Tax Laws Amendment (2007 Measures No. 3) Act 2007

No. 79, 2007

An Act to amend the law relating to taxation, and for related purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

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Tax Laws Amendment (2007 Measures No. 3) Act 2007

No. 79, 2007

An Act to amend the law relating to taxation, and for related purposes

[*Assented to 21 June 2007*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Tax Laws Amendment (2007 Measures No. 3) Act 2007*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	21 June 2007
2. Schedule 1	The day on which this Act receives the Royal Assent.	21 June 2007
3. Schedule 2	Immediately after the commencement of Schedule 1 to the *Tax Laws Amendment (Simplified Superannuation) Act 2007*.	15 March 2007
4. Schedules 3 to 7	The day on which this Act receives the Royal Assent.	21 June 2007
5. Schedule 8	1 July 2007.	1 July 2007
6. Schedules 9 and 10	The day on which this Act receives the Royal Assent.	21 June 2007

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Distributions to entities connected with a private company and related issues

Part 1—Main amendments

Income Tax Assessment Act 1936

1 Section 109B

Omit "and provides a basis for a debit arising in the company's franking account (under item 8 of the table in section 205-30 of the *Income Tax Assessment Act* 1997)".

2 At the end of subsection 109C(3A)

Add:

Note: Payments converted to loans before the private company's lodgment day are treated as loans (see subsection 109D(4A)).

3 After subsection 109D(4)

Insert:

Payment converted to loan before lodgment day

(4A) If:

(a) a private company makes a payment to an entity at a time in a year of income; and

(b) the payment is converted to a loan before the end of the private company's lodgment day for the year of income;

for the purposes of this Division, treat the events mentioned in paragraphs (a) and (b) as the private company making a loan to the entity at the time mentioned in paragraph (a).

4 Paragraph 109E(1)(c)

Repeal the paragraph, substitute:

(c) the amount (if any) paid to the private company during the current year in relation to the amalgamated loan falls short of the minimum yearly repayment of the amalgamated loan worked out under subsection (5) for the current year; and

(d) section 109Q does not apply in relation to the current year.

5 Subsection 109E(2)

Omit "the amount of the amalgamated loan that has not been repaid at the end of the current year", substitute "the amount of the shortfall mentioned in paragraph (1)(c)".

6 After subsection 109E(3)

Insert:

(3A) Subsection (3B) applies if:

(a) a private company is taken to have made an amalgamated loan (the ***old amalgamated loan***) during a year of income (the ***original year of income***); and

(b) the maximum term of the old amalgamated loan under subsection 109N(3) was 7 years; and

(c) in a later year of income (the ***later year of income***):

(i) a constituent loan taken account of by the old amalgamated loan becomes secured by a mortgage over real property; and

(ii) the term of the constituent loan is extended; and

(d) as a result of the mortgage, the maximum term of the constituent loan under subsection 109N(3) is 25 years; and

(e) the term of the constituent loan after the extension (including the period before the extension during which the constituent loan was in existence) does not exceed 25 years.

(3B) For the purposes of this Division in relation to the later year of income and subsequent years of income:

(a) treat the constituent loan as a new amalgamated loan that takes account of that constituent loan; and

(b) treat the new amalgamated loan as having been made just before the start of the later year of income; and

(c) treat the amount of the new amalgamated loan just before the start of the later year of income as the amount of the constituent loan that had not been repaid at that time; and

(d) unless paragraph (e) applies—reduce the amount of the old amalgamated loan just before the start of the later year of income by the amount of the new amalgamated loan at that time; and

(e) if the constituent loan was the only constituent loan taken account of by the old amalgamated loan—disregard the old amalgamated loan.

7 Paragraph 109G(3)(a)

Omit "or 109E".

Note: The heading to subsection 109G(3) is altered by omitting "*did give rise to dividend*" and substituting "*gives rise to dividend under section 109D*".

8 Paragraph 109G(3)(b)

Omit "subsection 108(1)", substitute "former subsection 108(1)".

9 After subsection 109G(3)

Insert:

Reduced dividend for forgiveness of loan debt if loan causes dividend under section 109E

(3A) Subsection (3B) applies if:

(a) a private company is taken under section 109F to pay a dividend at the end of a year of income because of the forgiveness of an amount of a debt resulting from a loan; and

(b) the private company is taken under section 109E to pay a dividend at the end of an earlier year of income in relation to the loan.

(3B) The amount of the dividend mentioned in paragraph (3A)(a) is reduced by the amount of the dividend mentioned in paragraph (3A)(b) (but not below zero).

Note: There may be more than one reduction under this subsection if the private company has been taken under section 109E to pay more than one dividend in relation to the loan.

10 After subsection 109N(3)

Insert:

(3A) Reduce the maximum term under paragraph (3)(a) for a loan (the ***new loan***) in accordance with subsection (3B) if:

(a) the new loan results from the refinancing of another loan (the ***old loan***); and

(b) the maximum term of the old loan under subsection (3) was 7 years; and

(c) the maximum term of the new loan under subsection (3) is 25 years (disregarding this subsection).

(3B) The amount of the reduction is equal to the length of the period:

(a) starting when the old loan was made; and

(b) ending when the old loan was refinanced.

(3C) Reduce the maximum term under paragraph (3)(b) for a loan (the ***new loan***) in accordance with subsection (3D) if:

(a) the new loan results from the refinancing of another loan (the ***old loan***); and

(b) the maximum term of the old loan under subsection (3) was 25 years; and

(c) the maximum term of the new loan under subsection (3) is 7 years (disregarding this subsection); and

(d) the length of the period:

(i) starting when the old loan was made; and

(ii) ending when the old loan was refinanced;

exceeds 18 years.

(3D) The amount of the reduction is the excess mentioned in paragraph (3C)(d).

11 Section 109P (note)

Repeal the note, substitute:

Note: A shortfall in a minimum yearly repayment of an amalgamated loan may be treated as a dividend under section 109E.

12 At the end of section 109R

Add:

(5) Subsection (2) does not apply to a payment if:

(a) the payment is made to refinance the loan mentioned in subsection (1) (the ***old loan***); and

(b) the entity to which the old loan was made has another loan (the ***primary*** loan) from another entity; and

(c) the old loan becomes subordinated to the primary loan; and

(d) the refinancing of the old loan mentioned in paragraph (a) took place in connection with that subordination; and

(e) that subordination arose as a result of circumstances beyond the control of the entity to which the old loan was made; and

(f) the entity to which the old loan was made and the other entity dealt with each other at arm's length in relation to that subordination; and

(g) the private company and the other entity dealt with each other at arm's length in relation to that subordination.

(6) Subsection (2) does not apply to a payment if:

(a) the payment is made to refinance the loan mentioned in subsection (1) (the ***old loan***); and

(b) the refinancing results in another loan (the ***new loan***); and

(c) the maximum term of the old loan under subsection 109N(3) was 7 years; and

(d) the maximum term of the new loan under subsection 109N(3) is 25 years (reduced in accordance with subsection 109N(3B)).

(7) Subsection (2) does not apply to a payment if:

(a) the payment is made to refinance the loan mentioned in subsection (1) (the ***old loan***); and

(b) the refinancing results in another loan (the ***new loan***); and

(c) the maximum term of the old loan under subsection 109N(3) was 25 years; and

(d) the maximum term of the new loan under subsection 109N(3) is:

(i) unless subparagraph (ii) applies—7 years; or

(ii) if subsection 109N(3D) applies—7 years reduced in accordance with that subsection.

13 After Subdivision DA of Division 7A

Insert:

Subdivision DB—Other exceptions

109RB Commissioner may disregard operation of Division or allow dividend to be franked

(1) The Commissioner may make a decision under subsection (2) if:
  (a) this Division (disregarding this section) operates with the result that:
    (i) a private company is taken to pay a particular dividend to a particular entity (the ***recipient***) under this Division; or
    (ii) a particular amount is included, as if it were a dividend, in the assessable income of a particular entity (also the ***recipient***) in relation to a private company under Subdivision EA; and
  (b) the result mentioned in paragraph (a) arises because of an honest mistake or inadvertent omission by any of the following entities:
    (i) the recipient;
    (ii) the private company;
    (iii) any other entity whose conduct contributed to that result.

(2) The Commissioner may decide in writing that:
  (a) the result mentioned in paragraph (1)(a) should be disregarded (see subsection (4)); or
  (b) the dividend mentioned in subparagraph (1)(a)(i) may be franked in accordance with Part 3-6 of the *Income Tax Assessment Act 1997* (see subsection (6)).

(3) In making a decision under subsection (2) (or refusing to make such a decision), the Commissioner must have regard to the following:
  (a) the circumstances that led to the mistake or omission mentioned in paragraph (1)(b);
  (b) the extent to which any of the entities mentioned in paragraph (1)(b) have taken action to try to correct the mistake or omission and if so, how quickly that action was taken;

(c) whether this Division has operated previously in relation to any of the entities mentioned in paragraph (1)(b), and if so, the circumstances in which this occurred;

(d) any other matters that the Commissioner considers relevant.

(4) The Commissioner may make a decision under subsection (2) subject to any of the following kinds of condition:

(a) a condition that the recipient or another entity must make specified payments to the private company or another entity within a specified time;

(b) a condition that a specified requirement in this Division must be met within a specified time.

(5) This Division is taken not to operate with the result mentioned in paragraph (1)(a) if:

(a) the Commissioner makes a decision under paragraph (2)(a); and

(b) if the Commissioner makes the decision subject to a condition under subsection (4)—the condition is satisfied.

(6) If the Commissioner makes a decision under paragraph (2)(b), subparagraph 202-45(g)(i) of the *Income Tax Assessment Act 1997* does not make the dividend mentioned in subparagraph (1)(a)(i) unfrankable.

(7) Despite subsection 33(3A) of the *Acts Interpretation Act 1901*, each decision made under subsection (2) must relate only to one amount that would (disregarding this section):

(a) be taken to be a dividend paid by the private company; or

(b) be included, as if it were a dividend, in the assessable income of an entity.

109RC Dividend may be franked if taken to be paid because of family law obligation

(1) This section applies if a dividend is taken to be paid under this Division because of a family law obligation.

(2) Subparagraph 202-45(g)(i) of the *Income Tax Assessment Act 1997* does not make the amount of the dividend unfrankable.

(3) The dividend can be franked in accordance with Part 3-6 of the *Income Tax Assessment Act 1997* only if:
  (a) the dividend is franked at the private company's benchmark franking percentage for the franking period in which the dividend is taken to be paid; or
  (b) if the private company does not have a benchmark franking percentage for the period—the dividend is franked at a franking percentage of 100%.

(4) For the purposes of subsection (3), if the recipient of the dividend is not a member of the private company for the purposes of Part 3-6 of the *Income Tax Assessment Act 1997*, treat that recipient as such a member.

109RD Commissioner may extend period for repayments of amalgamated loan

(1) The Commissioner may make a decision under subsection (2) if:
  (a) section 109E operates with the result that a private company is taken to pay a particular dividend to a particular entity (the ***recipient***); and
  (b) the shortfall mentioned in paragraph 109E(1)(c) arises because the recipient is unable to pay the private company the minimum yearly repayment mentioned in that paragraph because of circumstances beyond the recipient's control.

(2) The Commissioner may decide in writing that the result mentioned in paragraph (1)(a) should be disregarded (see subsection (4)) if the recipient pays the private company the amount of the shortfall within a specified time.

(3) In making a decision under subsection (2) (or refusing to make such a decision), the Commissioner must have regard to the following:
  (a) the nature of the circumstances mentioned in paragraph (1)(b);
  (b) any other matters that the Commissioner considers relevant.

(4) This Division is taken not to operate with the result mentioned in paragraph (1)(a) if:
  (a) the Commissioner makes a decision under subsection (2); and

(b) the recipient pays the private company the amount of the shortfall within the specified time.

(5) Despite subsection 33(3A) of the *Acts Interpretation Act 1901*, each decision made under subsection (2) must relate only to one amount that would be taken to be a dividend paid by the private company (disregarding this section).

14 At the end of section 109UA

Add:

(5) Subsection (1) does not apply if:

(a) as a result of the first entity's liability mentioned in that subsection, the target entity has a liability (other than a contingent liability) to make a payment to the first entity; and

(b) because of section 109N, the liability to make a payment to the first entity is not treated under this Division as giving rise to a dividend paid to the first entity.

