



PR 2001/89 - Income tax: deductibility of interest incurred on borrowings under the Equity Margins Limited Protected Equity Portfolio Loan

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 This document has changed over time. This is a consolidated version of the ruling which was published on *5 June 2002*



Product Ruling

Income tax: deductibility of interest incurred on borrowings under the Equity Margins Limited Protected Equity Portfolio Loan

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Preamble

The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons and Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.

[**Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

No guarantee of commercial success

Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

Terms of Use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of person who takes part in the arrangement to which this Ruling relates. In this Ruling the arrangement involves the borrowing of moneys from Equity Margins Limited (EML), a member of the Merrill Lynch Australia Group, under the Protected Equity Portfolio Loan which is referred to in this Ruling as 'PEPL'.
2. This Ruling does not address the tax consequences of the PEPL arrangement being terminated early.

Tax law(s)

3. The tax laws dealt with in this Ruling are:
 - section 8-1 of the *Income Tax Assessment Act 1997* ('the 1997 Act');
 - section 51AAA of the *Income Tax Assessment Act 1936* ('the 1936 Act');
 - Division 108 of Part 3-1 of the 1997 Act;
 - Division 110 of Part 3-1 of the 1997 Act;
 - section 82KL of the 1936 Act;
 - section 82KZM of the 1936 Act;
 - sections 82KZMA, 82KZMB, 82KZMC of the 1936 Act;
 - sections 82KZME, 82KZMF of the 1936 Act; and
 - Part IVA of the 1936 Act.
4. Potential investors should note that amendments contained in the New Business Tax System (Simplified Tax System) Bill 2000 will affect certain investors' eligibility to claim an immediate deduction for their prepayments (see paragraphs 38 to 42 below).

Class of persons

5. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement for its full term and of deriving assessable income from their involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Investors'.

Qualifications

6. The Commissioner rules on the precise arrangement identified in the Ruling.

7. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
- the Ruling will be withdrawn or modified.

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Date of effect

9. This Ruling applies prospectively from 20 June 2001, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

10. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, this Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

11. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

12. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- The application for a Product Ruling dated 3 May 2001 received from EML and amendments to the original application dated 31 May 2001;
- The PEPL Terms and Conditions of 3 May 2001 and the amended Terms and Conditions dated 31 May 2001 consisting of:
 - Loan Terms;
 - Option Terms;
 - Mortgage Terms;
 - Sponsorship Terms;
 - Nominee Terms; and
 - General Terms.
- PEPL Application and Instructions Form and Risk Disclosure Statement.

13. The details and aspects of the arrangement subject to this Ruling are summarised as follows:

- (a) The PEPL is a combined loan and option product for which Investors pay a fixed 'interest rate'. This 'interest rate' includes a put option cost component. 'Interest' is payable in advance on the PEPL and is calculated by applying the fixed 'interest rate' to the loan amount of the PEPL.

The Loan and Put Option

- (b) The Investors borrow funds under the PEPL from EML;
- (c) The loan amount under the PEPL is fully utilised by the Investor to finance the acquisition of a portfolio of shares listed on the Australian Stock Exchange ('the Portfolio'). The Portfolio is made up of shares in companies in such proportions as EML specifies. The drawdown of the loan amount under the PEPL occurs within 6 business days of the application being approved and the Portfolio is purchased within 3 business days of the drawdown. The purchase price of the Portfolio is represented by the loan draw down amount and is calculated as the closing buy price of the shares that comprise the Portfolio as established on pre-determined purchase dates;
- (d) The Investor appoints Merrill Lynch (Australia) Nominees Pty Ltd (MLAN) as a nominee. MLAN acquires the shares and may, in certain limited circumstances as set out in the PEPL terms and conditions, hold the shares and the Portfolio made up of shares and of any future rights arising from those shares, on the Investors' behalf. At all other times, however, the Investor is the legal and beneficial owner of the Portfolio;
- (e) The minimum loan amount that can be borrowed under the PEPL is \$100,000, with additional amounts available in \$50,000 increments;
- (f) The term of the PEPL is for a period of 12 months or for a term exceeding 12 months but not greater than 13 months. The 'interest' on the PEPL is payable in advance and is not refundable under any circumstances. This 'interest' prepayment on the PEPL is to be paid on or before the drawdown of the loan amount. Investors must seek their own source of funding for the prepayment of the 'interest';
- (g) Under the PEPL the Investor will acquire a Put Option to protect against a fall in the market value of the Portfolio. The Put Option allows the Investor to satisfy the loan amount borrowed under the PEPL by transferring the legal and beneficial interest in the Portfolio, free of all encumbrances other than the mortgage in favour of EML, to Merrill Lynch

