Tax Laws Amendment (2008 Measures No. 5) Act 2008

No. 145, 2008

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

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No. 145, 2008

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

[*Assented to 9 December 2008*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Tax Laws Amendment (2008 Measures No. 5) Act 2008*.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

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Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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

A New Tax System (Goods and Services Tax) Act 1999

1 After subsection 75-5(1A)

Insert:

(1B) A supply that you make to your *associate is taken for the purposes of subsection (1) to be a sale to your associate whether or not the supply is for *consideration.

2 At the end of subsection 75-5(3)

Add:

; or (e) it is a supply in relation to which all of the following apply:

(i) you acquired the interest, unit or lease from an entity as, or as part of, a *supply of a going concern to you that was *GST-free under Subdivision 38-J;

(ii) the entity was *registered or *required to be registered, at the time of the acquisition;

(iii) the entity had acquired the entire interest, unit or lease through a taxable supply on which the GST was worked out without applying the margin scheme; or

(f) it is a supply in relation to which all of the following apply:

(i) you acquired the interest, unit or lease from an entity as, or as part of, a supply to you that was GST-free under Subdivision 38-O;

(ii) the entity was registered or required to be registered, at the time of the acquisition;

(iii) the entity had acquired the entire interest, unit or lease through a taxable supply on which the GST was worked out without applying the margin scheme; or

(g) it is a supply in relation to which all of the following apply:

(i) you acquired the interest, unit or lease from an entity who was your *associate, and who was registered or required to be registered, at the time of the acquisition;

(ii) the acquisition from your associate was without *consideration;

(iii) the supply by your associate was not a taxable supply;

(iv) your associate made the supply in the course or furtherance of an *enterprise that your associate *carried on;

(v) your associate had acquired the entire interest, unit or lease through a taxable supply on which the GST was worked out without applying the margin scheme.

3 After subsection 75-5(3)

Insert:

(3A) Subparagraphs (3)(g)(iii) and (iv) do not apply if the acquisition from your *associate was not by means of a supply by your associate.

4 After subsection 75-11(4)

Insert:

Margin for supply of real property acquired as a GST-free going concern or as GST-free farm land

(5) If:

(a) you acquired the interest, unit or lease in question from an entity as, or as part of:

(i) a *supply of a going concern to you that was *GST-free under Subdivision 38-J; or

(ii) a supply to you that was GST-free under Subdivision 38-O; and

(b) the entity was *registered or *required to be registered, at the time of the acquisition; and

(c) none of subsections (1) to (4) applies;

the ***margin*** for the supply you make is the amount by which the *consideration for the supply exceeds:

(d) if that entity had acquired the interest, unit or lease before 1 July 2000 and on that day was registered or required to be registered:

(i) if you choose to apply an *approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at 1 July 2000; or

(ii) if subparagraph (i) does not apply—the *GST inclusive market value of the interest, unit or lease as at 1 July 2000; or

(e) if that entity had acquired the interest, unit or lease on or after 1 July 2000 and had been registered or required to be registered at the time of the acquisition:

(i) if the entity's acquisition was for consideration and you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the day on which the entity had acquired it; or

(ii) if the entity's acquisition was for consideration and subparagraph (i) does not apply—that consideration; or

(iii) if the entity's acquisition was without consideration—the GST inclusive market value of the interest, unit or lease as at the time of the acquisition; or

(f) if that entity had not been registered or required to be registered at the time of the entity's acquisition of the interest, unit or lease (and paragraph (d) does not apply):

(i) if you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the first day on which the entity was registered or required to be registered; or

(ii) if subparagraph (i) does not apply—the GST inclusive market value of the interest, unit or lease as at that day.

Margin for supply of real property acquired from associate

(6) If:

(a) you acquired the interest, unit or lease in question from an entity who was your *associate, and who was *registered or *required to be registered, at the time of the acquisition; and

(b) the acquisition from your associate was without *consideration; and

(c) the supply by your associate was not a *taxable supply; and

(d) your associate made the supply in the course or furtherance of an *enterprise that your associate *carried on; and

(e) none of subsections (1) to (5) applies;

the ***margin*** for the supply you make is the amount by which the consideration for the supply exceeds:

(f) if your associate had acquired the interest, unit or lease before 1 July 2000 and on that day was registered or required to be registered:

(i) if you choose to apply an *approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at 1 July 2000; or

(ii) if subparagraph (i) does not apply—the *GST inclusive market value of the interest, unit or lease as at 1 July 2000; or

(g) if your associate had acquired the interest, unit or lease on or after 1 July 2000 and had been registered or required to be registered at the time of the acquisition:

(i) if your associate's acquisition was for consideration and you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the day on which your associate had acquired it; or

(ii) if your associate's acquisition was for consideration and subparagraph (i) does not apply—that consideration; or

(iii) if your associate's acquisition was without consideration—the GST inclusive market value of the interest, unit or lease at the time of the acquisition; or

(h) if your associate had not been registered or required to be registered at the time of your associate's acquisition of the interest, unit or lease (and paragraph (f) does not apply):

(i) if you choose to apply an approved valuation to work out the margin for the supply—an approved valuation of the interest, unit or lease as at the first day on which the entity was registered or required to be registered; or

(ii) if subparagraph (i) does not apply—the GST inclusive market value of the interest, unit or lease as at that day.