15 Subsection 109X(2)

Repeal the subsection, substitute:

(2) Subsections (3) and (4) apply if a notional loan arises under section 109W because an entity interposed between the private company and the target entity makes a loan (the ***actual loan***) to the target entity.

(3) For the purposes of section 109N, treat the agreement under which the actual loan was made as the agreement under which the notional loan was made.

(4) For the purposes of section 109E:

(a) treat the notional loan as an amalgamated loan from the private company to the target entity; and

(b) treat the amount of the notional loan worked out under subsection 109W(1) as the amount of the amalgamated loan; and

(c) treat the agreement under which the actual loan was made as the agreement under which the amalgamated loan was made; and

(d) treat repayments by the target entity of the amount of the notional loan worked out under subsection 109W(3) as

payments by the target entity to the private company in relation to the amalgamated loan.

Note: The heading to section 109X is replaced by the heading "**Operation of Subdivision D in relation to payment or loan**".

16 Subsection 109Y(2) (definition of *net assets*)

Omit "undervalue", substitute "undervalue or overvalue".

17 Subsection 109Y(2) (definition of *net assets*)

Omit "overvalue", substitute "undervalue or overvalue".

18 Subsection 109Y(2) (paragraph (a) of the definition of *repayments of non-commercial loans*)

After "loans", insert "or amounts".

19 After subsection 109ZC(1)

Insert:

(1A) This section also sets out special rules for dealing with a dividend (also the ***later dividend***) distributed by a private company if:

(a) the private company distributes the later dividend to a shareholder in the company; and

(b) the shareholder applies the amount of the dividend to repay all or part of a loan:

(i) that was obtained from the private company by an associate of the shareholder; and

(ii) in relation to which a dividend was previously taken under this Division to have been paid by the private company.

20 Subsection 109ZC(2)

After "set off" (wherever occurring), insert "or applied".

21 Section 109ZD

Insert:

benchmark franking percentage has the same meaning as in the *Income Tax Assessment Act 1997*.

22 Section 109ZD

Insert:

> ***deficit*** has the same meaning as in the *Income Tax Assessment Act 1997*.

23 Section 109ZD

Insert:

> ***family law obligation*** means an order, agreement or award mentioned in paragraph 126-5(1)(a), (b), (c), (d), (e) or (f) of the *Income Tax Assessment Act 1997*.

24 Section 109ZD

Insert:

> ***franking account*** has the same meaning as in the *Income Tax Assessment Act 1997*.

25 Section 109ZD

Insert:

> ***franking percentage*** has the same meaning as in the *Income Tax Assessment Act 1997*.

26 Section 109ZD

Insert:

> ***franking period*** has the same meaning as in the *Income Tax Assessment Act 1997*.

27 Section 109ZD

Insert:

> ***unfrankable*** has the same meaning as in the *Income Tax Assessment Act 1997*.

Income Tax Assessment Act 1997

28 Subparagraph 202-45(g)(i)

Before “Division”, insert “unless subsection 109RB(6) or 109RC(2) applies in relation to the amount—”.

29 Section 205-30 (table item 8)

Repeal the item.

Part 2—Other amendments

Fringe Benefits Tax Assessment Act 1986

30 At the end of subsection 16(1)

Add:

Note: A loan benefit that is taken under this subsection to be provided in respect of a year of tax may not be provided as a fringe benefit if:

(a) the loan was made in that year of tax or a previous year of tax; and

(b) a dividend is not taken to be paid under section 109D of the *Income Tax Assessment Act 1936* in relation to the loan, because of section 109N of that Act.

See paragraph (s) of the definition of ***fringe benefit*** in subsection 136(1) of this Act.

31 Subsection 136(1) (paragraph (r) of the definition of *fringe benefit*)

Omit “dividend.”, substitute “dividend; or”.

32 Subsection 136(1) (at the end of the definition of *fringe benefit*)

Add:

(s) a loan (within the meaning of section 109D of the *Income Tax Assessment Act 1936*), if:

(i) a dividend is not taken to be paid under that section in relation to the loan, but would be if section 109N of that Act were disregarded; or

(ii) an amount is not included, as if it were a dividend, in the assessable income of an entity under section 109XB of that Act in relation to the loan, but would be if section 109N of that Act were disregarded.

Income Tax Assessment Act 1936

33 Section 108

Repeal the section.

34 Subsection 109Y(2) (definition of *non-commercial loans*)

Omit “section 108”, substitute “former section 108”.

35 Subsection 109Y(2) (definition of *repayments of non-commercial loans*)

Omit “section 108” (wherever occurring), substitute “former section 108, or section”.

36 Subsection 109Y(2) (subparagraph (b)(i) of the definition of *repayments of non-commercial loans*)

Omit “subsection 108(2)”, substitute “former subsection 108(2)”.

37 Paragraph 160AEA(1)(d)

Omit “or 108”.

38 Paragraph 268-40(5)(b) in Schedule 2F

Repeal the paragraph.

Income Tax Assessment Act 1997

39 Section 10-5 (table item headed “shareholders”)

Omit “**108,**”.

40 Paragraph 165-60(5)(b)

Repeal the paragraph.

41 Subparagraph 202-45(g)(ii)

Repeal the subparagraph.

Part 3—Time limit for making franking assessments

Income Tax Assessment Act 1997

42 After subsection 214-60(1)

Insert:

(1A) However, the Commissioner must not make an assessment under subsection (1) for an entity for an income year if:

(a) the entity is not required under Subdivision 214-A to give the Commissioner a *franking return for the income year; and

(b) the entity is not required under Division 214 of the *Income Tax (Transitional Provisions) Act 1997* to give the Commissioner a franking return for the balancing period ending within the income year; and

(c) the entity was required to lodge an *income tax return for the income year by a particular time; and

(d) the entity has lodged that income tax return; and

(e) 3 years have passed since the later of the following:

(i) the time mentioned in paragraph (c);

(ii) the time when the entity lodged that income tax return.

Part 4—Application

43 Application

(1) The amendments made by this Schedule apply to assessments for the income year in which 1 July 2006 occurred and later income years.

(2) Despite subitem (1), the amendments made by this Schedule to the *Fringe Benefits Tax Assessment Act 1986* apply to benefits provided in a year of tax that begins on or after 1 April 2007.

(3) If:

(a) a loan was made in a year of tax that began before 1 April 2007; and

(b) the loan is covered under paragraph (s) of the definition of ***fringe benefit*** in the *Fringe Benefits Tax Assessment Act 1986* (as added by this Schedule); and

(c) because of the loan, a loan benefit is taken under subsection 16(1) of the *Fringe Benefits Tax Assessment Act 1986* to be provided in respect of a year of tax that begins on or after 1 April 2007;

treat the loan benefit as not being a fringe benefit for the purposes of that Act.

(4) Despite subitem (1), the following rules apply:

(a) the amendments made by this Schedule, to they extent that they relate to section 109RB of the *Income Tax Assessment Act 1936*, apply in relation to the 2001-02 income year and later income years;

(b) the Commissioner may make decisions under that section on and after the commencement of that section in relation to events that occurred before that commencement;

(c) however, the Commissioner cannot make a decision under paragraph 109RB(2)(b) of that Act if the dividend mentioned in subparagraph 109RB(1)(a)(i) of that Act is taken to have been paid before 1 July 2002;

(d) the Commissioner may amend a franking assessment made before the commencement of this item for the purpose of giving effect to a decision under section 109RB of that Act, if

the amendment is made within 4 years after that commencement.

(5) Section 170 of the *Income Tax Assessment Act 1936* does not prevent the amendment of an assessment if:

(a) the assessment was made before the commencement of this item; and

(b) the amendment is made within 4 years after that commencement; and

(c) the amendment is made for the purpose of giving effect to a decision of the Commissioner under section 109RB of that Act.

(6) Despite subitem (1), the amendment made by Part 3 of this Schedule applies to franking assessments for the income year in which 1 July 2006 occurred and later income years.

Schedule 2—Transitional excess non-concessional contributions

Income Tax (Transitional Provisions) Act 1997

1 At the end of paragraph 292-80(3)(b)

Add:

(iii) included each contribution covered under subsection (7) in respect of the person; and

2 At the end of section 292-80

Add:

(7) A contribution is covered under this subsection if:

(a) the contribution is made in respect of the person mentioned in subparagraph (3)(b)(iii) by another entity; and

(b) the person is *not* an employee of the other entity; and

(c) under Division 295 of the *Income Tax Assessment Act 1997* (as that Division applies for the purposes of subsection (3)), the contribution is included in the assessable income of the superannuation provider in relation to the superannuation plan to which the contribution is made; and

(d) the contribution is made after 6 December 2006.

(8) For the purposes of paragraph (7)(b), treat the person as an employee of the other entity if the person would be treated as an employee of the other entity under Division 290 of the *Income Tax Assessment Act 1997* (as that Division applies for the purposes of subsection (3)).

Schedule 3—Capital gains of testamentary trusts

Income Tax Assessment Act 1997

1 Before paragraph 103-25(3)(a)

Insert:

(aa) subsection 115-230(3) (relating to assessment of *capital gains of resident testamentary trusts) requires a trustee to make a choice by the time specified in subsection 115-230(5); and

2 At the end of Subdivision 115-C

Add:

115-230 Assessing capital gains of resident testamentary trusts

Purpose

(1) The purpose of this section is to allow a trustee of a resident testamentary trust to make a choice that has the effect that the trustee will be assessed on *capital gains of the trust in situations where:

(a) the gains would otherwise form part of a share of the net income of the trust estate that would be included in the assessable income of a beneficiary who could not benefit from them; or

(b) the trustee would otherwise be liable to tax on the gains on behalf of such a beneficiary under section 98 of the *Income Tax Assessment Act 1936*.

Trusts for which choice can be made

(2) A trustee can only make a choice under this section in relation to a trust estate:

(a) that results from:

(i) a will, a codicil or an order of a court that varied or modified the provisions of a will or a codicil; or

(ii) an intestacy or an order of a court that varied or modified the application, in relation to the estate of a deceased person, of the provisions of the law relating to the distribution of the estates of persons who die intestate; and

(b) that is, in the income year in respect of which the choice is made, a resident trust estate within the meaning of Division 6 of Part III of the *Income Tax Assessment Act 1936*.

Circumstances in which choice can be made

(3) If:

(a) apart from this section:

(i) a share of the net income of a trust estate that is attributable to *capital gains would be included in the assessable income of a beneficiary for an income year under section 97 of the *Income Tax Assessment Act 1936*; or

(ii) a trustee would, on behalf of a beneficiary, be assessed and liable to pay tax for an income year under section 98 of the *Income Tax Assessment Act 1936* in respect of a share of the net income of a trust estate that is attributable to capital gains; and

(b) the beneficiary does not have a vested and indefeasible interest in trust property representing that share; and

(c) trust property representing that share has not been paid to or applied for the benefit of the beneficiary;

the trustee may, no later than the deadline in subsection (5), make a choice that subsection (4) applies in respect of the beneficiary's share.

Consequences if trustee makes choice

(4) These are the consequences if the trustee makes a choice that this subsection applies in respect of a beneficiary's share:

(a) for the purposes of sections 97, 98A and 100 of the *Income Tax Assessment Act 1936*, the share is taken not to be included in the assessable income of the beneficiary;

(b) the trustee is not assessed, and is not liable to pay tax, in respect of the share under section 98 of the *Income Tax Assessment Act 1936*.

Note 1: Because of these consequences in relation to sections 97 and 98 of the *Income Tax Assessment Act 1936*, the trustee will be assessed on the beneficiary's share under section 99A or (at the Commissioner's discretion) 99 of that Act.

Note 2: Section 115-215 does not apply in relation to an amount to which this subsection applies.

Deadline for making choice

(5) The deadline for the purposes of subsection (3) is:

(a) the day 2 months after the last day of the income year; or

(b) a later day allowed by the Commissioner.

Note: This deadline is an exception to the general rule about choices in section 103-25.

3 Application

(1) The amendments made by this Schedule apply in relation to the 2005-2006 income year and later income years.

