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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

As passed by both Houses

**Tax Laws Amendment (2009 Budget
Measures No. 2) Bill 2009**

No. , 2009

**A Bill for an Act to amend the law relating to
taxation and superannuation, and for related
purposes**

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1 **A Bill for an Act to amend the law relating to**
2 **taxation and superannuation, and for related**
3 **purposes**

4 The Parliament of Australia enacts:

5 **1 Short title**

6 This Act may be cited as the *Tax Laws Amendment (2009 Budget*
7 *Measures No. 2) Act 2009*.

8 **2 Commencement**

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

13

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	The later of: (a) the day this Act receives the Royal Assent; and (b) the day the <i>Income Tax (TFN Withholding Tax (ESS)) Act 2009</i> receives the Royal Assent. However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	
3. Schedules 2 and 3	The day this Act receives the Royal Assent.	

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

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

3 Schedule(s)

8 Each Act that is specified in a Schedule to this Act is amended or
9 repealed as set out in the applicable items in the Schedule
10 concerned, and any other item in a Schedule to this Act has effect
11 according to its terms.
12

1 **Schedule 1—Employee share schemes**

2 **Part 1—Main amendments**

3 *Income Tax Assessment Act 1997*

4 **1 At the end of Part 2-40**

5 Add:

6 **Division 83A—Employee share schemes**

7 **Table of Subdivisions**

8	Guide to Division 83A
9	83A-A Objects of Division and key concepts
10	83A-B Immediate inclusion of discount in assessable income
11	83A-C Deferred inclusion of gain in assessable income
12	83A-D Deduction for employer
13	83A-E Miscellaneous

14 **Guide to Division 83A**

15 **83A-1 What this Division is about**

16 Your assessable income includes discounts on shares, rights and
17 stapled securities you (or your associate) acquire under an
18 employee share scheme.

19 You may be entitled:

- 20 (a) to have the amount included in your assessable
21 income reduced; or
- 22 (b) to have the income year in which it is included
23 deferred.

1 **Subdivision 83A-A—Objects of Division and key concepts**

2 **Table of sections**

3	83A-5	Objects of Division
4	83A-10	Meaning of <i>ESS interest</i> and <i>employee share scheme</i>

5 **83A-5 Objects of Division**

6 The objects of this Division are:

- 7 (a) to ensure that benefits provided to employees under
8 *employee share schemes are subject to income tax at the
9 employees' marginal rates under *income tax law (instead of
10 being subject to *fringe benefits tax law); and
11 (b) to increase the extent to which the interests of employees are
12 aligned with those of their employers, by providing a tax
13 concession to encourage lower and middle income earners to
14 acquire *shares under such schemes.

15 **83A-10 Meaning of *ESS interest* and *employee share scheme***

16 (1) An *ESS interest*, in a company, is a beneficial interest in:

- 17 (a) a *share in the company; or
18 (b) a right to acquire a beneficial interest in a share in the
19 company.

20 (2) An *employee share scheme* is a *scheme under which *ESS
21 interests in a company are provided to employees, or *associates of
22 employees, (including past or prospective employees) of:

- 23 (a) the company; or
24 (b) *subsidiaries of the company;
25 in relation to the employees' employment.

26 Note: See section 83A-325 for relationships similar to employment.

1 **Subdivision 83A-B—Immediate inclusion of discount in**
2 **assessable income**

3 **Guide to Subdivision 83A-B**

4 **83A-15 What this Subdivision is about**

5 Generally, a discount you receive on shares, rights or stapled
6 securities you acquire under an employee share scheme is included
7 in your assessable income when you acquire the beneficial interest
8 in those shares, rights or securities.

9 You may be entitled to reduce the amount included in your
10 assessable income if you meet certain conditions which seek to
11 limit the concession to genuine schemes broadly available to all
12 permanent employees who do not already have anything other than
13 a minor interest in their employer.

14 The income year in which you are taxed may be deferred if there is
15 a real risk of forfeiture, or you acquired the shares or securities
16 under particular salary sacrifice arrangements (see
17 Subdivision 83A-C).

18 If you are a foreign resident, only the part of the discount that
19 relates to your employment in Australia is included in your
20 assessable income.

21 **Table of sections**

22 **Operative provisions**

23	83A-20	Application of Subdivision
24	83A-25	Discount to be included in assessable income
25	83A-30	Amount for which discounted ESS interest acquired
26	83A-35	Reduction of amounts included in assessable income

1 **Operative provisions**

2 **83A-20 Application of Subdivision**

- 3 (1) This Subdivision applies to an *ESS interest if you acquire the
4 interest under an *employee share scheme at a discount.

5 Note 1: This Subdivision does not apply if Subdivision 83A-C applies: see
6 section 83A-105.

7 Note 2: If an associate of yours acquires an interest in relation to your
8 employment, this Division applies as if you, rather than your
9 associate, acquired the interest: see section 83A-305.

10 Note 3: Regulations made for the purposes of section 83A-315 may be
11 relevant to working out whether you acquire the ESS interest at a
12 discount.

- 13 (2) However, this Subdivision does not apply if the *ESS interest is a
14 beneficial interest in a *share that you acquire as a result of
15 exercising a right, if you acquired a beneficial interest in the right
16 under an *employee share scheme.

17 **83A-25 Discount to be included in assessable income**

- 18 (1) Your assessable income for the income year in which you acquire
19 the *ESS interest includes the discount given in relation to the
20 interest.

- 21 (2) Treat an amount included in your assessable income under
22 subsection (1) as being from a source other than an *Australian
23 source to the extent that it relates to your employment outside
24 Australia.

25 Note: For the CGT treatment of employee share schemes, see
26 Subdivision 130-D.

27 **83A-30 Amount for which discounted ESS interest acquired**

28 For the purposes of this Act (other than this Division), the *ESS
29 interest (and the *share or right of which it forms part) is taken to
30 have been acquired for its *market value (rather than for its
31 discounted value).

32 Note: Regulations made for the purposes of section 83A-315 may substitute
33 a different amount for the market value of the ESS interest.

1 **83A-35 Reduction of amounts included in assessable income**

2 *Reduction and income test*

3 (1) Reduce the total amount included in your assessable income under
4 subsection 83A-25(1) for an income year by the total of the
5 amounts included in your assessable income under that subsection,
6 for the income year, for *ESS interests to which subsections (3) to
7 (9) of this section apply.

8 (2) However:

9 (a) do not reduce the total amount by more than \$1,000; and

10 (b) only make the reduction if the sum of the following does not
11 exceed \$180,000:

12 (i) your taxable income for the income year (including any
13 amount that would be included in your taxable income
14 if you disregarded this section);

15 (ii) your *reportable fringe benefits total for the income
16 year;

17 (iii) your *reportable superannuation contributions (if any)
18 for the income year;

19 (iv) your *total net investment loss for the income year.

20 *Employment*

21 (3) This subsection applies to an *ESS interest in a company if, when
22 you acquire the interest, you are employed by:

23 (a) the company; or

24 (b) a *subsidiary of the company.

25 *Employee share scheme relates only to ordinary shares*

26 (4) This subsection applies to an *ESS interest you acquire under an
27 *employee share scheme if, when you acquire the interest, all the
28 ESS interests available for acquisition under the scheme relate to
29 ordinary *shares.

30 *Integrity rule about share trading and investment companies.*

31 (5) This subsection applies to an *ESS interest in a company unless,
32 when you acquire the interest:

Schedule 1 Employee share schemes
Part 1 Main amendments

- 1 (a) the predominant business of the company (whether or not
2 stated in its constituent documents) is the acquisition, sale or
3 holding of *shares, securities or other investments (whether
4 directly or indirectly through one or more companies,
5 partnerships or trusts); and
6 (b) you are employed by the company; and
7 (c) you are also employed by any other company that is:
8 (i) a *subsidiary of the first company; or
9 (ii) a holding company (within the meaning of the
10 *Corporations Act 2001*) of the first company; or
11 (iii) a subsidiary of a holding company (within the meaning
12 of the *Corporations Act 2001*) of the first company.

13 *Scheme must be non-discriminatory*

- 14 (6) This subsection applies to an *ESS interest you acquire under an
15 *employee share scheme if, when you acquire the interest, both:
16 (a) the employee share scheme; and
17 (b) any scheme for the provision of financial assistance in
18 respect of acquisitions of ESS interests under the employee
19 share scheme;
20 are operated on a non-discriminatory basis in relation to at least
21 75% of the permanent employees of your employer who have
22 completed at least 3 years of service (whether continuous or
23 non-continuous) with your employer and who are Australian
24 residents.

25 *No risk of losing interest or share under the conditions of the*
26 *scheme*

- 27 (7) This subsection applies to an *ESS interest you acquire under an
28 *employee share scheme if, when you acquire the interest:
29 (a) if the ESS interest is a beneficial interest in a *share—there is
30 no real risk that, under the conditions of the scheme, you will
31 forfeit or lose the ESS interest (other than by disposing of it);
32 or
33 (b) if the ESS interest is a beneficial interest in a right to acquire
34 a beneficial interest in a *share:
35 (i) there is no real risk that, under the conditions of the
36 scheme, you will forfeit or lose the ESS interest (other

- 1 than by disposing of it, exercising the right or letting the
2 right lapse); and
3 (ii) there is no real risk that, under the conditions of the
4 scheme, if you exercise the right, you will forfeit or lose
5 the beneficial interest in the share (other than by
6 disposing of it).

7 *Minimum holding period*

- 8 (8) This subsection applies to an *ESS interest you acquire under an
9 *employee share scheme if, at all times during the period that:
10 (a) starts when you acquire the interest; and
11 (b) ends at the earlier of:
12 (i) 3 years later; and
13 (ii) when you cease being employed by your employer;
14 the scheme is operated so that:
15 (c) you are not permitted to dispose of:
16 (i) any ESS interest (the *scheme interest*) you acquire
17 under the scheme; or
18 (ii) a beneficial interest in a *share you acquire as a result of
19 a scheme interest;
20 before the earlier of:
21 (iii) the end of the period of 3 years after you acquire the
22 scheme interest; and
23 (iv) when you cease being employed by your employer; and
24 (d) everyone else who acquires ESS interests under the scheme is
25 subject to a corresponding restriction.

26 Note: This subsection is taken to apply in the case of a takeover or
27 restructure: see subsection 83A-130(3).

28 *5% limit on shareholding and voting power*

- 29 (9) This subsection applies to an *ESS interest in a company if,
30 immediately after you acquire the interest:
31 (a) you do not hold a beneficial interest in more than 5% of the
32 *shares in the company; and
33 (b) you are not in a position to cast, or to control the casting of,
34 more than 5% of the maximum number of votes that might be
35 cast at a general meeting of the company.

1 **Subdivision 83A-C—Deferred inclusion of gain in assessable**
2 **income**

3 **Guide to Subdivision 83A-C**

4 **83A-100 What this Subdivision is about**

5 If there is a real risk you might forfeit the share, right or stapled
6 security you acquired under an employee share scheme, you don't
7 include the discount in your assessable income when you acquired
8 it. Instead, in the first income year you are able to dispose of the
9 share, right or security, your assessable income will include any
10 gain you have made to that time. If you cease employment earlier,
11 or if 7 years pass, the gain is included in that income year instead.

12 A share or stapled security you acquire under salary sacrifice
13 arrangements can also be subject to this deferred taxing point if
14 you get no more than \$5,000 worth of shares under those
15 arrangements.

16 **Table of sections**

17 **Main provisions**

- 18 83A-105 Application of Subdivision
19 83A-110 Amount to be included in assessable income
20 83A-115 ESS deferred taxing point—shares
21 83A-120 ESS deferred taxing point—rights to acquire shares
22 83A-125 Tax treatment of ESS interests held after ESS deferred taxing points

23 **Takeovers and restructures**

- 24 83A-130 Takeovers and restructures

25 **Main provisions**

26 **83A-105 Application of Subdivision**

27 *Scope of Subdivision*

- 28 (1) This Subdivision applies, and Subdivision 83A-B does not apply,
29 to an *ESS interest in a company if:

- 1 (a) Subdivision 83A-B would, apart from this section, apply to
2 the interest (see section 83A-20); and
3 (b) subsections 83A-35(3), (4), (5) and (9) apply to the interest;
4 and
5 (c) if the interest is a beneficial interest in a *share:
6 (i) subsection (2) of this section applies to the interest; and
7 (ii) subsection (3) or (4) applies to the interest; and
8 (d) if the interest is a beneficial interest in a right to acquire a
9 beneficial interest in a share—subsection (3) applies to the
10 interest.

- 11 Note: Subsections 83A-35(3), (4), (5), and (9) contain conditions relating to
12 the following:
13 (a) your employment;
14 (b) the types of shares available under the employee share scheme;
15 (c) share trading and investment companies;
16 (d) your shareholding and voting power in the company.

17 *Broad availability of schemes*

- 18 (2) This subsection applies to an *ESS interest you acquire under an
19 *employee share scheme if, when you acquire the interest, at least
20 75% of the permanent employees of your employer who have
21 completed at least 3 years of service (whether continuous or
22 non-continuous) with your employer and who are Australian
23 residents are, or at some earlier time had been, entitled to acquire:
24 (a) ESS interests under the scheme; or
25 (b) ESS interests in:
26 (i) your employer; or
27 (ii) a holding company (within the meaning of the
28 *Corporations Act 2001*) of your employer;
29 under another employee share scheme.

30 *Real risk of losing interest or share under the conditions of the*
31 *scheme*

- 32 (3) This subsection applies to an *ESS interest you acquire under an
33 *employee share scheme if, when you acquire the interest:
34 (a) if the ESS interest is a beneficial interest in a *share—there is
35 a real risk that, under the conditions of the scheme, you will
36 forfeit or lose the ESS interest (other than by disposing of it);
37 or

Schedule 1 Employee share schemes
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- 1 (b) if the ESS interest is a beneficial interest in a right to acquire
2 a beneficial interest in a share:
3 (i) there is a real risk that, under the conditions of the
4 scheme, you will forfeit or lose the ESS interest (other
5 than by disposing of it, exercising the right or letting the
6 right lapse); or
7 (ii) there is a real risk that, under the conditions of the
8 scheme, if you exercise the right, you will forfeit or lose
9 the beneficial interest in the share (other than by
10 disposing of it).

