



Tax Laws Amendment (2004 Measures No. 3) Act 2004

No. 105, 2004

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

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

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

[Assented to 30 June 2004]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Tax Laws Amendment (2004
Measures No. 3) Act 2004*.

2 Commencement

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

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 4 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	30 June 2004
2. Schedule 1	The day on which this Act receives the Royal Assent.	30 June 2004
3. Schedule 2	1 April 2004.	1 April 2004
4. Schedule 3	The day on which this Act receives the Royal Assent.	30 June 2004

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

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

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Amendment of assessments

Section 170 of the *Income Tax Assessment Act 1936* does not prevent the amendment of an assessment made before the commencement of this section for the purposes of giving effect to this Act.

Schedule 1—Venture capital

Part 1—Tax amendments

Income Tax Assessment Act 1936

1 At the end of subsection 16(4)

Add:

- ; or (m) the PDF Registration Board established under section 5 of the *Pooled Development Funds Act 1992* for the purpose of the administration of a law of the Commonwealth relating to venture capital.

2 At the end of section 94D

Add:

- (4) The place of residence of a VCMP is the place at which the partnership has its central management and control.

3 At the end of subparagraph 128B(3)(h)(ii)

Add “(except interest derived by a limited partner in a VCLP or AFOF as such a partner)”.

Income Tax Assessment Act 1997

4 Subsection 118-410(3)

Before “under Part 2”, insert “of funds”.

5 At the end of section 118-420

Add:

- (8) For the purposes of this section, the place of residence of a *general partner of a *limited partnership:
 - (a) that is a company or a limited partnership; and
 - (b) that is a foreign resident;is the place in which the general partner has its central management and control.

- (9) For the purposes of this section, the place of residence of an entity referred to in paragraph (5)(a) is the place in which the entity has its central management and control.

6 After subsection 118-425(1)

Insert:

Certain entities not treated as connected entities

- (1A) In applying subparagraph (1)(d)(ii), ignore an entity that is a *connected entity of the company only because it is an *associate of the company because of an investment made in the entity by the partnership.

7 Subsection 118-425(3)

Repeal the subsection, substitute:

Predominant activity

- (3) The company must satisfy at least 2 of these requirements:
- (a) more than 75% of the company's assets (determined by value) must be used primarily in activities that are not ineligible activities mentioned in subsection (13);
 - (b) more than 75% of the company's employees must be engaged primarily in activities that are not ineligible activities mentioned in subsection (13);
 - (c) more than 75% of the company's total assessable income, *exempt income and *non-assessable non-exempt income must come from activities that are not ineligible activities mentioned in subsection (13).

Note 1: This requirement is ongoing. It is not limited to the circumstances at the time the investment was made.

Note 2: See subsection (10) for the value of assets.

Note 3: A company that fails to meet at least 2 of the requirements can still be eligible if the PDF Board determines that the company's primary activity is not ineligible and the failure is temporary: see subsection (14).

8 Subparagraph 118-425(4)(a)(i)

After “company”, insert “(except another entity that is an *associate of the company because of an investment made in the entity by the partnership)”.

9 Subsection 118-425(5)

Repeal the subsection, substitute:

Registered auditor

- (5) The company must have as its auditor:
- (a) a person registered as a company auditor under a law in force in a State or a Territory; or
 - (b) if the company is no longer an Australian resident—a person registered as a company auditor under a law in force in the country of which the company is a resident.

Note: This requirement is ongoing. It is not limited to the circumstances at the time the investment was made.

10 Subsection 118-425(10)

Omit “paragraph (2)(b)”, substitute “this section”.

11 At the end of section 118-425

Add:

Investment in holding companies

- (11) A company is taken to meet the requirements of subsections (3) and (4) if:
- (a) a *VCLP, an *AFOF or an *eligible venture capital investor acquires *shares or options in the company; and
 - (b) the company was formed solely for the purpose of investing in another company; and
 - (c) within 6 months after the investment referred to in paragraph (a) was made, the company uses the money from that investment:
 - (i) in acquiring shares or options in the other company (including incidental costs); or
 - (ii) on administrative expenses associated with the investment; or
 - (iii) making loans to the other company; and

- (d) the other company meets the requirements of subsections (2) to (7) within that period of 6 months and after the end of that period.

Note: The requirement in paragraph (11)(d) is ongoing (unless the company becomes the head company of a consolidated group or consolidatable group: see subsection (16)).