(2) Despite subsection 115-230(5) of the *Income Tax Assessment Act 1997*, a choice under subsection 115-230(3) of that Act may be made no later than 2 years after the commencement of section 115-230 (or a later time allowed by the Commissioner) if the choice is in respect of the 2005-2006 income year.

(3) Despite subsection 115-230(5) of the *Income Tax Assessment Act 1997*, a choice under subsection 115-230(3) of that Act may be made no later than 2 years after the commencement of section 115-230 (or a later time allowed by the Commissioner) if:

(a) section 115-230 commences after the end of the 2006-2007 income year; and

(b) the choice is in respect of the 2006-2007 income year.

4 Amendment of assessments

Section 170 of the *Income Tax Assessment Act 1936* does not prevent the amendment of an assessment if:

(a) the assessment was made before the commencement of this item; and

(b) an application to amend the assessment is made, in the form approved for the purposes of subsection 170(5), within 2 years of the commencement of this item; and

(c) the amendment is made for the purpose of giving effect to a choice under subsection 115-230(3) of the *Income Tax Assessment Act 1997*.

Schedule 4—Superannuation of deceased military and police

Income Tax Assessment Act 1997

1 Section 302-195

Before "A", insert "(1)".

2 At the end of section 302-195

Add:

(2) For the purposes of this Division, treat an individual who receives a *superannuation lump sum because of the death of another person as a ***death benefits dependant*** of the deceased person in relation to the lump sum if the deceased person *died in the line of duty (see subsection (3)) as:

(a) a member of the Defence Force; or

(b) a member of the Australian Federal Police or the police force of a State or Territory; or

(c) a protective service officer (within the meaning of the *Australian Federal Police Act 1979*).

(3) For the purposes of subsection (2), a person ***died in the line of duty*** if the person died in the circumstances specified in the regulations.

3 Subsection 995-1(1)

Insert:

died in the line of duty has the meaning given by subsection 302-195(3).

4 Application

The amendments made by this Schedule apply in relation to the 2007-08 income year and later income years.

5 Payments by Commissioner in relation to lump sums paid before 1 July 2007

To avoid doubt, nothing in any taxation law (within the meaning of the *Income Tax Assessment Act 1997*) prevents the Commissioner of Taxation (on behalf of the Commonwealth) from making an ex-gratia payment in relation to the tax treatment of a superannuation lump sum received in an income year ending before 1 July 2007 if:

(a) the lump sum is received by a person because of the death of another person; and

(b) the person who received the lump sum is not a dependant of the deceased person.

Schedule 5—Thin capitalisation

Income Tax (Transitional Provisions) Act 1997

1 Subsection 820-45(1)

Omit “3”, substitute “4”.

Schedule 6—Repeal of dividend tainting rules

Income Tax Assessment Act 1936

1 Sections 46G to 46M

Repeal the sections.

2 After paragraph 177EA(17)(g)

Insert:

(ga) whether a distribution that is made or that flows indirectly under the scheme to the relevant taxpayer is sourced, directly or indirectly, from unrealised or untaxed profits;

Income Tax Assessment Act 1997

3 Subsection 197-50(1) (note)

Repeal the note, substitute:

Note: If a company's share capital account is tainted, then a distribution from the account is taxed as a dividend in the hands of the shareholder. This is because a tainted share capital account does not count as a share capital account for the purposes of paragraph (d) of the definition of ***dividend*** in subsection 6(1) of the *Income Tax Assessment Act 1936* (see subsection 975-300(3) of this Act). However, although the distribution is taxed as a dividend, the company cannot pass on to the shareholder the benefit of the tax it has paid, because a distribution from a share capital account (whether or not tainted) is unfrankable (see paragraphs 202-45(e) and 975-300(3)(ba) of this Act).

4 Paragraph 202-45(e)

Repeal the paragraph, substitute:

(e) a distribution that is sourced, directly or indirectly, from a company's *share capital account;

5 Subsection 375-872(4)

Repeal the subsection, substitute:

Paragraph 202-45(e) does not apply

(4) Paragraph 202-45(e) does not apply to a payment that is taken to be a dividend under this section.

Note: Paragraph 202-45(e) provides that a distribution that is sourced, directly or indirectly, from a company's share capital account is unfrankable.

6 After paragraph 975-300(3)(b)

Insert:

(ba) paragraph 202-45(e); and

7 Paragraph 975-300(3)(e)

Repeal the paragraph.

8 Application

The amendments made by this Schedule apply in relation to distributions made on or after 1 July 2004.

Schedule 7—Interest withholding tax

Income Tax Assessment Act 1936

1 Paragraph 128F(1)(e)

Repeal the paragraph, substitute:

(c) for a debt interest other than a debenture—the debt interest:

(i) is a non-equity share; or

(ii) consists of 2 or more related schemes (within the meaning of the *Income Tax Assessment Act 1997*) where one or more of them is a non-equity share; or

(iii) is a syndicated loan; or

(iv) is prescribed by the regulations for the purposes of this section; and

(d) either:

(i) the issue of the debenture or debt interest satisfies the public offer test set out in subsection (3) or (4); or

(ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test set out in subsection (3A).

2 Paragraph 128F(1A)(d)

Repeal the paragraph, substitute:

(d) for a debt interest other than a debenture—the debt interest:

(i) is a non-equity share; or

(ii) consists of 2 or more related schemes (within the meaning of the *Income Tax Assessment Act 1997*) where one or more of them is a non-equity share; or

(iii) is a syndicated loan; or

(iv) is prescribed by the regulations for the purposes of this section; and

(e) either:

(i) the issue of the debenture or debt interest satisfies the public offer test set out in subsection (3) or (4); or

(ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test set out in subsection (3A).

3 Paragraph 128F(1B)(b)

Repeal the paragraph, substitute:

(b) for a debt interest other than a debenture—the debt interest:

(i) is a non-equity share; or

(ii) consists of 2 or more related schemes (within the meaning of the *Income Tax Assessment Act 1997*) where one or more of them is a non-equity share; or

(iii) is a syndicated loan; or

(iv) is prescribed by the regulations for the purposes of this section; and

(c) either:

(i) the issue of the debenture or debt interest satisfies the public offer test set out in subsection (3) or (4); or

(ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test set out in subsection (3A);

4 After subsection 128F(3)

Insert:

(3A) An invitation to become a lender under a syndicated loan facility by a company ***satisfies the public offer test*** if the invitation was made:

(a) to at least 10 persons each of whom:

(i) was carrying on a business of providing finance, or investing or dealing in securities, in the course of operating in financial markets; and

(ii) was not known, or suspected, by the company to be an associate (see subsection (9)) of any of the other persons covered by this paragraph; or

(b) publicly in electronic form, or in another form, that was used by financial markets for dealing in debentures or debt interests; or

(c) to a dealer, manager or underwriter, in relation to the placement of debentures or debt interests, who, under an agreement with the company, made the invitation to become a lender under the facility within 30 days in a way covered by paragraph (a) or (b).

5 After subsection 128F(5)

Insert:

(5AA) An invitation to become a lender under a syndicated loan facility is taken never to have ***satisfied the public offer test*** if, at the time the invitation is made, the company knew, or had reasonable grounds to suspect, that:

(a) an associate of the company is or will become a lender under the facility; and

(b) either:

(i) the associate is a non-resident and the associate is not or would not become a lender under the facility in carrying on a business in Australia at or through a permanent establishment of the associate in Australia; or

(ii) the associate is a resident of Australia and the associate is or would become a lender under the facility in carrying on a business in a country outside Australia at or through a permanent establishment of the associate in that country; and

(c) the associate is not or would not become a lender under the facility in the capacity of:

(i) a dealer, manager or underwriter in relation to the invitation; or

(ii) a clearing house, custodian, funds manager or responsible entity of a registered scheme.

Note: The heading to subsection 128F(5) is altered by omitting "*Issues*" and substituting "*Issues and invitations*".

6 Subsection 128F(9)

Insert:

syndicated loan means a loan or other form of financial accommodation that is provided under a syndicated loan facility, being a facility that has 2 or more lenders.

7 Subsection 128F(9)

Insert:

syndicated loan facility has the meaning given by subsections (11), (12) and (13).

8 At the end of section 128F

Add:

(11) A written agreement is a ***syndicated loan facility*** if:

(a) the agreement describes itself as a syndicated loan facility or syndicated facility agreement; and

(b) the agreement is between one or more borrowers and at least 2 lenders; and

(c) under the agreement each lender severally, but not jointly, agrees to lend money to, or otherwise provide financial accommodation to, the borrower or borrowers; and

(d) the amount to which the borrower or borrowers will have access at the time the first loan or other form of financial accommodation is to be provided under the agreement is at least $100,000,000 (or a prescribed amount).

(12) A written agreement is also a ***syndicated loan facility*** if:

(a) the agreement describes itself as a syndicated loan facility or syndicated facility agreement; and

(b) the agreement is between one or more borrowers and one lender where the agreement provides for the addition of other lenders; and

(c) the agreement provides that, when other lenders are added, each lender severally, but not jointly, agrees to lend money to, or otherwise provide financial accommodation to, the borrower or borrowers; and

(d) the amount to which the borrower or borrowers will have access at the time the first loan or other form of financial accommodation is to be provided under the agreement is at least $100,000,000 (or a prescribed amount).

(13) However, an agreement under which there are 2 or more borrowers is a ***syndicated loan facility*** only if all of them are:

(a) members of the same wholly-owned group (within the meaning of the *Income Tax Assessment Act 1997*); or

(b) parties to the same joint venture; or

(c) associates of each other.

(14) For the purposes of this section, a change (including by novation) to the lenders under a syndicated loan facility does not result in a different agreement.

(15) For a debt interest that consists of 2 or more related schemes (within the meaning of the *Income Tax Assessment Act 1997*) where one or more of them is a non-equity share, this section applies only to interest paid in respect of the non-equity share.

Note: Subsection 128A(1AB) defines ***interest*** for the purposes of this Division. Under that subsection, dividends paid in respect of a non-equity share are treated as being interest.

(16) The rule in subsection (15) does not apply to the extent that interest in respect of the other related scheme or schemes would be interest to which this section applies in respect of a debenture or debt interest.

9 Subsection 128FA(1)

Omit all the words after "issued by the trustee", substitute:

if:

(a) for a debt interest other than a debenture—the debt interest:

(i) is a syndicated loan; or

(ii) is prescribed by the regulations for the purposes of this section; and

(b) either:

(i) the issue of the debenture or debt interest satisfies the public offer test set (see subsection (6)); or

(ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test (see subsection (6A)).

10 Paragraph 128FA(2)(b)

Repeal the paragraph, substitute:

(b) for a debt interest other than a debenture—the debt interest:

(i) is a syndicated loan; or

(ii) is prescribed by the regulations for the purposes of this section; and

(c) either:

(i) the issue of the debenture or debt interest satisfies the public offer test set (see subsection (6)); or

(ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test (see subsection (6A));

11 After subsection 128FA(6)

Insert:

(6A) For the purposes of working out under this section whether an invitation to become a lender under a syndicated loan facility satisfies the public offer test, subsections 128F(3A) and (5AA) apply to the trustee of the eligible unit trust in a corresponding way to the way in which those subsections apply to a company, subject to subsection (7) of this section.

Note: The heading to subsection 128FA(6) is replaced by the heading "*Public offer test*".

12 Subsections 128FA(7)

Omit "subsections 128F(3) to (5) as mentioned in subsection (6) of this section", substitute "subsection 128F(3), (3A), (4), (5) or (5AA) as mentioned in subsection (6) or (6A) of this section".

13 After subsection 128FA(7)

Insert:

(7A) For the purposes of this section, a change (including by novation) to the lenders under a syndicated loan facility does not result in a different agreement.

14 Subsection 128FA(8)

Insert:

syndicated loan has the same meaning as in section 128F.

15 Subsection 128FA(8)

Insert:

syndicated loan facility has the same meaning as in section 128F.

16 Application

(1) The amendments made by this Schedule apply to interest paid in respect of debt interests issued on or after 7 December 2006 (the ***start day***).

(2) For the purposes of subitem (1), a debt interest is treated as being issued before the start day if it is issued under or results from a written agreement entered into on or after 21 March 2005 and before the start day.