(6A) Paragraphs (6)(c) and (d) do not apply if the acquisition from your *associate was not by means of a supply by your associate.

(6B) To avoid doubt, you cannot be taken, for the purposes of paragraph (5)(f) or (6)(h), to be *registered or *required to be registered on a day earlier than 1 July 2000.

5 Subsection 75-11(7) (heading)

Repeal the heading.

6 Subsection 75-11(8)

Omit “Subsection (7)”, substitute “Subsection (6) or (7)”.

7 Subsection 75-11(8)

Omit “subsection (7)”, substitute “that subsection”.

8 Section 75-13

After “for the supply”, insert “(whether or not the supply was for consideration)”.

9 After section 75-15

Insert:

75-16 Margins for supplies of real property acquired through several acquisitions

(1) If:

(a) you make a *taxable supply of *real property under the *margin scheme; and

(b) the interest, unit or lease in question is one that you acquired through 2 or more acquisitions (***partial acquisitions***); and

(c) one of the following provisions (a ***margin provision***) applies in relation to such a partial acquisition, or would so apply if the partial acquisition had been an acquisition of the whole of the interest, unit or lease:

(i) section 75-10;

(ii) subsection 75-11(1), (2), (2A), (2B), (3), (4), (5), (6) or (7);

the margin provision applies, in working out the margin for the supply you make, only to the extent that the supply is connected to the partial acquisition.

(2) The application of a margin provision in relation to one of the partial acquisitions does not prevent that margin provision or a different margin provision applying in relation to another of the partial acquisitions.

10 At the end of section 75-22

Add:

(3) You have an ***increasing adjustment*** if:

(a) you make a *taxable supply of *real property under the *margin scheme; and

(b) an acquisition that you made of part of the interest, unit or lease in question was made through a supply that was *ineligible for the margin scheme because of paragraph 75-5(3)(e), (f) or (g); and

(c) the entity from whom you made the acquisition had been entitled to an input tax credit for its acquisition.

(4) You have an ***increasing adjustment*** if:

(a) you make a *taxable supply of *real property under the *margin scheme; and

(b) the acquisition that you made of the interest, unit or lease in question:

(i) was made through a supply that was *GST-free under Subdivision 38-J or Subdivision 38-O; or

(ii) was made through a supply (other than a taxable supply) from your *associate without *consideration and in the course or furtherance of an *enterprise that your associate *carried on; or

(iii) was made from your associate but not by means of a supply from your associate; and

(c) the entity from whom you acquired the interest, unit or lease:

(i) acquired part of the interest, unit or lease through a supply that would have been *ineligible for the margin scheme if it had been a supply of the whole of the interest, unit or lease; and

(ii) had been entitled to an input tax credit for its acquisition; and

(iii) was *registered or *required to be registered, at the time of your acquisition of the interest, unit or lease.

(5) The amount of the *increasing adjustment under subsection (3) or (4) is an amount equal to $^{1}/_{11}$ of:

(a) if you choose to apply an *approved valuation to work out the amount—an approved valuation of the part of the interest,

unit or lease referred to in paragraph (3)(b) or subparagraph (4)(c)(i) as at the day on which the entity had acquired it; or

(b) otherwise—the *consideration for the entity's acquisition of that part of the interest, unit or lease.

11 At the end of section 165-5

Add:

Creating circumstances or states of affairs

(3) A *GST benefit that the avoider gets or got from a *scheme is not taken, for the purposes of paragraph (1)(b), to be attributable to a choice, election, application or agreement of a kind referred to in that paragraph if:

(a) the scheme, or part of the scheme, was entered into or carried out for the sole or dominant purpose of creating a circumstance or state of affairs; and

(b) the existence of the circumstance or state of affairs is necessary to enable the choice, election, application or agreement to be made.

12 Section 195-1 (definition of *margin*)

Omit "and 75-11", substitute ", 75-11 and 75-16".

13 Application

(1) The amendments made by items 1 to 10 and 12 of this Schedule apply in relation to supplies that are supplies of things that the supplier acquired through a new supply to the supplier.

