



# Income Tax Assessment Act 1997

No. 38, 1997

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This compilation is in 12 volumes

- Volume 1: sections 1-1 to 36-55
- Volume 2: sections 40-1 to 67-30
- Volume 3: sections 70-1 to 121-35
- Volume 4: sections 122-1 to 197-85**
- Volume 5: sections 200-1 to 253-15
- Volume 6: sections 275-1 to 313-85
- Volume 7: sections 315-1 to 420-70
- Volume 8: sections 615-1 to 721-40
- Volume 9: sections 723-1 to 880-205
- Volume 10: sections 900-1 to 995-1
- Volume 11: Endnotes 1 to 3
- Volume 12: Endnote 4

Each volume has its own contents

**This compilation includes commenced amendments made by Act No. 18, 2020. Amendments made by Act No. 79, 2020 have not commenced but are noted in the endnotes.**

Prepared by the Office of Parliamentary Counsel, Canberra

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## About this compilation

### This compilation

This is a compilation of the *Income Tax Assessment Act 1997* that shows the text of the law as amended and in force on 6 September 2020 (the **compilation date**).

The notes at the end of this compilation (the **endnotes**) include information about amending laws and the amendment history of provisions of the compiled law.

### Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register ([www.legislation.gov.au](http://www.legislation.gov.au)). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

### Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

### Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

### Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

### Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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## **Chapter 3—Specialist liability rules**

### **Part 3-3—Capital gains and losses: special topics**

#### **Division 122—Roll-over for the disposal of assets to, or the creation of assets in, a wholly-owned company**

##### **Table of Subdivisions**

	Guide to Division 122
122-A	Disposal or creation of assets by an individual or trustee to a wholly-owned company
122-B	Disposal or creation of assets by partners to a wholly-owned company

##### **Guide to Division 122**

###### **122-1 What this Division is about**

A roll-over can delay the making of a capital gain or loss if:

- you dispose of a CGT asset, or all the assets of a business, to a company in which you own all the shares; or
- you create a CGT asset in such a company; or
- all the partners in a partnership dispose of partnership property to a company in which they own all the shares; or
- the partners create a CGT asset in such a company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

**Part 3-3** Capital gains and losses: special topics

**Division 122** Roll-over for the disposal of assets to, or the creation of assets in, a wholly-owned company

Section 122-5

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**Subdivision 122-A—Disposal or creation of assets by an individual or trustee to a wholly-owned company**

**Guide to Subdivision 122-A**

**122-5 What this Subdivision is about**

This Subdivision sets out when you can obtain a roll-over if you transfer a CGT asset, or all the assets of a business, to a company. It also deals with the creation of a CGT asset in a company. There are consequences for the company also.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Same-asset roll-over consequences for the company (creation case)**

122-75 Consequences for the company (creation case)

## When is a roll-over available

### 122-15 Disposal or creation of assets—wholly-owned company

If you are an individual or a trustee, you can choose to obtain a roll-over if one of the \*CGT events (the *trigger event*) specified in this table happens involving you and a company in the circumstances set out in sections 122-20 to 122-35.

Relevant *CGT events	
Event No.	What you do
A1	*Dispose of a CGT asset, or all the assets of a business, to the company
D1	Create contractual or other rights in the company
D2	Grant an option to the company
D3	Grant the company a right to income from mining
F1	Grant a lease to the company, or renew or extend a lease

Note 1: The roll-over starts at section 122-40.

Note 2: Section 103-25 tells you when you have to make the choice.

Note 3: A roll-over may also be available under Subdivision 328-G (Restructures of small businesses).

Example: Gavin runs a plumbing business. He wants to incorporate it so he disposes of all its assets to a company. He becomes the sole shareholder of the company.

### 122-20 What you receive for the trigger event

- (1) The consideration you receive for the trigger event happening must be only:
  - (a) \*shares in the company; or

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 122-25

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- (b) for a \*disposal of a \*CGT asset, or all the assets of a business, to the company (a *disposal case*)—shares in the company and the company undertaking to discharge one or more liabilities in respect of the asset or assets of the \*business (as appropriate).

Note: There are rules for working out what are the liabilities in respect of an asset: see section 122-37.

- (2) The \*shares cannot be \*redeemable shares.
- (3) The \*market value of the \*shares you receive for the trigger event happening must be substantially the same as:
- (a) for a disposal case—the market value of the asset or assets you disposed of, less any liabilities the company undertakes to discharge in respect of the asset or assets (as appropriate); or
- (b) for another trigger event (a *creation case*)—the market value of the CGT asset created in the company (the *created asset*).
- (4) In working out if the requirement in paragraph (3)(a) is satisfied, if the \*market value of the \*shares is different to what it would otherwise be only because of the possibility of liabilities attaching to the asset or assets, disregard the difference.

Note: The company may have to pay income tax if an amount is included in its assessable income because of a CGT event happening to an asset you disposed of, or it may have a liability because of accrued leave entitlements of employees. The market value of the shares will reflect these contingent liabilities.

**122-25 Other requirements to be satisfied**

- (1) You must own all the \*shares in the company just after the time of the trigger event.

Note: You must own the shares in the same capacity as you owned or created the assets that the company now owns.

- (2) This Subdivision does not apply to the \*disposal or creation of any of the assets specified in this table:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Assets to which Subdivision does not apply**

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<b>Item</b>	<b>In this situation:</b>	<b>This Subdivision does not apply to:</b>
1	You *dispose of a *CGT asset to the company or create a CGT asset in the company	(a) a *collectable or a *personal use asset; or (b) a decoration awarded for valour or brave conduct (except if you paid money or gave any other property for it); or (c) a *precluded asset; or (d) an asset that becomes *trading stock of the company just after the *disposal or creation; or (e) an asset that becomes a *registered emissions unit *held by the company just after the *disposal or creation
2	You *dispose of all the assets of a *business to the company	(a) a *collectable or a *personal use asset; or (b) a decoration awarded for valour or brave conduct (except if you paid money or gave any other property for it); or (c) an asset that becomes *trading stock of the company just after the disposal or creation (unless it was your trading stock when you disposed of it); or (d) an asset that becomes a *registered emissions unit *held by the company just after the *disposal or creation (unless it was a registered emissions unit held by you when you disposed of it)

(3) A *precluded asset* is:

- (a) a \*depreciating asset; or
- (b) \*trading stock; or
- (c) an interest in the copyright in a \*film referred to in section 118-30; or
- (d) a \*registered emissions unit.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 122-25

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- (4) If:
- (a) the \*CGT asset or any of the assets of the \*business is a right, option, \*convertible interest or \*exchangeable interest; and
  - (b) the company \*acquires another CGT asset by exercising the right or option or by converting the convertible interest or in exchange for the disposal or redemption of the exchangeable interest;
- the other asset cannot become \*trading stock of the company just after the company acquired it.
- (5) The \*ordinary income and \*statutory income of the company must not be exempt from income tax because it is an \*exempt entity for the income year of the trigger event.
- (6) If you are an individual at the time of the trigger event, either:
- (a) you and the company must both be Australian residents at that time; or
  - (b) both of the following requirements must be satisfied:
    - (i) each asset must be \*taxable Australian property at that time;
    - (ii) the shares in the company mentioned in subsection 122-20(1) must be taxable Australian property just after that time.
- (7) If you are a trustee of a trust at the time of the trigger event, either:
- (a) at that time, the trust must be a \*resident trust for CGT purposes and the company must be an Australian resident; or
  - (b) both of the following requirements must be satisfied:
    - (i) each \*CGT asset must be a CGT asset of the trust that is \*taxable Australian property at that time; and
    - (ii) the shares in the company mentioned in subsection 122-20(1) must be taxable Australian property just after that time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**122-35 What if the company undertakes to discharge a liability  
 (disposal case)**

*Disposal of a CGT asset*

- (1) One of the requirements in this table must be satisfied if:
- (a) you \*dispose of a \*CGT asset; and
  - (b) the company undertakes to discharge one or more liabilities in respect of it.

(The \*market value, or the \*cost base, of an asset is worked out when you disposed of it.)

**\*What amount the liabilities cannot exceed**

Item	In this situation:	the liabilities cannot exceed:
1	You *acquired the asset on or after 20 September 1985	The *cost base of the asset
2	You *acquired the asset before 20 September 1985	The *market value of the asset

Note: There are rules for working out what are the liabilities in respect of an asset: see section 122-37.

*Disposal of all the assets of a business*

- (2) One of the requirements in this table must be satisfied if:
- (a) you \*dispose of all the assets of a \*business; and
  - (b) the company undertakes to discharge one or more liabilities in respect of the assets of the business.

(The \*market value, or the \*cost base, of an asset is worked out when you disposed of it.)

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

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**Division 122** Roll-over for the disposal of assets to, or the creation of assets in, a wholly-owned company

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<b>Item</b>	<b>In this situation:</b>	<b>The liabilities cannot exceed:</b>
1	You *acquired all the assets on or after 20 September 1985	The sum of the *market values of the *precluded assets and the *cost bases of the other assets
2	You *acquired all the assets before 20 September 1985	The sum of the *market values of the assets
3	You *acquired at least one asset on or after 20 September 1985 and at least one before that day	For liabilities in respect of assets you *acquired on or after that day—the sum of the *market values of the *precluded assets and the *cost bases of the other assets; For liabilities in respect of assets you *acquired before that day—the sum of the market values of those assets

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**122-37 Rules for working out what a liability in respect of an asset is**

- (1) These rules are relevant to working out what are the liabilities in respect of an asset.
- (2) A liability incurred for the purposes of a \*business that is not a liability in respect of a specific asset or assets of the business is taken to be a liability in respect of all the assets of the business.

Note: An example is a bank overdraft.

- (3) If a liability is in respect of 2 or more assets, the proportion of the liability that is in respect of any one of those assets is equal to:

$$\frac{\text{The *market value of the asset}}{\text{The total of the market values of all the assets that the liability is in respect of}}$$

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Replacement-asset roll-over if you dispose of a CGT asset**

### **122-40 Disposal of a CGT asset**

- (1) If you choose a roll-over, a \*capital gain or \*capital loss you make from the trigger event is disregarded.
  - (2) If you \*acquired the asset on or after 20 September 1985:
    - (a) the first element of each \*share's \*cost base is the asset's cost base when you \*disposed of it (less any liabilities the company undertakes to discharge in respect of it) divided by the number of shares; and
    - (b) the first element of each share's \*reduced cost base is worked out similarly.
- Note 1: There are rules for working out what are the liabilities in respect of an asset: see section 122-37.
- Note 2: There are special indexation rules for roll-overs: see Division 114.
- (3) If you \*acquired the asset before 20 September 1985, you are taken to have acquired the \*shares before that day.

## **Replacement-asset roll-over if you dispose of all the assets of a business**

### **122-45 Disposal of all the assets of a business**

- (1) If you choose a roll-over for \*disposing of all the assets of a \*business to the company, a \*capital gain or \*capital loss you make from each of the assets of the business is disregarded.
- (2) The other consequences relate to the \*shares you receive and depend on when you \*acquired the assets of the \*business.

- Note 1: There are 3 possible cases:
- you acquired all the assets on or after 20 September 1985: see section 122-50;
  - you acquired all the assets before that day: see section 122-55;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Part 3-3** Capital gains and losses: special topics

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- you acquired some of the assets on or after that day: see section 122-60.

Note 2: There are special indexation rules for roll-overs: see Division 114.

Note 3: There are other consequences for you and the company if you dispose of trading stock: see Division 70.

**122-50 All assets acquired on or after 20 September 1985**

(1) If you \*acquired all of the assets of the \*business on or after 20 September 1985:

(a) the first element of each \*share's \*cost base is the sum of the \*market values of the \*precluded assets and the cost bases of the other assets (less any liabilities the company undertakes to discharge in respect of all of those assets) divided by the number of shares; and

(b) the first element of each share's \*reduced cost base is worked out similarly.

Note 1: There are rules for working out what are the liabilities in respect of an asset: see section 122-37.

Note 2: There are special indexation rules for roll-overs: see Division 114.

Example: Nick is a small trader. He wants to incorporate his business. He disposes of all its assets to a company and receives 10 shares in return.

Nick acquired all the assets of the business after 20 September 1985.

Trading stock, plant and equipment and office furniture are precluded assets.

The market value of Nick's trading stock when he disposed of it is \$20,000. The market value of his plant and equipment at that time is \$50,000 and the market value of his office furniture at that time is \$10,000.

The cost bases of Nick's land and buildings at that time total \$120,000.

Nick has a business overdraft of \$15,000. It is taken to be a liability in respect of all the assets of his business.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 122-55

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The first element of the cost base of the 10 shares is:

$$\left( \$20,000 + \$50,000 + \$10,000 + \$120,000 \right) - \$15,000 = \$185,000$$

The first element of the reduced cost base of the 10 shares is worked out similarly.

- (2) The \*market value of an asset is worked out when you \*disposed of it. The \*cost base or \*reduced cost base of an asset is worked out at the same time.

### 122-55 All assets acquired before 20 September 1985

- (1) You are taken to have \*acquired all of the \*shares before 20 September 1985 if you acquired all the assets of the \*business before that day and none of the assets is a \*precluded asset.
- (2) However, if at least one of the assets is a \*precluded asset, you are taken to have \*acquired a whole number of the \*shares (but not all of them) before that day. The number is the greatest possible that (when expressed as a percentage of all the shares) does not exceed:
- the total of the \*market values of the assets that are not \*precluded assets, less any liabilities the company undertakes to discharge in respect of those assets; expressed as a percentage of:
  - the total of the market values of all the assets, less any liabilities the company undertakes to discharge in respect of those assets.

Note: There are rules for working out what are the liabilities in respect of an asset: see section 122-37.

- (3) The first element of each other \*share's \*cost base and \*reduced cost base is the total of the \*market values of the \*precluded assets (less any liabilities the company undertakes to discharge in respect of those assets) divided by the number of those other shares.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

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Section 122-60

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- (4) The \*market value of an asset is worked out when you \*disposed of it. The \*cost base or \*reduced cost base of an asset is worked out at the same time.

**122-60 Assets acquired before and after 20 September 1985**

- (1) If you \*acquired some of the assets on or after 20 September 1985, you are taken to have acquired a whole number of the \*shares (but not all of them) before that day. The number is the greatest possible that (when expressed as a percentage of all the shares) does not exceed:
- the total of the \*market values of the assets (except any \*precluded assets) that you acquired before that day, less any liabilities the company undertakes to discharge in respect of those assets;  
expressed as a percentage of:
  - the total of the market values of all the assets, less any liabilities the company undertakes to discharge in respect of those assets.
- (2) The first element of each other \*share's \*cost base is the sum of the \*market values of the \*precluded assets and the cost bases of the other assets that you \*acquired on or after that day (less any liabilities the company undertakes to discharge in respect of all of those assets) divided by the number of those other shares.
- Note: There are special indexation rules for roll-overs: see Division 114.
- (3) The first element of each other \*share's \*reduced cost base is worked out similarly.
- (4) The \*market value of an asset is worked out when you \*disposed of it. The \*cost base or \*reduced cost base of an asset is worked out at the same time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Replacement-asset roll-over for a creation case

### 122-65 Creation of asset

- (1) If you choose a roll-over, a \*capital gain or \*capital loss you make from the trigger event is disregarded.
- (2) The first element of each \*share's \*cost base is the amount applicable under this table divided by the number of shares. The first element of each share's \*reduced cost base is worked out similarly.

<b>Creation case</b>	
<b>Event No.</b>	<b>Applicable amount</b>
D1	the *incidental costs you incurred that relate to the trigger event
D2	the expenditure you incurred to grant the option
D3	the expenditure you incurred to grant the right
F1	the expenditure you incurred on the grant, renewal or extension of the lease

The expenditure can include a transfer of property: see section 103-5.

Example: Bill grants a licence (CGT event D1) to Tiffin Pty Ltd (a company he owns). The company issues him with 2 additional shares. He incurs legal expenses of \$1,000 to grant the licence.

Bill's cost base for each of the shares is \$500.

## Same-asset roll-over consequences for the company (disposal case)

### 122-70 Consequences for the company (disposal case)

- (1) There are these consequences for the company in a disposal case if you choose to obtain a roll-over. They are relevant for each \*CGT asset (except a \*precluded asset) that you \*disposed of to the company.

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

**Part 3-3** Capital gains and losses: special topics

**Division 122** Roll-over for the disposal of assets to, or the creation of assets in, a wholly-owned company

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Note: A capital gain or loss from a precluded asset can be disregarded: see Subdivision 118-A.

*Asset acquired on or after 20 September 1985*

- (2) If you \*acquired the asset on or after 20 September 1985:
- (a) the first element of the asset's \*cost base (in the hands of the company) is the asset's cost base when you disposed of it; and
  - (b) the first element of the asset's \*reduced cost base (in the hands of the company) is the asset's reduced cost base when you disposed of it.

Note 1: There are special indexation rules for roll-overs: see Division 114.

Note 2: The reduced cost base may be modified for a roll-over happening after a demerger: see section 125-170.

*Asset acquired before 20 September 1985*

- (3) If you \*acquired the asset before 20 September 1985, the company is taken to have acquired it before that day.

Note: A capital gain or loss from a CGT asset acquired before 20 September 1985 is generally disregarded: see Division 104. This exemption is removed in some situations: see Division 149.

**Same-asset roll-over consequences for the company (creation case)**

**122-75 Consequences for the company (creation case)**

- (1) There are these consequences for the company in a creation case if you choose to obtain a roll-over.
- (2) The first element of the created asset's \*cost base (in the hands of the company) is the applicable amount from the table in subsection 122-65(2).

Example: To continue the example in section 122-65, the cost base of the licence in Tiffin Pty Ltd's hands is \$1,000.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (3) The first element of the created asset's \*reduced cost base (in the hands of the company) is worked out similarly.

## **Subdivision 122-B—Disposal or creation of assets by partners to a wholly-owned company**

### **Guide to Subdivision 122-B**

#### **122-120 What this Subdivision is about**

This Subdivision sets out when the partners in a partnership can obtain a roll-over on transferring a CGT asset, or all the assets of a business, to a company. It also deals with the creation of a CGT asset in a company. There are consequences for the company also.

#### **Table of sections**

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- 122-145 Rules for working out what a liability in respect of an interest in an asset is

##### **Replacement-asset roll-over if partners dispose of a CGT asset**

- 122-150 Capital gain or loss disregarded
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- 122-170 Capital gain or loss disregarded
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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

**Part 3-3** Capital gains and losses: special topics

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**Replacement-asset roll-over for a creation case**

122-195 Creation of asset

**Same-asset roll-over consequences for the company (disposal case)**

122-200 Consequences for the company (disposal case)

**Same-asset roll-over consequences for the company (creation case)**

122-205 Consequences for the company (creation case)

**When is a roll-over available**

**122-125 Disposal or creation of assets—wholly-owned company**

All of the partners in a partnership can choose to obtain a roll-over if one of the \*CGT events (the *trigger event*) specified in this table happens involving the partners and a company in the circumstances set out in sections 122-130 to 122-140.

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<b>Relevant *CGT events</b>	
<b>Event No.</b>	<b>What the partners do</b>
A1	*Dispose of their interests in a *CGT asset of the partnership, or all the assets of a business carried on by the partnership, to the company
D1	Create contractual or other rights in the company
D2	Grant an option to the company
D3	Grant the company a right to income from mining
F1	Grant a lease to the company, or renew or extend a lease

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Note 1: The roll-over starts at section 122-150.

Note 2: Section 103-25 tells you when you have to make the choice.

Example: Michael and Sandra operate a fish shop in partnership. They agree to incorporate the business so they dispose of their interests in all its assets to a company. They are the only shareholders of the company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **122-130 What the partners receive for the trigger event**

- (1) The consideration the partners receive must be only:
  - (a) \*shares in the company; or
  - (b) for a \*disposal of their interests in a \*CGT asset, or in all the assets of a business, to the company (a *disposal case*)—shares in the company and the company undertaking to discharge one or more liabilities in respect of their interests.
- (2) The \*shares cannot be \*redeemable shares.
- (3) The \*market value of the \*shares each partner receives for the trigger event happening must be substantially the same as:
  - (a) for a disposal case—the market value of the interests in the asset or assets the partner disposed of, less any liabilities the company undertakes to discharge in respect of the interests in the asset or assets (as appropriate); or
  - (b) for another trigger event (a *creation case*)—the market value of what would have been the partner's interest in the \*CGT asset created in the company (the *created asset*) if it were an asset of the partnership.
- (4) In working out if the requirement in paragraph (3)(a) is satisfied, if the \*market value of the \*shares is different to what it would otherwise be only because of the possibility of liabilities attaching to the asset or assets, disregard the difference.

Note: The company may have to pay income tax if an amount is included in its assessable income because of a CGT event happening to an asset a partner disposed of, or it may have a liability because of accrued leave entitlements of employees. The market value of the shares will reflect these contingent liabilities.

### **122-135 Other requirements to be satisfied**

- (1) The partners must own all the \*shares in the company just after the time of the trigger event.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

**Part 3-3** Capital gains and losses: special topics

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Section 122-135

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- (2) Each partner must own the \*shares the partner received for the trigger event happening in the same capacity that the partner:
- (a) owned the partner's interests in the assets that the company now owns; or
  - (b) participated in the creation of the asset in the company.

Note: If a partner's interests were owned as trustee, the partner must receive shares as trustee.

- (3) This Subdivision does not apply to the \*disposal or creation of any of the assets specified in this table:

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**Assets to which Subdivision does not apply**

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<b>Item</b>	<b>In this situation:</b>	<b>This Subdivision does not apply to:</b>
1	The partners *dispose of their interests in a *CGT asset to, or create a CGT asset in, the company	<ul style="list-style-type: none"><li>(a) a *collectable or a *personal use asset; or</li><li>(b) a decoration awarded for valour or brave conduct (except if a partner paid money or gave any other property for it); or</li><li>(c) a *precluded asset; or</li><li>(d) an asset that becomes *trading stock of the company just after the *disposal or creation</li></ul>
2	The partners *dispose of their interests in all the assets of a business	<ul style="list-style-type: none"><li>(a) a *collectable or a *personal use asset; or</li><li>(b) a decoration awarded for valour or brave conduct (except if a partner paid money or gave any other property for it); or</li><li>(c) an asset that becomes *trading stock of the company just after the disposal or creation (unless it was trading stock of the partnership when it was disposed of)</li></ul>

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- (4) If:
- (a) the \*CGT asset or any of the assets of the \*business is a right, option, \*convertible interest or \*exchangeable interest; and
  - (b) the company \*acquires another CGT asset by exercising the right or option or by converting the convertible interest or in

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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exchange for the disposal or redemption of the exchangeable interest;

the other asset cannot become \*trading stock of the company just after the company acquired it.

- (5) The \*ordinary income and \*statutory income of the company must not be exempt from income tax because it is an \*exempt entity for the income year of the trigger event.
- (6) For a partner who is not a trustee of a trust at the time of the trigger event, either:
  - (a) the partner and the company must both be Australian residents at that time; or
  - (b) both of the following requirements must be satisfied:
    - (i) each asset must be \*taxable Australian property at that time; and
    - (ii) the shares in the company mentioned in subsection 122-130(1) must be taxable Australian property just after that time.
- (7) For a partner who is a trustee of a trust at the time of the trigger event, either:
  - (a) at that time, the trust must be a \*resident trust for CGT purposes and the company must be an Australian resident; or
  - (b) both of the following requirements must be satisfied:
    - (i) each \*CGT asset must be a CGT asset of the trust that is \*taxable Australian property at that time; and
    - (ii) the shares in the company mentioned in subsection 122-130(1) must be taxable Australian property just after that time.

### **122-140 What if the company undertakes to discharge a liability (disposal case)**

#### *Disposal of a CGT asset*

- (1) One of these requirements must be satisfied (for each partner) if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

**Part 3-3** Capital gains and losses: special topics

**Division 122** Roll-over for the disposal of assets to, or the creation of assets in, a wholly-owned company

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- (a) the partners \*dispose of their interests in a \*CGT asset; and
- (b) the company undertakes to discharge one or more liabilities in respect of the interests in the asset.

(The \*market value, or the \*cost base, of an interest is worked out at the time of the disposal.)

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**What amount the liabilities cannot exceed**

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<b>Item</b>	<b>In this situation:</b>	<b>the liabilities cannot exceed:</b>
1	A partner *acquired the interest on or after 20 September 1985	The *cost base of the interest
2	A partner *acquired the interest before 20 September 1985	The *market value of the interest

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Note: There are rules for working out what are the liabilities in respect of an interest in an asset: see section 122-145.

*Disposal of all the assets of a business*

- (2) One of these requirements must be satisfied (for each partner) if:
  - (a) the partners \*dispose of their interests in all the assets of a \*business; and
  - (b) the company undertakes to discharge one or more liabilities in respect of the interests in the assets.

(The \*market value, or the \*cost base, of an interest is worked out at the time of the disposal.)

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**What amount the liabilities cannot exceed**

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<b>Item</b>	<b>In this situation:</b>	<b>the liabilities cannot exceed:</b>
1	A partner *acquired all the interests on or after 20 September 1985	The sum of the *market values of the partner's interests in *precluded assets and the *cost bases of the partner's interests in other assets

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**What amount the liabilities cannot exceed**

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<b>Item</b>	<b>In this situation:</b>	<b>the liabilities cannot exceed:</b>
2	A partner *acquired all the interests before 20 September 1985	The sum of the *market values of the interests
3	A partner *acquired at least one interest on or after 20 September 1985 and at least one before that day	For liabilities in respect of interests *acquired on or after that day—the sum of the *market values of the partner’s interests in *precluded assets and the *cost bases of the partner’s interests in other assets  For liabilities in respect of interests *acquired before that day—the sum of the market values of those interests

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**122-145 Rules for working out what a liability in respect of an interest in an asset is**

- (1) These rules are relevant to working out what are the liabilities in respect of a partner’s interests in an asset.
- (2) A liability incurred for the purposes of a \*business that is not a liability in respect of interests in a specific asset or assets of the business is taken to be a liability in respect of the partner’s interests in all the assets of the business.

Note: An example is a bank overdraft.

- (3) If a liability is in respect of both:
  - (a) the partner’s interests in one or more assets that the partner \*acquired on or after 20 September 1985; and
  - (b) the partner’s interests in one or more assets that the partner acquired before that day;
 the proportion of the liability that is in respect of the partner’s interests that the partner acquired on or after that day is equal to:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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$$\frac{\text{The *market value of the partner's interest that the partner *acquired on or after that day}}{\text{The total of the market values of all the partner's interest in assets that the liability is in respect of}}$$

**Replacement-asset roll-over if partners dispose of a CGT asset**

**122-150 Capital gain or loss disregarded**

If the partners choose a roll-over for \*disposing of their interests in a CGT asset to the company, a \*capital gain or \*capital loss any partner makes from the disposal is disregarded.

**122-155 Disposal of post-CGT or pre-CGT interests**

- (1) If a partner \*acquired all the partner's interests in the asset on or after 20 September 1985:
  - (a) the first element of each \*share's \*cost base is the sum of the cost bases of the interests when the partner \*disposed of them (less any liabilities the company undertakes to discharge in respect of them) divided by the number of the partner's shares; and
  - (b) the first element of each share's \*reduced cost base is worked out similarly.
- Note 1: There are rules for working out what are the liabilities in respect of an interest in an asset: see section 122-145.
- Note 2: There are special indexation rules for roll-overs: see Division 114.
- (2) If a partner \*acquired all the partner's interests in the asset before 20 September 1985, the partner is taken to have acquired the \*shares before that day.

**122-160 Disposal of both post-CGT and pre-CGT interests**

- (1) If a partner \*acquired some of the partner's interests in the asset on or after 20 September 1985 and some before that day, the partner is

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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taken to have acquired a whole number of the \*shares (but not all of them) before that day. The number is the greatest possible that (when expressed as a percentage of all the shares the partner acquires) does not exceed:

- the \*market value of the interests in the asset that the partner acquired before that day;  
expressed as a percentage of:
- the total of the market values of all the partner's interests in the asset.

- (2) The first element of each other \*share's \*cost base is the sum of the cost bases of the partner's interests that the partner \*acquired on or after that day (less any liabilities the company undertakes to discharge in respect of all of those interests) divided by the number of the other shares.

Note: There are special indexation rules for roll-overs: see Division 114.

- (3) The first element of each other \*share's \*reduced cost base is worked out similarly.
- (4) The \*market value of an interest in an asset is worked out when the partner \*disposed of it. The \*cost base or \*reduced cost base of an interest in an asset is worked out at the same time.

### **Replacement-asset roll-over if the partners dispose of all the assets of a business**

#### **122-170 Capital gain or loss disregarded**

If the partners choose a roll-over for \*disposing of their interests in all the assets of a \*business to the company, a \*capital gain or \*capital loss any partner makes from the disposal is disregarded.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

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**122-175 Other consequences**

The other consequences relate to the \*shares the partners receive and depend on when they \*acquired their interests in the assets of the \*business.

Note 1: There are 3 possible cases:

- a partner acquired all the interests on or after 20 September 1985: see section 122-180;
- a partner acquired all the interests before that day: see section 122-185;
- a partner acquired some of the interests on or after that day: see section 122-190.

Note 2: There are other consequences for the partnership and the company if the partners dispose of their interests in trading stock of the partnership: see Division 70.

**122-180 All interests acquired on or after 20 September 1985**

- (1) If a partner \*acquired all of the partner's interests in the assets of the \*business on or after 20 September 1985:
  - (a) the first element of the partner's \*cost base of each \*share is the sum of the \*market values of the partner's interests in the \*precluded assets and the cost bases of the partner's interests in the other assets (less any liabilities the company undertakes to discharge in respect of all of those interests) divided by the number of the partner's shares; and
  - (b) the first element of the partner's \*reduced cost base of each \*share is worked out similarly.

Note 1: There are rules for working out what are the liabilities in respect of interests: see section 122-145.

Note 2: There are special indexation rules for roll-overs: see Division 114.

- (2) The \*market value of an interest in an asset is worked out when the partner \*disposed of it. The \*cost base or \*reduced cost base of an interest is worked out at the same time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **122-185 All interests acquired before 20 September 1985**

- (1) A partner is taken to have \*acquired all of the \*shares before 20 September 1985 if the partner acquired all the partner's interests in the assets of the \*business before that day and none of the assets is a \*precluded asset.
  - (2) However, if at least one of the assets is a \*precluded asset, the partner is taken to have \*acquired a whole number of the \*shares (but not all of them) before that day. The number is the greatest possible that (when expressed as a percentage of all the shares) does not exceed:
    - the total of the \*market values of the partner's interests in the assets that are not \*precluded assets, less any liabilities the company undertakes to discharge in respect of those interests;expressed as a percentage of:
    - the total of the market values of the partner's interests in all the assets, less any liabilities the company undertakes to discharge in respect of those interests.
- Note: There are rules for working out what are the liabilities in respect of an interest: see section 122-145.
- (3) The first element of the partner's \*cost base and \*reduced cost base of each other \*share is the total of the \*market values of the partner's interests in the \*precluded assets (less any liabilities the company undertakes to discharge in respect of those interests) divided by the number of the other shares.
  - (4) The \*market value of an interest in an asset is worked out when the partner \*disposed of it. The \*cost base or \*reduced cost base of an interest is worked out at the same time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 122-190

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**122-190 Interests acquired before and after 20 September 1985**

- (1) If a partner \*acquired some of the interests in the assets on or after 20 September 1985, the partner is taken to have acquired a whole number of the \*shares (but not all of them) before that day. The number is the greatest possible that (when expressed as a percentage of all the shares) does not exceed:
- the total of the \*market values of the partner's interests in the assets (except any \*precluded assets) that the partner acquired before that day, less any liabilities the company undertakes to discharge in respect of those interests; expressed as a percentage of:
  - the total of the market values of all the partner's interests in the assets, less any liabilities the company undertakes to discharge in respect of those interests.
- (2) The first element of the partner's \*cost base of each other \*share is the sum of the \*market values of the partner's interests in the \*precluded assets and the cost bases of the partner's interests in the other assets that the partner \*acquired on or after that day (less any liabilities the company undertakes to discharge in respect of all of those interests) divided by the number of the other shares.
- Note: There are special indexation rules for roll-overs: see Division 114.
- (3) The first element of the partner's \*reduced cost base of each other \*share is worked out similarly.
- (4) The \*market value of an interest in an asset is worked out when the partner \*disposed of it. The \*cost base or \*reduced cost base of an interest in an asset is worked out at the same time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Replacement-asset roll-over for a creation case

### 122-195 Creation of asset

- (1) If the partners choose a roll-over, a \*capital gain or \*capital loss any partner makes from the trigger event is disregarded.
- (2) The first element of the partner's \*cost base of each \*share is the amount applicable under this table divided by the number of shares. The first element of each share's \*reduced cost base is worked out similarly.

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<b>Creation case</b>	
<b>Event No.</b>	<b>Applicable amount</b>
D1	the partner's share of the *incidental costs incurred that relate to the trigger event
D2	the partner's share of the expenditure incurred to grant the option
D3	the partner's share of the expenditure incurred to grant the right
F1	the partner's share of the expenditure incurred on the grant, renewal or extension of the lease

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The expenditure can include a transfer of property: see section 103-5.

## Same-asset roll-over consequences for the company (disposal case)

### 122-200 Consequences for the company (disposal case)

- (1) There are these consequences for the company in a disposal case if the partners choose to obtain a roll-over. They are relevant for interests in each \*CGT asset (except a \*precluded asset) that the partners \*disposed of to the company.

Note 1: A capital gain or loss from a precluded asset can be disregarded: see Subdivision 118-A.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

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Note 2: The reduced cost base (as determined under this section) may be modified for a roll-over happening after a demerger: see section 125-170.

*Interests acquired on or after 20 September 1985*

- (2) If all of the partners' interests in an asset were \*acquired on or after 20 September 1985:
- (a) the first element of the asset's \*cost base (in the hands of the company) is the sum of the cost bases of the partners' interests in the asset when it was disposed of; and
  - (b) the first element of the asset's \*reduced cost base (in the hands of the company) is the sum of the reduced cost bases of the partners' interests in the asset when it was disposed of.

Note: There are special indexation rules for roll-overs: see Division 114.

*Interests acquired before 20 September 1985*

- (3) If all of the partners' interests in an asset were \*acquired before 20 September 1985, the company is taken to have acquired it before that day.

Note: A capital gain or loss from a CGT asset acquired before 20 September 1985 is generally disregarded: see Division 104. This exemption is removed in some situations: see Division 149.

*Interests acquired on or after and before 20 September 1985*

- (4) If some of the partners' interests in an asset (the **original asset**) were \*acquired on or after 20 September 1985 and some before that day, the company is taken to have acquired 2 separate \*CGT assets:
- (a) one (which the company is taken to have acquired on or after 20 September 1985) representing the extent to which the partners' interests in the original asset were acquired by the partners on or after that day; and
  - (b) another (which the company is taken to have acquired before that day) representing the extent to which the partners' interests in the original asset were acquired by the partners before that day.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (5) The first element of the \*cost base of the separate asset that the company is taken to have \*acquired on or after 20 September 1985 is the sum of the cost bases of the partners' interests in the original asset that they acquired on or after that day.

Note: There are special indexation rules for roll-overs: see Division 114.

- (6) The first element of its \*reduced cost base is worked out similarly.

### Same-asset roll-over consequences for the company (creation case)

#### 122-205 Consequences for the company (creation case)

- (1) There are these consequences for the company in a creation case if the partners choose to obtain a roll-over.
- (2) The first element of the created asset's \*cost base (in the hands of the company) is the applicable amount from this table.

Creation case	
Event No.	Applicable amount
D1	the total *incidental costs incurred that relate to the trigger event
D2	the total expenditure incurred to grant the option
D3	the total expenditure incurred to grant the right
F1	the total expenditure incurred on the grant, renewal or extension of the lease

The expenditure can include a transfer of property: see section 103-5.

- (3) The first element of the created asset's \*reduced cost base (in the hands of the company) is worked out similarly.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## **Division 124—Replacement-asset roll-overs**

### **Table of Subdivisions**

	Guide to Division 124
124-A	General rules
124-B	Asset compulsorily acquired, lost or destroyed
124-C	Statutory licences
124-D	Strata title conversion
124-E	Exchange of shares or units
124-F	Exchange of rights or options
124-I	Change of incorporation
124-J	Crown leases
124-K	Depreciating assets
124-L	Prospecting and mining entitlements
124-M	Scrip for scrip roll-over
124-N	Disposal of assets by a trust to a company
124-P	Exchange of a membership interest in an MDO for a membership interest in another MDO
124-Q	Exchange of stapled ownership interests for ownership interests in a unit trust
124-R	Water entitlements
124-S	Interest realignment arrangements

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Guide to Division 124

### 124-1 What this Division is about

A replacement-asset roll-over allows you, in special cases, to defer the making of a capital gain or loss from one CGT event until a later CGT event happens. It involves your ownership of one CGT asset ending and you acquiring another one.

### 124-5 How to find your way around this Division

- (1) First, find out if you can obtain a roll-over when your ownership of one or more CGT assets ends and you acquire one or more CGT assets: see Subdivisions 124-B to 124-R.

Note: If you carry on a small business, you may also be able to obtain a roll-over under Subdivision 152-E.

- (2) Second, find out what the consequences are for being able to obtain a roll-over: see Subdivision 124-A.

Note: The consequences of a scrip for scrip roll-over are set out in Subdivision 124-M. The consequences of replacing a statutory licence by a new statutory licence are set out in Subdivision 124-C. The consequences of an exchange of a membership interest in an MDO are set out in Subdivision 124-P. The consequences of an exchange of stapled ownership interests are set out in Subdivision 124-Q. The consequences of a roll-over for water entitlements are set out in Subdivision 124-R.

- (3) Third, find out if there are any special rules relevant to your situation: see the Subdivision under which you can get the roll-over.

## Subdivision 124-A—General rules

### Table of sections

124-10	Your ownership of one CGT asset ends
124-15	Your ownership of more than one CGT asset ends

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-10

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124-20 Share and interest sale facilities

**124-10 Your ownership of one CGT asset ends**

- (1) There are these consequences (in most cases) if you can obtain a roll-over when your ownership of a \*CGT asset (the *original asset*) ends and you \*acquire one or more CGT assets (the *new assets*) in a situation covered by this Division.
- (1A) A \*car, motor cycle or similar vehicle must not be one of the new assets.
- (2) A \*capital gain or a \*capital loss you make from the original asset is disregarded.
- (3) If you \*acquired the original asset on or after 20 September 1985, the first element of each new asset's \*cost base is:

$$\frac{\text{The original asset's cost base} \\ \text{(worked out when your ownership of it ended)}}{\text{Number of new assets}}$$

The first element of each new asset's \*reduced cost base is worked out similarly.

Note 1: In some cases the amount you paid to acquire the new asset also forms part of the first element: see Subdivision 124-D (about strata title conversion).

Note 2: There are modifications to the consequences in Subdivision 124-B (about compulsory acquisition, loss or destruction), Subdivision 124-C (about statutory licences), Subdivision 124-J (about Crown leases) and Subdivision 124-L (about prospecting and mining).

Note 3: No other elements of the cost base of the new asset are affected by the roll-over.

Note 4: There are special indexation rules for roll-overs: see Division 114.

Note 5: The reduced cost base may be modified for a roll-over happening after a demerger: see section 125-170.

- (4) If you \*acquired the original asset before 20 September 1985, you are taken to have acquired each new asset before that day.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note: A capital gain or loss you make from a CGT asset you acquired before 20 September 1985 is generally disregarded: see Division 104. This exemption is removed in some situations: see Division 149.

- (5) However, subsection (4) is taken never to have applied to a \*share to which subsection 104-195(6) applies (CGT event J4).

### **124-15 Your ownership of more than one CGT asset ends**

- (1) There are these consequences (in most cases) if you can obtain a roll-over when your ownership of more than one \*CGT asset (the **original assets**) ends and you acquire one or more CGT assets (the **new assets**) in a situation covered by this Division.

Example: You own 100 shares in a company. The company cancels these shares and issues you with 10 shares in return.

- (1A) A \*car, motor cycle or similar vehicle must not be one of the new assets.
- (2) A \*capital gain or a \*capital loss you make from each original asset is disregarded.
- (3) If you \*acquired all the original assets on or after 20 September 1985, the first element of each new asset's cost base is:

$$\frac{\text{The total of the cost bases of all the original assets (worked out when your ownership of them ended)}}{\text{Number of new assets}}$$

The first element of each new asset's \*reduced cost base is worked out similarly.

Note 1: No other elements of the cost base of the new asset are affected by the roll-over.

Note 2: There are special indexation rules for roll-overs: see Division 114.

- (4) If you \*acquired all the original assets before 20 September 1985, you are taken to have acquired each new asset before that day.

Note: A capital gain or loss you make from a CGT asset you acquired before 20 September 1985 is generally disregarded: see Division 104. This exemption is removed in some situations: see Division 149.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-15

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- (5) If you \*acquired some of the original assets before 20 September 1985, you are taken to have acquired a number of new assets before that day. It is the maximum possible that does not exceed:

$$\text{The number of new assets} \times \frac{\text{The number of original assets you *acquired before 20 September 1985}}{\text{The total number of original assets}}$$

If the result is less than one, none of the new assets are taken to have been \*acquired before 20 September 1985.

Example: To continue the example, suppose you acquired 67 of the 100 original shares before 20 September 1985. The number of new shares that you are taken to have acquired before that day cannot exceed:

$$10 \times \frac{67}{100} = 6.7$$

So, you are taken to have acquired 6 of the 10 shares before that day.

- (6) These rules are relevant to each remaining new asset. The first element of each one's \*cost base is:

$$\frac{\text{The total of the cost bases of all the original assets that you *acquired on or after 20 September 1985 (worked out when your ownership of them ended)}}{\text{Number of remaining new assets}}$$

The first element of each one's \*reduced cost base is worked out similarly.

Note: There are special indexation rules for roll-overs: see Division 114.

Example: To continue the example, suppose the total of the cost bases of the 33 shares you acquired on or after 20 September 1985 is \$400.

The first element of the cost base of each of the remaining 4 shares is:

$$\frac{\$400}{4} = \$100$$

The first element of the reduced cost base of those 4 shares is worked out similarly.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (7) However, subsections (4) and (5) are taken never to have applied to a \*share to which subsection 104-195(6) applies (CGT event J4).

## 124-20 Share and interest sale facilities

### *Share and interest sale facilities*

- (1) An entity (the **investor**) is treated as owning an \*ownership interest (the **roll-over interest**) in a company or trust (the **issuer**) at a time (the **deeming time**), if:
- (a) the investor owned an ownership interest (the **original interest**) in a company or trust; and
  - (b) a transaction happened in relation to the original interest; and
  - (c) because:
    - (i) a \*foreign law impedes the ability of the issuer to issue or transfer the roll-over interest to the investor; or
    - (ii) it would be impractical or unreasonably onerous to determine whether a foreign law impedes the ability of the issuer to issue or transfer the roll-over interest to the investor;
- it is \*arranged that the issuer will issue or transfer the roll-over interest to another entity (the **facility**) under the transaction instead of to the investor; and
- (d) in accordance with that arrangement and as a result of the transaction, the facility:
    - (i) becomes the owner of the roll-over interest; and
    - (ii) owns the roll-over interest at the deeming time; and
  - (e) under the arrangement, the investor is entitled to receive from the facility:
    - (i) an amount equivalent to the \*capital proceeds of any \*CGT event that happens in relation to the roll-over interest (less expenses); or
    - (ii) if a CGT event happens in relation to the roll-over interest together with CGT events happening in relation to other ownership interests—an amount equivalent to

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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the investor's proportion of the total capital proceeds of the CGT events (less expenses).

- (2) The facility is treated as not owning the roll-over interest at the deeming time.
- (3) This section applies for the purposes of:
  - (a) applying one of the following provisions (the ***roll-over provision***) in relation to the transaction:
    - (iii) Subdivision 124-I (Change of incorporation);
    - (iv) Subdivision 124-N (Disposal of assets by a trust to a company);
    - (v) Subdivision 124-Q (Exchange of stapled ownership interests for ownership interests in a unit trust);
    - (vi) Division 615 (Roll-overs for business restructures); and
  - (b) the following provisions, to the extent that they relate to a roll-over under the roll-over provision that involves the transaction:
    - (i) item 2 of the table in subsection 115-30(1);
    - (ii) sections 124-10 and 124-15.