(3) However, subitem (2) does not apply to the extent that the agreement referred to in that subitem is altered after the start day to extend its term.

Schedule 8—Forestry managed investment schemes

Part 1—Main amendments

Income Tax Assessment Act 1936

1 After section 82KZMG

Insert:

82KZMGA Deductions for certain forestry expenditure

(1) A taxpayer cannot deduct expenditure in relation to which the requirements in section 82KZMG are met if:
  (a) the taxpayer holds the taxpayer's interest in the agreement mentioned in section 82KZMG as an initial participant in the agreement; and
  (b) a CGT event happens in relation to that interest within 4 years after the end of the year of income in which the taxpayer first incurred expenditure under the agreement.

(2) Despite section 170, the Commissioner may amend the taxpayer's assessment at any time within 2 years after the end of the year of income in which the CGT event happens, for the purpose of giving effect to this section.

82KZMGB CGT event in relation to interest in 82KZMG agreement

(1) This section applies if:
  (a) a taxpayer holds an interest in an agreement mentioned in section 82KZMG as an initial participant in the agreement; and
  (b) at least one of these conditions is satisfied:
    (i) the taxpayer can deduct or has deducted an amount for a year of income in relation to the interest;
    (ii) the condition in subparagraph (i) would be satisfied if section 82KZMGA were disregarded; and

(c) subsection 82KZMG(1) applies to the timing of the deduction (or would apply if section 82KZMGA were disregarded); and

(d) a CGT event happens in relation to the interest, other than a CGT event that happens in respect of thinning.

(2) The taxpayer's assessable income for the year of income in which the CGT event happens includes:

(a) if, as a result of the CGT event, the taxpayer no longer holds the interest—the market value of the interest (worked out as at the time of the event); or

(b) otherwise—the decrease (if any) in the market value of the interest as a result of the CGT event.

(3) Any amount that the taxpayer actually receives because of the CGT event is not included in the taxpayer's assessable income (nor is it exempt income).

Income Tax Assessment Act 1997

2 After Division 392

Insert:

Division 394—Forestry managed investment schemes

Guide to Division 394

394-1 What this Division is about

This Division sets out rules about deductions for contributions to forestry managed investment schemes. It also sets out the tax treatment of proceeds from the sale of interests in such schemes, and of proceeds from harvesting trees under such schemes.

Table of sections

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394-45 Direct forestry expenditure

394-5 Object of this Division

The object of this Division is to encourage the expansion of commercial plantation forestry in Australia through the establishment and tending of new plantations for felling. This is achieved by:

(a) permitting investors to deduct amounts paid under a forestry scheme in the year of payment, if certain conditions are met (for example, that it is reasonable to expect that the manager of the scheme will spend at least 70% of investors' contributions, on a market value basis, on activities that establish, tend, fell and harvest trees); and

(b) allowing secondary market trading of interests in such schemes, while minimising tax arbitrage and providing tax certainty for investors.

394-10 Deduction for amounts paid under forestry managed investment schemes

(1) You can deduct an amount if:

(a) you hold a *forestry interest in a *forestry managed investment scheme; and

(b) you pay the amount under the scheme; and

(c) the scheme satisfies the *70% DFE rule (see section 394-35) on 30 June in the income year in which a *participant in the scheme first pays an amount under the scheme; and

(d) you do not have day to day control over the operation of the scheme (whether or not you have the right to be consulted or give directions); and

(e) at least one of these conditions is satisfied:

(i) there is more than one participant in the scheme;

(ii) the *forestry manager of the scheme, or an *associate of the forestry manager, manages, arranges or promotes similar schemes; and

(f) the condition in subsection (4) is satisfied.

(2) You deduct the amount for the income year in which you pay it.

(3) For the purposes of this Division, do *not* treat an amount as being paid under a *forestry managed investment scheme if:

(a) you pay the amount in connection with a *CGT event in relation to a *forestry interest in the scheme; and

(b) as a result of the CGT event:

(i) another *participant in the scheme no longer holds the forestry interest; and

(ii) you start to hold the forestry interest.

(4) For the purposes of paragraph (1)(f), the condition in this subsection is satisfied unless:

(a) 18 months have elapsed since the end of the income year in which an amount is first paid under the *forestry managed investment scheme by a *participant in the scheme; and

(b) the trees intended to be established in accordance with the scheme have not all been established before the end of those 18 months.

(5) You cannot deduct an amount under subsection (1) if:

(a) you hold the *forestry interest mentioned in paragraph (1)(a) as an *initial participant; and

(b) a *CGT event happens in relation to the forestry interest within 4 years after the end of the income year in which you first pay an amount under the scheme.

If you have already deducted it, your assessment may be amended to disallow the deduction.

(6) Despite section 170 of the *Income Tax Assessment Act 1936*, the Commissioner may amend your assessment at any time within 2 years after the *CGT event, for the purpose of giving effect to subsection (5).

(7) Sections 82KZMD and 82KZMF of the *Income Tax Assessment Act 1936* do not affect the timing of a deduction under this section.

394-15 Forestry managed investment schemes and related concepts

(1) A *scheme is a ***forestry managed investment scheme*** if the purpose of the scheme is for establishing and tending trees for felling in Australia.

(2) The entity that manages, arranges or promotes a *forestry managed investment scheme is the ***forestry manager*** of the scheme.

(3) A ***forestry interest*** in a *forestry managed investment scheme is a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

(4) An entity that holds a *forestry interest in a *forestry managed investment scheme (other than the *forestry manager of the scheme) is a ***participant*** in the scheme.

(5) A *participant in a *forestry managed investment scheme holds a *forestry interest in the scheme as an ***initial participant*** if:
   (a) the participant obtains the forestry interest from the *forestry manager of the scheme; and
   (b) the payment by the participant to obtain the forestry interest results in the establishment of trees.

394-20 Payments on behalf of participant in forestry managed investment scheme

For the purposes of this Division, treat a payment to the *forestry manager of a *forestry managed investment on behalf of a *participant in the scheme as a payment by the participant to the forestry manager.

394-25 CGT event in relation to forestry interest in forestry managed investment scheme—initial participant

(1) This section applies if:
   (a) you hold a *forestry interest in a *forestry managed investment scheme as an *initial participant in the scheme; and
   (b) at least one of these conditions is satisfied:

(i) you can deduct or have deducted an amount for an income year under section 394-10 in relation to the forestry interest;

(ii) the condition in subparagraph (i) would be satisfied if subsection 394-10(5) were disregarded; and

(c) a *CGT event happens in relation to the forestry interest, other than a CGT event that happens in respect of thinning.

(2) Your assessable income for the income year in which the *CGT event happens includes:

(a) if, as a result of the CGT event, you no longer hold the *forestry interest—the *market value of the forestry interest (worked out as at the time of the event); or

(b) otherwise—the decrease (if any) in the market value of the forestry interest as a result of the CGT event.

(3) Any amount that you actually receive because of the *CGT event is not included in your assessable income (nor is it *exempt income).

394-30 CGT event in relation to forestry interest in forestry managed investment scheme—subsequent participant

(1) This section applies if:

(a) you hold a *forestry interest in a *forestry managed investment scheme otherwise than as an *initial participant in the scheme; and

(b) at least one of these conditions is satisfied:

(i) you can deduct or have deducted an amount for an income year under section 394-10 in relation to the forestry interest;

(ii) you could deduct an amount for an income year under section 394-10 if you had paid the amount under the scheme in that year; and

(c) a *CGT event happens in relation to the forestry interest, other than a CGT event that happens in respect of thinning.

(2) Your assessable income for the income year in which the *CGT event happens includes the lesser of the following:

(a) the *market value of the forestry interest (worked out as at the time of the event);

(b) the amount (if any) by which the *total forestry scheme deductions in relation to the forestry interest exceeds the *incidental forestry scheme receipts in relation to the forestry interest.

(3) The ***total forestry scheme deductions*** in relation to the *forestry interest is the total of each amount that you can deduct or have deducted under section 394-10 for each income year in relation to the forestry interest.

(4) The ***incidental forestry scheme receipts*** in relation to the *forestry interest is the total of each amount that you have received under the scheme in each income year in relation to the forestry interest for a reason otherwise than because of the *CGT event.

(5) However, if you still hold the forestry interest despite the *CGT event, work out the amount included in your assessable income under subsection (2) using this formula (instead of using the amount worked out under subsection (2)):

$$\text{Amount worked out under subsection (2)} \times \frac{\text{Decrease (if any) in the *market value of the *forestry interest as a result of the CGT event}}{\text{*Market value of the *forestry interest just before the CGT event}}$$

(6) If this section has operated previously in relation to the *forestry interest, disregard an amount for the purposes of subsections (3) and (4) to the extent that it has already been reflected in your assessable income under that previous operation in relation to the forestry interest.

(7) These provisions do not apply to the *CGT event:

(a) section 6-5 (about *ordinary income);

(b) any other provision that includes an amount in assessable income, other than the following:

(i) a provision in Part 3-1 or 3-3;

(ii) subsection (2) of this section;

(c) section 8-1 (about amounts you can deduct);

(d) any other provision that allows you to deduct an amount from your assessable income;

(e) section 118-20.

(8) However, the provisions referred to in subsection (7) can apply to the *CGT event if a *capital gain or *capital loss from the event is disregarded because of section 118-25.

(9) Just before the *CGT event, increase the *cost base and *reduced cost base of the *forestry interest by the amount included in your assessable income under subsection (2).

394-35 70% DFE rule

(1) A *forestry managed investment scheme satisfies the ***70% DFE rule*** on 30 June in an income year if it is reasonable to expect on that 30 June that the amount of DFE under the scheme (see subsection (2)) is no less than 70% of the amount of the payments under the scheme (see subsection (3)).

(2) The amount of DFE under the scheme is the amount of the net present value (on that 30 June) of all *direct forestry expenditure under the scheme that the *forestry manager of the scheme has paid or will pay under the scheme.

(3) The amount of payments under the scheme is the amount of the net present value (on that 30 June) of all amounts that all current and future *participants in the scheme have paid or will pay under the scheme.

(4) In working out the net present value of an amount paid before that 30 June:

(a) unless paragraph (b) applies—treat the amount as having been paid on that 30 June; or

(b) if the amount was paid in an income year ending before that 30 June—treat the amount as having been paid on the 30 June in that income year.

(5) In working out the net present value of an amount expected to be paid after that 30 June, treat the amount as having been paid on 1 January in the income year in which it is expected to be paid.

(6) Reduce an amount worked out under subsection (2) or (3) to the extent (if any) to which that amount can reasonably be expected to be recouped.

(7) In working out the net present value of an amount for the purposes of this section, use the yield on Australian Government Treasury Bonds with the maturity closest to 10 years (as published by the Reserve Bank of Australia).

(8) For the purposes of subsection (2), if:
  (a) the *forestry manager of the scheme has paid or will pay an amount under the scheme in a transaction; and
  (b) the forestry manager and at least one other party to the transaction did not or will not deal at *arm's length in relation to the transaction; and
  (c) the amount is or will be more or less than the *market value of what it is for;

treat the amount as that market value.

394-40 Payments under forestry managed investment scheme

For the purposes of this Division, do *not* treat the following payments as payments under a *forestry managed investment scheme by a *participant in the scheme:
  (a) payments for *borrowing money;
  (b) payments of interest and payments in the nature of interest;
  (c) payments of stamp duty;
  (d) payments of *GST;
  (e) payments that relate to one or more of the matters mentioned in paragraphs 394-45(4)(a), (b) or (c).

394-45 Direct forestry expenditure

(1) ***Direct forestry expenditure*** under a *forestry managed investment scheme means:
  (a) an amount paid under the scheme that is attributable to establishing, tending, felling and harvesting trees; and
  (b) notional amounts reflecting the *market value of goods, services or the use of land, provided by the *forestry manager of the scheme, for establishing, tending, felling and harvesting trees.

Example 1: Notional amounts reflecting the value of the use of land owned by the forestry manager that is provided for establishing, tending, felling and harvesting trees.

Example 2: Notional amounts reflecting the value of tree felling services provided by the forestry manager.