(Australia) Futures Limited (MLAF). The exercise price payable under the Put Option Terms is equal to the loan amount borrowed under the PEPL. The Investor is only able to exercise the option on the termination date of the PEPL arrangement. If the Investor exercises the Put Option, the exercise price payable by EML will be deemed to have been satisfied by EML treating the PEPL loan amount as having been repaid. The Put Option Cost (Put Option premium) is defined in the Option Terms. The Put Option premium, is calculated as the excess of the 'interest rate' charged over the lower of the Reserve Bank Bulletin Indicator Lending Rates for personal unsecured loans or 60% of the 'interest rate' charged;

- (h) Under Clause 4.2(a) of the Loan Terms, prior to the date when the PEPL is to be repaid, the Investors should notify EML of the method to be used to discharge the obligation owing on the loan. The Investor may discharge the obligation owing on the loan by:
- (i) repaying the PEPL amount in full using the Investors own funds;
 - (ii) repaying the PEPL amount from the proceeds of the sale of the portfolio;
 - (iii) satisfying the PEPL amount by the transfer of the Portfolio under the Put Option; or
 - (iv) refinancing the PEPL amount.

In the event that the PEPL amount is repaid using the proceeds of the sale of the Portfolio, any excess proceeds from the sale over the PEPL amount after deducting brokerage, stamp duty and other costs of sale is payable to the Investor. Where the Investor does not notify EML as to the method to be used to discharge the loan obligation, the Investor will be taken to have elected to discharge the loan obligation from the proceeds of the sale of the Portfolio.

- (i) The Investor may repay the PEPL in full at any time before the loan becomes due or request that EML consent to the sale of the Portfolio prior to the expiration of the loan term. EML will not withhold consent to the sale of the Portfolio prior to the term of the PEPL where the proceeds of the sale are to be used to repay the loan amount outstanding on the PEPL and where EML is satisfied that the proceeds from the sale

are likely to exceed the loan amount outstanding on the PEPL after deducting brokerage, stamp duty and other costs of sale.

- (j) Under Clause 5.2 of the Loan Terms, the PEPL amount may become immediately due and payable on EML's demand at any time on or after the date upon which:
- Any of the shares in the Portfolio become subject to a takeover offer, a proposal for reconstruction, cancellation, or any proposal which could affect EML's interests in respect of the Portfolio or under the Put Option; or
 - If any shares included in the Portfolio cease to be quoted on the Australian Stock Exchange.

Where Clause 5.2 is invoked by EML and payment of the loan amount is not immediately made in full, EML may exercise its rights under the Mortgage Terms to dispose of the Portfolio, but the liability of the Investor in respect of the loan amount is limited to the proceeds of the sale of the Portfolio.

Other Terms and Conditions

- (k) MLAN is authorised by the Investor to mortgage the shares in the Portfolio and any other future rights arising from the shares in the portfolio in favour of EML;
- (l) MLAN is appointed by the Investor under the Sponsorship Terms as the Controlling Participant for the shares that comprise the Portfolio and other future rights arising from the shares that comprise the Portfolio;
- (m) Stamp duty and other expenses, excluding brokerage are payable by the Investor on the purchase of the Portfolio. The Investor is liable for stamp duty costs, brokerage and other associated costs on the disposal of the Portfolio. Other expenses incurred by the CHESS Participant on behalf of the Investor are to be reimbursed by the Investor.

Investor entitlements under the PEPL arrangement

- (n) Any dividends paid in respect of the shares purchased under the PEPL are paid to the Investor;

- (o) The Investor will be entitled to the benefit of any rebates or credits attaching to any dividend received. This is subject to the “at-risk holding period rules” being satisfied;
- (p) The Investor receives the benefits of any bonus or rights issues or shares arising from dividend reinvestment plans, subject to the provision that any additional shares acquired will form part of the PEPL security for the outstanding loan amount.