*Incorporated bodies*

- (4) Without limiting this section, it also has effect, in a case covered by subparagraph (3)(a)(iii) (about Subdivision 124-I), as if each reference in this section to an \*ownership interest in a company or trust were a reference to:
  - (a) an interest in an incorporated body; and
  - (b) any rights relating to the body owned by the entity that owns that interest.
- (5) This section applies, in a case covered by subparagraph (3)(a)(iii) (about Subdivision 124-I), in relation to rights as a \*member of a company incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* in the same way as it applies in relation to \*shares in a company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## **Subdivision 124-B—Asset compulsorily acquired, lost or destroyed**

### **Table of sections**

#### **When a roll-over is available**

124-70	Events giving rise to a roll-over
124-75	Other requirements if you receive money
124-80	Other requirements if you receive an asset

#### **The consequences of a roll-over being available**

124-85	Consequences for receiving money
124-90	Consequences for receiving an asset
124-95	You receive both money and an asset

### **When a roll-over is available**

#### **124-70 Events giving rise to a roll-over**

- (1) You may be able to choose a roll-over if one of these events happens to a \*CGT asset (the *original asset*) you own:
  - (a) it is compulsorily \*acquired by an \*Australian government agency;
  - (aa) it is compulsorily acquired by an entity (other than an Australian government agency or a \*foreign government agency) under a power of compulsory acquisition conferred by a law covered under subsection (1A);
  - (b) it, or part of it, is lost or destroyed;
  - (c) you \*dispose of it to an entity (other than a foreign government agency) in circumstances meeting all of these conditions:
    - (i) the disposal takes place after a notice was served on you by or on behalf of the entity;
    - (ii) the notice invited you to negotiate with the entity with a view to the entity acquiring the asset by agreement;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (iii) the notice informed you that if the negotiations were unsuccessful, the asset would be compulsorily acquired by the entity;
- (iv) the compulsory acquisition would have been under a power of compulsory acquisition conferred by a law covered under subsection (1A);
- (ca) you dispose of it to an entity (other than a foreign government agency) in circumstances meeting all of these conditions:
  - (i) the asset is land over which a mining lease was compulsorily granted;
  - (ii) the lease significantly affected your use of the land;
  - (iii) the lease was in force just before the disposal;
  - (iv) the entity to which you dispose of the land was the lessee under the lease;
- (cb) you dispose of it to an entity (other than a foreign government agency) in circumstances meeting all of these conditions:
  - (i) the asset is land over which a mining lease would have been compulsorily granted if you had not disposed of it;
  - (ii) that lease would have significantly affected your use of the land;
  - (iii) the entity to which you dispose of the land would have been the lessee under the lease.
- (d) if it is a lease granted to you by an \*Australian government agency under an \*Australian law—the lease expires and is not renewed.

Note 1: There are no roll-over consequences if you make a capital loss from the event.

Note 2: Section 103-25 tells you when you have to make the choice.

(1A) A law is covered under this subsection if it is:

- (a) an \*Australian law (other than Chapter 6A of the *Corporations Act 2001*); or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) a \*foreign law (other than a foreign law corresponding to Chapter 6A of the *Corporations Act 2001*).
- (2) You must receive money or another \*CGT asset (except a \*car, motor cycle or similar vehicle), or both:
- (a) as compensation for the event happening; or
  - (b) under an insurance policy against the risk of loss or destruction of the original asset.
- Note: There are other requirements that must be satisfied if:
- you receive money: see section 124-75; or
  - you receive another CGT asset: see section 124-80.
- (3) The requirement in subsection (4) must be satisfied if:
- (a) you are a foreign resident just before the event happens; or
  - (b) you are the trustee of a trust that is a \*foreign trust for CGT purposes for the income year in which the event happens.
- (4) The original asset must be \*taxable Australian property just before the event happens. The other asset must be taxable Australian property just after you \*acquire it.

### **124-75 Other requirements if you receive money**

- (1) If you receive money for the event happening, you can choose to obtain a roll-over only if these other requirements are satisfied.
- Note: The roll-over consequences are set out in section 124-85.
- (2) You must:
- (a) incur expenditure in \*acquiring another \*CGT asset (except a \*depreciating asset whose decline in value is worked out under Division 40 or deductions for which are calculated under Division 328); or
  - (b) if part of the original asset is lost or destroyed—incur expenditure of a capital nature in repairing or restoring it.
- (3) At least some of the expenditure must be incurred:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Section 124-80**

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- (a) no earlier than one year, or within such further time as the Commissioner allows in special circumstances, before the event happens; or
- (b) no later than one year, or within such further time as the Commissioner allows in special circumstances, after the end of the income year in which the event happens.

*Special rules if you acquire another asset*

- (4) If just before the event happened the original asset:
  - (a) was used in your \*business; or
  - (b) was \*installed ready for use in your business; or
  - (c) was in the process of being \*installed ready for use in your business;

the other asset must be used in the business, or be installed ready for use in the business, for a reasonable time after you \*acquired it.

Otherwise, you must use the other asset (for a reasonable time after you \*acquired it) for the same purpose as, or for a similar purpose to, the purpose for which you used the original asset just before the event happened.

- (5) The other asset cannot become an item of your \*trading stock just after you \*acquire it, nor can it be a \*depreciating asset whose decline in value is worked out under Division 40 or deductions for which are calculated under Division 328.
- (6) The other asset cannot become a \*registered emissions unit \*held by you just after you \*acquire it.

**124-80 Other requirements if you receive an asset**

- (1) If you receive another \*CGT asset for the event happening, you can choose to obtain a roll-over only if these other requirements are satisfied.

Note: The roll-over consequences are set out in section 124-90.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (2) The other asset cannot become an item of your \*trading stock just after you \*acquire it, nor can it be a \*depreciating asset whose decline in value is worked out under Division 40 or deductions for which are calculated under Division 328 nor can it be a \*registered emissions unit.
- (3) The \*market value of the other asset (when you \*acquire it) must be more than the \*cost base of the original asset just before the event happens.

## The consequences of a roll-over being available

### 124-85 Consequences for receiving money

- (1) If you receive money for the event happening, there are these consequences if you choose to obtain a roll-over.

*Original asset acquired on or after 20 September 1985*

- (2) If you make a \*capital gain from the event, this table sets out in what situations the gain is reduced, not reduced or disregarded.

It also sets out in what situations the expenditure you incurred to \*acquire another \*CGT asset or to repair or restore the original asset is reduced.

<b>You make a capital gain from the event</b>		
<b>Item</b>	<b>In this situation:</b>	<b>There are these consequences</b>
1	The money exceeds the expenditure you incurred to *acquire another CGT asset or to repair or restore the original asset	If the gain is more than the excess: (a) the gain is reduced to the amount by which the money exceeds that expenditure; and (b) that expenditure is reduced by the amount by which the gain (before it is reduced) is more than the excess
2	The money exceeds that expenditure	If the gain is less than or equal to the excess, the gain is not reduced

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-85

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**You make a capital gain from the event**

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<b>Item</b>	<b>In this situation:</b>	<b>There are these consequences</b>
3	The money does not exceed that expenditure	The gain is disregarded in working out your *net capital gain or *net capital loss for the income year. That expenditure is reduced by the amount of the gain

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**Example:** In 1999 Simon bought a small factory. In 2000 a fire destroys part of it. He receives \$100,000 under an insurance policy.

The capital gain is worked out under section 112-30.

Suppose the factory's cost base at the time of the fire is \$75,000 and the market value of the part that is not destroyed is \$150,000. The cost base of the part that is destroyed is:

$$\$75,000 \times \frac{\$100,000}{\$100,000 + \$150,000} = \$30,000$$

The capital gain is:

$$\$100,000 - \$30,000 = \$70,000$$

Case 1

Suppose Simon spent \$80,000 on repairing the factory. The money he received under the insurance policy exceeds the repair cost by \$20,000. The gain exceeds that by \$50,000.

The result is that the gain is reduced to \$20,000 and the \$80,000 he spent on repairs is reduced to \$30,000.

Case 2

Suppose Simon spent \$15,000 on repairs instead. The money he received under the policy exceeds that amount by \$85,000. This is more than the gain he made.

The gain is relevant to working out Simon's net capital gain or loss for the income year and the \$15,000 he spent on repairs forms part of the factory's cost base.

Case 3

Suppose Simon spent \$120,000 on repairs instead. The gain is disregarded and the \$120,000 is reduced to \$50,000.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



*Original asset acquired before 20 September 1985*

- (3) If you \*acquired the original asset before 20 September 1985 and you incurred expenditure in acquiring another \*CGT asset, you are taken to have acquired the other asset before that day if:
  - (a) the expenditure is not more than 120% of the \*market value of the original asset when the event happened; or
  - (b) a natural disaster happened so that the original asset, or part of it, is lost or destroyed and it is reasonable to treat the other asset as substantially the same as the original asset.
- (4) If you \*acquired the original asset before 20 September 1985 and you incurred expenditure of a capital nature in repairing or restoring it, you are taken to have acquired the original asset (as repaired or restored) before that day.

**124-90 Consequences for receiving an asset**

- (1) If you receive another \*CGT asset for the event happening, there are these consequences if you choose to obtain a roll-over.
- (2) A \*capital gain you make from the original asset is disregarded.
- (3) If you \*acquired the original asset on or after 20 September 1985:
  - (a) the first element of the other asset's \*cost base is the original asset's cost base at the time of the event; and
  - (b) the first element of the other asset's \*reduced cost base is the original asset's reduced cost base at the time of the event.

Note: There are special indexation rules for roll-overs: see Division 114.

Example: Steven bought land in 1999 for \$100,000. In 2001 the government compulsorily acquires the land and gives him new land in return.

A capital gain he makes from the original land is disregarded. Suppose the original land's cost base when it is acquired is \$120,000. The first element of the new land's cost base becomes \$120,000.

- (4) If you acquired the original asset before 20 September 1985, you are taken to have \*acquired the other asset before that day.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-95

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**124-95 You receive both money and an asset**

- (1) If you receive both money and another \*CGT asset for the event happening and choose to obtain a roll-over, the requirements and consequences are different for each part of the compensation attributable to the original asset (having regard to the amount of money and the \*market value of the other asset).

*The other asset as a part of compensation*

- (2) The \*market value of the other asset (when you \*acquire it) must be more than that part of the \*cost base of the original asset that is attributable to the new asset.

Note: This requirement is different to that in subsection 124-80(3). It requires a proportional attribution of the cost base of the original asset.

- (3) If you \*acquired the original asset on or after 20 September 1985:
- (a) the first element of the other asset's \*cost base is that part of the original asset's cost base at the time of the event that is attributable to the new asset; and
  - (b) the first element of the other asset's \*reduced cost base is worked out similarly.

Note: These consequences are different to those in subsection 124-90(3). They require a proportional attribution of the cost base of the original asset.

- (4) If you \*acquired the original asset before 20 September 1985, you are taken to have acquired the new asset before that day.

*Money as a part of compensation*

- (5) If you make a \*capital gain from the event, this table sets out in what situations that part of the gain on the original asset that is attributable to the amount of money you received is reduced, not reduced or disregarded.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

It also sets out in what situations the expenditure you incurred to \*acquire another \*CGT asset or to repair or restore the original asset is reduced.

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**You make a capital gain from the event**

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Item	In this situation:	There are these consequences
1	The money exceeds the expenditure you incurred to *acquire another CGT asset or to repair or restore the original asset	If that part of the gain that is attributable to the amount of money is more than the excess: (a) that part of the gain is reduced to the amount by which the money exceeds that expenditure; and (b) that expenditure is reduced by the amount by which that part of the gain (before it is reduced) is more than the excess
2	The money exceeds that expenditure	If that part of the gain that is attributable to the amount of money is less than or equal to the excess, the gain is not reduced
3	The money does not exceed that expenditure	That part of the gain that is attributable to the amount of money is disregarded in working out your *net capital gain or *net capital loss for the income year. That expenditure is reduced by the amount of that part of the gain

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Note: These consequences are different to those in subsection 124-85(2). They require a proportional attribution of capital gain on the original asset.

- (6) If you \*acquired the original asset before 20 September 1985 and you incurred expenditure in acquiring another \*CGT asset, you are taken to have acquired the other asset before that day if:
- (a) the expenditure you incurred in acquiring the other asset is not more than 120% of the \*market value of

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-95

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that part of the original asset that is attributable to the other asset when the event happened; or

- (b) a natural disaster happened so that the original asset, or part of it, is lost or destroyed and it is reasonable to treat the other asset as substantially the same as that part of the original asset that is attributable to the new asset.

Note 1: The consequences in paragraph (6)(a) are different to those in paragraph 124-85(3)(a). They require a proportional attribution of the market value of the original asset.

Note 2: The consequences in paragraph (6)(b) are different to those in paragraph 124-85(3)(b). They require a proportional attribution of the original asset.

Example: Kris owns land, which he acquired in 1998. It is compulsorily acquired, and Kris receives \$80,000 in cash and replacement land with a market value of \$80,000.

The cost base of the original land is \$150,000.

Kris buys additional land for \$80,000.

Subsection (2) is satisfied because the market value of the replacement land (\$80,000) is more than the part of the cost base of the original land that is attributable to the replacement land:

$$50\% \times \$150,000 = \$75,000$$

Applying subsection (5), the other part of the gain is disregarded, and the first element of the cost base of the replacement land is the part of the cost base of the original land that is attributable to the replacement land:

$$50\% \times \$150,000 = \$75,000$$

Applying subsection (3), the money he received (\$80,000) is the same as the expenditure he incurred to buy the additional land. Item 3 in the table applies. The part of the gain that is attributable to that money is disregarded:

$$50\% \times \$10,000 = \$5,000$$

The expenditure is reduced by \$5,000.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## Subdivision 124-C—Statutory licences

### 124-140 New statutory licences

- (1) There is a roll-over if:
- (a) your ownership of one or more \*statutory licences (each of which is an **original licence**) ends, resulting in \*CGT event C2 happening to the licence (or to each of the licences as part of an \*arrangement); and
  - (b) as a result of the CGT event or events, you are issued one or more new licences (each of which is a **new licence**) for the original licence (or original licences); and
  - (c) the new licence authorises (or the new licences taken together authorise) substantially similar activity as that authorised by the original licence (or by the original licences taken together).

Note 1: If there has been a capital improvement to the original licence: see section 108-75.

Note 2: Subdivision 124-C of the *Income Tax (Transitional Provisions) Act 1997* modifies this roll-over for certain water-related licences. A separate roll-over for other water entitlements is provided in Subdivision 124-R of this Act.

(1A) If:

- (a) you are a foreign resident just before the \*CGT event happens (or just before one or more of the CGT events happens); or
- (b) you are the trustee of a trust that is a \*foreign trust for CGT purposes for the income year in which the event happens (or for an income year in which one or more of those events happens);

there is no roll-over under this section unless the conditions in subsection (1B) are satisfied.

(1B) The conditions are that:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-145

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- (a) if there was only one original licence—the licence must be \*taxable Australian property just before the \*CGT event happens; and
  - (b) if there was more than one original licence—each original licence must be taxable Australian property just before the CGT event in relation to it happens; and
  - (c) if there is only one new licence—the licence must be taxable Australian property just after you \*acquire it; and
  - (d) if there is more than one new licence—each new licence must be taxable Australian property just after you acquire it.
- (2) The first element of the \*cost base and \*reduced cost base of the new licence includes any amount you paid to get it (which can include giving property: see section 103-5).
- (3) A **statutory licence** is an authority, licence, permit or quota (except a lease or a \*mining entitlement or \*prospecting entitlement) granted by:
- (a) an \*Australian government agency under an \*Australian law; or
  - (b) a \*foreign government agency under a \*foreign law.

**124-145 Rollover consequences—capital gain or loss disregarded**

A \*capital gain or \*capital loss you make from the original licence (or from each of the original licences) is disregarded.

**124-150 Rollover consequences—partial roll-over**

- (1) You can obtain only a partial roll-over in relation to an original licence if the \*capital proceeds for that licence includes something (the **ineligible proceeds**) other than a new licence or new licences. There is no roll-over for that part (the **ineligible part**) of the licence for which you received the ineligible proceeds.

Note: If there is more than one original licence, some or all of those original licences may each have an ineligible part.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (2) The \*cost base of the ineligible part is that part of the cost base of the original licence as is reasonably attributable to the ineligible part.
- (3) The \*reduced cost base of the ineligible part is that part of the reduced cost base of the original licence as is reasonably attributable to the ineligible part.
- (4) For the purposes of sections 124-155 and 124-165, for each original licence that has an ineligible part:
  - (a) reduce the \*cost base of that licence (just before the \*CGT event that happened in relation to it) by so much of that cost base as is attributable to that ineligible part; and
  - (b) reduce the \*reduced cost base of that licence (just before the CGT event that happened in relation to it) by so much of that reduced cost base as is attributable to that ineligible part.

#### **124-155 Roll-over consequences—all original licences were post-CGT**

- (1) This section applies if you \*acquired the original licence (or all of the original licences) on or after 20 September 1985.
- (2) The first element of the \*cost base of the new licence (or of each of the new licences) is such amount as is reasonable having regard to:
  - (a) the total of the cost bases of all the original licences; and
  - (b) the number, \*market value and character of the original licences; and
  - (c) the number, market value and character of the new licences.
- (3) The first element of the \*reduced cost base of the new licence (or of each of the new licences) is such amount as is reasonable having regard to:
  - (a) the total of the reduced cost bases of all the original licences; and
  - (b) the number, \*market value and character of the original licences; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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(c) the number, market value and character of the new licences.

**124-160 Roll-over consequences—all original licences were pre-CGT**

If you \*acquired the original licence (or all of the original licences) before 20 September 1985, you are taken to have acquired the new licence (or all of the new licences) before that day.

**124-165 Roll-over consequences—some original licences were pre-CGT, others were post-CGT**

- (1) This section applies if:
  - (a) there was more than one original licence; and
  - (b) you \*acquired one or more of the original licences before 20 September 1985; and
  - (c) you acquired one or more of the original licences on or after that day.
- (2) Each new licence is taken to be 2 separate \*CGT assets that are both \*statutory licences:
  - (a) one (which you are taken to have \*acquired on or after 20 September 1985) representing the extent to which you acquired the original licences on or after that day; and
  - (b) another (which you are taken to have acquired before that day) representing the extent to which you acquired the original licences before that day.
- (3) The first element of the \*cost base and \*reduced cost base of the \*CGT asset mentioned in paragraph (2)(a) in relation to a new licence is worked out under the formula:

$$\text{Total post-CGT cost base} \times \frac{\text{Market value of new licence}}{\text{Market value of all new licences}}$$

where:

**market value of all new licences** is the total of the \*market values of all of the new licences.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



**market value of new licence** is the \*market value of the new licence to which the \*CGT asset mentioned in paragraph (2)(a) relates.

**total post-CGT cost base** is the total of the \*cost bases of all the original licences that you \*acquired on or after 20 September 1985.

## **Subdivision 124-D—Strata title conversion**

### **124-190 Strata title conversion**

- (1) You can choose to obtain a roll-over if:
- (a) you own property that gives you a right to occupy a unit in a building; and
  - (b) the building's owner subdivides it into \*stratum units; and
  - (c) the owner transfers to you the stratum unit that corresponds to the unit you had the right to occupy just before the subdivision.

Note 1: The roll-over consequences are set out in section 124-10. The original asset is the property that gave you the right to occupy a unit in the building. The new asset is the stratum unit.

Note 2: Section 103-25 tells you when you have to make the choice.

- (2) The first element of the \*cost base and \*reduced cost base of the \*stratum unit includes any amount you paid to get it (which can include giving property: see section 103-5).

Note: The rest of the first element is worked out under Subdivision 124-A.

- (3) A **stratum unit** is a lot or unit (however described in an \*Australian law or a \*foreign law relating to strata title or similar title) and any accompanying common property.

## **Subdivision 124-E—Exchange of shares or units**

### **Table of sections**

124-240 Exchange of shares in the same company

124-245 Exchange of units in the same unit trust

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**124-240 Exchange of shares in the same company**

You can choose to obtain a roll-over if:

- (a) you own \*shares (the *original shares*) of a certain class in a company; and
- (b) the company redeems or cancels all shares of that class; and
- (c) the company issues you with new shares (and you receive nothing else) in substitution for the original shares; and
- (d) the \*market value of the new shares just after they were issued is at least equal to the market value of the original shares just before they were redeemed or cancelled; and
- (e) the \*paid-up share capital of the company just after the new shares were issued is the same as just before the original shares were redeemed or cancelled; and
- (f) one of these requirements is satisfied:
  - (i) you are an Australian resident at the time of the redemption or cancellation; or
  - (ii) if you are a foreign resident at that time—the original shares were \*taxable Australian property just before that time and the new shares are taxable Australian property when they are issued.

Note 1: The roll-over consequences are set out in Subdivision 124-A. The original assets are the original shares. The new assets are the new shares.

Note 2: Section 103-25 tells you when you have to make the choice.

**124-245 Exchange of units in the same unit trust**

You can choose to obtain a roll-over if:

- (a) you own units (the *original units*) of a certain class in a unit trust; and
- (b) the trustee redeems or cancels all units of that class; and
- (c) the trustee issues you with new units (and you receive nothing else) in substitution for the original units; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (d) the \*market value of the new units just after they were issued is at least equal to the market value of the original units just before they were redeemed or cancelled; and
- (e) one of these requirements is satisfied:
  - (i) you are an Australian resident at the time of the redemption or cancellation; or
  - (ii) if you are a foreign resident at that time—the original units were \*taxable Australian property just before that time and the new units are taxable Australian property when they are issued.

Note: The roll-over consequences are set out in Subdivision 124-A. The original assets are the original units. The new assets are the new units.

### **Subdivision 124-F—Exchange of rights or options**

#### **Table of sections**

124-295	Exchange of rights or option to acquire shares in a company
124-300	Exchange of rights or option to acquire units in a unit trust

#### **124-295 Exchange of rights or option to acquire shares in a company**

- (1) You can choose to obtain a roll-over if:
  - (a) you own rights (the *original rights*) to \*acquire \*shares in a company or to acquire an option to acquire \*shares in a company; or
  - (b) you own an option (the *original option*) to acquire \*shares in a company;and these other requirements are satisfied.

Note: Section 103-25 tells you when you have to make the choice.

- (2) The \*shares must:
  - (a) be consolidated and divided into new shares of a larger amount; or
  - (b) be subdivided into new shares of a smaller amount.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3) The company must cancel the original rights or original option because of the consolidation or subdivision.
- (4) The company must:
  - (a) issue you with new rights (relating to the new \*shares) in substitution for the original rights; or
  - (b) issue you with a new option (relating to the new shares) in substitution for the original option.
- (5) You must receive nothing else in substitution for the original rights or original option.
- (6) The \*market value of the new rights or new option just after it was issued must be at least equal to the market value of the original rights or original option just before it was cancelled.
- (7) One of these requirements must be satisfied:
  - (a) you must be an Australian resident at the time of the cancellation; or
  - (b) if you are a foreign resident at that time:
    - (i) the original rights or original option were \*taxable Australian property just before that time; and
    - (ii) the new rights or new option are taxable Australian property when they are issued.

Note: The roll-over consequences are set out in Subdivision 124-A. The original asset is the original rights or original option. The new asset is the new rights or new option.

**124-300 Exchange of rights or option to acquire units in a unit trust**

- (1) You can choose to obtain a roll-over if:
  - (a) you own rights (the **original rights**) to \*acquire units in a unit trust or to acquire an option to acquire units in a unit trust; or
  - (b) you own an option (the **original option**) to acquire units in a unit trust;and these other requirements are satisfied.

Note: Section 103-25 tells you when you have to make the choice.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (2) The units must:
  - (a) be consolidated and divided into new units of a larger amount; or
  - (b) be subdivided into new units of a smaller amount.
- (3) The trustee must cancel the original rights or original option because of the consolidation or subdivision.
- (4) The trustee must:
  - (a) issue you with new rights (relating to the new units) in substitution for the original rights; or
  - (b) issue you with a new option (relating to the new units) in substitution for the original option.
- (5) You must receive nothing else in substitution for the original rights or original option.
- (6) The \*market value of the new rights or new option just after it was issued must be at least equal to the market value of the original rights or original option just before it was cancelled.
- (7) One of these requirements must be satisfied:
  - (a) you must be an Australian resident at the time of the cancellation; or
  - (b) if you are a foreign resident at that time:
    - (i) the original rights or original option were \*taxable Australian property just before that time; and
    - (ii) the new rights or new option are taxable Australian property when they are issued.

Note: The roll-over consequences are set out in Subdivision 124-A. The original asset is the original rights or original option. The new asset is the new rights or new option.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-510

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## Subdivision 124-I—Change of incorporation

### Guide to Subdivision 124-I

#### 124-510 What this Subdivision is about

Roll-over relief is available for members of a body that is incorporated under one law and is converted to, or replaced with, a body incorporated under another law.

#### Table of sections

##### Object of this Subdivision

124-515 Object of this Subdivision

##### Change of incorporation without change of entity

124-520 Change of incorporation without change of entity

##### Old corporation wound up

124-525 Old corporation wound up

##### Special consequences of some roll-overs

124-530 Shares in company replacing pre-CGT and post-CGT mix of interest and rights in body

124-535 Rights as member of Indigenous corporation replacing pre-CGT and post-CGT mix of interest and rights in body

### Object of this Subdivision

#### 124-515 Object of this Subdivision

The object of this Subdivision is to ensure that CGT considerations for \*members of a body incorporated under a law do not impede a change of incorporation involving converting the body to, or replacing it with, a company incorporated under:

(a) the *Corporations Act 2001* or a similar \*foreign law; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Note: Subdivision 620-A provides a roll-over for the assets of the body.

## Change of incorporation without change of entity

### 124-520 Change of incorporation without change of entity

- (1) This section applies if:
- (a) you are a \*member of a body incorporated under a law described in column 1 of an item of the table; and
  - (b) the body is converted into a company incorporated under a law described in column 2 of the item, without creating a new legal entity; and
  - (c) it is reasonable to conclude that there is no significant difference:
    - (i) between the ownership of the body, and of rights relating to the body held by entities that owned the body, just before the conversion and the ownership of the company just after the conversion; or
    - (ii) between the mix of ownership of the body, and of rights relating to the body held by entities that owned the body, just before the conversion and the mix of ownership of the company just after the conversion.

Note: See section 124-20 if an entity uses a share or interest sale facility.

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#### Laws the body and company are incorporated under

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	<b>Column 1</b>	<b>Column 2</b>
	<b>Body incorporated under this law</b>	<b>Company incorporated under this law</b>
1	A law other than the <i>Corporations Act 2001</i> and a similar *foreign law relating to companies	The <i>Corporations Act 2001</i> or a similar foreign law relating to companies

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-520

<b>Laws the body and company are incorporated under</b>	
<b>Column 1</b>	<b>Column 2</b>
<b>Body incorporated under this law</b>	<b>Company incorporated under this law</b>
2 A law other than the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>	The <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>

- (2) You can choose to obtain a roll-over if:
- (a) as a result of the conversion you are issued with \*shares in the company and you receive nothing else; and
  - (b) either you are an Australian resident at the time of the conversion or, if you are a foreign resident at that time:
    - (i) each of your interest and your other rights (if any) relating to the body was \*taxable Australian property just before that time; and
    - (ii) the shares are taxable Australian property when they are issued.

Note 1: The roll-over consequences are set out in Subdivision 124-A and section 124-530.

Note 2: Section 103-25 tells you when you have to make the choice.

- (3) If the company is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, subsection (2) applies in relation to rights as a \*member of the company in the same way as that subsection applies to \*shares in a company.

Note: This may allow you to choose to obtain a roll-over. The roll-over consequences are set out in Subdivision 124-A and section 124-535.

*Exception for demutualisation of certain bodies*

- (4) This section does not apply to demutualisation of a body if Division 326 in Schedule 2H to the *Income Tax Assessment Act 1936* applies to the demutualisation.

Note: That Division deals with demutualisation of entities other than insurance companies and health insurers.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



## Old corporation wound up

### 124-525 Old corporation wound up

- (1) This section applies if:
- (a) a body is incorporated under a law described in column 1 of an item of the table; and
  - (b) a company is incorporated under a law described in column 2 of the item; and
  - (c) the body ceases to exist, but the company continues to exist, after the time (the *switch time*) the \*members of the body receive \*shares in the company, or rights as members of it if it is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, on account of:
    - (i) their interests in the body; and
    - (ii) their other rights (if any) relating to the body; and
  - (d) the members of the body do not receive anything else on account of the expected ending of those interests and rights; and
  - (e) it is reasonable to conclude that there is no significant difference:
    - (i) between the ownership of the body, and of rights relating to the body held by entities that owned the body, just before the switch time and the ownership of the company just after the switch time; or
    - (ii) between the mix of ownership of the body, and of rights relating to the body held by entities that owned the body, just before the switch time and the mix of ownership of the company just after the switch time; and
- Note: See section 124-20 if an entity uses a share or interest sale facility.
- (f) the body \*disposes of all its \*CGT assets to the company, except any assets expected to be needed to meet the body's existing or expected liabilities before it ceases to exist.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-525

<b>Laws the body and company are incorporated under</b>	
<b>Column 1</b>	<b>Column 2</b>
<b>Body incorporated under this law</b>	<b>Company incorporated under this law</b>
1 A law other than the <i>Corporations Act 2001</i> and a similar *foreign law relating to companies	The <i>Corporations Act 2001</i> or a similar foreign law relating to companies
2 A law other than the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>	The <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>

- (2) You can choose to obtain a roll-over if:
- (a) you were a \*member of the body just before the switch time; and
  - (b) your ownership of your interest in the body ends at a time (the *end time*) after the switch time; and
  - (c) at the end time you have the \*shares in the company that you received at the switch time; and
  - (d) either you are an Australian resident at the end time or, if you are a foreign resident at the end time:
    - (i) each of your interest in the body and your other rights (if any) relating to the body was \*taxable Australian property just before the end time; and
    - (ii) the shares in the company that you received at the switch time are taxable Australian property at the end time.

Note 1: The roll-over consequences are set out in Subdivision 124-A and section 124-530.

Note 2: Section 103-25 tells you when you have to make the choice.

- (3) If the company is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, subsection (2) applies in relation to rights as a \*member of the company in the same way as that subsection applies to \*shares in a company.

Note: This may allow you to choose to obtain a roll-over. The roll-over consequences are set out in Subdivision 124-A and section 124-535.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## Special consequences of some roll-overs

### 124-530 Shares in company replacing pre-CGT and post-CGT mix of interest and rights in body

- (1) This section applies if:
  - (a) you choose to obtain a roll-over under section 124-520 or 124-525 relating to \*shares you have in the company on account of the following (your *original assets*):
    - (i) your interest in the body mentioned in that section;
    - (ii) your other rights relating to the body mentioned in that section; and
  - (b) you \*acquired some of your original assets before 20 September 1985 and the rest of them on or after that day.
- (2) You are taken to have \*acquired so many of the \*shares before 20 September 1985 as is reasonable, having regard to:
  - (a) the number and \*market value of your original assets; and
  - (b) the number and market value of the shares.
- (3) The first element of the \*cost base of each of the \*shares not taken by subsection (2) to have been \*acquired before 20 September 1985 (your *post-CGT shares*) is such amount as is reasonable having regard to:
  - (a) the total of the cost bases of your original assets that you acquired on or after 20 September 1985; and
  - (b) the number and \*market value of your post-CGT shares.
- (4) The reduced cost base of each of your post-CGT shares is worked out similarly.
- (5) This section has effect despite subsections 124-15(5) and (6).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-535

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**124-535 Rights as member of Indigenous corporation replacing pre-CGT and post-CGT mix of interest and rights in body**

- (1) This section applies if:
  - (a) you choose to obtain a roll-over under section 124-520 or 124-525 relating to rights (the *replacement rights*) you have as a \*member of a company incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* on account of the following (your *original assets*):
    - (i) your interest in the body mentioned in that section;
    - (ii) your other rights relating to the body mentioned in that section; and
  - (b) you \*acquired any of your original assets before 20 September 1985.
- (2) You are taken to have \*acquired the replacement rights before 20 September 1985.
- (3) This section has effect despite subsection 124-15(5).

**Subdivision 124-J—Crown leases**

**Guide to Subdivision 124-J**

**124-570 What this Subdivision is about**

This Subdivision sets out the situations in which the holder of a Crown lease over land obtains a replacement asset roll-over when the lease is, among other things, renewed, extended or converted to an estate in fee simple.

**Table of sections**

**Operative provisions**

124-575 Extension or renewal of Crown lease

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- 124-580 Meaning of *Crown lease*
- 124-585 Original right differs in area from new right
- 124-590 Part of original right excised
- 124-595 Treating parts of new right as separate assets
- 124-600 What is the roll-over?
- 124-605 Change of lessor

## Operative provisions

### 124-575 Extension or renewal of Crown lease

- (1) There is a roll-over if:
- (a) you hold one or more \*CGT assets that are \*Crown leases over land (the *original right*); and
  - (b) the original right expires or you surrender it; and
  - (c) you are granted one or more new Crown leases over land or one or more estates in fee simple in land, or both (the *new right*); and
  - (d) the new right relates to the same land as the original right.

Note 1: The roll-over consequences are set out in Subdivision 124-A. They might be modified: see section 124-600.

Note 2: If there has been a capital improvement to the Crown lease: see section 108-75.

- (2) The new right must have been granted in one of these ways:
- (a) by renewing or extending the term of the original right where the renewal or extension is mainly due to your having held the original right; or
  - (b) by changing the purpose for which the land to which the original right related can be used; or
  - (c) by converting the original right to a \*Crown lease in perpetuity; or
  - (d) by converting the original right to an estate in fee simple; or
  - (e) by consolidating, or consolidating and dividing, the original right; or
  - (f) by subdividing the original right; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-580

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- (g) by excising or relinquishing a part of the land to which the original right related; or
- (h) by expanding the area of that land.

**124-580 Meaning of *Crown lease***

A *Crown lease* is:

- (a) a lease of land granted by the Crown under an \*Australian law (other than the common law); or
- (b) a similar lease granted under a \*foreign law.

**124-585 Original right differs in area from new right**

- (1) Even if the new right relates to different land to that to which the original right related, this Subdivision applies as if it relates to the same land in these cases:
  - (a) the difference in area is not significant;
  - (b) the difference in \*market value is not significant;
  - (c) the new right was granted to correct errors in or omissions from the original right;
  - (d) the new right relates to a significantly different area of land but you had made reasonable efforts to ensure that the area was the same;
  - (e) it is otherwise reasonable for this Subdivision to apply in that way.
- (2) However, the rule in subsection (1) does not apply if section 124-590 applies.

**124-590 Part of original right excised**

- (1) There is a *partial* roll-over if you \*acquired the original right on or after 20 September 1985 and:
  - (a) the land to which the new right relates is different in area to the land the subject of the original right because a part (the *excised part*) of the land to which the original right related was excised or you relinquished it; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) you received a payment for the expiry or surrender of the original right.

The payment can include giving property: see section 103-5.

Note: Section 124-600 sets out the effect on your cost base.

- (2) There is no roll-over for the excised part. The \*cost base of the excised part is so much of the \*cost base of the relevant \*Crown lease as is attributable to the excised part.

Its \*reduced cost base is worked out similarly.

Note: You may make a capital gain or loss on the excised part because of CGT event C2.

### **124-595 Treating parts of new right as separate assets**

- (1) Each part of a \*Crown lease or an estate in fee simple that is part of the new right is taken to be a separate \*CGT asset to the extent that it relates to:
- (a) land to which a Crown lease (that was part of the original right) related where you \*acquired the lease before 20 September 1985; and
  - (b) land to which a Crown lease (that was part of the original right) related where you acquired the lease on or after 20 September 1985; and
  - (c) other land.
- (2) You are taken to have \*acquired each asset that is a separate \*CGT asset because of paragraph (1)(a) before 20 September 1985.

### **124-600 What is the roll-over?**

- (1) The roll-over is mainly as specified in Subdivision 124-A.
- (2) However, you work out the \*cost base and \*reduced cost base of \*CGT assets (that you are not taken to have \*acquired before 20 September 1985) and that are part of the new right a bit differently where section 124-590 or 124-595 applies.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-605

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- (3) The first element of your \*cost base for each of those assets is:

$$\text{CB of post-CGT original right} \times \frac{\text{Market value of separate asset}}{\text{Market value of all new assets}}$$

where:

**CB of post-CGT original right** is the sum of the \*cost bases of the \*Crown leases (that were part of the original right) and that you \*acquired on or after 20 September 1985 (just before the original right expired or was surrendered) reduced, if there is an excised part, by so much of those cost bases as is attributable to the excised part.

**market value of all new assets** is the \*market value of all \*CGT assets (that you are not taken to have \*acquired before 20 September 1985) that are part of the new right just after you acquired them.

**market value of separate asset** is the \*market value of the particular asset just after you \*acquired it.

- (4) The first element of the \*reduced cost base of each of those assets is worked out similarly.

### 124-605 Change of lessor

- (1) You treat a lease of land (whether or not it is a \*Crown lease) granted to you (the **fresh lease**) as being a renewal of your original right if:
- (a) after the grant of the original right, the land (the **original land**) to which it related became vested in an \*Australian government agency (other than the one that granted the original right); and
  - (b) the second agency granted you the fresh lease over:
    - (i) the original land; or
    - (ii) the original land less an excised area; or
    - (iii) the original land and other land; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (c) the fresh lease was granted under an \*Australian law (other than the common law).
- (2) You do this even if there is a period between the end of the original right and the grant of the fresh lease if you continued to occupy the original land during that period under a permission, licence or authority granted by the second agency.

## **Subdivision 124-K—Depreciating assets**

### **Table of sections**

124-655	Roll-over for depreciating assets
124-660	Right granted to associate

### **124-655 Roll-over for depreciating assets**

There is a roll-over for a \*depreciating asset if:

- (a) the asset is attached to land you hold under a \*quasi-ownership right granted by an \*exempt Australian government agency or an \*exempt foreign government agency; and
- (b) you \*hold the asset because of section 40-40; and
- (c) the quasi-ownership right expires or is terminated or you surrender it; and
- (d) you are granted a new quasi-ownership right over the land or an estate in fee simple in the land; and
- (e) there is no roll-over for you under Subdivision 124-J (about Crown leases) or Subdivision 124-L (about prospecting and mining entitlements).

Note 1: The roll-over consequences are set out in Subdivision 124-A.

Note 2: This section provides a roll-over for a depreciating asset in the limited circumstances where Subdivision 124-J cannot because a quasi-ownership right over land covers situations that a Crown lease does not (for example, an easement over land).

Note 3: If there has been a capital improvement to the quasi-ownership right: see section 108-75.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-660

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**124-660 Right granted to associate**

If the \*quasi-ownership right or estate in fee simple is instead granted to an \*associate or an \*associated government entity of yours:

- (a) your \*reduced cost base of the \*depreciating asset is reduced by the \*adjustable value of the asset just before the original quasi-ownership right expired or was surrendered or terminated; and
- (b) there is no roll-over.

**Subdivision 124-L—Prospecting and mining entitlements**

**Guide to Subdivision 124-L**

**124-700 What this Subdivision is about**

This Subdivision sets out the situations in which there is a roll-over if a prospecting or mining entitlement expires or is surrendered and it is replaced by a new one.

**Table of sections**

**Operative provisions**

- 124-705 Extension or renewal of prospecting or mining entitlement
- 124-710 Meaning of prospecting entitlement and mining entitlement
- 124-715 Original entitlement differs in area from new entitlement
- 124-720 Part of original entitlement excised
- 124-725 Treating parts of new entitlement as separate assets
- 124-730 What is the roll-over?

**Operative provisions**

**124-705 Extension or renewal of prospecting or mining entitlement**

- (1) There is a roll-over if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (a) you hold one or more \*CGT assets that are \*prospecting entitlements or \*mining entitlements (the *original entitlement*); and
- (b) the original entitlement expires or you surrender it; and
- (c) you are granted one or more new prospecting entitlements or mining entitlements (the *new entitlement*); and
- (d) the new entitlement relates to the same land as the original entitlement.

Note 1: The roll-over consequences are set out in Subdivision 124-A. They might be modified: see section 124-730.

Note 2: If there has been a capital improvement to the entitlement: see section 108-75.

- (2) The new entitlement must have been granted in one of these ways:
  - (a) by renewing or extending the term of the original entitlement where the renewal or extension is mainly due to your having held the original entitlement; or
  - (b) by consolidating, or consolidating and dividing, the original entitlement; or
  - (c) by subdividing the original entitlement; or
  - (d) by converting a \*prospecting entitlement to a \*mining entitlement, or a mining entitlement to a prospecting entitlement; or
  - (e) by excising or relinquishing a part of the land to which the original entitlement related; or
  - (f) by expanding the area of that land.

### **124-710 Meaning of prospecting entitlement and mining entitlement**

- (1) A *prospecting entitlement* is:
  - (a) an authority, licence, permit or entitlement under an \*Australian law or \*foreign law to prospect or explore for \*minerals in an area; or
  - (aa) an authority, licence, permit or entitlement under an Australian law to prospect or explore for \*geothermal energy resources in an area; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-715

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- (b) a lease of land that allows the lessee to prospect or explore for minerals or geothermal energy resources on the land; or
  - (c) an interest in a thing referred to in paragraph (a), (aa) or (b).
- (2) A **mining entitlement** is:
- (a) an authority, licence, permit or entitlement under an \*Australian law or \*foreign law to mine for \*minerals in an area; or
  - (aa) an authority, licence, permit or entitlement under an Australian law to extract energy from \*geothermal energy resources in an area; or
  - (b) a lease of land that allows the lessee to mine for minerals, or extract energy from geothermal energy resources, on the land; or
  - (c) an interest in a thing referred to in paragraph (a), (aa) or (b).

**124-715 Original entitlement differs in area from new entitlement**

- (1) Even if the new entitlement relates to different land to that to which the original entitlement related, this Subdivision applies as if it relates to the same land in these cases:
  - (a) the difference in area is not significant;
  - (b) the difference in \*market value is not significant;
  - (c) the new entitlement was granted to correct errors in or omissions from the original entitlement;
  - (d) it is otherwise reasonable for this Subdivision to apply in that way.
- (2) However, the rule in subsection (1) does not apply if section 124-720 applies.

**124-720 Part of original entitlement excised**

- (1) There is *partial* roll-over if you \*acquired the original entitlement on or after 20 September 1985 and:
  - (a) the land to which the new entitlement relates is different in area to the land the subject of the original entitlement

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

because a part (the *excised part*) of the land to which the original entitlement related was excised or you relinquished it; and

- (b) you received a payment for the expiry or surrender of the original entitlement.

The payment can include giving property: see section 103-5.

Note: Section 124-730 sets out the effect on your cost base.

- (2) There is no roll-over for the excised part. The \*cost base of the excised part is so much of the \*cost base of the original entitlement as is attributable to the excised part.

Its \*reduced cost base is worked out similarly.

Note: You may make a capital gain or loss on the excised part because of CGT event C2.

### **124-725 Treating parts of new entitlement as separate assets**

- (1) Each part of a \*prospecting entitlement or \*mining entitlement that is part of the new entitlement is taken to be a separate \*CGT asset to the extent that it relates to:
- (a) land to which a prospecting entitlement or mining entitlement (that was part of the original entitlement) related where you \*acquired the entitlement before 20 September 1985; and
  - (b) land to which a prospecting entitlement or mining entitlement (that was part of the original entitlement) related where you acquired the entitlement on or after 20 September 1985; and
  - (c) other land.
- (2) You are taken to have \*acquired each asset that is a separate \*CGT asset because of paragraph (1)(a) before 20 September 1985.

### **124-730 What is the roll-over?**

- (1) The roll-over is mainly as specified in Subdivision 124-A.
- (2) However, you work out the \*cost base and \*reduced cost base of \*CGT assets (that you are not taken to have \*acquired before

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-775

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20 September 1985) and that are part of the new entitlement a bit differently where section 124-720 or 124-725 applies.

- (3) The first element of your \*cost base for each of those assets is:

$$\text{CB of post-CGT original entitlement} \times \frac{\text{Market value of separate asset}}{\text{Market value of all new assets}}$$

where:

***CB of post-CGT original entitlement*** is the sum of the \*cost bases of the prospecting entitlements or mining entitlements (that were part of the original entitlement) and that you \*acquired on or after 20 September 1985 (just before the original entitlement expired or was surrendered) reduced, if there is an excised part, by so much of those cost bases as is attributable to the excised part.

***market value of all new assets*** is the \*market value of all \*CGT assets (that you are not taken to have \*acquired before 20 September 1985) that are part of the new entitlement just after you acquired them.

***market value of separate asset*** is the \*market value of the particular asset just after you \*acquired it.

- (4) The first element of the \*reduced cost base of each of those assets is worked out similarly.

### **Subdivision 124-M—Scrip for scrip roll-over**

#### **Guide to Subdivision 124-M**

##### **124-775 What this Subdivision is about**

This Subdivision allows you to choose a roll-over where post-CGT shares or trust interests you own are replaced with other shares or trust interests, for example, where there is a company takeover.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

You can only choose the roll-over if you would have made a capital gain from the exchange.

## Table of sections

### Operative provisions

- 124-780 Replacement of shares
- 124-781 Replacement of trust interests
- 124-782 Transfer or allocation of cost base of shares acquired by acquiring entity etc.
- 124-783 Meaning of *significant stakeholder*, *common stakeholder*, *significant stake* and *common stake*
- 124-783A Rights that affect stakes
- 124-784 Cost base of equity or debt given within acquiring group
- 124-784A When arrangement is a restructure
- 124-784B What is the cost base and reduced cost base when arrangement is a restructure?
- 124-784C Cost base of equity or debt given within acquiring group
- 124-785 What is the roll-over?
- 124-790 Partial roll-over
- 124-795 Exceptions
- 124-800 Interest received for pre-CGT interest
- 124-810 Certain companies and trusts not regarded as having 300 members or beneficiaries

## Operative provisions

### 124-780 Replacement of shares

- (1) There is a roll-over if:
  - (a) an entity (the *original interest holder*) exchanges:
    - (i) a \*share (the entity's *original interest*) in a company (the *original entity*) for a share (the holder's *replacement interest*) in another company; or
    - (ii) an option, right or similar interest (also the holder's *original interest*) issued by the original entity that gives the holder an entitlement to acquire a share in the

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-780

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original entity for a similar interest (also the holder's **replacement interest**) in another company; and

- (b) the exchange is in consequence of a single \*arrangement that satisfies subsection (2) or (2A); and
- (c) the conditions in subsection (3) are satisfied; and
- (d) if subsection (4) applies, the conditions in subsection (5) are satisfied.

Note 1: There are some exceptions: see section 124-795.

Note 2: The original interest holder can obtain only a partial roll-over if the capital proceeds for its original interest include something other than its replacement interest: see section 124-790.