(2) Treat *direct forestry expenditure covered by paragraph (1)(b) as paid annually for each income year of the *forestry manager of the scheme based on the *market value of the goods, services, or the use of the land. Treat the day on which it is paid as:

(a) unless paragraph (b) or (c) applies—1 January in the income year; or

(b) if the first time an amount is paid under the scheme is later than the first day of the income year—the last day of the income year; or

(c) if the scheme comes to an end on a day before the end of the income year—that day.

Exclusions—general

(3) However, ***direct forestry expenditure*** under the scheme does not include amounts paid under the scheme to the extent that they relate to any of the following:

(a) marketing of the scheme;

Example: Advertising, sales, sponsorship and entertainment.

(b) insurance, contingency funds or provisions (other than provisions for employee entitlements);

(c) financing;

(d) lobbying;

(e) general business overheads (but not overheads directly related to forestry);

(f) subscriptions to industry bodies;

(g) commissions for financial planners or financial advisers;

(h) compliance with requirements related to the structure and operations of the *forestry manager of the scheme;

Example: Product design and preparation of product disclosure statements.

(i) supervision and auditing of contracts, other than direct supervision of direct forestry activities (such as establishing trees for felling);

(j) legal fees relating to any matter mentioned in this subsection.

Exclusions—expenditure after harvest etc.

(4) Also, ***direct forestry expenditure*** under the scheme does not include amounts paid under the scheme to the extent that they relate to any of the following:

(a) transportation and handling of felled trees that happens after the earliest of the following:

(i) sale of the trees;

(ii) arrival of the trees at the mill door;

(iii) arrival of the trees at the port;

(iv) arrival of the trees at the place of processing (other than where processing happens in-field);

(b) processing;

(c) stockpiling (other than in-field stockpiling);

(d) marketing and sale of forestry produce.

Taxation Administration Act 1953

3 At the end of Part 5-25 in Schedule 1

Add:

Division 394—Reporting about forestry managed investment schemes

Guide to Division 394

394-1 What this Division is about

A forestry manager of a forestry managed investment scheme must give the Commissioner information about initial contributions by participants in the scheme. The forestry manager must also inform the Commissioner if the trees are not established under the scheme within 18 months of the first investment in the scheme.

Table of sections

394-5 Statements about initial contributions to scheme
394-10 Statements about failure to establish trees within 18 months

394-5 Statements about initial contributions to scheme

(1) The *forestry manager of a *forestry managed investment scheme must give the Commissioner a statement in relation to the scheme if:

(a) the scheme satisfies the requirement in paragraph 394-10(1)(c) of the *Income Tax Assessment Act 1997* (the *70% DFE rule); and

(b) the forestry manager (or an *associate of the forestry manager) receives an amount under the scheme that is included in the forestry manager's (or the associate's) assessable income under section 15-46 of that Act; and

(c) that amount is the amount that is first paid under the scheme by a *participant in the scheme.

Note: Section 286-75 provides an administrative penalty for breach of this subsection.

(2) A statement under subsection (1) must be in the *approved form.

(3) The statement must be given to the Commissioner within 3 months after the end of the income year in which the *forestry manager (or the *associate) receives the amount.

Note: Section 388-55 allows the Commissioner to defer the time for giving an approved form.

(4) The *approved form may require the statement to contain the following information:

(a) the name of the scheme;

(b) information relating to the identity of the *forestry manager (or the *associate);

(c) information relating to the amounts paid or payable under the scheme by *participants in the scheme.

(5) Subsection (4) does not limit the information that the *approved form may require the statement to contain.

394-10 Statements about failure to establish trees within 18 months

(1) If:

(a) a *forestry managed investment scheme satisfies the requirement in paragraph 394-10(1)(c) of the *Income Tax Assessment Act 1997* (the *70% DFE rule); and

(b) the condition in subsection 394-10(4) of that Act is not satisfied in relation to the scheme;

the *forestry manager of the scheme must give the Commissioner a statement in relation to the reasons why that condition was not satisfied.

Note: Section 286-75 provides an administrative penalty for breach of this subsection.

(2) A statement under subsection (1) must be in the *approved form.

(3) The statement must be given to the Commissioner within 3 months after the end of the 18 months mentioned in subsection 394-10(4) of the *Income Tax Assessment Act 1997*.

Note: Section 388-55 allows the Commissioner to defer the time for giving an approved form.

(4) The *approved form may require the statement to contain the following information:

(a) the name of the scheme;

(b) information relating to the identity of the *forestry manager;

(c) information relating to the circumstances that gave rise to the condition not being satisfied.

(5) Subsection (4) does not limit the information that the *approved form may require the statement to contain.

Part 2—Other amendments

Income Tax Assessment Act 1936

4 Subsection 82KH(1) (after paragraph (p) of the definition of *relevant expenditure*)

Insert:

(pa) a loss or outgoing incurred by the taxpayer in respect of the establishment and tending of trees for felling on behalf of the taxpayer to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 394-10 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

5 After paragraph 82KH(1G)(p)

Insert:

(pa) in a case where the relevant expenditure was incurred by the taxpayer in respect of the establishment and tending of trees for felling on behalf of the taxpayer—the establishment and tending of trees for felling on behalf of the taxpayer;

6 Paragraph 82KH(1L)(p)

After “paragraph (p)”, insert “or paragraph (pa)”.

7 After subsection 262A(2)

Insert:

(2AAA) Subsection (1) applies to a participant in a forestry managed investment scheme in relation to the scheme even if the participant is not carrying on a business in relation to the scheme.

(2AAB) Subsection (2AAC) applies to the forestry manager of a forestry managed investment scheme if:

(a) the forestry manager (or an associate of the forestry manager) receives an amount under the scheme; and

(b) the amount is included in the forestry manager’s (or the associate’s) assessable income under section 15-46 of the *Income Tax Assessment Act 1997*.

(2AAC) The records to be kept under subsection (1) by the forestry manager include records about the basis on which the scheme satisfies the requirement in paragraph 394-10(1)(c) of the *Income Tax Assessment Act 1997* (the 70% DFE rule).

8 Subsection 262A(6)

Insert:

associate has the same meaning as in the *Income Tax Assessment Act 1997*.

9 Subsection 262A(6)

Insert:

forestry managed investment scheme has the same meaning as in the *Income Tax Assessment Act 1997*.

10 Subsection 262A(6)

Insert:

forestry manager of a forestry managed investment scheme has the same meaning as in the *Income Tax Assessment Act 1997*.

11 Subsection 262A(6)

Insert:

participant in a forestry managed investment scheme has the same meaning as in the *Income Tax Assessment Act 1997*.

Income Tax Assessment Act 1997

12 Section 10-5 (at the end of table item headed "forestry agreement")

Add:

CGT event in relation to forestry interest in agreement.....	82KZMGB

13 Section 10-5 (after table item headed "forestry agreement")

Insert:

forestry managed investment schemes

forestry manager's receipts under scheme	15-46
CGT event in relation to forestry interest in scheme for initial participant	394-25(2)
CGT event in relation to forestry interest in scheme for subsequent participant	394-30(2)

14 Section 12-5 (after table item headed "foreign tax credits")

Insert:

forestry managed investment schemes

payments under scheme	394-10(1)

15 After section 15-45

Insert:

15-46 Amounts paid under forestry managed investment schemes

(1) Your assessable income includes an amount you receive under a *forestry managed investment scheme if:

(a) you are the *forestry manager of the scheme, or an *associate of the forestry manager; and

(b) the entity that paid the amount can deduct or has deducted the amount under section 394-10 in relation to the scheme (disregarding subsection 394-10(5)).

The amount is included for the income year for which the entity that paid the amount can or has claimed a deduction for it (disregarding subsection 394-10(5)).

(2) No part of an amount included under subsection (1) is included in your assessable income for a later income year.

16 Section 112-97 (after table item 22)

Insert:

22A	A CGT event happens in relation to forestry interest in a forestry managed investment scheme for a subsequent participant	The total cost base and reduced cost base	Subsection 394-30(9)

17 Subsection 995-1(1)

Insert:

70% DFE rule has the meaning given by section 394-35.

18 Subsection 995-1(1)

Insert:

direct forestry expenditure has the meaning given by section 394-45.

19 Subsection 995-1(1)

Insert:

forestry managed investment scheme has the meaning given by subsection 394-15(1).

20 Subsection 995-1(1)

Insert:

incidental forestry scheme receipts has the meaning given by subsection 394-30(4).

21 Subsection 995-1(1)

Insert:

initial participant in a *forestry managed investment scheme has the meaning given by subsection 394-15(5).

22 Subsection 995-1(1)

Insert:

forestry interest in a *forestry managed investment scheme has the meaning given by subsection 394-15(3).

23 Subsection 995-1(1)

Insert:

forestry manager of a *forestry managed investment scheme has the meaning given by subsection 394-15(2).

24 Subsection 995-1(1) (definition of *participant*)

Repeal the definition, substitute:

participant:

(a) ***participant***, in relation to a *GST joint venture, has the meaning given by section 195-1 of the *GST Act; and

(a) ***participant*** in a *forestry managed investment scheme has the meaning given by subsection 394-15(4).

25 Subsection 995-1(1)

Insert:

total forestry scheme deductions has the meaning given by subsection 394-30(3).

Part 3—Application

26 Application

(1) The amendments made by this Schedule apply to amounts paid by a participant under a forestry managed investment scheme on or after 1 July 2007.

(2) Despite subitem (1), the amendments do not apply if any other amounts were paid by the participant or any other participant under the scheme before 1 July 2007.

(3) Despite subitem (1), sections 394-25 and 394-30 of the *Income Tax Assessment Act 1997* apply to CGT events that happen on or after 1 July 2007.

(4) Despite subitem (1), sections 82KZMGA and 82KZMGB of the *Income Tax Assessment Act 1936* apply to CGT events that happen on or after 1 July 2007.

Schedule 9—Non-resident trustee beneficiaries

Income Tax Assessment Act 1936

1 Subsections 98(3) and (4)

Repeal the subsections, substitute:

(2A) If:

(a) a beneficiary of a trust estate who is presently entitled to a share of the income of the trust estate:

(i) is a non-resident at the end of the year of income; and

(ii) is not, in respect of that share of the income of the trust estate, a beneficiary in the capacity of a trustee of another trust estate; and

(iii) is not a beneficiary to whom section 97A applies in relation to the year of income; and

(iv) is not a beneficiary to whom subsection 97(3) applies; and

(b) the trustee of the trust estate is not assessed and is not liable to pay tax under subsection (1) or (2) in respect of any part of that share of the net income of the trust estate;

subsection (3) applies to the trustee in respect of:

(c) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and

(d) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia.

(3) A trustee to whom this subsection applies in respect of an amount of net income is to be assessed and is liable to pay tax:

(a) if the beneficiary is not a company—in respect of the amount of net income as if it were the income of an individual and were not subject to any deduction; or

(b) if the beneficiary is a company—in respect of the amount of net income at the rate declared by the Parliament for the purposes of this paragraph.

Note: If the trust estate's net income includes a net capital gain, and the beneficiary is a company, Subdivision 115-C of the *Income Tax Assessment Act 1997* affects the assessment of the trustee.

(4) If:

(a) a beneficiary of a trust estate (the ***first trust estate***) who is presently entitled to a share of the income of the first trust estate:

(i) is, in respect of that share of the income of the first trust estate, a beneficiary in the capacity of a trustee of another trust estate; and

(ii) is not a beneficiary to whom subsection 97(3) applies; and

(b) a trustee of the other trust estate is a non-resident at the end of the year of income;

the trustee of the first trust estate is to be assessed and is liable to pay tax in respect of so much of that share of the net income of the first trust estate as is attributable to sources in Australia at the rate declared by the Parliament for the purposes of this subsection.

Note: If the trust estate's net income includes a net capital gain, Subdivision 115-C of the *Income Tax Assessment Act 1997* affects the assessment of the trustee.

2 Subsection 98A(1)

Omit "or (4)".

3 Paragraph 98A(2)(a)

After "trust estate", insert "(including, for a beneficiary that is a company, any tax paid in respect of that interest because of section 115-220 of the *Income Tax Assessment Act 1997*)".