The Participants

- 14. EML is the provider of the PEPL and the Put Option and facilitates the acquisition of the Portfolio through its agent MLAF.
- 15. The Investors will be individuals, companies or trusts that make an investment in the PEPL.

Ruling

- 16. Subject to the assumptions listed below:
 - (i) Part of the ‘interest’ charged under the PEPL is a capital protection fee and is not deductible under section 8-1 of the 1997 Act;
 - (ii) The PEPL ‘interest’ charge allowable under section 8-1 of the 1997 Act is the amount that does not exceed the benchmark interest rate calculated as the lower of the Reserve Bank Bulletin Indicator Lending Rates for Personal Unsecured Loans or 60% of the ‘interest’ charged by EML. As the ‘interest rate’ charged on the PEPL is a fixed rate the Reserve Bank Bulletin Indicator Lending Rates for Personal Unsecured Loans Fixed is used;
 - (iii) The Put Option premium (Put Option Cost as defined in the Option Terms) paid by the Investor is not an allowable deduction pursuant to section 8-1 of the 1997 Act;
 - (iv) The Put Option premium is capital in nature, being paid to acquire an asset, namely, the Put Option;
 - (v) The amount of ‘interest’ charged that is not deductible under the formula described above in paragraph 16(ii) represents the payment for a put option and becomes part of the cost base of the Put Option;

- (vi) Section 51AAA of the 1936 Act will not apply to deny the PEPL 'interest' charge allowable under section 8-1 of the 1997 Act;
- (vii) Section 82KL, a specific anti-avoidance provision of the 1936 Act, will not apply to deny deductibility of the PEPL 'interest' charge allowable under section 8-1 of the 1997 Act;
- (viii) Section 82KZM of Subdivision H of Division 3 of Part III of the 1936 Act will not apply to deny immediate deductibility for the PEPL 'interest' charge incurred by the Investor in respect of borrowings to fund the purchase of the Portfolio, where the Investor is either a small business taxpayer or does not incur the interest expenditure in carrying on a business;
- (ix) Sections 82KZMA, 82KZMB and 82KZMC of Subdivision H of Division 3 of Part III of the 1936 Act will apply to determine the amount and timing of deductions for the PEPL 'interest' charge incurred in respect of borrowing used to fund the purchase of the Portfolio under the PEPL where the expenditure is incurred by an Investor (other than a small business taxpayer), in carrying on a business;
- (x) Section 82KZMF of Subdivision H of Division 3 of Part III of the 1936 Act will not apply to set the amount and timing of deductions for the PEPL 'interest' charge.
- (xi) The anti-avoidance provisions contained in Part IVA of the 1936 Act will not be applied to deny deductibility of the 'interest' incurred by the Investor on the PEPL borrowings used to fund the purchase of the Portfolio.

IMPORTANT: Paragraphs 16(viii) to 16(ix) above describe the deductions that are allowable to Investors under current law. Investors are advised to carefully examine the information contained in paragraphs 38 to 42 relating to proposed changes to the prepayment rules.

Assumptions

17. This Ruling is made on the basis of the following necessary assumptions:

- (i) All of the Investors are Australian residents;

- (ii) The Investors are not traders in investments and are not treated for taxation purposes as either trading in PEPL securities or carrying on a business of investing in the PEPL securities. Further, the Investors do not otherwise hold the PEPL securities as revenue assets;
- (iii) Investors who enter into the PEPL arrangement will enter into the arrangement for a period of 12 months or a period over 12 months but not more than 13 months;
- (iv) In respect of any 'interest' to be paid in advance under the PEPL lending arrangement, the 'interest' is prepaid, but only in relation to a loan interest payment period of less than 13 months;
- (v) Investors will derive assessable income from the investment in the PEPL. That assessable income will not include income other than dividend income and capital gain receipts;
- (vi) The dominant purpose of an Investor entering into the PEPL is to derive assessable income;
- (vii) The arrangement will be executed in the manner described in the 'Arrangement' section of this Ruling; and
- (viii) All dealings between the Investors and EML will be at arm's length.

Explanations

Section 8-1 of the 1997 Act

18. The cost (or interest paid) of a borrowing used to acquire income producing assets such as shares is generally treated as deductible under section 8-1 where it is expected that dividends or other assessable income would be derived from the investment (see Taxation Ruling TR 95/33).