11 *Salary sacrifice arrangement*

- 12 (4) This subsection applies to an *ESS interest you acquire under an
13 *employee share scheme during an income year at a discount if:
14 (a) the interest is provided:
15 (i) because you agreed to acquire the interest in return for a
16 reduction in your salary or wages that would not have
17 happened apart from the agreement; or
18 (ii) as part of your remuneration package, in circumstances
19 where it is reasonable to conclude that your salary or
20 wages would be greater if the interest was not made part
21 of that package; and
22 (b) at the time you acquire the interest:
23 (i) the discount equals the *market value of the ESS
24 interest; and
25 (ii) all of the ESS interests available for acquisition under
26 the scheme are ESS interests to which subsection (3)
27 applies, beneficial interests in *shares, or both; and
28 (iii) the governing rules of the scheme expressly state that
29 this Subdivision applies to the scheme (subject to the
30 requirements of this Act); and
31 (c) the total *market value of the *ESS interests in your employer
32 and any holding company (within the meaning of the
33 *Corporations Act 2001*) of your employer:
34 (i) that you acquire during the year under any employee
35 share scheme or schemes; and
36 (ii) to which both this Subdivision and this subsection
37 apply;
38 does not exceed \$5,000.

- 1 (5) For the purposes of paragraph (4)(c), work out the *market value of
2 each *ESS interest as at the time you acquire it.

3 Note: Regulations made for the purposes of section 83A-315 may substitute
4 a different amount for the market value of the ESS interest.

5 **83A-110 Amount to be included in assessable income**

- 6 (1) Your assessable income for the income year in which the *ESS
7 deferred taxing point for the *ESS interest occurs includes the
8 *market value of the interest at the ESS deferred taxing point,
9 reduced by the *cost base of the interest.

10 Note: Regulations made for the purposes of section 83A-315 may substitute
11 a different amount for the market value of the ESS interest.

- 12 (2) Treat an amount included in your assessable income under
13 subsection (1) as being from a source other than an *Australian
14 source to the extent that it relates to your employment outside
15 Australia.

16 Note: For the CGT treatment of employee share schemes, see
17 Subdivision 130-D.

18 **83A-115 ESS deferred taxing point—shares**

19 *Scope*

- 20 (1) This section applies if the *ESS interest is a beneficial interest in a
21 *share.

22 *Meaning of ESS deferred taxing point*

- 23 (2) The *ESS deferred taxing point* for the *ESS interest is the earliest
24 of the times mentioned in subsections (4) to (6).
25 (3) However, the *ESS deferred taxing point* for the *ESS interest is
26 instead the time you dispose of the interest, if that time occurs
27 within 30 days after the time worked out under subsection (2).

28 *No restrictions on disposing of share*

- 29 (4) The first possible taxing point is the earliest time when:
30 (a) there is no real risk that, under the conditions of the
31 *employee share scheme, you will forfeit or lose the *ESS
32 interest (other than by disposing of it); and
-

- 1 (b) if, at the time you acquired the interest, the scheme genuinely
2 restricted you immediately disposing of the interest—the
3 scheme no longer so restricts you.

4 *Cessation of employment*

- 5 (5) The 2nd possible taxing point is the time when the employment in
6 respect of which you acquired the interest ends.

7 *Maximum time period for deferral*

- 8 (6) The 3rd possible taxing point is the end of the 7 year period
9 starting when you acquired the interest.

10 **83A-120 ESS deferred taxing point—rights to acquire shares**

11 *Scope*

- 12 (1) This section applies if the *ESS interest is a beneficial interest in a
13 right to acquire a beneficial interest in a *share.

14 *Meaning of ESS deferred taxing point*

- 15 (2) The *ESS deferred taxing point* for the *ESS interest is the earliest
16 of the times mentioned in subsections (4) to (7).

- 17 (3) However, the *ESS deferred taxing point* for the *ESS interest is:

18 (a) the time you dispose of the ESS interest (other than by
19 exercising the right); or

20 (b) if you exercise the right—the time you dispose of the
21 beneficial interest in the *share;

22 if that time occurs within 30 days after the time worked out under
23 subsection (2).

24 *No restrictions on disposing of right*

- 25 (4) The first possible taxing point is the earliest time when:

26 (a) you have not exercised the right; and

27 (b) there is no real risk that, under the conditions of the

28 *employee share scheme, you will forfeit or lose the *ESS
29 interest (other than by disposing of it, exercising the right or
30 letting the right lapse); and

- 1 (c) if, at the time you acquired the ESS interest, the scheme
2 genuinely restricted you immediately disposing of the ESS
3 interest—the scheme no longer so restricts you.

4 *Cessation of employment*

- 5 (5) The 2nd possible taxing point is the time when the employment in
6 respect of which you acquired the interest ends.

7 *Maximum time period for deferral*

- 8 (6) The 3rd possible taxing point is the end of the 7 year period
9 starting when you acquired the interest.

10 *No restrictions on exercising right and disposing of share*

- 11 (7) The 4th possible taxing point is the earliest time when:
12 (a) there is no real risk that, under the conditions of the scheme,
13 you will forfeit or lose the *ESS interest (other than by
14 disposing of it, exercising the right or letting the right lapse);
15 and
16 (b) if, at the time you acquired the ESS interest, the scheme
17 genuinely restricted you immediately exercising the right—
18 the scheme no longer so restricts you; and
19 (c) there is no real risk that, under the conditions of the scheme,
20 if you exercise the right, you will forfeit or lose the beneficial
21 interest in the *share (other than by disposing of it); and
22 (d) if, at the time you acquired the ESS interest, the scheme
23 genuinely restricted you immediately disposing of the
24 beneficial interest in the share if you exercised the right—the
25 scheme no longer so restricts you.

26 **83A-125 Tax treatment of ESS interests held after ESS deferred**
27 **taxing points**

28 For the purposes of this Act (other than this Division), the *ESS
29 interest (and the *share or right of which it forms part) is taken to
30 have been acquired immediately after the *ESS deferred taxing
31 point for the interest for its *market value, unless the ESS deferred
32 taxing point occurs at the time the interest is disposed of.

33 Note: Regulations made for the purposes of section 83A-315 may substitute
34 a different amount for the market value of the ESS interest.

1 Takeovers and restructures

2 83A-130 Takeovers and restructures

3 *Object and scope*

4 (1) The object of this section is to allow this Division to continue to
5 apply if:

6 (a) at least one of the following applies:

7 (i) an *arrangement (the *takeover*) is entered into that is
8 intended to result in a company (the *old company*)
9 becoming a *100% subsidiary of another company;

10 (ii) *ESS interests in a company (the *old company*) acquired
11 under *employee share schemes can reasonably be
12 regarded as having been replaced, wholly or partly, by
13 ESS interests in one or more other companies as a result
14 of a change (the *restructure*) in the ownership
15 (including the structure of the ownership) of the old
16 company; and

17 (b) just before the takeover or restructure, you held ESS interests
18 (the *old interests*) in the old company that you acquired
19 under an employee share scheme.

20 *Treat new interests as continuations of old interests*

21 (2) For the purposes of this Division, treat any *ESS interests (the *new*
22 *interests*) in a company (the *new company*) that you acquire in
23 connection with the takeover or restructure as a continuation of the
24 old interests, to the extent that:

25 (a) as a result of the arrangement or change, you stop holding the
26 old interests; and

27 (b) the new interests can reasonably be regarded as matching any
28 of the old interests.

29 Note: In determining to what extent something can reasonably be regarded
30 as matching any of the old interests, one of the factors to consider is
31 the respective market values of that thing and of the old interests.

32 (3) Subsection 83A-35(8) (about the 3 year rule) is taken to apply to
33 the *ESS interests.

34 (4) Subsections (2) and (3) only apply if the new interests relate to
35 ordinary *shares.

1 *Old interest not matched by new interests*

- 2 (5) For the purposes of this Division, treat yourself as having disposed
3 of the old interests to the extent that, in connection with the
4 takeover or restructure, you acquire anything that:
5 (a) can reasonably be regarded as matching any of the old
6 interests; but
7 (b) is not treated by subsection (2) as a continuation of those
8 interests.

9 *Continuation of your employment*

- 10 (6) For the purposes of this Division, treat your employment by:
11 (a) the new company; or
12 (b) a *subsidiary of the new company; or
13 (c) a holding company (within the meaning of the *Corporations*
14 *Act 2001*) of the new company; or
15 (d) a subsidiary of a holding company (within the meaning of the
16 *Corporations Act 2001*) of the new company;
17 as a continuation of the employment in respect of which you
18 acquired the old interests.

19 *Apportionment of cost base of old interests*

- 20 (7) Treat yourself as having given, as consideration for the assets
21 mentioned in subsection (8), the amount worked out by
22 apportioning among those assets, according to their respective
23 *market values immediately after the takeover or restructure, the
24 total of:
25 (a) the *cost bases of the old interests when you stop holding
26 them; and
27 (b) the cost bases of the assets mentioned in paragraph (8)(b)
28 immediately after the takeover or restructure (ignoring the
29 effect of this subsection).
- 30 (8) The assets are:
31 (a) the things that:
32 (i) you acquired in connection with the takeover or
33 restructure; and
34 (ii) can reasonably be regarded as matching the old
35 interests;

- 1 (including all of the new interests); and
2 (b) in a case covered by subparagraph (1)(a)(ii)—any *ESS
3 interests in the old company that:
4 (i) you held just before, and continue to hold just after, the
5 restructure; and
6 (ii) that can reasonably be regarded as matching the old
7 interests.

8 *Exceptions*

- 9 (9) This section only applies if:
10 (a) at or about the time you acquire the new interests, you are
11 employed as mentioned in subsection (6); and
12 (b) at the time you acquire the new interests:
13 (i) you do not hold a beneficial interest in more than 5% of
14 the *shares in the new company; and
15 (ii) you are not in a position to cast, or to control the casting
16 of, more than 5% of the maximum number of votes that
17 might be cast at a general meeting of the new company.

18 **Subdivision 83A-D—Deduction for employer**

19 **Guide to Subdivision 83A-D**

20 **83A-200 What this Subdivision is about**

21 You can deduct an amount for shares, rights or stapled securities
22 you provide to your employees under an employee share scheme if
23 they are eligible for a reduction in their assessable income under
24 section 83A-35. The amount you can deduct is equal to that
25 reduction.

26 You must defer any deduction you are entitled to for amounts you
27 provide to finance your employees acquiring interests in shares,
28 rights or stapled securities under an employee share scheme until
29 the employees have actually acquired those interests.

30 **Table of sections**

31 **Operative provisions**

- 1 83A-205 Deduction for employer
2 83A-210 Timing of general deductions

3 **Operative provisions**

4 **83A-205 Deduction for employer**

- 5 (1) You can deduct an amount for an income year if:
6 (a) during the year you provided one or more *ESS interests to
7 an individual under an *employee share scheme; and
8 (b) you did so as:
9 (i) the employer of the individual; or
10 (ii) a holding company (within the meaning of the
11 *Corporations Act 2001*) of the employer of the
12 individual; and
13 (c) section 83A-35 applies to reduce the amount included in the
14 individual's assessable income under subsection 83A-25(1)
15 in relation to some or all of the interests.
- 16 (2) Disregard paragraph 83A-35(2)(b) (income test) for the purposes
17 of paragraph (1)(c) of this section.
- 18 (3) The amount of the deduction is the amount of the reduction
19 mentioned in paragraph (1)(c).

20 *Deduction to be apportioned if interest provided by multiple*
21 *entities*

- 22 (4) The amount of the deduction worked out under subsection (3) must
23 be apportioned between 2 or more entities on a reasonable basis if
24 the entities jointly provide an *ESS interest for which an amount
25 can be deducted under subsection (1).

26 **83A-210 Timing of general deductions**

- 27 If:
28 (a) at a particular time, you provide another entity with money or
29 other property:
30 (i) under an *arrangement; and
31 (ii) for the purpose of enabling an individual (the *ultimate*
32 *beneficiary*) to acquire, directly or indirectly, an *ESS
33 interest under an *employee share scheme in relation to

1 the ultimate beneficiary's employment (including past
2 or prospective employment); and
3 (b) that particular time occurs before the time (the *acquisition*
4 *time*) the ultimate beneficiary acquires the *ESS interest;
5 then, for the purpose of determining the income year (if any) in
6 which you can deduct an amount in respect of the provision of the
7 money or other property, you are taken to have provided the money
8 or other property at the acquisition time.

9 **Subdivision 83A-E—Miscellaneous**

10 **Table of sections**

11	83A-305	Acquisition by associates
12	83A-310	Forfeiture etc. of ESS interest
13	83A-315	Market value of ESS interest
14	83A-320	Interests in a trust
15	83A-325	Application of Division to relationships similar to employment
16	83A-330	Application of Division to ceasing employment
17	83A-335	Application of Division to stapled securities
18	83A-340	Application of Division to indeterminate rights

19 **83A-305 Acquisition by associates**

20 If an *associate (other than an *employee share trust) of an
21 individual acquires an *ESS interest in relation to the individual's
22 employment (including past or prospective employment), then, for
23 the purposes of this Division:

- 24 (a) treat the interest as having being acquired by the individual
25 (instead of the associate); and
26 (b) treat any circumstance, right or obligation existing or not
27 existing in relation to the interest in relation to the associate
28 as existing or not existing in relation to the individual; and
29 (c) treat anything done or not done by or in relation to the
30 associate in relation to the interest as being done or not done
31 by or in relation to the individual.

32 Example 1: The following are attributed to the employee, rather than to the
33 associate:

- 34 (a) the associate's voting rights;
35 (b) the associate's ability or inability to dispose of the ESS interest;
36 (c) whether there is a real risk that the associate may lose the ESS
37 interest;

1 (d) the associate's cost base for the ESS interest.

2 Example 2: If the associate disposes of the ESS interest, the employee is taken to
3 have disposed of the ESS interest instead.

4 **83A-310 Forfeiture etc. of ESS interest**

5 This Division (apart from this Subdivision) is taken never to have
6 applied in relation to an *ESS interest acquired by an individual
7 under an *employee share scheme if:

8 (a) disregarding this section, an amount is included in the
9 individual's assessable income under this Division in relation
10 to the interest; and

11 (b) either:

12 (i) the individual forfeits the interest; or

13 (ii) in the case of an ESS interest that is a beneficial interest
14 in a right—the individual forfeits or loses the interest
15 (without having disposed of the interest or exercised the
16 right); and

17 (c) the forfeiture or loss is not the result of:

18 (i) a choice made by the individual (other than a choice by
19 that individual to cease particular employment); or

20 (ii) a condition of the scheme that has the direct effect of
21 protecting (wholly or partly) the individual against a fall
22 in the *market value of the interest.