4 At the end of section 98A

Add:

(3) If a beneficiary of a trust estate who is presently entitled to a share of the income of the trust estate:

(a) is not, in respect of that share of the income of the trust estate, a beneficiary in the capacity of a trustee of another trust estate; and

(b) is a non-resident at the end of the year of income;

the assessable income of the beneficiary includes so much of the individual interest of the beneficiary in the net income of the trust estate as is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4).

Note: If the trust estate's net income includes a net capital gain, Subdivision 115-C of the *Income Tax Assessment Act 1997* also affects the assessment of the beneficiary.

(4) To the extent that subsection (3) includes an amount in the assessable income of a beneficiary of a trust estate, the amount is not included by subsection (1) or section 100.

5 After section 98A

Insert:

98B Deduction from beneficiary's tax

(1) This section applies to a beneficiary of a trust estate for a year of income if the assessable income of the beneficiary of the year of income includes an amount covered by subsection (2).

(2) This subsection covers an amount (the ***assessable amount***) if:

(a) the amount is included in the assessable income of the beneficiary under one of the following:

(i) section 97;

(ii) subsection 98A(3);

(iii) section 100; and

(b) the amount does not represent income of the trust estate to which the beneficiary is presently entitled in the capacity of a trustee of another trust estate; and

(c) the amount is reasonably attributable to an amount (the ***taxed net income***) in respect of which the trustee of another trust estate is assessed and liable to pay tax (the ***subsection 98(4) tax***) under subsection 98(4) (including any tax paid under subsection 98(4) in respect of the taxed net income because of section 115-222 of the *Income Tax Assessment Act 1997*).

(3) A proportion of the subsection 98(4) tax is to be deducted from the income tax assessed against the beneficiary of the year of income. That proportion is the same as the proportion of the taxed net income that gave rise to the assessable amount.

Note: To work out the proportion of the taxed net income that gives rise to assessable income for a beneficiary of another trust estate, you would have regard to the share of the income of each interposed trust estate to which a beneficiary (including a beneficiary in the capacity of a trustee) is presently entitled.

Example: The P Trust has two non-resident trustee beneficiaries, the trustees of the S Trust and the H Trust. Each trustee is presently entitled to a 1/2 share of the income of the P Trust. The net income of the P Trust is $100,000. The trustee of the P Trust pays tax of $22,500 under subsection 98(4) in respect of the trustee of the S Trust's interest and $22,500 under subsection 98(4) in respect of the trustee of the H Trust's interest.

The S Trust has a non-resident beneficiary, G, who is presently entitled to a 1/3 share of the income of the S Trust. The net income of the S Trust is $30,000. Subsection 98A(3) includes $10,000 in G's assessable income.

The taxed net income of the P trust is $50,000. The proportion of that taxed net income that gave rise to the $10,000 being included in G's assessable income is 1/3.This is because G had a 1/3 share of the income of the S Trust. $7,500 (1/3 x $22,500) is deducted from the income tax assessed against G.

If section 97, subsection 98A(3) or section 100 also includes amounts in the assessable income of any beneficiaries of the H Trust, each of those beneficiaries also works out the amount of the deduction against the income tax assessed against them in the same way.

(4) If the amount to be deducted under subsection (3) is greater than the amount of the income tax assessed against the beneficiary, the Commissioner must pay to the beneficiary an amount equal to the difference between those 2 amounts.

Note: See Division 3A of Part IIB of, and section 105-65 in Schedule 1 to, the *Taxation Administration Act 1953* for the rules about how the Commissioner must pay the entity. Division 3A of Part IIB allows the Commissioner to apply the amount owing as a credit against tax debts that the entity owes to the Commonwealth.

6 After paragraph 99B(2)(b)

Insert:

(ba) an amount that is non-assessable non-exempt income of the beneficiary because of section 802-17 of the *Income Tax Assessment Act 1997*;

7 After subparagraph 99B(2)(c)(ii)

Insert:

or (iii) that is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4);

8 After section 99D

Insert:

99E Later trust not taxed on income already taxed under subsection 98(4)

Sections 98, 99 and 99A do not apply to so much of the net income of a trust estate of a year of income as is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4).

9 Subsection 100(1) (note)

Omit "Note", substitute "Note 1".

10 At the end of subsection 100(1)

Add:

Note 2: An amount is not included in assessable income under this section to the extent that subsection 98A(3) already includes it: see subsection 98A(4).

11 After subsection 100(1A)

Insert:

(1B) If a beneficiary in a trust estate who is under a legal disability or is deemed to be presently entitled to any of the income of the trust estate by virtue of the operation of subsection 95A(2):

(a) is a resident at the end of the year of income; and

(b) is not a beneficiary in any other trust estate and does not derive income from any other source;

the assessable income of the beneficiary includes so much of the individual interest of the beneficiary in the net income of the trust estate as is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4).

Note 1: If the trust estate's net income includes a net capital gain, Subdivision 115-C of the *Income Tax Assessment Act 1997* also affects the assessment of the beneficiary.

Note 2: A credit is available under section 98B for an appropriate part of the subsection 98(4) tax.

Note 3: An amount is not included in assessable income under this section to the extent that subsection 98A(3) already includes it: see subsection 98A(4).

12 At the end of section 100

Add:

(3) However, an amount of tax is not to be deducted under subsection (2) from the income tax assessed against a beneficiary to the extent that the amount is deducted under section 98B from the income tax assessed against the beneficiary.

13 Subsection 128B(1) (note)

Omit "section 802-15", substitute "sections 802-15 and 802-17".

Income Tax Assessment Act 1997

14 Section 12-5 (table item headed "foreign residents")

Repeal the item.

15 Section 13-1 (table item headed "trusts")

Before:

non-resident beneficiary	**98A(2)(a)**

insert:

beneficiary in a foreign trust.....	**98B**

16 Subparagraphs 115-215(2)(b)(ii) and (iii)

Repeal the subparagraphs, substitute:

(ii) under subsection 98A(1) or (3) of that Act; or

(iii) under section 100 of that Act.

17 Section 115-220 (heading)

Repeal the heading, substitute:

115-220 Special rule for assessing trustee under paragraph 98(3)(b) of the *Income Tax Assessment Act 1936*

18 Subsection 115-220(1)

Omit "subsection 98(3)", substitute "paragraph 98(3)(b)".

19 Subsection 115-220(2) (heading)

Repeal the heading, substitute:

Modification of paragraph 98(3)(b)

20 Subsection 115-220(2)

Omit "subsection 98(3)", substitute "paragraph 98(3)(b)".

21 After section 115-220

Insert:

115-222 Special rule for assessing trustee under subsection 98(4) of the *Income Tax Assessment Act 1936*

Purpose

(1) The purpose of this section is to ensure a trustee assessed under subsection 98(4) of the *Income Tax Assessment Act 1936* (in respect of the share of the net income to which a beneficiary that is a foreign resident in the capacity of a trustee is entitled) does not get the benefit in that assessment of the *discount percentage.

Modification of subsection 98(4)

(2) The trustee is to be assessed (and pay tax) under subsection 98(4) of the *Income Tax Assessment Act 1936* as if the part of the share that is attributable to a *capital gain of the trust that was reduced under step 3 of the method statement in subsection 102-5(1) were double the amount that it actually is.

22 Subparagraph 207-50(3)(b)(ii)

Omit "paragraph 98A(1)(a) or (b), or paragraph 100(1)(a) or (b),", substitute "section 98A or 100".

23 After section 802-15

Insert:

802-17 Trust estates and foreign resident beneficiaries—exempting CFI from Australian tax

Foreign resident beneficiaries

(1) So much of a share of the net income of a trust as is reasonably attributable to the whole or a part of the *unfranked part of a *frankable distribution made by an *Australian corporate tax entity that the entity declares, in its *distribution statement, to be *conduit foreign income:

(a) is not assessable income and is not *exempt income of a beneficiary of the trust who:

(i) is a foreign resident; and

(ii) is presently entitled to the share of the income of the trust; and

(b) is an amount to which section 128B (Liability to withholding tax) of the *Income Tax Assessment Act 1936* does not apply.

Note: A frankable distribution to which a part of the net income of a trust is reasonably attributable may be made by the Australian corporate tax entity to the trust directly, or to the trust indirectly through one or more interposed trusts.

(2) The declaration must be made on or before the day on which the *distribution is made.

Note: For a private company, this rule may bring forward the time at which the company is required to make its distribution statement: see section 202-75.

Trusts

(3) The trustee of a trust is not to be assessed (and pay tax) under section 98, 99 or 99A of the *Income Tax Assessment Act 1936* in respect of so much of the net income of the trust as is *non-assessable non-exempt income of a beneficiary of the trust under subsection (1).

24 Subsection 855-40(3)

Repeal the subsection, substitute:

(3) You are not liable to pay tax as a trustee of a *fixed trust in respect of an amount to the extent that the amount gives rise to a *capital gain that is disregarded for a beneficiary under subsection (2).

25 Subsection 855-40(4)

After "subsection 98A(1)", insert "or (3)".

26 Subsection 855-40(9)

Repeal the subsection (including the notes).

Income Tax Rates Act 1986

27 Subparagraph 5(a)(iv)

Omit "subsection 98(3)", substitute "paragraph 98(3)(b) or subsection 98(4)".

28 Subparagraph 5(b)(iv)

Omit "subsection 98(3)", substitute "paragraph 98(3)(b) or subsection 98(4)".

29 Section 28

Repeal the section, substitute:

28 Rates of tax payable by certain trustees to whom section 98 of the Assessment Act applies

The rates of tax payable by a trustee of a trust estate in respect of a share of the net income of the trust estate in respect of which the trustee is liable to be assessed and to pay tax are:

(a) if paragraph 98(3)(b) of the Assessment Act applies—the rate specified in subsection 23(2) (about companies); and

(b) if subsection 98(4) of the Assessment Act applies—the maximum rate specified in column 3 of the table in Part II of Schedule 7 to this Act that applies for the year of income.

Note: If paragraph 98(3)(a) of the Assessment Act applies, see subsection 12(6).

30 Application

(1) Subject to items 31, 32 and 33 of this Schedule, the amendments made by this Schedule, other than items 13 and 23, apply in relation to income years starting on or after 1 July 2006.

(2) The amendments made by items 13 and 23 of this Schedule apply in relation to income years starting on or after 1 July 2005.

31 Transitional provision—trusts that ceased to exist before introduction

Subsection 98(4) of the *Income Tax Assessment Act 1936*, as inserted by item 1 of this Schedule, does not apply in relation to a trustee of a trust that ceased to exist before the Bill for this Act was introduced into the House of Representatives.

32 Transitional provision—managed investment trusts

(1) This item applies in relation to the following income years:

(a) the first income year starting on or after 1 July 2006;

(b) the income year immediately prior to the first income year starting on or after the first 1 July after the day on which this Act receives the Royal Assent;

(c) each intervening income year (if any).

(2) In this item, expressions mean the same as in the *Income Tax Assessment Act 1997*.

(3) Subsection 98(4) of the *Income Tax Assessment Act 1936*, as inserted by item 1 of this Schedule, does not apply in relation to a trustee of a trust in relation to an income year to which this item applies if the conditions in subitems (4) to (6) are satisfied for the trust for the income year.

(4) The trust must be a resident trust estate for the purposes of Division 6 of Part III of the *Income Tax Assessment Act 1936* for the income year.

(5) At each of the times in the income year mentioned in subitem (9), the trust must be a managed investment scheme (as defined by section 9 of the *Corporations Act 2001*) and be operated by a financial services licensee (as defined by section 761A of that Act) whose licence covers operating such a managed investment scheme.

(6) At each of the times in the income year mentioned in subitem (9), one of the following must be satisfied:

(a) units in the trust must be listed for quotation in the official list of an approved stock exchange in Australia;

(b) the trust must have at least 50 members (ignoring objects of a trust);

(c) one of the entities covered by subitem (7) must be a member of the trust.

(7) These are the entities:

(a) a life insurance company;

(b) a complying superannuation fund, a complying approved deposit fund or a foreign superannuation fund, being a fund that has at least 50 members;

(c) a trust that satisfies the conditions in subitems (4) and (5) and also satisfies the condition in paragraph (a) or (b) of subitem (6);

(d) an entity that is recognised, under a foreign law relating to corporate regulation, as an entity with a similar status to a managed investment scheme and that has at least 50 members;

(e) a trust:

(i) interests in which are owned directly by an entity covered by an earlier paragraph; or

(ii) interests in which are held indirectly by an entity covered by an earlier paragraph through a *chain of trusts;

where the conditions in subitems (4) and (5) are satisfied for the trust, or for each trust in the chain.