Note 3: A trustee who gets a roll-over under this Subdivision for an original interest consisting of shares issued as part of a demutualisation may be eligible for a further roll-over under Subdivision 126-E when a beneficiary becomes absolutely entitled to the replacement shares.

Example 1: You can get a roll-over if you exchange your shares in one entity for shares in another entity or if you exchange options in one entity for options in another entity. You cannot get a roll-over if you exchange options for shares.

Example 2: Examples of arrangements that could be involved include:

- a company takeover, whether or not it is regulated by the *Corporations Act 2001*, resulting in a company owning 80% or more of another company's shares.
- a scheme of arrangement governed by the *Corporations Act 2001* that involves a cancellation of some interests in an original entity resulting in another entity owning 80% or more of the interests in the original entity.

*Conditions for arrangement*

- (2) The \*arrangement must:
  - (a) result in:
    - (i) a company (the **acquiring entity**) that is not a member of a \*wholly-owned group becoming the owner of 80% or more of the \*voting shares in the original entity; or
    - (ii) a company (also an **acquiring entity**) that is a member of such a group increasing the percentage of voting shares that it owns in the original entity, and that

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



company or members of the group becoming the owner of 80% or more of those shares; and

- (b) be one in which at least all owners of \*voting shares in the original entity (except a company referred to in paragraph (a)) could participate; and
- (c) be one in which participation was available on substantially the same terms for all of the owners of interests of a particular type in the original entity.

Note 1: The 80% or more requirement is satisfied if the acquiring entity ends up owning at least 80% of the voting shares in the original entity. This may include shares held before the arrangement started.

Note 2: Participation will be on substantially the same terms if, for example, matters such as those referred to in subsections 619(2) and (3) of the *Corporations Act 2001* affect the capital proceeds that each participant can receive.

*Conditions for arrangement—takeover bids and arrangements*

(2A) The \*arrangement must:

- (a) satisfy paragraph (2)(a); and
- (b) be, be part of, or include one or more of the following:
  - (i) a takeover bid (within the meaning of the *Corporations Act 2001*) for the original interests by the acquiring entity that is not carried out in contravention of the provisions mentioned in paragraphs 612(a) to (g) of that Act;

Note: For exemption and modification of provisions by ASIC (and review by the takeovers panel) see Part 6.10 of the *Corporations Act 2001*. For Court declarations excusing contraventions see section 1325D of that Act.

- (ii) a compromise or arrangement entered into by the original entity under Part 5.1 of the *Corporations Act 2001*, approved by order of a court made for the purposes of paragraph 411(4)(b) of that Act.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-780

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*Conditions for roll-over*

- (3) The conditions are:
- (a) the original interest holder \*acquired its original interest on or after 20 September 1985; and
  - (b) apart from the roll-over, it would make a \*capital gain from a \*CGT event happening in relation to its original interest; and
  - (c) its replacement interest is in a company (the **replacement entity**) that is:
    - (i) the company referred to in subparagraph (2)(a)(i); or
    - (ii) in any other case—the \*ultimate holding company of the \*wholly-owned group; and
  - (d) the original interest holder chooses to obtain the roll-over or, if section 124-782 applies to it for the \*arrangement, it and the replacement entity jointly choose to obtain the roll-over; and
  - (e) if that section applies, the original interest holder informs the replacement entity in writing of the \*cost base of its original interest worked out just before a CGT event happened in relation to it; and
  - (f) if an acquiring entity is a member of a wholly-owned group—no member of the group issues equity (other than a replacement interest), or owes new debt, under the arrangement:
    - (i) to an entity that is not a member of the group; and
    - (ii) in relation to the issuing of the replacement interest.

Note: If the original interest holder also exchanges a CGT asset that it acquired before 20 September 1985, the cost base of any interest received in exchange for it is worked out under section 124-800.

*Further roll-over conditions in certain cases*

- (4) The conditions specified in subsection (5) must be satisfied if the original interest holder and an acquiring entity did not deal with each other at \*arm's length and:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (a) neither the original entity nor the replacement entity had at least 300 \*members just before the \*arrangement started; or
- (b) the original interest holder, the original entity and an acquiring entity were all members of the same \*linked group just before that time.

Note: There are some cases where a company will not be regarded as having 300 members: see section 124-810.

- (5) The conditions are:
  - (a) the \*market value of the original interest holder's \*capital proceeds for the exchange is at least substantially the same as the market value of its original interest; and
  - (b) its replacement interest carries the same kind of rights and obligations as those attached to its original interest.

*CUF*

- (6) This section applies to the holder of a Chess Unit of Foreign Security as if the holder held the underlying interests that the unit represents.

Note: A Chess Unit of Foreign Security is an interest, traded on the stock market operated by ASX Limited, in a foreign share, unit or interest.

- (7) A company is the **ultimate holding company** of a \*wholly-owned group if it is not a \*100% subsidiary of another company in the group.

## 124-781 Replacement of trust interests

- (1) There is a roll-over if:
  - (a) an entity (also the **original interest holder**) exchanges:
    - (i) a unit or other interest (also the holder's **original interest**) in a trust (also the **original entity**) for a unit or other interest (also the holder's **replacement interest**) in another trust (also the **acquiring entity** and the **replacement entity**); or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (ii) an option, right or similar interest (also the holder's **original interest**) issued by the original entity that gives the holder an entitlement to acquire a unit or other interest in the original entity for a similar interest (also the holder's **replacement interest**) in another trust (also the **acquiring entity** and the **replacement entity**); and
- (b) entities have \*fixed entitlements to all of the income and capital of the original entity and the acquiring entity; and
- (c) the exchange is in consequence of an \*arrangement that satisfies subsection (2) or (2A); and
- (d) the conditions in subsections (3) and (4) are satisfied.

Note 1: There are some exceptions: see section 124-795.

Note 2: The original interest holder can obtain only a partial roll-over if the capital proceeds for its original interest include something other than its replacement interest: see section 124-790.

*Conditions for arrangement*

- (2) The \*arrangement must:
  - (a) result in the acquiring entity owning 80% or more of the \*trust voting interests in the original entity or, if there are none, 80% or more of the units or other interests in the original entity; and
  - (b) be one in which at least all owners of trust voting interests (or of units or other interests) in the original entity (except the acquiring entity) could participate; and
  - (c) be one in which participation was available on substantially the same terms for all of the owners of interests or units of a particular type in the original entity.

*Conditions for arrangement—takeover bids*

- (2A) The \*arrangement must:
  - (a) satisfy paragraph (2)(a); and
  - (b) be, be part of, or include a takeover bid (within the meaning of the *Corporations Act 2001*) for the original interests by the

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

acquiring entity that is not carried out in contravention of the provisions mentioned in paragraphs 612(a) to (g) of that Act.

Note: For exemption and modification of provisions by ASIC (and review by the takeovers panel) see Part 6.10 of the *Corporations Act 2001*. For Court declarations excusing contraventions see section 1325D of that Act.

*Conditions for roll-over*

- (3) The conditions are:
- (a) the original interest holder \*acquired its original interest on or after 20 September 1985; and
  - (b) apart from the roll-over, it would make a \*capital gain from a \*CGT event happening in relation to its original interest; and
  - (c) it chooses to obtain the roll-over or, if section 124-782 applies to it for the \*arrangement, it and the trustee of the acquiring entity jointly choose to obtain the roll-over; and
  - (d) if that section applies to it, it informs that trustee in writing of the \*cost base of its original interest as at the time just before a CGT event happened in relation to it.

Note: If the original interest holder also exchanges a CGT asset that it acquired before 20 September 1985, the cost base of any interest received in exchange for it is worked out under section 124-800.

*Further roll-over conditions in certain cases*

- (4) These conditions must be satisfied if the original interest holder and the trustee of the acquiring entity did not deal with each other at \*arm's length and neither the original entity nor the acquiring entity had at least 300 beneficiaries just before the \*arrangement started:
- (a) the \*market value of the original interest holder's \*capital proceeds for the exchange is at least substantially the same as the market value of its original interest; and
  - (b) its replacement interest carries the same kind of rights and obligations as those attached to its original interest.

Note: There are some cases where a trust will not be regarded as having 300 beneficiaries: see section 124-810.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*CUFS*

- (5) This section applies to the holder of a Chess Unit of Foreign Security as if the holder held the underlying interests that the unit represents.

Note: A Chess Unit of Foreign Security is an interest, traded on the stock market operated by ASX Limited, in a foreign share, unit or interest.

*Meaning of trust voting interest*

- (6) A **trust voting interest** in a trust is an interest in the trust that confers rights of the same or a similar kind as the rights conferred by a \*voting share in a company.

**124-782 Transfer or allocation of cost base of shares acquired by acquiring entity etc.**

*Transfer of cost base*

- (1) The \*cost base of an original interest \*acquired by an acquiring entity under the \*arrangement from an original interest holder becomes the first element of the cost base and \*reduced cost base of the acquiring entity for the interest if:
- (a) the original interest holder obtains a roll-over; and
  - (b) the holder is a \*significant stakeholder or a \*common stakeholder for the arrangement.

Note 1: For other interests, for example, interests for which the roll-over is not chosen, the cost base will be worked out under the ordinary cost base rules in Divisions 110 and 112.

Note 2: There is a special rule to determine the cost base of equity or debt given to a member of an acquiring wholly-owned group by another member of the group under an arrangement: see section 124-784.

*Allocation of cost base in cancellation case*

- (2) The \*cost base and \*reduced cost base of any interests (the **new interests**) issued by the original entity to an acquiring entity under the \*arrangement is worked out under subsection (3) if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (a) original interests of an original interest holder are cancelled under the arrangement; and
  - (b) the holder obtains a roll-over for the cancellation; and
  - (c) the holder is a \*significant stakeholder or a \*common stakeholder for the arrangement.
- (3) The first element of the \*cost base and \*reduced cost base of the new interests of an acquiring entity is that part of the cost base of the cancelled interests as can be reasonably allocated to the new interests, having regard to:
- (a) the nature of the \*arrangement; and
  - (b) the number, type and relative \*market values of the cancelled interests and the new interests; and
  - (c) any other relevant matters.

**Example:** Robert Co has 3 shareholders: Antill Co with 300 shares, Rachael Co 400 shares and Margaret Co 300 shares. The cost base of each share is \$1 and market value is \$2. Margaret Co is owned by two shareholders, John and Paul, who each have 50 shares. The market value of each share is \$20.

Under an arrangement, Robert Co cancels the shares of Antill Co and Rachael Co. They receive 30 and 40 shares respectively in Margaret Co, which becomes the sole shareholder in Robert Co. The market value of Antill Co's and Rachael Co's shares in Margaret Co is equivalent to the market value of their cancelled shares in Robert Co.

Robert Co also issues 700 shares to Margaret Co, reflecting the \$1,400 total market value of the shares issued by Margaret Co to Antill Co and Rachael Co. Before and after the arrangement, Margaret Co's shares in Robert Co were worth \$2 each.

It is necessary to reasonably allocate the cost bases of the cancelled shares (700 x \$1) to the 700 shares issued by Robert Co to Margaret Co. In this case, an allocation of \$1 per share would be reasonable.

**Note:** If no new shares are issued by Robert Co, the cost base of the original shares that Margaret Co holds would not be adjusted.

- (4) The amount allocated to a new interest under subsection (3) must not be more than its \*market value just after the \*arrangement was completed.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-783

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**124-783 Meaning of *significant stakeholder*, *common stakeholder*, *significant stake* and *common stake***

*Significant stakeholder*

- (1) An original interest holder is a ***significant stakeholder*** for an \*arrangement if it had:
  - (a) a \*significant stake in the original entity just before the arrangement started; and
  - (b) a significant stake in the replacement entity just after the arrangement was completed.
- (2) Also, if an original interest holder is an acquiring entity, any other original interest holder is a ***significant stakeholder*** for an \*arrangement if it:
  - (a) had a \*significant stake in the original entity just before the \*arrangement started; and
  - (b) is an \*associate of the replacement entity just after the arrangement was completed.

*Common stakeholder*

- (3) An original interest holder is a ***common stakeholder*** for an \*arrangement if it had:
  - (a) a \*common stake in the original entity just before the arrangement started; and
  - (b) a common stake in the replacement entity just after the arrangement was completed.
- (4) If an acquiring entity for an \*arrangement is an original interest holder, each other original interest holder that has a replacement interest is a ***common stakeholder*** for the arrangement.
- (5) No original interest holder is a ***common stakeholder*** for an \*arrangement if either the original entity or the replacement entity had at least 300 \*members (for a company) or 300 beneficiaries (for a trust) just before the arrangement started.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*Significant stake*

- (6) An entity has a **significant stake** in a company at a time if the entity, or the entity and the entity's \*associates between them:
- (a) have at that time \*shares carrying 30% or more of the voting rights in the company; or
  - (b) have at that time the right to receive 30% or more of any \*dividends that the company may pay; or
  - (c) have at that time the right to receive 30% or more of any distribution of capital of the company.

Example: There are 4 shareholders in YZT Company: Sonja has 60%, Mario has 20%, Peter has 10% and Dave has 10%.

Sonja, Mario and Peter are associates. They each have a significant stake in YZT because, on an associate inclusive basis, they each have a 90% stake in YZT. Dave does not have a significant stake because his total stake, on an associate inclusive basis, is 10%.

- (7) An entity has a **significant stake** in a trust at a time if the entity, or the entity and the entity's \*associates between them, had at that time the right to receive 30% or more of any distribution to beneficiaries of the trust of income or capital of the trust.
- (8) No original interest holder has a **significant stake** in a company that has at least 300 \*members or a trust that has at least 300 beneficiaries if it is reasonable for the company or the trustee of the trust to conclude that this is the case on the information available to it.

Note: There are some cases where a company or trust will not be regarded as having 300 members or beneficiaries: see section 124-810.

*Common stake*

- (9) If the original entity and the replacement entity are companies, an entity, or 2 or more entities, have a **common stake** in the original entity just before the \*arrangement started and in the replacement entity just after the arrangement was completed if the entity or entities, and their \*associates, between them:
- (a) had 80% or more of:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (i) the voting rights in the original entity just before the arrangement started; and
    - (ii) the voting rights in the replacement entity just after the arrangement was completed; or
  - (b) had the right to receive 80% or more of:
    - (i) any \*dividends that the original entity may pay just before the arrangement started; and
    - (ii) any dividends that the replacement entity may pay just after the arrangement was completed; or
  - (c) had the right to receive 80% or more of:
    - (i) any distribution of capital of the original entity just before the arrangement started; and
    - (ii) any distribution of capital of the replacement entity just after the arrangement was completed.
- (10) If the original entity and the replacement entity are trusts, an entity, or 2 or more entities, have a **common stake** in the original entity just before the \*arrangement started and in the replacement entity just after the arrangement was completed if the entity or entities, and their \*associates, between them:
- (a) had, just before the arrangement started, the right to receive 80% or more of any distribution to beneficiaries of the original entity of income or capital of the original entity; and
  - (b) had, just after the arrangement was completed, the right to receive 80% or more of any distribution to beneficiaries of the replacement entity of income or capital of that entity.

**124-783A Rights that affect stakes**

- (1) An entity has a **significant stake** in another entity if:
- (a) the first entity has one or more \*stake options in the other entity; and
  - (b) the first entity would have such a stake (under section 124-783) if the first entity acquired \*stake interests in the other entity under any of those stake options.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Note: Paragraph (b) is satisfied if there are any circumstances (e.g. the first entity exercises some but not all of the stake options) in which the first entity would have a significant stake in the other entity, even if in other circumstances the first entity would not have such a stake.

- (2) An entity, or 2 or more entities, have a **common stake** in the original entity just before the \*arrangement started and in the replacement entity just after the arrangement was completed if:
- (a) the entities:
    - (i) had one or more \*stake options in the original entity before the arrangement started; or
    - (ii) have one or more stake options in the replacement entity; and
  - (b) the entities would have such stakes (under section 124-783) if:
    - (i) the entities had acquired \*stake interests in the original entity under any of the stake options mentioned in subparagraph (a)(i); or
    - (ii) the entities acquired stake interests in the replacement entity under some or all of the stake options mentioned in subparagraph (a)(ii).
- (3) Something is a **stake option** an entity has in another entity if it gives the first entity, or its \*associates, a right to acquire the following (**stake interests**):
- (a) if the other entity is a company:
    - (i) voting rights in the company; or
    - (ii) the right to receive any part of any \*dividends that the company may pay; or
    - (iii) the right to receive any part of any distribution of capital of the company;
  - (b) if the other entity is a trust—the right to receive any part of any distribution to beneficiaries of the trust of income or capital of the trust;
- and the acquisition could occur before the end of 5 years after the \*arrangement was completed.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Example 1: An option.

Example 2: A share that gives a voting right that is temporarily suppressed.

- (4) For the purposes of subsection (1), treat the reference in subparagraph (3)(a)(i) to voting rights as being a reference to \*shares carrying voting rights.
- (5) This section does not limit subsections 124-783(6) to (10).

**124-784 Cost base of equity or debt given within acquiring group**

*Purpose*

- (1) This section allocates an appropriate \*cost base to equity issued, or new debt owed, under the \*arrangement, by a member of a \*wholly-owned group to another member (the *recipient*) of the group, if:
- (a) the acquiring entity is a member of the group; and
  - (b) the cost base of an original interest was transferred or allocated under section 124-782 because the original interest holder is a \*significant stakeholder or a \*common stakeholder for the arrangement.

*Allocation of cost base*

- (2) The first element of the \*cost base of the equity or debt for the recipient is that part of the cost base of the original interest transferred or allocated under section 124-782 as:
- (a) may be reasonably allocated to the equity or debt; and
  - (b) is not more than the \*market value of the equity or debt just after the \*arrangement was completed.

**124-784A When arrangement is a restructure**

- (1) This section applies in relation to a single \*arrangement if:
- (a) the replacement entity for the arrangement knows, or could reasonably be expected to know:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (i) that a roll-over under section 124-780 or 124-781 has been, or will be, obtained in relation to the arrangement; and
  - (ii) that there is a \*common stakeholder for the arrangement (disregarding subsections 124-783(4) and (5)); and
- (b) subsection (2) is satisfied for the arrangement.

Note: If this section applies, the first element of the cost base and reduced cost base of interests in the original entity acquired under the arrangement is worked out under section 124-784B.

- (2) This subsection is satisfied for the \*arrangement if the result of step 2 is more than 80% of the result of step 3.

*Method statement*

Step 1. Add up the \*market value just after the \*arrangement was completed (the **completion time**) of all of the replacement interests issued by the replacement entity under the arrangement in exchange for the following interests (the **qualifying interests**):

- (a) original interests in the original entity;
- (b) any interests issued by the original entity to an acquiring entity under the arrangement in respect of other original interests in the original entity cancelled under the arrangement.

Step 2. Add to the result of step 1 the \*market value at the completion time of all of the replacement interests issued by the replacement entity under any earlier arrangement for which this section applied in exchange for qualifying interests in the original entity.

Step 3. Add up the \*market value at the completion time of all of the:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) if the replacement entity is a company—\*shares \*on issue by the replacement entity; and
- (b) if the replacement entity is a company—options, rights and similar interests issued by the replacement entity that give the holder an entitlement to acquire a share in the replacement entity at or after the completion time; and
- (c) if the replacement entity is a trust—units or other interests in the replacement entity; and
- (d) if the replacement entity is a trust—options, rights or similar interests issued by the replacement entity that gives the holder an entitlement to acquire a unit or other interest in the replacement entity at or after the completion time.

*Application if an entity is listed*

- (3) For the purposes of:
  - (a) subsection (2); and
  - (b) step 5 of the method statement in subsection 124-784B(2);if interests in an entity are listed for quotation in the official list of an \*approved stock exchange at the completion time, then the replacement entity may choose that the \*market value at that time of an interest in the first-mentioned entity is taken to be the \*officially quoted price of the interest at that time.

*Application if more than one original entity*

- (4) If qualifying interests in more than one original entity are \*acquired under the \*arrangement, then, for the purposes of subsections (1) and (2):
  - (a) those interests of each of those original entities are taken to have been acquired under separate arrangements; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) those separate arrangements are taken to have happened in the same order as the acquisitions.
- (5) If qualifying interests in more than one original entity:
- (a) would be taken by subsection (4) to have been \*acquired under separate \*arrangements happening at the same time; or
  - (b) are acquired under separate arrangements that commence at the same time;
- then, for the purposes of subsections (1) and (2), the replacement entity must choose the order in which those separate arrangements are to have happened.

*Meaning of **officially quoted price***

- (6) An interest in an entity has an **officially quoted price** at a particular time if, during the one week period starting on the day in which that time occurred, there was at least one transaction on the relevant stock exchange in interests of that class. That price is the weighted average of the prices at which those interests were traded on that stock exchange during that period.
- (7) For the purposes of subsection (6), if an interest is quoted on 2 or more \*approved stock exchanges on that day, the **officially quoted price** of the interest is determined under subsection (6) in respect of whichever of those the entity chooses.

**124-784B What is the cost base and reduced cost base when arrangement is a restructure?**

- (1) This section applies in relation to each qualifying interest in the original entity:
- (a) \*acquired by an acquiring entity under an \*arrangement to which section 124-784A applies; and
  - (b) for which the first element of the \*cost base of the acquiring entity is not worked out under section 124-782.

Note: Section 124-782 applies when an original interest holder is a significant stakeholder or a common stakeholder.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*First element of cost base—qualifying interests acquired in exchange for replacement interests only*

- (2) The first element of the \*cost base of the acquiring entity for the qualifying interest in the original entity is worked out as follows:

*Method statement*

Step 1. Add up:

- (a) the \*market value, at the completion time, of the original entity's \*pre-CGT assets (except \*trading stock); and
- (b) the \*cost bases, at the completion time, of the original entity's \*post-CGT assets (except trading stock); and
- (c) for the original entity's \*CGT assets (except trading stock) that had no cost base—the maximum amount of consideration the original entity would need to receive if it were to dispose, at the completion time, of those assets without an amount being assessable income of, or deductible to, the original entity; and
- (d) the amount worked out under steps 2 and 3.

Step 2. For the original entity's \*trading stock, add up:

- (a) the \*value of the trading stock at the start of the income year containing the completion time; and
- (b) for \*live stock acquired by natural increase during that income year but before the completion time—the \*cost of that live stock; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) the amount of any outgoing incurred in connection with acquiring an item of trading stock during that income year but before the completion time (except live stock acquired by natural increase); and
- (d) the amount of any outgoings forming part of the cost of the trading stock incurred by the entity during its current holding of the trading stock but before the completion time.

Step 3. For any asset of the original entity not covered by steps 1 and 2, work out the amount that would be the asset's \*cost base at the completion time if it were a \*CGT asset.

Step 4. Subtract from the result of step 1 the original entity's liabilities (if any) at the completion time in respect of those assets.

Step 5. If there is one class of \*membership interests in the original entity, divide the result of step 4 by the total number of those membership interests at the completion time.

If there are 2 or more classes of membership interests in the original entity, allocate a portion of the result of step 4 to each class in proportion to the \*market value of all the membership interests in that class and divide that result by the total number of membership interests in that class at the completion time.

Note 1: For the purposes of this subsection, Division 701 (Core rules for consolidated groups) is disregarded for an original entity that becomes a subsidiary member of a consolidated group or MEC group under the arrangement (see paragraph 715-910(1)(a)).

Note 2: If the original entity is the head company of a consolidated group or MEC group, then subsection 701-1(1) (the single entity rule) and section 701-5 (the entry history rule) apply in relation to that group when working out steps 1 and 2 (see subsection 715-910(2)).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note 3: For step 5, the replacement entity may choose to use the officially quoted price of the qualifying interests as their market value (see subsection 124-784A(3)).

*First element of cost base—interests acquired in exchange for replacement interests and cash etc.*

- (3) However, if the qualifying interest was acquired under the \*arrangement partly in exchange for one or more replacement interests and partly for something else, subsection (2) applies only for working out the first element of that part of the \*cost base of the qualifying interest that is attributable to the replacement interests.

Note 1: This means that the acquiring entity will have to apportion the cost base amount worked out under subsection (2) according to the relative values of the replacement interests and the other component.

Note 2: The first element of that part of the cost base, and reduced cost base, of the qualifying interest that is attributable to cash etc. is worked out using the general rules about cost base.

*Liabilities*

- (4) For the purposes of step 4 of subsection (2), a liability of the original entity that is not a liability in respect of a specific asset or assets of the entity is taken to be a liability in respect of all the assets of the entity.
- (5) If a liability is in respect of 2 or more assets, the proportion of the liability that is in respect of any one of those assets is equal to:

$$\frac{\text{The *market value of the asset}}{\text{The total of the *market values of all the assets that the liability is in respect of}}$$

*First element of reduced cost base*

- (6) The first element of the \*reduced cost base of the acquiring entity for the qualifying interest in the original entity is worked out similarly.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Rights and options to acquire membership interests*

- (7) For the purposes of step 5 of subsection (2), if at the completion time a person holds an option, right or similar interest (including a contingent option, right or interest), created or issued by the original entity, to acquire a \*membership interest in the original entity, that option, right or interest is treated as if it were a membership interest in the original entity.

**124-784C Cost base of equity or debt given within acquiring group**

*Purpose*

- (1) This section allocates an appropriate \*cost base to equity issued, or new debt owed, under the \*arrangement by a member of a \*wholly-owned group to another member (the **holder**) of the group, if:
- (a) an acquiring entity is a member of the group; and
  - (b) the cost base of the acquiring entity for a qualifying interest was worked out under section 124-784B.

*Allocation of cost base*

- (2) The first element of the \*cost base of the equity or debt for the holder is that part of the cost base of the qualifying interest worked out under section 124-784B as:
- (a) may be reasonably allocated to the equity or debt; and
  - (b) is not more than the \*market value of the equity or debt at the completion time.

**124-785 What is the roll-over?**

- (1) A \*capital gain you make from your original interest is disregarded.
- (2) You work out the first element of the \*cost base of each \*CGT asset you received as a result of the exchange by reasonably attributing to it the cost base (or the part of it) of your original

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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interest for which it was exchanged and for which you obtained the roll-over.

- (3) In applying subsection (2), you reduce the \*cost base of your original interest (just before you stop owning it) by so much of that cost base as is attributable to an ineligible part (see section 124-790).

- (4) The first element of the \*reduced cost base is worked out similarly.

Example 1: Lyn exchanges 1 share with a cost base of \$10 for another share. The cost base of the new share is \$10.

Example 2: Glenn exchanges 2 shares with cost bases of \$10 and \$11 respectively for one new share. The cost base of the new share is \$21.

Example 3: Wayne exchanges 1 share with a cost base of \$9 for share A with a market value of \$5 and share B with a market value of \$10. The cost base of share A is \$3 and the cost base of share B is \$6.

**124-790 Partial roll-over**

- (1) The original interest holder can obtain only a partial roll-over if its \*capital proceeds for its original interest include something (the *ineligible proceeds*) other than its replacement interest. There is no roll-over for that part (the *ineligible part*) of its original interest for which it received ineligible proceeds.

- (2) The \*cost base of the ineligible part is that part of the cost base of your original interest as is reasonably attributable to it.

Example: Ken owns 100 shares in Aim Ltd. Those shares have a cost base of \$2.

Ken accepts an offer from LBZ Ltd to acquire those shares. The offer is 1 share in LBZ (market value \$4) plus \$1 for each Aim share.

Ken chooses the roll-over to the extent that he can.

The cost base of the ineligible part is  $[\$100 \times \$200] \div \$500 = \$40$ .

Ken makes a capital gain of  $\$100 - \$40 = \$60$ .

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

### 124-795 Exceptions

- (1) You cannot obtain the roll-over if, just before you stop owning your original interest, you are a foreign resident unless, just after you \*acquire your replacement interest, the replacement interest is \*taxable Australian property.
- (2) You cannot obtain the roll-over if:
  - (a) any \*capital gain you might make from your replacement interest would be disregarded (except because of a roll-over); or
  - (b) you and the acquiring entity are members of the same \*wholly-owned group just before you stop owning your original interest and the acquiring entity is a foreign resident.

Example: An example of a capital gain or loss being disregarded as mentioned in paragraph (2)(a) is because the asset is trading stock.

Note: A roll-over may be available under Subdivision 126-B in the circumstances mentioned in paragraph (2)(b).

- (3) You cannot obtain the roll-over for the \*CGT event happening in relation to the exchange of your original interest if you can choose a roll-over under Division 122 or 615 for that event.

Note: Division 122 deals with the disposal of assets to a wholly-owned company, and Division 615 deals with business restructures.

- (4) You cannot obtain the roll-over for the \*CGT event happening in relation to the exchange of your qualifying interest if:
  - (a) the replacement entity makes a choice to that effect under this subsection; and
  - (b) that entity or the original entity notifies you in writing of the choice before the exchange.

### 124-800 Interest received for pre-CGT interest

- (1) If, in consequence of the \*arrangement, you exchange an interest that you \*acquired before 20 September 1985 for an interest in the replacement entity, the first element of the \*cost base and \*reduced

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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cost base of the interest in the replacement entity is its \*market value just after you acquired it.

- (2) The \*cost base and \*reduced cost base of the interest in the replacement entity is reduced if all or part of a \*capital gain from \*CGT event K6 happening is disregarded because of subsection 104-230(10). The amount of the reduction is the amount of the \*capital gain you disregard under that subsection.

Note 1: The full list of CGT events is in section 104-5.

Note 2: Subsection 104-230(10) provides that a capital gain from CGT event K6 is disregarded to the extent that you could have chosen a roll-over under this Subdivision if your original interest had been post-CGT.

**124-810 Certain companies and trusts not regarded as having 300 members or beneficiaries**

- (1) For the purposes of this Subdivision, a company is treated as if it did not have at least 300 \*members if subsection (3) or (5) applies to it.
- (2) For the purposes of this Subdivision, a trust is treated as if it did not have at least 300 beneficiaries if subsection (4) or (5) applies to it.

*Concentrated ownership*

- (3) This subsection applies to a company if an individual owns, or up to 20 individuals own between them, directly or indirectly (through one or more interposed entities) and for their own benefit, \*shares in the company:
- (a) carrying \*fixed entitlements to:
    - (i) at least 75% of the company's income; or
    - (ii) at least 75% of the company's capital; or
  - (b) carrying at least 75% of the voting rights in the company.
- (4) This subsection applies to a trust if an individual owns, or up to 20 individuals own between them, directly or indirectly (through one

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

or more interposed entities) and for their own benefit, units or other fixed interests in the trust:

- (a) carrying \*fixed entitlements to:
  - (i) at least 75% of the trust's income; or
  - (ii) at least 75% of the trust's capital; or
- (b) if beneficiaries of the trust have a right to vote in respect of activities of the trust—carrying at least 75% of those voting rights.

*Possible variation of rights etc.*

- (5) This subsection applies to a company or trust if, because of:
  - (a) any provision in the entity's constituent document, or in any contract, agreement or instrument:
    - (i) authorising the variation or abrogation of rights attaching to any of the \*shares, units or other fixed interests in the entity; or
    - (ii) relating to the conversion, cancellation, extinguishment or redemption of any of those interests; or
  - (b) any contract, \*arrangement, option or instrument under which a person has power to acquire any of those interests; or
  - (c) any power, authority or discretion in a person in relation to the rights attaching to any of those shares, units or interests;it is reasonable to conclude that the rights attaching to any of those interests are capable of being varied or abrogated in such a way (even if they are not in fact varied or abrogated in that way) that, directly or indirectly, subsection (3) or (4) would apply to the entity.

*Single individual*

- (6) For the purposes of subsections (3) and (4), all of the following are taken to be a single individual:
  - (a) an individual, whether or not the individual holds \*shares, units or other interests in the entity concerned;
  - (b) the individual's \*associates;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) for any shares, units or interests in respect of which other individuals are nominees of the individual or of the individual's associates—those other individuals.

**Subdivision 124-N—Disposal of assets by a trust to a company**

**Guide to Subdivision 124-N**

**124-850 What this Subdivision is about**

Entities can choose to obtain a roll-over if:

- (a) a trust disposes of all of its assets to a company; and
- (b) units and interests in the trust are replaced by shares in the company.

The roll-over may also be available for 2 or more trusts disposing of all their assets to a single company.

Note: The effect of the roll-over may be reversed if the trust does not cease to exist within 6 months: see section 104-195.

**Table of sections**

**Operative provisions**

124-855	What this Subdivision deals with
124-860	Requirements for roll-over
124-865	Entities both choose the roll-over
124-870	Roll-over for owner of units or interests in a trust
124-875	Effect on the transferor and transferee

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Operative provisions

### 124-855 What this Subdivision deals with

- (1) A roll-over may be available for a restructuring (a *trust restructure*) if:
  - (a) a trust, or 2 or more trusts, (the *transferor*) \*dispose of all of their \*CGT assets to a company limited by \*shares (the *transferee*); and
  - (b) \*CGT event E4 is capable of applying to all of the units and interests in the transferor; and
  - (c) the requirements in section 124-860 are met.

Note: A roll-over is not available for a restructure undertaken by a discretionary trust.

- (2) For 2 or more transferors, units and interests in each transferor must be owned in the same proportions by the same beneficiaries.

Example: Matthew and Jaclyn each own 50% of the units in the Spring Unit Trust and the Dale Unit trust. All of the assets of both trusts are disposed of to Jonathon Pty Ltd. A roll-over for a trust restructure is available if the other requirements of this Subdivision are met.

### 124-860 Requirements for roll-over

- (1) All of the \*CGT assets owned by the transferor must be disposed of to the transferee during the \*trust restructuring period. However, ignore any CGT assets retained by the transferor to pay existing or expected debts of the transferor.
- (2) The *trust restructuring period* for a trust restructure:
  - (a) starts just before the first \*CGT asset is \*disposed of to the transferee under the trust restructure, which must happen on or after 11 November 1999; and
  - (b) ends when the last CGT asset of the transferor is disposed of to the transferee.
- (3) The transferee must not be an \*exempt entity.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (4) The transferee must be a company that:
- (a) has never carried on commercial activities; and
  - (b) has no \*CGT assets, other than any or all of the following:
    - (i) small amounts of cash or debt;
    - (ii) its rights under an \*arrangement, if (collectively) those rights only facilitate the transfer of assets to the transferee from the transferor; and
  - (c) has no losses of any kind.

Example: It could be a shelf company.

- (5) Subsection (4) does not apply to a transferee that is the trustee of the transferor.
- (6) Just after the end of the \*trust restructuring period:
- (a) each entity that owned interests in a transferor just before the start of the trust restructuring period must own replacement interests in the transferee in the same proportion as it owned those interests in that transferor; and
  - (b) the \*market value of the replacement interests each of those entities owns in the transferee must be at least substantially the same as the market value of the interests it owned in the transferor or transferors just before the start of the trust restructuring period.

Note 1: Any assets in the company just before the start of the trust restructuring period may affect the ability of owners of units or interests to comply with paragraph (6)(b).

Note 2: See section 124-20 if an entity uses an interest sale facility.

- (7) For the purposes of subsection (6), ignore any \*shares in the transferee that:
- (a) just before the start of the \*trust restructuring period, were owned by entities who together owned no more than 5 shares; and
  - (b) just after the end of that period, represented such a low percentage of the total \*market value of all the shares that it

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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is reasonable to treat other entities as if they owned all the shares in the transferee.

**Example:** To continue the example in subsection 124-855(2), assume that Jonathon Pty Ltd was a shelf company organised for Matthew and Jaelyn by their solicitor, Indira.

Indira owned the 2 shares in Jonathon Pty Ltd before the trust restructuring period. The company issues Matthew and Jaelyn 5,000 shares each.

In these circumstances, it is reasonable to treat Matthew and Jaelyn as if they owned all the shares in Jonathon Pty Ltd.

### **124-865 Entities both choose the roll-over**

A roll-over is only available for the transferor and transferee if both the transferor and transferee choose to obtain it.

**Note 1:** If they do so, the consequences for the transferor and transferee are set out in section 124-875.

**Note 2:** An entity that owns a unit or interest in the transferor can also choose to obtain a roll-over: see section 124-870.

### **124-870 Roll-over for owner of units or interests in a trust**

- (1) You can choose to obtain a roll-over (whether or not the transferor and transferee choose to obtain a roll-over, and even if \*CGT event J4 applies) if:
- (a) you own units or interests in the transferor (your *original interests*); and
  - (b) the ownership of all your units or interests ends under a trust restructure in exchange for \*shares in the transferee (your *replacement interests*).

**Note 1:** The roll-over consequences are set out in Subdivision 124-A. The original assets are your units and interests in the transferor. The new assets are your shares in the transferee.

**Note 2:** The effect of the roll-over may be reversed if the transferor does not cease to exist within 6 months: see section 104-195.

- (2) You must make the choice for each of your original interests.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3) An entity that is a foreign resident cannot choose a roll-over under this section unless the replacement interests the entity \*acquires in the transferee are \*taxable Australian property just after their acquisition.
- (4) If you choose a roll-over, you cannot make a \*capital loss from a \*CGT event that happens to your original interests during the \*trust restructuring period.

Note: The rule in subsection (4) prevents a capital loss arising on your units or interests after the trust assets have been disposed of to the company but before your shares are issued to you.

*Exception: trading stock*

- (5) This section does not apply to your ownership of an original interest ending if:
- (a) the interest was an item of your \*trading stock and the corresponding replacement interest becomes an item of your trading stock when you \*acquire it; or
  - (b) the interest was not an item of your trading stock but the corresponding replacement interest becomes an item of your trading stock when you acquire it.

**124-875 Effect on the transferor and transferee**

*Capital gains and losses disregarded*

- (1) Any \*capital gain or \*capital loss from \*CGT event A1 happening to the transferor under the trust restructure is disregarded (even if \*CGT event J4 applies).

Note: The effect of the roll-over may be reversed if the transferor does not cease to exist within 6 months: see section 104-195.

*Cost base is transferred*

- (2) The first element of the \*cost base and \*reduced cost base (for the transferee) of each \*CGT asset that the transferee \*acquires under

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

the trust restructure is the same as the cost base and reduced cost base of that asset (for the transferor) just before that acquisition.

Note: For the cost base and reduced cost base of interests in the transferee: see Subdivision 124-A.

*Pre-CGT assets retain their status*

- (3) If the transferor \*acquired any of the \*CGT assets \*disposed of to the transferee under the trust restructure before 20 September 1985, the transferee is taken to have acquired it before that day.
- (4) However, subsection (3) is taken never to have applied to such an asset of the transferee if subsection 104-195(4) (CGT event J4) applies to the transferee in relation to the asset.

*Exception: trading stock*

- (5) This section does not apply to a \*CGT asset if:
  - (a) the asset was an item of \*trading stock of the transferor and becomes an item of trading stock of the transferee; or
  - (b) the asset was not an item of trading stock of the transferor but becomes an item of trading stock of the transferee when the transferee \*acquires it.

*Exception: asset must be taxable Australian property for foreign resident transferee*

- (6) For a transferee that is a foreign resident, this section only applies to a \*CGT asset that is \*taxable Australian property just after the transferee \*acquires it under the trust restructure.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Subdivision 124-P—Exchange of a membership interest in an MDO for a membership interest in another MDO

### Guide to Subdivision 124-P

#### 124-975 What this Subdivision is about

You can choose a roll-over if you exchange your interest as a member of an MDO for an interest as a member of another MDO.

You can only choose the roll-over if you would have made a capital gain from the exchange.

#### Table of sections

##### Operative provisions

124-980	Exchange of membership interests in an MDO
124-985	What the roll-over is for post-CGT interests
124-990	Partial roll-over
124-995	Pre-CGT interests

#### Operative provisions

##### 124-980 Exchange of membership interests in an MDO

- (1) There is a roll-over if:
  - (a) an entity exchanges:
    - (i) an interest (the *original interest*) in an \*MDO (the *original MDO*) as a member of the original MDO; for
    - (ii) a similar interest (the *replacement interest*) in another MDO (the *new MDO*) as a member of the new MDO; and
  - (b) both the original MDO and the new MDO are companies limited by guarantee; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) the exchange is in consequence of a single \*arrangement that satisfies subsection (3); and
- (d) apart from the roll-over, the entity would make a \*capital gain from a \*CGT event happening in relation to its original interest; and
- (e) the entity chooses to obtain the roll-over; and
- (f) the entity acquired the original interest on or after 20 September 1985.

Note: The entity can obtain only a partial roll-over if the capital proceeds for its original interest include something other than its replacement interest: see section 124-990.

- (2) In working out whether an original interest is exchanged for a similar interest, disregard a difference that consists only of a right to receive distributions of income or capital.

*Conditions for arrangement*

- (3) The \*arrangement must:
  - (a) result in the new \*MDO becoming the sole \*member of the original MDO; and
  - (b) be one in which participation was available on substantially the same terms for all of the holders of interests as members of the original MDO of a particular type.

**124-985 What the roll-over is for post-CGT interests**

- (1) A \*capital gain the entity makes from an original interest \*acquired on or after 20 September 1985 is disregarded.
- (2) The entity works out the first element of the \*cost base of each replacement interest the entity received as a result of the exchange by reasonably attributing to it the cost base (or the part of it) of the entity's original interest for which it was exchanged and for which the entity obtained the roll-over.
- (3) In applying subsection (2), the entity reduces (but not below zero) the \*cost base of the original interest (just before stopping owning

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-990

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it) by so much of that cost base as is attributable to an ineligible part (see section 124-990).

- (4) The first element of the \*reduced cost base of a replacement interest is worked out similarly.

**124-990 Partial roll-over**

- (1) The entity can obtain only a partial roll-over if its \*capital proceeds for its original interest include something (the *ineligible proceeds*) other than its replacement interest. There is no roll-over for that part (the *ineligible part*) of its original interest for which it received ineligible proceeds.
- (2) The \*cost base of the ineligible part is that part of the cost base of the original interest as is reasonably attributable to it.

**124-995 Pre-CGT interests**

If the entity exchanges an original interest that the entity \*acquired before 20 September 1985 for its replacement interest, the first element of the \*cost base and \*reduced cost base of the replacement interest is zero.

**Subdivision 124-Q—Exchange of stapled ownership interests for ownership interests in a unit trust**

**Guide to Subdivision 124-Q**

**124-1040 What this Subdivision is about**

There is a roll-over if you own ownership interests that are stapled and, as a result of a reorganisation, you stop owning those interests and you acquire or own ownership interests in an interposed unit trust.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- 124-1050 Conditions
- 124-1055 Consequences of the roll-over for exchanging members
- 124-1060 Consequences of the roll-over for interposed trust

## Operative provisions

### 124-1045 Exchange of stapled securities

- (1) There is a roll-over if:
  - (a) you own \*ownership interests in 2 or more trusts, or in one or more companies and one or more trusts, and those interests are stapled together to form stapled securities; and
  - (b) at least one of the trusts is a trust whose trustee is not assessed and liable to pay tax under Division 6C of Part III of the *Income Tax Assessment Act 1936*; and
  - (c) if no company is involved—at least one of the trusts is a trust whose trustee is assessed and liable to pay tax under Division 6C of Part III of that Act; and
  - (d) under a \*scheme for reorganising the affairs of the relevant \*stapled entities, you and the other entities that own the ownership interests in the stapled entities (together the ***exchanging members***):
    - (i) stop being the owner of those ownership interests and acquire ownership interests in a new unit trust (the ***interposed trust***) and nothing else (a ***new trust case***); or
    - (ii) retain their ownership interests in one of those trusts (also the ***interposed trust***), stop being the owner of the remaining ownership interests that form the stapled securities and receive nothing other than ownership interests in the interposed trust, or an increase in value of their existing ownership interests in the interposed trust, or both (an ***existing trust case***); and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note: See section 124-20 if an exchanging member uses an interest sale facility.

- (e) under the scheme, the interposed trust becomes the owner of:
  - (i) for a new trust case—all of the ownership interests in the stapled entities; or
  - (ii) for an existing trust case—all of the ownership interests in the other stapled entities; and
- (f) the conditions in section 124-1050 are satisfied.

Note: Division 6C of Part III of the *Income Tax Assessment Act 1936* deals with taxing public trading trusts in the same way as companies.

- (2) An entity is a ***stapled entity*** in relation to stapled securities if \*ownership interests in the entity form part of the stapled securities.
- (3) Ignore for the purposes of subsection (1) \*ownership interests held by one \*stapled entity in another stapled entity as at the start of the day on which the Bill for this Act was introduced into the Parliament.

**124-1050 Conditions**

- (1) Just after the \*scheme is completed (the ***completion time***), each exchanging member must own a percentage of the \*ownership interests in the interposed trust that reasonably equates to the percentage of the ownership interests that the member owned in the \*stapled entities.

Example: Public Company A, Unit Trust No. 1 and Unit Trust No. 2 are stapled entities. Each stapled entity has 4,000 ownership interests on issue. There are no ownership interests in any of the stapled entities other than shares in the company and units in the trusts.

Under a scheme for reorganising the stapled entities, Unit Trust No. 3 is interposed between the stapled entities and the owners of the interests in those entities. Unit Trust No. 3 (the interposed trust) becomes the owner of all of the interests in each of the three stapled entities. Exchanging members receive one unit in the interposed trust for each stapled security they owned. All units in the interposed trust are of the same class.

Naomi owned 200 shares in Public Company A, 200 units in Unit Trust No. 1 and 200 units in Unit Trust No. 2. Naomi therefore owned

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

5% of the ownership interests in each of the stapled entities. Under the scheme, Naomi receives 100 units in Unit Trust No. 3 (out of a total of 2,000 units) in exchange for her ownership interests in the stapled entities. Naomi now owns 5% of the ownership interests in the interposed trust and meets the condition in subsection (1).

- (2) Just after the completion time, each exchanging member must have the same, or as nearly as practicable the same, proportionate \*market value of \*ownership interests in the interposed trust as the member had in the \*stapled entities just before that time.
- (3) In working out whether an exchanging member complies with subsection (2), an anticipated reasonable approximation of the \*market value of \*ownership interests just after the completion time is sufficient.