23 **83A-315 Market value of ESS interest**

24 (1) Whenever this Division uses the *market value of an *ESS interest,
25 instead use the amount specified in the regulations for the purposes
26 of this section in relation to the interest, if the regulations specify
27 such an amount.

28 (2) To avoid doubt, apply the rule in subsection (1) to the *market
29 value component of any calculation for the purposes of this
30 Division that involves market value.

31 Example: If the regulations specify an amount in relation to an ESS interest, use
32 that amount instead of the market value of the interest in working out:

33 (a) whether there is a discount given in relation to interest; and

34 (b) if so—the amount of the discount.

83A-320 Interests in a trust

- (1) This section applies if, at a time:
- (a) you hold an interest in a trust whose assets include *shares; and
 - (b) that interest corresponds to a particular number of the shares (even if the interest does not correspond to particular shares).
- (2) For the purposes of this Division, treat yourself as holding at that time a beneficial interest in each of a number of the *shares included in the assets of the trust equal to the number mentioned in paragraph (1)(b).
- (3) If there are 2 or more classes of *shares included in the assets of the trust, this section operates separately in relation to each class as if the shares in that class were all the shares included in the assets of the trust.
- (4) This section applies to rights to acquire beneficial interests in *shares in the same way it applies to shares.

Note: For the CGT treatment of employee share schemes, see Subdivision 130-D.

83A-325 Application of Division to relationships similar to employment

This Division applies to an individual covered by column 1 of an item in the table as if:

- (a) he or she were employed by the entity referred to in column 2 of that item; and
- (b) the thing referred to column 3 of that item constituted that employment.

Application of Division to relationships similar to employment

Item	Column 1 This Division applies to an individual who:	Column 2 as if he or she were employed by:	Column 3 and this constituted that employment:
1	receives, or is entitled to receive, *work and income support withholding payments	the entity that pays or provides the work and income support withholding	the relationship because of which the entity pays or provides the work and income support

Application of Division to relationships similar to employment

Item	Column 1 This Division applies to an individual who:	Column 2 as if he or she were employed by:	Column 3 and this constituted that employment:
	(otherwise than as an employee)	payments (or is liable to do so)	withholding payments to the individual (or is liable to do so).
2	is engaged in service in a foreign country as the holder of an office	the entity by whom the individual is so engaged	the holding of the office.
3	provides services to an entity (other than services covered by a previous item in this table and services provided as an employee)	the entity	the *arrangement between the individual and the entity under which those services are provided.

1 **83A-330 Application of Division to ceasing employment**

2 For the purposes of this Division, you are treated as ceasing
3 employment when you are no longer employed by any of the
4 following:

- 5 (a) your employer in that employment;
6 (b) a holding company (within the meaning of the *Corporations*
7 *Act 2001*) of your employer;
8 (c) a *subsidiary of your employer;
9 (d) a *subsidiary of a holding company (within the meaning of
10 the *Corporations Act 2001*) of your employer.

11 **83A-335 Application of Division to stapled securities**

12 (1) This Division applies in relation to a stapled security in the same
13 way as it applies in relation to a *share in a company, if at least one
14 of the *ownership interests that are stapled together to form the
15 stapled security is a share in the company.

16 Note: This means the Division also applies to rights to acquire such a stapled
17 security in the same way it applies to rights to acquire a share.

18 (2) This Division applies in relation to a stapled security in the same
19 way as it applies in relation to an ordinary *share in a company, if

1 at least one of the *ownership interests that are stapled together to
2 form the stapled security is an ordinary share in the company.

3 (3) For the purposes of this Division, in relation to a stapled security or
4 right to acquire a beneficial interest in a stapled security, a
5 company is taken to include (as part of the company) each *stapled
6 entity for the stapled security, if at least one of the *ownership
7 interests that are stapled together to form the stapled security is a
8 *share in the company.

9 **83A-340 Application of Division to indeterminate rights**

- 10 (1) This section applies if:
11 (a) you acquire a beneficial interest in a right; and
12 (b) the right later becomes a right to acquire a beneficial interest
13 in a *share.

14 Example 1: You acquire a right to acquire, at a future time:

- 15 (a) shares with a specified total value, rather than a specified number
16 of shares; or
17 (b) an indeterminate number of shares.

18 Example 2: You acquire a right under which the provider must provide you with
19 either ESS interests or cash, whichever the provider chooses.

- 20 (2) This Division applies as if the right had always been a right to
21 acquire the beneficial interest in the *share.

22 ***Taxation Administration Act 1953***

23 **2 At the end of Division 14 in Schedule 1**

24 Add:

25 **Subdivision 14-C—Shares and rights under employee share** 26 **schemes**

27 **Table of sections**

28	14-155	Liability for TFN withholding tax (ESS)
29	14-160	Employer may give individual tax file numbers to provider
30	14-165	Provider may recover TFN withholding tax (ESS) from individual
31	14-170	Application of rules in Division 18
32	14-175	Overpayment of TFN withholding tax (ESS)

14-180 Application of certain provisions of Division 83A of the *Income Tax Assessment Act 1997*

14-155 Liability for TFN withholding tax (ESS)

- (1) Tax (***TFN withholding tax (ESS)***) imposed by the *Income Tax (TFN Withholding Tax (ESS)) Act 2009* is payable if:
- (a) a company (the ***provider***) provides one or more *ESS interests to an individual under an *employee share scheme; and
 - (b) as a result, an amount is included in the individual's assessable income under Division 83A of the *Income Tax Assessment Act 1997* for an income year (taking into account subsection (2) of this section); and
 - (c) the individual has quoted neither of the following to the provider before the end of the income year:
 - (i) if the individual acquired the interests in relation to any services provided to the provider, or to a *subsidiary of the provider, in the course or furtherance of an *enterprise *carried on by the individual—the individual's *ABN;
 - (ii) in any case—the individual's *tax file number.
- (2) For the purposes of paragraph (1)(b), disregard section 83A-35 of the *Income Tax Assessment Act 1997* (about reducing the amount included in the individual's assessable income).

Note: Disregard the 30 day rule in subsections 83A-115(3) and 83A-120(3) of the *Income Tax Assessment Act 1997* for the purposes of this Subdivision: see subsection 392-5(6) in this Schedule.

- (3) The *TFN withholding tax (ESS) is payable by the provider.
- (4) The *TFN withholding tax (ESS) is due and payable at the end of 21 days after the end of the income year referred to in paragraph (1)(b).

Note 1: When it is due and payable, the TFN withholding tax (ESS) is payable to the Commissioner: see paragraph 255-5(1)(b).

Note 2: The provider must pay the TFN withholding tax (ESS) to the Commissioner in accordance with Subdivision 16-B: see subsection 16-70(4). If any of it remains unpaid, the provider is liable to pay general interest charge: see section 16-80.

Note 3: The Commissioner may defer the time at which TFN withholding tax (ESS) becomes due and payable: see section 255-10.

1 **14-160 Employer may give individual tax file numbers to provider**

- 2 (1) The individual is taken to have authorised a *subsidiary (the
3 **employer**) of the provider to inform the provider of the individual's
4 *tax file number if:
5 (a) the individual has made a *TFN declaration in relation to the
6 employer; and
7 (b) some or all of the *ESS interests mentioned in paragraph
8 14-155(1)(a) were provided to the individual in relation to the
9 individual's employment by the employer.
- 10 (2) If the employer does so, the individual is taken, for the purposes of
11 this Subdivision and Division 392 (Employee share scheme
12 reporting), to have quoted his or her *tax file number to the
13 provider.

14 **14-165 Provider may recover TFN withholding tax (ESS) from**
15 **individual**

- 16 (1) The provider may recover from the individual as a debt any of the
17 *TFN withholding tax (ESS) the provider pays.
- 18 (2) The provider is entitled to set off an amount that the provider can
19 recover from the individual under this section against a debt due by
20 the provider to the individual.

21 **14-170 Application of rules in Division 18**

22 These provisions:

- 23 (a) subsection 18-15(1) (about credits for amounts withheld from
24 withholding payments); and
25 (b) sections 18-65 and 18-70 (about refunds of amounts withheld
26 in error);

27 apply as if any of the *TFN withholding tax (ESS) that has been
28 paid were an amount withheld under section 12-35 from a
29 *withholding payment made to the individual and covered by that
30 section.

31 **14-175 Overpayment of TFN withholding tax (ESS)**

32 If *TFN withholding tax (ESS) has been overpaid:

- 33 (a) the Commissioner must refund the amount overpaid; and
-

1 (b) the individual is not entitled to a credit under section 18-15 in
2 respect of the amount overpaid.

3 **14-180 Application of certain provisions of Division 83A of the**
4 ***Income Tax Assessment Act 1997***

5 The following provisions of the *Income Tax Assessment Act 1997*
6 have effect for the purposes of this Subdivision in the same way as
7 they have for the purposes of Division 83A of that Act:

- 8 (a) section 83A-130 (about takeovers and restructures);
9 (b) section 83A-305 (about associates);
10 (c) section 83A-320 (about trusts);
11 (d) section 83A-325 (about relationships similar to employment);
12 (e) section 83A-335 (about stapled securities);
13 (f) section 83A-340 (about indeterminate rights).

14 **3 After subsection 16-70(3) in Schedule 1 (before the note)**

15 Insert:

- 16 (4) An entity that must pay an amount to the Commissioner under
17 Subdivision 14-C must do so in accordance with sections 16-80
18 and 16-85.

19 **4 Section 16-80 in Schedule 1**

20 Omit “or (3)”, substitute “, (3) or (4)”.

21 **5 After Division 391 in Schedule 1**

22 Insert:

23 **Division 392—Employee share scheme reporting**

24 **Table of Subdivisions**

25		Guide to Division 392
26	392-A	Statements
27	392-B	Miscellaneous

1 **Guide to Division 392**

2 **392-1 What this Division is about**

3 A company that provides ESS interests to an individual under an
4 employee share scheme during a year must, at the end of the year
5 (and, in certain cases, at the end of a later year), give certain
6 information to the Commissioner and to the individual.

7 Note: For the tax treatment of employee share schemes, see
8 Division 83A of the *Income Tax Assessment Act 1997*.

9 **Subdivision 392-A—Statements**

10 **Table of sections**

11	392-5	Statements by providers
12	392-10	Change or omission in information given to the Commissioner

13 **392-5 Statements by providers**

14 *Statements*

- 15 (1) An entity (the *provider*) must give a statement to the
16 Commissioner and to an individual for a *financial year if:
- 17 (a) both of the following subparagraphs apply:
- 18 (i) the provider provides *ESS interests to the individual
19 during the year;
- 20 (ii) Subdivision 83A-B or 83A-C of the *Income Tax*
21 *Assessment Act 1997* (about employee share schemes)
22 applies to the interests; or
- 23 (b) all of the following subparagraphs apply:
- 24 (i) the provider has provided ESS interests to the individual
25 (whether during the year or during an earlier year);
- 26 (ii) Subdivision 83A-C of the *Income Tax Assessment Act*
27 *1997* (about employee share schemes) applies to the
28 interests;
- 29 (iii) the *ESS deferred taxing point for the interests occurs
30 during the year.

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

1 *Form of statements*

- 2 (2) The statement must be in the *approved form.
- 3 (3) The *approved form may require the statement to contain the
4 following information:
- 5 (a) the provider's *ABN;
- 6 (b) the following information about the individual:
- 7 (i) the individual's name and address;
- 8 (ii) if the individual has quoted his or her *tax file number to
9 the provider—that tax file number;
- 10 (iii) if the individual acquired the interests in relation to any
11 services provided to the provider, or to a *subsidiary of
12 the provider, in the course or furtherance of an
13 *enterprise *carried on by the individual, and the
14 individual has *quoted his or her ABN to the provider—
15 that ABN;
- 16 (c) the following information about any interests to which both
17 paragraph (1)(a) of this section and Subdivision 83A-B of the
18 *Income Tax Assessment Act 1997* apply:
- 19 (i) the number of the interests;
- 20 (ii) the amount paid, at or before the time of acquisition,
21 towards acquiring the interests;
- 22 (iii) the provider's estimate of the *market value of the
23 interests at the time of acquisition;
- 24 (iv) the amount of *TFN withholding tax (ESS) paid or
25 payable by the provider in respect of the interests during
26 the year;
- 27 (d) the following information about any interests to which both
28 paragraph (1)(a) of this section and Subdivision 83A-C of the
29 *Income Tax Assessment Act 1997* apply:
- 30 (i) the number of the interests;
- 31 (ii) the amount paid, at or before the time of acquisition,
32 towards acquiring the interests;
- 33 (e) the following information about any interests to which
34 paragraph (1)(b) applies:
- 35 (i) the number of the interests;
- 36 (ii) the amount paid, after the time of acquisition but not
37 after the *ESS deferred taxing point, towards acquiring
38 the interests;
-

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- 1 (iii) the provider's estimate of the market value of the
2 interests at the ESS deferred taxing point;
3 (iv) the amount of TFN withholding tax (ESS) paid or
4 payable by the provider in respect of the interests during
5 the year.

6 Note: Regulations made for the purposes of section 83A-315 of the *Income*
7 *Tax Assessment Act 1997* may substitute different amounts for the
8 market values of the ESS interests: see section 392-15 in this
9 Schedule.

- 10 (4) Subsection (3) does not limit the information that the *approved
11 form may require the statement to contain.

12 *When statements must be given*

- 13 (5) The statement must be given:
14 (a) to the individual no later than 14 July after the end of the
15 year; and
16 (b) to the Commissioner no later than 14 August after the end of
17 the year.

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

20 *Disregard 30 day rule for ESS deferred taxing point if provider*
21 *does not know when shares are disposed of etc.*

- 22 (6) For the purposes of Subdivision 14-C (about TFN withholding tax
23 (ESS)) and this Division, in working out the *ESS deferred taxing
24 point for an *ESS interest, disregard subsection 83A-115(3) or
25 83A-120(3) (whichever is applicable) of the *Income Tax*
26 *Assessment Act 1997* (about the 30 day rule) if the provider does
27 not know the time worked out under that subsection at the earlier
28 of:

- 29 (a) the time (if any) the provider gives a statement to the relevant
30 individual under this section for the *financial year
31 mentioned in subsection (7); and
32 (b) the later of:
33 (i) 14 July after the end of the financial year mentioned in
34 subsection (7); and
35 (ii) if, under section 388-55, the Commissioner defers to a
36 later time the time within which the statement under this

1 section for that financial year is required to be given to
2 the individual—that later time.

