





# **Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013**

**No. 101, 2013**

**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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## Contents

1	Short title.....	1
2	Commencement.....	2
3	Schedule(s).....	2
<b>Schedule 1—General anti-avoidance rules</b>		<b>3</b>
	<i>Income Tax Assessment Act 1936</i>	3
	<i>Taxation Administration Act 1953</i>	6
<b>Schedule 2—Modernisation of transfer pricing rules</b>		<b>7</b>
Part 1—Main amendments		7
	<i>Income Tax Assessment Act 1936</i>	7
	<i>Income Tax Assessment Act 1997</i>	7
	<i>Taxation Administration Act 1953</i>	21
Part 2—Other amendments		27
	<i>Income Tax Assessment Act 1936</i>	27
	<i>Income Tax Assessment Act 1997</i>	28
	<i>Taxation Administration Act 1953</i>	32
Part 3—Application		34
	<i>Income Tax (Transitional Provisions) Act 1997</i>	34
Part 4—Minor amendments relating to treaty-equivalent transfer pricing rules		36
	<i>Income Tax Assessment Act 1997</i>	36
	<i>Taxation Administration Act 1953</i>	36





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**No. 101, 2013**

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

*[Assented to 29 June 2013]*

The Parliament of Australia enacts:

## **1 Short title**

This Act may be cited as the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*.

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## 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.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	29 June 2013
2. Schedule 1	The day this Act receives the Royal Assent.	29 June 2013
3. Schedule 2, Parts 1 to 3	The day this Act receives the Royal Assent.	29 June 2013
4. Schedule 2, Part 4	Immediately after the commencement of the <i>Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No. 1) 2012</i> .	8 September 2012

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be 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—General anti-avoidance rules**

### ***Income Tax Assessment Act 1936***

#### **1 Paragraph 45B(8)(k)**

Omit “subparagraphs 177D(b)(i) to (viii)”, substitute “subsection 177D(2)”.

#### **2 At the end of paragraph 177C(1)(bb)**

Add “or”.

#### **3 After paragraph 177C(1)(bb)**

Insert:

- (bc) the taxpayer not being liable to pay withholding tax on an amount where the taxpayer either would have, or might reasonably be expected to have, been liable to pay withholding tax on the amount if the scheme had not been entered into or carried out;

#### **4 At the end of subsection 177C(1)**

Add:

- ; and (g) in a case to which paragraph (bc) applies—the amount referred to in that paragraph.

#### **5 Sections 177CA and 177D**

Repeal the sections, substitute:

#### **177CB The bases for identifying tax benefits**

- (1) This section applies to deciding, under section 177C, whether any of the following (*tax effects*) would have occurred, or might reasonably be expected to have occurred, if a scheme had not been entered into or carried out:
  - (a) an amount being included in the assessable income of the taxpayer;
  - (b) the whole or a part of a deduction not being allowable to the taxpayer;

- (c) the whole or a part of a capital loss not being incurred by the taxpayer;
  - (d) the whole or a part of a foreign income tax offset not being allowable to the taxpayer;
  - (e) the taxpayer being liable to pay withholding tax on an amount.
- (2) A decision that a tax effect would have occurred if the scheme had not been entered into or carried out must be based on a postulate that comprises only the events or circumstances that actually happened or existed (other than those that form part of the scheme).
- (3) A decision that a tax effect might reasonably be expected to have occurred if the scheme had not been entered into or carried out must be based on a postulate that is a reasonable alternative to entering into or carrying out the scheme.
- (4) In determining for the purposes of subsection (3) whether a postulate is such a reasonable alternative:
- (a) have particular regard to:
    - (i) the substance of the scheme; and
    - (ii) any result or consequence for the taxpayer that is or would be achieved by the scheme (other than a result in relation to the operation of this Act); but
  - (b) disregard any result in relation to the operation of this Act that would be achieved by the postulate for any person (whether or not a party to the scheme).

### 177D Schemes to which this Part applies

#### *Scheme for purpose of obtaining a tax benefit*

- (1) This Part applies to a scheme if it would be concluded (having regard to the matters in subsection (2)) that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of:
- (a) enabling a taxpayer (a **relevant taxpayer**) to obtain a tax benefit in connection with the scheme; or

- (b) enabling the relevant taxpayer and another taxpayer (or other taxpayers) each to obtain a tax benefit in connection with the scheme;

whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers.

*Have regard to certain matters*

- (2) For the purpose of subsection (1), have regard to the following matters:
  - (a) the manner in which the scheme was entered into or carried out;
  - (b) the form and substance of the scheme;
  - (c) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
  - (d) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;
  - (e) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;
  - (f) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;
  - (g) any other consequence for the relevant taxpayer, or for any person referred to in paragraph (f), of the scheme having been entered into or carried out;
  - (h) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in paragraph (f).

Note: Section 960-255 of the *Income Tax Assessment Act 1997* may be relevant to determining family relationships for the purposes of paragraphs (f) and (h).

*Tax benefit*

- (3) Despite subsection (1), this Part applies to the scheme only if the relevant taxpayer has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme.

*When schemes entered into etc.*

- (4) Despite subsection (1), this Part applies to the scheme only if:
- (a) the scheme has been or is entered into after 27 May 1981; or
  - (b) the scheme has been or is carried out or commenced to be carried out after that day (and is not a scheme that was entered into on or before that day).

*Schemes outside Australia*

- (5) This section applies whether or not the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia.

**6 Paragraphs 177EA(17)(j) and 177EB(10)(f)**

Omit “subparagraphs 177D(b)(i) to (viii)”, substitute “subsection 177D(2)”.