(8) The condition in subitem (6) is not satisfied for a trust at a time if, at that time, one foreign resident individual, directly or indirectly:

(a) held, or had the right to acquire, interests representing 10% or more of the value of the interests in the trust; or

(b) had the control of, or the ability to control, 10% or more of the rights attaching to membership interests in the trust; or

(c) had the right to receive 10% or more of any distribution of income that the trustee may make.

(9) The times in an income year are:

(a) for a trust that was in existence throughout the income year—the first day and the last day of the income year; and

(b) for a trust that comes into existence in the income year—the time that is 1 month after the time the trust comes into existence, and the last day of the income year; and

(c) for a trust that ceases to exist in the income year—the first day of the income year and the time that is 1 month before the time the trust ceases to exist.

33 Transitional provision—intermediaries

(1) This item applies in relation to the following income years:

(a) the first income year starting on or after 1 July 2006;

(b) the income year immediately prior to the first income year starting on or after the first 1 July after the day on which this Act receives the Royal Assent;

(c) each intervening income year (if any).

(2) In this item, expressions mean the same as in the *Income Tax Assessment Act 1997*.

(3) Subsection 98(4) of the *Income Tax Assessment Act 1936*, as inserted by item 1 of this Schedule, does not apply to a trustee of a trust in relation to so much of the net income of the trust of an income year to which this item applies as:

(a) represents income applied by the trustee in making a payment covered by subitem (4); and

(b) is attributable to a payment made by a trustee of another trust, if the conditions in subitems 32(4) to (6) of this Schedule are satisfied for the other trust for the income year in which the payment made by the trustee of the other trust is made.

(4) A payment made by a trustee of a trust is covered by this subitem if:

(a) the payment is made to an entity that is a foreign resident at the time of the payment; and

(b) at the time of the payment, the trust is carrying on a business that consists predominantly of providing a custodial or depository service (as defined by section 766E of the *Corporations Act 2001*) pursuant to an Australian financial services licence (as defined by section 761A of that Act); and

(c) the payment is made in the course of the business; and

(d) either:

(i) the trust is a resident trust estate for the purposes of Division 6 of Part III of the *Income Tax Assessment Act 1936* for the income year in which the payment is made; or

(b) the business is carried on in Australia through an Australian permanent establishment.

34 Transitional provision—application of former subsection 768-605(4) and former section 768-615 of the *Income Tax Assessment Act 1997*

(1) Former subsection 768-605(4) of the *Income Tax Assessment Act 1997* applies in relation to income years starting on or after 1 July 2006 as if the reference in that subsection to subsection 98A(1) were instead a reference to subsection 98A(1) or (3).

(2) Former section 768-615 of the *Income Tax Assessment Act 1997* does not apply in relation to income years starting on or after 1 July 2006.

Schedule 10—Distributions to foreign residents from managed investment trusts

Part 1—Main amendments

Taxation Administration Act 1953

1 At the end of Division 12 in Schedule 1

Add:

Subdivision 12-H—Distributions of managed investment trust income to foreign residents

Guide to Subdivision 12-H

12-375 What this Division is about

A distribution to a foreign resident by managed investment trusts of their Australian sourced income and some capital gains may be subject to a single non-final withholding at the corporate tax rate. This includes distributions made to the foreign resident indirectly through one or more intermediaries, if relevant notices have been provided by payers.

Generally, the distribution must be made by the managed investment trust within 3 months after the end of its income year.

Division 6 of Part III of the *Income Tax Assessment Act 1936* does not apply to trustees and intermediaries to the extent that they have to withhold under this subdivision (see section 99G of that Division).

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Operative provisions

12-380 Object

(1) The object of this Subdivision is to implement a withholding regime to assist the collection of Australian tax on distributions of Australian sourced income by *managed investment trusts to foreign residents (directly, or indirectly through one or more *intermediaries).

(2) This regime overcomes information problems in applying alternative withholding regimes by:

(a) providing for withholding at a flat rate—the *corporate tax rate; and

(b) clarifying when withholding is required when payments are made via *intermediaries, which is commonly the case with distributions from *managed investment trusts.

Note: Withholding other than at a flat rate would require managed investment trusts and intermediaries to know information about the foreign resident that they are unlikely to know.

12-385 Withholding by trustee of managed investment trust

(1) The trustee of a *managed investment trust that makes a *fund payment in relation to an income year to an entity covered by section 12-410 must withhold an amount from the payment.

(2) The amount the trustee must withhold is:

Amount of the *fund payment × *corporate tax rate

12-390 Withholding by intermediary

(1) An entity must withhold an amount from a payment (the ***later payment***) it makes if:

(a) the entity is an *intermediary in relation to a payment (the ***earlier payment***) it received; and

(b) all or some of the later payment (the ***notice part***) is attributable to the part of the earlier payment that was covered by the notice the entity received in relation to the earlier payment; and

(c) the later payment is made to an entity covered by section 12-410.

Note: Paragraph (1)(b) means that the notice part is attributable to a fund payment made by a managed investment trust, or 2 or more fund payments made by one or more managed investment trusts, to an intermediary.

(2) The amount the entity must withhold is:

Notice part × *corporate tax rate

12-395 Meaning of managed investment trust

(1) A trust is a ***managed investment trust*** in relation to an income year if:

(a) the trustee of the trust makes the first *fund payment in relation to the income year; and

(b) the conditions in this table are satisfied.

Conditions to be satisfied	
Item	**Condition**
1	At the time the payment is made, or at an earlier time in the income year: (a) the trustee was an Australian resident; or (b) the central management and control of the trust was in Australia.
2	At the time the payment is made, the trust is a managed investment scheme (as defined by section 9 of the *Corporations Act 2001*) and is operated by a financial services licensee (as defined by section 761A of that Act) whose licence covers operating such a managed investment scheme.
3	At the time the payment is made: (a) units in the trust are listed for quotation in the official list of an *approved

Conditions to be satisfied	
Item	**Condition**
	stock exchange in Australia; or (b) the trust has at least 50 *members (ignoring objects of a trust); or (c) one of the entities covered by a paragraph of subsection (2) is a member of the trust.

(2) These are the entities:

(a) a *life insurance company;

(b) a *complying superannuation fund, a *complying approved deposit fund or a *foreign superannuation fund, being a fund that has at least 50 *members;

(c) a trust for which the conditions in table items 1 and 2 in subsection (1), and the condition in paragraph (a) or (b) of table item 3, are satisfied;

(d) an entity that is recognised, under a *foreign law relating to corporate regulation, as an entity with a similar status to a managed investment scheme and that has at least 50 members;

(e) a trust:

(i) interests in which are owned directly by an entity covered by an earlier paragraph; or

(ii) interests in which are held indirectly by an entity covered by an earlier paragraph through a *chain of trusts;

where the conditions in table items 1 and 2 in subsection (1) are satisfied for the trust, or for each trust in the chain.

Exception: foreign resident individual having a substantial interest

(3) The condition in table item 3 in subsection (1) is not satisfied for a trust at a time if, at that time, one foreign resident individual, directly or indirectly:

(a) held, or had the right to acquire, interests representing 10% or more of the value of the interests in the trust; or

(b) had the control of, or the ability to control, 10% or more of the rights attaching to *membership interests in the trust; or

(c) had the right to receive 10% or more of any distribution of income that the trustee may make.

Start-up phase

(4) A trust that is created during an income year is a ***managed investment trust*** in relation to the income year if, at the time the trustee of the trust makes the first *fund payment in relation to the income year, the conditions in table items 1 and 2 in subsection (1) are satisfied for the trust.

Wind-up phase

(5) A trust that ceases to exist during an income year is a ***managed investment trust*** in relation to the income year if:

(a) at the time the trustee makes the first *fund payment in relation to the income year, the conditions in table items 1 and 2 in subsection (1) are satisfied for the trust; and

(b) the trust was a *managed investment trust in relation to the previous income year otherwise than because of subsection (4).

12-400 Meaning of fund payment

(1) The object of this section is to ensure that the total of the *fund payments that the trustee of a trust makes in relation to an income year equals, as nearly as practicable, the net income of the trust for the income year, disregarding these amounts (***excluded amounts***):

(a) a dividend (as defined in Division 11A of Part III of the *Income Tax Assessment Act 1936*) that is subject to, or exempted from, a requirement to withhold under Subdivision 12-F;

(b) interest (as so defined) that is subject to, or exempted from, such a requirement;

(c) a *royalty that is subject to, or exempted from, such a requirement;

(d) a *capital gain from a *CGT asset that is not *taxable Australian property;

(e) amounts that are not from an *Australian source;

and disregarding deductions relating to excluded amounts.

(2) Work out as follows how much of a payment (the ***actual payment***) made by the trustee of a trust in relation to an income year is a ***fund payment*** in relation to that year:

Method statement

Step 1. Reduce the actual payment by so much of it that is attributable to excluded amounts.

Step 2. Work out what it is reasonable to expect will be the *net income of the trust for the income year:

(a) disregarding excluded amounts, expected excluded amounts and deductions relating to those amounts; and

(b) on the basis that a *capital gain from *taxable Australian property of the trust that was or would be reduced under step 3 of the method statement in subsection 102-5(1) were double the amount it actually is.

Step 3. The ***fund payment*** is so much of the step 2 amount as is reasonable having regard to:

(a) the object of this section; and

(b) the step 1 amount; and

(c) the amounts of any earlier *fund payments made by the trustee in relation to the income year; and

(d) the expected amounts of any later fund payments the trustee expects to make in relation to the income year.

(3) The expected *net income of the trust and the expected amounts of future *fund payments are to be worked out on the basis of the trustee's knowledge when the actual payment is made.

(4) However, an amount is not a ***fund payment*** in relation to the income year unless it is paid:

(a) during the income year; or
(b) within 3 months after the end of the income year; or
(c) within a longer period (starting at the end of the period referred to in paragraph (b) and not exceeding 3 months) allowed by the Commissioner.

(5) The Commissioner may allow a longer period as mentioned in paragraph (4)(c) only if the Commissioner is of the opinion that the trustee was unable to make the payment during the income year, or within 3 months after the end of the income year, because of circumstances beyond the influence or control of the trustee.

12-405 Meaning of intermediary

(1) An entity is an ***intermediary*** in relation to a payment it receives at a time (the ***receipt time***) if:
(a) it is *carrying on a *business at the receipt time that consists predominantly of providing a custodial or depository service (as defined by section 766E of the *Corporations Act 2001*) pursuant to an Australian financial services licence (as defined by section 761A of that Act); and
(b) it received the payment in the course of that business; and
(c) before or at the receipt time, it received a notice of the kind referred to in section 12-415 in relation to the payment; and
(d) either:
(i) subsection (2) is satisfied for the entity at the receipt time; or
(ii) the business is carried on at the receipt time through an *Australian permanent establishment.

(2) This subsection is satisfied for an entity at the receipt time if:
(a) for a trust—at that time:
(i) the trustee was an Australian resident; or
(ii) the central management and control of the trust was in Australia; or
(b) for another entity—the entity is an Australian resident at the receipt time.

12-410 Entity to whom payment is made

(1) An entity (the ***recipient***) is covered by this section for a payment made to it by another entity (the ***payer***) if any of these conditions is satisfied when the payment is made:

(a) the recipient is a foreign resident;

(b) the payer believes, or has reasonable grounds to believe, that the recipient is a foreign resident;

(c) the payer has no reasonable grounds to believe that the recipient is an Australian resident, and either:

(i) the recipient has an address outside Australia (according to any record that is in the payer's possession, or is kept or maintained on the payer's behalf, about the transaction to which the payment relates); or

(ii) the payer is authorised to make the payment at a place outside Australia (whether to the recipient or to anyone else);

(d) the recipient has a connection outside Australia of a kind set out in the regulations.

(2) However, a recipient is not covered by this section for a payment if the recipient is an *intermediary.