3 (7) The *financial year is the financial year in which the *ESS deferred
4 taxing point for the *ESS interest occurs, disregarding subsection
5 83A-115(3) or 83A-120(3) (whichever is applicable) of the *Income*
6 *Tax Assessment Act 1997* (about the 30 day rule).

7 **392-10 Change or omission in information given to the**
8 **Commissioner**

- 9 (1) If the provider becomes aware of a material change or material
10 omission in any information given to the individual or the
11 Commissioner under this Division, the provider must:
12 (a) tell the individual or the Commissioner, as applicable, of the
13 change in the *approved form; or
14 (b) give the omitted information to the individual or the
15 Commissioner, as applicable, in the approved form.
- 16 (2) Information required by subsection (1) must be given no later than
17 30 days after the provider becomes aware of the change or
18 omission.

19 Note 1: Section 388-55 allows the Commissioner to defer the time for giving
20 an approved form.

21 Note 2: Section 286-75 provides an administrative penalty for breach of this
22 section.

23 **Subdivision 392-B—Miscellaneous**

24 **Table of sections**

25 392-15 Application of certain provisions of Division 83A of the *Income Tax*
26 *Assessment Act 1997*

27 **392-15 Application of certain provisions of Division 83A of the**
28 ***Income Tax Assessment Act 1997***

29 The following provisions of the *Income Tax Assessment Act 1997*
30 have effect for the purposes of this Division in the same way as
31 they have for the purposes of Division 83A of that Act:

- 32 (a) section 83A-130 (about takeovers and restructures);
33 (b) section 83A-305 (about associates);

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- 1 (c) section 83A-315 (about market values and discounts);
- 2 (d) section 83A-320 (about trusts);
- 3 (e) section 83A-325 (about relationships similar to employment);
- 4 (f) section 83A-335 (about stapled securities);
- 5 (g) section 83A-340 (about indeterminate rights).
- 6

1 **Part 2—Consequential amendments**

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

3 **6 Paragraphs 84-14(a) and (b)**

4 Repeal the paragraphs, substitute:

- 5 (a) the *recipient of the supply is not an entity that has acquired,
6 or may in the future acquire, an ESS interest (within the
7 meaning of the *ITAA 1997) under the scheme; and
8 (b) Subdivision 83A-B or 83A-C of the ITAA 1997 applies to
9 any ESS interest (within the meaning of that Act) acquired
10 under the scheme; and

11 **7 Section 195-1 (definition of *employee share scheme*)**

12 Omit “section 139C (including as affected by Subdivision DB of
13 Division 13A of Part III) of the *ITAA 1936”, substitute “the *ITAA
14 1997”.

15 ***Fringe Benefits Tax Assessment Act 1986***

16 **8 Subsection 136(1) (paragraphs (h) to (hc) of the definition
17 of *fringe benefit*)**

18 Repeal the paragraphs, substitute:

- 19 (h) a benefit constituted by the acquisition of an ESS interest
20 under an employee share scheme (within the meaning of the
21 *Income Tax Assessment Act 1997*) to which
22 Subdivision 83A-B or 83A-C of that Act applies; or
23 (ha) a benefit constituted by the acquisition of money or property
24 by an employee share trust (within the meaning of the
25 *Income Tax Assessment Act 1997*); or

26 ***Income Tax Assessment Act 1936***

27 **9 Subsection 6(1) (paragraph (n) of the definition of *passive*
28 *income*)**

29 Omit “Division 13A”, substitute “Division 83A of the *Income Tax*
30 *Assessment Act 1997* (about employee share schemes)”.

31 **10 Subsection 6BA(3)**

1 Omit “(other than section 26AAC)”.

2 **11 At the end of section 21A**

3 Add:

4 (7) This section does not apply to an ESS interest (within the meaning
5 of the *Income Tax Assessment Act 1997*) to which
6 Subdivision 83A-B or 83A-C of that Act (about employee share
7 schemes) applies.

8 **12 Subsection 23AF(18) (paragraph (a) of the definition of**
9 ***eligible foreign remuneration*)**

10 Omit “Division 13A”, substitute “Division 83A of the *Income Tax*
11 *Assessment Act 1997* (about employee share schemes)”.

12 **13 Subsection 23AF(18) (paragraph (b) of the definition of**
13 ***eligible foreign remuneration*)**

14 Omit “Division 13A”, substitute “that Division”.

15 **14 Subsection 23AG(7) (definition of *foreign earnings*)**

16 Omit “Division 13A”, substitute “Division 83A of the *Income Tax*
17 *Assessment Act 1997* (about employee share schemes)”.

18 **15 Sections 26AAC and 26AAD**

19 Repeal the sections.

20 **16 Section 109H**

21 Omit “shares, rights or stapled securities”, substitute “ESS interests”.

22 **17 Section 109NB**

23 Repeal the section, substitute:

24 **109NB Loans to purchase shares under employee share schemes not**
25 **treated as dividends**

26 A private company is not taken under section 109D to pay a
27 dividend because of a loan made solely for the purpose of enabling
28 the shareholder, or an associate of the shareholder, to acquire an
29 ESS interest under an employee share scheme (within the meaning
30 of the *Income Tax Assessment Act 1997*) to which:

- 1 (a) Subdivision 83A-B and subsections 83A-35(3) to (9) of that
2 Act apply; or
3 (b) Subdivision 83A-C of that Act applies.

4 **18 Division 13A of Part III**

5 Repeal the Division.

6 **19 Subsection 170(10AA) (after table item 25)**

7 Insert:

- | | | |
|----|-----------------|---|
| 30 | Section 83A-310 | Forfeiture of ESS interests acquired under an employee share scheme |
| 35 | Section 83A-340 | Rights that become rights to acquire shares |

8 **20 Section 530A**

9 Repeal the section, substitute:

10 **530A Reduction of foreign investment fund income because of**
11 **employee share scheme**

- 12 (1) This section applies if a taxpayer acquires an ESS interest (within
13 the meaning of the *Income Tax Assessment Act 1997*) to which
14 Subdivision 83A-C of that Act (about employee share schemes)
15 applies.
- 16 (2) The foreign investment fund income of the taxpayer for a notional
17 accounting period of the FIF, to the extent that the income relates
18 to the interest, is zero if, for the whole of the period, the following
19 conditions are satisfied:
- 20 (a) the taxpayer holds the interest;
 - 21 (b) the interest is an interest in the FIF;
 - 22 (c) the ESS deferred taxing point (within the meaning of the
23 *Income Tax Assessment Act 1997*) for the interest has not
24 occurred.
- 25 (3) The foreign investment fund income of the taxpayer for a notional
26 accounting period of the FIF is to be reduced by an amount equal
27 to any increase in the market value of the interest during a period
28 (if any):
- 29 (a) that forms part of the notional accounting period; and
 - 30 (b) for the whole of which, the following conditions are satisfied:

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- 1 (i) the taxpayer holds the interest;
2 (ii) the interest is an interest in the FIF;
3 (iii) the ESS deferred taxing point (within the meaning of
4 the *Income Tax Assessment Act 1997*) for the interest
5 has not occurred.

6 (4) Section 83A-315 of the *Income Tax Assessment Act 1997* (about
7 market values of ESS interests) applies to subsection (3) of this
8 section in the same way as it applies to Division 83A of that Act.

9 ***Income Tax Assessment Act 1997***

10 **21 Section 10-5 (table item headed “shares”)**

11 Repeal:
employee share acquisition schemes **26AAC, 139 to
139GH**

12 Substitute:
employee share schemes Subdivisions 83A-
B and 83A-C

13 **22 Section 12-5 (table item headed “shares”)**

14 Repeal:
employee share acquisition schemes, deduction for
15 provider of qualifying shares or rights **139DC**

Substitute:
employee share schemes, deduction for provider of ESS
16 interests Subdivision 83A-
D

16 **23 At the end of subsection 15-2(3)**

17 Add:
18 ; (e) *ESS interests to which Subdivision 83A-B or 83A-C (about
19 employee share schemes) applies.

20 **24 Paragraph 59-40(2)(d)**

21 Repeal the paragraph, substitute:
22 (d) if you acquired a beneficial interest in the rights under an
23 *employee share scheme—neither Subdivision 83A-B nor

1 83A-C (about employee share schemes) applies to the
2 beneficial interest;

3 **25 Paragraph 82-135(m)**

4 Omit “Division 13A of Part III of the *Income Tax Assessment Act*
5 *1936*”, substitute “Division 83A of this Act”.

6 **26 Subsections 104-60(5) and 104-75(4) and (6) (notes)**

7 Omit “section 130-90”, substitute “section 130-80”.

8 **27 Subsections 104-145(7) and (8)**

9 Repeal the subsections, substitute:

10 (7) You cannot choose to make a *capital loss for a *share, or a right to
11 acquire a beneficial interest in a share, if:

12 (a) you acquired the beneficial interest (the *ESS interest*) in the
13 share or right under an *employee share scheme; and

14 (b) subsequent to an amount being included in your assessable
15 income under Division 83A (about employee share schemes)
16 in relation to the ESS interest, section 83A-310 (about
17 forfeiture) applies in relation to ESS interest.

18 **28 Subsection 104-160(6)**

19 Repeal the subsection.

20 **29 Section 109-55 (table item 12)**

21 Repeal the item.

22 **30 Section 109-60 (after table item 11)**

23 Insert:

11A	You acquire an *ESS interest and Subdivision 83A-C (about employee share schemes) applies to the interest	at the *ESS deferred taxing point for the interest	section 83A-125
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24 **31 Subsection 112-20(3) (note)**

25 After “Note”, insert “(1)”.

26 **32 At the end of subsection 112-20(3)**

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1 Add:

2 Note 2: This section does not apply to ESS interests acquired under employee
3 share schemes: see subsection 130-80(4).

4 **33 Section 112-75**

5 Repeal the section.

6 **34 Section 112-97 (at the end of the table)**

7 Add:

32 You acquire an *ESS interest and Subdivision 83A-B or 83A-C (about employee share schemes) applies to the interest First element of cost base and reduced cost base sections 83A-30 and 83A-125

8 **35 Subsection 115-30(1) (table item 8)**

9 Repeal the item.

10 **36 Subsections 115-30(1A) and (1B)**

11 Repeal the subsections.

12 **37 At the end of section 116-30**

13 Add:

14 Note: This section does not apply to ESS interests acquired under employee
15 share schemes: see subsection 130-80(4).

16 **38 Subsections 125-75(2) and (3)**

17 Repeal the subsections, substitute:

18 (2) An *ownership interest, in a company, that is owned by an entity is
19 disregarded under subsection (1) if:

- 20 (a) the entity acquired a beneficial interest in the ownership
21 interest under an *employee share scheme; and
22 (b) either Subdivision 83A-B and subsections 83A-35(3) to (9),
23 or Subdivision 83A-C, applies to the beneficial interest; and
24 (c) the ownership interest is not a fully-paid ordinary *share.

25 (3) An *ownership interest, in a trust, that is owned by an entity is
26 disregarded under subsection (1) if:

- 1 (a) both of the following would apply if Division 83A (about
2 employee share schemes) applied to ownership interests in
3 trusts in the same way as it applies to *shares:
4 (i) the entity acquired a beneficial interest in the ownership
5 interest under an *employee share scheme;
6 (ii) either Subdivision 83A-B and subsections 83A-35(3) to
7 (9), or Subdivision 83A-C, applies to the beneficial
8 interest; and
9 (b) the ownership interest is not a fully-paid unit.

10 **39 Subsection 130-40(1) (note)**

11 Repeal the note, substitute:

12 Note: For rights acquired under employee share schemes, see Division 83A,
13 Subdivision 130-D and Division 134.

14 **40 Subdivision 130-D**

15 Repeal the Subdivision, substitute:

16 **Subdivision 130-D—Employee share schemes**

17 **Table of sections**

18	130-75	Objects of Subdivision
19	130-80	ESS interests acquired under employee share schemes
20	130-85	Interests in employee share trusts
21	130-90	Shares held by employee share trusts
22	130-95	Shares and rights in relation to ESS interests
23	130-100	Application of certain provisions of Division 83A

24 **130-75 Objects of Subdivision**

25 The objects of this Subdivision are:

- 26 (a) to recognise that:
27 (i) Division 83A contains the primary rules for taxing gains
28 on *ESS interests acquired under *employee share
29 schemes; and
30 (ii) *capital gains and *capital losses on such interests
31 should usually be disregarded during the period in
32 which Division 83A applies to them; and
33 (b) to align the treatment of ESS interests under Division 83A
34 and the CGT provisions by, for example:

- 1 (i) turning off certain special CGT rules; and
2 (ii) extending some of the deeming provisions of that
3 Division into the CGT provisions; and
4 (c) to disregard *employee share trusts for most CGT purposes,
5 by treating ESS interests owned by such trusts as being
6 directly owned by the beneficiaries of the trusts.

7 **130-80 ESS interests acquired under employee share schemes**

8 *Capital gains and losses*

- 9 (1) Disregard any *capital gain or *capital loss to the extent that it
10 results from a *CGT event if:
11 (a) the CGT event happens in relation to an *ESS interest you
12 *acquire under an *employee share scheme; and
13 (b) the CGT event is not CGT event E4, G1 or K8; and
14 (c) if Subdivision 83A-B applies to the interest—the time of the
15 acquisition is the time when the CGT event happens; and
16 (d) if Subdivision 83A-C applies to the interest:
17 (i) the time of the acquisition is the time when the CGT
18 event happens; or
19 (ii) the CGT event happens on or before the *ESS deferred
20 taxing point for the ESS interest.
- 21 (2) Subsection (1) does not apply if:
22 (a) Subdivision 83A-C applies to the *ESS interest; and
23 (b) the *CGT event happens because you forfeit or lose the ESS
24 interest (other than by disposing of it) on or before the *ESS
25 deferred taxing point for the interest.

26 *General acquisition rule*

- 27 (3) Subsection 109-5(2) (about when you acquire a CGT asset) does
28 not apply to a *CGT asset and a *CGT event if:
29 (a) the CGT asset is:
30 (i) a *share; or
31 (ii) a right to acquire a beneficial interest in a share; and
32 (b) the CGT event is CGT event A1; and
33 (c) you acquire an *ESS interest; and

- 1 (d) the ESS interest is a beneficial interest in the share or right;
2 and
3 (e) Subdivision 83A-B or 83A-C (about employee share
4 schemes) applies to the ESS interest.