**7 Subsection 177F(1)**

Omit “a tax benefit has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies,” substitute “this Part applies to a scheme in connection with which a tax benefit has been obtained, or would but for this section be obtained,”.

**8 Subsection 177F(2A)**

Omit “section 177CA”, substitute “paragraph 177C(1)(bc)”.

***Taxation Administration Act 1953***

**9 Paragraph 18-40(1)(a) in Schedule 1**

Omit “section 177CA”, substitute “paragraph 177C(1)(bc)”.

**10 Application**

The amendments made by this Schedule apply in relation to all schemes except schemes that were entered into, or that were commenced to be carried out, on or before 15 November 2012.

## **Schedule 2—Modernisation of transfer pricing rules**

### **Part 1—Main amendments**

#### ***Income Tax Assessment Act 1936***

##### **1 Division 13 of Part III**

Repeal the Division.

#### ***Income Tax Assessment Act 1997***

##### **2 At the end of Division 815**

Add:

##### **Subdivision 815-B—Arm’s length principle for cross-border conditions between entities**

##### **Guide to Subdivision 815-B**

##### **815-101 What this Subdivision is about**

This Subdivision applies if an entity would otherwise get a tax advantage in Australia from cross-border conditions that are inconsistent with the internationally accepted arm’s length principle.

The entity is treated for income tax and withholding tax purposes as if arm’s length conditions had operated.

##### **Table of sections**

###### **Operative provisions**

815-105	Object
815-110	Operation of Subdivision
815-115	Substitution of arm’s length conditions
815-120	When an entity gets a <i>transfer pricing benefit</i>
815-125	Meaning of <i>arm’s length conditions</i>

## Schedule 2 Modernisation of transfer pricing rules

### Part 1 Main amendments

---

815-130	Relevance of actual commercial or financial relations
815-135	Guidance
815-140	Modification for thin capitalisation
815-145	Consequential adjustments
815-150	Amendment of assessments

## Operative provisions

### 815-105 Object

- (1) The object of this Subdivision is to ensure that the amount brought to tax in Australia from cross-border conditions between entities is not less than it would be if those conditions reflected:
  - (a) the arm's length contribution made by Australian operations through functions performed, assets used and risks assumed; and
  - (b) the conditions that might be expected to operate between entities dealing at \*arm's length.
- (2) The Subdivision does this by specifying that, where an entity would otherwise get a tax advantage from actual conditions that differ from \*arm's length conditions, the arm's length conditions are taken to operate for income tax and withholding tax purposes.

### 815-110 Operation of Subdivision

- (1) Nothing in the provisions of this Act other than this Subdivision limits the operation of this Subdivision.
- (2) Nothing in this Subdivision limits Division 820 (about thin capitalisation) in its application to reduce, or further reduce, \*debt deductions of an entity.

### 815-115 Substitution of arm's length conditions

- (1) For the purposes covered by subsection (2), if an entity gets a \*transfer pricing benefit from conditions that operate between the entity and another entity in connection with their commercial or financial relations:
  - (a) those conditions are taken not to operate; and
  - (b) instead, the \*arm's length conditions are taken to operate.

Note 1: The conditions that operate include, but are not limited to, such things as price, gross margin, net profit, and the division of profit between the entities.

Note 2: There are special rules about documentation that affect when an entity has a reasonably arguable position about the application (or non-application) of this Subdivision: see Subdivision 284-E in Schedule 1 to the *Taxation Administration Act 1953*.

(2) The purposes covered by this subsection are:

- (a) if the \*transfer pricing benefit arises under subparagraph 815-120(1)(c)(i)—working out the amount (if any) of the entity’s taxable income for the income year; and
- (b) if the transfer pricing benefit arises under subparagraph 815-120(1)(c)(ii)—working out the amount (if any) of the entity’s loss of a particular \*sort for the income year; and
- (c) if the transfer pricing benefit arises under subparagraph 815-120(1)(c)(iii)—working out the amount (if any) of the entity’s \*tax offsets for the income year; and
- (d) if the transfer pricing benefit arises under subparagraph 815-120(1)(c)(iv)—working out the amount (if any) of \*withholding tax payable by the entity in respect of interest or royalties.

### **815-120 When an entity gets a *transfer pricing benefit***

- (1) An entity gets a *transfer pricing benefit* from conditions that operate between the entity and another entity in connection with their commercial or financial relations if:
  - (a) those conditions (the *actual conditions*) differ from the \*arm’s length conditions; and
  - (b) the actual conditions satisfy the cross-border test in subsection (3) for the entity; and
  - (c) had the arm’s length conditions operated, instead of the actual conditions, one or more of the following would, apart from this Subdivision, apply:
    - (i) the amount of the entity’s taxable income for an income year would be *greater*;
    - (ii) the amount of the entity’s loss of a particular \*sort for an income year would be *less*;

**Schedule 2** Modernisation of transfer pricing rules  
**Part 1** Main amendments

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- (iii) the amount of the entity's \*tax offsets for an income year would be *less*;
- (iv) an amount of \*withholding tax payable in respect of interest or royalties by the entity would be *greater*.

*Absence of condition*

- (2) For the purposes of subsection (1), there is taken to be a difference between the actual conditions and the \*arm's length conditions if:
  - (a) an actual condition exists that is not one of the arm's length conditions; or
  - (b) a condition does not exist in the actual conditions but is one of the arm's length conditions.

*Cross-border test*

- (3) Conditions that operate between an entity and another entity in connection with their commercial or financial relations satisfy the cross-border test if:
  - (a) the conditions meet the overseas requirement in the following table for either or both of the entities; or
  - (b) the conditions operate in connection with a \*business that the entity carries on in an \*area covered by an international tax sharing treaty.