(2) Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* as in force immediately before the commencement of this Schedule continues to apply in relation to supplies that are not supplies of things that the supplier acquired through a new supply to the supplier.

(3) The amendment made by item 11 of this Schedule applies in relation to choices, elections, applications and agreements made on or after the commencement of this Schedule.

(4) In this item:

new supply means a supply that:

(a) is made on or after the commencement of this Schedule; and

(b) is not made:

(i) under a written agreement entered into before that commencement; or

(ii) pursuant to a right or option granted before that commencement;

that specifies in writing the consideration, or a way of working out the consideration, for the supply.

Schedule 2—Thin capitalisation and international financial reporting standards

Income Tax Assessment Act 1997

1 At the end of subsection 820-680(1)

Add:

Note: This requirement to comply with the accounting standards is modified in certain cases (see sections 820-682, 820-683 and 820-684).

2 At the end of subsection 820-680(1A)

Add:

Note: This application of the accounting standards is modified in certain cases (see sections 820-682 and 820-683).

3 Subsection 820-680(2) (note)

Repeal the note, substitute:

Note 1: The entity must also keep records in accordance with section 820-985 about the revaluation, unless the exception in subsection (2A) of this section applies.

Note 2: This subsection also applies to some revaluations that are not allowed by the accounting standards (see subsection 820-684(5)).

4 At the end of subsection 820-680(2B)

Add:

Note: This subsection also applies to some revaluations that are not allowed by the accounting standards (see subsection 820-684(5)).

5 After section 820-680

Insert:

820-682 Recognition of assets and liabilities—modifying application of accounting standards

Deferred tax assets and deferred tax liabilities

(1) Despite subsections 820-680(1) and (1A), an entity must not recognise:

(a) a deferred tax liability (within the meaning of the *accounting standards) as a liability for the purposes of this Division; or

(b) a deferred tax asset (within the meaning of the accounting standards) as an asset for the purposes of this Division.

Note: Subsections 820-680(1) and (1A) require compliance with accounting standards.

Surpluses and deficits in defined benefit superannuation plans

(2) Despite subsections 820-680(1) and (1A), an entity must not recognise an amount relating to a defined benefit plan (within the meaning of the *accounting standards) as:

(a) a liability for the purposes of this Division; or

(b) an asset for the purposes of this Division.

Note: Subsections 820-680(1) and (1A) require compliance with accounting standards.

Not applicable to ADIs

(3) This section does not apply in relation to an entity for a period if, for the period, the entity is an *outward investing entity (ADI) or an *inward investing entity (ADI).

Not applicable to records about Australian permanent establishments

(4) This section does not apply for the purposes of section 820-960.

820-683 Recognition of internally generated intangible items—modifying application of accounting standards

Accounting standards prevent recognition of some items

(1) Subsection (2) applies in relation to an item, other than internally generated goodwill (within the meaning of *accounting standard AASB 138), if:

(a) the item cannot be recognised under that standard as an internally generated intangible asset (within the meaning of that standard) because that standard determines that the cost of the item cannot be distinguished from the cost of developing the entity's business as a whole; and

(b) the item would otherwise meet criteria under that standard for recognition as such an asset.

Note 1: As a general rule, an entity must comply with the accounting standards when recognising its assets for the purposes of this Division (see subsections 820-680(1) and (1A)).

Note 2: This section does not apply to ADIs (see subsection (6)).

Entity may choose to recognise the item as an intangible asset

(2) Despite subsections 820-680(1) and (1A), the entity may choose to recognise the item as such an asset for a period for the purposes of this Division (other than section 820-960).

Note: Section 820-960 is about records for Australian permanent establishments.

(3) A choice under subsection (2):

(a) must be in writing and may cover more than one item; and

(b) must be made before the due day for lodging the entity's *income tax return for the income year that is, or that includes, the period; and

(c) subject to subsection (4), has effect, for the entity and the item, for the period and each later period.

(4) The entity may, in writing, revoke a choice under subsection (2). The revocation has effect:

(a) for each period in the income year for which the entity is next required to lodge an *income tax return; and

(b) for each later period.

(5) When:

(a) recognising an item as an asset under this section; and

(b) calculating the value of the asset (including revaluing the asset);

the entity must, to the maximum extent possible, comply with the *accounting standards as if the recognition were allowed by those standards. This subsection has effect subject to section 820-684.

Note: Section 820-684 will allow the entity to revalue the asset even if accounting standard AASB 138 would prevent this because of the absence of an active market.

Choice not available to ADIs

(6) An entity cannot make a choice under subsection (2) for a period if, for the period, the entity is an *outward investing entity (ADI) or an *inward investing entity (ADI).