5 *Market value substitution rule*

- 6 (4) Sections 112-20 and 116-30 (about the market value substitution
7 rule) do not apply to the extent that they relate to:
8 (a) you acquiring an *ESS interest to which Subdivision 83A-C
9 (about employee share schemes) applies; or
10 (b) you:
11 (i) forfeiting an ESS interest; or
12 (ii) forfeiting or losing an ESS interest that is a beneficial
13 interest in a right (without you having disposed of the
14 interest or exercised the right);
15 if Subdivision 83A-B or 83A-C applies to the ESS interest
16 (ignoring section 83A-310).

17 **130-85 Interests in employee share trusts**

18 *Scope*

- 19 (1) This section applies if:
20 (a) you *acquire an *ESS interest under an *employee share
21 scheme; and
22 (b) Subdivision 83A-B or 83A-C applies to the ESS interest; and
23 (c) the ESS interest is, or arises because of, an interest you hold
24 in an *employee share trust.

25 *Application of Division 83A, Part 3-1 and this Part*

- 26 (2) Division 83A (Employee share schemes), Part 3-1 (Capital gains
27 and losses: general topics) and this Part apply as if you were
28 absolutely entitled to the relevant *share or right:
29 (a) from the time of acquisition of the *ESS interest; and
30 (b) until you no longer have an ESS interest in the share or right.

31 Note 1: An interest you hold in an employee share trust may give rise to an
32 ESS interest because of the operation of section 83A-320.

33 Note 2: As a result of subsection (2) of this section, CGT event E5 might
34 happen at the time of acquisition. This may result in the trustee

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1 making a capital gain. However, any capital gain made by the
2 beneficiary would be disregarded under section 130-80.

3 (3) However, if this section applies to you because an *associate of
4 yours *acquired the *ESS interest, Division 83A, this Part and
5 Part 3-3 apply as if your associate were absolutely entitled to the
6 relevant *share or right (instead of you):

7 (a) either:

8 (i) if Subdivision 83A-B applies to the ESS interest—from
9 the time of acquisition; or

10 (ii) if Subdivision 83A-C applies to the ESS interest—from
11 immediately after the *ESS deferred taxing point for the
12 ESS interest; and

13 (b) until your associate no longer has an ESS interest in the share
14 or right.

15 Note: Once the ESS interest has been taxed to you under Subdivision 83A-B
16 or 83A-C, section 83A-305 (which treats the interest as having been
17 acquired by you, rather than your associate) is no longer relevant.
18 Subsection (3) of this section ensures that your associate then gets the
19 same tax treatment as you would have, had you originally acquired the
20 interest. This does not, however, imply a disposal from you to your
21 associate.

22 *Meaning of employee share trust*

23 (4) An *employee share trust*, for an *employee share scheme, is a trust
24 whose sole activities are:

25 (a) obtaining *shares or rights in a company; and

26 (b) ensuring that *ESS interests in the company that are
27 beneficial interests in those shares or rights are provided
28 under the employee share scheme to employees, or to
29 *associates of employees, of:

30 (i) the company; or

31 (ii) a *subsidiary of the company; and

32 (c) other activities that are merely incidental to the activities
33 mentioned in paragraphs (a) and (b).

34 **130-90 Shares held by employee share trusts**

35 (1) Disregard any *capital gain or *capital loss made by an *employee
36 share trust, or a beneficiary of the trust, to the extent that it results
37 from a *CGT event, if:

- 1 (a) the CGT event is CGT event E5 or E7; and
2 (b) the CGT event happens in relation to a *share; and
3 (c) the beneficiary had acquired a beneficial interest in the share
4 by exercising a right; and
5 (d) the beneficiary's beneficial interest in the right was an *ESS
6 interest to which Subdivision 83A-B or 83A-C (about
7 employee share schemes) applied.
- 8 (2) Subsection (1) does not apply if the beneficiary acquired the
9 beneficial interest in the *share for more than its *cost base in the
10 hands of the *employee share trust at the time the *CGT event
11 happens.

12 **130-95 Shares and rights in relation to ESS interests**

- 13 For the purposes of Part 3-1 (Capital gains and losses: general
14 topics) and this Part, treat a *CGT event that happens in relation to
15 a *share or right in the same way as a CGT event that happens in
16 relation to an *ESS interest, if:
17 (a) Subdivision 83A-B or 83A-C (about employee share
18 schemes) applies to the ESS interest; and
19 (b) the ESS interest forms part of the share or right.

20 **130-100 Application of certain provisions of Division 83A**

- 21 The following provisions have effect for the purposes of this
22 Subdivision in the same way as they have for the purposes of
23 Division 83A:
24 (a) section 83A-130 (about takeovers and restructures);
25 (b) section 83A-305 (about associates);
26 (c) section 83A-320 (about trusts);
27 (d) section 83A-325 (about relationships similar to employment);
28 (e) section 83A-335 (about stapled securities);
29 (f) section 83A-340 (about indeterminate rights).

30 **41 Section 134-1 (note 3)**

31 Repeal the note, substitute:

- 32 Note 3: Item 1 in the table is modified for ESS interests acquired under
33 employee share schemes: see Division 83A and section 112-97.

- 1 (i) he or she does not hold a beneficial interest in more than
2 5% of the shares in the company; and
3 (ii) he or she is not in a position to control, or to control the
4 casting of, more than 5% of the maximum number of
5 votes that might be cast at a general meeting of the
6 company; and
7 (c) the share is not a *non-equity share.

8 (2) An individual also acquires a beneficial interest in a *share in a
9 company under an *employee share scheme in circumstances that
10 are relevant for the purposes of paragraphs 208-205(b) and
11 208-235(b) if:

- 12 (a) the share is part of a stapled security; and
13 (b) Subdivision 83A-B or 83A-C (about employee share
14 schemes) applies to the beneficial interest in the stapled
15 security.

16 **44 Section 208-235**

17 Repeal the section, substitute:

18 **208-235 Distributions to employees acquiring shares under eligible** 19 **employee share schemes**

20 Division 207 also applies to a *distribution *franked with an
21 exempting credit made by a *former exempting entity as if it were
22 a *franked distribution if:

- 23 (a) the distribution is made to an individual who, at the time the
24 distribution is made, is an employee of:
25 (i) the former exempting entity; or
26 (ii) a *subsidiary of the former exempting entity; and
27 (b) the employee acquired a beneficial interest in the *share on
28 which the distribution is made:
29 (i) under an *employee share scheme; and
30 (ii) in circumstances specified as relevant in
31 section 208-215; and
32 (c) the employee does not hold that beneficial interest as a
33 trustee.

34 **45 Paragraph 208-240(b)**

35 Omit “natural persons”, substitute “individuals”.

1 **46 Paragraphs 208-240(c) and (d)**

2 Omit “persons mentioned in paragraph (b)”, substitute “individuals”.

3 **47 Paragraph 208-240(e)**

4 Omit “a person”, substitute “an individual”.

5 **48 Paragraph 208-240(f)**

6 Omit “the person” (first occurring), substitute “the individual mentioned
7 in paragraph (e)”.

8 **49 Paragraph 208-240(f)**

9 Omit “the person mentioned in paragraph (b)”, substitute “that
10 individual”.

11 **50 Paragraph 208-240(g)**

12 Omit “the person”, substitute “the individual”.

13 **51 Subsection 247-15(3)**

14 Repeal the subsection, substitute:

15 (3) This Division does not apply to a *capital protected borrowing if:

16 (a) an *ESS interest is acquired under the borrowing; and

17 (b) Subdivision 83A-B or 83A-C (about employee share
18 schemes) applies to the ESS interest.

19 **52 Paragraph 703-35(4)(b)**

20 Omit “subsection (7)”, substitute “subsection (5)”.

21 **53 Subsections 703-35(5), (6) and (7)**

22 Repeal the subsections, substitute:

23 (5) A *share or *membership interest in a company may be disregarded
24 under subsection (4) if:

25 (a) the entity who holds the beneficial interest in the share or
26 membership interest acquired that beneficial interest:

27 (i) under an *employee share scheme; or

28 (ii) by exercising a right, a beneficial interest in which was
29 acquired under an employee share scheme; and

- 1 (b) paragraphs 83A-105(1)(a) and (b) and subsection 83A-105(2)
2 apply to the beneficial interest acquired under the scheme;
3 and
4 (c) in the case of a membership interest—the interest is part of a
5 stapled security.

6 **54 Paragraph 707-325(5)(b)**

7 Repeal the paragraph, substitute:

- 8 (b) in association with the acquisition of a *share in a company
9 in relation to which the conditions in subsection 703-35(5)
10 are met; or

11 **55 Subsection 707-325(5) (note)**

12 Omit “and section 139CD of the *Income Tax Assessment Act 1936*
13 deal”, substitute “deals”.

14 **56 Subsection 709-80(1) (note 1)**

15 Omit “held”, substitute “acquired”.

16 **57 Subsection 713-140(5) (table item 3)**

17 Repeal the item, substitute:

3	<i>Income Tax Assessment Act 1997</i>	Division 83A	The Division does not apply in relation to an *ESS interest acquired under an *employee share scheme before the day specified in the choice if the Division did not apply in relation to the interest before that day.
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18 **58 Subsections 719-30(3), (4) and (5)**

19 Repeal the subsections, substitute:

- 20 (3) A *share or *membership interest in a company is covered by this
21 subsection if:
22 (a) the entity who holds the beneficial interest in the share or
23 membership interest acquired that beneficial interest:
24 (i) under an *employee share scheme; or
25 (ii) by exercising a right, a beneficial interest in which was
26 acquired under an employee share scheme; and

- 1 (b) paragraphs 83A-105(1)(a) and (b) and subsection 83A-105(2)
2 apply to the beneficial interest acquired under the scheme;
3 and
4 (c) in the case of a membership interest—the interest is part of a
5 stapled security.

6 **59 Paragraph 768-910(3)(c)**

7 Omit “Division 86;”, substitute “Division 86.”.

8 **60 Paragraph 768-910(3)(d)**

9 Repeal the paragraph.

10 **61 Subsections 768-910(4), (5) and (6)**

11 Repeal the subsections.

12 **62 Sections 768-920 to 768-945**

13 Repeal the sections.

14 **63 Subsection 768-955(2) (2nd sentence)**

15 Repeal the sentence.

16 **64 Subsection 768-955(4)**

17 Repeal the subsection, substitute:

- 18 (4) This section does not apply to an *ESS interest if:
19 (a) Subdivision 83A-C (about employee share schemes) applies
20 to the interest; and
21 (b) the *ESS deferred taxing point for the interest has not yet
22 occurred.

23 **65 Subsection 855-45(4)**

24 Repeal the section, substitute:

- 25 (4) This section does not apply to an *ESS interest if:
26 (a) Subdivision 83-C (about employee share schemes) applies to
27 the interest; and
28 (b) the *ESS deferred taxing point for the interest has not yet
29 occurred.

30 **66 At the end of Division 960**

1 Add:

2 **960-415 Amounts that depend on market value**

3 To avoid doubt, apply the rules in this Subdivision to the *market
4 value component of any calculation that involves market value.

5 **67 Subsection 995-1(1) (definition of *cessation time*)**

6 Repeal the definition.

7 **68 Subsection 995-1(1) (definition of *employee share*
8 *scheme*)**

9 Repeal the definition, substitute:

10 *employee share scheme* has the meaning given by subsection
11 83A-10(2).

12 **69 Subsection 995-1(1) (definition of *employee share trust*)**

13 Repeal the definition, substitute:

14 *employee share trust* has the meaning given by subsection
15 130-85(4).

16 **70 Subsection 995-1(1)**

17 Insert:

18 *ESS deferred taxing point*, for an *ESS interest, has the meaning
19 given by sections 83A-115 and 83A-120.

20 Note 1: ESS is short for employee share scheme.

21 Note 2: For ESS interests acquired before 1 July 2009, see subsection
22 83A-5(4) of the *Income Tax (Transitional Provisions) Act 1997*.

23 **71 Subsection 995-1(1)**

24 Insert:

25 *ESS interest*, in a company, has the meaning given by subsection
26 83A-10(1).

27 Note: ESS is short for employee share scheme.

28 **72 Subsection 995-1(1) (definition of *qualifying right*)**

29 Repeal the definition.

1 **73 Subsection 995-1(1) (definition of *qualifying share*)**

2 Repeal the definition.

3 **74 Subsection 995-1(1) (definition of *subsidiary*)**

4 Repeal the definition, substitute:

5 *subsidiary*: the question whether a company is a *subsidiary* of
6 another company is to be determined in the same way as the
7 question whether a corporation is a subsidiary of another
8 corporation is determined under the *Corporations Act 2001*.

9 Note: The expression *100% subsidiary* has the meaning given by
10 section 975-505.

11 **75 Subsection 995-1(1)**

12 Insert:

13 *TFN withholding tax (ESS)* means tax payable in accordance with
14 section 14-155 in Schedule 1 to the *Taxation Administration Act*
15 *1953*.

16 Note: ESS is short for employee share scheme.

17 **76 Subsection 995-1(1)**

18 Insert:

19 *work and income support withholding payments* means work and
20 income support related withholding payments and benefits, within
21 the meaning given by the *Income Tax Assessment Act 1936*.

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

23 **77 Subdivisions 130-DA and 130-D**

24 Repeal the Subdivisions.

25 ***Taxation Administration Act 1953***

26 **78 Paragraphs 14-5(3)(d) and (e) in Schedule 1**

27 Repeal the paragraphs, substitute:

28 (d) a benefit constituted by the acquisition of an *ESS interest
29 *under an employee share scheme to which

1 Subdivision 83A-B or 83A-C of the *Income Tax Assessment*
2 *Act 1997* applies.

3 **79 Subsection 250-10(2) in Schedule 1 (after table item 95)**

4 Insert:

100 TFN withholding tax 14-155 in *Taxation Administration Act 1953*
(ESS) Schedule 1

5 **80 After subsection 286-75(2B) in Schedule 1**

6 Insert:

7 (2BA) You are also liable to an administrative penalty if:

8 (a) you are required under Division 392 (Employee share
9 scheme reporting) to give a statement to an entity (other than
10 the Commissioner) in the *approved form by a particular day;
11 and

12 (b) you do not give the statement in the approved form to the
13 entity by that day.