<b>Overseas requirement</b>		
<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b>The conditions meet the overseas requirement for this type of entity:</b>	<b>if:</b>
1	any of the following: <ul style="list-style-type: none"> <li>(a) an Australian resident;</li> <li>(b) a resident trust estate for the purposes of Division 6 of Part III of the <i>Income Tax Assessment Act 1936</i>;</li> <li>(c) a partnership in which all of the partners are, directly or indirectly through one or more interposed partnerships, Australian residents or resident trust estates</li> </ul>	the conditions operate at or through an *overseas permanent establishment of the entity.
2	an entity not covered by column 1 of item 1	the conditions do not operate

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<b>Overseas requirement</b>		
<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b>The conditions meet the overseas requirement for this type of entity:</b>	<b>if:</b>
		solely at or through an *Australian permanent establishment of the entity.

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- (4) For the purposes of the table in subsection (3), treat any entity that is an Australian resident as not being an Australian resident if:
- (a) the entity is also a resident in a country that has entered into an \*international tax agreement with Australia containing a \*residence article; and
  - (b) under that residence article, the entity is taken, for the purposes of the agreement, to be a resident only of that other country.

*Nil amounts*

- (5) For the purposes of this section and section 815-145:
- (a) treat an entity that has no taxable income for an income year as having a taxable income for the year of a nil amount; and
  - (b) treat an entity that has no loss of a particular \*sort for an income year as having a loss of that sort for the year of a nil amount; and
  - (c) treat an entity that has no \*tax offsets for an income year as having tax offsets for the year of a nil amount.

*Meaning of residence article*

- (6) A **residence article** is:
- (a) Article 4 of the United Kingdom convention (within the meaning of the *International Tax Agreements Act 1953*); or
  - (b) a corresponding provision of another \*international tax agreement.

**815-125 Meaning of arm's length conditions**

- (1) The **arm's length conditions**, in relation to conditions that operate between an entity and another entity, are the conditions that might

be expected to operate between independent entities dealing wholly independently with one another in comparable circumstances.

*Most appropriate and reliable method to be used*

- (2) In identifying the \*arm's length conditions, use the method, or the combination of methods, that is the most appropriate and reliable, having regard to all relevant factors, including the following:
- (a) the respective strengths and weaknesses of the possible methods in their application to the actual conditions;
  - (b) the circumstances, including the functions performed, assets used and risks borne by the entities;
  - (c) the availability of reliable information required to apply a particular method;
  - (d) the degree of comparability between the actual circumstances and the comparable circumstances, including the reliability of any adjustments to eliminate the effect of material differences between those circumstances.

Note: The possible methods include the methods set out in the documents mentioned in section 815-135 (about relevant guidance material).

*Comparability of circumstances*

- (3) In identifying comparable circumstances for the purpose of this section, regard must be had to all relevant factors, including the following:
- (a) the functions performed, assets used and risks borne by the entities;
  - (b) the characteristics of any property or services transferred;
  - (c) the terms of any relevant contracts between the entities;
  - (d) the economic circumstances;
  - (e) the business strategies of the entities.
- (4) For the purposes of this section, circumstances are comparable to actual circumstances if, to the extent (if any) that the circumstances differ from the actual circumstances:
- (a) the difference does not materially affect a condition that is relevant to the method; or
  - (b) a reasonably accurate adjustment can be made to eliminate the effect of the difference on a condition that is relevant to the method.

### **815-130 Relevance of actual commercial or financial relations**

#### *Basic rule*

- (1) The identification of the \*arm's length conditions must:
  - (a) be based on the commercial or financial relations in connection with which the actual conditions operate; and
  - (b) have regard to both the form and substance of those relations.

#### *Exceptions*

- (2) Despite paragraph (1)(b), disregard the form of the actual commercial or financial relations to the extent (if any) that it is inconsistent with the substance of those relations.
- (3) Despite subsection (1), if:
  - (a) independent entities dealing wholly independently with one another in comparable circumstances would not have entered into the actual commercial or financial relations; and
  - (b) independent entities dealing wholly independently with one another in comparable circumstances would have entered into other commercial or financial relations; and
  - (c) those other commercial or financial relations differ in substance from the actual commercial or financial relations;the identification of the \*arm's length conditions must be based on those other commercial or financial relations.
- (4) Despite subsection (1), if independent entities dealing wholly independently with one another in comparable circumstances would not have entered into commercial or financial relations, the identification of the \*arm's length conditions is to be based on that absence of commercial or financial relations.
- (5) Subsections 815-125(3) and (4) (about comparability of circumstances) apply for the purposes of this section.

### **815-135 Guidance**

- (1) For the purpose of determining the effect this Subdivision has in relation to an entity, identify \*arm's length conditions so as best to achieve consistency with the documents covered by this section.

- (2) The documents covered by this section are as follows:
- (a) the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, as approved by the Council of the Organisation for Economic Cooperation and Development and last amended on 22 July 2010;
  - (b) a document, or part of a document, prescribed by the regulations for the purposes of this paragraph.
- (3) However, the document mentioned in paragraph (2)(a) is not covered by this section if the regulations so prescribe.
- (4) Regulations made for the purposes of paragraph (2)(b) or subsection (3) may prescribe different documents or parts of documents for different circumstances.

### **815-140 Modification for thin capitalisation**

- (1) This section modifies the way an entity to which section 815-115 applies works out its taxable income, or its loss of a particular \*sort, for an income year, if:
- (a) Division 820 (about thin capitalisation) applies to the entity for the income year; and
  - (b) the \*arm's length conditions affect costs that are \*debt deductions of the entity for the income year.
- (2) If working out what those costs would be if the \*arm's length conditions had operated involves applying a rate to a \*debt interest:
- (a) work out the rate as if the arm's length conditions had operated; but
  - (b) apply the rate to the debt interest the entity actually issued.