820-684 Valuation of intangible assets if no active market—modifying application of accounting standards

Accounting standards prevent revaluation of some assets

(1) Subsection (2) applies if complying with *accounting standard AASB 138 would prevent an entity from revaluing an intangible asset (within the meaning of that standard) because of the absence of an active market (within the meaning of that standard).

Note 1: As a general rule, an entity must comply with the accounting standards when revaluing its assets for the purposes of this Division (see subsection 820-680(1)).

Note 2: This section does not apply to ADIs (see subsection (7)).

Entity may choose to revalue the asset

(2) Despite subsection 820-680(1), the entity may choose to revalue the asset for a period for the purposes of this Division (other than section 820-960).

Note: Section 820-960 is about records for Australian permanent establishments.

(3) A choice under subsection (2):

(a) must be in writing and may cover more than one asset; and

(b) must be made before the due day for lodging the entity's *income tax return for the income year that is, or that includes, the period; and

(c) subject to subsection (4), has effect, for the entity and the item, for the period and each later period.

(4) The entity may, in writing, revoke a choice under subsection (2). The revocation has effect:

(a) for each period in the income year for which the entity is next required to lodge an *income tax return; and

(b) for each later period.

Requirements for such revaluations

(5) Subsections 820-680(2) and (2B) apply in relation to a revaluation under subsection (2) in a corresponding way to the way they apply in relation to a revaluation mentioned in paragraph 820-680(1)(a).

Note 1: Subsections 820-680(2) and (2B) set out requirements and other matters in relation to revaluations under subsection 820-680(1).

Note 2: The entity must also keep records in accordance with section 820-985 about the revaluation.

(6) When revaluing an asset under subsection (2), the entity must, to the maximum extent possible, comply with the *accounting standards as if the revaluation were allowed by those standards.

Choice not available to ADIs

(7) An entity cannot make a choice under subsection (2) for a period if, for the period, the entity is an *outward investing entity (ADI) or an *inward investing entity (ADI).

6 Section 820-690

After "*accounting standards", insert "and this Subdivision".

7 Subsection 820-985(1)

After "820-680(2A))", insert "or 820-684(2)".

8 At the end of subsection 820-985(3)

Add:

This subsection extends to subsection 820-680(2B) as it applies because of subsection 820-684(5).

Note: Section 820-684 allows some revaluations that are not allowed by the accounting standards.

9 Application

The amendments made by this Schedule apply to assessments for each income year starting on or after the commencement of this Schedule.

Schedule 3—Interest withholding tax and state government bonds

Income Tax Assessment Act 1936

1 After subsection 128F(5A)

Insert:

(5B) Subsection (5A) does not apply to a bond issued in Australia by a central borrowing authority of a State or Territory. In this subsection ***bond*** includes debenture stock and notes.

Note: The heading to subsection (5A) is altered by omitting "*No exemption for central*" and substituting "*Central*".

2 Application

The amendment made by this Schedule applies to interest paid on or after the commencement of this Schedule.

Schedule 4—Fringe benefits tax

Part 1—Main amendments

Fringe Benefits Tax Assessment Act 1986

1 Subsection 19(1) (paragraph (e) of the definition of *ND*)

After “applies”, insert “and paragraph (i) does not apply”.

2 Subsection 19(1) (paragraph (f) of the definition of *ND*)

After “applies”, insert “and paragraph (i) does not apply”.

3 Subsection 19(1) (at the end of subparagraph (g)(ii) of the definition of *ND*)

Add “and”.

4 Subsection 19(1) (after subparagraph (g)(ii) of the definition of *ND*)

Insert:

(iia) paragraph (i) does not apply;

5 Subsection 19(1) (at the end of subparagraph (h)(ii) of the definition of *ND*)

Add “and”.

6 Subsection 19(1) (after subparagraph (h)(ii) of the definition of *ND*)

Insert:

(iia) paragraph (i) does not apply;

7 At the end of subsection 19(1)

Add:

; or (i) if, under subsection 138(3), the loan fringe benefit is deemed to have been provided to the recipient only—the amount calculated in accordance with subsection (5).

8 At the end of section 19

Add:

(5) For the purposes of paragraph (1)(i) (which applies to a loan fringe benefit that, under subsection 138(3), is deemed to have been provided to an employee only), the amount is calculated in accordance with the formula:

Unadjusted ND × Employee's percentage of interest

where:

employee's percentage of interest:

(a) is the percentage of the interest held by the employee, during a period (in this subsection called the ***holding period***) in the year of tax, in the asset or other thing that:

(i) is purchased or paid for using all or part of the loan to which the loan fringe benefit relates; and

(ii) is applied or used for the purpose of producing assessable income of the employee; and

(b) does not include the percentage of the interest held in that asset or other thing by the employee's associate or associates during the holding period.

unadjusted ND is the amount that would be ascertained as representing the component ND in the formula in subsection (1) if paragraph (1)(i) did not apply in relation to the loan fringe benefit.