14 **81 Paragraph 286-80(2)(a) in Schedule 1**

15 After “(2B)”, insert “, (2BA)”.

16 **82 Subsection 446-5(6) in Schedule 1 (table item 5)**

17 Omit “section 130-90”, substitute “section 130-80”.

18

1 **Part 3—Application provisions**

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

3 **83 At the end of Part 2-40**

4 Add:

5 **Division 83A—Employee share schemes**

6 **Table of Subdivisions**

7 83A-A Application of Division 83A of the Income Tax Assessment
8 Act 1997

9 83A-B Application of former provisions of the Income Tax
10 Assessment Act 1936

11 **Subdivision 83A-A—Application of Division 83A of the Income
12 Tax Assessment Act 1997**

13 **Table of sections**

14 83A-5 Application of Division 83A of the *Income Tax Assessment Act 1997*

15 **83A-5 Application of Division 83A of the *Income Tax Assessment Act*
16 *1997***

17 (1) Division 83A of the *Income Tax Assessment Act 1997* applies in
18 relation to an ESS interest if:

19 (a) the interest was acquired on or after 1 July 2009; and

20 (b) the relevant share or right (within the meaning of
21 Division 13A of Part III of the *Income Tax Assessment Act*
22 *1936*, as in force at the time (the ***pre-Division 83A time***)
23 occurring just before Schedule 1 to the *Tax Laws Amendment*
24 *(2009 Budget Measures No. 2) Act 2009* commenced,
25 ***(former Division 13A)***) was *not* acquired (within the
26 meaning of former Division 13A) before 1 July 2009.

27 (2) Furthermore, Subdivision 83A-C of the *Income Tax Assessment*
28 *Act 1997* (and the rest of Division 83A of that Act, to the extent
29 that it relates to that Subdivision) also applies in relation to an ESS
30 interest if:

- 1 (a) all of the following subparagraphs apply:
2 (i) at the pre-Division 83A time, subsection 139B(3) of the
3 *Income Tax Assessment Act 1936* applied in relation to
4 the interest;
5 (ii) the interest was acquired (within the meaning of former
6 Division 13A) before 1 July 2009;
7 (iii) the cessation time mentioned in subsection 139B(3) of
8 the *Income Tax Assessment Act 1936*, as in force at the
9 pre-Division 83A time, for the interest did not occur
10 before 1 July 2009; or
11 (b) all of the following subparagraphs apply:
12 (i) at the pre-Division 83A time, section 26AAC of the
13 *Income Tax Assessment Act 1936*, as in force at that
14 time, (**former section 26AAC**) applied in relation to the
15 interest;
16 (ii) the interest was acquired (within the meaning of former
17 section 26AAC) before 1 July 2009;
18 (iii) an amount has not been included in a person's
19 assessable income under former section 26AAC in
20 relation to the interest before 1 July 2009.
- 21 (3) Subsection (2) applies despite section 83A-105 of the *Income Tax*
22 *Assessment Act 1997*.
- 23 (4) If Subdivision 83A-C of the *Income Tax Assessment Act 1997*
24 applies in relation to an ESS interest because of subsection (2):
25 (a) do not include an amount in your assessable income under
26 subsection 83A-110(1) of that Act in relation to the ESS
27 interest to the extent that the amount relates to your
28 employment outside Australia; and
29 (b) subject to subsection 83A-115(3) or 83A-120(3) of that Act,
30 whichever is applicable, treat the **ESS deferred taxing point**
31 for the interest as being:
32 (i) if paragraph (2)(a) of this section applies—the cessation
33 time mentioned in subparagraph (2)(a)(iii); or
34 (ii) if paragraph (2)(b) applies—the earliest time at which
35 an amount is included in a person's assessable income
36 under former section 26AAC in relation to the interest;
37 and
38 (c) treat the reference in subsection 83A-115(3) or 83A-120(3)
39 (30 day rule for ESS deferred taxing point), whichever is
-

- 1 applicable, of that Act to the time worked out under
2 subsection 83A-115(2) or 83A-120(2) of that Act as being a
3 reference to the time worked out under paragraph (b) of this
4 subsection; and
- 5 (d) treat the requirements in paragraphs 83A-310(a), (b) and (c)
6 of that Act as being satisfied in relation to the interest if, and
7 only if:
- 8 (i) if paragraph (2)(a) applies—the 2 requirements
9 mentioned in section 139DD of the *Income Tax*
10 *Assessment Act 1936* (as in force at the
11 pre-Division 83A time) are satisfied in relation to the
12 interest; or
- 13 (ii) if paragraph (2)(b) applies—the requirements in
14 paragraphs (8D)(a), (b) and (c) of former
15 section 26AAC are satisfied in relation to the interest;
16 and
- 17 (e) Subdivision 14-C in Schedule 1 to the *Taxation*
18 *Administration Act 1953* (about TFN withholding tax (ESS))
19 does not apply to the ESS interest; and
- 20 (f) if paragraph (2)(a) applies:
- 21 (i) for the purposes of Division 115 of the *Income Tax*
22 *Assessment Act 1997* (Discount capital gains and trusts'
23 net capital gains), treat the ESS interest as having been
24 acquired by an individual when the individual acquired
25 the legal title in the share or right of which the ESS
26 interest forms part; and
- 27 (ii) for the purposes of Division 392 in Schedule 1 to the
28 *Taxation Administration Act 1953* (Statements),
29 disregard any election made under former section 139E
30 of the *Income Tax Assessment Act 1936*; and
- 31 (g) if paragraph (2)(b) applies—paragraph 82-135(m) of the
32 *Income Tax Assessment Act 1997* does not apply in relation
33 to the ESS interest.

34 **Subdivision 83A-B—Application of former provisions of the**
35 **Income Tax Assessment Act 1936**

36 **Table of sections**

37	83A-10	Savings—continued operation of former provisions
38	83A-15	Indeterminate rights

1 **83A-10 Savings—continued operation of former provisions**

2 (1) This section applies if:

3 (a) at the time (the *pre-Division 83A time*) occurring just before
4 Schedule 1 to the *Tax Laws Amendment (2009 Budget*
5 *Measures No. 2) Act 2009* commenced:

6 (i) Division 13A of Part III of the *Income Tax Assessment*
7 *Act 1936*, as in force at that time, (*former Division 13A*)
8 applied in relation to a share or right (within the
9 meaning of former Division 13A); or

10 (ii) section 26AAC of that Act, as in force at that time,
11 applied in relation to a share or right (within the
12 meaning of that section as in force at that time); and

13 (b) if there is a beneficial interest in the share or right that is an
14 ESS interest—Division 83A of the *Income Tax Assessment*
15 *Act 1997* does not apply in relation to the interest under
16 section 83A-5.

17 (2) If subparagraph (1)(a)(i) applies, to avoid doubt, former
18 Division 13A continues to apply (in spite of its repeal) to the share
19 or right.

20 (3) If subparagraph (1)(a)(ii) applies, to avoid doubt, sections 26AAC
21 and 26AAD of the *Income Tax Assessment Act 1936*, as in force at
22 the pre-Division 83A time, continue to apply (in spite of their
23 repeal) to the share or right.

24 **83A-15 Indeterminate rights**

25 (1) This section applies if:

26 (a) you acquired a beneficial interest in a right before 1 July
27 2009; and

28 (b) on or after 1 July 2009, the right becomes a right to acquire a
29 beneficial interest in a share.

30 (2) Division 13A of the *Income Tax Assessment Act 1936* is taken to
31 have applied as if the right had always been a right to acquire the
32 beneficial interest in the share.

33 **84 At the end of Division 703**

34 Add:

1 **703-35 Employee share schemes**

2 Despite the amendments of section 703-35 of the *Income Tax*
3 *Assessment Act 1997* made by Schedule 1 to the *Tax Laws*
4 *Amendment (2009 Budget Measures No. 2) Act 2009*,
5 subsection (4) of that section continues to apply, from the
6 commencement of that Schedule, to each share and membership
7 interest that it applied to just before that commencement.

8 **85 At the end of Subdivision 719-B**

9 Add:

10 **719-30 Employee share schemes**

11 Despite the amendment of section 719-30 of the *Income Tax*
12 *Assessment Act 1997* made by Schedule 1 to the *Tax Laws*
13 *Amendment (2009 Budget Measures No. 2) Act 2009*,
14 subsection (2) of that section continues to apply, from the
15 commencement of that Schedule, to each share and membership
16 interest that it applied to just before that commencement.

17 **86 Application of other amendments**

18 The amendments made by this Schedule (other than items 1, 83, 84 and
19 85) apply in relation to the ESS interests mentioned in subsections
20 83A-5(1) and (2) of the *Income Tax (Transitional Provisions) Act 1997*,
21 as inserted by this Schedule.

22 **87 Transitional—regulations**

23 Despite subsection 12(2) of the *Legislative Instruments Act 2003*,
24 regulations that:

- 25 (a) are made for the purposes of Division 83A of the *Income Tax*
26 *Assessment Act 1997*, added by this Schedule; or
27 (b) are made for the purposes of a taxation law (within the
28 meaning of that Act) and relate to the amendments made by
29 this Schedule;

30 may take effect from any time on or after 1 July 2009, if the regulations
31 are made before the end of the period of 3 months commencing on the
32 day this Schedule commences.

33

1 **Schedule 2—Non-commercial losses**
2

3 ***Income Tax Assessment Act 1997***

4 **1 Section 35-1**

5 Omit:

6

<p>It sets out a series of tests to determine whether a business activity is treated as being non-commercial.</p> <p>The deferred losses may be offset in later years against profits from the activity or, if one of the tests is satisfied or the Commissioner exercises a discretion, against other income.</p>
--

11 Substitute:

12

<p>It sets out an income requirement and a series of tests to determine whether a business activity is treated as being non-commercial.</p> <p>The deferred losses may be offset in later years against profits from the activity. They may also be offset against other income if the income requirement and one of the other tests are satisfied, or if the Commissioner exercises a discretion.</p>
--

18 **2 Paragraph 35-10(1)(a)**

19 Repeal the paragraph, substitute:

- 20 (a) you satisfy subsection (2E) for that year, and one of the tests
21 set out in any of the following provisions is satisfied for the
22 business activity for that year:
- 23 (i) section 35-30 (assessable income test);
 - 24 (ii) section 35-35 (profits test);
 - 25 (iii) section 35-40 (real property test);
 - 26 (iv) section 35-45 (other assets test); or

27 **3 Subsection 35-10(2) (note)**

28 Repeal the note, substitute:

29 Note 1: There are modifications of this rule if you have exempt income (see
30 section 35-15) or you become bankrupt (see section 35-20).

1 Note 2: This rule does not apply if your excess is solely due to deductions
2 under Division 41 (see section 35-10 of the *Income Tax (Transitional*
3 *Provisions) Act 1997*).

4 **4 Paragraph 35-10(2A)(a)**

5 Repeal the paragraph, substitute:

6 (a) you satisfied subsection (2E), and one of the tests set out in
7 any of the following provisions was satisfied for the business
8 activity:

9 (i) section 35-30 (assessable income test);

10 (ii) section 35-35 (profits test);

11 (iii) section 35-40 (real property test);

12 (iv) section 35-45 (other assets test); or

13 **5 After subsection 35-10(2D)**

14 Insert:

15 *Income requirement*

16 (2E) You satisfy this subsection for an income year if the sum of the
17 following is less than \$250,000:

18 (a) your taxable income for that year;

19 (b) your *reportable fringe benefits total for that year;

20 (c) your *reportable superannuation contributions for that year;

21 (d) your *total net investment losses for that year.

22 For the purposes of paragraph (a), when working out your taxable
23 income, disregard any excess mentioned in subsection (2) for any
24 *business activity for that year that you could otherwise deduct
25 under this Act for that year.

26 **6 Subsection 35-55(1)**

27 After “may”, insert “, on application,”.

28 **7 Subsection 35-55(1)**

29 After “one or more income years”, insert “(the *excluded years*)”.

30 **8 Paragraph 35-55(1)(a)**

31 Omit “that or those income years”, substitute “the excluded years”.

32 **9 Paragraph 35-55(1)(b)**

1 Omit “the business activity has started to be carried on and, for that or
2 those income years:”, substitute “for an applicant who carries on the
3 business activity who satisfies subsection 35-10(2E) (income
4 requirement) for the most recent income year ending before the
5 application is made—the business activity has started to be carried on
6 and, for the excluded years:”.

7 **10 Paragraph 35-55(1)(b) (note)**

8 Repeal the note.

9 **11 At the end of subsection 35-55(1)**

10 Add:

11 ; or (c) for an applicant who carries on the business activity who
12 does not satisfy subsection 35-10(2E) (income requirement)
13 for the most recent income year ending before the application
14 is made—the business activity has started to be carried on
15 and, for the excluded years:

- 16 (i) because of its nature, it has not produced, or will not
17 produce, assessable income greater than the deductions
18 attributable to it; and
- 19 (ii) there is an objective expectation, based on evidence
20 from independent sources (where available) that, within
21 a period that is commercially viable for the industry
22 concerned, the activity will produce assessable income
23 for an income year greater than the deductions
24 attributable to it for that year (apart from the operation
25 of subsections 35-10(2) and (2C)).

26 Note: Paragraphs (b) and (c) are intended to cover a business activity that
27 has a lead time between the commencement of the activity and the
28 production of any assessable income. For example, an activity
29 involving the planting of hardwood trees for harvest, where many
30 years would pass before the activity could reasonably be expected to
31 produce income.

32 **12 Subsection 35-55(2)**

33 After “may”, insert “, on application,”.

34 **13 At the end of section 35-55**

35 Add:

- 1 (3) An application for a decision by the Commissioner under this
2 section must be made in the *approved form.

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

4 **14 After Division 34**

5 Insert:

6 **Division 35—Deferral of losses from non-commercial**
7 **business activities**

8 **Table of sections**

9	35-10	Deductions for certain new business investment
10	35-20	Application of Commissioner's decisions

11 **35-10 Deductions for certain new business investment**

12 The rule in subsection 35-10(2) of the *Income Tax Assessment Act*
13 *1997* does not apply for an income year to a business activity if:

- 14 (a) apart from that rule, you could otherwise deduct amounts
15 under Division 41 of that Act for that income year; and
16 (b) the total of those amounts is more than or equal to the excess
17 worked out under that subsection for the business activity for
18 the income year.