Note: Division 820 may apply to reduce or further reduce debt deductions.

### **815-145 Consequential adjustments**

- (1) The Commissioner may make a determination under subsection (2) in relation to an entity (the *disadvantaged entity*) if:
- (a) \*arm's length conditions are taken by section 815-115 to operate; and
  - (b) the Commissioner considers that, if the arm's length conditions, instead of the actual conditions, had operated:

- (i) the amount of the disadvantaged entity's taxable income for an income year might have been expected to be *less* than its actual amount; or
  - (ii) the amount of the disadvantaged entity's loss of a particular \*sort for an income year might have been expected to be *greater* than its actual amount; or
  - (iii) the amount of the disadvantaged entity's \*tax offsets for an income year might have been expected to be *greater* than their actual amount; or
  - (iv) an amount of \*withholding tax payable in respect of interest or royalties by the disadvantaged entity might have been expected to be *less* than its actual amount; and
- (c) the Commissioner considers that it is fair and reasonable that the actual amount mentioned in subparagraph (b)(i), (ii), (iii) or (iv) (as the case requires) be adjusted accordingly.
- (2) For the purpose of adjusting an amount as mentioned in paragraph (1)(c), the Commissioner may make a determination stating the amount that is (and has been at all times) the amount of the disadvantaged entity's:
- (a) taxable income for the income year; or
  - (b) loss of a particular \*sort for the income year; or
  - (c) \*tax offsets, or tax offset of a particular kind, for the income year; or
  - (d) \*withholding tax payable in respect of interest or royalties.
- (3) The Commissioner may take such action as the Commissioner considers necessary to give effect to a determination under this section.
- (4) The Commissioner must give a copy of a determination under this section to the disadvantaged entity.
- (5) A failure to comply with subsection (4) does not affect the validity of the determination.
- (6) To avoid doubt, the Commissioner may include all or any determinations under this section in relation to a particular entity, including determinations of different kinds, in the same document.

## Schedule 2 Modernisation of transfer pricing rules

### Part 1 Main amendments

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- (7) An entity may give the Commissioner a written request to make a determination under this section relating to the entity. The Commissioner must decide whether or not to grant the request, and give the entity notice of the Commissioner's decision.
- (8) If the entity is dissatisfied with the Commissioner's decision, the entity may object, in the manner set out in Part IVC of the *Taxation Administration Act 1953*, against that decision.

#### 815-150 Amendment of assessments

- (1) Section 170 of the *Income Tax Assessment Act 1936* does not prevent the amendment of an assessment of an entity for an income year if:
  - (a) the amendment is made within 7 years after the day on which the Commissioner gives notice of the assessment to the entity; and
  - (b) the amendment is made for the purpose of giving effect to section 815-115.
- (2) Section 170 of the *Income Tax Assessment Act 1936* does not prevent the amendment of an assessment at any time for the purpose of giving effect to section 815-145.

#### Subdivision 815-C—Arm's length principle for permanent establishments

#### Guide to Subdivision 815-C

#### 815-201 What this Subdivision is about

This Subdivision applies the internationally accepted arm's length principle in the context of permanent establishments (PEs).

#### Table of sections

##### Operative provisions

815-205	Object
815-210	Operation of Subdivision
815-215	Substitution of arm's length profits

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815-220	When an entity gets a <i>transfer pricing benefit</i>
815-225	Meaning of <i>arm's length profits</i>
815-230	Source rules for certain arm's length profits
815-235	Guidance
815-240	Amendment of assessments

## **Operative provisions**

### **815-205 Object**

The object of this Subdivision is to ensure that the amount brought to tax in Australia by entities operating \*permanent establishments is not less than it would be if the permanent establishment were a distinct and separate entity engaged in the same or comparable activities under the same or comparable circumstances, but dealing wholly independently with the other part of the entity.

### **815-210 Operation of Subdivision**

- (1) Nothing in the provisions of this Act other than this Subdivision limits the operation of this Subdivision.
- (2) Nothing in this Subdivision limits Division 820 (about thin capitalisation) in its application to reduce, or further reduce, \*debt deductions of an entity.
- (3) For the purposes of this Subdivision, a branch to which subsection 160ZZW(2) of the *Income Tax Assessment Act 1936* (about certain Australian branches of foreign banks) applies is taken not to be, and not to have been at any time since its establishment, a \*permanent establishment in Australia of the bank.

### **815-215 Substitution of arm's length profits**

- (1) For the purposes covered by subsection (2), if an entity gets a \*transfer pricing benefit from the attribution of profits to a \*PE of the entity:
  - (a) the amount of profits actually attributed to the PE is taken not to have been so attributed; and
  - (b) instead, the \*arm's length profits are taken to have been attributed to the PE.

**Schedule 2** Modernisation of transfer pricing rules  
**Part 1** Main amendments

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Note: There are special rules about documentation that affect when an entity has a reasonably arguable position about the application (or non-application) of this Subdivision: see Subdivision 284-E in Schedule 1 to the *Taxation Administration Act 1953*.

- (2) The purposes covered by this subsection are:
- (a) if the \*transfer pricing benefit arises under subparagraph 815-220(1)(b)(i)—working out the amount (if any) of the entity’s taxable income for the income year; and
  - (b) if the transfer pricing benefit arises under subparagraph 815-220(1)(b)(ii)—working out the amount (if any) of a loss of a particular \*sort for the income year; and
  - (c) if the transfer pricing benefit arises under subparagraph 815-220(1)(b)(iii)—working out the amount (if any) of the entity’s \*tax offsets for the income year.