Note: An anticipated reasonable approximation of market values of ownership interests may include valuations provided to exchanging members in scheme documents.
- (4) You must be an Australian resident at the completion time or, if you are a foreign resident at that time:
  - (a) some or all of your \*ownership interests in the \*stapled entities must have been \*taxable Australian property just before that time; and
  - (b) your ownership interests in the interposed trust must be taxable Australian property just after that time.

### **124-1055 Consequences of the roll-over for exchanging members**

- (1) A \*capital gain or \*capital loss you make as a result of the \*scheme from each of your \*ownership interests is disregarded.
- (2) If you \*acquired all of your \*ownership interests in the \*stapled entities on or after 20 September 1985, the first element of the \*cost base and \*reduced cost base of each of your ownership interests in the interposed trust is such amount as is reasonable having regard to:
  - (a) the total of the \*cost bases of all of your ownership interests in the \*stapled entities; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) the number, \*market value and character of your ownership interests in the interposed trust.

Example: Naomi had a cost base of \$2.00 for each of her 200 Public Company A shares, \$1.50 for each of her 200 Unit Trust No. 1 units and \$0.50 for each of her 200 Unit Trust No. 2 units. The total of the cost bases of all of her membership interests is \$800.00.

It is reasonable to allocate \$8.00 to each of the 100 units in the interposed trust that she receives under the reorganisation.

- (3) If you \*acquired all of your \*ownership interests in the \*stapled entities before 20 September 1985, you are taken to have acquired all of your ownership interests in the interposed trust before that day.
- (4) If you \*acquired some of your \*ownership interests in the \*stapled entities before 20 September 1985, you are taken to have acquired so many of your ownership interests in the interposed trust as is reasonable before that day having regard to:
- (a) the number, \*market value and character of your ownership interests in the stapled entities; and
  - (b) the number, market value and character of your ownership interests in the interposed trust.

Note: Generally, a capital gain or capital loss from a CGT asset acquired before 20 September 1985 can be disregarded: see Division 104.

- (5) The first element of the \*cost base and \*reduced cost base of each of your \*ownership interests in the interposed trust that is not taken by subsection (4) to have been \*acquired before 20 September 1985 (your ***post-CGT interests***) is such amount as is reasonable having regard to:
- (a) the total of the cost bases of your ownership interests in the \*stapled entities that you acquired on or after 20 September 1985; and
  - (b) the number, \*market value and character of your post-CGT interests.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**124-1060 Consequences of the roll-over for interposed trust**

- (1) Apply this section separately for the interposed trust in relation to the \*ownership interests in each \*stapled entity that the trustee of the interposed trust \*acquires under the \*scheme.
- (2) A whole number of \*ownership interests in a \*stapled entity that the trustee \*acquires under the \*scheme are taken to have been acquired before 20 September 1985 if any of the stapled entity's assets as at the completion time were acquired by it before that day.

Note: Generally, a capital gain or capital loss from a CGT asset acquired before 20 September 1985 can be disregarded: see Division 104.
- (3) The number (worked out as at the completion time) is the greatest possible that (when expressed as a percentage of all the \*ownership interests in the \*stapled entity \*acquired by the trustee) does not exceed:
  - (a) the \*market value of the stapled entity's assets that it acquired before 20 September 1985; less
  - (b) its liabilities (if any) in respect of those assets;expressed as a percentage of the market value of all the stapled entity's assets less all of its liabilities. The amounts in paragraphs (a) and (b) are to be worked out as at the completion time.
- (4) The first element of the \*cost base and \*reduced cost base of each of the trustee's \*ownership interests in that \*stapled entity that are not taken by subsection (3) to have been \*acquired before 20 September 1985 is such proportion as is reasonable of the total of the cost bases (as at the completion time) of that stapled entity's assets that it acquired on or after that day less its liabilities (if any) in respect of those assets.
- (5) In applying this section:
  - (a) a liability of a \*stapled entity that is not a liability in respect of a specific asset or assets of the stapled entity is a liability in respect of all the assets of the stapled entity; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) if a liability is in respect of 2 or more assets, the proportion of the liability that is in respect of any one of those assets is such amount as is reasonable having regard to the \*market values of each of those assets.

**Subdivision 124-R—Water entitlements**

**Guide to Subdivision 124-R**

**124-1100 What this Subdivision is about**

There is a roll-over if a CGT event happens to you because of something occurring in relation to one or more water entitlements. You do not need to own water entitlements for the event to happen to you.

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- 124-1115 Roll-over consequences—partial roll-over
- 124-1120 Roll-over consequences—all original entitlements post-CGT
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- 124-1130 Roll-over consequences—some original entitlements pre-CGT, others post-CGT

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- 124-1135 Reduction in water entitlements roll-over
- 124-1140 Roll-over consequences—capital gain or loss disregarded
- 124-1145 Roll-over consequences—all original entitlements post-CGT
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- 124-1155 Roll-over for variation to CGT asset
- 124-1160 Roll-over consequences

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

124-1165 Roll-over consequences—partial roll-over

## Replacement case

### 124-1105 Replacement water entitlements roll-over

#### *Automatic roll-over for single water entitlements*

- (1) There is a roll-over if:
- (a) your ownership of a \*water entitlement (the ***original entitlement***) ends, resulting in a \*CGT event happening; and
  - (b) as a result of your ownership of the original entitlement ending, you \*acquire one or more water entitlements (each of which is a ***new entitlement***); and
  - (c) if you are a foreign resident just before your ownership of the original entitlement ends, or you are the trustee of a trust that is a \*foreign trust for CGT purposes for the income year in which your ownership of the original entitlement ends:
    - (i) the original entitlement was \*taxable Australian property just before you stopped owning it; and
    - (ii) if there is only one new entitlement—the new entitlement is taxable Australian property just after you acquire it; and
    - (iii) if there is more than one new entitlement—each new entitlement is taxable Australian property just after you acquire it; and
  - (d) you have not chosen a roll-over in relation to the original entitlement under subsection (2).

#### *Elective roll-over for bundled water entitlements*

- (2) There is a roll-over if:
- (a) your ownership of more than one \*water entitlement (each of which is an ***original entitlement***) ends, resulting in a \*CGT event happening; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-1105

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- (b) as a result of your ownership of the original entitlements ending, you \*acquire one or more water entitlements (each of which is a **new entitlement**); and
- (c) if you are a foreign resident just before your ownership of the original entitlements ends, or you are the trustee of a trust that is a \*foreign trust for CGT purposes for the income year in which your ownership of the original entitlements ends:
  - (i) each original entitlement was \*taxable Australian property just before you stopped owning it; and
  - (ii) if there is only one new entitlement—the new entitlement is taxable Australian property just after you acquire it; and
  - (iii) if there is more than one new entitlement—each new entitlement is taxable Australian property just after you acquire it; and
- (d) you choose to obtain the roll-over.

Note: Section 103-25 tells you when the choice must be made.

*No roll-over if Subdivision 124-C applies*

- (3) However, there is no roll-over in relation to a \*water entitlement under this section if there is a roll-over in relation to the water entitlement under Subdivision 124-C (statutory licences).

*Meaning of water entitlement*

- (4) A **water entitlement** is a legal or equitable right that an entity owns that relates to water, including a right to:
  - (a) receive water; or
  - (b) take water from a water resource; or
  - (c) have water delivered; or
  - (d) deliver water;

and includes a right that must be owned by the entity in order to own a right covered by paragraph (a), (b), (c) or (d).

Example: Philip owns a share in Big Pump Irrigation Ltd. The share provides Philip with the right to receive dividends, to participate in the running

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



of the company and to have a separate contractual agreement with Big Pump Irrigation Ltd for the delivery of 1 megalitre of water. Philip has such an agreement. Philip's agreement is a *water entitlement*. Philip's share is also a *water entitlement* because he must own the share in order to have a contractual arrangement with Big Pump Irrigation Ltd for the delivery of water.

### **124-1110 Roll-over consequences—capital gain or loss disregarded**

Disregard a \*capital gain or \*capital loss you make from each original entitlement that qualifies for a roll-over.

### **124-1115 Roll-over consequences—partial roll-over**

- (1) You can obtain only a partial roll-over in relation to an original entitlement if the \*capital proceeds for that entitlement includes something (the *ineligible proceeds*) other than a new entitlement or new entitlements. There is no roll-over for that part (the *ineligible part*) of the entitlement for which you received the ineligible proceeds.

Note: If the roll-over is under subsection 124-1105(2), some or all of the original entitlements may each have an ineligible part.

- (2) The \*cost base of the ineligible part is that part of the cost base of the original entitlement as is reasonably attributable to the ineligible part.
- (3) The \*reduced cost base of the ineligible part is worked out similarly.
- (4) In working out what is reasonably attributable to the ineligible part for the purposes of subsections (2) and (3), have regard to the \*market value of the new entitlement relative to the market value of the ineligible proceeds.
- (5) If the roll-over is under subsection 124-1105(2), for the purposes of sections 124-1120 and 124-1130, for each original entitlement that has an ineligible part:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-1120

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- (a) reduce the \*cost base of that entitlement (just before you stopped owning it) by so much of that cost base as is attributable to that ineligible part; and
- (b) reduce the \*reduced cost base of that entitlement similarly.

**124-1120 Roll-over consequences—all original entitlements post-CGT**

- (1) In a situation covered by subsection 124-1105(1), if you \*acquired the original entitlement on or after 20 September 1985, the first element of the \*cost base of the new entitlement (or of each of the new entitlements) is such amount as is reasonable having regard to:
  - (a) the cost base and \*market value of the original entitlement; and
  - (b) the number and market value of the new entitlements; and
  - (c) any amount you paid to get the new entitlement (which can include giving property: see section 103-5).
- (2) In a situation covered by subsection 124-1105(2), if you \*acquired the original entitlements on or after 20 September 1985, the first element of the \*cost base of the new entitlement (or of each of the new entitlements) is such amount as is reasonable having regard to:
  - (a) the total of the cost bases of all the original entitlements; and
  - (b) the number and \*market value of the original entitlements; and
  - (c) the number and market value of the new entitlements; and
  - (d) any amount you paid to get the new entitlements (which can include giving property: see section 103-5).
- (3) In the situation covered by subsection 124-1105(1) or (2), the first element of the \*reduced cost base of the new entitlement (or of each of the new entitlements) is worked out similarly.
- (4) For the purposes of paragraphs (1)(b) and (2)(c), the \*market value of the new entitlements is their market value at the time you \*acquired them.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**124-1125 Roll-over consequences—all original entitlements  
pre-CGT**

- (1) In the situation covered by subsection 124-1105(1), if you \*acquired the original entitlement before 20 September 1985, you are taken to have acquired the new entitlement (or all of the new entitlements) before that day.
- (2) In the situation covered by subsection 124-1105(2), if you \*acquired the original entitlements before 20 September 1985, you are taken to have acquired the new entitlement (or all of the new entitlements) before that day.

**124-1130 Roll-over consequences—some original entitlements  
pre-CGT, others post-CGT**

- (1) This section applies if:
  - (a) the roll-over is under subsection 124-1105(2); and
  - (b) you \*acquired one or more of the original entitlements before 20 September 1985; and
  - (c) you acquired one or more of the original entitlements on or after that day.
- (2) You are taken to have \*acquired so many of your new entitlements before 20 September 1985 as is reasonable, having regard to:
  - (a) the number and \*market value of your original entitlements; and
  - (b) the number and market value of your new entitlements.
- (3) The first element of the \*cost base of each of your new entitlements that are not taken by subsection (2) to have been \*acquired before 20 September 1985 (your *post-CGT entitlements*) is such amount as is reasonable having regard to:
  - (a) the total of the cost bases of the original entitlements you acquired on or after 20 September 1985; and
  - (b) the number and \*market value of your post-CGT entitlements; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-1135

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- (c) any amount you paid to get the new entitlements (which can include giving property: see section 103-5).
- (4) The reduced cost base of each of your post-CGT entitlements is worked out similarly.

**Reduction case**

**124-1135 Reduction in water entitlements roll-over**

There is a roll-over if:

- (a) you own more than one \*water entitlement; and
- (b) under an \*arrangement:
  - (i) your ownership of one or more of the water entitlements (each of which is an **original entitlement**) ends, resulting in a \*CGT event happening; and
  - (ii) you do not receive anything for the original entitlement or entitlements; and
  - (iii) you retain one or more of your original entitlements (the **retained entitlements**); and
- (c) the total of the \*market values of all of the retained entitlements immediately after the CGT event happens is substantially the same as the total of the market values of all of the original entitlements immediately before the CGT event happened.

**124-1140 Roll-over consequences—capital gain or loss disregarded**

A \*capital gain or \*capital loss you make from your ownership of the original entitlements ending is disregarded.

**124-1145 Roll-over consequences—all original entitlements post-CGT**

- (1) This section applies if you \*acquired the original entitlement (or all of the original entitlements) on or after 20 September 1985.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (2) The first element of the \*cost base of the retained entitlement (or of each of the retained entitlements) is such amount as is reasonable having regard to:
  - (a) the total of the cost bases of all the original entitlements; and
  - (b) the number and \*market value of the original entitlements; and
  - (c) the number and market value of the retained entitlements.
- (3) The first element of the \*reduced cost base of the retained entitlements is worked out similarly.
- (4) For the purposes of paragraph (2)(c), the \*market value of the retained entitlements is their market value just after the \*CGT event referred to in section 124-1135 happens.

**124-1150 Roll-over consequences—some original entitlements pre-CGT, others post-CGT**

- (1) This section applies if:
  - (a) you \*acquired one or more of the original entitlements before 20 September 1985; and
  - (b) you acquired one or more of the original entitlements on or after that day.
- (2) You are taken to have \*acquired so many of your retained entitlements before 20 September 1985 as is reasonable, having regard to:
  - (a) the number and \*market value of your original entitlements; and
  - (b) the number and market value of your retained entitlements.
- (3) The first element of the \*cost base of each of your retained entitlements that are not taken by subsection (2) to have been \*acquired before 20 September 1985 (your *post-CGT entitlements*) is such amount as is reasonable having regard to:
  - (a) the total of the cost bases of the original entitlements you acquired on or after 20 September 1985; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-1155

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- (b) the number and \*market value of the your post-CGT entitlements.
- (4) The reduced cost base of each of your post-CGT entitlements is worked out similarly.

**Variation to CGT asset case**

**124-1155 Roll-over for variation to CGT asset**

There is a roll-over if:

- (a) a \*CGT event happens to a \*CGT asset that you own; and
- (b) the CGT event happens as a direct result of the circumstances that gave rise to a roll-over under section 124-1105; and
- (c) you continue to be the owner of the asset (the *retained asset*) immediately after the CGT event has happened.

**124-1160 Roll-over consequences**

A \*capital gain or \*capital loss you make from the \*CGT event is disregarded.

**124-1165 Roll-over consequences—partial roll-over**

- (1) You can obtain only a partial roll-over in relation to a \*CGT asset if the \*capital proceeds for that asset includes something (the *ineligible proceeds*) other than your retained asset. There is no roll-over for that part (the *ineligible part*) of the asset for which you received the ineligible proceeds.
- (2) The \*cost base of the ineligible part is that part of the cost base of the \*CGT asset as is reasonably attributable to the ineligible part.
- (3) The \*reduced cost base of the ineligible part is worked out similarly.
- (4) In working out what is reasonably attributable to the ineligible part for the purposes of subsections (2) and (3), have regard to the

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

\*market value of the retained asset relative to the market value of the ineligible proceeds.

## **Subdivision 124-S—Interest realignment arrangements**

### **Guide to Subdivision 124-S**

#### **124-1220 What this Subdivision is about**

There is roll-over relief if an interest in a mining, quarrying or prospecting right is disposed of under an interest realignment arrangement.

#### **Table of sections**

##### **Operative provisions**

- 124-1225 Disposals of interests under interest realignment arrangements
- 124-1230 Roll-over consequences—partial roll-over
- 124-1235 Roll-over consequences—all original interests were post-CGT and pre-UCA
- 124-1240 Roll-over consequences—all original interests were pre-CGT
- 124-1245 Roll-over consequences—original interests were of mixed CGT status, all were pre-UCA
- 124-1250 Roll-over consequences—some original interests were pre-UCA

#### **Operative provisions**

##### **124-1225 Disposals of interests under interest realignment arrangements**

- (1) There is a roll-over if:
  - (a) \*CGT event A1 happens because you \*dispose of one or more assets each of which:
    - (i) is an interest (an *original interest*) in a \*mining, quarrying or prospecting right; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-1230

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- (ii) is an interest that you started to \*hold before 1 July 2001; and
  - (b) the disposal occurs under an \*interest realignment arrangement.
- (2) The first element of the \*cost base and \*reduced cost base of an interest (a *new interest*) in a \*mining, quarrying or prospecting right that you acquire under the \*interest realignment arrangement includes any amount you paid to acquire the new interest.
- Note 1: The rest of the first element is worked out under Subdivision 124-A.
- Note 2: Under subsections 124-10(2) and 124-15(2), a capital gain or capital loss you make from the original interest is disregarded.
- (3) The amount can include giving property: see section 103-5. However, it does not include a \*mining, quarrying or prospecting right that you dispose of under the \*interest realignment arrangement.

**124-1230 Roll-over consequences—partial roll-over**

- (1) You can obtain only a partial roll-over in relation to an original interest if the \*capital proceeds for that interest includes something (the *ineligible proceeds*) other than a new interest or new interests. There is no roll-over for that part (the *ineligible part*) of the interest for which you received the ineligible proceeds.
- Note: If there is more than one original interest, some or all of those original interests may each have an ineligible part.
- (2) The \*cost base of the ineligible part is that part of the cost base of the original interest as is reasonably attributable to the ineligible part.
- (3) The \*reduced cost base of the ineligible part is that part of the reduced cost base of the original interest as is reasonably attributable to the ineligible part.
- (4) For the purposes of sections 124-1235 and 124-1245, for each original interest that has an ineligible part:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (a) reduce the \*cost base of that interest (just before the \*CGT event that happened in relation to it) by so much of that cost base as is attributable to that ineligible part; and
- (b) reduce the \*reduced cost base of that interest (just before the CGT event that happened in relation to it) by so much of that reduced cost base as is attributable to that ineligible part.

**124-1235 Roll-over consequences—all original interests were post-CGT and pre-UCA**

- (1) If you acquire the new interest in exchange for:
  - (a) one original interest that you started to \*hold on or after 20 September 1985 and before 1 July 2001; or
  - (b) 2 or more original interests, each of which you started to hold on or after 20 September 1985 and before 1 July 2001;you are taken to have started to hold the new interest (or all of the new interests) on or after 20 September 1985 and before 1 July 2001.
- (2) The first element of the \*cost base of the new interest (or of each of the new interests) is such amount as is reasonable having regard to:
  - (a) the total of the cost bases of all the original interests; and
  - (b) the number, \*market value and character of the original interests; and
  - (c) the number, market value and character of the new interests.
- (3) The first element of the \*reduced cost base of the new interest (or of each of the new interests) is such amount as is reasonable having regard to:
  - (a) the total of the reduced cost bases of all the original interests; and
  - (b) the number, \*market value and character of the original interests; and
  - (c) the number, market value and character of the new interests.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 124-1240

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**124-1240 Roll-over consequences—all original interests were pre-CGT**

If you acquire the new interest in exchange for:

- (a) one original interest that you started to \*hold before 20 September 1985; or
- (b) 2 or more original interests, each of which you started to hold before 20 September 1985;

you are taken to have started to hold the new interest (or all of the new interests) before that day.

**124-1245 Roll-over consequences—original interests were of mixed CGT status, all were pre-UCA**

- (1) This section applies if:
  - (a) you acquire the new interest in exchange for more than one original interest; and
  - (b) you started to \*hold one or more of the original interests before 20 September 1985; and
  - (c) you started to hold one or more of the original interests on or after that day; and
  - (d) you did not start to hold any of the original interests on or after 1 July 2001.
- (2) Each new interest is taken to be 2 separate \*CGT assets that are both new interests:
  - (a) one (which you are taken to have started to \*hold on or after 20 September 1985 and before 1 July 2001) representing the extent to which you started to hold the original interests on or after 20 September 1985 and before 1 July 2001; and
  - (b) another (which you are taken to have started to hold before 20 September 1985) representing the extent to which you started to hold the original interests before that day.
- (3) The first element of the \*cost base and \*reduced cost base of the \*CGT asset mentioned in paragraph (2)(a) in relation to a new interest is worked out under the formula:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

$$\text{Total post-CGT cost base} \times \frac{\text{Market value of new interest}}{\text{Market value of all new interests}}$$

where:

**market value of all new interests** is the total of the \*market values of all of the new interests.

**market value of new interest** is the \*market value of the new interest to which the \*CGT asset mentioned in paragraph (2)(a) relates.

**total post-CGT cost base** is the total of the \*cost bases of all the original interests that you started to \*hold on or after 20 September 1985.

### **124-1250 Roll-over consequences—some original interests were pre-UCA**

- (1) This section applies if:
  - (a) you acquire the new interest in exchange for more than one original interest; and
  - (b) you started to \*hold one or more of the original interests (**pre-UCA interests**) before 1 July 2001; and
  - (c) you started to hold one or more of the original interests (**post-UCA interests**) on or after that day.
- (2) If you started to \*hold all of the pre-UCA interests on or after 20 September 1985, each new interest is taken to be 2 separate assets that are both new interests:
  - (a) one (which you are taken to have started to hold on or after that day and before 1 July 2001) representing the extent to which the original interests are pre-UCA interests; and
  - (b) another (which you are taken to have started to hold on or after 1 July 2001) representing the extent to which the original interests are post-UCA interests.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 124-1250

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Apply section 124-1235 to the interest referred to in paragraph (a) as if the pre-UCA interests were the only original interests. Apply Division 40 to the interests referred to in paragraph (b).

- (3) If you started to \*hold all of the pre-UCA interests before 20 September 1985, each new interest is taken to be 2 separate assets that are both new interests:
- (a) one (which you are taken to have started to hold before that day) representing the extent to which the original interests are pre-UCA interests; and
  - (b) another (which you are taken to have started to hold on or after 1 July 2001) representing the extent to which the original interests are post-UCA interests.

Apply section 124-1240 to the new interest referred to in paragraph (a) as if the pre-UCA interests were the only original interests. Apply Division 40 to the new interest referred to in paragraph (b).

- (4) If you started to \*hold one or more of the pre-UCA interests before 20 September 1985 and one or more of the pre-UCA interests on or after that day, each new interest is taken to be 3 separate assets that are all new interests:
- (a) one (which you are taken to have started to hold on or after 20 September 1985 and before 1 July 2001) representing the extent to which the original interests that you started to hold on or after 20 September 1985 are pre-UCA interests; and
  - (b) another (which you are taken to have started to hold before 20 September 1985) representing the extent to which the original interests that you started to hold before 20 September 1985 are pre-UCA interests; and
  - (c) another (which you are taken to have started to hold on or after 1 July 2001) representing the extent to which the original interests are post-UCA interests.

Apply section 124-1245 to the new interests referred to in paragraphs (a) and (b) as if the pre-UCA interests were the only original interests. Apply Division 40 to the new interest referred to in paragraph (c).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## Division 125—Demerger relief

### Table of Subdivisions

	Guide to Division 125
125-A	Object of this Division
125-B	Consequences for owners of interests
125-C	Consequences for members of demerger group
125-D	Public trading trusts
125-E	Miscellaneous

### Guide to Division 125

#### 125-1 What this Division is about

Entities can obtain CGT relief for a demerger.

Owners of ownership interests in the head entity of a demerger group can obtain a roll-over to defer CGT consequences for the CGT events that happen to their interests under the demerger (see Subdivision 125-B).

Capital gains and capital losses made by members of the demerger group from certain CGT events that happen under the demerger are disregarded (see Subdivision 125-C).

Note: Dividend relief is also available: see section 44 of the *Income Tax Assessment Act 1936*.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 125-5

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## Subdivision 125-A—Object of this Division

### Table of sections

125-5 Object of this Division

### 125-5 Object of this Division

The object of this Division is to facilitate the demerging of entities by ensuring that capital gains tax considerations are not an impediment to restructuring a \*business.

## Subdivision 125-B—Consequences for owners of interests

### Guide to Subdivision 125-B

#### 125-50 Guide to Subdivision 125-B

You can choose to obtain a roll-over if a CGT event happens to your interests in a company or trust because of a demerger of an entity from the group of which the company or trust is the head entity.

There are cost base adjustments if you receive new interests under a demerger and no CGT event happens to your original interests.

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125-55 When a roll-over is available for a demerger  
125-60 Meaning of *ownership interest* and related terms  
125-65 Meanings of *demerger group*, *head entity* and *demerger subsidiary*  
125-70 Meanings of *demerger*, *demerged entity* and *demerging entity*  
125-75 Exception: employee share schemes  
125-80 What is the roll-over?  
125-85 Cost base adjustments where CGT event happens but no roll-over chosen  
125-90 Cost base adjustments where no CGT event

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- 125-95 No other cost base adjustment after demerger  
125-100 No further demerger relief in some cases

## Operative provisions

### 125-55 When a roll-over is available for a demerger

- (1) You can choose to obtain a roll-over if:
- (a) you own an \*ownership interest in a company or trust (your **original interest**); and
  - (b) the company or trust is the \*head entity of a \*demerger group; and
  - (c) a \*demerger happens to the demerger group; and
  - (d) under the demerger, a \*CGT event happens to your original interest and you \*acquire a new or replacement interest (your **new interest**) in the \*demerged entity.

Note 1: Section 125-80 sets out what the roll-over is.

Note 2: You have to make cost base adjustments even if there is no CGT event: see section 125-90.

Example: Peter owns shares (his original interests) in Company A, a public company. Company B is a wholly owned subsidiary of Company A. Company A announces a demerger utilising a proportionate capital reduction and the disposal of all its shares in Company B to its 320,000 shareholders. Following the demerger all of the shareholders in Company A, including Peter, will own all of the shares in Company B (their new interests).

- (2) You cannot choose to obtain a roll-over under this Subdivision for an original interest if:
- (a) you are a foreign resident; and
  - (b) the new interest you \*acquire under the \*demerger in exchange for that original interest is not \*taxable Australian property just after you acquire it.

Note: For **taxable Australian property**, see section 855-15.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 125-60

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**125-60 Meaning of *ownership interest* and related terms**

- (1) An ***ownership interest*** in a company or trust is:
  - (a) for a company, a \*share in the company or an option, right or similar interest issued by the company that gives the owner an entitlement to \*acquire a share in the company; and
  - (b) for a trust, a unit or other interest in the trust or an option, right or similar interest issued by the trustee that gives the owner an entitlement to acquire a unit or other interest in the trust.
- (2) However, this Subdivision applies to a \*dual listed company voting share in a company that is the \*head entity of a \*demerger group as if it were not an ***ownership interest*** if there are not more than 5 of those \*shares in the company.
- (3) A ***dual listed company voting share*** is a \*share in a company:
  - (a) issued:
    - (ii) as part of a \*dual listed company arrangement; and
    - (iii) mainly for the purpose of ensuring that shareholders of both companies involved in the arrangement vote as a single decision-making body on matters affecting them; and
  - (b) that does not carry rights to financial entitlements (except the return of the amount paid up on the share and a dividend that is the equivalent of a dividend paid on an ordinary share).
- (4) A ***dual listed company arrangement*** is an \*arrangement under which 2 publicly listed companies, while maintaining their separate legal entity status, shareholdings and listings, align their strategic directions and the economic interests of their respective shareholders through:
  - (a) the appointment of common (or almost identical) boards of directors, except where the effect of the relevant regulatory requirements prevents this; and
  - (b) management of the operations of the 2 companies on a unified basis; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) the shareholders of both companies voting in effect as a single decision-making body on substantial issues affecting their combined interests; and
  - (d) equalised distributions to shareholders in accordance with an equalisation ratio applying between the 2 companies, both generally and in the event of a winding up of one or both of the companies; and
  - (e) cross-guarantees as to, or similar financial support for, each other's substantial obligations or operations, except where the effect of the relevant regulatory requirements prevents those guarantees or that financial support.
- (5) However, an arrangement is not a *dual listed company arrangement* unless one but not both of the companies is an Australian resident.

### **125-65 Meanings of demerger group, head entity and demerger subsidiary**

- (1) A *demerger group* comprises the \*head entity of the group and one or more \*demerger subsidiaries.

Note: An entity may be a member of one or more demerger groups.

- (2) A trust cannot be a member of a *demerger group* unless \*CGT event E4 is capable of applying to all of the units and interests in the trust.

Note: A discretionary trust cannot be a member of a demerger group.

- (2A) Neither a corporation sole nor a \*complying superannuation entity is a member of a \*demerger group.

- (3) A company or trust is the *head entity* of a \*demerger group if no other member of the group owns \*ownership interests in the company or trust.

- (4) If apart from this subsection, a company or trust would be the \*head entity of a \*demerger group and the company or trust, and all of its \*demerger subsidiaries, are also demerger subsidiaries of

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 125-70

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another company or trust in another demerger group, the first-mentioned company or trust is not the *head entity* of a demerger group.

- (5) A company or trust (the *first company or trust*) that would, apart from this subsection, be a member of a *demerger group* is not a member of the *demerger group* if:
- (a) the first company or trust owns, either alone or together with another company or trust that would, apart from this subsection, be a member of the \*demerger group, more than 20% but less than 80% of the \*ownership interests in a \*listed public company or \*listed widely held trust; and
  - (b) the listed public company or listed widely held trust chooses that the first company or trust not be a member of the demerger group.
- (6) A company is a *demerger subsidiary* of another company or a trust that is a member of a \*demerger group if the other company or the trust, either alone or together with other members of the group, owns, or has the right to \*acquire, \*ownership interests in the company that carry between them:
- (a) the right to receive more than 20% of any distribution of income or capital by the company; or
  - (b) the right to exercise, or control the exercise of, more than 20% of the voting power of the company.
- (7) A trust is a *demerger subsidiary* of another trust or a company that is a member of a \*demerger group if the other trust or the company, either alone or together with other members of the group, owns, or has the right to \*acquire, \*ownership interests in the trust that carry between them the right to receive more than 20% of any distribution of income or capital by the trustee.

**125-70 Meanings of *demerger*, *demerged entity* and *demerging entity***

- (1) A *demerger* happens to a \*demerger group if:
- (a) there is a restructuring of the demerger group; and
  - (b) under the restructuring:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (i) members of the demerger group \*dispose of at least 80% of their total \*ownership interests in another member of the demerger group to owners of original interests in the \*head entity of the demerger group; or
- (ii) at least 80% of the total ownership interests of members of the demerger group in another member of the demerger group end and new interests are issued to owners of original interests in the head entity; or
- (iii) the demerged entity issues sufficient new ownership interests in itself with the result that owners of original interests in the head entity own at least 80% of the total ownership interests in the demerged entity; or
- (iv) some combination of the processes referred to in subparagraphs (i), (ii) and (iii) happens with the effect that members of the demerger group stop owning at least 80% of the total ownership interests owned by members of the demerger group in another member of the group; and

Note: CGT event C2 and CGT event C3 are the only relevant CGT events in a subparagraph (ii) case.

- (c) under the restructuring:
  - (i) a \*CGT event happens to an original interest owned by an entity in the head entity of the group and the entity \*acquires a new interest and nothing else; or
  - (ii) no CGT event happens to an original interest owned by an entity in the head entity of the group and the entity acquires a new interest and nothing else; and
- (d) the acquisition by entities of new interests happens only because those entities own or owned original interests; and
- (e) the new interests acquired are:
  - (i) if the head entity is a company—ownership interests in a company; or
  - (ii) if the head entity is a trust—ownership interests in a trust; and
- (g) neither the original interests nor the new interests are in a trust that is a \*non-complying superannuation fund; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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(h) the requirements of subsection (2) are met.

**Example:** To continue the example from subsection 125-55(1), Peter owns 400 post-CGT shares in Company A. Companies A and B are both members of a demerger group. Company A is the head entity of the demerger group and Company B is a demerger subsidiary.

Company A proceeds to demerge 100% of its shares in Company B to its shareholders.

Company A enters into a proportionate capital reduction, returning 40 cents per share to its ordinary shareholders. Peter is entitled to \$160 (40c times 400 shares) under the capital reduction.

For Peter, the capital reduction amount of \$160 is compulsorily applied to acquire Company A's shares in Company B, at \$6.75 (a discount of 10% to current market value). Company A rounds up the fractional amounts in calculating the number of whole shares to be distributed to each shareholder. This gives Peter 24 shares in Company B (160 divided by 6.75, rounded up to the nearest whole number).

**Note:** Acquiring new interests by an owner of original interests may include the allocation of the owner's entitlement to new interests to a nominee:

- to sell on the owner's behalf; or
- to hold pending the owner being located.

- (2) Each owner (an **original owner**) of original interests in the \*head entity of the \*demerger group must:
- (a) \*acquire, under the \*demerger, the same proportion, or as nearly as practicable the same proportion, of new interests in the \*demerged entity as the original owner owned in the head entity just before the demerger; and
  - (b) just after the demerger, have the same proportionate total \*market value of \*ownership interests in the head entity and demerged entity as the original owner owned in the head entity just before the demerger.

**Note 1:** There is an exception: see section 125-75.

**Note 2:** Dual listed company voting shares are not treated as ownership interests: see section 125-60.

**Note 3:** Fractional interests will generally not affect your ability to choose a roll-over.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Example: To continue the example from subsection (1), Company A concludes, given the circumstances of the demerger, that the market values of Peter's and the other shareholders' shares in A and B are expected to be in proportion with their original interests in Company A, and advises the shareholders of this position.

- (3) In working out whether an original owner complies with subsection (2):
- (a) disregard \*ownership interests that are original interests the owner owns in the \*demerged entity; and
  - (b) an anticipated reasonable approximation of the \*market value of ownership interests is sufficient.

Example: An anticipated reasonable approximation of market values of ownership interests may include:

- valuations provided to shareholders in scheme documents;
- the price selected for use under a sale facility;

and may be made by reference to long-term value.

*Exception: off-market buy-backs*

- (4) A buy-back of \*shares that is an off-market purchase for the purposes of Division 16K of Part III of the *Income Tax Assessment Act 1936* is not a \*demerger.

*Exception: roll-over available under another provision*

- (5) Circumstances where an owner of original interests can obtain a roll-over under a provision of this Act outside this Division for all of the CGT events that happened to the owner's original interests under the circumstances cannot be a **demerger**.

Note: An owner might be able to obtain a roll-over for the CGT events under Subdivision 124-E, or 124-M or Division 615.

*Meaning of demerged entity*

- (6) An entity that is a former member of a \*demerger group is a **demerged entity** if, under a \*demerger that happens to the group, \*ownership interests in the entity are acquired by:
- (a) shareholders in the \*head entity of the group; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) unitholders or holders of interests in the head entity of the group.

*Meaning of demerging entity*

- (7) An entity that is a member of a \*demerger group just before the \*CGT event referred to in section 125-155 happens is a **demerging entity** if, under a \*demerger that happens to the group:
- (a) the entity (either alone or together with other members of the demerger group)\*dispose of at least 80% of their total \*ownership interests in another member of the demerger group to owners of original interests in the \*head entity of the demerger group; or
  - (b) at least 80% of the total ownership interests of that entity and of other members of the demerger group in another member of the demerger group end and new interests are issued to owners of original interests in the head entity; or
- Note: CGT event C2 and CGT event C3 are the only relevant CGT events.
- (c) the demerged entity issues sufficient new ownership interests in itself with the result that owners of original interests in the head entity own at least 80% of the total ownership interests in the demerged entity; or
  - (d) some combination of the processes referred to in paragraphs (a), (b) and (c) happens with the effect that members of the demerger group stop owning at least 80% of the total ownership interests owned by members of the demerger group in another member of the group.

**125-75 Exceptions to subsection 125-70(2)**

*Employee share schemes*

- (1) In working out whether the requirements in subsection 125-70(2) are met, disregard each of the \*ownership interests described in subsections (2) and (3) if, just before the \*demerger, those interests (taking into account either or both of their number and value)

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

represented not more than 3% of the total \*ownership interests in the entity.

- (2) An \*ownership interest, in a company, that is owned by an entity is disregarded under subsection (1) if:
- (a) the entity acquired a beneficial interest in the ownership interest under an \*employee share scheme; and
  - (b) these provisions apply to the beneficial interest:
    - (i) Subdivision 83A-B and the provisions referred to in paragraphs 83A-33(1)(a) to (c); or
    - (ii) Subdivision 83A-B and the provisions referred to in paragraphs 83A-35(1)(a) and (b); or
    - (iii) Subdivision 83A-C; and
  - (c) the ownership interest is not a fully-paid ordinary \*share.
- (3) An \*ownership interest, in a trust, that is owned by an entity is disregarded under subsection (1) if:
- (a) both of the following would apply if Division 83A (about employee share schemes) applied to ownership interests in trusts in the same way as it applies to \*shares:
    - (i) the entity acquired a beneficial interest in the ownership interest under an \*employee share scheme;
    - (ii) the provisions referred to in subparagraph (2)(b)(i), (ii) or (iii) apply to the beneficial interest; and
  - (b) the ownership interest is not a fully-paid unit.

*Adjusting instruments*

- (4) In working out whether the requirements in subsection 125-70(2) are met, disregard each of the \*ownership interests described in subsection (5) (*adjusting instruments*) if, just before the \*demerger, those interests represented not more than 10%, or such greater percentage (not exceeding 17%) as is prescribed, of the ownership interests in the entity.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (5) An \*ownership interest in a \*listed public company or a \*listed widely held trust that is the \*head entity of a \*demerger group is disregarded under subsection (4) if:
- (a) the adjusting instrument was issued on terms that ensure that its value is not adversely affected by an \*arrangement undertaken by the company or trust in relation to other ownership interests in the company or trust; and
  - (b) if the adjusting instrument can be converted into an ordinary \*share in the company or an ordinary unit in the trust, any conversion will occur on a basis:
    - (i) that is set out in the terms of the issue of the instrument; and
    - (ii) that is adjusted to take into account a capital reduction or a capital reconstruction; and
  - (c) before conversion, the owner of the adjusting instrument does not have a right to participate in distributions of profit or capital except as set out in the terms of the issue of the instrument; and
  - (d) the adjusting instrument deals with the effect of a \*demerger that happens to the demerger group on the value of the instrument.

Example: Some examples of adjusting instruments are:

- convertible preference shares, including reset preference shares;
- convertible notes;
- partly paid shares where the paid-up amount is adjusted to reflect a capital reduction.

*Additional exceptions*

- (6) The regulations may provide that, in working out whether the requirements in subsection 125-70(2) are met, other \*ownership interests of a kind specified in the regulations are to be disregarded if, just before the \*demerger, those interests represented not more than a prescribed percentage of the ownership interests in the entity.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (7) However, the total percentage of \*ownership interests to be disregarded under this section must not exceed 20% of the ownership interests in the entity.

### **125-80 What is the roll-over?**

- (1) If you choose the roll-over, a \*capital gain or \*capital loss you make from a \*CGT event happening under the \*demerger to an original interest you own is disregarded.
- (2) If you choose the roll-over, the first element of the \*cost base and \*reduced cost base of:
- (a) each new interest that you are not taken to have \*acquired before 20 September 1985; and
  - (b) if not all of your original interests ended under the \*demerger—each of your remaining original interests that you acquired on or after 20 September 1985;

is such proportion of the sum of the cost bases of all your original interests that you acquired on or after 20 September 1985 (worked out just before the demerger) as is reasonable having regard to the matters specified in subsection (3).

Note 1: These rules replace the cost base and reduced cost base adjustments in CGT event E4 and CGT event G1.

Note 2: The head entity or the demerging entity may advise you of the proportions.

- (3) The matters are:
- (a) the \*market values of your remaining original interests just after the \*demerger, or an anticipated reasonable approximation of those market values; and
  - (b) the market values of your new interests just after the demerger, or an anticipated reasonable approximation of those market values.

Example: To continue the example from subsection 125-70(2), Company A advises its shareholders that Company B at that time represents 5% of the market value of the group as a whole. Peter's cost base for each of his shares in A is \$4.60, and Peter recalculates his cost base as follows:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Total cost base = \$1840 (4.60 × 400 shares)

to be spread over 400 shares in A and 24 shares in B.

5% of 1840 = 92

92 ÷ 24 shares = \$3.83 per B share

1840 – 92 = 1748

1748 ÷ 400 = \$4.37 per A share

*Pre-CGT interests*

- (4) The following subsections apply if you choose the roll-over and you \*acquired some or all of your original interests before 20 September 1985.
- (5) If you \*acquired all of your original interests before 20 September 1985, you are taken to have acquired all of your new interests before that day.
- (6) If you \*acquired some of your original interests before 20 September 1985, you are taken to have acquired a reasonable whole number of your new interests before that day having regard to:
  - (a) the \*market values of your original interests and your remaining original interests just after the \*demerger, or an anticipated reasonable approximation of those market values; and
  - (b) the market values of your new interests just after the demerger, or an anticipated reasonable approximation of those market values.
- (7) If a proportion, but not all, of your original interests ends under the \*demerger and you \*acquired some of your original interests before 20 September 1985, that same proportion of those interests you acquired before that day ends.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note: CGT event K6 may be relevant if you later dispose of your interests that are treated as being pre-CGT.

Example: Bert owned 100 shares in a company of which 50 were acquired pre-CGT. Under a demerger 20 of Bert's 100 shares were cancelled in exchange for new interests. As 20% of his shares were cancelled, 10 of his pre-CGT shares are taken to have been cancelled.

*Partial roll-over*

- (8) If you choose a roll-over for some but not all of your original interests, you apply the rules in this section as if your original interests for which you chose the roll-over were your only original interests.

**125-85 Cost base adjustments where CGT event happens but no roll-over chosen**

- (1) You must adjust the \*cost base and \*reduced cost base of an \*ownership interest you own in a company or trust if:
- (a) a \*demerger happens to a \*demerger group of which the company or trust is a member; and
  - (b) you owned an original interest in the \*head entity of the demerger group just before the demerger; and
  - (c) a \*CGT event happens to the original interest and you \*acquire a new interest under the demerger; and
  - (d) you do not choose a roll-over under this Subdivision for the original interest.
- (2) The adjustments you must make are the same as the adjustments you would have to make under section 125-80 for the \*cost bases and \*reduced cost bases of the remaining original interests and new interests just after the \*CGT event if you could have chosen a roll-over under this Subdivision for the \*demerger and you had done so.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**125-90 Cost base adjustments where no CGT event**

- (1) You must adjust the \*cost base and \*reduced cost base of an \*ownership interest you own in a company or trust if:
  - (a) a \*demerger happens to a \*demerger group of which the company or trust is a member; and
  - (b) you owned an original interest in the \*head entity of the demerger group just before the demerger; and
  - (c) no \*CGT event happens to the original interest, but you \*acquire a new interest under the demerger.
- (2) The adjustments you must make are the same as the adjustments you would have to make under section 125-80 if you could have chosen a roll-over under this Subdivision for the \*demerger and you had done so.

**125-95 No other cost base adjustment after demerger**

If you have to make adjustments to the \*cost base and \*reduced cost base of your \*ownership interests under section 125-80, 125-85 or 125-90 because of a \*demerger, no other adjustment can be made under this Act to those cost bases and reduced cost bases because of something that happens under the demerger.

Note: Those sections deal with any value shift that might occur under the demerger and avoid the need for the general value shifting regime to apply.

**125-100 No further demerger relief in some cases**

This Division does not apply to the remaining \*ownership interests in a \*demerged entity if one or more members of the \*demerger group \*disposed of or cancelled less than 100% of the total ownership interests of that group in the demerged entity.

Note: After the demerger, a former member of the demerger group can undertake a further demerger to which this Division can apply.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Subdivision 125-C—Consequences for members of demerger group**

### **Guide to Subdivision 125-C**

#### **125-150 Guide to Subdivision 125-C**

Certain capital gains and capital losses that members of a demerger group make under a demerger are disregarded.

Certain capital losses made under a demerger are reduced where the demerger results in a value shift.

#### **Table of sections**

##### **Operative provisions**

125-155	Certain capital gains or losses disregarded for demerging entity
125-160	No CGT event J1
125-165	Adjusted capital loss for value shift under a demerger
125-170	Reduced cost base reduction if demerger asset subject to roll-over

#### **Operative provisions**

##### **125-155 Certain capital gains or losses disregarded for demerging entity**

Any \*capital gain or \*capital loss a \*demerging entity makes from \*CGT event A1, \*CGT event C2, \*CGT event C3 or \*CGT event K6 happening to its \*ownership interests in a \*demerged entity under a \*demerger is disregarded.

Note 1: The full list of CGT events is in section 104-5.

Note 2: This section will not apply if section 125-100 applies.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**125-160 No CGT event J1**

\*CGT event J1 does not happen to a \*demerged entity or a member of a \*demerger group under a \*demerger.

**125-165 Adjusted capital loss for value shift under a demerger**

A \*capital loss made by an entity that was a member of a \*demerger group from a \*CGT event happening to a \*CGT asset under a \*demerger or after a demerger is reduced to the extent that the capital loss is reasonably attributable to a reduction in the \*market value of the asset because of the demerger.

Example: The market value of equity or loan interests in the demerging entity may be reduced by the disposal, for inadequate value, of ownership interests of another member of the demerger group to owners of original interests in the head entity of the group.