9 Application

(1) The amendments made by items 1 to 8 apply to a loan benefit that is provided after 7.30 pm, by legal time in the Australian Capital Territory, on 13 May 2008 (the ***commencing time***).

(2) However, those amendments do not apply to a loan benefit that is provided after the commencing time and before 1 April 2009 if the loan was entered into before the commencing time.

10 Subsection 24(1)

Omit "the taxable value, but for this subsection and Division 14, of the expense payment fringe benefit in relation to the year of tax shall be reduced by:", substitute:

the taxable value, but for Division 14, of the expense payment fringe benefit in relation to the year of tax is the amount calculated in accordance with the formula:

TV – ND

where:

TV is the amount that, but for this subsection and Division 14, would be the taxable value of the expense payment fringe benefit in relation to the year of tax; and

ND is:

11 Paragraph 24(1)(g)

After “applies”, insert “and paragraph (l) does not apply”.

12 Paragraph 24(1)(h)

After “applies”, insert “and paragraph (l) does not apply”.

13 At the end of subparagraph 24(1)(j)(ii)

Add “and”.

14 After subparagraph 24(1)(j)(ii)

Insert:

(iia) paragraph (l) does not apply;

15 At the end of subparagraph 24(1)(k)(ii)

Add “and”.

16 After subparagraph 24(1)(k)(ii)

Insert:

(iia) paragraph (l) does not apply;

17 At the end of subsection 24(1)

Add:

; or (l) if, under subsection 138(3), the expense payment fringe benefit is deemed to have been provided to the recipient only—the amount calculated in accordance with subsection (9).

18 Paragraph 24(7)(b)

Omit "the amount (in this subsection called the ***reducing amount***) by which the taxable value, but for subsection (1) and Division 14, of the fringe benefit is reduced under", substitute "representing the component ND in the formula in".

19 Subparagraph 24(7)(b)(i)

Omit "the reducing amount", substitute "representing that component".

20 Subparagraph 24(7)(b)(ii)

Omit "the reducing amount", substitute "representing that component".

21 Subsection 24(7)

Omit "the reducing amount had", substitute "the amount represented by that component had".

22 At the end of section 24

Add:

(9) For the purposes of paragraph (1)(l) (which applies to an expense payment fringe benefit that, under subsection 138(3), is deemed to have been provided to an employee only), the amount is calculated in accordance with the formula:

$$\text{Unadjusted ND} \times \text{Employee's percentage of interest}$$

where:

employee's percentage of interest:

(a) is the percentage of the interest held by the employee, during a period (in this subsection called the ***holding period***) in the year of tax, in the asset or other thing that:

(i) relates to the matter in respect of which the expense payment fringe benefit is provided; and

(ii) is applied or used for the purpose of producing assessable income of the employee; and

(b) does not include the percentage of the interest held in that asset or other thing by the employee's associate or associates during the holding period.

unadjusted ND is the amount that would be ascertained as representing the component ND in the formula in subsection (1) if

paragraph (1)(l) did not apply in relation to the expense payment fringe benefit.

23 Application

(1) The amendments made by items 10 to 22 apply to an expense payment benefit that is provided after 7.30 pm, by legal time in the Australian Capital Territory, on 13 May 2008 (the ***commencing time***).

(2) However, those amendments do not apply to an expense payment benefit that is provided to an employee after the commencing time and before 1 April 2009 if:

(a) the benefit is provided:

(i) because the employee agreed to receive the benefit in return for a reduction in the employee's salary or wages that would not have happened apart from the agreement; or

(ii) as part of the employee's remuneration package, in circumstances where is it reasonable to conclude that the employee's salary or wages would be greater if the benefit were not made part of that package; and

(b) the agreement was made, or the remuneration package was agreed to, before the commencing time.

24 Subsection 44(1) (paragraph (f) of the definition of *ND*)

After "applies", insert "and paragraph (k) does not apply".

25 Subsection 44(1) (paragraph (g) of the definition of *ND*)

After "applies", insert "and paragraph (k) does not apply".

26 Subsection 44(1) (at the end of subparagraph (h)(ii) of the definition of *ND*)

Add "and".

27 Subsection 44(1) (after subparagraph (h)(ii) of the definition of *ND*)

Insert:

(iia) paragraph (k) does not apply;

28 Subsection 44(1) (at the end of subparagraph (j)(ii) of the definition of *ND*)

Add “and”.

29 Subsection 44(1) (after subparagraph (j)(ii) of the definition of *ND*)

Insert:

(iia) paragraph (k) does not apply;

30 At the end of subsection 44(1)

Add:

; or (k) if, under subsection 138(3), the property fringe benefit is deemed to have been provided to the recipient only—the amount calculated in accordance with subsection (5).