12-415 Notices

(1) An entity that makes a payment to another entity (the ***recipient***) from which an amount would have been required to be withheld under this Subdivision if the payment had been made to an entity covered by section 12-410 may give the recipient a notice.

(2) The notice:

(a) must specify that part of the payment from which an amount would have been so required to have been withheld; and

(b) if that part is worked out by reference to a *discount capital gain—must specify the amount of that gain; and

(c) must specify the income year of the *managed investment trust to which the relevant *fund payment relates.

(3) An *intermediary in relation to a payment cannot give a notice in relation to an amount:

(a) that is a payment only because of section 11-5; and

(b) that is attributable (wholly or partly) to the first-mentioned payment.

Note: Under section 11-5, an entity is taken to have paid an amount to another entity if the first entity applies or deals with the amount on the other entity's behalf or as the other entity directs.

12-420 Agency rules

(1) This Subdivision has effect as if a payment made to an entity in the capacity as agent for another entity (the ***principal***) had been made to the principal.

(2) However, if the agent is an *intermediary in relation to the payment:

(a) this Subdivision has effect as if the intermediary were not an agent in relation to the payment; and

(b) for the purposes of this Subdivision, the receipt by the intermediary of the payment on behalf of the principal is not to be treated as a payment to the principal by any entity.

Note: As a result of subsection (2), an agent intermediary may be required to withhold amounts under this Subdivision.

2 At the end of Subdivision 18-A in Schedule 1

Add:

Entitlement to credit: amount attributable to fund payment

18-50 Credit: amount attributable to fund payment

(1) This section applies to an entity if:

(a) the entity is a beneficiary of a trust and the assessable income of the entity for an income year includes an amount (the ***assessable amount***) under section 97, 99F or 100 of the *Income Tax Assessment Act 1936*; or

(b) the entity is a trustee of a trust and is assessed and is liable to pay tax under section 99 or 99A of that Act on an amount (also the ***assessable amount***) for an income year;

and an assessment has been made of the income tax payable by the entity for the income year.

(2) The assessable amount includes any amount included in the assessable income of the beneficiary because of subsection 115-215(3) of the *Income Tax Assessment Act 1997*.

(3) The entity is entitled to a credit if the assessable amount is represented by or reasonably attributable to a *withholding payment from which an amount was withheld under Subdivision 12-H (about distributions to foreign residents from managed investment trusts).

(4) The amount of the credit is worked out using the formula:

$$\text{Amount withheld} \times \frac{\text{Attributable part of the payment}}{\text{Amount of the *withholding payment}}$$

where:

attributable part of the payment is so much of the assessable amount as is represented by or reasonably attributable to the *withholding payment.

(5) Paragraph (1)(a) does not apply to a beneficiary of a trust in relation to an amount included in the beneficiary's assessable income under section 97 of the *Income Tax Assessment Act 1936* if the beneficiary has the amount included in the capacity of a trustee of another trust.

(6) However, subsection (5) does not stop paragraph (1)(a) applying to a trustee of:

(a) a *complying superannuation fund, a *non-complying superannuation fund, a *complying approved deposit fund, a *non-complying approved deposit fund or a *pooled superannuation trust; or

(b) a *corporate unit trust; or

(c) a *public trading trust.

Part 2—Consequential amendments

Income Tax Assessment Act 1936

3 Subsection 6(1)

Insert:

> ***fund payment*** has the same meaning as in the *Income Tax Assessment Act 1997*.

4 Subsection 6(1)

Insert:

> ***intermediary*** has the same meaning as in the *Income Tax Assessment Act 1997*.

5 Subsection 6(1)

Insert:

> ***managed investment trust*** has the same meaning as in the *Income Tax Assessment Act 1997*.

6 Before section 100

Insert:

99F Assessable income includes amounts attributable to fund payments

If a beneficiary of a trust estate who is presently entitled to a share of the income of the trust estate:

(a) is a non-resident at the end of the year of income; and

(b) is not, in respect of that share, a beneficiary in the capacity of a trustee of another trust estate;

the assessable income of the beneficiary includes so much of the individual interest of the beneficiary in the net income of the trust estate as is represented by or reasonably attributable to an amount from which an entity is required to withhold an amount under Subdivision 12-H in Schedule 1 to the *Taxation Administration Act 1953*.

99G Payments covered by withholding requirement

(1) Sections 98, 99 and 99A do not apply to so much of the net income of a trust estate of a year of income as:

(a) represents income to which a beneficiary is presently entitled; and

(b) is represented by or reasonably attributable to an amount from which an entity is required to withhold an amount under Subdivision 12-H in Schedule 1 to the *Taxation Administration Act 1953*.

(2) Subsection 98(4) does not apply to so much of the net income of a trust estate as represents income to which a beneficiary is presently entitled and gives rise to an amount from which an entity is required to withhold an amount under that Subdivision.

99H Late payments

(1) This section applies if:

(a) a beneficiary of a trust estate that is a managed investment trust is presently entitled to a share of the income of the trust estate of a year of income; and

(b) the beneficiary is a non-resident at the end of the year of income; and

(c) all or part of that share of the net income of the trust estate (the ***late amount***) has not been paid to the beneficiary by the end of the period applicable under subsection 12-400(4) in Schedule 1 to the *Taxation Administration Act 1953*; and

Note: That subsection requires payments to be made before the end of 3 months after the end of the relevant year of income or within a longer period allowed by the Commissioner.

(d) if the late amount had been paid to the beneficiary within that period, the payment would have been a fund payment made by the trustee of the managed investment trust.

(2) This Division applies as if that portion of the beneficiary's income that represents the late amount were income to which no beneficiary was presently entitled.

(3) In working out the net income of the trust estate for the year of income for the purposes of subsection (1), disregard these amounts (***excluded amounts***):

(a) a dividend (as defined in Division 11A of Part III) that is subject to, or exempted from, a requirement to withhold under Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953*;

(b) interest (as so defined) that is subject to, or exempted from, such a requirement;

(c) a royalty that is subject to, or exempted from, such a requirement;

(d) a capital gain from a CGT asset that is not taxable Australian property;

(e) amounts that are not from a source in Australia;

and disregard deductions relating to excluded amounts.

7 Before subsection 100(2)

Insert:

(1C) If a beneficiary in a trust estate who is under a legal disability or is deemed to be presently entitled to any of the income of the trust estate by virtue of the operation of subsection 95A(2):

(a) is a resident at the end of the year of income; and

(b) is not a beneficiary in any other trust estate and does not derive income from any other source;

the assessable income of the beneficiary includes so much of the individual interest of the beneficiary in the net income of the trust estate as is represented by or reasonably attributable to a payment from which an entity was required to withhold an amount under Subdivision 12-H in Schedule 1 to the *Taxation Administration Act 1953*.

Note: A credit is available under section 18-50 in Schedule 1 to the *Taxation Administration Act 1953* for an appropriate part of the amount withheld.

8 Paragraph 202EE(1)(c)

After “Subdivision 12-F”, insert “or 12-H”.

9 Subsection 255(2A)

After “natural resource payments)”, insert “or Subdivision 12-H in that Schedule (about distributions to foreign residents from managed investment trusts)”.

Income Tax Assessment Act 1997

10 At the end of paragraph 115-215(2)(b)

Add:

; or (iv) under section 99F of that Act.

11 Subsection 995-1(1)

Insert:

fund payment has the meaning given by section 12-400 in Schedule 1 to the *Taxation Administration Act 1953*.

12 Subsection 995-1(1)

Insert:

intermediary has the meaning given by section 12-405 in Schedule 1 to the *Taxation Administration Act 1953*.

13 Subsection 995-1(1)

Insert:

managed investment trust has the meaning given by section 12-395 in Schedule 1 to the *Taxation Administration Act 1953*.

Taxation Administration Act 1953

14 Subsection 10-5(1) in Schedule 1 (at the end of the table)

Add:

25	A payment by a managed investment trust	12-385
26	A payment by an intermediary	12-390

15 Subsection 12-5(2) in Schedule 1 (before table item 1)

Insert:

1AA	section 12-385 or 12-390	distributions to foreign residents from *managed investment trusts	each other withholding provision

16 Subsection 15-15(1) in Schedule 1

After "or 12-145", insert "or Subdivision 12-H".

17 Subsection 15-15(1) in Schedule 1 (at the end of the note)

Add "Subdivision 12-H is about distributions to foreign residents from managed investment trusts (except dividends, interest and royalties).".

18 Subsection 15-35(1) in Schedule 1

After "section 12-325", insert ", 12-385 or 12-390".

19 After subsection 16-153(3) in Schedule 1

Insert:

(4) An entity must give a report to the Commissioner in the *approved form if the entity is required to withhold amounts under Subdivision 12-H in relation to *fund payments made by a particular *managed investment trust (the ***paying trust***) in relation to an income year of that trust.

Note: The entity may be the managed investment trust itself or an intermediary.

(4A) The report under subsection (4) must be given:

(a) not later than 14 days after the end of 6 months after the end of the income year of the *managed investment trust in relation to which the relevant *fund payments were made; or

(b) within a longer period allowed by the Commissioner.

20 Paragraph 16-155(1)(a) in Schedule 1

Omit "or 12-317", substitute ", 12-317, 12-385 or 12-390".

21 After section 16-155 in Schedule 1

Insert:

16-157 Payment summary for Subdivision 12-H

(1) An entity (the ***payer***) must give a *payment summary to another entity (the ***recipient***) if the payer made *withholding payments covered by section 12-385 or 12-390 to the recipient in relation to *fund payments made by a particular *managed investment trust (the ***paying trust***) in relation to an income year of that trust.

Note: The entity may be the managed investment trust itself or an intermediary.

(2) The *payment summary:

(a) must cover each of the *withholding payments mentioned in subsection (1); and

(b) may be in electronic form; and

(c) must be given:

(i) not later than 14 days after the end of 6 months after the end of the income year of the *managed investment trust in relation to which the relevant *fund payments were made; or

(ii) within a longer period allowed by the Commissioner.

22 Paragraph 16-160(1)(a) in Schedule 1

Omit “or 12-317”, substitute “, 12-317, 12-385 or 12-390”.

23 Subsection 16-170(1) in Schedule 1

After “***payment summary***”, insert “(except one relating to Subdivision 12-H)”.

24 After subsection 16-170(1) in Schedule 1

Insert:

(1AA) A ***payment summary*** relating to Subdivision 12-H is a statement that:

(a) names the payer and the recipient; and

(b) if the recipient has given the recipient’s *tax file number or *ABN to the payer—states the tax file number or ABN; and

(c) states the total of the *withholding payments (if any) that it covers, and the total of the *amounts withheld by the payer from those withholding payments; and

(d) specifies the income year of the relevant *managed investment trust to which it relates.

25 Subsection 16-175(1) in Schedule 1

After "16-155,", insert "16-157,".

26 Subsection 16-175(1) in Schedule 1

After "16-170(1),", insert "(1AA),".

27 At the end of section 18-15 in Schedule 1

Add:

(3) An entity is not entitled to a credit under this section in relation to a *withholding payment if the entity is entitled to a credit under section 18-50 in relation to that withholding payment.

28 At the end of section 18-25 in Schedule 1

Add:

(9) An entity is not entitled to a credit under this section in relation to a *withholding payment if the entity is entitled to a credit under section 18-50 in relation to that withholding payment.

29 Paragraph 20-35(3)(a) in Schedule 1

After "*payment summary", insert "(except one relating to Subdivision 12-H)".

30 Paragraph 20-35(3)(b) in Schedule 1

Before "a payment summary", insert "such".

31 At the end of section 20-35 in Schedule 1

Add:

(4) A person must not, with the intention of obtaining a credit, a payment or any other benefit, present:

(a) a *payment summary relating to Subdivision 12-H, or a copy of such a payment summary; or

(b) a document purporting to be such a payment summary or a copy of such a payment summary;

which is not a payment summary, or a copy of a payment summary, duly given to the person.

Penalty: 60 penalty units, or imprisonment for 12 months, or both.

Note: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Part 3—Application

32 Application

The amendments made by this Schedule apply to the first income year starting on or after the first 1 July after the day on which this Act receives the Royal Assent and later income years.

[*Minister's second reading speech made in—*
House of Representatives on 10 May 2007
Senate on 12 June 2007]

(74/07)