**125-170 Reduced cost base reduction if demerger asset subject to roll-over**

- (1) The \*reduced cost base of a \*CGT asset is reduced if:
  - (a) the \*market value of the asset is reduced because of a \*demerger; and
  - (b) after the demerger the asset is \*acquired by an entity from another entity (the *transferor*) in a situation where the transferor obtained a roll-over for the disposal; and
  - (c) the reduction occurred when the transferor owned the asset.
- (2) The \*reduced cost base of the asset as determined under the roll-over is reduced just after the roll-over to the extent of the reduction in \*market value caused by the \*demerger.

Note: The rules in section 125-165 and this section deal with any value shift that might occur under the demerger and avoid the need for the general value shifting regime to apply.

- (3) If the \*reduced cost base of a \*CGT asset is reduced under this section because of a \*demerger, no other adjustment can be made

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

under this Act to that reduced cost base because of something that happens under the demerger.

## **Subdivision 125-D—Public trading trusts**

### **Guide to Subdivision 125-D**

#### **125-225 Guide to Subdivision 125-D**

This Division applies to corporate unit trusts and public trading trusts as if they were companies.

#### **Table of sections**

##### **Operative provisions**

125-230 Application of Division to public trading trusts

### **Operative provisions**

#### **125-230 Application of Division to public trading trusts**

This Division applies to a trust to which section 102S of the *Income Tax Assessment Act 1936* applies for an income year in which a \*demerger happens as if:

- (a) the trust were a company; and
- (b) \*ownership interests in it were interests in a company.

## **Subdivision 125-E—Miscellaneous**

### **Table of sections**

125-235 Share and interest sale facilities

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 125-235

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**125-235 Share and interest sale facilities**

*Share and interest sale facilities*

- (1) An entity (the *investor*) is treated as owning an \*ownership interest (the *roll-over interest*) in a \*demerged entity at a time (the *deeming time*), if:
- (a) the investor owned an ownership interest in a company or trust that was the \*head entity of a \*demerger group; and
  - (b) a \*demerger happens to the demerger group; and
  - (c) because:
    - (i) a \*foreign law impedes the ability of a member of the demerger group to issue or transfer the roll-over interest to the investor; or
    - (ii) it would be impractical or unreasonably onerous to determine whether a foreign law impedes the ability of a member of the demerger group to issue or transfer the roll-over interest to the investor;it is \*arranged that the member will issue or transfer the roll-over interest to another entity (the *facility*) under the demerger instead of to the investor; and
  - (d) in accordance with that arrangement and as a result of the demerger, the facility:
    - (i) becomes the owner of the roll-over interest (which is a new or replacement interest in the demerged entity); and
    - (ii) owns the roll-over interest at the deeming time; and
  - (e) under the arrangement, the investor is entitled to receive from the facility:
    - (i) an amount equivalent to the \*capital proceeds of any \*CGT event that happens in relation to the roll-over interest (less expenses); or
    - (ii) if a CGT event happens in relation to the roll-over interest together with CGT events happening in relation to other ownership interests—an amount equivalent to the investor's proportion of the total capital proceeds of the CGT events (less expenses).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (2) The facility is treated as not owning the roll-over interest at the deeming time.
- (3) This section applies for the purposes of:
  - (a) applying this Division in relation to the demerger; and
  - (b) item 2 of the table in subsection 115-30(1), to the extent that it relates to a roll-over under this Division that involves the demerger.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Division 126—Same-asset roll-overs**

### **Table of Subdivisions**

	Guide to Division 126
126-A	Marriage or relationship breakdowns
126-B	Companies in the same wholly-owned group
126-C	Changes to trust deeds
126-D	Small superannuation funds
126-E	Entitlement to shares after demutualisation and scrip for scrip roll-over
126-G	Transfer of assets between certain trusts

### **Guide to Division 126**

#### **126-1 What this Division is about**

A same-asset roll-over allows a capital gain or loss an entity makes from disposing of a CGT asset to, or creating a CGT asset in, another entity to be disregarded. For a disposal, certain attributes of the asset are transferred to the receiving entity.

### **Subdivision 126-A—Marriage or relationship breakdowns**

#### **Table of sections**

126-5	CGT event involving spouses
126-15	CGT event involving company or trustee
126-20	Subsequent CGT event happening to roll-over asset where transferor was a CFC or a non-resident trust
126-25	Conditions for the purposes of subsections 126-5(3A) and 126-15(5)

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### 126-5 CGT event involving spouses

- (1) There is a roll-over if a \*CGT event (the **trigger event**) happens involving an individual (the **transferor**) and his or her \*spouse (the **transferee**), or a former \*spouse (also the **transferee**), because of:
- (a) a court order under the *Family Law Act 1975* or under a \*State law, \*Territory law or \*foreign law relating to breakdowns of relationships between spouses; or
  - (b) a maintenance agreement approved by a court under section 87 of the *Family Law Act 1975* or a corresponding agreement approved by a court under a corresponding \*foreign law; or
  - (d) something done under:
    - (i) a financial agreement made under Part VIIIA of the *Family Law Act 1975* that is binding because of section 90G of that Act; or
    - (ii) a corresponding written agreement that is binding because of a corresponding foreign law; or
  - (da) something done under:
    - (i) a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*) that is binding because of section 90UJ of that Act; or
    - (ii) a corresponding written agreement that is binding because of a corresponding foreign law; or
  - (e) something done under:
    - (i) an award made in an arbitration referred to in section 13H of the *Family Law Act 1975*; or
    - (ii) a corresponding award made in an arbitration under a corresponding State law, Territory law or foreign law; or
  - (f) something done under a written agreement:
    - (i) that is binding because of a State law, Territory law or foreign law relating to breakdowns of relationships between spouses; and
    - (ii) that, because of such a law, prevents a court making an order about matters to which the agreement applies, or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 126-5

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that is inconsistent with the terms of the agreement in relation to those matters, unless the agreement is varied or set aside.

- (2) Only these \*CGT events are relevant:
- (a) CGT events A1 and B1 (a *disposal case*); and
  - (b) CGT events D1, D2, D3 and F1 (a *creation case*).
- Note: The full list of CGT events is in section 104-5.
- (3) However, there is no roll-over if:
- (a) the \*CGT asset involved is \*trading stock of the transferor; or
  - (b) for \*CGT event B1—title in the CGT asset does not pass to the transferee at or before the end of the agreement.
- (3A) There is no roll-over because of paragraph (1)(d), (da) or (f) unless the conditions set out in section 126-25 are met.
- (4) A \*capital gain or a \*capital loss the transferor makes from the \*CGT event is disregarded.

*Consequences for the transferee (disposal case)*

- (5) For a disposal case where the transferor \*acquired the asset on or after 20 September 1985:
- (a) the *first* element of the asset's \*cost base (in the hands of the transferee) is the asset's cost base (in the hands of the transferor) at the time the transferee acquired it; and
  - (b) the *first* element of the asset's \*reduced cost base (in the hands of the transferee) is worked out similarly.

Example: Your spouse transfers land to you because of a court order under the *Family Law Act 1975*. Any capital gain or loss your spouse makes is disregarded.

If the land's cost base at the time you acquired it is \$10,000, the first element of the land's cost base in your hands becomes \$10,000.

Note 1: There are special indexation rules for roll-overs: see Division 114.

Note 2: A roll-over under this Subdivision may have an effect on the transferee's main residence exemption: see sections 118-178 and 118-180.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (6) For a disposal case where the transferor \*acquired the asset before 20 September 1985, the transferee is taken to have acquired it before that day.

Note: A capital gain or loss you make from a CGT asset you acquired before 20 September 1985 is generally disregarded: see Division 104. This exemption is removed in some situations: see Division 149.

- (7) For a disposal case where the transferor \*disposed of a \*collectable or \*personal use asset, the transferee is taken to have \*acquired one.

Note 1: Capital losses from collectables can be subtracted only from capital gains from collectables: see section 108-10.

Note 2: Capital losses from personal use assets are disregarded: see section 108-20.

*Consequences for the transferee (creation case)*

- (8) For a creation case, the *first* element of the asset's \*cost base (in the hands of the transferee) is the amount applicable under this table. The first element of its \*reduced cost base is worked out similarly.

<b>Creation case</b>	
<b>Event No.</b>	<b>Applicable amount</b>
D1	the *incidental costs the transferor incurred that relate to the trigger event
D2	the expenditure the transferor incurred to grant the option
D3	the expenditure the transferor incurred to grant the right
F1	the expenditure the transferor incurred on the grant, renewal or extension of the lease

The expenditure can include giving property: see section 103-5.

### 126-15 CGT event involving company or trustee

- (1) There are the roll-over consequences in section 126-5 if the trigger event involves a company (the *transferor*) or a trustee (also the

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 126-15

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**transferor**) and a \*spouse or former spouse (the **transferee**) of another individual because of:

- (a) a court order under the *Family Law Act 1975* or under a \*State law, \*Territory law or \*foreign law relating to breakdowns of relationships between spouses; or
- (b) a maintenance agreement approved by a court under section 87 of the *Family Law Act 1975* or a corresponding agreement approved by a court under a corresponding \*foreign law; or
- (d) something done under:
  - (i) a financial agreement made under Part VIIIA of the *Family Law Act 1975* that is binding because of section 90G of that Act; or
  - (ii) a corresponding written agreement that is binding because of a corresponding foreign law; or
- (da) something done under:
  - (i) a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*) that is binding because of section 90UJ of that Act; or
  - (ii) a corresponding written agreement that is binding because of a corresponding foreign law; or
- (e) something done under:
  - (i) an award made in an arbitration referred to in section 13H of the *Family Law Act 1975*; or
  - (ii) a corresponding award made in an arbitration under a corresponding State law, Territory law or foreign law; or
- (f) something done under a written agreement:
  - (i) that is binding because of a State law, Territory law or foreign law relating to breakdowns of relationships between spouses; and
  - (ii) that, because of such a law, prevents a court making an order about matters to which the agreement applies, or that is inconsistent with the terms of the agreement in

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

relation to those matters, unless the agreement is varied or set aside.

- (2) There are other consequences if:
- (a) just before the time of the trigger event, an entity (including the transferee) owned another \*CGT asset of a kind covered by this table; and
  - (b) the entity \*acquired it on or after 20 September 1985; and
  - (c) a \*CGT event happens in relation to it.

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**Relevant CGT assets**

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Item	For this transferor:	The entity can own these assets:
1	Company	(a) a *share in the company; or (b) a loan to the company; or (c) an indirect interest (through one or more interposed companies or trusts) in a *share in, or loan to, the company
2	Trustee	(a) an interest or unit in the trust; or (b) a loan to the trustee; or (c) an indirect interest (through one or more interposed companies or trusts) in an interest or unit in the trust or in a loan to the trustee

Example: An individual owns all the shares in a company. The company owns land. The individual's marriage breaks down. The Family Court orders that the company transfer the land it owns to the individual's spouse. The individual later sells the shares.

- (3) The \*cost base and \*reduced cost base of the other asset are reduced by an amount that reasonably reflects the fall in its \*market value because of the trigger event. The reduction occurs at the time of the trigger event.
- (4) If the entity owning the other asset is also the transferee, the \*cost base and \*reduced cost base of the other asset are then increased by any amount that is included in the entity's assessable income for any income year because of the trigger event.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 126-20

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Note: The reduced cost base may be modified for a roll-over happening after a demerger: see section 125-170.

- (5) There is no roll-over because of paragraph (1)(d), (da) or (f) unless the conditions set out in section 126-25 are met.

**126-20 Subsequent CGT event happening to roll-over asset where transferor was a CFC or a non-resident trust**

- (1) This section applies if:
- (a) there is a roll-over for the trigger event under section 126-15; and
  - (b) the transferor was:
    - (i) a \*CFC; or
    - (ii) a trustee of a trust that is a non-resident trust estate within the meaning of section 102AAB of the *Income Tax Assessment Act 1936* for the income year of the trigger event; and
  - (c) section 126-15 is relevant to:
    - (i) the calculation of the \*attributable income of the CFC under Division 7 of Part X of the *Income Tax Assessment Act 1936*; or
    - (ii) the calculation of the attributable income of the trust under Subdivision D of Division 6AAA of Part III of that Act;because (ignoring the residency assumptions in that Division or Subdivision) the roll-over asset was not \*taxable Australian property; and
  - (d) a subsequent \*CGT event happens in relation to the roll-over asset.
- (2) In working out the amount of any \*capital gain or \*capital loss the transferee (or a subsequent owner of the roll-over asset if there is a series of roll-overs until there is no roll-over) makes when a subsequent \*CGT event happens in relation to the asset, the modifications specified in Division 7 of Part X, or Subdivision D

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



of Division 6AAA of Part III, of the *Income Tax Assessment Act 1936* apply.

**126-25 Conditions for the purposes of subsections 126-5(3A) and 126-15(5)**

- (1) The conditions referred to in subsections 126-5(3A) and 126-15(5) are that:
  - (a) at the time of the trigger event:
    - (i) the \*spouses, or former spouses, involved are separated; and
    - (ii) there is no reasonable likelihood of cohabitation being resumed; and
  - (b) the trigger event happened because of reasons directly connected with the breakdown of the relationship between the spouses or former spouses.
- (2) For the purposes of this section, the question whether \*spouses or former spouses have separated is to be determined in the same way as it is for the purposes of section 48 of the *Family Law Act 1975* (as affected by sections 49 and 50 of that Act).

**Subdivision 126-B—Companies in the same wholly-owned group**

**Guide to Subdivision 126-B**

**126-40 What this Subdivision is about**

A roll-over may be available for the transfer of a CGT asset between 2 companies, or the creation of a CGT asset by one company in another, if:

- (a) both companies are members of the same wholly-owned group; and

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 126-45

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(b) at least one of the companies is a foreign resident.

**Table of sections**

**Operative provisions**

126-45	Roll-over for members of wholly-owned group
126-50	Requirements for roll-over
126-55	When there is a roll-over
126-60	Consequences of roll-over
126-75	Originating company is a CFC
126-85	Effect of roll-over on certain liquidations

**Operative provisions**

**126-45 Roll-over for members of wholly-owned group**

- (1) There may be a roll-over if a \*CGT event (the *trigger event*) happens involving a company (the *originating company*) and another company (the *recipient company*) in the circumstances set out in section 126-50.
- (2) Only these \*CGT events are relevant:
  - (a) CGT events A1 and B1 (a *disposal case*); and
  - (b) CGT events D1, D2, D3 and F1 (a *creation case*).

Note: The full list of CGT events is in section 104-5.

- (3) However, there is no roll-over for \*CGT event B1 if title in the \*CGT asset does not pass to the transferee at or before the end of the agreement.

Note: CGT event J1 can happen if the recipient company stops being a 100% subsidiary of a company in the relevant group: see section 104-175.

**126-50 Requirements for roll-over**

- (1) The originating company and recipient company must be members of the same \*wholly-owned group at the time of the trigger event.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note: This requirement is taken to be satisfied in the case of the transfer of the life insurance business of a life insurance company: see section 121AS of the *Income Tax Assessment Act 1936*.

- (2) The \*CGT asset involved (the **roll-over asset**) must not be:
- (a) \*trading stock of the recipient company just after the time of the trigger event; or
  - (b) a \*registered emissions unit \*held by the recipient company just after the time of the trigger event.
- (3) If:
- (a) the roll-over asset is a right or \*convertible interest referred to in Division 130, or an option referred to in Division 134, or an \*exchangeable interest; and
  - (b) the recipient company \*acquires another \*CGT asset by exercising the right or option or by converting the convertible interest or in exchange for the disposal or redemption of the exchangeable interest;
- the other asset cannot become \*trading stock of the recipient company just after the recipient company acquired it.
- (3A) If:
- (a) the roll-over asset is an option referred to in Division 134; and
  - (b) the recipient company \*acquires another \*CGT asset by exercising the option;
- the other asset cannot become a \*registered emissions unit \*held by the recipient company just after the recipient company acquired it.
- (4) The \*ordinary income and \*statutory income of the recipient company must not be exempt from income tax because it is an \*exempt entity for the income year of the trigger event.
- (5) The requirements in one of the items in this table must be satisfied.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 126-50

<b>Additional requirements</b>			
<b>Item</b>	<b>At the time of the trigger event the originating company must be:</b>	<b>At the time of the trigger event the recipient company must be:</b>	<b>The roll-over asset must be taxable Australian property:</b>
1	Either: (a) a foreign resident; or (b) an Australian resident but not a *prescribed dual resident	A foreign resident	Either: (a) just before and just after the trigger event, for a disposal case; or (b) just after that event, for a creation case
2	A foreign resident	An Australian resident but not a *prescribed dual resident	Either: (a) just before the trigger event, for a disposal case; or (b) just after that event, for a creation case

- (6) If the originating company or the recipient company is an Australian resident at the time of the trigger event, that company must:
- (a) be a \*member of a \*consolidated group or \*MEC group at that time; or
  - (b) *not* be a member of a \*consolidatable group at that time.
- (7) If the originating company is a foreign resident, it must *not* have \*acquired the \*CGT asset described in subsection (8) because of:
- (a) a single \*CGT event giving rise to a roll-over under a previous application of this Subdivision (as amended by the *New Business Tax System (Consolidation) Act (No. 1) 2002*) involving an Australian resident originating company other than the company that is the recipient company for the current application of this Subdivision; or
  - (b) a series (whether or not it is the longest possible series) of consecutive CGT events giving rise to roll-overs under previous applications of this Subdivision (as amended by the

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*New Business Tax System (Consolidation) Act (No. 1) 2002*), the earliest involving an Australian resident originating company other than the company that is the recipient company for the current application of this Subdivision.

- (8) Subsection (7) operates in relation to the \*CGT asset:
- (a) that was involved in the trigger event in a disposal case; or
  - (b) because of which the originating company was able to create the CGT asset that was involved in the trigger event in a creation case.
- (9) Subsection (7) does not apply if each of the following companies mentioned in that subsection:
- (a) the recipient company for the roll-over under the current application of this Subdivision;
  - (b) the Australian resident originating company for the roll-over under:
    - (i) for paragraph (7)(a)—the previous application of this Subdivision; or
    - (ii) for paragraph (7)(b)—the earliest previous application of this Subdivision for that series of consecutive \*CGT events;
- was, at the time of its roll-over, the \*head company of the same \*MEC group.

## **126-55 When there is a roll-over**

### *Capital gain or no loss*

- (1) There is a roll-over if:
- (a) either:
    - (i) the trigger event would have resulted in the originating company making a \*capital gain, or making no \*capital loss and not being entitled to a deduction; or
    - (ii) the originating company \*acquired the roll-over asset before 20 September 1985; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 126-60

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- (b) the originating company and recipient company both choose to obtain it.

Note: Section 103-25 sets out when the choice must be made.

**126-60 Consequences of roll-over**

*Consequences for the originating company in all cases*

- (1) A \*capital gain the originating company makes from the trigger event is disregarded.

*Consequences for the recipient company (disposal case)*

- (2) For a disposal case, if the originating company \*acquired the roll-over asset on or after 20 September 1985:
- (a) the *first* element of the asset's \*cost base (in the hands of the recipient company) is the asset's cost base (in the hands of the originating company) when the recipient company acquired it; and
  - (b) the *first* element of the asset's \*reduced cost base (in the hands of the recipient company) is worked out similarly.

Note 1: There are special indexation rules for roll-overs: see Division 114.

Note 2: The reduced cost base may be modified for a roll-over happening after a demerger: see section 125-170.

- (3) If the originating company \*acquired the roll-over asset before 20 September 1985, the recipient company is taken to have acquired it before that day.

Note 1: A capital gain or loss you make from a CGT asset you acquired before 20 September 1985 is generally disregarded: see Division 104. This exemption is removed in some situations: see, for example, Division 149.

Note 2: Under section 716-855, where there have been certain roll-overs, the cost base and reduced cost base of pre-CGT assets for the purposes of Part 3-90 (Consolidated groups) are worked out by applying subsection (2), rather than subsection (3), of this section.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (4) If the trigger event involved a \*personal use asset of the originating company, the recipient company is taken to have \*acquired one.

*Consequences for the recipient company (creation case)*

- (5) For a creation case, the *first* element of the asset's \*cost base (in the hands of the recipient company) is the amount applicable under this table. The first element of its \*reduced cost base is worked out similarly.

<b>Creation case</b>	
<b>Event No.</b>	<b>Applicable amount</b>
D1	the *incidental costs the originating company incurred that relate to the trigger event
D2	the expenditure the originating company incurred to grant the option
D3	the expenditure the originating company incurred to grant the right
F1	the expenditure the originating company incurred on the grant, renewal or extension of the lease

The expenditure can include giving property: see section 103-5.

Note: CGT event J1 may occur if the recipient company stops being a member of the wholly-owned group while still owning the roll-over asset: see section 104-175.

### **126-75 Originating company is a CFC**

- (1) This section applies if:
- (a) there is a roll-over for the trigger event under this Subdivision; and
  - (b) the originating company was a \*CFC at the time of the trigger event; and
  - (c) this Subdivision is relevant to the calculation of the \*attributable income of the originating company under Division 7 of Part X of the *Income Tax Assessment Act 1936*

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 126-85

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- because (ignoring the residency assumptions in that Division) the roll-over asset was not \*taxable Australian property for the originating company; and
- (d) a subsequent \*CGT event happens in relation to the roll-over asset.
- (2) In working out the amount of any \*capital gain or \*capital loss the recipient company (or a subsequent owner of the roll-over asset if there is a series of roll-overs until there is no roll-over) makes when a subsequent \*CGT event happens in relation to the asset, the modifications specified in Division 7 of Part X of the *Income Tax Assessment Act 1936* apply.

**126-85 Effect of roll-over on certain liquidations**

- (1) A \*capital gain a company (the **holding company**) makes because \*shares in its \*100% subsidiary are cancelled (an example of \*CGT event C2: see section 104-25) on the liquidation of the subsidiary is reduced if the conditions in subsection (2) are satisfied. The reduction is worked out under subsection (3).
- (2) These conditions must be satisfied:
- (a) there must be a roll-over under this Subdivision for at least one \*CGT asset that the subsidiary \*acquired on or after 20 September 1985 (the **CGT roll-over asset**) being \*disposed of by the subsidiary to the holding company in the course of the liquidation of the subsidiary;
- (c) the disposals must either:
- (i) be part of the liquidator's final distribution in the course of the liquidation; or
- (ii) have occurred within 18 months of the dissolution of the subsidiary if they are part of an interim distribution in the course of the liquidation;
- (d) the holding company must have beneficially owned all of the shares in the subsidiary for the whole period from the time of the disposal, or the first disposal, of a CGT roll-over asset until the cancellation of the shares;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (e) the \*market value of the CGT roll-over asset or assets must comprise at least part of the \*capital proceeds for the cancellation of the shares in the subsidiary that are beneficially owned by the holding company;
  - (f) one or more of the shares that were cancelled (the *post-CGT shares*) must have been acquired by the holding company on or after 20 September 1985.
- (3) The reduction of the \*capital gain is worked out in this way.

*Method statement*

Step 1. Work out (disregarding this section) the sum of the \*capital gains and the sum of the \*capital losses the holding company would make on the cancellation of its shares in the subsidiary.

Step 2. Work out (disregarding this Subdivision):

- (a) the sum of the \*capital gains the subsidiary would make on the \*disposal of its CGT roll-over assets to the holding company; and
- (b) the sum of the \*capital losses it would make except for Subdivision 170-D on the disposal of its \*CGT assets to the holding company;

in the course of the liquidation assuming the \*capital proceeds were the assets' \*market values at the time of the disposal.

Step 3. If, after subtracting the sum of the \*capital losses from the sum of the \*capital gains, there is an overall capital gain from step 1 and an overall capital gain from step 2, then continue. Otherwise there is no adjustment.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- Step 4. Express the number of post-CGT shares as a fraction of the total number of shares the holding company owned in the subsidiary.
- Step 5. Multiply the overall \*capital gain from Step 2 by the fraction from Step 4.
- Step 6. Reduce the overall \*capital gain from Step 1 by the amount from Step 5. The result is the \*capital gain the holding company makes from the cancellation of its shares in the subsidiary.

Note: This Subdivision is modified in calculating the attributable income of a CFC: see section 419 of the *Income Tax Assessment Act 1936*.

**Subdivision 126-C—Changes to trust deeds**

**Guide to Subdivision 126-C**

**126-125 What this Subdivision is about**

This Subdivision sets out when there is a roll-over for a CGT event that happens because of an amendment to or replacement of the trust deed of a complying approved deposit fund, a complying superannuation fund or a fund that accepts worker entitlement contributions.

**Table of sections**

- 126-130 Changes to trust deeds  
126-135 Consequences of roll-over

**126-130 Changes to trust deeds**

- (1) There is a roll-over if:
- (a) \*CGT event E1 or E2 happens in relation to a \*CGT asset because the trust deed of a \*complying approved deposit fund

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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or \*complying superannuation fund is amended or replaced;  
and

- (b) the amendment or replacement is done for the purpose of:
  - (i) complying with the *Superannuation Industry (Supervision) Act 1993*; or
  - (ii) enabling a \*complying approved deposit fund to become a \*complying superannuation fund; and
- (c) the assets and members of the fund do not change as a consequence of the amendment or replacement.

Note: The full list of CGT events is in section 104-5.

- (2) There is a roll-over if:
  - (a) \*CGT event E1 or E2 happens in relation to a \*CGT asset because the trust deed of a fund is amended or replaced; and
  - (b) the amendment or replacement is done for the purpose of having:
    - (i) the fund endorsed as an approved worker entitlement fund under subsection 58PB(3) of the *Fringe Benefits Tax Assessment Act 1986*; or
    - (ii) the entity that operates the fund endorsed for the operation of the fund as an approved worker entitlement fund under subsection 58PB(3A) of that Act.
  - (c) the assets and members of the fund do not change as a consequence of the amendment or replacement.

Note: The full list of CGT events is in section 104-5.

### 126-135 Consequences of roll-over

- (1) A \*capital gain or \*capital loss made from the \*CGT event is disregarded.
- (2) If the fund that owned the \*CGT asset just before the time of the \*CGT event \*acquired it before 20 September 1985, the asset retains its status as a \*pre-CGT asset in the hands of the fund that owned it after the time of the event.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3) If the fund that owned the \*CGT asset just before the time of the \*CGT event \*acquired it on or after 20 September 1985:
- (a) the first element of the asset's \*cost base (in the hands of the fund that owned the asset after the time of the event) is its cost base just before that time; and
  - (b) the first element of the asset's \*reduced cost base asset is worked out similarly; and
  - (c) the fund that owned the asset after the time of the event is taken to have acquired the asset at that time.

**Subdivision 126-D—Small superannuation funds**

**Table of sections**

126-140 CGT event involving small superannuation funds

**126-140 CGT event involving small superannuation funds**

*Payment splits under Family Law Act*

- (1) There is a roll-over if:
- (a) an interest in a \*small superannuation fund is subject to a \*payment split; and
  - (b) the \*non-member spouse in relation to that interest serves a waiver notice under section 90XZA of the *Family Law Act 1975* in respect of that interest; and
  - (c) as a result of serving the notice, the trustee (the *transferor*) of the fund transfers a \*CGT asset to the trustee (the *transferee*) of another \*complying superannuation fund for the benefit of the non-member spouse.

Note: CGT event E2 may apply to the transfer.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*Payment splits under the Superannuation Industry (Supervision) Regulations*

- (2) There is also a roll-over if:
- (a) an interest in a \*small superannuation fund (the **first fund**) is subject to a \*payment split; and
  - (b) as a result of the payment split, there is a transfer or roll over of benefits, for the benefit of the \*non-member spouse, from the first fund to another \*complying superannuation fund; and
  - (c) the transfer is under provisions of the Superannuation Industry (Supervision) Regulations 1994 dealing with superannuation interests that are subject to payment splits; and
  - (d) in order to give effect to the payment split, the trustee (the **transferor**) of the first fund transfers a \*CGT asset to the trustee (the **transferee**) of the other fund for the benefit of the non-member spouse.

Note: CGT event E2 may apply to the transfer.

*Transfer of own interest in a small superannuation fund*

- (2A) There is also a roll-over if:
- (a) an individual has an interest in a \*small superannuation fund (the **first fund**); and
  - (b) the individual's \*spouse, or former spouse, also has an interest in the first fund; and
  - (c) the trustee (the **transferor**) of the first fund transfers a \*CGT asset to the trustee (the **transferee**) of another \*complying superannuation fund for the benefit of the individual; and
  - (d) the transfer is in accordance with an award, order or agreement mentioned in subsection (2B); and
  - (e) if the transfer is part of a series of transfers in accordance with the award, order or agreement—the individual will no longer have an interest in the first fund when the series of transfers is complete; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (f) if the transfer is not part of a series of transfers in accordance with the award, order or agreement—as a result of the transfer, the individual no longer has an interest in the first fund; and
- (g) there has not been a roll-over under subsection (1) or (2) or this subsection in relation to the transfer of another CGT asset from the first fund, where the transfer was:
  - (i) made because of the award, order or agreement; and
  - (ii) for the benefit of that spouse, or former spouse; and
- (h) if the transfer is in accordance with an agreement mentioned in paragraph (2B)(d), (da) or (e), the conditions in subsection (2C) are satisfied.

Note: CGT event E2 may apply to the transfer.

(2B) The awards, orders and agreements are:

- (a) an award made in an arbitration referred to in section 13H of the *Family Law Act 1975* or a corresponding award made in an arbitration under a corresponding \*State law, \*Territory law or \*foreign law; or
- (b) a court order made under section 79, subsection 90AE(2) or 90AF(2) or section 90SM of the *Family Law Act 1975*; or
- (c) a court order made under a State law, Territory law or foreign law relating to breakdowns of relationships between \*spouses that corresponds to an order made under subsection 90AE(2) or 90AF(2) or section 90SM of the *Family Law Act 1975*; or
- (d) a financial agreement made under Part VIIIA of the *Family Law Act 1975* that is binding because of section 90G of that Act or a corresponding written agreement that is binding because of a corresponding foreign law; or
- (da) a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*) that is binding because of section 90UJ of that Act; or
- (e) a written agreement:
  - (i) that is binding under a State law, Territory law or foreign law relating to breakdowns of relationships between spouses; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (ii) that, because of such a law, prevents a court making an order about matters to which the agreement applies, or that is inconsistent with the terms of the agreement in relation to those matters, unless the agreement is varied or set aside.
- (2C) The conditions are that:
- (a) at the time of the transfer:
    - (i) the \*spouses, or former spouses, involved are separated; and
    - (ii) there is no reasonable likelihood of cohabitation being resumed; and
  - (b) the transfer happened because of reasons directly connected with the breakdown of the relationship between the spouses or former spouses.
- (2D) For the purposes of subsection (2C), the question whether \*spouses, or former spouses, have separated is to be determined in the same way as it is for the purposes of section 48 of the *Family Law Act 1975* (as affected by sections 49 and 50 of that Act).

*Roll-over consequences*

- (3) A \*capital gain or \*capital loss the transferor makes from the transfer of the asset is disregarded.
- (4) If the transferor \*acquired the asset on or after 20 September 1985:
  - (a) the first element of the asset's \*cost base (in the hands of the transferee) is the asset's cost base (in the hands of the transferor) at the time the transferee acquired it; and
  - (b) the first element of the asset's \*reduced cost base (in the hands of the transferee) is worked out similarly.
- (5) If the transferor \*acquired the asset before 20 September 1985, the transferee is taken to have acquired it before that day.

Note: A capital gain or loss you make from a CGT asset you acquired before 20 September 1985 is generally disregarded: see Division 104. This exemption is removed in some situations: see Division 149.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Subdivision 126-E—Entitlement to shares after demutualisation and scrip for scrip roll-over

### Guide to Subdivision 126-E

#### 126-185 What this Subdivision is about

This Subdivision sets out when there is a roll-over for a CGT event that happens because a beneficiary becomes absolutely entitled to a share as against the trustee where the trustee obtained a roll-over under Subdivision 124-M following a demutualisation.

#### Table of sections

##### Operative provisions

126-190	When there is a roll-over
126-195	Consequences of roll-over

#### Operative provisions

##### 126-190 When there is a roll-over

There is a roll-over if:

- (a) an insurance company demutualises; and
- (b) the trustee of a trust holds a \*share issued under the demutualisation in trust for an entity to whom the share would have been issued if the entity could, and were in a position to, prove the entity's entitlement to the share; and
- (c) the trustee obtains a roll-over under Subdivision 124-M of this Act (Scrip for scrip roll-over) for the share because the trustee exchanges the share for a share (the **replacement share**) in another company (whether or not the trustee receives something in addition to the replacement share); and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (d) a \*CGT event happens in relation to the replacement share because the entity becomes absolutely entitled to the share as against the trustee.

Note: This Subdivision does not apply to the demutualisation of a private health insurer: see section 315-160.

### 126-195 Consequences of roll-over

- (1) A \*capital gain or \*capital loss the trustee makes from the \*CGT event is disregarded.
- (2) The first element of the \*cost base of the replacement share for the entity is the cost base of the replacement share in the hands of the trustee just before the \*CGT event happened. The first element of the \*reduced cost base of the replacement share for the entity is worked out similarly.

Example: The JB mutual insurance company demutualises, issuing shares in JB Limited to its policyholders. It is unable to locate some of its policyholders so it establishes a trust and issues shares to the trustee on behalf of those policyholders. Steve is one of those policyholders (being potentially entitled to 50 shares).

JB Limited is taken over by PVDM Limited. Members of JB are issued with 2 shares in PVDM for each share they have in JB. The trustee obtains a roll-over under Subdivision 124-M for the exchange. Each PVDM share held by the trustee has a cost base and reduced cost base of \$15.

Steve writes to the trustee and proves his entitlement to the shares held in trust for him.

There is a roll-over under this Subdivision so that any capital gain or loss made by the trustee is disregarded. The first element of the cost base and reduced cost base of each of Steve's PVDM shares is \$15.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 126-215

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**Subdivision 126-G—Transfer of assets between certain trusts**

**Guide to Subdivision 126-G**

**126-215 What this Subdivision is about**

Roll-overs may be available when CGT assets are transferred between certain trusts.

**Table of sections**

**Operative provisions**

126-220	Object of this Subdivision
126-225	When a roll-over may be chosen
126-230	Beneficiaries' entitlements not be discretionary etc.
126-235	Exceptions for roll-over
126-240	Consequences for the trusts
126-245	Consequences for beneficiaries—general approach for working out cost base etc.
126-250	Consequences for beneficiaries—other approach for working out cost base etc.
126-255	No other cost base etc. adjustment for beneficiaries
126-260	Giving information to beneficiaries
126-265	Interest sale facilities

**Operative provisions**

**126-220 Object of this Subdivision**

The object of this Subdivision is to ensure that CGT considerations are not an impediment to the restructure of trusts, whilst ensuring that subsequent changes to the manner and extent to which beneficiaries can benefit from the trusts are subject to appropriate tax consequences.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**126-225 When a roll-over may be chosen**

- (1) A roll-over may be chosen for a \*CGT asset (the *roll-over asset*) if:
- (a) the trustee of a trust (the *transferring trust*):
    - (i) creates a trust (the *receiving trust*), by declaration or settlement, over one or more CGT assets that include the roll-over asset; or
    - (ii) transfers the roll-over asset to an existing trust (the *receiving trust*);at a particular time (the *transfer time*); and
  - (b) if subparagraph (a)(ii) applies—the receiving trust has no CGT assets immediately before the transfer time, other than any or all of the following:
    - (i) small amounts of cash or debt;
    - (ii) its rights under an \*arrangement, if (collectively) those rights only facilitate the transfer of assets to it from the transferring trust; and
  - (c) just after the transfer time:
    - (i) each of the trusts has the same beneficiaries; and
    - (ii) the receiving trust has the same \*classes of \*membership interests that the transferring trust had just before, and has just after, the transfer time; and
    - (iii) the sum of the \*market values of each beneficiary’s membership interests of a particular class in both trusts is substantially the same as the sum of the market values, just before the transfer time, of the beneficiary’s membership interests of that class in both trusts; and
  - (d) the requirement in section 126-230 is met; and
  - (e) the exceptions in section 126-235 do not apply.

*Exception if other roll-over assets already transferred*

- (2) However, paragraph (1)(b) does not apply if:
- (a) the roll-over asset is transferred to the receiving trust under an \*arrangement; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 126-230

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- (b) the roll-over asset was an asset of the transferring trust just before the arrangement was made; and
- (c) at least one other asset of the receiving trust:
  - (i) is an asset for which a roll-over was obtained under this Subdivision for the trusts; and
  - (ii) is an asset over which the receiving trust was created, or was transferred by the transferring trust to the receiving trust under the arrangement; and
- (d) the transfer time is in the income year for the transferring trust that includes the earliest transfer time (the *start time*) for the assets covered by paragraph (c).

*Obtaining the roll-over*

- (3) The roll-over only happens if both the trustee of the transferring trust and the trustee of the receiving trust choose to obtain it.

**126-230 Beneficiaries' entitlements not be discretionary etc.**

- (1) The conditions in subsections (2) and (3) must be met:
  - (a) if subsection 126-225(2) applies—at all times during the period:
    - (i) starting at the start time; and
    - (ii) ending at the transfer time; and
  - (b) otherwise—at the transfer time.

*CGT event E4 is capable of happening*

- (2) The first condition is met at a particular time if, at that time, \*CGT event E4 is capable of happening to all of the \*membership interests in each of the trusts.

Note: A roll-over cannot be chosen if either trust is a discretionary trust.

*Beneficiaries' entitlements not discretionary*

- (3) The second condition is met at a particular time if, at that time, the manner or extent to which each beneficiary of each trust can

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

benefit from the trust is not capable of being significantly affected by the exercise, or non-exercise, of a power.

- (4) However, if both trusts are \*managed investment trusts, disregard a power if the power's existence at that time does not significantly affect the \*market value at that time of each \*membership interest in each of the trusts.

### **126-235 Exceptions for roll-over**

#### *Foreign trusts*

- (1) An exception applies for a \*CGT asset if:
- (a) the receiving trust is a \*foreign trust for CGT purposes for the income year that includes the transfer time; and
  - (b) the roll-over asset is not \*taxable Australian property just after the transfer time.

#### *Public trading trusts*

- (2) Another exception applies if either trust is a trust to which section 102S of the *Income Tax Assessment Act 1936* applies for the income year that includes the transfer time.

#### *Choices*

- (3) Another exception applies if, just after the transfer time:
- (a) a choice (however described) under a provision of a \*taxation law is in force for either of the trusts in relation to particular circumstances; and
  - (b) the same choice (however described) under that provision for the other trust in relation to those circumstances (a ***mirror choice***) is not also in force; and
  - (c) the absence of a mirror choice would or could have an ongoing effect on the calculation of an entity's \*net income, or taxable income, for:
    - (i) the entity's income year that includes the transfer time; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 126-240

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(ii) a later income year.

- (4) However, the exception in subsection (3) does not apply if:
- (a) the other trust makes a mirror choice before the first time after the transfer time when the absence of the mirror choice would affect the calculation of an entity's \*net income, or taxable income, for an income year; or
  - (b) it would not be reasonable for subsection (3) to apply.

Note: For paragraph (a), the other trust must still be able, under the relevant provision of the taxation law, to make the mirror choice.

- (5) If, just after the transfer time:
- (a) a choice (however described) referred to in paragraph (3)(a) is in force for either of the trusts (the **first choice**); and
  - (b) a provision of a \*taxation law:
    - (i) prevents the revocation or variation of that choice; or
    - (ii) sets out a consequence for an entity if that choice is revoked or varied;

that provision is taken to apply for a mirror choice, in force for the other trust at or after that time, in a way corresponding to the way in which it applies for the first choice.

Note: For example, if the provision sets out consequences that flow from the revocation of the first choice, then those consequences will also flow if the mirror choice is revoked.

## 126-240 Consequences for the trusts

*Disregard any capital gain or loss*

- (1) If the roll-over is chosen, disregard any \*capital gain or \*capital loss the trustee of the transferring trust makes from:
- (a) creating the receiving trust over the roll-over asset; or
  - (b) transferring the roll-over asset to the receiving trust; at the transfer time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Adjust roll-over asset's cost base and reduced cost base*

- (2) If the roll-over is chosen:
- (a) the first element of the roll-over asset's \*cost base, in the hands of the receiving trust, is its cost base just before the transfer time; and
  - (b) the first element of the roll-over asset's \*reduced cost base is worked out similarly.

*Any pre-transfer losses of receiving trust cannot be utilised*

- (3) If the roll-over is chosen:
- (a) any \*net capital loss of the receiving trust for an income year ending before the transfer time cannot be applied after the transfer time to reduce an amount of that trust's \*capital gains; and
  - (b) the sum of the receiving trust's \*capital losses for the income year that includes the transfer time (the **transfer year**) is reduced by an amount equal to any net capital loss that the trust would have had for that year had that year ended just before the transfer time; and
  - (c) any \*tax loss of the receiving trust for an income year ending before the transfer time cannot be deducted after the transfer time from an amount of that trust's assessable income or \*net exempt income; and
  - (d) the sum of the receiving trust's deductions for the transfer year is reduced by an amount equal to any tax loss that the trust would have had for that year had that year ended just before the transfer time.

References in this subsection to the transfer time are to be read as references to the start time if subsection 126-225(2) applies.

Note: Subsection 126-225(2) applies if the roll-over asset is transferred to the receiving trust after an earlier roll-over under this Subdivision, for another asset, was obtained for the trusts.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 126-245

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*Pre-CGT assets*

- (4) If:
- (a) the roll-over is chosen; and
  - (b) the transferring trust last \*acquired the roll-over asset before 20 September 1985;
- the receiving trust is taken to have acquired it before that day.

**126-245 Consequences for beneficiaries—general approach for working out cost base etc.**

- (1) If the roll-over is chosen, each of the following:
- (a) the \*cost base and \*reduced cost base of each of a beneficiary's \*membership interests in each trust;
  - (b) the time each of the beneficiary's membership interests in the receiving trust is treated as having been \*acquired;
- is adjusted under this section for the transfer time unless the beneficiary has chosen for them to be adjusted under section 126-250.

Note: The beneficiary can choose for these things to be adjusted once for several consecutive transfer times (for multiple roll-over assets) if the beneficiary owned the interests at all of those times (see section 126-250).

*First element of cost base of interests in transferring trust*

- (2) The first element of the \*cost base, just after the transfer time, of each of the beneficiary's \*membership interests in the transferring trust is an amount equal to such proportion of the interest's cost base just before the transfer time as is reasonable having regard to:
- (a) the \*market value of the interest just after the transfer time, or a reasonable approximation of that market value; and
  - (b) the market value of the interest just before the transfer time, or a reasonable approximation of that market value.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



*First element of cost base of interests in receiving trust*

- (3) The first element of the \*cost base, just after the transfer time, of each of the beneficiary's \*membership interests in the receiving trust is such amount so that the sum of:
- (a) the cost base, just before the transfer time, of that membership interest in the receiving trust; and
  - (b) if, just after the transfer time, that interest in the receiving trust corresponds to at least one of the beneficiary's membership interests in the transferring trust—the cost base, just before the transfer time, of each of those corresponding membership interests in the transferring trust; and
  - (c) if, just after the transfer time, that interest in the receiving trust corresponds to a proportion of one of the beneficiary's membership interests in the transferring trust—that proportion of the cost base, just before the transfer time, of that corresponding membership interest in the transferring trust;
- reasonably approximates:
- (d) if paragraph (b) applies—the sum of the cost bases, just after the transfer time, of each of the interests referred to in paragraphs (a) and (b); and
  - (e) if paragraph (c) applies—the sum of:
    - (i) the cost base, just after the transfer time, of the interest referred to in paragraph (a); and
    - (ii) the proportion of the cost base, just after the transfer time, of the interest referred to in paragraph (c).

*First element of reduced cost base of interests in each trust*

- (4) The first element of the \*reduced cost base, just after the transfer time, of each of the beneficiary's \*membership interests in each trust is worked out similarly.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 126-250

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*Time of acquisition for interests in the receiving trust*

- (5) Each of the beneficiary's \*membership interests in the receiving trust is treated as having been \*acquired just after the transfer time.

*Time of acquisition for pre-CGT interests in the receiving trust*

- (6) However, if one or more of the beneficiary's \*membership interests in the transferring trust were \*pre-CGT assets just before the transfer time, the beneficiary is treated as having \*acquired before 20 September 1985 its interests in the receiving trust that correspond to those interests in the transferring trust.

**126-250 Consequences for beneficiaries—other approach for working out cost base etc.**

- (1) This section applies if the beneficiary owns one or more \*membership interests in the transferring trust at all times during the period:
- (a) starting just before this time (the *starting time*):
    - (i) the transfer time; or
    - (ii) the transfer time for an asset referred to in paragraph 126-225(2)(c) (assuming subsection 126-225(2) applies); and
  - (b) ending just after this time (the *ending time*):
    - (i) the transfer time (assuming this is not also the starting time); or
    - (ii) a later time in the transfer year that is the transfer time for another asset for which a roll-over is obtained under this Subdivision for the trusts.

Note: Subsection 126-225(2) applies if the roll-over asset is transferred to the receiving trust after an earlier roll-over under this Subdivision, for another asset, was obtained for the trusts.

- (2) The beneficiary may choose for each of the following:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (a) the \*cost base and \*reduced cost base of each of those \*membership interests and of the beneficiary's corresponding membership interests in the receiving trust;
  - (b) the time each of those corresponding interests in the receiving trust is treated as having been \*acquired;
- to be adjusted under subsection (3) for the period.
- (3) For each of the interests referred to in subsection (2), subsections 126-245(2), (3), (4), (5) and (6) apply as if:
    - (a) references in those subsections to just before the transfer time were references to just before the starting time; and
    - (b) references in those subsections to just after the transfer time were references to just after the ending time.