**815-220 When an entity gets a transfer pricing benefit**

- (1) An entity gets a **transfer pricing benefit** from the attribution of profits to a \*PE of the entity if:
- (a) the amount of profits (the **actual profits**) attributed to the PE differs from the \*arm’s length profits for the PE; and
  - (b) had the arm’s length profits, instead of the actual profits, been attributed to the PE, one or more of the following would, apart from this Subdivision, apply:
    - (i) the amount of the entity’s taxable income for an income year would be *greater*;
    - (ii) the amount of the entity’s loss of a particular \*sort for an income year would be *less*;
    - (iii) the amount of the entity’s \*tax offsets for an income year would be *less*.

*Nil amounts*

- (2) For the purposes of this section:
- (a) treat an entity that has no taxable income for an income year as having a taxable income for the year of a nil amount; and
  - (b) treat an entity that has no loss of a particular \*sort for an income year as having a loss of that sort for the year of a nil amount; and

- (c) treat an entity that has no \*tax offsets for an income year as having tax offsets for the year of a nil amount.

### **815-225 Meaning of *arm's length profits***

- (1) The *arm's length profits* for a \*PE of an entity are worked out by allocating the actual expenditure and income of the entity between the PE and the entity so that the profits attributed to the PE equal the profits the PE might be expected to make if:
- (a) the PE were a distinct and separate entity; and
  - (b) the activities and circumstances of the PE, including the functions performed, assets used and risks borne by the PE, were those of that separate entity; and
  - (c) the conditions that operated between that separate entity and the entity of which it is a PE were the \*arm's length conditions.
- (2) The conditions to which the \*arm's length conditions mentioned in paragraph (1)(c) relate are the conditions that would operate between the separate entity and the entity of which it is a \*PE if the assumptions in paragraphs (1)(a) and (b) were made.
- (3) For the purposes of subsection (1):
- (a) the actual expenditure of an entity is taken to include losses and outgoings; and
  - (b) the actual income of an entity is taken to include any amount that is, or is to be, included in the entity's assessable income.

### **815-230 Source rules for certain arm's length profits**

- (1) The \*arm's length profits for a \*PE in Australia are taken, for the purposes of this Act, to be attributable to sources in Australia.
- (2) The \*arm's length profits for a \*PE in an \*area covered by an international tax sharing treaty are taken, for the purposes of this Act, to be attributable to sources in that area.

### **815-235 Guidance**

- (1) For the purpose of determining the effect this Subdivision has in relation to an entity, work out \*arm's length profits, and identify \*arm's length conditions, so as best to achieve consistency with:

- (a) the documents covered by this section; and
  - (b) subject to paragraph (a), the documents covered by section 815-135.
- (2) The documents covered by this section are as follows:
- (a) the Model Tax Convention on Income and on Capital, and its Commentaries, as adopted by the Council of the Organisation for Economic Cooperation and Development and last amended on 22 July 2010, to the extent that document extracts the text of Article 7 and its Commentary as they read before 22 July 2010;
  - (b) a document, or part of a document, prescribed by the regulations for the purposes of this paragraph.
- (3) However, the document mentioned in paragraph (2)(a) is not covered by this section if the regulations so prescribe.
- (4) A document covered by section 815-135 is to be disregarded for the purposes of this section if the regulations so prescribe.
- (5) Regulations made for the purposes of paragraph (2)(b), subsection (3) or subsection (4) may prescribe different documents or parts of documents for different circumstances.

#### **815-240 Amendment of assessments**

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

- (a) the amendment is made within 7 years after the day on which the Commissioner gives notice of the assessment to the entity; and
- (b) the amendment is made for the purpose of giving effect to section 815-215.

## **Subdivision 815-D—Special rules for trusts and partnerships**

### **Guide to Subdivision 815-D**

#### **815-301 What this Subdivision is about**

This Subdivision provides special rules about the way Subdivisions 815-B and 815-C apply to trusts and partnerships.

#### **Table of sections**

##### **Operative provisions**

- 815-305 Special rule for trusts
- 815-310 Special rules for partnerships

#### **Operative provisions**

##### **815-305 Special rule for trusts**

Subdivisions 815-B and 815-C apply in relation to the \*net income of a trust in the same way those Subdivisions apply in relation to the taxable income of an entity other than a trust.

##### **815-310 Special rules for partnerships**

- (1) Subdivisions 815-B and 815-C apply in relation to the \*net income of a partnership in the same way those Subdivisions apply in relation to the taxable income of an entity other than a partnership.
- (2) Subdivisions 815-B and 815-C apply in relation to a \*partnership loss of a partnership in the same way those Subdivisions apply in relation to a \*tax loss of an entity other than a partnership.

### ***Taxation Administration Act 1953***

#### **3 After subsection 284-145(2A) in Schedule 1**

Insert:

- (2B) You are also liable to an administrative penalty if:

- (a) to give effect to Subdivision 815-B or 815-C of the *Income Tax Assessment Act 1997* (also the **adjustment provision**) in relation to a \*scheme, the Commissioner:
  - (i) amends your assessment for an income year; or
  - (ii) serves you with one or more notices under subsection 128C(7) of the *Income Tax Assessment Act 1936* in respect of income that is taken because of the application of the adjustment provision to have been derived in the income year; and
- (b) as a result, you are liable to pay an additional amount of income tax or \*withholding tax (as the case requires).

Note: Subdivisions 815-B and 815-C of the *Income Tax Assessment Act 1997* apply the arm's length principle (about transfer pricing) to entities and permanent establishments respectively.