19 **35-20 Application of Commissioner's decisions**

20 A decision of the Commissioner made under section 35-55 of the
21 *Income Tax Assessment Act 1997*:

- 22 (a) before the commencement of Schedule 2 to the *Tax Laws*
23 *Amendment (2009 Budget Measures No. 2) Act 2009*; and
24 (b) for one or more income years;
25 continues to have effect, after that commencement, for those
26 income years despite the amendments made by that Schedule.

27 **15 Application**

28 The following apply in relation to the 2009-2010 income year and later
29 income years:

- 30 (a) the amendments made by items 1 to 13 of this Schedule;

1
2
3

(b) section 35-10 of the *Income Tax (Transitional Provisions) Act 1997* (as inserted by this Schedule).

1 **Schedule 3—Lost members' superannuation**

2 **Part 1—Amendment of the Superannuation**
3 **(Unclaimed Money and Lost Members) Act**
4 **1999**

5 **1 Paragraph 6(a)**

6 Repeal the paragraph, substitute:

7 (a) the keeping of registers of details relating to:

8 (i) unclaimed money; and

9 (ii) certain amounts relating to superannuation of persons
10 (*former temporary residents*) who used to be holders of
11 temporary visas under the *Migration Act 1958* and have
12 left Australia; and

13 (iii) certain amounts relating to superannuation of persons
14 who used to be lost members;

15 so that the money and amounts can be claimed by persons
16 entitled to them; and

17 **2 Paragraph 6(ca)**

18 Repeal the paragraph.

19 **3 Paragraphs 6(e) and (ea)**

20 Repeal the paragraphs, substitute:

21 (e) the payment to the Commissioner of:

22 (i) unclaimed money; and

23 (ii) certain amounts relating to superannuation of former
24 temporary residents; and

25 (iii) certain amounts relating to superannuation of lost
26 members; and

27 (ea) the safekeeping of such money and amounts paid to the
28 Commissioner until the Commissioner can pay the money
29 and amounts to persons entitled to them; and

30 **4 Section 7**

31 Omit:

1 Superannuation providers must pay to the Commissioner of
2 Taxation any unclaimed money they hold. If the
3 Commissioner is satisfied he or she has received such a
4 payment in respect of a person, the Commissioner must pay
5 the amount he or she has received to the person, to a fund
6 identified by the person or, if the person has died, to the
7 person's death beneficiaries or legal personal representative.

8 Substitute:

9 Superannuation providers must pay to the Commissioner of
10 Taxation any unclaimed money they hold. Later, the
11 Commissioner must, if satisfied that it is possible to do so, pay
12 the amount he or she has received in respect of a person to:

- 13 (a) the person; or
14 (b) to a fund identified by the person; or
15 (c) if the person has died—to the person's death
16 beneficiaries or legal personal representative.

17 **5 At the end of section 7**

18 Add:

19 *Superannuation of lost members*

20 At the times determined by the Commissioner, superannuation
21 providers must give the Commissioner of Taxation details
22 relating to:

- 23 (a) small accounts of lost members; and
24 (b) inactive accounts of unidentifiable lost members.

25 Superannuation providers must pay to the Commissioner of
26 Taxation the value of any such accounts. Later, the
27 Commissioner must, if satisfied that it is possible to do so, pay
28 an amount he or she has received in respect of a person:

- 29 (a) to a fund identified by the person; or

Schedule 3 Lost members' superannuation

Part 1 Amendment of the Superannuation (Unclaimed Money and Lost Members) Act 1999

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- (b) if the person has reached eligibility age or the amount is less than \$200—to the person; or
- (c) if the person has died—to the person's death beneficiaries or legal personal representative.

6 Section 8

Insert:

account, in a fund, has a meaning affected by subsection 24B(3).

7 Section 8

Insert:

lost member account has the meaning given by section 24B.

8 Section 8

Insert:

non-member spouse has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

9 Section 8

Insert:

payment split means a payment split under Part VIIIIB of the *Family Law Act 1975*.

10 Section 8 (paragraph (a) of the definition of *scheduled statement day*)

After "Part 3", insert "or 4A".

11 Section 8

Insert:

splittable payment has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

12 Paragraph 12(1)(c)

Omit "for at least 2 years", substitute "within the last 2 years".

1 **13 Subsections 12(3) and 13(1B)**

2 Repeal the subsections.

3 **14 Paragraph 14(c)**

4 Omit "for at least 2 years", substitute "within the last 2 years".

5 **15 Paragraph 15A(a)**

6 After "this Part", insert "and Part 4A".

7 **16 Paragraph 15A(b)**

8 After "this Part, insert "or Part 4A".

9 **17 At the end of subsection 19(1)**

10 Add:

11 ; and (e) amounts paid to the Commissioner under section 24E (lost
12 member accounts); and

13 (f) each person in respect of whom there is an amount referred to
14 in paragraph (e) of this subsection.

15 **18 At the end of subparagraph 20H(1)(b)(ii)**

16 Add "and".

17 **19 After subparagraph 20H(1)(b)(ii)**

18 Insert:

19 (ia) the amounts (if any) paid to the Commissioner under
20 section 24E in respect of the person;

21 **20 At the end of paragraph 20H(1)(b)**

22 Add:

23 ; and (vi) the amounts (if any) paid by the Commissioner under
24 section 24G in respect of the person.

25 **21 Paragraph 20H(2B)(a)**

26 After "section 17", insert ", 24E or 24G".

27 **22 Subsection 20H(3)**

28 Omit "and (ii)", substitute ", (ii) and (ia)".

1 **23 Part 4 (heading)**

2 Repeal the heading, substitute:

3 **Part 4—Information about lost members**

4 **24 After Part 4**

5 Insert:

6 **Part 4A—Payment of lost member accounts to the**
7 **Commissioner**

8 **Division 1—Preliminary**

9 **24A Object of Part**

10 The object of this Part is to set out a procedure for dealing with:

- 11 (a) small accounts of lost members; and
12 (b) inactive accounts of unidentifiable lost members.

13 **24B Meaning of *lost member account***

14 *Small accounts*

15 (1) An account in a fund is taken to be a ***lost member account*** if:

- 16 (a) the member on whose behalf the account is held is a lost
17 member; and
18 (b) the balance of the account is less than \$200; and
19 (c) the account does not support or relate to a defined benefit
20 interest (within the meaning of section 292-175 of the *Income*
21 *Tax Assessment Act 1997*).

22 Note: The balance of an account does not reflect any earnings, fees or
23 charges that have not yet been credited to, or debited from, the
24 account.

25 *Inactive accounts of unidentifiable members*

26 (2) An account in a fund is also taken to be a ***lost member account*** if:

- 27 (a) the member on whose behalf the account is held is a lost
28 member; and

- 1 (b) the superannuation provider has not received an amount in
2 respect of the member within the last 5 years; and
3 (c) the superannuation provider is satisfied that it will never be
4 possible for the provider, having regard to the information
5 reasonably available to the provider, to pay an amount to the
6 member; and
7 (d) the account does not support or relate to a defined benefit
8 interest (within the meaning of section 292-175 of the *Income*
9 *Tax Assessment Act 1997*).

10 *RSAs*

- 11 (3) A reference to an *account* in a fund that is an RSA is a reference
12 to:
13 (a) if the RSA is an account—that account; or
14 (b) if the RSA is a policy (within the meaning of the RSA Act)—
15 that policy.

16 **Division 2—Statement of lost member accounts**

17 **24C Statement of lost member accounts**

18 *Superannuation provider must give statement to Commissioner*

- 19 (1) A superannuation provider must, for each unclaimed money day,
20 give the Commissioner a statement, in the approved form, of
21 information relevant to either or both of the following:
22 (a) each lost member account as at the end of the day;
23 (b) the administration of any of the following in connection with
24 each lost member account:
25 (i) this Part;
26 (ii) the *Superannuation (Departing Australia*
27 *Superannuation Payments Tax) Act 2007*;
28 (iii) the *Income Tax Assessment Act 1997*, Part 3AA of this
29 Act, and Chapters 2 and 4 in Schedule 1 to the *Taxation*
30 *Administration Act 1953*, so far as they relate to this
31 Part or the *Superannuation (Departing Australia*
32 *Superannuation Payments Tax) Act 2007*.

33 Note 1: For State or Territory public sector superannuation schemes, see
34 section 24H.

Schedule 3 Lost members' superannuation

Part 1 Amendment of the Superannuation (Unclaimed Money and Lost Members) Act 1999

1 Note 2: The *Taxation Administration Act 1953* provides for offences and
2 administrative penalties if the statement required under subsection (1)
3 includes false or misleading information: see sections 8K, 8M, 8N and
4 8R of that Act and Division 284 in Schedule 1 to that Act.

5 Note 3: The approved form may also require the statement to include certain
6 tax file numbers: see subsection 25(4) of this Act.

7 (2) If, at the end of the unclaimed money day, there are no lost
8 member accounts, the statement must say so.

9 Note: If the fund is a regulated superannuation fund that has fewer than 5
10 members, see subsection (4).

11 (3) The statement must also contain information, required by the
12 approved form, relevant to any account that ceases to be a lost
13 member account because the member ceases to be a lost member
14 during the period that:

15 (a) starts on the unclaimed money day; and

16 (b) ends on the day on which the statement is given to the
17 Commissioner.

18 (4) This section does not apply if, at the end of the unclaimed money
19 day:

20 (a) the fund is a regulated superannuation fund that has fewer
21 than 5 members; and

22 (b) there are no lost member accounts.

23 *When statement must be given*

24 (5) The superannuation provider must give the Commissioner the
25 statement by the end of the scheduled statement day for the
26 unclaimed money day.

27 Note 1: The Commissioner may defer the time for giving the statement: see
28 section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*.

29 Note 2: The *Taxation Administration Act 1953* provides for offences and
30 administrative penalties if the statement is not given when it must be:
31 see sections 8C and 8E of that Act and Division 286 in Schedule 1 to
32 that Act.

33 *Relationship to rest of Act*

34 (6) This section does not apply in relation to:

35 (a) an amount that is unclaimed money at the end of the
36 unclaimed money day; or

1 (b) amounts payable to a person identified in a notice the
2 Commissioner has given the superannuation provider under
3 section 20C.

4 Note: Section 16 requires the superannuation provider to give the
5 Commissioner a statement about unclaimed money.

6 Note 2: Section 20E requires the superannuation provider to give the
7 Commissioner a statement about the superannuation interest of a
8 person identified in a notice given to the provider under section 20C
9 (which is about notices identifying former temporary residents).

10 **24D Error or omission in statement**

11 *Scope*

- 12 (1) This section applies if:
- 13 (a) a superannuation provider gives the Commissioner a
14 statement under section 24C; and
- 15 (b) the superannuation provider becomes aware of a material
16 error, or material omission, in any information in the
17 statement.

18 *Superannuation provider must give information*

- 19 (2) The superannuation provider must, in the approved form, give the
20 Commissioner the corrected or omitted information.
- 21 (3) Information required by subsection (2) must be given no later than
22 30 days after the superannuation provider becomes aware of the
23 error or omission.

24 Note 1: The Commissioner may defer the time for giving the information: see
25 section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*.

26 Note 2: The *Taxation Administration Act 1953* provides for offences and
27 administrative penalties if the information is not given when it must
28 be: see sections 8C and 8E of that Act and Division 286 in Schedule 1
29 to that Act.

1 **Division 3—Payment in respect of lost member accounts**

2 **24E Payment in respect of lost member accounts**

3 *Provider must pay Commissioner*

- 4 (1) A superannuation provider must pay the Commissioner (for the
5 Commonwealth) the amount worked out under subsection (2) in
6 respect of a person if:
- 7 (a) an account is a lost member account as at the end of an
8 unclaimed money day; and
 - 9 (b) the account is held by the provider on behalf of the person;
10 and
 - 11 (c) the person is still a lost member at the time (the *calculation*
12 *time*) immediately before the earlier of:
 - 13 (i) the time (if any) the payment is made; and
 - 14 (ii) the time at which the payment is due and payable,
15 (assuming that the payment must be made).

16 The amount is due and payable at the end of the scheduled
17 statement day for the unclaimed money day.

18 Note 1: For State or Territory public sector superannuation schemes, see
19 section 24H.

20 Note 2: Subsection 24F(2) makes it an offence not to comply with a
21 requirement under this subsection.

22 Note 3: The amount the superannuation provider must pay the Commissioner
23 is a tax-related liability for the purposes of the *Taxation*
24 *Administration Act 1953*. Division 255 in Schedule 1 to that Act deals
25 with payment and recovery of tax-related liabilities. Division 284 in
26 that Schedule provides for administrative penalties connected with
27 such liabilities.

28 Note 4: The Commissioner may defer the time at which the amount is due and
29 payable: see section 255-10 in Schedule 1 to the *Taxation*
30 *Administration Act 1953*.

31 Note 5: Section 24J provides for refunds of overpayments by the
32 superannuation provider to the Commissioner.

33 *Amount of payment*

- 34 (2) The amount payable in respect of the lost member is the amount
35 that would have been payable by the superannuation provider if the
36 lost member had requested that the balance of the account be rolled

1 over or transferred to a complying superannuation fund (within the
2 meaning of the SIS Act).

- 3 (3) For the purposes of subsection (2):
4 (a) work out the amount that would have been payable at the
5 calculation time; and
6 (b) assume that the request were made before the calculation
7 time; and
8 (c) assume that the lost member had not died before the
9 calculation time.

10 *Family Law payment splits*

- 11 (4) If, as a result of a payment split that applies in relation to the
12 account, the non-member spouse (or his or her legal personal
13 representative if he or she has died) is, or could in the future be,
14 entitled to be paid an amount, then:
15 (a) for the purposes of subsection (2), take account only of the
16 lost member's entitlement to payment remaining after any
17 reduction by the payment split (disregarding subsection
18 90MB(3) of the *Family Law Act 1975*); and
19 (b) the superannuation provider must also pay an amount (the
20 ***non-member spouse amount***) to the Commissioner in respect
21 of the non-member spouse; and
22 (c) the non-member spouse amount is due and payable at the
23 same time as the amount payable under subsection (1); and
24 (d) the amount of the non-member spouse amount is the amount
25 of the reduction mentioned in paragraph (a).

26 Note 1: Part VIII B of the *Family Law Act 1975* is about splitting amounts
27 payable in respect of a superannuation interest between the parties to a
28 marriage. Subsection 90MB(3) of that Act provides that the Part has
29 effect subject to this Act.