### **126-255 No other cost base etc. adjustment for beneficiaries**

If a beneficiary of the trusts makes adjustments under section 126-245 or 126-250 to the \*cost base and \*reduced cost base of the beneficiary's \*membership interests in relation to the \*CGT event that is:

- (a) the creation of the receiving trust over the roll-over asset; or
- (b) the transfer of the roll-over asset to the receiving trust;

no other adjustment is to be made under this Act to those cost bases and reduced cost bases because of something that happens in relation to that event.

Note: This section prevents the general value shifting regime from applying in relation to the event because sections 126-245 and 126-250 deal with any value shift that might occur.

### **126-260 Giving information to beneficiaries**

*Beneficiaries must be given particulars of the roll-over*

- (1) If the roll-over is chosen, the trustee of the transferring trust must, within 3 months after the end of the transfer year, send written notice of the particulars set out in subsection (2) to each of the trust's beneficiaries:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) by post to the address most recently notified by the beneficiary as the beneficiary's address; or
- (b) by any other means notified by the beneficiary for receiving correspondence from the trust.

Note: The trustee may also notify beneficiaries of other details of the roll-over.

*The particulars that must be given*

- (2) The particulars are as follows:
  - (a) the roll-over asset's transfer time;
  - (b) sufficient information to enable a beneficiary to work out which of the beneficiary's \*membership interests in the receiving trust correspond to each of the beneficiary's membership interests in the transferring trust;
  - (c) the \*market value of each of the membership interests held by the beneficiary in the transferring trust just after the roll-over asset's transfer time, or a reasonable approximation of that market value;
  - (d) the market value of each of the membership interests held by the beneficiary in the transferring trust just before the roll-over asset's transfer time, or a reasonable approximation of that market value.

*Offence*

- (3) A trustee commits an offence if the trustee contravenes subsection (1).

Penalty: 30 penalty units.

- (4) An offence against subsection (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*If the transferring trust has multiple trustees*

- (5) If the transferring trust has 2 or more trustees, the obligation imposed by subsection (1) is imposed on each of the trustees, but may be discharged by any of the trustees.

Note: Each of the trustees commits an offence against subsection (3) if none of them discharges the obligation imposed by subsection (1).

- (6) In a prosecution of a trustee for an offence against subsection (3) for an act or omission contravening subsection (1), it is a defence if the trustee proves that the trustee:
- (a) did not aid, abet, counsel or procure the act or omission; and
  - (b) was not in any way knowingly concerned in, or party to, the act or omission (whether directly or indirectly and whether by any act or omission of the trustee).

Note: A defendant bears a legal burden in relation to the matters in subsection (6): see section 13.4 of the *Criminal Code*.

*Obligations of beneficiary unaffected if not notified of roll-over*

- (7) A failure by a trustee to comply with subsection (1) does not affect the application of section 126-245 to the beneficiary.

## **126-265 Interest sale facilities**

*Interest sale facilities*

- (1) For the purposes of this Subdivision, an entity (the **investor**) is treated as owning a \*membership interest (the **roll-over interest**) in the receiving trust at a time (the **deeming time**), if:
- (a) the investor owned a membership interest in the transferring trust; and
  - (b) a trust is created, or a transfer happens, (the **transaction**) as mentioned in paragraph 126-225(1)(a) in relation to \*CGT assets of the transferring trust; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) because:
- (i) a \*foreign law impedes the ability of the receiving trust to issue or transfer the roll-over interest to the investor; or
  - (ii) it would be impractical or unreasonably onerous to determine whether a foreign law impedes the ability of the receiving trust to issue or transfer the roll-over interest to the investor;
- it is \*arranged that the receiving trust will issue or transfer the roll-over interest to another entity (the *facility*) under the transaction instead of to the investor; and
- (d) in accordance with that arrangement and as a result of the transaction, the facility:
- (i) becomes the owner of the roll-over interest; and
  - (ii) owns the roll-over interest at the deeming time; and
- (e) under the arrangement, the investor is entitled to receive from the facility:
- (i) an amount equivalent to the \*capital proceeds of any \*CGT event that happens in relation to the roll-over interest (less expenses); or
  - (ii) if a CGT event happens in relation to the roll-over interest together with CGT events happening in relation to other membership interests—an amount equivalent to the investor's proportion of the total capital proceeds of the CGT events (less expenses).
- (2) The facility is treated as not owning the roll-over interest at the deeming time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Division 128—Effect of death

### Guide to Division 128

#### 128-1 What this Division is about

This Division sets out what happens when you die and a CGT asset you owned just before dying devolves to your legal personal representative or passes to a beneficiary in your estate.

It also contains rules about what happens when a joint tenant dies.

#### General rules

- 128-10 Capital gain or loss when you die is disregarded
- 128-15 Effect on the legal personal representative or beneficiary
- 128-20 When does an asset *pass* to a beneficiary?
- 128-25 The beneficiary is a trustee of a superannuation fund etc.

#### Special rules for joint tenants

- 128-50 Joint tenants

### General rules

#### 128-10 Capital gain or loss when you die is disregarded

When you die, a \*capital gain or \*capital loss from a \*CGT event that results for a \*CGT asset you owned just before dying is disregarded.

- Note 1: Section 104-215 sets out an exception to this rule if the CGT asset passes to a beneficiary in your estate who is:
- an exempt entity; or
  - the trustee of a complying superannuation entity; or
  - a foreign resident.

- Note 2: There is a special indexation rule for deceased estates: see section 114-10.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 128-15

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**128-15 Effect on the legal personal representative or beneficiary**

- (1) This section sets out what happens if a \*CGT asset you owned just before dying:
- (a) devolves to your \*legal personal representative; or
  - (b) \*passes to a beneficiary in your estate.

Note 1: Section 128-25 has different rules if the asset passes to a beneficiary in your estate who is the trustee of a complying superannuation entity.

Note 2: If the beneficiary is an exempt entity, Division 57 in Schedule 2D to the *Income Tax Assessment Act 1936* has rules about exempt entities that become taxable. It sets out what the entity is taken to have purchased its assets for when it becomes taxable.

Note 3: If the beneficiary is a foreign resident, Subdivision 855-B sets out what happens if the beneficiary becomes an Australian resident. The beneficiary is taken to have acquired each asset owned just before becoming an Australian resident for the market value of the asset at that time.

- (2) The \*legal personal representative, or beneficiary, is taken to have \*acquired the asset on the day you died.

*Special rule for legal personal representative*

- (3) Any \*capital gain or \*capital loss the \*legal personal representative makes if the asset \*passes to a beneficiary in your estate is disregarded.

*Cost base rules for both*

- (4) This table sets out the modifications to the \*cost base and \*reduced cost base of the \*CGT asset in the hands of the \*legal personal representative or beneficiary.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Modifications to cost base and reduced cost base**

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Item	For this kind of CGT asset:	The first element of the asset's cost base is:	The first element of the asset's reduced cost base is:
1	One you *acquired on or after 20 September 1985, except one covered by item 2, 3, 3A or 3B	the *cost base of the asset on the day you died	the *reduced cost base of the asset on the day you died
2	One that was *trading stock in your hands just before you died	the amount worked out under section 70-105	the amount worked out under section 70-105
3	A *dwelling that was your main residence just before you died if:  (a) the dwelling was not then being used for the *purpose of producing assessable income; and  (b) you were not then an *excluded foreign resident	the *market value of the *dwelling on the day you died	the market value of the *dwelling on the day you died
3A	If you were a foreign resident just before you died—an asset that was not *taxable Australian property just before you died, except one covered by item 2	the *market value of the asset on the day you died	the market value of the asset on the day you died
3B	One that *passes to a trustee of a *special disability trust	the *market value of the asset on the day you died	the market value of the asset on the day you died

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 128-15

**Modifications to cost base and reduced cost base**

Item	For this kind of CGT asset:	The first element of the asset's cost base is:	The first element of the asset's reduced cost base is:
4	One you *acquired before 20 September 1985	the *market value of the asset on the day you died	the market value of the asset on the day you died

Note 1: Section 70-105 has a general rule that the person on whom the trading stock devolves is taken to have bought it for its market value. There are some exceptions though.

Note 2: Subdivision 118-B contains other rules about dwellings acquired through deceased estates.

Note 3: The rule in item 3 in the table does not apply to a dwelling that devolved to your legal personal representative, or passed to a beneficiary in your estate, on or before 7.30 pm on 20 August 1996: see section 128-15 of the *Income Tax (Transitional Provisions) Act 1997*.

*Further rule for a beneficiary*

- (5) A beneficiary can include in the \*cost base or \*reduced cost base of the asset any expenditure that the \*legal personal representative *would* have been able to include at the time the asset \*passes to the beneficiary. The beneficiary can include the expenditure on the day the representative incurred it.

Example: You die on 1 May 1995 owning land. On 15 June 1995 your legal personal representative pays \$500 council rates for the land.

On 31 July 1995 your representative transfers it to a beneficiary in your estate, who is taken to have acquired it on 1 May 1995.

The beneficiary can include the \$500 in the third element of the cost base of the land. It is included on 15 June 1995.

*Collectables and personal use assets*

- (6) The \*legal personal representative or beneficiary is taken to have \*acquired a \*collectable or a \*personal use asset if:
- (a) you acquired it on or after 20 September 1985; and

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) it was a \*collectable or a \*personal use asset (as appropriate) in your hands when you died.

Note 1: Capital losses from collectables can be used only to reduce capital gains from collectables: see section 108-10.

Note 2: Capital losses from personal use assets are disregarded: see section 108-20.

### **128-20 When does an asset *pass* to a beneficiary?**

- (1) A \*CGT asset *passes* to a beneficiary in your estate if the beneficiary becomes the owner of the asset:
- (a) under your will, or that will as varied by a court order; or
  - (b) by operation of an intestacy law, or such a law as varied by a court order; or
  - (c) because it is appropriated to the beneficiary by your legal personal representative in satisfaction of a pecuniary legacy or some other interest or share in your estate; or
  - (d) under a deed of arrangement if:
    - (i) the beneficiary entered into the deed to settle a claim to participate in the distribution of your estate; and
    - (ii) any consideration given by the beneficiary for the asset consisted only of the variation or waiver of a claim to one or more other \*CGT assets that formed part of your estate.

(It does not matter whether the asset is transmitted directly to the beneficiary or is transferred to the beneficiary by your \*legal personal representative.)

- (2) A \*CGT asset does *not pass* to a beneficiary in your estate if the beneficiary becomes the owner of the asset because your \*legal personal representative transfers it under a power of sale.

### **128-25 The beneficiary is a trustee of a superannuation fund etc.**

- (1) This section has rules about \*cost base and \*reduced cost base that are relevant if you die and a \*CGT asset you owned just before

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 128-50

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dying \*passes to a beneficiary in your estate who (when the asset passes) is the trustee of a \*complying superannuation entity.

Note: A capital gain or loss is also made: see section 104-215.

- (2) The beneficiary is taken to have \*acquired the asset on the day you died. The first element of the \*cost base and \*reduced cost base of the asset is its \*market value on that day.
- (3) The beneficiary can include in the \*cost base or \*reduced cost base of the asset any expenditure that your \*legal personal representative *would* have been able to include at the time the asset \*passes to the beneficiary. The beneficiary can include the expenditure on the day the representative incurred it.

### Special rules for joint tenants

#### 128-50 Joint tenants

- (1) This section has rules that are relevant if a \*CGT asset is owned by joint tenants and one of them dies.
- (2) The survivor is taken to have \*acquired (on the day the individual died) the individual's interest in the asset. If there are 2 or more survivors, they are taken to have acquired that interest in equal shares.  
  
Note: Joint tenants are treated as owning a CGT asset in equal shares: see section 108-7.
- (3) If the individual who died \*acquired his or her interest in the asset on or after 20 September 1985, the first element of the \*cost base of the interest *each* survivor is taken to have acquired is:

$$\frac{\text{Cost base of the interest of the individual who died} \\ \text{(worked out on the day the individual died)}}{\text{Number of survivors}}$$

The first element of the \*reduced cost base of the interest each survivor is taken to have \*acquired is worked out similarly.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Example: In 1999 2 individuals buy land for \$50,000 as joint tenants. Each one is taken to have a 50% interest in it. On 1 May 2001 one of them dies.

The survivor is taken to have acquired the interest of the individual who died on 1 May 2001. If the cost base of that interest on that day is \$27,000, the survivor is taken to have acquired that interest for that amount.

- (4) If the individual who died \*acquired his or her interest in the asset before 20 September 1985, the first element of the \*cost base and \*reduced cost base of the interest *each* survivor is taken to have acquired is:

\*Market value of the interest of the individual who died  
(worked out on the day the individual died)  
-----  
Number of survivors

Note: There is a special indexation rule for surviving joint tenants: see section 114-10.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Division 130—Investments**

### **Table of Subdivisions**

	Guide to Division 130
130-A	Bonus shares and units
130-B	Rights
130-C	Convertible interests
130-D	Employee share schemes
130-E	Exchangeable interests
130-F	Exploration investments

### **Guide to Division 130**

#### **130-1 What this Division is about**

This Division sets out the rules for these kinds of investments:

- bonus shares and units; and
- rights; and
- convertible interests; and
- shares acquired under an employee share scheme; and
- exchangeable interests; and
- exploration investments.

Most are about modifying the cost base and reduced cost base of a CGT asset.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Subdivision 130-A—Bonus shares and units

### Guide to Subdivision 130-A

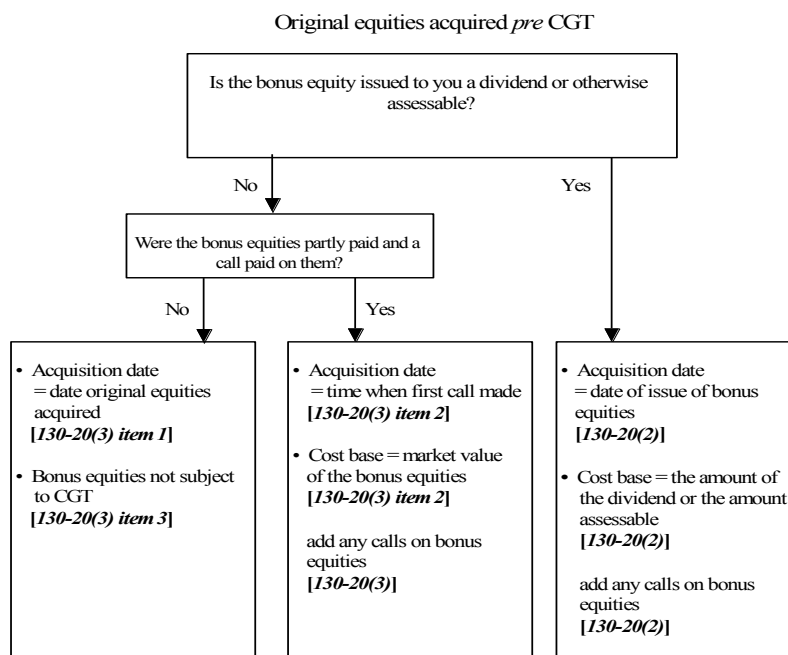
#### Table of sections

130-15 Acquisition time and cost base of bonus equities

#### Operative provisions

130-20 Issue of bonus shares or units

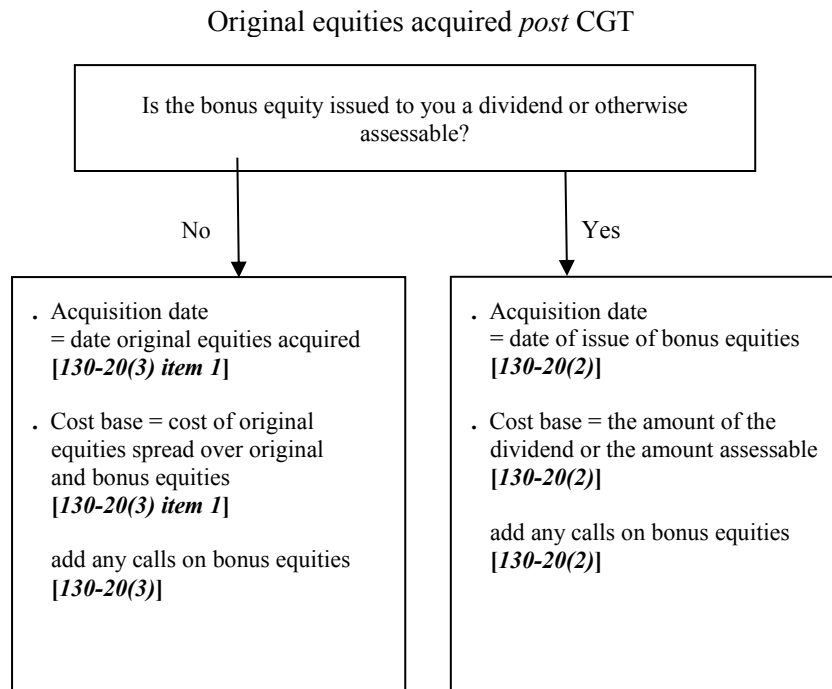
### 130-15 Acquisition time and cost base of bonus equities



\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 130-20

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## Operative provisions

### 130-20 Issue of bonus shares or units

- (1) This section sets out what happens if:
- (a) you own \*shares in a company or units in a unit trust (the *original equities*); and
  - (b) the company issues other shares, or the trustee issues other units, (the *bonus equities*) to you in relation to the original equities.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (2) The first element of your \*cost base and \*reduced cost base for the bonus equities includes:
- (a) for \*shares—any part of the shares that are a \*dividend (or taken to be a dividend under subsection 45(2) or 45C(1) of the *Income Tax Assessment Act 1936*); and
  - (b) for units—any part of the other units that are or will be included in your assessable income.

You are taken to have \*acquired the bonus equities when they were issued.

Note 1: There are special indexation rules for cost base modifications: see Division 114.

Note 2: The amounts of calls you pay on partly-paid equities will also form part of the first element of their cost base and reduced cost base.

Note 3: There is a special rule for shares issued on or before 30 June 1987: see subsection 130-20(2) of the *Income Tax (Transitional Provisions) Act 1997*.

Note 4: Certain capital distributions are taken to be dividends under subsections 45(2) and 45C(1) if a company has entered into a capital streaming or dividend substitution arrangement.

- (3) This table sets out what happens if:
- (a) none of the shares are a \*dividend (or taken to be a dividend under subsection 45(2) or 45C(1) of the *Income Tax Assessment Act 1936*); or
  - (b) none of the other units are or will be included in your assessable income.

Note: Certain capital distributions are taken to be dividends under subsections 45(2) and 45C(1) if a company has entered into a capital streaming or dividend substitution arrangement.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 130-20

<b>Modifications where neither a dividend nor assessable</b>			
<b>Item</b>	<b>In this situation:</b>	<b>You are taken to have *acquired the bonus equities when:</b>	<b>There is this effect:</b>
1	You *acquire the original equities on or after 20 September 1985	You *acquired the original equities	You apportion the first element of your *cost base and *reduced cost base for the original equities in a reasonable way over both the original and bonus equities
2	You *acquire the original equities before 20 September 1985 and an amount has been paid for the bonus equities that you were required to pay	The liability to pay the amount arose	The first element of your *cost base and *reduced cost base for the bonus equities includes their *market value just before that time
3	You *acquire the original equities before 20 September 1985 and the bonus equities are fully paid	You *acquired the original equities	Any *capital gain or *capital loss you make from the bonus equities is disregarded

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Modifications where neither a dividend nor assessable**

Item	In this situation:	You are taken to have *acquired the bonus equities when:	There is this effect:
4	You *acquire the original equities before 20 September 1985 and the bonus equities are partly paid but no amount has been paid since the issue of the bonus equities	You *acquired the original equities	Any *capital gain or *capital loss you make from the bonus equities is disregarded

The amount paid or payable can include giving property: see section 103-5.

Note 1: The amounts of calls you pay on partly-paid equities will also form part of the first element of their cost base and reduced cost base.

Note 2: There is a special rule for bonus equities issued on or before 1 pm on 10 December 1986 that affects item 2 of the table: see subsection 130-20(3) of the *Income Tax (Transitional Provisions) Act 1997*.

(3A) If only a part of a capital benefit that is bonus equities is a \*dividend, or is taken to be a dividend under subsection 45(2) or 45C(1) of the *Income Tax Assessment Act 1936*, you apportion the first element of your \*cost base and \*reduced cost base for the original equities in a reasonable way over both the original equities and the bonus equities.

(4) The modifications in this section are not made if, for the income year in which the bonus equities are issued, the unit trust is a public trading trust within the meaning of section 102R of the *Income Tax Assessment Act 1936*.

Note: Subsection 26BC(9E) of the *Income Tax Assessment Act 1936* (about securities lending arrangements) modifies the operation of this section.

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 130-40

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## Subdivision 130-B—Rights

### Table of sections

130-40	Exercise of rights
130-45	Timing rules
130-50	Application to options

### 130-40 Exercise of rights

(1) The table in this section sets out the modifications to the rules about \*cost base and \*reduced cost base that happen if you exercise rights to \*acquire:

- (a) \*shares, or options to acquire shares, in a company; or
- (b) units, or options to acquire units, in a unit trust.

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

(2) The modifications happen only if:

- (a) you did not pay for the rights and the condition in subsection (3) is satisfied; or
- (b) the condition in subsection (4) is satisfied.

The payment can include giving property: see section 103-5.

(3) When you were issued the rights, you must:

- (a) already own shares in, or \*convertible interests issued by, the company or a company that is a member of the same \*wholly-owned group (the *original shares or interests*); or
- (b) already own units in, or convertible interests issued by the trustee of, the unit trust (the *original units or interests*).

(4) You must have \*acquired the rights from an entity that already owned shares, units or convertible interests of the kind referred to in subsection (3).

(5) The company that is a member of the same \*wholly-owned group mentioned in paragraph (3)(a) includes a company that would cease to be a member of that group by the exercise of the rights.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (6) The rights to \*acquire units or to acquire an option to acquire units in a unit trust must have been issued by the trustee after 28 January 1988.

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**Modifications on exercise of rights**

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Item	In this situation:	The modification is...
1	You exercise rights issued to you to *acquire the *shares, units or options.	The first element of your *cost base for the shares, units or options is the sum of: <ul style="list-style-type: none"> <li>(a) the cost base of the rights at the time of exercise; and</li> <li>(b) any amount paid to exercise the rights, except to the extent that the amount is represented in the paragraph (a) amount; and</li> <li>(c) all the amounts to be added under subsection (6A).</li> </ul> The first element of their *reduced cost base is worked out similarly.
2	You exercise rights you *acquired from another entity to acquire the *shares, units or options.	The first element of your *cost base for the shares, units or options is the sum of: <ul style="list-style-type: none"> <li>(a) the cost base of the rights at the time of exercise; and</li> <li>(b) any amount paid to exercise the rights, except to the extent that the amount is represented in the paragraph (a) amount; and</li> <li>(c) all the amounts to be added under subsection (6A).</li> </ul> The first element of their *reduced cost base is worked out similarly.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 130-40

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**Modifications on exercise of rights**

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<b>Item</b>	<b>In this situation:</b>	<b>The modification is...</b>
3	You exercise rights issued to you to *acquire the *shares, units or options, and you acquired the original shares or *convertible interests, or the original units or convertible interests, before 20 September 1985.	<p>The first element of your *cost base for the shares, units or options is the sum of:</p> <p>(a) the *market value of the rights when they were exercised; and</p> <p>(b) any amount paid to exercise the rights, except to the extent that the amount is represented in the paragraph (a) amount; and</p> <p>(c) all the amounts to be added under subsection (6A).</p> <p>The first element of their *reduced cost base is worked out similarly.</p>

(6A) An amount is to be added under this subsection if a \*capital gain made from the right has been reduced under section 118-20. This is so even though a capital gain that is made on exercise is disregarded under subsection (7). The amount to be added is the amount of the reduction.

Note: For example, a capital gain made on the exercise of the right under section 118-20 may be reduced because an amount is included in the owner's assessable income under subsection 26BB(2) of the *Income Tax Assessment Act 1936* (about assessing a gain on disposal or redemption of a traditional security) or section 159GS of that Act (about balancing adjustments on transfer of a qualifying security).

(7) A \*capital gain or \*capital loss you make from the exercise of the rights is disregarded.

Note 1: The exercise of the rights would be an example of CGT event C2 (about a CGT asset ending).

Note 2: There are transitional rules for some rights: see section 130-40 of the *Income Tax (Transitional Provisions) Act 1997*.

Note 3: The effect of this Subdivision is modified in 2 cases by sections 102AAZBA (about non-resident trusts) and 414 (about CFC's) of the *Income Tax Assessment Act 1936*.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **130-45 Timing rules**

#### *Acquisition of rights*

- (1) If you \*acquired the rights from the company or trustee, you are taken to have acquired the rights when you acquired the original shares or interests or the original units or interests.

#### *Acquisition of shares, units or options on exercise of rights*

- (2) You are taken to have \*acquired the new \*shares, units or options when you exercise the rights.

### **130-50 Application to options**

This Subdivision applies to options in the same way that it applies to rights.

### **Subdivision 130-C—Convertible interests**

### **130-60 Shares or units acquired by converting a convertible interest**

- (1) This table sets out the modification to the rules about \*cost base and \*reduced cost base that happens if you \*acquire \*shares, or units in a unit trust, by converting a \*convertible interest.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 130-60

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<b>Conversion of a convertible interest</b>		
<b>Item</b>	<b>In this situation:</b>	<b>The modification is...</b>
1	You *acquire *shares or units in a unit trust by converting a *convertible interest that is a *traditional security.	<p>The first element of the *cost base of the shares or units is the sum of:</p> <p>(a) the cost base of the convertible interest at the time of conversion; and</p> <p>(b) any amount paid to convert the convertible interest, except to the extent that the amount is represented in the paragraph (a) amount; and</p> <p>(c) all the amounts to be added under subsection (1A).</p> <p>The first element of their *reduced cost base is worked out similarly.</p>
2	You *acquire *shares (except shares acquired under an *employee share scheme) by converting a *convertible interest that is not a *traditional security.	<p>The first element of the *cost base of the shares is the sum of:</p> <p>(a) the cost base of the convertible interest at the time of conversion; and</p> <p>(b) any amount paid to convert the convertible interest, except to the extent that the amount is represented in the paragraph (a) amount; and</p> <p>(c) all the amounts to be added under subsection (1A).</p> <p>The first element of their *reduced cost base is worked out similarly.</p>

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



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**Conversion of a convertible interest**

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Item	In this situation:	The modification is...
3	You *acquire units in a unit trust by converting a *convertible interest (except one that is a *traditional security) that was issued by the trustee of the unit trust after 28 January 1988.	The first element of the *cost base of the units is the sum of: <ul style="list-style-type: none"> <li>(a) the cost base of the convertible interest at the time of conversion; and</li> <li>(b) any amount paid to convert the convertible interest, except to the extent that the amount is represented in the paragraph (a) amount; and</li> <li>(c) all the amounts to be added under subsection (1A).</li> </ul> The first element of their *reduced cost base is worked out similarly.

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(1A) An amount is to be added under this subsection if a \*capital gain from the \*convertible interest has been reduced under section 118-20. This is so even though a capital gain that is made on conversion is disregarded under subsection (3). The amount to be added is the amount of the reduction.

Note: For example, a capital gain made on the conversion under section 118-20 may be reduced because an amount is included in the owner's assessable income under subsection 26BB(2) of the *Income Tax Assessment Act 1936* (about assessing a gain on disposal or redemption of a traditional security) or section 159GS of that Act (about balancing adjustments on transfer of a qualifying security).

(1B) The payment to convert the convertible interest can include giving property (see section 103-5).

(2) You are taken to have \*acquired the shares or units when the conversion of the convertible interest happened.

(3) A \*capital gain or \*capital loss you make from converting the convertible interest is disregarded.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 130-75

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- Note 1: The conversion of the convertible interest would be an example of CGT event C2 (about a CGT asset ending).
- Note 2: There are transitional rules for some convertible notes: see section 130-60 of the *Income Tax (Transitional Provisions) Act 1997*.

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

**Table of sections**

130-75	Objects of Subdivision
130-80	ESS interests acquired under employee share schemes
130-85	Interests in employee share trusts
130-90	Shares held by employee share trusts
130-95	Shares and rights in relation to ESS interests
130-97	Application of certain provisions of Division 83A

**130-75 Objects of Subdivision**

The objects of this Subdivision are:

- (a) to recognise that:
  - (i) Division 83A contains the primary rules for taxing gains on \*ESS interests acquired under \*employee share schemes; and
  - (ii) \*capital gains and \*capital losses on such interests should usually be disregarded during the period in which Division 83A applies to them; and
- (b) to align the treatment of ESS interests under Division 83A and the CGT provisions by, for example:
  - (i) turning off certain special CGT rules; and
  - (ii) extending some of the deeming provisions of that Division into the CGT provisions; and
- (c) to disregard \*employee share trusts for most CGT purposes, by treating ESS interests owned by such trusts as being directly owned by the beneficiaries of the trusts.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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

#### *Capital gains and losses*

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

#### *General acquisition rule*

- (3) Subsection 109-5(2) (about when you acquire a CGT asset) does not apply to a \*CGT asset and a \*CGT event if:
  - (a) the CGT asset is:
    - (i) a \*share; or
    - (ii) a right to acquire a beneficial interest in a share; and
  - (b) the CGT event is CGT event A1; and
  - (c) you acquire an \*ESS interest; and
  - (d) the ESS interest is a beneficial interest in the share or right; and
  - (e) Subdivision 83A-B or 83A-C (about employee share schemes) applies to the ESS interest.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 130-85

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*Market value substitution rule*

- (4) Sections 112-20 and 116-30 (about the market value substitution rule) do not apply to the extent that they relate to:
- (a) you acquiring an \*ESS interest to which Subdivision 83A-C (about employee share schemes) applies; or
  - (b) you:
    - (i) forfeiting an ESS interest; or
    - (ii) forfeiting or losing an ESS interest that is a beneficial interest in a right (without you having disposed of the interest or exercised the right);if Subdivision 83A-B or 83A-C applies to the ESS interest (ignoring section 83A-310); or
  - (c) you acquiring an ESS interest that:
    - (i) is a beneficial interest in a right; and
    - (ii) is an ESS interest to which the provisions referred to in paragraphs 83A-33(1)(a) to (c) (about start ups) apply.

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

*Scope*

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

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

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

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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

Note 2: As a result of subsection (2) of this section, CGT event E5 might happen at the time of acquisition. This may result in the trustee making a capital gain. However, any capital gain made by the beneficiary would be disregarded under section 130-80.

- (3) However, if this section applies to you because an \*associate of yours \*acquired the \*ESS interest, Division 83A, this Part and Part 3-3 apply as if your associate were absolutely entitled to the relevant \*share or right (instead of you):
- (a) either:
- (i) if Subdivision 83A-B applies to the ESS interest—from the time of acquisition; or
  - (ii) if Subdivision 83A-C applies to the ESS interest—from immediately after the \*ESS deferred taxing point for the ESS interest; and
- (b) until your associate no longer has an ESS interest in the share or right.

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

*Meaning of **employee share trust***

- (4) An **employee share trust**, for an \*employee share scheme, is a trust whose sole activities are:
- (a) obtaining \*shares or rights in a company; and
- (b) ensuring that \*ESS interests in the company that are beneficial interests in those shares or rights are provided under the employee share scheme to employees, or to \*associates of employees, of:
- (i) the company; or
  - (ii) a \*subsidiary of the company; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 130-90

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

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

*Shares held for future acquisition under employee share schemes*

- (1A) Disregard any \*capital gain or \*capital loss made by an \*employee share trust to the extent that it results from a \*CGT event, if:
  - (a) immediately before the event happens, an \*ESS interest is a \*CGT asset of the trust; and
  - (b) either of the following subparagraphs applies:
    - (i) the event is CGT event E5, and the event happens because a beneficiary of the trust becomes absolutely entitled to the ESS interest as against the trustee;
    - (ii) the event is CGT event E7, and the event happens because the trustee \*disposes of the ESS interest to a beneficiary of the trust; and
  - (c) Subdivision 83A-B or 83A-C (about employee share schemes) applies to the ESS interest.

*Shares held to satisfy the future exercise of rights acquired under employee share schemes*

- (1) Disregard any \*capital gain or \*capital loss made by an \*employee share trust, or a beneficiary of the trust, to the extent that it results from a \*CGT event, if:
  - (a) the CGT event is CGT event E5 or E7; and
  - (b) the CGT event happens in relation to a \*share; and
  - (c) the beneficiary had acquired a beneficial interest in the share by exercising a right; and
  - (d) the beneficiary's beneficial interest in the right was an \*ESS interest to which Subdivision 83A-B or 83A-C (about employee share schemes) applied.
- (2) Subsection (1A) or (1) does not apply if the beneficiary acquired the beneficial interest in the \*share for more than its \*cost base in

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

the hands of the \*employee share trust at the time the \*CGT event happens.

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

For the purposes of Part 3-1 (Capital gains and losses: general topics) and this Part, treat a \*CGT event that happens in relation to a \*share or right in the same way as a CGT event that happens in relation to an \*ESS interest, if:

- (a) Subdivision 83A-B or 83A-C (about employee share schemes) applies to the ESS interest; and
- (b) the ESS interest forms part of the share or right.

### **130-97 Application of certain provisions of Division 83A**

The following provisions have effect for the purposes of this Subdivision in the same way as they have for the purposes of Division 83A:

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

### **Subdivision 130-E—Exchangeable interests**

#### **Table of sections**

130-100	Exchangeable interest
130-105	Shares acquired in exchange for the disposal or redemption of an exchangeable interest

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 130-100

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**130-100 Exchangeable interest**

An *exchangeable interest* is a \*traditional security or \*qualifying security that:

- (a) was issued on the basis that it will or may be:
  - (i) disposed of to the issuer of the traditional security or the qualifying security or to a \*connected entity of the issuer of the traditional security or the qualifying security; or
  - (ii) redeemed;  
in exchange for \*shares in a company that is neither:
  - (iii) the issuer of the traditional security or the qualifying security; nor
  - (iv) a connected entity of the issuer of the traditional security or the qualifying security; and
- (b) was issued on or after 1 July 2001.

**130-105 Shares acquired in exchange for the disposal or redemption of an exchangeable interest**

*Cost base and reduced cost base*

- (1) The table has effect:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Exchange of an exchangeable interest**

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Item	In this situation:	The rules about cost base and reduced cost base are modified in this way...
1	You *acquire shares in a company in exchange for the disposal of an *exchangeable interest, and the disposal of the exchangeable interest was to: (a) the issuer of the exchangeable interest; or (b) a *connected entity of the issuer of the exchangeable interest.	The first element of the *cost base of the shares is the sum of: (a) the cost base of the exchangeable interest at the time of the disposal; and (b) any amount paid for the exchange, except to the extent that the amount is represented in the paragraph (a) amount; and (c) all the amounts to be added under subsection (2).  The first element of their *reduced cost base is worked out similarly.
2	You *acquire shares in a company in exchange for the redemption of an *exchangeable interest.	The first element of the *cost base of the shares is the sum of: (a) the cost base of the exchangeable interest at the time of the redemption; and (b) any amount paid for the exchange, except to the extent that the amount is represented in the paragraph (a) amount; and (c) all the amounts to be added under subsection (2).  The first element of their *reduced cost base is worked out similarly.

- (2) An amount is to be added under this subsection if a \*capital gain on the disposal or redemption of the exchangeable interest has been reduced under section 118-20. This is so even though a capital gain that is made on the disposal or redemption of the exchangeable

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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interest is disregarded under subsection (4). The amount to be added is the amount of the reduction.

- (3) The payment for the exchange can include giving property (see section 103-5).

*Other CGT consequences*

- (4) The table has effect:

<b>Exchange of an exchangeable interest</b>		
<b>Item</b>	<b>In this situation:</b>	<b>This is the result:</b>
1	You *acquire shares in a company in exchange for the disposal of an *exchangeable interest, and the disposal of the exchangeable interest was to: (a) the issuer of the exchangeable interest; or (b) a *connected entity of the issuer of the exchangeable interest.	(a) you are taken to have acquired the shares when the disposal of the exchangeable interest happened; and (b) a *capital gain or *capital loss you make from the disposal of the exchangeable interest is disregarded.
2	You *acquire shares in a company in exchange for the redemption of an *exchangeable interest.	(a) you are taken to have acquired the shares when the redemption of the exchangeable interest happened; and (b) a *capital gain or *capital loss you make from the redemption of the exchangeable interest is disregarded.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Application*

- (5) This section applies to the disposal or redemption of an \*exchangeable interest on or after 1 July 2001.

**Subdivision 130-F—Exploration investments**

**130-110 Reducing the reduced cost base before disposal**

- (1) This section applies if:
- (a) an entity (the *minerals explorer*) issues a \*share in the minerals explorer to another entity (the *investor*) during the 2017-18, 2018-19, 2019-20 or 2020-21 income year; and
  - (b) the Commissioner makes a determination under section 418-101 allocating exploration credits to the minerals explorer for the income year in which the share is issued; and
  - (c) the share is issued to the investor on or after the day on which the Commissioner's determination is made; and
  - (d) the share is an \*equity interest.
- (2) The \*reduced cost base of the \*share is to be reduced immediately before the disposal of the share by the amount worked out as follows:

$$\begin{array}{l} \text{The *corporate tax rate} \\ \text{for the minerals explorer} \\ \text{for the income year} \\ \text{in which the *share} \\ \text{is issued} \end{array} \times \begin{array}{l} \text{The amount paid up} \\ \text{by the investor on the} \\ \text{share during the} \\ \text{investment period} \end{array}$$

where:

*investment period* means the period, within the income year in which the \*share is issued to the investor, that:

- (a) begins on the day on which the Commissioner makes the determination mentioned in paragraph (1)(b); and
- (b) ends at the end of the income year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## **Division 132—Leases**

### **Table of sections**

132-1	Lessee incurs expenditure to get lease term varied or waived
132-5	Lessor pays lessee for improvements
132-10	Grant of a long-term lease
132-15	Lessee of land acquires reversionary interest of lessor

### **132-1 Lessee incurs expenditure to get lease term varied or waived**

If the lessee of property incurs expenditure in obtaining the consent of the lessor to vary or waive a term of the lease, the fourth element of the lease's \*cost base and \*reduced cost base includes the amount of that expenditure.

The expenditure can include giving property: see section 103-5.

### **132-5 Lessor pays lessee for improvements**

The fourth element of the \*cost base and \*reduced cost base of property that was subject to a lease includes any payment (because of the lease expiring or being surrendered or forfeited) by the lessor to the lessee for expenditure of a capital nature incurred by the lessee in making improvements to the lease property.

The payment or expenditure can include giving property: see section 103-5.

### **132-10 Grant of a long-term lease**

- (1) These rules apply if \*CGT event F2 happens for a lessor of property.
- (2) For any later \*CGT event that happens to the land or the lessor's lease of it, its \*cost base and \*reduced cost base (including the cost base and reduced cost base of any building, part of a building,

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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structure or improvement that is treated as a separate \*CGT asset) excludes:

- (a) any expenditure incurred before \*CGT event F2 happens; and
- (b) the \*cost of any \*depreciating asset for which the lessor has deducted or can deduct an amount for the asset's decline in value under this Act.

Note: Subdivision 108-D sets out when a building, structure or improvement is treated as a separate CGT asset.

- (3) The fourth element of the property's \*cost base and \*reduced cost base includes any payment by the lessor to the lessee to vary or waive a term of the lease or for the forfeiture or surrender of the lease, reduced by the amount of any \*input tax credit to which the lessor is entitled for the variation or waiver.
- (4) The expenditure or payment can include giving property: see section 103-5.

**132-15 Lessee of land acquires reversionary interest of lessor**

- (1) This table sets out what happens if:
  - (a) the lessee of land \*acquires the reversionary interest of the lessor in the land; and
  - (b) Subdivision 124-J (roll-over provisions for Crown leases) does not apply to the acquisition.

<b>Lessee acquires reversionary interest of lessor</b>			
<b>Item</b>	<b>In this situation:</b>	<b>The lessee is taken to have *acquired the land at this time:</b>	<b>The lessee is taken to have acquired the land for:</b>
1	The lease was originally granted for 99 years or more	When the lease was granted or assigned to the lessee	Any premium the lessee paid for the grant or assignment of the lease, plus the amount the lessee paid to *acquire the reversionary interest

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Lessee acquires reversionary interest of lessor**

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<b>Item</b>	<b>In this situation:</b>	<b>The lessee is taken to have *acquired the land at this time:</b>	<b>The lessee is taken to have acquired the land for:</b>
2	The lease was originally granted for less than 99 years	When the lessee *acquired the reversionary interest	(a) if the lessee *acquired the lease after 19 September 1985—any premium the lessee paid for the grant or assignment of the lease, plus the amount the lessee paid to acquire the reversionary interest; or  (b) if the lessee acquired the lease before 20 September 1985—the *market value of the land when the lessee acquired it

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(2) All the payments can include giving property: see section 103-5.

Note: CGT events F1 to F5 deal specifically with leases. See also (in particular) CGT event C2 (about cancellation, surrender and similar endings).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Division 134—Options

### 134-1 Exercise of options

- (1) This table sets out the effects of the exercise of an option (including an option that has been renewed or extended) on the \*cost bases and \*reduced cost bases of the grantor and the entity that exercises the option (the *grantee*).

<b>Exercise of options</b>		
<b>Item</b>	<b>In this situation:</b>	<b>Effect on cost base and reduced cost base:</b>
1	Option binds grantor to: (a) *dispose of a *CGT asset; or (b) create (including grant or issue) a CGT asset (call option)	<i>For the grantee</i> The first element of the grantee's *cost base and *reduced cost base for the CGT asset is what the grantee paid for the option (or to renew or extend it) plus any amount the grantee paid to exercise it <i>For the grantor</i> See section 116-65
2	Option binds grantor to *acquire a *CGT asset (put option)	<i>For the grantor</i> The first element of the grantor's *cost base and *reduced cost base for the asset acquired is any amount paid to exercise the option reduced by any payment received by the grantor for the option (or to renew or extend it) <i>For the grantee</i> The second element of the grantee's cost base and reduced cost base for the asset acquired by the grantor includes any payment the grantee made to acquire the option (or to renew or extend it)

Note 1: If you granted, renewed or extended an option, CGT event C3 or D2 may happen.

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note 2: Item 1 in the table is modified for certain options granted before 20 September 1985: see section 134-1 of the *Income Tax (Transitional Provisions) Act 1997*.

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

Note 4: This Division has no operation in relation to an option acquired under an employee share scheme if the option is exercised before the ESS deferred taxing point for the option: see Subdivision 130-D. Division 83A applies instead.

(2) All the payments can include giving property: see section 103-5.

Example 1: Steven obtains an option to buy a yacht (for \$75,000) from Tom. Steven pays \$5,000 for the option.

Steven exercises the option. The first element of his cost base and reduced cost base for the yacht includes the expenditure he incurred for the option.

So, the first element of his cost base and reduced cost base for the yacht is:

$$\$75,000 + \$5,000 = \$80,000$$

Example 2: An entity owns 1,000 shares in a company. Bill grants the entity an option which, if exercised, would require him to buy the shares for \$2 each. The entity pays Bill 10 cents per share for the option.

The entity exercises the option. Bill paid \$2,000 for the shares. He received \$100 from the entity for granting the option.

The first element of Bill's cost base and reduced cost base for the shares is:

$$\$2,000 - \$100 = \$1,900$$

In working out whether the entity made a capital gain or loss on the sale of the shares, the second element of its cost base (and reduced cost base) includes the \$100 the entity paid for the option.

(4) A \*capital gain or \*capital loss the grantee makes from exercising the option is disregarded. However, this rule does not apply if the grantee \*acquired the option under a trust restructure (see Subdivision 124-N) and, on exercising the option, held the resulting asset as an item of \*trading stock.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



Note 1: The exercise of the option would be an example of CGT event C2 (about a CGT asset ending).

Note 2: There is an exemption for the grantor if the option is exercised: see subsection 104-40(5).

- (5) This Division does not apply to rights or options to which Subdivision 130-B applies.

Note: Subdivision 130-B deals (amongst other things) with rights and options issued by a company or trust where you did not pay or give anything to acquire them.

- (6) This Division does not apply to:

- (a) an option to the extent that the option binds the grantor to \*dispose of \*foreign currency; or
- (b) an option to the extent that the option binds the grantor to \*acquire \*foreign currency.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Division 149—When an asset stops being a pre-CGT asset

### Table of Subdivisions

- 149-A Key concepts
- 149-B When asset of non-public entity stops being a pre-CGT asset
- 149-C When asset of public entity stops being a pre-CGT asset
- 149-F How to treat a “demutualised” public entity

### Subdivision 149-A—Key concepts

#### Table of sections

- 149-10 What is a pre-CGT asset?
- 149-15 Majority underlying interests in a CGT asset

### 149-10 What is a pre-CGT asset?

A \*CGT asset that an entity owns is a *pre-CGT asset* if, and only if:

- (a) the entity last acquired the asset before 20 September 1985; and
- (b) the entity was not, immediately before the start of the 1998-99 income year, taken under:
  - (i) former subsection 160ZZS(1) of the *Income Tax Assessment Act 1936*; or
  - (ii) Subdivision C of Division 20 of former Part IIIA of that Act;to have acquired the asset on or after 20 September 1985; and
- (c) the asset has not stopped being a pre-CGT asset of the entity because of this Division.

Note: There are transitional rules for assets that stopped being pre-CGT assets under the *Income Tax Assessment Act 1936*: see section 149-5 of the *Income Tax (Transitional Provisions) Act 1997*.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### 149-15 Majority underlying interests in a CGT asset

- (1) **Majority underlying interests** in a \*CGT asset consist of:
  - (a) more than 50% of the beneficial interests that \*ultimate owners have (whether directly or \*indirectly) in the asset; and
  - (b) more than 50% of the beneficial interests that ultimate owners have (whether directly or indirectly) in any \*ordinary income that may be \*derived from the asset.
  