#### 4 At the end of section 284-150 in Schedule 1

Add:

*Scheme shortfall amount for cross-border transfer pricing*

- (4) Despite subsection (2), your **scheme shortfall amount** for a \*scheme to which subsection 284-145(2B) applies is the total amount of additional income tax and \*withholding tax you are liable to pay as mentioned in that subsection.
- (5) Disregard your \*scheme shortfall amount for a \*scheme to which subsection 284-145(1) applies to the extent that scheme shortfall amount is attributable to additional tax that is, or is part of, your scheme shortfall amount for a scheme to which subsection 284-145(2B) applies.

#### 5 Section 284-160 in Schedule 1

Repeal the section, substitute:

##### **284-160 Base penalty amount: schemes**

- (1) The **base penalty amount** for a \*scheme to which subsection 284-145(1) applies is, subject to section 284-224:
  - (a) 50% of your \*scheme shortfall amount; or
  - (b) 25% of your scheme shortfall amount if it is \*reasonably arguable that the adjustment provision does not apply.

- (2) The **base penalty amount** for a \*scheme to which subsection 284-145(2A) applies is, subject to section 284-224:
- (a) 25% of your \*scheme shortfall amount; or
  - (b) 10% of your scheme shortfall amount if it is \*reasonably arguable that the adjustment provision does not apply.
- (3) The **base penalty amount** for a \*scheme to which subsection 284-145(2B) applies is worked out using this table and section 284-224 if relevant:

<b>Base penalty amount</b>		
<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b>In this situation:</b>	<b>The base penalty amount is:</b>
1	having regard to any relevant matters, it is reasonable to conclude that an entity that (alone or with others) entered into or carried out the *scheme, or part of it, did so with the sole or dominant purpose of that entity or another entity getting a *transfer pricing benefit from the scheme	the sum of: <ul style="list-style-type: none"> <li>(a) 50% of your *scheme shortfall amount, to the extent that it is not attributable as mentioned in paragraph (b); and</li> <li>(b) 25% of your scheme shortfall amount, to the extent (if any) that it is attributable to the entity, or the entity's agent, treating the adjustment provision as applying (including not applying) to a matter (or identical matters) in a particular way that is *reasonably arguable</li> </ul>
2	item 1 does not apply	the sum of: <ul style="list-style-type: none"> <li>(a) 25% of your *scheme shortfall amount, to the extent that it is not attributable as mentioned in paragraph (b); and</li> <li>(b) 10% of your scheme shortfall amount, to the extent (if any) that it is attributable to the entity, or the entity's agent, treating the adjustment provision as applying (including not applying) to a matter (or identical matters) in a particular way that is *reasonably arguable</li> </ul>

Note: For special rules about when transfer pricing treatment is not reasonably arguable, see Subdivision 284-E.

## **6 At the end of Subdivision 284-C in Schedule 1**

Add:

**284-165 Exception—threshold for penalty arising from cross-border transfer pricing**

- (1) You are not liable to an administrative penalty under subsection 284-145(2B) if your \*scheme shortfall amount is equal to or less than your \*reasonably arguable threshold.
- (2) You are also not liable to an administrative penalty under that subsection if:
  - (a) you have the \*scheme shortfall amount because of section 284-30 (about trusts); and
  - (b) the amount by which the trust would, apart from the application of Subdivision 815-B or 815-C of the *Income Tax Assessment Act 1997*, have had a greater \*net income, or a lesser \*tax loss, is equal to or less than the trust's \*reasonably arguable threshold.
- (3) You are also not liable to an administrative penalty under that subsection if:
  - (a) you have the \*scheme shortfall amount because you are a partner in a partnership that participated in the \*scheme; and
  - (b) the amount by which the partnership would, apart from the application of Subdivision 815-B or 815-C of that Act, have had a greater \*net income, or a lesser \*partnership loss, is equal to or less than the partnership's \*reasonably arguable threshold.

*Nil amounts*

- (4) For the purposes of this section:
  - (a) treat a trust or a partnership that has no \*net income for an income year as having a net income for the year of a nil amount; and
  - (b) treat a trust that has no \*tax loss for an income year as having a tax loss for the year of a nil amount; and
  - (c) treat a partnership that has no \*partnership loss for an income year as having a partnership loss for the year of a nil amount.

**7 At the end of Division 284 in Schedule 1**

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Add:

**Subdivision 284-E—Special rules about unarguable positions  
for cross-border transfer pricing**

**Table of sections**

284-250	Undocumented transfer pricing treatment not reasonably arguable
284-255	Documentation requirements

**284-250 Undocumented transfer pricing treatment not reasonably  
arguable**

This Division has effect in relation to an entity as if a matter was not \*reasonably arguable if:

- (a) the matter is a particular way of applying (including not applying) Subdivision 815-B or 815-C of the *Income Tax Assessment Act 1997* to a matter (or identical matters); and
- (b) the entity does not have records that meet the requirements in this Subdivision for the application of the Subdivision mentioned in paragraph (a) to that matter (or those matters) in that way.

Note: For the Commissioner's power to remit an administrative penalty imposed by this Part, see section 298-20.

**284-255 Documentation requirements**

- (1) Records kept by an entity meet the requirements in this Subdivision for the application (or non-application) of Subdivision 815-B or 815-C of the *Income Tax Assessment Act 1997* to a matter (or identical matters) in a particular way if the records:
  - (a) are prepared before the time by which the entity lodges its \*income tax return for the income year relevant to the matter (or matters); and
  - (b) are in English, or readily accessible and convertible into English; and
  - (c) explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters); and
  - (d) explain why the application of the Subdivision to the matter (or matters) in that way best achieves the consistency

mentioned in section 815-135 or 815-235 of that Act (as the case requires) (about guidance material).