31 At the end of section 44

Add:

(5) For the purposes of paragraph (1)(k) (which applies to a property fringe benefit that, under subsection 138(3), is deemed to have been provided to an employee only), the amount is calculated in accordance with the formula:

Unadjusted ND × Employee’s percentage of interest

where:

employee’s percentage of interest:

(a) is the percentage of the interest held by the employee, during a period (in this subsection called the ***holding period***) in the year of tax, in the asset or other thing that:

(i) is the property to which the property fringe benefit relates; and

(ii) is applied or used for the purpose of producing assessable income of the employee; and

(b) does not include the percentage of the interest held in that asset or other thing by the employee’s associate or associates during the holding period.

unadjusted ND is the amount that would be ascertained as representing the component ND in the formula in subsection (1) if

paragraph (1)(k) did not apply in relation to the property fringe benefit.

32 Application

(1) The amendments made by items 24 to 31 apply to a property benefit that is provided after 7.30 pm, by legal time in the Australian Capital Territory, on 13 May 2008 (the ***commencing time***).

(2) However, those amendments do not apply to a property benefit that is provided to an employee after the commencing time and before 1 April 2009 if:

(a) the benefit is provided:

(i) because the employee agreed to receive the benefit in return for a reduction in the employee's salary or wages that would not have happened apart from the agreement; or

(ii) as part of the employee's remuneration package, in circumstances where is it reasonable to conclude that the employee's salary or wages would be greater if the benefit were not made part of that package; and

(b) the agreement was made, or the remuneration package was agreed to, before the commencing time.

33 Subsection 52(1) (paragraph (f) of the definition of *ND*)

After "applies", insert "and paragraph (k) does not apply".

34 Subsection 52(1) (paragraph (g) of the definition of *ND*)

After "applies", insert "and paragraph (k) does not apply".

35 Subsection 52(1) (at the end of subparagraph (h)(ii) of the definition of *ND*)

Add "and".

36 Subsection 52(1) (after subparagraph (h)(ii) of the definition of *ND*)

Insert:

(iia) paragraph (k) does not apply;

37 Subsection 52(1) (at the end of subparagraph (j)(ii) of the definition of *ND*)

Add “and”.

38 Subsection 52(1) (after subparagraph (j)(ii) of the definition of *ND*)

Insert:

(iia) paragraph (k) does not apply;

39 At the end of subsection 52(1)

Add:

; or (k) if, under subsection 138(3), the residual fringe benefit is deemed to have been provided to the recipient only—the amount calculated in accordance with subsection (5).

40 At the end of section 52

Add:

(5) For the purposes of paragraph (1)(k) (which applies to a residual fringe benefit that, under subsection 138(3), is deemed to have been provided to an employee only), the amount is calculated in accordance with the formula:

$$\text{Unadjusted ND} \times \text{Employee's percentage of interest}$$

where:

employee's percentage of interest:

(a) is the percentage of the interest held by the employee, during a period (in this subsection called the ***holding period***) in the year of tax, in the asset or other thing:

(i) to which the residual fringe benefit relates; and

(ii) that is applied or used for the purpose of producing assessable income of the employee; and

(b) does not include the percentage of the interest held in that asset or other thing by the employee's associate or associates during the holding period.

unadjusted ND is the amount that would be ascertained as representing the component ND in the formula in subsection (1) if paragraph (1)(k) did not apply in relation to the residual fringe benefit.

41 Application

(1) The amendments made by items 33 to 40 apply to a benefit that is provided after 7.30 pm, by legal time in the Australian Capital Territory, on 13 May 2008 (the ***commencing time***).

(2) However, those amendments do not apply to a benefit that is provided to an employee after the commencing time and before 1 April 2009 if:

(a) the benefit is provided:

(i) because the employee agreed to receive the benefit in return for a reduction in the employee's salary or wages that would not have happened apart from the agreement; or

(ii) as part of the employee's remuneration package, in circumstances where is it reasonable to conclude that the employee's salary or wages would be greater if the benefit were not made part of that package; and

(b) the agreement was made, or the remuneration package was agreed to, before the commencing time.

Part 2—Technical amendments

Fringe Benefits Tax Assessment Act 1986

42 At the end of paragraphs 19(1)(a), (b), (ba) and (c)

Add “and”.

43 At the end of sub-subparagraph 19(1)(d)(i)(A)

Add “and”.

44 Subsection 19(1) (at the end of paragraph (e) of the definition of *ND*)

Add “or”.

45 Subsection 19(1) (at the end of subparagraph (f)(ii) of the definition of *ND*)

Add “or”.