Application to consolidated or consolidatable groups

- (12) This section applies to a *consolidated group or *consolidatable group as if:
- (a) the *head company of the group carried on all of the activities that are carried on by *subsidiary members of the group; and
 - (b) the assets, employees and income of the subsidiary members of the group were assets, employees and income of the head company; and
 - (c) each subsidiary member of the group were parts of the head company rather than separate entities.

Ineligible activities

- (13) These activities are ineligible activities:
- (a) property development or land ownership;
 - (b) finance, to the extent that it is any of the following:
 - (i) banking;
 - (ii) providing capital to others;
 - (iii) leasing;
 - (iv) factoring;
 - (v) securitisation;
 - (c) insurance;
 - (d) construction (including extension, improvement or up-grading) or acquisition of infrastructure facilities (within the meaning of section 93L of the *Development Allowance Authority Act 1992*) or related facilities (within the meaning of section 93M of that Act), or both;
 - (e) making investments, whether made directly or indirectly, that are directed to deriving income in the nature of interest, rents, dividends, royalties or lease payments.

For the purposes of this subsection, activities that are ancillary or incidental to a particular activity are taken to form part of that activity.

PDF Board discretion

- (14) A company is taken to meet the requirements of subsection (3) even if it fails to satisfy at least 2 of the requirements in that subsection if the *PDF Board determines under section 25-15 of the *Venture Capital Act 2002* that:
- (a) the company's primary activity is not an ineligible activity mentioned in subsection (13); and
 - (b) the failure is temporary and did not exist at the time the investment referred to in subsection (1) was made and, if it has been disposed of, when it was disposed of.

Convertible notes and convertible preference shares

- (15) To the extent that an investment by an entity consists of the acquisition of a *share in a company by converting a *convertible note, or a convertible preference share, issued by the company, the investment is, for the purpose of determining whether the company meets the requirements of subsections (2) to (7), taken to have been made at the time when the entity last acquired the convertible note or convertible preference share.

Subsection (11) stops applying

- (16) Subsection (11) stops applying to the company first referred to in that subsection if the company becomes the *head company of a *consolidated group or *consolidatable group.

12 At the end of subsection 118-440(1)

Add:

Note: The time the entity makes the investment is, for a share acquired by converting a convertible note or a convertible preference share, the time when the entity last acquired the convertible note or convertible preference share: see subsection 118-425(15).

13 At the end of section 118-440

Add:

- (3) In applying paragraphs (1)(b), (5)(b) and (7)(c), ignore the total value of the assets of an entity that is *connected with the entity first-mentioned in subsection (1) (the **target entity**) either immediately before or immediately after the investment referred to in that subsection if it is so connected only because of *eligible venture capital investments made in both of those entities by the same *VCLP, *AFOF or *eligible venture capital investor.
- (4) In applying paragraphs (1)(b), (5)(b) and (7)(c), ignore the total value of the assets of an entity that, immediately after the investment is made, is not *connected with the target entity.
- (5) Despite the previous provisions of this section, the target entity exceeds the **permitted entity value** immediately before the time (the **investment time**) when the *VCLP, *AFOF or *eligible venture capital investor made the investment in the target entity if:
- (a) the target entity was *connected with an entity (the **linked entity**) in which the VCLP, AFOF or eligible venture capital investor had made an *eligible venture capital investment at some time in the period of 12 months before the investment time; and
 - (b) the sum of the total value of the assets of the target entity and of any entity *connected with the target entity (at the investment time) and the linked entity and of any entity connected with the linked entity (at the time that the entity making the investment made its investment in the linked entity) exceeds \$250 million.
- (6) The Commissioner may determine that subsection (5) does not apply if the Commissioner is satisfied that:
- (a) the activities of the target entity are not the same as, not an integral part of and not a necessary support for the activities of the linked entity; and
 - (b) the making of the investment in the target entity is not part of a *scheme to acquire interests in all or a substantial part of a group of companies that are *connected with each other.
- (7) Despite the previous provisions of this section, the target entity exceeds the **permitted entity value** immediately before the investment time if:
- (a) the target entity was *connected with an entity (also the **linked entity**) in which the *VCLP, *AFOF or *eligible

- venture capital investor had made an *eligible venture capital investment more than 12 months before the investment time; and
- (b) the activities of the target entity are the same as, are an integral part of or are a necessary support for the activities of the linked entity; and
 - (c) the sum of the total value of the assets of the target entity and of any entity *connected with the target entity (at the investment time) and the linked entity and of any entity connected with the linked entity (at the time that the entity making the investment made its investment in the linked entity) exceeds \$250 million.
- (8) In applying paragraphs (5)(b) and (7)(c), ignore the total value of the assets of an entity that is *connected with the linked entity either immediately before or immediately after the investment in the linked entity if it is so connected only because of *eligible venture capital investments made in both of those entities by the same *VCLP, *AFOF or *eligible venture capital investor.