19. The ATO view expressed in media release Nat 99/26 is that part of the prepaid 'interest' under the PEPL is a capital protection fee and is not deductible under section 8-1. The ATO considers that the purpose of this fee is to give the taxpayer capital protection in the event of a fall in the value of the shares that comprise the Portfolio.

20. The ATO view is that part of the prepaid 'interest' under the PEPL, described as the Put Option Cost in the Option Terms, is a capital protection fee and is not deductible under section 8-1.

21. Investors should only claim deductions equal to the amount of interest determined as follows - the lower of the Reserve Bank Bulletin Indicator Lending Rates for Personal Unsecured Loans or 60% of the 'interest' rate charged by EML. As the interest rate charged on the PEPL is a fixed rate the Reserve Bank Bulletin Indicator Lending Rates for Personal Unsecured Loans Fixed is used.

22. The ATO view is that the Put Option premium (Put Option Cost) is not deductible because it is incurred for a purpose other than to service or maintain the borrowed funds. The Put Option premium is capital in nature, being paid to acquire an asset, namely, the Put Option.

23. The Put Option premium ensures that the borrower is protected from liability to repay the loan principal under the PEPL if the market value of the shares that comprise the Portfolio falls below the amount borrowed. In effect, the Put Option ensures that EML will acquire the shares in full satisfaction of the loan amount if the shares have fallen in value below the amount borrowed. Accordingly, the Put Option premium is a capital protection fee.

24. That amount which is not deductible to the Investor under section 8-1 forms the cost base of a Put Option and constitutes an asset for capital gains tax purposes which is separate and in addition to the other rights created under the PEPL as described in this Ruling.

Section 51AAA of the 1936 Act

25. Under the PEPL it is contemplated that over a period of an Investor's involvement there will be assessable income derived by way of dividend income as well as by way of capital gain. Accordingly, the interest would have been deductible under section 8-1 irrespective of whether the capital gain is included in assessable income, or, more precisely, a deduction would have been allowable irrespective of whether the capital gain has been included in assessable income. Accordingly, section 51AAA has no application to an Investor in the PEPL.

Section 82KL of the 1936 Act

26. The operation of Section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Insufficient 'additional benefits' will be provided to trigger the application of Section 82KL. It will not apply to deny a deduction otherwise allowable under section 8-1.

Subdivision H of Division 3 of Part III of the 1936 Act

27. This subdivision deals with the timing of deductions for certain prepaid expenditure. Separate rules apply depending on whether the expenditure is incurred in carrying on a business, whether the Investor is a 'small business taxpayer' and whether the expenditure qualifies for transitional treatment.

Subdivision 960-Q of the 1997 Act - small business taxpayers

28. A 'small business taxpayer' is defined in sections 960-335 and 960-350. In broad terms, a small taxpayer is a taxpayer that has an average turnover of less than \$1,000,000 from business activities.

29. Whether an Investor is a 'small business taxpayer' depends upon the individual circumstances of each Investor and is beyond the scope of this Ruling. It is the individual responsibility of each Investor to determine whether or not they are within the definition of a 'small business taxpayer'.

The eligible service period for the purposes of Subdivision H of Division 3 of Part III of the 1936 Act

30. The PEPL 'interest' allowable under section 8-1 is in relation to a prepayment of loan interest for a period of less than 13 months. Paragraph 82KZL(2)(a) states that a payment of interest that is made in return for the making available of a loan principal is to be taken, for the purposes of Subdivision H, to be expenditure incurred under an agreement in return for the doing of a thing under the agreement for the period to which the interest payment relates. The eligible service period in relation to a payment of loan interest is determined by reference to the period to which the interest relates, which in the case of the PEPL, is either one year or a period over one year but not greater than 13 months.

Section 82KZM of the 1936 Act: prepaid expenditure incurred by small business taxpayers and non-business expenditure

31. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure incurred by a small business taxpayer or for prepaid expenditure not incurred in carrying on a business that would otherwise be immediately deductible, in full, under section 8-1. The section applies if certain expenditure incurred under an agreement is in return for the doing of a thing under the agreement that is not wholly to be done within 13 months after the day on which the expenditure is incurred.

32. As the eligible service period in relation to the deductible PEPL interest is less than 13 months, section 82KZM will have no application to small business taxpayers nor to Investors who are not carrying on a business.