- (2) An **underlying interest** in a \*CGT asset is a beneficial interest that an \*ultimate owner has (whether directly or \*indirectly) in the asset or in any \*ordinary income that may be \*derived from the asset.
  
- (3) An **ultimate owner** is:
  - (a) an individual; or
  - (b) a company whose \*constitution prevents it from making any distribution, whether in money, property or otherwise, to its members; or
  - (c) the Commonwealth, a State or a Territory; or
  - (d) a municipal corporation; or
  - (e) a \*local governing body; or
  - (f) the government of a foreign country, or of part of a foreign country.
  
- (4) An \*ultimate owner **indirectly** has a beneficial interest in a \*CGT asset of another entity (that is *not* an ultimate owner) if he, she or it would receive for his, her or its own benefit any of the capital of the other entity if:
  - (a) the other entity were to distribute any of its capital; and
  - (b) the capital were then successively distributed by each entity interposed between the other entity and the ultimate owner.
  
- (5) An \*ultimate owner **indirectly** has a beneficial interest in \*ordinary income that may be \*derived from a \*CGT asset of another entity (that is *not* an ultimate owner) if he, she or it would receive for his, her or its own benefit any of a \*dividend or income if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) the other entity were to pay that dividend, or otherwise distribute that income; and
- (b) the dividend or income were then successively paid or distributed by each entity interposed between the other entity and the ultimate owner.

**Subdivision 149-B—When asset of non-public entity stops being a pre-CGT asset**

**Table of sections**

149-25	Which entities are affected
149-30	Effects if asset no longer has same majority underlying ownership
149-35	Cost base elements of asset that stops being a pre-CGT asset

**149-25 Which entities are affected**

This Subdivision provides for when a \*CGT asset of an entity stops being a \*pre-CGT asset (unless the entity is covered by section 149-50).

Note: Subdivision 149-C deals with when an asset of such an entity stops being a pre-CGT asset.

**149-30 Effects if asset no longer has same majority underlying ownership**

- (1) The asset stops being a \*pre-CGT asset at the earliest time when \*majority underlying interests in the asset were *not* had by \*ultimate owners who had \*majority underlying interests in the asset immediately before 20 September 1985.
- (1A) Also, Part 3-1 and this Part (except this Division) apply to the asset as if the entity had acquired it at that earliest time.
- (2) If the Commissioner is satisfied, or thinks it reasonable to assume, that at all times on and after 20 September 1985 and before a particular time \*majority underlying interests in the asset *were* had by \*ultimate owners who had \*majority underlying interests in the

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

asset immediately before that day, subsections (1) and (1A) apply as if that were in fact the case.

*New owner standing in shoes of former owner*

- (3) Subsection (4) affects how the \*majority underlying interests in the asset are worked out if an \*ultimate owner (the **new owner**) has acquired a percentage (the **acquired percentage**) of the \*underlying interests in the asset because of an event described in column 2 of an item in the table. The **former owner** is the entity described in column 3 of that item.

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**Events leading to new owner standing in for former owner**

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Item	For this kind of event:	The <b>former owner</b> is:
1	*CGT event A1 or B1 if there is a roll-over under Subdivision 126-A (about marriage or relationship breakdowns) for the event	the entity that, immediately before the event happened, owned the *CGT asset to which the event relates
2	the death of a person	that person

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- (4) This section applies as if the new owner had (in addition to any other \*underlying interests), at any time when the former owner had a percentage (the **former owner's percentage**) of the underlying interests in the asset, a percentage of the underlying interests in the asset equal to the acquired percentage, or the former owner's percentage at that time, whichever is the less.

**149-35 Cost base elements of asset that stops being a pre-CGT asset**

- (1) This section affects the \*cost base and \*reduced cost base of the asset if it stops being a \*pre-CGT asset.
- (2) The first element of each is the asset's \*market value at the time referred to in subsection 149-30(1).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Subdivision 149-C—When asset of public entity stops being a pre-CGT asset**

**Table of sections**

149-50	Which entities are affected
149-55	Entity to give the Commissioner evidence periodically as to whether asset still has same majority underlying ownership
149-60	What the evidence must show
149-70	Effects if asset no longer has same majority underlying ownership
149-75	Cost base elements of asset that stops being a pre-CGT asset
149-80	No more evidence needed after asset stops being a pre-CGT asset

**149-50 Which entities are affected**

- (1) This Subdivision provides for when a \*CGT asset of an entity of any of these kinds stops being a \*pre-CGT asset:
- (a) a company \*shares in which (except shares that carry the right to a fixed rate of \*dividend) are listed for quotation in the official list of an \*approved stock exchange;
  - (b) a \*publicly traded unit trust;
  - (c) a \*mutual insurance company;
  - (d) a \*mutual affiliate company;
  - (e) a company (other than one covered by paragraph (a)) all the \*shares in which are beneficially owned, whether directly, or indirectly through one or more interposed entities, by one or more of the following:
    - (i) a company covered by paragraph (a);
    - (ii) a \*mutual insurance company;
    - (iii) a \*mutual affiliate company;
    - (iv) a \*publicly traded unit trust;
- (2) A **publicly traded unit trust** is a unit trust the units in which:
- (a) are listed for quotation in the official list of an \*approved stock exchange; or
  - (b) are ordinarily available for subscription or purchase by the public.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (3) This Division applies as if what is done or not done by the trustee of a \*publicly traded unit trust had been done or not done by the trust.

**149-55 Entity to give the Commissioner evidence periodically as to whether asset still has same majority underlying ownership**

- (1) Within 6 months after each \*test day, the entity must give the Commissioner written evidence about the \*majority underlying interests in the asset at the end of that day. (The Commissioner can extend the period for doing so.)
- (1A) The evidence must be given in a form that makes the information about those interests readily apparent.
- (1B) The only consequences of failing to give the evidence are those set out in section 149-70. It is not an offence to fail to give the evidence.

*Test days*

- (2) Each of these days is a **test day**:
- (aa) 30 June 1999;
- (a) a day that is 5 years (or a multiple of 5 years) after 30 June 1999 (but see subsection (3));
- (b) if the entity is covered by paragraph 149-50(1)(a) or (e)—a day on which there is \*abnormal trading in \*shares in the company;
- (c) if the entity is a \*publicly traded unit trust—a day on which there is \*abnormal trading in units in the trust;
- (d) if the entity is a company all the \*shares in which are beneficially owned, whether directly, or indirectly through one or more interposed entities, by one or more of the following:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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(i) a company \*shares in which (except shares that carry the right to a fixed rate of \*dividend) are listed for quotation in the official list of an \*approved stock exchange;

(ii) a \*publicly traded unit trust;

a day on which there is \*abnormal trading in \*shares in the other company or in units in that unit trust.

Note: Subsections (6) and (7) change the normal rules about abnormal trading.

(3) If a day (the ***fifth anniversary***) that would otherwise be a \*test day because of paragraph (2)(a) is:

(a) a Saturday; or

(b) a Sunday; or

(c) a day that is a public holiday or a bank holiday in the place where the records of ownership of shares or other interests in the entity are kept;

the next day that is *not* covered by a paragraph of this subsection is a ***test day*** instead of the fifth anniversary.

*Determining the end of a day*

(4) For the purposes of this section, the end of a day is determined according to legal time in the place where the records of ownership of shares or other interests in the entity are kept.

*Special rules about abnormal trading*

(5) Subsections (6) and (7) change how Subdivision 960-H applies for the purposes of determining under this section whether there is \*abnormal trading in \*shares in a company or in units in a unit trust.

(6) An issue, redemption or transfer, or any other dealing, is a ***trading*** if, and only if, it changes the respective proportions in which \*ultimate owners have \*underlying interests in \*CGT assets of the company or trust.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (7) Section 960-235 (about suspected transactions involving 5% or more of \*shares in the company or units in the trust) is disregarded.

### **149-60 What the evidence must show**

- (1A) To avoid the consequences in section 149-70, the following condition must be complied with.
- (1) On the basis solely of the evidence given to the Commissioner under subsection 149-55(1), the Commissioner must be satisfied that, or think it reasonable to assume that, at the end of the \*test day, \*majority underlying interests in the asset were had by \*ultimate owners who also had \*majority underlying interests in the asset at the end of the starting day. The **starting day** is:
- (a) a day the entity chooses under subsection (2); or
  - (b) if no day is so chosen—19 September 1985.
- (2) The day chosen:
- (a) must be no earlier than 1 July 1985 and no later than 30 June 1986; and
  - (b) must be one the choice of which will allow evidence to be given that enables a reasonable approximation of the \*ultimate owners who had \*underlying interests in the assets of the entity at the end of 19 September 1985.

#### *How unidentified owners are treated*

- (3) So far as the evidence does not show who had \*underlying interests in the asset at the end of the \*starting day, the evidence must be treated on the assumption that those interests were then had by \*ultimate owners who did *not* have \*underlying interests in the asset at the end of the \*test day.

#### *New owner standing in the shoes of former owner*

- (4) Subsection (5) affects how the evidence must be treated if an \*ultimate owner (the **new owner**) has acquired a percentage (the **acquired percentage**) of the \*underlying interests in the asset

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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because of an event described in column 2 of an item in the table.  
The *former owner* is the entity described in column 3 of that item.

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<b>Events leading to new owner standing in for former owner</b>		
<b>Item</b>	<b>For this kind of event:</b>	<b>The <i>former owner</i> is:</b>
1	*CGT event A1 or B1 if there is a roll-over under Subdivision 126-A (about marriage or relationship breakdowns) for the event	the entity that, immediately before the event happened, owned the *CGT asset to which the event relates
2	the death of a person	that person

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- (5) The evidence must be treated on the assumption that the new owner had (in addition to any other \*underlying interests), at any time when the former owner had a percentage (the *former owner's percentage*) of the \*underlying interests in the asset, a percentage of the underlying interests in the asset equal to the acquired percentage, or the former owner's percentage at that time, whichever is the less.

*Determining the end of a day*

- (6) For the purposes of this section, the end of a day is determined according to legal time in the place where the records of ownership of shares or other interests in the entity are kept.

**149-70 Effects if asset no longer has same majority underlying ownership**

- (1) The asset stops being a \*pre-CGT asset if the condition in subsection 149-60(1) is not satisfied.
- (2) Also, Part 3-1 and this Part (except this Division) apply to the asset as if the entity had acquired it at the end of the \*test day (as determined under subsection 149-55(4)).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **149-75 Cost base elements of asset that stops being a pre-CGT asset**

- (1) This section affects the \*cost base and \*reduced cost base of the asset if it stops being a \*pre-CGT asset.
- (2) The first element of each is the asset's \*market value at the time referred to in subsection 149-70(2).

### **149-80 No more evidence needed after asset stops being a pre-CGT asset**

After the asset stops being a \*pre-CGT asset, the entity need not give the Commissioner any more evidence about it under section 149-55.

### **Subdivision 149-F—How to treat a “demutualised” public entity**

#### **Table of sections**

149-162	Subdivision applies only if entity gives sufficient evidence
149-165	Members treated as having underlying interests in assets until demutualisation
149-170	Effect of demutualisation of interposed company

### **149-162 Subdivision applies only if entity gives sufficient evidence**

- (1) This Subdivision applies only if, on the basis solely of evidence the entity gives the Commissioner, the Commissioner is satisfied, or thinks it reasonable to assume, that this Subdivision applies to the entity.
- (2) The evidence must be given in a form that makes it readily apparent whether this Subdivision applies.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**149-165 Members treated as having underlying interests in assets until demutualisation**

- (1) This section modifies the treatment of evidence that an entity gives the Commissioner under section 149-55 as to the \*ultimate owners who had \*underlying interests in the asset at a particular time if the entity:
- (a) was:
    - (i) a \*mutual insurance company; or
    - (ii) a \*mutual affiliate company;at the end of the \*starting day (as determined under subsection 149-60(6)); and
  - (b) has since stopped being a company of either of those kinds, but either:
    - (i) has continued in existence as a company covered by paragraph 149-50(1)(a) or (e) or a \*publicly traded unit trust; or
    - (ii) has undergone a demutualisation in relation to which Division 316 (Demutualisation of friendly society health or life insurers) applied and has continued in existence as a company; and
  - (c) when it stopped being an entity of either of those kinds (the **stopping time**), had more than 50 members.
- (2) The entity may require the Commissioner to treat the evidence on the assumption that an \*ultimate owner who:
- (a) immediately before the stopping time was a member of the entity; and
  - (b) immediately after the stopping time had an \*underlying interest in the asset;
- had the interest at all times from and including the end of the \*starting day until immediately after the stopping time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **149-170 Effect of demutualisation of interposed company**

- (1) This section modifies the treatment of evidence that an entity (the **head entity**) gives the Commissioner under section 149-55 as to the \*ultimate owners who had \*underlying interests in the asset at a particular time if another entity (the **interposed company**):
- (a) was:
    - (i) a \*mutual insurance company; or
    - (ii) a \*mutual affiliate company;at the end of the \*starting day (as determined under subsection 149-60(6)) for the head entity; and
  - (b) has since stopped being a company of either of those kinds, but either:
    - (i) has continued in existence as a company covered by paragraph 149-50(1)(a) or (e) or a \*publicly traded unit trust; or
    - (ii) has undergone a demutualisation in relation to which Division 316 (Demutualisation of friendly society health or life insurers) applied and has continued in existence as a company; and
  - (c) when it stopped being an entity of either of those kinds (the **stopping time**), had more than 50 members.
- (2) The head entity may require the Commissioner to treat the evidence on the assumption that an \*ultimate owner who:
- (a) immediately before the stopping time was a member of the interposed company; and
  - (b) immediately after the stopping time had, through the interposed company, an \*underlying interest in the asset;
- had the interest at all times from and including the end of the \*starting day until immediately after the stopping time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## **Division 152—Small business relief**

### **Guide to Division 152**

#### **152-1 What this Division is about**

To help small business, if the basic conditions for relief are satisfied, capital gains can be reduced by the various concessions in this Division. Those basic conditions are in Subdivision 152-A. Some of the concessions have additional, specific conditions that must also be satisfied.

The 4 available small business concessions are:

- (a) the 15-year exemption (in Subdivision 152-B);
- (b) the 50% reduction (in Subdivision 152-C);
- (c) the retirement concession (in Subdivision 152-D);
- (d) the roll-over (in Subdivision 152-E).

A capital gain that qualifies for the 15-year exemption is disregarded entirely and is not taken into account under the method statement in subsection 102-5(1). By contrast, the other concessions are only activated by step 4 of that method statement. This means that you must apply all available capital losses against your capital gains (under steps 1 and 2) before you can reduce them using those 3 concessions.

#### **Table of Subdivisions**

152-A	Basic conditions for relief under this Division
152-B	Small business 15-year exemption
152-C	Small business 50% reduction

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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152-D Small business retirement exemption

152-E Small business roll-over

## **Subdivision 152-A—Basic conditions for relief under this Division**

### **Guide to Subdivision 152-A**

#### **152-5 What this Subdivision is about**

This Subdivision sets out some basic conditions for relief. If the basic conditions are satisfied, an entity may be able to reduce its capital gains using the small business concessions in this Division.

The 2 major basic conditions are:

- (a) the entity must be a CGT small business entity or a partner in a partnership that is a CGT small business entity, or the net value of assets that the entity and related entities own must not exceed \$6,000,000; and
- (b) the CGT asset must be an active asset.

Additional basic conditions must be satisfied in the following circumstances:

- (a) the CGT asset is a share in a company or an interest in a trust;
- (b) the CGT event involves certain rights or interests in relation to the income or capital of a partnership.

Some of the concessions have additional, specific conditions that also must be satisfied. For example, the 15-year exemption applies only if you have held the CGT asset for at least 15 years and you retire.

There are limitations on the availability of the small business concessions for CGT events J2, J5 and J6.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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You do not need to satisfy the basic conditions for the retirement exemption in relation to CGT events J5 and J6.

**Table of sections**

**Basic conditions for relief**

- 152-10 Basic conditions for relief
- 152-12 Special conditions for CGT event D1

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- 152-15 Maximum net asset value test
- 152-20 Meaning of net value of the CGT assets

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**Treatment of passively held CGT assets**

- 152-47 Spouses or children taken to be affiliates for certain passively held CGT assets
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- 152-50 Significant individual test
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- 152-60 Meaning of *CGT concession stakeholder*

**Small business participation percentage**

- 152-65 Small business participation percentage
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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Nomination of controllers of discretionary trust**

152-78 Trustee of discretionary trust may nominate beneficiaries to be controllers of trust

**CGT event happens to asset or interest within 2 years of an individual's death**

152-80 CGT event happens to an asset or interest within 2 years of individual's death

**Basic conditions for relief**

**152-10 Basic conditions for relief**

- (1) A \*capital gain (except a capital gain from \*CGT event K7) you make may be reduced or disregarded under this Division if the following basic conditions are satisfied for the gain:
- (a) a \*CGT event happens in relation to a \*CGT asset of yours in an income year;  
Note: This condition does not apply in the case of CGT event D1: see section 152-12.
  - (b) the event would (apart from this Division) have resulted in the gain;
  - (c) at least one of the following applies:
    - (i) you are a \*CGT small business entity for the income year;
    - (ii) you satisfy the maximum net asset value test (see section 152-15);
    - (iii) you are a partner in a partnership that is a CGT small business entity for the income year and the CGT asset is an interest in an asset of the partnership;
    - (iv) the conditions mentioned in subsection (1A) or (1B) are satisfied in relation to the CGT asset in the income year;
  - (d) the CGT asset satisfies the active asset test (see section 152-35).

Note: This condition does not apply in the case of CGT event D1: see section 152-12.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*CGT small business entity*

- (1AA) You are a **CGT small business entity** for an income year if:
- (a) you are a \*small business entity for the income year; and
  - (b) you would be a small business entity for the income year if each reference in section 328-110 to \$10 million were a reference to \$2 million.

Note: For the purposes of subsection (1A) or (1B), in determining whether an entity would be a small business entity, see also sections 152-48 and 152-78.

*Passively held assets—affiliates and entities connected with you*

- (1A) The conditions in this subsection are satisfied in relation to the \*CGT asset in the income year if:
- (a) your \*affiliate, or an entity that is \*connected with you, is a \*CGT small business entity for the income year; and
  - (b) you do not carry on a \*business in the income year (other than in partnership); and
  - (c) if you carry on a business in partnership—the CGT asset is not an interest in an asset of the partnership; and
  - (d) in any case—the CGT small business entity referred to in paragraph (a) is the entity that, at a time in the income year, carries on the business (as referred to in subparagraph 152-40(1)(a)(ii) or (iii) or paragraph 152-40(1)(b)) in relation to the CGT asset.

Note 1: The meaning of *connected with* is affected by section 152-78.

Note 3: For businesses that are winding up, see section 152-49 and subsection 328-110(5).

*Passively held assets—partnerships*

- (1B) The conditions in this subsection are satisfied in relation to the \*CGT asset in the income year if:
- (a) you are a partner in a partnership in the income year; and
  - (b) the partnership is a \*CGT small business entity for the income year; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (c) you do not carry on a \*business in the income year (other than in partnership); and
- (d) the CGT asset is not an interest in an asset of the partnership; and
- (e) the business you carry on as a partner in the partnership referred to in paragraph (a) is the business that you, at a time in the income year, carry on (as referred to in subparagraph 152-40(1)(a)(i) or paragraph 152-40(1)(b)) in relation to the CGT asset.

Note: For businesses that are winding up, see section 152-49 and subsection 328-110(5).

*Additional basic conditions for shares in a company or interests in a trust*

- (2) The following additional basic conditions must be satisfied if the \*CGT asset is a \*share in a company, or an interest in a trust, (the **object entity**):
  - (a) the CGT asset would still satisfy the active asset test (see section 152-35) if the assumptions in subsection (2A) were made;
  - (b) if you do not satisfy the maximum net asset value test (see section 152-15)—you are carrying on a \*business just before the \*CGT event;
  - (c) either:
    - (i) the object entity would be a \*CGT small business entity for the income year; or
    - (ii) the object entity would satisfy the maximum net asset value test (see section 152-15);if the following assumptions were made:
    - (iii) the only CGT assets or \*annual turnovers considered were those of the object entity, each affiliate of the object entity, and each entity controlled by the object entity in a way described in section 328-125;
    - (iv) each reference in section 328-125 to 40% were a reference to 20%;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (v) no determination under subsection 328-125(6) were in force;
  - (d) just before the CGT event, either:
    - (i) you are a \*CGT concession stakeholder in the object entity; or
    - (ii) CGT concession stakeholders in the object entity together have a \*small business participation percentage in you of at least 90%.
- (2A) For the purposes of paragraph (2)(a), in working out whether subsection 152-40(3) applies at a given time (the *test time*) assume that:
- (a) an asset of a company or trust is covered by neither:
    - (i) subparagraph 152-40(3)(b)(ii) (about financial instruments); nor
    - (ii) subparagraph 152-40(3)(b)(iii) (about cash);if the company or trust acquired that asset for a purpose that included assisting an entity to otherwise satisfy paragraph (2)(a) of this section; and
  - (b) paragraph 152-40(3)(b) does not cover an asset that:
    - (i) is a share in a company, or an interest in a trust, (the *later entity*); and
    - (ii) is held at the test time by the object entity directly or indirectly (through one or more interposed entities); and
  - (c) subparagraph 152-40(3)(b)(i) also covers each asset that:
    - (i) is held at the test time by a later entity covered by subsection (2B); and
    - (ii) is, for that later entity, an asset of a kind referred to in subparagraph 152-40(3)(b)(i), (ii) or (iii), as modified by paragraphs (a) and (b) of this subsection; and
  - (d) subject to paragraph (b) of this subsection, all of the assets of the object entity at the test time included all of the assets of each later entity at the test time; and
  - (e) for the purposes of paragraph 152-40(3)(b), the \*market value at the test time of an asset held by a later entity were the product of:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (i) the asset's market value, apart from this paragraph, at the test time; and
  - (ii) the object entity's \*small business participation percentage in the later entity at the test time.
- (2B) For the purposes of paragraph (2A)(c), this subsection covers a later entity if:
- (a) at the test time:
    - (i) your \*small business participation percentage in the later entity is at least 20%; or
    - (ii) you are a \*CGT concession stakeholder of the later entity; and
  - (b) either:
    - (i) the later entity would be a \*CGT small business entity for the income year that includes the test time; or
    - (ii) the later entity would satisfy the maximum net asset value test (see section 152-15) for a notional CGT event taken to have happened at the test time;if the following assumptions were made:
    - (iii) the only \*CGT assets or \*annual turnovers considered were those of the later entity and of the entities referred to in subparagraph (2)(c)(iii);
    - (iv) each reference in section 328-125 to 40% were a reference to 20%;
    - (v) no determination under subsection 328-125(6) were in force.

*Additional basic condition for CGT events involving certain rights or interests in relation to the income or capital of a partnership*

- (2C) If the \*CGT event involves the creation, transfer, variation or cessation of a right or interest that would entitle an entity to:
- (a) an amount of the income or capital of a partnership; or
  - (b) an amount calculated by reference to a partner's entitlement to an amount of income or capital of a partnership;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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it is an additional basic condition that the right or interest is a \*membership interest of the entity in the partnership:

- (c) immediately after the CGT event happens; or
- (d) if the CGT event involved the cessation of the right or interest—immediately before the CGT event happens.

*Extra conditions for some concessions*

- (3) In addition to the basic conditions in this section, some of the concessions in this Division have extra conditions that must be satisfied for the concession to be available. These extra conditions are set out in the relevant Subdivisions.

*Special rules for certain CGT events*

- (4) Subdivisions 152-B and 152-C do not apply to \*CGT events J2, J5 and J6. In addition, Subdivision 152-E does not apply to CGT events J5 and J6.

Note 1: Those CGT events are about previous applications of the roll-over in Subdivision 152-E.

Note 2: This Subdivision does not apply to CGT events J5 and J6 in relation to the retirement exemption (see subsection 152-305(4)).

**152-12 Special conditions for CGT event D1**

- (1) Paragraphs 152-10(1)(a) and (d) do not apply in the case of \*CGT event D1.
- (2) Instead, it is a basic condition that the right you create that triggers the \*CGT event must be inherently connected with a \*CGT asset of yours that satisfies the active asset test (see section 152-35).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Maximum net asset value test

### 152-15 Maximum net asset value test

You satisfy the maximum net asset value test if, just before the \*CGT event, the sum of the following amounts does not exceed \$6,000,000:

- (a) the \*net value of the CGT assets of yours;
- (b) the net value of the CGT assets of any entities \*connected with you;
- (c) the net value of the CGT assets of any \*affiliates of yours or entities connected with your affiliates (not counting any assets already counted under paragraph (b)).

Note 1: Some assets are not included in the definition of *net value of the CGT assets*: see subsections 152-20(2), (3) and (4).

Note 2: The meaning of *connected with* is affected by section 152-78.

### 152-20 Meaning of *net value of the CGT assets*

#### *Meaning of net value of the CGT assets*

- (1) The *net value of the CGT assets* of an entity is the amount (whether positive, negative or nil) obtained by subtracting from the sum of the \*market values of those assets the sum of:
  - (a) the liabilities of the entity that are related to the assets; and
  - (b) the following provisions made by the entity:
    - (i) provisions for annual leave;
    - (ii) provisions for long service leave;
    - (iii) provisions for unearned income;
    - (iv) provisions for tax liabilities.

#### *Assets to be disregarded*

- (2) In working out the *net value of the CGT assets* of an entity:
  - (a) disregard \*shares, units or other interests (except debt) in another entity that is \*connected with the first-mentioned

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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entity or with an \*affiliate of the first-mentioned entity, but include any liabilities related to any such shares, units or interests; and

- (b) if the entity is an individual, disregard:
- (i) assets being used solely for the personal use and enjoyment of the individual, or the individual's \*affiliate (except a \*dwelling, or an \*ownership interest in a dwelling, that is the individual's main residence, including any adjacent land to which the main residence exemption can extend because of section 118-120); and
  - (ii) except for an amount included under subsection (2A), the \*market value of a dwelling, or an ownership interest in a dwelling, that is the individual's main residence (including any relevant adjacent land); and
  - (iii) a right to, or to any part of, any allowance, annuity or capital amount payable out of a \*superannuation fund or an \*approved deposit fund; and
  - (iv) a right to, or to any part of, an asset of a superannuation fund or of an approved deposit fund; and
  - (v) a policy of insurance on the life of an individual.

Note: The meaning of *connected with* is affected by section 152-78.

*Individual's dwelling*

- (2A) In working out the **net value of the CGT assets** of an individual, if:
- (a) a \*dwelling of the individual, an \*ownership interest in such a dwelling or any relevant adjacent land, was used, during all or part of the \*ownership period of the dwelling, by the individual to produce assessable income to a particular extent; and
  - (b) the individual satisfied paragraph 118-190(1)(c) (about interest deductibility) at least to some extent;
- include such amount as is reasonable having regard to the extent to which that paragraph was satisfied.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note: The net value of the CGT assets of the individual will be reduced by the same proportion of the individual's liabilities related to the dwelling, ownership interest or adjacent land.

*Net value of the CGT assets of others*

- (3) In working out the **net value of the CGT assets** of:
- (a) your \*affiliate; or
  - (b) an entity that is \*connected with your affiliate;
- include only those assets that are used, or held ready for use, in the carrying on of a \*business by you or another entity \*connected with you (whether the business is carried on alone or jointly with others).

Note: The meaning of **connected with** is affected by section 152-78.

- (4) However, disregard assets under subsection (3) that are used, or held ready for use, in the carrying on of a \*business by an entity that is \*connected with you only because of your \*affiliate.

Example: You and your husband sell a florist's business that you jointly carry on. Your husband also wholly owns a company that carries on a newsagency business. You yourself have no other involvement with the newsagency business.

Under subsection (4), you disregard the newsagency company's assets in working out whether you satisfy the maximum net asset value test because, although the company is "connected" with you, it is so connected only because of your affiliate (your husband).

Note: The meaning of **connected with** is affected by section 152-78.

*Effect of look-through earnout rights*

- (5) Despite subsections (1) to (4), in working out the **net value of the CGT assets** of an entity at the time just before the \*CGT event (the **valuing time**), you can make a choice under subsection (6) if:
- (a) at the valuing time, one or more of the entity's \*CGT assets were assets for which the entity later provided, or was later provided with, one or more \*financial benefits under one or more \*look-through earnout rights that were in existence at the valuing time; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) at the valuing time, one or more of the entity's CGT assets were look-through earnout rights relating to CGT assets of:
    - (i) one or more of the other entities referred to in section 152-15; or
    - (ii) one or more entities not referred to in that section; or
  - (c) you are the entity, and:
    - (i) the CGT event referred to in section 152-15 happened because you \*disposed of a CGT asset; and
    - (ii) your \*capital proceeds from the disposal were affected by one or more financial benefits provided to, or by, you under one or more look-through earnout rights;and no further financial benefits can be provided under any of those look-through earnout rights.
- Note: For paragraph (c), capital proceeds can be affected by financial benefits provided under a look-through earnout right (see section 116-120).
- (6) You can choose to treat the \*market value of each of the \*CGT assets first mentioned in the applicable paragraph of subsection (5) as if it were, at the valuing time, equal to:
    - (a) if paragraph (5)(a) applies—the first element of the CGT asset's \*cost base at the valuing time; or
    - (b) if subparagraph (5)(b)(i) applies—nil; or
    - (c) if subparagraph (5)(b)(ii) applies—the total of the financial benefits provided under the \*look-through earnout right after the valuing time; or
    - (d) if paragraph (5)(c) applies—those \*capital proceeds.
- Note: For paragraph (a), the first element of a CGT asset's cost base can be affected by financial benefits provided under a look-through earnout right (see section 112-36).
- (7) In working out the *net value of the CGT assets* of an entity at the valuing time, if:
    - (a) you make a choice under subsection (6) about a \*CGT asset of the entity that is a CGT asset covered by paragraph (5)(a) or (c); and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) a \*look-through earnout right covered by that paragraph is also a CGT asset of the entity;  
treat the \*market value of that right as if it were nil at the valuing time.

## Active asset test

### 152-35 Active asset test

- (1) A \*CGT asset satisfies the active asset test if:
- (a) you have owned the asset for 15 years or less and the asset was an \*active asset of yours for a total of at least half of the period specified in subsection (2); or
  - (b) you have owned the asset for more than 15 years and the asset was an active asset of yours for a total of at least 7<sup>1</sup>/<sub>2</sub> years during the period specified in subsection (2).
- (2) The period:
- (a) begins when you \*acquired the asset; and
  - (b) ends at the earlier of:
    - (i) the \*CGT event; and
    - (ii) if the relevant business ceased to be carried on in the 12 months before that time or any longer period that the Commissioner allows—the cessation of the business.

### 152-40 Meaning of *active asset*

- (1) A \*CGT asset is an *active asset* at a time if, at that time:
- (a) you own the asset (whether the asset is tangible or intangible) and it is used, or held ready for use, in the course of carrying on a \*business that is carried on (whether alone or in partnership) by:
    - (i) you; or
    - (ii) your \*affiliate; or
    - (iii) another entity that is \*connected with you; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) if the asset is an intangible asset—you own it and it is inherently connected with a business that is carried on (whether alone or in partnership) by you, your affiliate, or another entity that is connected with you.

Note 1: An intangible asset need satisfy only paragraph (a) or paragraph (b).

Note 2: The meaning of *connected with* in subparagraph (1)(a)(iii) and paragraph (b) is affected by section 152-78.

Note 3: An example of an asset that is inherently connected with a business is goodwill or the benefit of a restrictive covenant.

Note 4: For businesses that are winding up, see section 152-49 and subsection 328-110(5).

- (2) Subsection 392-20(1) is disregarded in determining, for the purposes of subsection (1) of this section, whether an entity is carrying on a \*business.

Note: An entity would be taken to be carrying on a primary production business under subsection 392-20(1) if the business is carried on by a trust and the entity is presently entitled to trust income.

- (3) A \*CGT asset is also an *active asset* at a given time if, at that time, you own it and:

- (a) it is either a \*share in a company that is an Australian resident at that time or an interest in a trust that is a \*resident trust for CGT purposes for the income year in which that time occurs; and

- (b) the total of:

- (i) the \*market values of the active assets of the company or trust; and  
(ii) the market value of any financial instruments of the company or trust that are inherently connected with a business that the company or trust carries on; and  
(iii) any cash of the company or trust that is inherently connected with such a business;

is 80% or more of the market value of all of the assets of the company or trust.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (3A) A \*share in a company, or an interest in a trust, mentioned in paragraph (3)(a) is an **active asset** at a time (the **later time**) if:
- (a) the share or interest was an active asset at an earlier time; and
  - (b) it is reasonable to conclude that the share or interest is still an active asset at the later time.

Note: This ensures that the 80% test does not need to be applied on a day to day basis.

- (3B) A \*share in a company, or an interest in a trust, mentioned in paragraph (3)(a) is an **active asset** at a time if:
- (a) the share or interest fails to meet the requirements under subsection (3) at that time; and
  - (b) the failure is of a temporary nature only.

Note: If a share in a company or an interest in a trust is chosen as a replacement asset, this ensures that a temporary failure of the 80% test does not automatically lead to CGT event J2 happening.

#### *Exceptions*

- (4) However, the following \*CGT assets cannot be **active assets**:
- (a) interests in an entity that is \*connected with you, other than \*shares and interests covered by subsection (3);
  - (b) shares in a company, other than:
    - (i) shares in a \*widely held company that are covered by subsection (3), (3A) or (3B) and held by a \*CGT concession stakeholder of the company; and
    - (ii) shares in any other company that are covered by subsection (3), (3A) or (3B);
  - (c) interests in a trust, other than:
    - (i) interests in a trust to which subsection (5) applies that are covered by subsection (3), (3A) or (3B) and held by a CGT concession stakeholder of the trust; and
    - (ii) interests in any other trust that are covered by subsection (3), (3A) or (3B);
  - (d) financial instruments (such as loans, debentures, bonds, promissory notes, futures contracts, forward contracts,

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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currency swap contracts and a right or option in respect of a share, security, loan or contract);

- (e) an asset whose main use by you is to \*derive interest, an annuity, rent, royalties or foreign exchange gains unless:
  - (i) the asset is an intangible asset and has been substantially developed, altered or improved by you so that its \*market value has been substantially enhanced; or
  - (ii) its main use for deriving rent was only temporary.

Example: A company uses a house purely as an investment property and rents it out. The house is not an **active asset** because the company is not using the house in the course of carrying on a business. If, on the other hand, the company ran the house as a guest house the house would be an **active asset** because the company would be using it to carry on a business and not to derive rent.

Note: The meaning of **connected with** is affected by section 152-78.

- (4A) For the purposes of paragraph (4)(e), in determining the main use of an asset:
  - (a) disregard any personal use or enjoyment of the asset by you; and
  - (b) treat any use by your \*affiliate, or an entity that is \*connected with you, as your use.

Note: The meaning of **connected with** is affected by section 152-78.

- (5) This subsection applies to a trust if:
  - (a) interests in the trust are listed for quotation in the official list of an \*approved stock exchange; or
  - (b) the trust has more than 50 \*members, unless the trust is a discretionary trust or a trust where at least one of the following conditions is met during an income year:
    - (i) no more than 20 persons held, or had the right to acquire or become the holders of, \*membership interests representing at least 75% of the value of the membership interests in the trust;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (ii) if there are \*trust voting interests in the trust—at least 75% of the trust voting interests in the trust was capable of being controlled by no more than 20 persons;
- (iii) at least 75% of the amount of any distribution made by the trustee during the year was made to no more than 20 persons;
- (iv) if no distribution was made by the trustee during the year—the Commissioner is of the opinion that, if a distribution had been made during the year, at least 75% of the distribution would have been made to no more than 20 persons.

### **152-45 Continuing time periods for involuntary disposals**

#### *Asset compulsorily acquired, lost or destroyed*

- (1) If a \*CGT asset is an asset (the ***new asset***) you acquired to satisfy the requirement in subsection 124-70(2) or 124-75(2) for a roll-over under Subdivision 124-B, then the active asset test in section 152-35 applies as if:
  - (a) you had acquired the new asset when you acquired the old asset; and
  - (b) the new asset had been your \*active asset at all times when the original asset was your active asset; and
  - (c) the new asset had not been your active asset at all times when the original asset was not your active asset.

Note 1: Subdivision 124-B allows you to choose a roll-over if your CGT asset is compulsorily acquired, lost or destroyed.

Note 2: If this subsection applies to a CGT asset, then section 152-115 (which is about continuing time periods) will apply for the 15-year exemption.

#### *Assets replaced during FSR transition (same owner roll-overs)*

- (1A) If a \*CGT asset is an asset (the ***new asset***) you acquired in a situation covered by former section 124-880, 124-885 or 124-890, then the active asset test in section 152-35 applies as if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 152-45

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- (a) you had acquired the new asset when you acquired the original asset; and
- (b) the new asset had been your \*active asset at all times when the original asset was your active asset; and
- (c) the new asset had not been your active asset at all times when the original asset was not your active asset.

Note 1: Former Subdivision 124-O provided a roll-over for certain CGT assets that came to an end as a result of an FSR transition.

Note 2: If this subsection applies to a CGT asset, then section 152-115 (which is about continuing time periods) will apply for the 15-year exemption.

*Assets replaced during FSR transition (new owner roll-overs)*

- (1B) If a \*CGT asset is an asset (the *new asset*) acquired in a situation covered by former section 124-900, 124-905 or 124-910, then the active asset test in section 152-35 applies as if:
- (a) the new owner had acquired the new asset when the original owner acquired the original asset; and
  - (b) the new asset had been the \*active asset of the new owner at all times when the original asset was the original owner's active asset; and
  - (c) the new asset had not been the active asset of the new owner at all times when the original asset was not the original owner's active asset.

Note 1: Former Subdivision 124-O provided a roll-over for certain CGT assets that came to an end as a result of an FSR transition.

Note 2: If this subsection applies to a CGT asset, then section 152-115 (which is about continuing time periods) will apply for the 15-year exemption.

*Marriage or relationship breakdowns*

- (2) If you were the transferee of a \*CGT asset for which there has been a roll-over under Subdivision 126-A, then you may choose that the active asset test in section 152-35 applies as if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) you had acquired the asset when the transferor acquired the asset; and
- (b) the asset had been an \*active asset of yours at all times when the asset was an active asset of the transferor; and
- (c) the asset had not been an active asset of yours at all times when the asset was not an active asset of the transferor.

Note 1: Section 103-25 tells you when the choice must be made.

Note 2: There is a roll-over under Subdivision 126-A if CGT assets are transferred because of a marriage or relationship breakdown.

Note 3: If you don't make the choice, the time of acquisition is simply the time of the transfer.

Note 4: Making the choice here has certain consequences for the 15-year exemption: see section 152-115.

## Treatment of passively held CGT assets

### 152-47 Spouses or children taken to be affiliates for certain passively held CGT assets

- (1) This section applies if:
  - (a) one entity (the **asset owner**) owns a \*CGT asset (whether the asset is tangible or intangible); and
  - (b) either:
    - (i) the asset is used, or held ready for use, in the course of carrying on a \*business in an income year by another entity (the **business entity**); or
    - (ii) the asset is inherently connected with a business that is carried on in an income year by another entity (the **business entity**); and
  - (c) the business entity is not (apart from this section) an \*affiliate of, or \*connected with, the asset owner.

Note: The meaning of **connected with** an entity is affected by section 152-78.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 152-48

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- (2) For the purposes of this Subdivision, in determining whether the business entity is an \*affiliate of, or is \*connected with, the asset owner, take the following to be affiliates of an individual:
- (a) a \*spouse of the individual;
  - (b) a \*child of the individual, being a child who is under 18 years.
- (3) If an entity is an \*affiliate of, or \*connected with, another entity as a result of subsection (2), then the \*spouse or \*child mentioned in that subsection is, in addition, taken to be an affiliate of the individual for the purposes of this Subdivision, and for the purposes of sections 328-110 to 328-125 to the extent that they relate to this Subdivision.
- Example: The spouse or child mentioned in subsection (2) is taken to be an affiliate of the individual for the purposes of working out which entities are affiliates of or connected with entities under section 152-48.
- (4) To avoid doubt, subsection (2) applies:
- (a) for the purposes of reducing or disregarding, under this Division, any \*capital gain from any \*CGT asset; but
  - (b) only while:
    - (i) a \*spouse remains a spouse; or
    - (ii) a \*child remains a child who is under 18 years.

**152-48 Working out an entity's aggregated turnover for passively held CGT assets**

- (1) This section applies for the purposes of section 328-115 to determine whether an entity (the *test entity*) is a \*CGT small business entity for the purposes of subsection 152-10(1A) or (1B).
- (2) An entity (the *deemed entity*) is taken to be an \*affiliate of, or \*connected with, the test entity (as the case requires) if:
- (a) the deemed entity is an affiliate of, or connected with, the entity that owns the \*CGT asset referred to in subsection 152-10(1A) or (1B); and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) the deemed entity is not (apart from this section) an affiliate of, or connected with, the test entity.

Note: Paragraphs (a) and (b)—the meaning of *connected with* is affected by section 152-78.

- (3) If:
  - (a) the entity that owns the \*CGT asset referred to in subsection 152-10(1B) is a partner in 2 or more partnerships; and
  - (b) the asset is:
    - (i) used, or held ready for use, in the course of carrying on a \*business that is carried on by at least 2 of those partnerships; or
    - (ii) inherently connected with businesses that are carried on by at least 2 of those partnerships;then, each partnership referred to in paragraph (b) that is not (apart from this section) \*connected with the test entity is taken to be connected with the test entity.

### **152-49 Businesses that are winding up**

- (1) This section applies to an entity in an income year (the *CGT event year*) if:
  - (a) a \*business that the entity previously carried on (including in partnership) is being wound up in that year; and
  - (b) either:
    - (i) the asset was used, or held ready for use, in the course of carrying on the business at a time in the income year in which the business stopped being carried on; or
    - (ii) if the asset is an intangible asset—the asset was inherently connected with the business that was carried on at a time in the income year in which the business stopped being carried on.
- (2) For the purposes of paragraphs 152-40(1)(a) and (b) as they apply for the purposes of paragraphs 152-10(1A)(d) and (1B)(e):

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 152-50

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- (a) the entity is taken to carry on the \*business at a time in the CGT event year; and
- (b) either:
  - (i) the \*CGT asset is taken to be used, or held ready for use, in the course of carrying on the business at that time; or
  - (ii) if the asset is an intangible asset—the CGT asset is taken to be inherently connected with the business at that time.

Note: The entity might also be taken to be a small business entity in the CGT event year (see subsection 328-110(5)).

## Significant individual test

### 152-50 Significant individual test

An entity satisfies the significant individual test if the entity had at least one \*significant individual just before the \*CGT event.

### 152-55 Meaning of *significant individual*

An individual is a *significant individual* in a company or a trust at a time if, at that time, the individual has a \*small business participation percentage in the company or trust of at least 20%.

## CGT concession stakeholder

### 152-60 Meaning of *CGT concession stakeholder*

An individual is a *CGT concession stakeholder* of a company or trust at a time if the individual is:

- (a) a \*significant individual in the company or trust; or
- (b) a spouse of a significant individual in the company or trust, if the spouse has a \*small business participation percentage in the company or trust at that time that is greater than zero.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## Small business participation percentage

### 152-65 Small business participation percentage

An entity's *small business participation percentage* in another entity at a time is the percentage that is the sum of:

- (a) the entity's \*direct small business participation percentage in the other entity at that time; and
- (b) the entity's \*indirect small business participation percentage in the other entity at that time.

### 152-70 Direct small business participation percentage

- (1) An entity holds a *direct small business participation percentage* at the relevant time in an entity equal to the percentage worked out using this table:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 152-70

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**An entity's direct small business participation percentage**

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In this entity:	Is:
1 A company	This percentage that the entity has because of holding the legal and equitable interests in *shares in the company: (a) the percentage of the voting power in the company; or (b) the percentage of any *dividend that the company may pay; or (c) the percentage of any distribution of capital that the company may make; or, if they are different, the smaller or smallest.
2 A trust (where entities have entitlements to all the income and capital of the trust)	This percentage: (a) the percentage of any distribution of income that the trustee may make to which the entity would be beneficially entitled; or (b) the percentage of any distribution of capital that the trustee may make to which the entity would be beneficially entitled; or, if they are different, the smaller.
3 A trust (where entities do not have entitlements to all the income and capital of the trust)	This percentage: (a) if the trustee makes distributions of income during the income year (the <b>relevant year</b> ) in which that time occurs—the percentage of the distributions to which the entity was beneficially entitled; or (b) if the trustee makes distributions of capital during the relevant year—the percentage of the distributions to which the entity was beneficially entitled; or, if 2 different percentages are applicable, the smaller.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Companies*

- (2) For item 1 of the table, ignore \*redeemable shares.
- (3) Paragraph (a) of item 1 of the table does not apply if the entity holds the legal and equitable interests in the \*shares jointly with another entity.