Part 2—Venture Capital Act amendments

Venture Capital Act 2002

14 After paragraph 15-1(g)

Insert:

- (ga) for an investment in a company that the partnership held throughout the financial year—a statement from a general partner as to whether the company met the requirements of subsections 118-425(3), (4) and (5), and paragraph 118-425(11)(d), of the *Income Tax Assessment Act 1997* at all times during that year;

15 At the end of section 15-10

Add:

- ; and (c) for each investment in a company made during the quarter—a statement from a general partner as to whether the company met the requirements of subsections 118-425(3), (4) and (5), and paragraph 118-425(11)(d), of the *Income Tax Assessment Act 1997* at all times during the quarter after the investment was made; and
- (d) for each disposal of an investment in a company during the quarter—a statement from a general partner as to whether the company met those requirements at all times during the quarter up to the day of disposal.

16 At the end of subsection 21-20(1)

Add:

- ; (g) for each investment in a company that the entity held throughout that year—a statement as to whether the company met the requirements of subsections 118-425(3), (4) and (5), and paragraph 118-425(11)(d), of the *Income Tax Assessment Act 1997* at all times during that year;
- (h) for each investment in a company that the entity made during that year—a statement as to whether the company met those requirements at all times during that year after the investment was made;

- (i) for each investment in a company that the entity disposed of during that year—a statement as to whether the company met those requirements at all times during that year up to the day of disposal.

17 At the end of Division 25

Add:

25-15 PDF Board may determine that a requirement does not apply

- (1) The *PDF Board may, on the application of a *general partner of a partnership registered as a *VCLP or an *AFOF, determine that:
 - (a) a company's primary activity is not an ineligible activity mentioned in subsection 118-425(13) of the *Income Tax Assessment Act 1997*; and
 - (b) the company's failure to satisfy at least 2 of the requirements in subsection 118-425(3) of that Act is temporary and did not exist at the time the relevant investment in the company was made and, if it has been disposed of, when it was disposed of.
- (2) The application must be in the *form approved by the PDF Board.
- (3) In considering whether to make a determination, the *PDF Board must apply the principles specified under subsection (4).
- (4) The *PDF Board may make principles about making determinations under this section.
- (5) If the *PDF Board makes a determination under subsection (1), the PDF Board must notify the *general partner as soon as practicable after the determination is made.
- (6) If the *PDF Board refuses to make a determination, the PDF Board must:
 - (a) notify the *general partner as soon as practicable after the refusal; and
 - (b) provide reasons for the refusal.
- (7) Principles made under subsection (4) are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.

18 Paragraph 29-1(i)

Schedule 1 Venture capital
Part 2 Venture Capital Act amendments

After “section 25-10”, insert “or 25-15”.

Part 3—Application

19 Application

The amendments made by this Schedule apply, and are taken to have applied, to CGT events relating to investments made on or after 1 July 2002.

Schedule 2—Worker entitlement funds

Fringe Benefits Tax Assessment Act 1986

1 Paragraph 58PC(1)(a)

After “existing worker entitlement fund”, insert “or an approved worker entitlement fund”.

2 Paragraph 58PC(1)(d)

After “1 April 2003”, insert “or 1 April 2004”.

3 Subsection 58PC(3)

Repeal the subsection, substitute:

(3) A contribution is made in accordance with *existing industrial practice* if the taxpayer or another person in the taxpayer’s industry:

- (a) made payments in the FBT year beginning on 1 April 2002 to an existing worker entitlement fund; or
- (b) made payments in the FBT year beginning on 1 April 2003 to an approved worker entitlement fund;

for the purposes of ensuring that an obligation to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met.

4 Application

The amendments made by this Schedule apply in respect of the FBT year beginning on 1 April 2004 and in respect of all later FBT years.

Schedule 3—Technical corrections

Income Tax Assessment Act 1936

1 Paragraph 160AFCD(1)(a)

Omit “but not (d)”, substitute “but not paragraph 160AF(1)(e)”.

2 Subsection 160AFCJ(2)

Omit “but not (d)”, substitute “but not paragraph 160AF(1)(e)”.

*[Minister’s second reading speech made in—
House of Representatives on 27 May 2004
Senate on 15 June 2004]*

(85/04)