Sections 82KZMA - 82KZMC of the 1936 Act: prepaid business expenditure incurred by non-small business taxpayers

33. For an Investor (other than a small business taxpayer) who incurs expenditure in carrying on a business for the doing of a thing that is not to be wholly done within the expenditure year, the deduction for the expenditure is spread over the relevant eligible service period. Sections 82KZMA - 82KZMC include transitional rules for phasing out the benefit of the immediate deductibility of such prepayments.

Sections 82KZME and 82KZMF of the 1936 Act - prepaid expenditure and 'tax shelter' type arrangements

34. The rules in sections 82KZME and 82KZMF apply, subject to the exceptions in section 82KZME, where expenditure is incurred is incurred in relation to a 'tax shelter' type arrangements for the doing of a thing that is to be wholly done within 13 months after the day on which the expenditure, but not wholly within the expenditure year.

35. For the purposes of section 82KZME, 'agreements' are broadly defined to include an entire arrangement of which a contract may form part. Under sub-section 82KZME(4), the relevant 'agreement' is all the contractual arrangements and activities associated with the participation in the PEPL, including the financing, share purchase, share holding and disposal arrangements.

36. Exception 1, as contained in subsection 82KZME(5), applies to exclude interest incurred on borrowings under the PEPL from the operation of section 82KZMF, as:

- (i) the prepaid 'interest' expenditure under the PEPL, that does not represent the put option premium, is incurred in respect of money borrowed to acquire shares that are listed for quotation on the Australian Stock Exchange;
- (ii) the Investor can reasonably be expected to obtain dividends income from the investment;
- (iii) the Investor will not obtain any other kind of assessable income from the investment, except for capital gains; and
- (iv) all aspects of the PEPL are at arm's length.

Part IVA

37. Provided that the arrangement is entered into and carried out as disclosed (see the Arrangement part of this Ruling), it is accepted that the arrangement is a normal commercial transaction and Part IVA will not apply.

Proposed changes to prepayment rules

38. The amendments contained in the New Business Tax System (Simplified Tax System) Bill 2000 introduce a new 12-month prepayment rule. Under this rule, an advance payment made by a STS taxpayer (that is, a small business taxpayer that has entered the Simplified Tax System) or an individual incurring deductible non-business expenditure will be immediately deductible where:

- it is incurred in respect of a period of service not exceeding 12 months; and
- the period of service ends no later than the last day of the income year following the date on which the payment is made.

39. Small business taxpayers not entering the Simplified Tax System and non-individual taxpayers who are incurring deductible non-business expenditure will have to apportion their deductions for incurred deductible prepayments over the service period.

40. These changes apply to assessments for the first year of income starting after 30 June 2001 and later years of income.

41. The information given in paragraphs 38 to 40 above is not binding on the Commissioner. Legally binding advice in respect of those changes cannot be given until the relevant laws are enacted.

42. If the changes become law the operation of that law will take precedence over the application of this Ruling, and to that extent, this Ruling will become superseded. If requested, when the relevant law(s) are enacted, the Commissioner will formalise the non-binding information shown in this Ruling by issuing a new Product Ruling that describes the operation of those laws.

Detailed contents list

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Commissioner of Taxation

20 June 2001

Previous draft:

Not previously issued in draft form

*Related Rulings/Determinations:*TR 92/1; TR 92/20; TR 95/33,
TR 97/16; TD 93/34; PR 1999/95

PR 2001/89

Subject references:

- financial products
- interest expenses
- prepaid expenses
- product rulings
- public rulings
- small business taxpayer
- taxation administration
- tax avoidance

- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZME
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(5)
- ITAA 1936 82KZMF
- ITAA 1936 Pt III
- ITAA 1936 Pt IVA
- ITAA 1936 Subdiv H
- ITAA 1936 Div 3
- ITAA 1997 Part 3-1
- ITAA 1997 8-1
- ITAA 1997 Div 108
- ITAA 1997 Subdiv 960-Q
- ITAA 1997 960-335
- ITAA 1997 960-350

Legislative references:

- ITAA 1936 51AAA
- ITAA 1936 82KL
- ITAA 1936 82KZL(2)(a)
- ITAA 1936 82KZM
- ITAA 1936 82KZMA

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