46 At the end of sub-subparagraph 19(3)(b)(ii)(A)

Add “and”.

47 At the end of paragraphs 24(1)(a), (b) and (ba)

Add “and”.

48 At the end of sub-subparagraphs 24(1)(c)(ia)(A) and (C)

Add “or”.

49 At the end of subparagraph 24(1)(c)(ii)

Add “and”.

50 At the end of paragraph 24(1)(d)

Add “and”.

51 At the end of subparagraphs 24(1)(e)(i), (ia), (ii) and (iii)

Add “or”.

52 At the end of paragraph 24(1)(e)

Add “and”.

53 At the end of sub-subparagraph 24(1)(f)(i)(A)

Add “and”.

54 At the end of paragraph 24(1)(g)

Add “or”.

55 At the end of sub-subparagraph 24(1)(h)(ii)(B)

Add “or”.

56 At the end of sub-subparagraph 24(1)(j)(v)(B)

Add “or”.

57 At the end of sub-subparagraph 24(7)(b)(ii)(A)

Add “and”.

58 At the end of paragraphs 44(1)(a), (b) and (ba)

Add “and”.

59 At the end of subparagraphs 44(1)(c)(i) and (ia)

Add “or”.

60 At the end of paragraphs 44(1)(c) and (d)

Add “and”.

61 At the end of sub-subparagraph 44(1)(e)(i)(A)

Add “and”.

62 Subsection 44(1) (at the end of paragraph (f) of the definition of *ND*)

Add “or”.

63 Subsection 44(1) (at the end of subparagraph (g)(ii) of the definition of *ND*)

Add “or”.

64 At the end of sub-subparagraph 44(3)(b)(ii)(A)

Add “and”.

65 At the end of paragraphs 52(1)(a), (b) and (ba)

Add “and”.

66 At the end of subparagraphs 52(1)(c)(i) and (ia)

Add “or”.

67 At the end of paragraphs 52(1)(c) and (d)

Add “and”.

68 At the end of sub-subparagraph 52(1)(e)(i)(A)

Add “and”.

69 Subsection 52(1) (at the end of paragraph (f) of the definition of *ND*)

Add “or”.

70 Subsection 52(1) (at the end of subparagraph (g)(ii) of the definition of *ND*)

Add “or”.

71 At the end of sub-subparagraph 52(3)(b)(ii)(A)

Add “and”.

72 Paragraph 152A(2)(b)

Omit “subparagraph 24(1)(b)(iii)”, substitute “paragraph 24(1)(b)”.

73 Paragraph 152A(3)(b)

Omit “subparagraph 44(1)(b)(i)”, substitute “paragraph 44(1)(b)”.

74 Paragraph 152A(4)(b)

Omit “subparagraph 52(1)(b)(i)”, substitute “paragraph 52(1)(b)”.

75 Subsection 152A(9) (definition of *gross deduction*)

Omit “subparagraph 24(1)(b)(iii), 44(1)(b)(i) or 52(1)(b)(i)”, substitute “paragraph 24(1)(b), 44(1)(b) or 52(1)(b)”.

Schedule 5—Eligible investment business rules

Income Tax Assessment Act 1936

1 Section 102M

Insert:

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

2 Section 102M (definition of *eligible investment business*)

Omit "either or both of", substitute "one or more of".

3 Section 102M (subparagraph (b)(iii) of the definition of *eligible investment business*)

After "company", insert ", including shares in a foreign hybrid company (as defined in the *Income Tax Assessment Act 1997*)".

4 Section 102M (at the end of the definition of *eligible investment business*)

Add:

; or (c) investing or trading in financial instruments (not covered by paragraph (b)) that arise under financial arrangements, other than arrangements excepted by section 102MA.

5 Section 102M

Insert:

> ***excluded rent*** means rent worked out by reference to the profits or receipts of an entity that uses any of the relevant land under an arrangement that is designed to result in the transfer of all, or substantially all, of what would otherwise be the profits of the entity to another party to the arrangement.

6 Section 102M

Insert:

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

7 Section 102M (at the end of the definition of *land*)

Add "and fixtures on land".

8 After section 102M

Insert:

102MA Arrangements not covered

(1) For the purposes of paragraph (c) of the definition of ***eligible investment business*** in section 102M, the excepted arrangements are those specified in this section.

Note: This section does not affect an arrangement that satisfies paragraph (a) or (b) of that definition.