- (2) Without limiting subsection (1), the records must allow each of the following to be readily ascertained:
- (a) the \*arm's length conditions relevant to the matter (or matters);
  - (b) the particulars of the method used and comparable circumstances relevant to identifying those arm's length conditions;
  - (c) unless the records are for the non-application of the Subdivision to a matter (or matters)—the result that the application of the Subdivision in that particular way, as compared to the non-application of the Subdivision, has for the operation of this Act in relation to the entity;
  - (d) for Subdivision 815-B—the actual conditions relevant to the matter (or matters);
  - (e) for Subdivision 815-C:
    - (i) the actual profits mentioned in paragraph 815-220(1)(a) of that Act and the \*arm's length profits, to the extent that they are relevant to the matter (or matters); and
    - (ii) the particulars of the activities and circumstances mentioned in subsection 815-225(1) of that Act, to the extent they are relevant to the matter (or matters).

## **Part 2—Other amendments**

### ***Income Tax Assessment Act 1936***

#### **8 Subsection 6(1) (definition of *international tax sharing treaty*)**

Repeal the definition.

#### **9 Section 102AAZA**

Repeal the section.

#### **10 At the end of subsection 160ZZW(2)**

Add:

Note: For cross-border transfer pricing, the rules in Subdivision 815-B of the *Income Tax Assessment Act 1997* apply to the separate legal entity, rather than the rules for permanent establishments in Subdivision 815-C: see subsection 815-210(3) of that Act.

#### **11 Subsection 160ZZW(5)**

Repeal the subsection.

#### **12 Subsections 170(9B) and (9C)**

Repeal the subsections.

#### **13 Subsection 170(10) (table item 24)**

Repeal the item.

#### **14 Subsection 170(14) (definition of *double taxation agreement*)**

Repeal the definition.

#### **15 Subsection 170(14) (definition of *prescribed provision*)**

Repeal the definition.

#### **16 Subsection 170(14) (definition of *relevant provision*)**

Repeal the definition.

#### **17 Paragraph 389(a)**

Omit “subsection 136AF(1A)”.

## **18 Section 400**

Repeal the section, substitute:

### **400 Modified cross-border requirement for transfer pricing**

- (1) This section applies in calculating the attributable income of the eligible CFC.
- (2) Conditions that operate between the eligible CFC and another entity do not satisfy the cross-border test in subsection 815-120(3) of the *Income Tax Assessment Act 1997* if:
  - (a) the other entity is a CFC; and
  - (b) the eligible CFC and the other entity are residents of the same listed country (disregarding section 383 of this Act).

## **19 Subsection 434(3)**

Repeal the subsection, substitute:

- (3) If:
  - (a) arm’s length conditions are taken by Subdivision 815-B of the *Income Tax Assessment Act 1997* to operate for purposes relating to the company; and
  - (b) had those conditions operated, an amount described in any of the paragraphs of subsection (1) as being an amount shown in the recognised accounts of the company for the statutory account period would have been different;then the different amount is substituted for the amount shown in the recognised accounts.

## ***Income Tax Assessment Act 1997***

### **20 Section 10-5 (table item headed “avoidance of tax”)**

Omit:  
profits shifted out of Australia ..... 136AD, 136AE

### **21 Section 10-5 (after table item headed “trading stock”)**

Insert:

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**transfer pricing**

arm's length principle for cross-border conditions  
between entities ..... Subdivision 815-B  
arm's length principle for permanent establishments..... Subdivision 815-C

**22 Section 12-5 (table item headed "tax avoidance schemes")**

Omit:  
international profit shifting, transfer pricing ..... 136AA to 136AF

**23 Section 12-5 (table item headed "transfer pricing")**

Repeal the item, substitute:

**transfer pricing**

arm's length principle for cross-border conditions  
between entities ..... Subdivision 815-B  
arm's length principle for permanent establishments..... Subdivision 815-C

**24 Section 70-20 (note 1)**

Omit "Note 1", substitute "Note".

**25 Section 70-20 (note 2)**

Repeal the note.

**26 Section 355-400 (note 1)**

Omit "Note 1", substitute "Note".

**27 Section 355-400 (note 2)**

Repeal the note.

**28 Section 420-20 (note)**

Repeal the note.

**29 Section 420-30 (note)**

Repeal the note.

**30 Paragraph 802-35(1)(c)**

Omit "international tax sharing treaty (as defined in  
subsection 136AA(1) of the *Income Tax Assessment Act 1936*)",  
substitute "\*international tax sharing treaty".

**31 Paragraph 802-35(2)(c)**

Omit “international tax sharing treaty (as defined in subsection 136AA(1) of the *Income Tax Assessment Act 1936*)”, substitute “\*international tax sharing treaty”.

**32 At the end of section 815-10**

Add:

Note: This Subdivision does not apply to income years to which Subdivisions 815-B and 815-C apply: see section 815-1 of the *Income Tax (Transitional Provisions) Act 1997*.

**33 Subsection 815-40(2)**

Before “section 136AB”, insert “former”.

**34 Section 820-30 (note)**

Omit “Subdivision 815-A”, substitute “Division 815”.

**35 Subparagraph 842-250(1)(c)(ii)**

Repeal the subparagraph, substitute:

- (ii) in respect of a fund that is resident in a country that has not entered into an international tax agreement with Australia containing a business profits article—amounts included in the assessable income of the fund are treated as having a source in Australia because of subsection 815-230(1); or

**36 Subsection 995-1(1)**

Insert:

*area covered by an international tax sharing treaty*: if, under an \*international tax sharing treaty, Australia and another country share tax revenues from activities undertaken in an area identified by or under the treaty, that area is an *area covered by an international tax sharing treaty*.

**37 Subsection 995-1(1)**

Insert:

*arm’s length conditions* has the meaning given by section 815-125.