30 Note 2: Subsection 24F(2) makes it an offence not to comply with a
31 requirement under this subsection.

32 *Miscellaneous*

- 33 (5) This section does not require the superannuation provider to pay
34 the Commissioner:
35 (a) an amount that is unclaimed money at the end of the
36 unclaimed money day; or

Schedule 3 Lost members' superannuation

Part 1 Amendment of the Superannuation (Unclaimed Money and Lost Members) Act 1999

1 (b) an amount payable to a person identified in a notice the
2 Commissioner has given the provider under section 20C.

3 Note 1: Unclaimed money is payable to the Commissioner under section 17.

4 Note 2: An amount mentioned in paragraph (5)(b) is payable to the
5 Commissioner under section 20F.

6 (6) Upon payment to the Commissioner of an amount as required
7 under this section, the superannuation provider is discharged from
8 further liability in respect of that amount.

9 (7) For the purposes of this section, ignore accounts with nil balances,
10 or balances below nil, as at the calculation time mentioned in
11 subsection (1).

12 **24F Payment in respect of lost member accounts—late payments**

13 *General interest charge on late payment*

14 (1) If any of the amount a superannuation provider must pay under
15 section 24E remains unpaid after it is due and payable, the
16 superannuation provider is liable to pay general interest charge on
17 the unpaid amount for each day in the period that:

18 (a) starts at the time it is due and payable; and

19 (b) ends at the end of the last day on which either of the
20 following remains unpaid:

21 (i) the amount unpaid when it is due and payable;

22 (ii) general interest charge on any of the amount.

23 *Offence of failing to make payment to Commissioner*

24 (2) A person commits an offence if:

25 (a) the person is subject to a requirement under subsection
26 24E(1) or (4); and

27 (b) the person engages in conduct; and

28 (c) the person's conduct breaches the requirement.

29 Penalty for an offence against subsection (2): 100 penalty units.

30 **24G Payment by Commissioner in respect of person for whom an**
31 **amount has been paid to Commissioner**

32 (1) This section applies in relation to a person if:

- 1 (a) a superannuation provider paid an amount to the
2 Commissioner under section 24E in respect of the person;
3 and
4 (b) the Commissioner is satisfied, on application in the approved
5 form or on the Commissioner's own initiative, that it is
6 possible for the Commissioner to pay the amount in
7 accordance with subsection (2).

8 (2) The Commissioner must pay the amount:

- 9 (a) to a single fund if:
10 (i) the person has not died; and
11 (ii) the person directs the Commissioner to pay to the fund;
12 and
13 (iii) the fund is a complying superannuation plan (within the
14 meaning of the *Income Tax Assessment Act 1997*); or
15 (b) in accordance with subsection (3) if:
16 (i) the person has died; and
17 (ii) the Commissioner is satisfied that, if the superannuation
18 provider had not paid the amount to the Commissioner,
19 the provider would have been required to pay an amount
20 or amounts (death benefits) to one or more other
21 persons (death beneficiaries) because of the deceased
22 person's death; or
23 (c) to the person's legal personal representative if the person has
24 died but subparagraph (b)(ii) does not apply; or
25 (d) to the person if:
26 (i) subparagraph (a)(ii) does not apply; and
27 (ii) the person has reached the eligibility age or the amount
28 is less than \$200; and
29 (iii) the person has not died.

30 Note: Money for payments under subsection (2) is appropriated by
31 section 16 of the *Taxation Administration Act 1953*.

32 (3) In a case covered by paragraph (2)(b), the Commissioner must pay
33 the amount under subsection (2) by paying to each death
34 beneficiary the amount worked out using the following formula:

35
$$\text{Amount payable under subsection (2)} \times \frac{\text{Death benefit for the death beneficiary}}{\text{Total death benefits}}$$

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1 Note: If there is only one death beneficiary, the whole of the amount is
2 payable to that beneficiary.

3 (4) This section does not apply to an amount that is to be, is or has
4 been, taken into account in determining whether the Commissioner
5 must make a payment under section 20H.

6 Note: Section 20H provides for payment by the Commissioner of amounts
7 equal to amounts paid to the Commissioner under subsections 17(1),
8 20F(1) and 24E(1) in respect of a person who:
9 (a) is identified in a notice under section 20C; or
10 (b) used to be the holder of a temporary visa.

11 Division 4—Various rules for special cases

12 24H Payment in respect of lost member accounts—State or 13 Territory public sector superannuation schemes

14 Sections 24C and 24E do not apply to a superannuation provider in
15 relation to an unclaimed money day if, because of section 18, the
16 superannuation provider does not have to comply with subsection
17 16(1) or 17(1) in relation to the unclaimed money day.

18 24J Refund of overpayment made by superannuation provider

- 19 (1) This section applies if:
- 20 (a) a superannuation provider for a fund (the *first fund*) has
21 made a payment to the Commissioner under section 24E in
22 respect of a person; and
 - 23 (b) the Commissioner is satisfied that the amount paid exceeded
24 the amount (if any) that was payable under that section in
25 respect of the person.
- 26 (2) The Commissioner must pay the excess:
- 27 (a) to the superannuation provider; or
 - 28 (b) to a superannuation provider for another fund if the
29 Commissioner is satisfied that:
 - 30 (i) the first fund no longer exists; and
 - 31 (ii) the other fund provides rights relating to the person
32 equivalent to those provided by the first fund.

33 Note: Money for payments under subsection (2) is appropriated by
34 section 16 of the *Taxation Administration Act 1953*.

24K Commissioner may recover overpayment

- 1
- 2 (1) This section applies if:
- 3 (a) the Commissioner makes a payment in respect of a person
- 4 under, or purportedly under, this Part; and
- 5 (b) the amount paid exceeds the amount (if any) properly
- 6 payable under this Part in respect of the person.
- 7 (2) The Commissioner may recover all or part of the excess from a
- 8 person (the *debtor*) described in subsection (3) as a debt due by the
- 9 debtor to the Commonwealth if the conditions specified in
- 10 subsection (4) are met.
- 11 (3) The persons from whom the Commissioner may recover are as
- 12 follows:
- 13 (a) the person to whom the payment was made (whether the
- 14 payment was made to the person in his or her own right or as
- 15 the legal personal representative of someone else who had
- 16 died);
- 17 (b) the superannuation provider for the fund to which the
- 18 payment was made;
- 19 (c) if the payment, or an amount wholly or partly attributable to
- 20 that payment, was transferred to another fund—the
- 21 superannuation provider for that other fund.
- 22 (4) The conditions for recovery are that:
- 23 (a) the Commissioner gave the debtor written notice, as
- 24 prescribed by the regulations, of the proposed recovery and
- 25 the amount to be recovered; and
- 26 (b) at least 28 days have passed since the notice was given; and
- 27 (c) the amount recovered is not more than the amount specified
- 28 in the notice.
- 29 (5) Despite subsections (2) and (3), if the Commissioner gives a notice
- 30 described in paragraph (4)(a) to a superannuation provider for a
- 31 fund, and the fund does not hold an amount attributable to the
- 32 payment, the Commissioner cannot recover from the
- 33 superannuation provider.
- 34 (6) The Commissioner may revoke a notice described in
- 35 paragraph (4)(a).

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1 (7) The total of the amounts recovered from different debtors in
2 relation to the same excess must not be more than the excess.

3 (8) A notice described in paragraph (4)(a) is not a legislative
4 instrument.

5 **24L Superannuation provider to return payment from**
6 **Commissioner that cannot be credited**

7 *Scope*

8 (1) This section applies if:

9 (a) a payment (the *Commissioner's payment*) is made to a fund
10 under section 24G in accordance with a person's direction;
11 and

12 (b) the superannuation provider for the fund has not credited the
13 payment to an account for the benefit of the person by the
14 time (the *repayment time*) that is the end of the 28th day after
15 the day on which the Commissioner's payment was made.

16 *Repayment*

17 (2) The superannuation provider is liable to repay the Commissioner's
18 payment to the Commonwealth. The repayment is due and payable
19 at the repayment time.

20 Note: The amount the superannuation provider is liable to repay is a
21 tax-related liability for the purposes of the *Taxation Administration*
22 *Act 1953*. Division 255 in Schedule 1 to that Act deals with payment
23 and recovery of tax-related liabilities.

24 (3) The superannuation provider must give the Commissioner, in the
25 approved form, information relating to the Commissioner's
26 payment when repaying it.

27 Note: The *Taxation Administration Act 1953* provides for offences and
28 administrative penalties if the form is not given when it must be or
29 includes false or misleading information: see sections 8C, 8K and 8N
30 of that Act and Divisions 284 and 286 in Schedule 1 to that Act.

31 *General interest charge*

32 (4) If any of the amount the superannuation provider is liable to repay
33 under subsection (2) remains unpaid by the superannuation
34 provider after the repayment time, the superannuation provider is

1 liable to pay general interest charge on the unpaid amount for each
2 day in the period that:

- 3 (a) starts at the repayment time; and
4 (b) ends at the end of the last day on which either of the
5 following remains unpaid:
6 (i) the amount unpaid at the repayment time;
7 (ii) general interest charge on any of the amount.

8 **24M Compensation for acquisition of property**

- 9 (1) If the operation of this Part would result in an acquisition of
10 property from a person otherwise than on just terms, the
11 Commonwealth is liable to pay a reasonable amount of
12 compensation to the person.
13 (2) If the Commonwealth and the person do not agree on the amount
14 of the compensation, the person may institute proceedings in a
15 court of competent jurisdiction for the recovery from the
16 Commonwealth of such reasonable amount of compensation as the
17 court determines.

- 18 (3) In this section:

19 *acquisition of property* has the same meaning as in paragraph
20 51(xxxi) of the Constitution.

21 *just terms* has the same meaning as in paragraph 51(xxxi) of the
22 Constitution.

23 **25 At the end of section 25**

24 Add:

25 *Lost member accounts statements*

- 26 (4) The approved form of statement by a superannuation provider for
27 the purposes of section 24C may require the statement to contain
28 the tax file number of:
29 (a) the superannuation provider; and
30 (b) the fund; and
31 (c) a member of the fund if:
32 (i) the statement relates to an account, in the fund, held on
33 behalf of the member; and

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- 1 (ii) the member has quoted his or her tax file number to the
2 superannuation provider.

3 **26 Paragraph 29(1)(aa)**

4 After "subsection 20H(1)", insert "or 24G(1)".
5

1 **Part 2—Other amendments**

2 ***Financial Transaction Reports Act 1988***

3 **27 Paragraph 18(4B)(ca)**

4 Omit “Part 3 or 3A”, substitute “Part 3, 3A or 4A”.

5 ***Income Tax Assessment Act 1997***

6 **28 Section 301-125**

7 After “section 20H”, insert “or 24G”.

8 **29 Section 301-225**

9 Before “Despite”, insert “(1)”.

10 **30 At the end of section 301-225**

11 Add:

- 12 (2) Despite anything else in this Division (apart from
13 Subdivision 301-D), a *superannuation member benefit that you
14 receive is not assessable income and is not *exempt income if:
- 15 (a) the benefit is a *superannuation lump sum; and
 - 16 (b) the benefit is paid to you under subsection 24G(2) of the
17 *Superannuation (Unclaimed Money and Lost Members) Act*
18 *1999* in a case covered by paragraph (d) of that subsection;
19 and
 - 20 (c) the amount of the benefit is less than \$200.

21 **31 Subsection 307-5(1) (cell at table item 5, column 2)**

22 After “section 20H”, insert “, 24E or 24G”.

23 **32 Subsection 307-5(1) (cell at table item 5, column 3)**

24 Omit “or 20H”, substitute “, 20H or 24G”.

25 **33 Paragraph 307-120(2)(e)**

26 After “section 20H”, insert “or 24G”.

27 **34 Subsection 307-142(1)**

1 After "section 20H", insert "or 24G".

2 **35 Subsection 307-142(2) (method statement, at the end of**
3 **the note to step 1)**

4 Add:

5

A payment made under section 24G of that Act is 6 attributable to a single unclaimed amount set out in 7 item 4 of the table.

8 **36 Subsection 307-142(3) (at the end of the table)**

9 Add:

4 an amount paid to the Commissioner under section 24E of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* in respect of the person a *superannuation benefit paid from a *superannuation plan the *tax free component of that superannuation benefit

10 **37 Subsection 307-300(1)**

11 After "section 20H", insert "or 24G".

12 **38 Subsection 307-300(2) (method statement, at the end of**
13 **the note to step 1)**

14 Add:

15

A payment made under section 24G of that Act is 16 attributable to a single unclaimed amount set out in 17 item 4 of the table.

18 **39 Subsection 307-300(3) (at the end of the table)**

19 Add:

4 an amount paid to the Commissioner under section 24E of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* in respect of the person a *superannuation benefit paid from a *superannuation plan the *element taxed in the fund of the *taxable component of that superannuation benefit

20 **40 Subsection 307-350(2B)**

21 Omit "section 20H", substitute "sections 20H and 24G".

1 ***Taxation Administration Act 1953***

2 **41 Subsection 8AAB(5) (after table item 13C)**

3 Insert:

13D	24F	<i>Superannuation (Unclaimed Money and Lost Members) Act 1999</i>
<hr/>		
13E	24L	<i>Superannuation (Unclaimed Money and Lost Members) Act 1999</i>

4 **42 Subsection 250-10(2) in Schedule 1 (table items 68 and 69)**

5 Omit "section".

6 **43 Subsection 250-10(2) in Schedule 1 (after table item 69)**

69A	payment of value of lost member accounts to the Commissioner	24E	<i>Superannuation (Unclaimed Money and Lost Members) Act 1999</i>
<hr/>			
69B	payment from Commissioner that cannot be credited	24L	<i>Superannuation (Unclaimed Money and Lost Members) Act 1999</i>

7

1 **Part 3—Application and saving provisions**

2 **44 Application**

- 3 The amendments made by this Schedule apply in relation to:
- 4 (a) the last unclaimed money day (within the meaning of the
- 5 *Superannuation (Unclaimed Money and Lost Members) Act*
- 6 *1999* occurring before 1 July 2010; and
- 7 (b) later unclaimed money days.

8 **45 Saving—regulations**

9 If, just before the commencement of this item, regulations made for the

10 purposes of paragraph 18B(4)(a) of the *Superannuation (Unclaimed*

11 *Money and Lost Members) Act 1999* were in force, the regulations have

12 effect, from that commencement, as if they had also been made for the

13 purposes of paragraph 24K(4)(a) of that Act, as inserted by this

14 Schedule.

15

(190/09)