Leasing or property arrangement

(2) A right or obligation arising under:

(a) an arrangement to which Division 42A (about leases of luxury cars) in Schedule 2E applies; or

(b) an arrangement to which Division 240 of the *Income Tax Assessment Act 1997* (about arrangements treated as a sale and loan) applies; or

(c) a financial arrangement in the form of a loan that is taken to exist by subsection 250-155(1) of the *Income Tax Assessment Act 1997*; or

(d) an arrangement that, in substance or effect, depends on the use of a specific asset that is:

(i) real property; or

(ii) goods or a personal chattel (other than money or a money equivalent); or

(iii) intellectual property;

and gives a right to control the use of the asset; or

(e) an arrangement that is a licence to use:

(i) real property; or

(ii) goods or a personal chattel (other than money or a money equivalent); or

(iii) intellectual property.

Interest in partnership or trust estate

(3) A right carried by an interest in a partnership or a trust estate, or an obligation that corresponds to such a right, if:
  (a) there is only one class of interest in the partnership or trust estate; or
  (b) the interest is an equity interest in the partnership or trust estate; or
  (c) for a right or obligation relating to a trust estate—the trust estate is managed by a funds manager or custodian, or a responsible entity (as defined in the *Corporations Act 2001*) of a registered scheme (as so defined).

General insurance policies

(4) A right or obligation under a general insurance policy.

Guarantees and indemnities

(5) A right or obligation under a guarantee or indemnity unless:
  (a) the financial arrangement is one where:
    (i) its value changes in response to changes in a specified variable or variables (such as an interest rate, foreign exchange rate, credit rating, index or commodity or financial instrument price); and
    (ii) there is no requirement for a net investment, or there is such a requirement but the net investment is smaller than would be required for other types of financial arrangement that would be expected to have a similar response to changes in market factors; or
  (b) the guarantee or indemnity is given or entered into in relation to a financial arrangement.

Superannuation and pension income

(6) A right to receive, or an obligation to provide, a financial benefit (as defined in the *Income Tax Assessment Act 1997*) if the right or obligation arises from a person's membership of a superannuation or pension scheme.

Retirement village arrangements

(7) A right or obligation arising under:
  (a) a contract that gives rise to a right to occupy residential premises in a retirement village (as defined in the *A New Tax System (Goods and Services Tax) Act 1999*); or
  (b) a contract under which a resident of such a retirement village is provided with general or personal services in the retirement village.

102MB Investing in land

Moveable property

(1) For the purposes of this Division, investments in moveable property, being property that is:
  (a) incidental to and relevant to the renting of land; and
  (b) customarily supplied or provided in connection with the renting of land; and
  (c) ancillary to the ownership and use of land;

are taken to be investments in land.

Safe harbour rule

(2) For the purposes of this Division, an entity's investments in land are taken to be for the purpose, or primarily for the purpose, of deriving rent during a year of income if:
  (a) each of those investments is for purposes (other than the purpose of trading) that include a purpose of deriving rent; and
  (b) at least 75% of the gross revenue from those investments for the year of income consists of rent (except excluded rent); and
  (c) none of the remaining gross revenue from those investments for the year of income is:
    (i) excluded rent; or
    (ii) from the carrying on of a business that is not incidental and relevant to the renting of the land.

(3) In working out the gross revenue referred to in paragraph (2)(b), payments for the provision of services that:

(a) are incidental to and relevant to the renting of land; and

(b) are ancillary to the ownership and use of the land;

are taken to be rent derived from the land.

Example: Payments as reimbursement for expenses incurred by the lessor in providing security services for a shopping centre would be covered by this subsection.

(4) In working out the gross revenue referred to in subsection (2), disregard any capital gains and capital losses from a CGT event arising from a disposal or other realisation of ownership of land.

Meaning of entity

(5) In this section:

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

102MC When trading business not carried on

A trustee of a unit trust that would, apart from this section, carry on a trading business at a time during a year of income is taken for the purposes of this Division not to carry on a trading business at a time during that year if, for that year, not more than 2% of the gross revenue of the trustee (as trustee of the unit trust) was income from things other than eligible investment business (except from the carrying on of a business that is not incidental and relevant to the eligible investment business).

9 Application

The amendments made by this Schedule apply to assessments for the income year (the ***application year***) in which this Act receives the Royal Assent and later income years.

10 Transitional

(1) Subsections 102MB(2), (3) and (4), and section 102MC, of the *Income Tax Assessment Act 1936* do not apply to a unit trust for the application year if the trustee of the trust chooses that those provisions are not to apply.

(2) A choice the trustee can make under subitem (1) must be made by the day the trustee lodges the trustee's return of income for the application year.

(3) The way the trustee prepares the trustee's return of income for the application year is sufficient evidence of the making of the choice.

Example: A unit trust that would cease to be a public trading trust because of the safe harbour rule could make a choice under this provision so that it is taxed as a public trading trust for the application year.

[*Minister's second reading speech made in—*
House of Representatives on 25 September 2008
Senate on 26 November 2008]

(187/08)