**38 Subsection 995-1(1)**

Insert:

*arm's length profits* has the meaning given by section 815-225.

**39 Subsection 995-1(1)**

Insert:

*international tax sharing treaty*:

- (a) means an agreement between Australia and another country under which Australia and the other country share tax revenues from activities undertaken in an area identified by or under the agreement; and
- (b) does not include an agreement within the meaning of the *International Tax Agreements Act 1953*.

**40 Subsection 995-1(1)**

Insert:

*PE*: see *permanent establishment*.

**41 Subsection 995-1(1)**

Insert:

*reasonably arguable threshold* for an income year has the meaning given by subsection 284-90(3) in Schedule 1 to the *Taxation Administration Act 1953*.

**42 Subsection 995-1(1)**

Insert:

*residence article* has the meaning given by subsection 815-120(6).

**43 Subsection 995-1(1) (definition of *transfer pricing benefit*)**

Repeal the definition, substitute:

*transfer pricing benefit* has the meaning given by sections 815-15, 815-120 and 815-220.

### ***Taxation Administration Act 1953***

#### **44 At the end of subsection 284-15(1) in Schedule 1**

Add:

Note: For the effect of transfer pricing documentation on when a matter is reasonably arguable, see Subdivision 284-E.

#### **45 Subsection 284-90(1) in Schedule 1 (table item 4, column headed “In this situation:”)**

Omit “the greater of \$10,000 or 1% of the income tax payable, or \*MRRT payable, by you for the income year, worked out on the basis of your \*income tax return or \*MRRT return”, substitute “your \*reasonably arguable threshold”.

#### **46 Subsection 284-90(1) in Schedule 1 (table item 5, column headed “In this situation:”)**

Omit “the greater of \$20,000 or 2% of the trust’s net income (if any) for that year worked out on the basis of the trust’s \*income tax return”, substitute “the trust’s \*reasonably arguable threshold”.

#### **47 Subsection 284-90(1) in Schedule 1 (table item 6, column headed “In this situation:”)**

Omit “the greater of \$20,000 or 2% of the partnership net income (if any) for that year, worked out on the basis of the partnership’s \*income tax return”, substitute “the partnership’s \*reasonably arguable threshold”.

#### **48 At the end of section 284-90 in Schedule 1**

Add:

- (3) An entity’s *reasonably arguable threshold* for an income year is:
- (a) unless paragraph (b) applies—the greater of the following amounts:
    - (i) \$10,000;
    - (ii) 1% of the income tax payable, or \*MRRT payable (as the case requires), by the entity for the income year, worked out on the basis of the entity’s \*income tax return or \*MRRT return (as the case requires); or

- (b) if the entity is a trust or partnership—the greater of the following amounts:
- (i) \$20,000;
  - (ii) 2% of the entity's \*net income (if any) for the income year worked out on the basis of the entity's \*income tax return.

**49 Subsection 284-145(2) in Schedule 1**

Repeal the subsection.

## Part 3—Application

### 50 Application

The amendments made by Parts 1 and 2 of this Schedule (except item 2) apply:

- (a) in respect of tax other than withholding tax—in relation to income years starting on or after the date mentioned in subsection 815-15(2) of the *Income Tax (Transitional Provisions) Act 1997*, as inserted by this Part; and
- (b) in respect of withholding tax—in relation to income derived, or taken to be derived, in income years starting on or after that date.

Note: For the application of Subdivisions 815-B, 815-C and 815-D of the *Income Tax Assessment Act 1997*, as inserted by item 2, see Division 815 of the *Income Tax (Transitional Provisions) Act 1997*.

### *Income Tax (Transitional Provisions) Act 1997*

#### 51 Subdivision 815-A (heading)

Repeal the heading, substitute:

#### **Subdivision 815-A—Cross-border transfer pricing**

#### 52 Section 815-1

Before “Subdivision 815-A”, insert “(1)”.

#### 53 At the end of section 815-1

Add:

- (2) However, Subdivision 815-A does not apply to an income year to which Subdivisions 815-B and 815-C of that Act apply.

Note: For the income years to which Subdivisions 815-B and 815-C apply, see section 815-15 of this Act.

#### 54 At the end of Subdivision 815-A

Add:

**815-15 Application of Subdivisions 815-B, 815-C and 815-D of the  
*Income Tax Assessment Act 1997***

- (1) Subdivisions 815-B, 815-C and 815-D of the *Income Tax Assessment Act 1997* apply:
- (a) in respect of tax other than withholding tax—in relation to income years starting on or after the date mentioned in subsection (2); and
  - (b) in respect of withholding tax—in relation to income derived, or taken to be derived, in income years starting on or after that date.

*Start date for transfer pricing amendments*

- (2) The date is the earlier of:
- (a) 1 July 2013; and
  - (b) the day the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* receives the Royal Assent.

## **Part 4—Minor amendments relating to treaty-equivalent transfer pricing rules**

### ***Income Tax Assessment Act 1997***

#### **55 Subparagraph 815-35(1)(b)(ii)**

Omit “tax loss”, substitute “\*tax loss”.

#### **56 Subparagraph 815-35(2)(b)(ii)**

Omit “tax loss”, substitute “\*tax loss”.

#### **57 Subsection 815-35(10)**

Omit “an entity”, substitute “the entity”.

### ***Taxation Administration Act 1953***

#### **58 Paragraph 284-160(b) in Schedule 1**

After “subsection 284-145(2)”, insert “or (2A)”.

#### **59 Application**

The amendment made by item 58 applies to income years starting on or after 1 July 2012.

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*[Minister's second reading speech made in—  
House of Representatives on 13 February 2013  
Senate on 16 May 2013]*

*(14/13)*

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*Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*

*No. 101, 2013*      37