*Discretionary trusts*

- (4) Subsections (5) and (6) apply for the purpose of working out the \*direct small business participation percentage in an entity in connection with a \*CGT event that happened in an income year (the **CGT event year**), if:
  - (a) the entity is a trust (where entities do not have entitlements to all the income and capital of the trust); and
  - (b) during the relevant year mentioned in item 3 of the table in subsection (1) (disregarding subsection (5)), the trustee mentioned in that item:
    - (i) does not make a distribution of income; and
    - (ii) does not make a distribution of capital.
- (5) Treat the references in that item to the relevant year as being references to:
  - (a) if the trustee made a distribution of income or capital during the CGT event year—the CGT event year; or
  - (b) otherwise—the last income year before the CGT event year in which the trustee did make a distribution of income or capital.
- (6) Despite subsection (5), an entity holds a **direct small business participation percentage** of 0% in the trust at the relevant time if either:
  - (a) the trust:
    - (i) had a \*net income for the relevant year; and
    - (ii) did not have a \*tax loss for the relevant year; or
  - (b) the trustee did not make a distribution of income or capital at any time before the end of the CGT event year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 152-75

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**152-75 Indirect small business participation percentage**

- (1) Work out the *indirect small business participation percentage* that an entity (the *holding entity*) holds at a particular time in another entity (the *test entity*) by multiplying:
- (a) the holding entity's \*direct small business participation percentage (if any) in another entity (the *intermediate entity*) at that time; by
  - (b) the sum of:
    - (i) the intermediate entity's direct small business participation percentage (if any) in the test entity at that time; and
    - (ii) the intermediate entity's indirect small business participation percentage (if any) in the test entity at that time (as worked out under one or more other applications of this section).

Note: When testing an intermediate entity's indirect small business participation percentage in another entity, the intermediate entity becomes the holding entity.

- (2) If there is more than one intermediate entity to which paragraph (1)(a) applies at that time, the holding entity's *indirect small business participation percentage* is the sum of the percentages worked out under subsection (1) in relation to each of those intermediate entities.

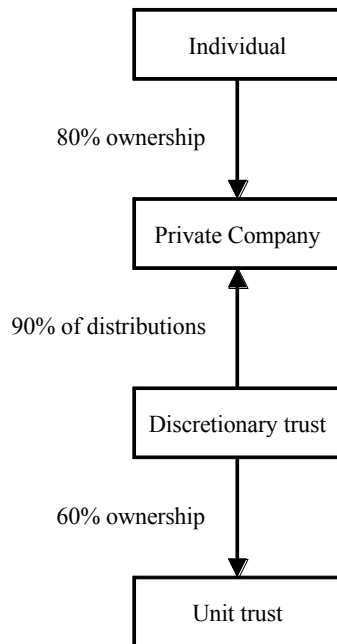
Example: The individual mentioned in the diagram has an indirect small business participation percentage in the unit trust.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Multiplying the percentages as mentioned in subsection (1) produces small business participation percentage of 43.2%.

If the individual had a direct small business participation percentage of 10% in the unit trust, that would be added to the individual's indirect small business participation percentage to produce a small business participation percentage in the trust of 53.2%.

## Nomination of controllers of discretionary trust

### 152-78 Trustee of discretionary trust may nominate beneficiaries to be controllers of trust

- (1) This section applies for the purposes of determining whether an entity is \*connected with you, for the purposes of:
- (a) this Subdivision; and
  - (b) sections 328-110, 328-115 and 328-125 so far as they relate to this Subdivision.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 152-80

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- (2) The trustee of a discretionary trust may nominate not more than 4 beneficiaries as being controllers of the trust for an income year (the *relevant income year*) for which the trustee did not make a distribution of income or capital if the trust had a \*tax loss, or no \*net income, for that year.
- (3) A nomination under subsection (2) has effect as if each nominated beneficiary controlled the trust for the relevant income year in a way described in section 328-125.

Note: This means each nominated beneficiary is connected with the trust.

- (4) A nomination under subsection (2) must:
  - (a) be in writing; and
  - (b) be signed by the trustee and by each nominated beneficiary.

**CGT event happens to asset or interest within 2 years of an individual's death**

**152-80 CGT event happens to an asset or interest within 2 years of individual's death**

- (1) This section applies if:
  - (a) a \*CGT asset:
    - (i) forms part of the estate of a deceased individual; or
    - (ii) was owned by joint tenants and one of them dies; and
  - (b) any of the following applies:
    - (i) the asset devolves to the individual's \*legal personal representative;
    - (ii) the asset \*passes to a beneficiary of the individual;
    - (iii) an interest in the asset is \*acquired by the surviving joint tenant or tenants (as the case may be) as mentioned in section 128-50;
    - (iv) the asset devolves to a trustee of a trust established by the will of the individual; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (c) the deceased individual referred to in subparagraph (a)(i) or (ii) would have been entitled to reduce or disregard a \*capital gain under this Division if a \*CGT event had happened in relation to the CGT asset immediately before his or her death; and
  - (d) a CGT event happens in relation to the CGT asset within 2 years of the individual's death.
- (2) A person mentioned in subsection (2A) is entitled to reduce or disregard a \*capital gain under this Division in the same way as the deceased individual would have been entitled to as if:
- (a) paragraph 152-105(d) only required the deceased individual to have been 55 or over, or permanently incapacitated, at the time of the \*CGT event referred to in paragraph (1)(c) of this section; and
  - (b) paragraph 152-305(1)(b) did not apply.
- (2A) The following persons (as the case requires) are entitled to reduce or disregard a \*capital gain under this Division in accordance with subsection (2):
- (a) the \*legal personal representative of the individual;
  - (b) the beneficiary of the individual;
  - (c) the surviving joint tenant or tenants;
  - (d) the trustee or a beneficiary of the trust.
- (3) The Commissioner may extend the time limit in paragraph (1)(d).

## **Subdivision 152-B—Small business 15-year exemption**

### **Guide to Subdivision 152-B**

#### **152-100 What this Subdivision is about**

A CGT small business entity can disregard a capital gain arising from a CGT asset that it has owned for at least 15 years if certain conditions are met. Capital losses are not affected.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 152-100

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Also, any amount of income a company or trust derives from a CGT event covered by this Subdivision is neither assessable income nor exempt income. If the company or trust makes payments to its CGT concession stakeholders that are attributable to the exempt amount, the payments will not be taken into account in determining the taxable income of the company, trust or recipient.

The main conditions are that:

- the basic conditions for relief in Subdivision 152-A are satisfied;
- the entity continuously owned the asset for the 15-year period leading up to the CGT event;
- if the entity is an individual, the individual retires or is permanently incapacitated;
- if the entity is a company or trust, the entity had a significant individual for a total of at least 15 years during which the entity owned the asset and the individual who was the significant individual just before the CGT event retires or is permanently incapacitated.

The Subdivision also allows time periods to continue to run if there has been a roll-over because of marriage or relationship breakdown or compulsory acquisition.

**Table of sections**

152-105	15-year exemption for individuals
152-110	15-year exemption for companies and trusts
152-115	Continuing time periods for involuntary disposals
152-125	Payments to company's or trust's CGT concession stakeholders are exempt

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **152-105 15-year exemption for individuals**

If you are an individual, you can disregard any \*capital gain arising from a \*CGT event if all of the following conditions are satisfied:

- (a) the basic conditions in Subdivision 152-A are satisfied for the gain;
- (b) you continuously owned the \*CGT asset for the 15-year period ending just before the CGT event;

Note: Section 152-115 allows for continuation of the period if there is an involuntary disposal of the asset.

- (c) if the CGT asset is a \*share in a company or an interest in a trust—the company or trust had a \*significant individual for a total of at least 15 years (even if the 15 years was not continuous and it was not always the same significant individual) during which you owned the CGT asset;
- (d) either:
  - (i) you are 55 or over at the time of the CGT event and the event happens in connection with your retirement; or
  - (ii) you are permanently incapacitated at the time of the CGT event.

### **152-110 15-year exemption for companies and trusts**

- (1) An entity that is a company or trust can disregard any \*capital gain arising from a \*CGT event if all of the following conditions are satisfied:

- (a) the basic conditions in Subdivision 152-A are satisfied for the gain;
- (b) the entity continuously owned the \*CGT asset for the 15-year period ending just before the CGT event;

Note: Section 152-115 allows for continuation of the period if there is an involuntary disposal of the asset.

- (c) the entity had a \*significant individual for a total of at least 15 years (even if the 15 years was not continuous and it was not always the same significant individual) during which the entity owned the CGT asset;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 152-115

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- (d) an individual who was a significant individual of the company or trust just before the CGT event either:
  - (i) was 55 or over at that time and the event happened in connection with the individual's retirement; or
  - (ii) was permanently incapacitated at that time.
- (1A) For the purposes of paragraphs (1)(b) and (c), disregard subsection 149-30(1A) (which applies if an asset stops being a pre-CGT asset).
- (2) Any \*ordinary income or \*statutory income the company or trust \*derives from a \*CGT event that would be covered by subsection (1) (assuming the event gave rise to a \*capital gain, even if it didn't) is neither assessable income nor \*exempt income.

*Exception*

- (3) However, subsection (2) does not apply to income \*derived by a company or trust as a result of a \*balancing adjustment event occurring to a \*depreciating asset:
  - (a) whose decline in value is worked out under Division 40; or
  - (b) deductions for which are calculated under Division 328.

**152-115 Continuing time periods for involuntary disposals**

*Asset compulsorily acquired, lost or destroyed*

- (1) If a \*CGT asset is an asset (the **new asset**) you acquired to satisfy the requirement in subsection 124-70(2) or 124-75(2) for a roll-over under Subdivision 124-B, then paragraphs 152-105(b) and 152-110(1)(b) and (c) (the 15-year and significant individual rules) apply as if you had acquired the new asset when you acquired the original asset.

Note: Subdivision 124-B allows you to choose a roll-over if your CGT asset is compulsorily acquired, lost or destroyed.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*Assets replaced during FSR transition (same owner roll-overs)*

- (1A) If a \*CGT asset is an asset (the **new asset**) you acquired in a situation covered by former section 124-880, 124-885 or 124-890, then paragraphs 152-105(b) and 152-110(1)(b) and (c) (the 15-year and significant individual rules) apply as if you had acquired the new asset when you acquired the original asset.

Note: Former Subdivision 124-O provided a roll-over for certain CGT assets that came to an end as a result of an FSR transition.

*Asset replaced during FSR transition (new owner roll-overs)*

- (1B) If a \*CGT asset is an asset (the **new asset**) acquired in a situation covered by former section 124-900, 124-905 or 124-910, then paragraphs 152-105(b) and 152-110(1)(b) and (c) (the 15-year and significant individual rules) apply as if the new owner had acquired the new asset when the original owner acquired the original asset.

Note: Former Subdivision 124-O provided a roll-over for certain CGT assets that came to an end as a result of an FSR transition.

*Marriage or relationship breakdowns*

- (2) If you made the choice mentioned in subsection 152-45(2) for a \*CGT asset, then paragraphs 152-105(b) and (c) and 152-110(1)(b) and (c) (the 15-year and significant individual rules) apply as if you had acquired the asset when the transferor acquired it.

Note: There is a roll-over under Subdivision 126-A if CGT assets are transferred because of a marriage or relationship breakdown.

*Restructures of small businesses*

- (3) If section 328-450 or 328-455 applies in relation to the transfer of an asset to you, then paragraphs 152-105(b) and (c) and 152-110(1)(b) and (c) (the 15-year and significant individual rules) apply as if:
- (a) you had acquired the asset when the entity transferring the asset acquired it; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 152-125

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- (b) in a case where, for the purposes of applying those paragraphs, the time when that entity acquired the asset was provided for by this subsection—you had acquired the asset at that time.

**152-125 Payments to company's or trust's CGT concession stakeholders are exempt**

- (1) This section applies if:
- (a) one or more of the following apply:
    - (i) under section 152-110, a \*capital gain (the *exempt amount*) of a company or trust is disregarded;
    - (ii) under section 152-110, an amount of income (the *exempt amount*) is \*non-assessable non-exempt income of a company or trust;
    - (iii) subparagraph (i) of this paragraph would have applied to an amount (the *exempt amount*) except that the capital gain was disregarded anyway because the relevant \*CGT asset was \*acquired before 20 September 1985;
    - (iv) subparagraph (i) of this paragraph would have applied to an amount (the *exempt amount*) if subsection 149-30(1A) and section 149-35 had not applied to the relevant asset; and
  - (b) the company or trust makes one or more payments relating to the exempt amount to an individual (whether directly or indirectly through one or more interposed entities) before the later of:
    - (i) 2 years after the relevant \*CGT event; and
    - (ii) if the relevant CGT event happened because the company or trust \*disposed of the relevant CGT asset—6 months after the latest time a possible \*financial benefit becomes or could become due under a \*look-through earnout right relating to that CGT asset and the disposal; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) the individual was a \*CGT concession stakeholder of the company or trust just before the relevant CGT event.

Note: A normal business payment, for example, a payment of wages, would not be made “in relation to the exempt amount”.

- (2) In determining the taxable income of the company, the trust, the individual, or any of the interposed entities, disregard the total amount of the payment or payments made to the \*CGT concession stakeholder, up to the following limit:

$$\frac{\text{Stakeholder's participation percentage}}{\text{percentage}} \times \text{Exempt amount}$$

where:

**stakeholder's participation percentage** means:

- (a) in the case of a company or a trust referred to in item 2 of the table in subsection 152-70(1)—the stakeholder's \*small business participation percentage in the company or trust just before the relevant \*CGT event; or
- (b) in the case of a trust referred to in item 3 of that table—the amount (expressed as a percentage) worked out using the following formula:

$$\frac{100}{\text{Number of *CGT concession stakeholders of the trust just before the *CGT event}}$$

- (3) If a company makes such a payment, this Act applies to the payment, to the extent that it is less than or equal to the limit mentioned in subsection (2), as if:
- (a) it were not a \*dividend; and
- (b) it were not a \*frankable distribution.
- (4) The Commissioner may extend the time limit under paragraph (1)(b).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 152-200

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**Subdivision 152-C—Small business 50% reduction**

**Guide to Subdivision 152-C**

**152-200 What this Subdivision is about**

This Subdivision tells you how to apply the small business CGT concessions mentioned in step 4 of the method statement in subsection 102-5(1).

A capital gain is reduced by 50% if the basic conditions in Subdivision 152-A are satisfied.

If the capital gain has already been reduced by the discount percentage, the 50% reduction under this Subdivision applies to that reduced gain.

The capital gain may be further reduced by the small business retirement exemption or a small business rollover, or both.

Alternatively, you may choose not to apply the 50% reduction and instead apply the small business retirement exemption or small business rollover.

None of these rules apply if the 15-year exemption already applies to the capital gain, since such a gain is disregarded anyway.

**Table of sections**

152-205	You get the small business 50% reduction
152-210	You may also get the small business retirement exemption and small business roll-over relief
152-215	15-year rule has priority
152-220	You may choose not to apply this Subdivision

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **152-205 You get the small business 50% reduction**

The amount of a \*capital gain remaining after applying step 3 of the method statement in subsection 102-5(1) is reduced by 50%, if the basic conditions in Subdivision 152-A are satisfied for the gain.

**Example:** For an individual (other than one who opts to claim indexation instead of the discount), the discount percentage that applies under step 3 of the method statement is 50%. Therefore, the combined effect of the discount percentage and this section would be to reduce the original capital gain by a total of 75%.

For an individual who opts to claim indexation, or a company, there is no discount percentage, so the individual or company would simply get the 50% reduction under this section.

### **152-210 You may also get the small business retirement exemption and small business roll-over relief**

- (1) The \*capital gain, as reduced under section 152-205, may also qualify for:
  - (a) the small business retirement exemption (see Subdivision 152-D); or
  - (b) a small business roll-over (see Subdivision 152-E);or both.
- (2) If it qualifies for both of those concessions, you may choose which order to apply them in.

### **152-215 15-year rule has priority**

This Subdivision does not apply to a \*capital gain to which Subdivision 152-B (15-year exemption) applies.

**Note:** Under that Subdivision, such a gain is entirely disregarded, so there is no need for any further concession to apply.

### **152-220 You may choose not to apply this Subdivision**

You may choose not to apply the reduction mentioned in section 152-205 to a particular \*capital gain.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 152-300

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Note: Making this choice might allow a company or trust to make larger tax-free payments under the small business retirement exemption: see section 152-325.

**Subdivision 152-D—Small business retirement exemption**

**Guide to Subdivision 152-D**

**152-300 What this Subdivision is about**

You can choose to disregard a capital gain from a CGT event happening to a CGT asset of your small business if the capital proceeds from the event are used in connection with your retirement.

There is a lifetime limit of \$500,000 for all choices that can be made in respect of an individual under this Subdivision.

You may choose not to apply the concession in section 152-205 (small business 50% reduction) before this one. For an additional concession, see also Subdivision 152-E (small business roll-over).

You do not need to satisfy the basic conditions for this exemption in relation to CGT events J5 and J6.

**Table of sections**

152-305	Choosing the exemption
152-310	Consequences of choice
152-315	Choosing the amount to disregard
152-320	Meaning of CGT retirement exemption limit
152-325	Company or trust conditions
152-330	15-year rule has priority

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## 152-305 Choosing the exemption

### *Individual*

- (1) If you are an individual, you can choose to disregard all or part of a \*capital gain if:
- (a) the basic conditions in Subdivision 152-A are satisfied for the gain; and
  - (b) if you are under 55 just before you make the choice—you contribute an amount equal to the asset's \*CGT exempt amount to a \*complying superannuation fund or an \*RSA; and
- Note: For the non-deductibility of the contribution, see subsection 290-150(4).
- (c) the contribution is made:
    - (i) if the relevant CGT event is CGT event J2, J5 or J6—when you made the choice; or
    - (ii) otherwise—at the later of when you made the choice and when you received the proceeds.

Note 1: Section 103-25 tells you when the choice must be made.

- (1A) If you receive the \*capital proceeds from the \*CGT event in instalments, paragraphs (1)(b) and (c) apply to each instalment in succession (up to the asset's \*CGT exempt amount).
- (1B) For the purposes of (but without limiting) subsection (1A), you are treated as receiving the \*capital proceeds in instalments if:
- (a) the \*CGT event happened because you \*disposed of the \*CGT asset; and
  - (b) the capital proceeds from the disposal are increased by one or more \*financial benefits that you receive under a \*look-through earnout right.

### *Company or trust*

- (2) A company or a trust (except a public entity—see subsection (3)) can also choose to disregard such an amount if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 152-310

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- (a) the basic conditions in Subdivision 152-A are satisfied for the \*capital gain; and
- (b) the entity satisfies the significant individual test (see section 152-50); and
- (c) the company or trust conditions in section 152-325 are satisfied.

Note: Section 103-25 tells you when the choice must be made.

- (3) Entities of a kind referred to in subsection 328-125(8) cannot make the choice.
- (4) Paragraphs (1)(a) and (2)(a) do not apply if the \*capital gain arose from \*CGT event J5 or J6.

**152-310 Consequences of choice**

*Consequences in all cases*

- (1) If the individual, company or trust makes the choice mentioned in section 152-305 for any part of the \*capital gain from the \*CGT asset, that part of the capital gain equal to its \*CGT exempt amount is disregarded.

*Additional consequences in relation to company or trust*

- (2) Any payment or part of one the company or trust makes to comply with section 152-325:
  - (a) is not assessable income, and is not \*exempt income, of the \*CGT concession stakeholder to whom it is made; and
  - (b) cannot be deducted from the company's or trust's assessable income.

*Additional consequences in relation to interposed entities*

- (3) If:
  - (a) an entity (the ***paying entity***) receives a payment (whether directly or indirectly through one or more interposed entities)

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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that a company or trust makes to comply with section 152-325; and

- (b) the paying entity passes on the payment to the \*CGT concession stakeholder or another interposed entity;

then:

- (c) the payment cannot be deducted from the paying entity's assessable income; and  
(d) the payment received by the paying entity is not assessable income and is not \*exempt income.

### **152-315 Choosing the amount to disregard**

- (1) You can choose to disregard all or part of each \*capital gain to which this Subdivision applies.

Note 1: You make capital gains equal to any parts that you do not choose to disregard.

Note 2: Section 103-25 tells you when the choice must be made.

- (2) However, the choice must be made in a way that ensures that:
- (a) for an individual—your \*CGT retirement exemption limit is not exceeded; or  
(b) for a company or trust—the CGT retirement exemption limit of each individual for whom the choice is made is not exceeded.

- (3) The amount chosen for the asset is its **CGT exempt amount**.

- (4) The \*CGT exempt amount must be specified in writing.

- (5) If a company or trust is making the choice and it has more than one \*CGT concession stakeholder, it must specify in writing the percentage of each \*CGT asset's \*CGT exempt amount that is attributable to each of those stakeholders. One or more of the percentages may be nil, but all of the percentages must add up to 100%.

Example: Daryl is a significant individual in a company. The company specifies 90% for Daryl under subsection (5) (which means that the percentage

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Section 152-320**

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specified for the other stakeholder must be 10%). Daryl's retirement exemption limit is \$500,000.

To determine whether subsection (2) is complied with, Daryl would take 90% of the asset's CGT exempt amount, add that to amounts previously specified in choices made by or for him under this Subdivision and see whether the total exceeds \$500,000.

Note: Subsections (4) and (5) are exceptions to the general rule about choices in section 103-25.

**152-320 Meaning of *CGT retirement exemption limit***

- (1) An individual's *CGT retirement exemption limit* at a time is \$500,000 reduced by the \*CGT exempt amounts of \*CGT assets specified in choices previously made by or for the individual under this Subdivision.

Note: The \$500,000 is also reduced by any reduction under old provisions about reduction of the CGT retirement exemption limit: see item 62 of Schedule 1 to the *New Business Tax System (Capital Gains Tax) Act 1999*.

- (2) If the individual was one of at least 2 \*CGT concession stakeholders of a company or trust, and the company or trust made a choice for the individual, only the individual's percentage (see subsection 152-315(5)) of the assets' \*CGT exempt amounts is taken into account under subsection (1) for that choice.

**152-325 Company or trust conditions**

*Company or trust to make payments*

- (1) A company or trust must make a payment (whether directly or indirectly through one or more interposed entities) to at least one of its \*CGT concession stakeholders if:
- (a) the company or trust makes a choice under this Subdivision to disregard a \*capital gain from \*CGT event J2, J5 or J6; or
  - (b) the company or trust receives an amount of \*capital proceeds from a \*CGT event for which it makes a choice under this Subdivision.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (2) If the company or trust receives the \*capital proceeds from the CGT event in instalments, subsection (1) applies to each instalment in succession (up to the relevant \*CGT exempt amount).
- (2A) For the purposes of (but without limiting) subsection (2), the company or trust is treated as receiving the \*capital proceeds in instalments if:
  - (a) the \*CGT event happened because the company or trust \*disposed of the \*CGT asset; and
  - (b) the capital proceeds from the disposal are increased by one or more \*financial benefits that the company or trust receives under a \*look-through earnout right.

*Amount and timing of payments*

- (3) If a payment is made to more than one \*CGT concession stakeholder, the amount of each such payment is to be worked out by reference to each individual's percentage (see subsection 152-315(5)) of the relevant \*CGT exempt amount.
- (3A) If the \*CGT concession stakeholder to whom the payment is made is an employee of the company or trust, the payment must not be of a kind mentioned in section 82-135 (disregarding paragraph (fa) of that section).
- (4) The payment must be made by:
  - (a) if paragraph (1)(a) applies—7 days after the company or trust makes the choice; and
  - (b) otherwise—the later of:
    - (i) 7 days after the company or trust makes the choice; and
    - (ii) 7 days after the company or trust receives an amount of \*capital proceeds from the \*CGT event.
- (5) The amount of the payment, or the sum of the amounts of the payments, required to be made under this section must be equal to the lesser of:
  - (a) either:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 152-325

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- (i) if paragraph (1)(a) applies—the amount of the \*capital gain from the \*CGT event that the company or trust disregarded; or
  - (ii) otherwise—the amount of \*capital proceeds received; and
- (b) the relevant \*CGT exempt amount.

*Payments may be joint or separate*

- (6) If this section requires the company or trust to make 2 or more payments to a single \*CGT concession stakeholder (whether or not by the same time), the company or trust may meet that requirement by making one payment or by making separate payments.
- (7) If a \*CGT concession stakeholder is under 55 just before a payment is made under this section in relation to him or her:
- (a) the company or trust must make the payment to the CGT concession stakeholder by contributing it for the stakeholder to a \*complying superannuation fund or an \*RSA in respect of the stakeholder; and
  - (b) the company or trust must notify the trustee of the fund or the \*RSA provider at the time the contribution is made that the contribution is made in accordance with this section.

Note: For the non-deductibility of the contribution, see subsection 290-150(4).

- (8) For the purposes of Part 3-30, treat a payment mentioned in paragraph (7)(a), made in accordance with this section, as a contribution made by the \*CGT concession stakeholder.

*Payments are not dividends or frankable distributions*

- (9) Subsection (10) applies if:
- (a) a company makes a payment to comply with subsection (1) to:
    - (i) a \*CGT concession stakeholder; or
    - (ii) an interposed entity, in relation to a CGT concession stakeholder; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) both of the following apply:
- (i) an interposed entity receives a payment (whether directly or indirectly through one or more interposed entities) that a company or trust makes to comply with subsection (1), in relation to a CGT concession stakeholder;
  - (ii) the interposed entity passes on the payment to the CGT concession stakeholder or another interposed entity.
- (10) This Act applies to the payment, to the extent that it is less than or equal to the amount mentioned in subsection (3) for the stakeholder, as if:
- (a) it were not a \*dividend; and
  - (b) it were not a \*frankable distribution.
- (11) Subsection (10) applies in relation to the payment despite section 109 and Division 7A of Part III of the *Income Tax Assessment Act 1936*.

### **152-330 15-year rule has priority**

This Subdivision does not apply to a \*capital gain to which Subdivision 152-B (15-year exemption) applies.

Note: Under that Subdivision, such a gain is entirely disregarded, so there is no need for any further concession to apply.

## **Subdivision 152-E—Small business roll-over**

### **Guide to Subdivision 152-E**

#### **152-400 What this Subdivision is about**

A small business roll-over allows you to defer the making of a capital gain from a CGT event happening in relation to one or more small business assets if the basic conditions in Subdivision 152-A are satisfied for the gain.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 152-410

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You may choose not to apply the concession in section 152-205 (small business 50% reduction) before this one. For an additional exemption, see also Subdivision 152-D (small business retirement exemption).

**Table of sections**

**Operative provisions**

- 152-410 When you can obtain the roll-over
- 152-415 What the roll-over consists of
- 152-420 Rules where an individual who has obtained a roll-over dies
- 152-430 15-year rule has priority

**Operative provisions**

**152-410 When you can obtain the roll-over**

You can choose to obtain a roll-over under this Subdivision for a \*capital gain if the basic conditions in Subdivision 152-A are satisfied for the gain.

- Note 1: You can choose the roll-over even if you have not yet acquired a replacement asset or incurred fourth element expenditure, but:
- (a) CGT event J5 happens if, by the end of the replacement asset period, you do not acquire the asset or incur the expenditure (see section 104-197); and
  - (b) CGT event J6 happens if, by the end of the replacement asset period, the cost of the replacement asset or the amount of fourth element expenditure incurred (or both) is less than the amount of the capital gain that you disregarded (see section 104-198).
- Note 2: If you have acquired a replacement asset or incurred fourth element expenditure but there is a change in relation to the replacement asset or improved asset after the end of the replacement asset period, CGT event J2 may happen: see section 104-185.

**152-415 What the roll-over consists of**

If you choose the roll-over, you can choose to disregard all or part of each \*capital gain to which this Subdivision applies.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Note: If you choose to disregard only some of the capital gain, you make a capital gain equal to the remaining amount.

Example: The original capital gain was \$100,000. You have reduced it to \$25,000 under other concessions (apart from the roll-over). If you choose to disregard \$20,000, you are left with a final capital gain of \$5,000.

### **152-420 Rules where an individual who has obtained a roll-over dies**

- (1) This section applies if:
  - (a) a replacement asset, or an asset in relation to which \*fourth element expenditure has been incurred, formed part of the estate of an individual who has died; and
  - (b) either or both of the following apply:
    - (i) the asset has devolved to the deceased's \*legal personal representative;
    - (ii) the asset has \*passed to a beneficiary of the deceased; and
  - (c) a change covered by subsection 104-185(2) or (3) did not happen while the deceased owned it or, if the asset has passed to a beneficiary, while the asset was in the hands of the deceased's legal personal representative.
- (2) For the purposes of this Subdivision, anything done or not done by the deceased in relation to the asset is treated as though it had been done or not done by the \*legal personal representative.
- (3) For the purposes of this Subdivision, if the asset has \*passed to a beneficiary, anything done or not done by the deceased or by the deceased's \*legal personal representative (including because of the operation of subsection (2)) in relation to the asset is treated as though it had been done or not done by the beneficiary.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 152-430

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**152-430 15-year rule has priority**

This Subdivision does not apply to a \*capital gain to which Subdivision 152-B (15-year exemption) applies.

Note: Under that Subdivision, such a gain is entirely disregarded, so there is no need for any further concession to apply.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Part 3-5—Corporate taxpayers and corporate distributions**

### **Division 164—Non-share capital accounts for companies**

#### **Guide to Division 164**

##### **164-1 What this Division is about**

A company that issues non-share equity interests will have a notional account called a *non-share capital account*. This account records contributions to the company in relation to those non-share equity interests and returns made by the company of those contributions.

A non-share distribution that represents a return of contributions is not taxed as a dividend (subject to the anti-avoidance provisions dealing with dividend substitution). In certain circumstances a company may use its share capital account as the source for such distributions.

#### **Table of sections**

##### **Operative provisions**

164-5	Object
164-10	Non-share capital account
164-15	Credits to non-share capital account
164-20	Debits to non-share capital account

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Operative provisions

### 164-5 Object

- (1) This Division provides for the \*non-share capital account through which a company records contributions made to it in respect of \*non-share equity interests and returns by it of those contributions.
- (2) This allows a \*non-share distribution to be characterised as either:
  - (a) a \*non-share dividend; or
  - (b) a \*non-share capital return.

### 164-10 Non-share capital account

- (1) A company has a *non-share capital account* if:
  - (a) the company issues a \*non-share equity interest in the company on or after 1 July 2001; or
  - (b) the company has issued a non-share equity interest in the company before 1 July 2001 that is still in existence on 1 July 2001; or
  - (c) a \*debt interest in the company changes at a particular time (the *change time*) to an \*equity interest in the company because of subsection 974-110(1) or (2); or
  - (d) the following conditions are satisfied in relation to an interest in the company:
    - (i) immediately before subsection 974-75(4) ceases to have effect, the interest is taken to be a debt interest in the company because of that subsection;
    - (ii) the interest is an equity interest in the company at the time (the *change time*) that is immediately after that cessation;
    - (iii) subsection 974-75(6) does not apply to the interest in relation to the income year that includes the change time; or
  - (e) the following conditions are satisfied in relation to an interest in the company:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (i) subsection 974-75(6) applies to the interest in relation to a particular income year;
  - (ii) that subsection does not apply to the interest in relation to the next income year;
  - (iii) the interest is an equity interest in the company at the time (the **change time**) that is the start of that next income year.
- (2) The account continues in existence even if the company ceases to have any \*non-share equity interests on issue.
- (3) The balance of the account cannot fall below nil.
- (4) The only credits and debits that may be made to the account are those provided for in sections 164-15 and 164-20.

### **164-15 Credits to non-share capital account**

- (1) If the company issues a \*non-share equity interest in the company on or after 1 July 2001, there is a credit to the \*non-share capital account equal to:

Amount received – Share capital account credit

where:

**amount received** is the \*market value, when it is provided, of the consideration the company receives for the issue of the interest.

**share capital account credit** is the amount of any credit made to the company's \*share capital account in respect of the issue of the interest.

Note: The issue of a non-share equity interest can give rise to a credit to the company's share capital account if the interest consists, for example, of a stapled security that includes a share in the company's capital.

- (2) If paragraph 164-10(1)(c), (d) or (e) applies in relation to a particular interest in the company, there is a credit to the \*non-share capital account at the change time referred to in that paragraph of an amount equal to:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 164-15

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$$\text{Amount received} - \frac{\text{Share capital}}{\text{account credit}} - \text{Amount returned}$$

where:

**amount received** is the \*market value, when it was provided, of the consideration the company received for the issue of the interest.

**amount returned** is so much of the amount received as has been returned to a holder of the interest before the change time.

**share capital account credit** is the amount of any credit made to the company's \*share capital account in respect of the issue of the interest.

- (3) If the company has a \*non-share capital account at the beginning of 1 July 2001 because of a \*non-share equity interest the company issued before 1 July 2001, there is a credit to the non-share capital account on that day for each non-share equity interest in the company that:

- (a) was issued before 1 July 2001; and
- (b) is still in existence on 1 July 2001.

- (4) The amount of the credit under subsection (3) is:

$$\text{Amount received} - \frac{\text{Return of}}{\text{amount received}} - \frac{\text{Share capital}}{\text{account credit}}$$

where:

**amount received** is the \*market value, when it is provided, of the consideration the company receives for the issue of the interest.

**return of amount received** is the sum of the amounts paid before 1 July 2001 by way of return, in whole or in part, of the amount received.

**share capital account credit** is the sum of any amounts credited before 1 July 2001 to the company's \*share capital account in respect of the issue of the interest.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (5) To avoid doubt, if:
- (a) it appears that a credit to the company's \*non-share capital account has arisen under this section because an interest in the company appears to be, or have become, an \*equity interest at a time in a particular income year; and
  - (b) because subsection 974-75(6) or 974-110(1A) is subsequently found to apply in relation to the interest and that income year, the interest was not in fact, or did not in fact become, an equity interest at that time;
- the credit referred to in paragraph (a) is taken never to have arisen.

### **164-20 Debits to non-share capital account**

- (1) The company may debit the whole or a part of a \*non-share distribution against the company's \*non-share capital account:
- (a) to the extent to which the distribution is made as consideration for the surrender, cancellation or redemption of a \*non-share equity interest in the company; or
  - (b) to the extent to which:
    - (i) the distribution is made in connection with a reduction in the \*market value of a non-share equity interest in the company; and
    - (ii) the amount of the distribution is equal to the amount of the reduction in market value.
- (2) The total of the amounts debited to the account in respect of a particular \*non-share equity interest must not exceed the total of the amounts credited to the account in respect of the interest.
- (3) If:
- (a) an \*equity interest in the company changes at a particular time (the *change time*) to a \*debt interest in the company because of subsection 974-110(1) or (2); or
  - (b) an equity interest in the company changes to a debt interest in the company, with effect from a time (the *change time*) that is the start of a particular income year, because of subsection 974-110(1A); or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 164-20

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(c) the following conditions are satisfied in relation to an interest in the company:

- (i) subsection 974-75(6) does not apply to the interest in relation to a particular income year;
- (ii) the interest is an equity interest in the company at the end of that income year;
- (iii) subsection 974-75(6) applies to the interest from the time (the *change time*) that is the start of the next income year;

there is, or is taken to have been, a debit to the \*non-share capital account at the change time equal to:

Credits in relation to \_ Debits in relation to  
the interest the interest

where:

**credits in relation to the interest** is the sum of all the credits that have been made to the \*non-share capital account in relation to the interest before the change time.

**debits in relation to the interest** is the sum of all the debits that have been made to the \*non-share capital account in relation to the interest before the change time.

(4) To avoid doubt, if:

- (a) it appears that a debit to the company's \*non-share capital account has arisen because an interest in the company appears to be, or have become, a \*debt interest at a time in a particular income year; and
- (b) because subsection 974-75(6) or 974-110(1A) is subsequently found not to apply in relation to the interest and that income year, the interest was not in fact, or did not in fact become, a debt interest at that time;

the debit referred to in paragraph (a) is taken never to have arisen.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## **Division 165—Income tax consequences of changing ownership or control of a company**

### **Table of Subdivisions**

- Guide to Division 165
- 165-A Deducting tax losses of earlier income years
- 165-B Working out the taxable income and tax loss for the income year of the change
- 165-CA Applying net capital losses of earlier income years
- 165-CB Working out the net capital gain and the net capital loss for the income year of the change
- 165-CC Change of ownership or control of company that has an unrealised net loss
- 165-CD Reductions after alterations in ownership or control of loss company
- 165-C Deducting bad debts
- 165-D Tests for finding out whether the company has maintained the same owners
- 165-E Business continuity test
- 165-F Special provisions relating to ownership by non-fixed trusts

### **Guide to Division 165**

#### **165-1 What this Division is about**

A change in the ownership or control of a company can affect:

- whether it can deduct its tax losses of earlier income years; and
- how it calculates its taxable income and tax loss for the income year of the change; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-5

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- whether it can deduct debts owed to it that are written off as bad.

**Subdivision 165-A—Deducting tax losses of earlier income years**

**Guide to Subdivision 165-A**

**165-5 What this Subdivision is about**

A company cannot deduct a tax loss unless:

- (a) it has the same owners and the same control throughout the period from the start of the loss year to the end of the income year; or
- (b) it satisfies the business continuity test by carrying on the same business (including entering into no new kinds of transactions and conducting no new kinds of business), or by carrying on a similar business (on or after 1 July 2015).

Note: The exceptions mentioned in this section apply differently in relation to designated infrastructure project entities: see section 415-35.

**Table of sections**

**Operative provisions**

165-10	To deduct a tax loss
165-12	Company must maintain the same owners
165-13	Alternatively, the company must satisfy the business continuity test
165-15	The same people must control the voting power, or the company must satisfy the business continuity test
165-20	When company can deduct <i>part</i> of a tax loss

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Operative provisions

### 165-10 To deduct a tax loss

A company cannot deduct a \*tax loss unless either:

- (a) it meets the conditions in section 165-12 (which is about the company maintaining the same owners); or

Note: See section 165-215 for a special alternative to these conditions.

- (b) it meets the condition in section 165-13 (which is about the company satisfying the business continuity test).

Note: In the case of a widely held or eligible Division 166 company, Subdivision 166-A modifies how this Subdivision applies, unless the company chooses otherwise.

### 165-12 Company must maintain the same owners

#### *Ownership test period*

- (1) In determining whether section 165-10 prevents a company from deducting a \*tax loss, the ***ownership test period*** is the period from the start of the \*loss year to the end of the income year.

Note: See section 165-255 for the rule about incomplete test periods.

#### *Voting power*

- (2) There must be persons who had \*more than 50% of the voting power in the company at all times during the \*ownership test period.

Note 1: See section 165-150 to work out who had more than 50% of the voting power.

Note 2: Subdivision 167-B has special rules for working out voting power in a company whose shares do not all carry the same voting rights, or do not carry all of the voting rights in the company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-12

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*Rights to dividends*

- (3) There must be persons who had rights to \*more than 50% of the company's dividends at all times during the \*ownership test period.

Note 1: See section 165-155 to work out who had rights to more than 50% of the company's dividends.

Note 2: Subdivision 167-A has special rules for working out rights to dividends in a company whose shares do not all carry the same rights to dividends.

*Rights to capital distributions*

- (4) There must be persons who had rights to \*more than 50% of the company's capital distributions at all times during the \*ownership test period.

Note 1: See section 165-160 to work out who had rights to more than 50% of the company's capital distributions.

Note 2: Subdivision 167-A has special rules for working out rights to capital distributions in a company whose shares do not all carry the same rights to capital distributions.

*When to apply the primary test*

- (5) To work out whether a condition in this section was satisfied at all times during the \*ownership test period, apply the primary test for that condition unless subsection (6) requires the alternative test to be applied.

Note: For the primary test, see subsections 165-150(1), 165-155(1) and 165-160(1).

*When to apply the alternative test*

- (6) Apply the alternative test for that condition if one or more other companies beneficially owned \*shares or interests in shares in the company at any time during the \*ownership test period.

Note: For the alternative test, see subsections 165-150(2), 165-155(2) and 165-160(2).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



*Conditions in subsections (2), (3) and (4) may be treated as having been satisfied in certain circumstances*

- (7) If any of the conditions in subsections (2), (3) and (4) have not been satisfied, those conditions are taken to have been satisfied if:
- (a) they would have been satisfied except for the operation of section 165-165; and
  - (b) the company has information from which it would be reasonable to conclude that less than 50% of the \*tax loss has been reflected in deductions, capital losses, or reduced assessable income, that occurred, or could occur in future, because of the happening of any \*CGT event in relation to any \*direct equity interests or \*indirect equity interests in the company during the \*ownership test period.
- (7A) If the company is:
- (a) a \*non-profit company; or
  - (b) a \*mutual affiliate company; or
  - (c) a \*mutual insurance company;
- during the whole of the \*ownership test period, the conditions in subsections (3) and (4) are taken to have been satisfied by the company.

*Time of happening of CGT event*

- (8) The happening of a \*CGT event in relation to a \*direct equity interest or \*indirect equity interest in the company that results in the failure of the company to satisfy a condition in subsection (2), (3) or (4) is taken, for the purposes of paragraph (7)(b), to have occurred during the \*ownership test period.

### **165-13 Alternatively, the company must satisfy the business continuity test**

- (1) This section sets out the condition that a company must meet to be able to deduct the \*tax loss if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

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**Section 165-15**

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- (a) the company fails to meet a condition in subsection 165-12(2), (3) or (4); or
- (b) it is not practicable to show that the company meets the conditions in those subsections.

Note Other provisions may treat the company as meeting, or failing to meet, the conditions in subsections 165-12(2), (3) and (4).

- (2) The company must satisfy the \*business continuity test for the income year (the **business continuity test period**). Apply the test to the \*business the company carried on immediately before the time (the **test time**) shown in the relevant item of the table.

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<b>Test time</b>		
<b>Item</b>	<b>If:</b>	<b>The test time is:</b>
1	It is practicable to show there is a period that meets these conditions: <ul style="list-style-type: none"><li>(a) the period starts at the start of the *ownership test period or, if the company came into being during the *loss year, at the time the company came into being;</li><li>(b) the company would meet the conditions in subsections 165-12(2), (3) and (4) if the period were the ownership test period for the purposes of this Act</li></ul>	The latest time that it is practicable to show is in the period
2	Item 1 does not apply and the company was in being throughout the *loss year	The start of the loss year
3	Item 1 does not apply and the company came into being during the *loss year	The end of the loss year

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For the business continuity test: see Subdivision 165-E.

**165-15 The same people must control the voting power, or the company must satisfy the business continuity test**

- (1) Even if a company meets the conditions in section 165-12 or 165-13, it cannot deduct the \*tax loss if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) for some or all of the part of the \*ownership test period that started at the end of the \*loss year, a person controlled, or was able to control, the voting power in the company (whether directly, or indirectly through one or more interposed entities); and
- (b) for some or all of the \*loss year, that person did *not* control, and was *not* able to control, that voting power (directly, or indirectly in that way); and
- (c) that person began to control, or became able to control, that voting power (directly, or indirectly in that way) for the purpose of:
  - (i) getting some benefit or advantage in relation to how this Act applies; or
  - (ii) getting such a benefit or advantage for someone else; or for purposes including that purpose.

Note: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

- (2) However, that person's control of the voting power, or ability to control it, does not prevent the company from deducting the \*tax loss if the company satisfies the \*business continuity test for the income year (the ***business continuity test period***).
- (3) Apply the \*business continuity test to the \*business that the company carried on immediately before the time (the ***test time***) when the person began to control that voting power, or became able to control it.

For the business continuity test: see Subdivision 165-E.

### **165-20 When company can deduct *part* of a tax loss**

- (1) If section 165-10 (which is about deducting a tax loss) prevents a company from deducting a \*tax loss, the company can deduct the *part of the tax loss* that was incurred during a *part of the loss year*.
- (2) However, the company can do this only if, assuming that *part* of the \*loss year had been treated as the *whole* of the loss year for the

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-23

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purposes of section 165-10, the company would have been entitled to deduct the \*tax loss.

**Subdivision 165-B—Working out the taxable income and tax loss for the income year of the change**

**Guide to Subdivision 165-B**

**165-23 What this Subdivision is about**

A company that has not had the same ownership and control during the income year, and has not satisfied the business continuity test, works out its taxable income and tax loss under this Subdivision.

**Table of sections**

- 165-25 Summary of this Subdivision
- 165-30 Flow chart showing the application of this Subdivision

**When a company must work out its taxable income and tax loss under this Subdivision**

- 165-35 On a change of ownership, unless the company satisfies the business continuity test
- 165-37 Who has *more than a 50% stake* in the company during a period
- 165-40 On a change of control of the voting power in the company, unless the company satisfies the business continuity test

**Working out the company's taxable income**

- 165-45 First, divide the income year into periods
- 165-50 Next, calculate the notional loss or notional taxable income for each period
- 165-55 How to attribute deductions to periods
- 165-60 How to attribute assessable income to periods
- 165-65 How to calculate the company's taxable income for the income year

**Working out the company's tax loss**

- 165-70 How to calculate the company's tax loss for the income year

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Special rules that apply if the company is in partnership**

- 165-75 How to calculate the company's notional loss or notional taxable income for a period when the company was a partner
- 165-80 How to calculate the company's share of a partnership's notional loss or notional net income for a period if both entities have the same income year
- 165-85 How to calculate the company's share of a partnership's notional loss or notional net income for a period if the entities have different income years
- 165-90 Company's full year deductions include a share of partnership's full year deductions

**165-25 Summary of this Subdivision**

- (1) The company calculates its taxable income for the income year in this way:

*Method statement*

- Step 1. Divide the income year into periods: each change in ownership or control is a dividing point between periods.
- Step 2. Treat each period as if it were an income year and work out the notional loss or notional taxable income for that period.
- Step 3. Work out the taxable income for the year of the change by adding up:
  - each notional taxable income; and
  - any full year amounts (amounts of assessable income not taken into account at Step 2);and then subtracting any full year deductions (deductions not taken into account at Step 2).

Note: Do *not* take into account any notional loss.

- (2) As well as a taxable income, the company will have a tax loss. It is the total of:

- each notional loss; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- excess full year deductions of particular kinds.
- (3) Special rules apply if the company was in partnership at some time during the income year.

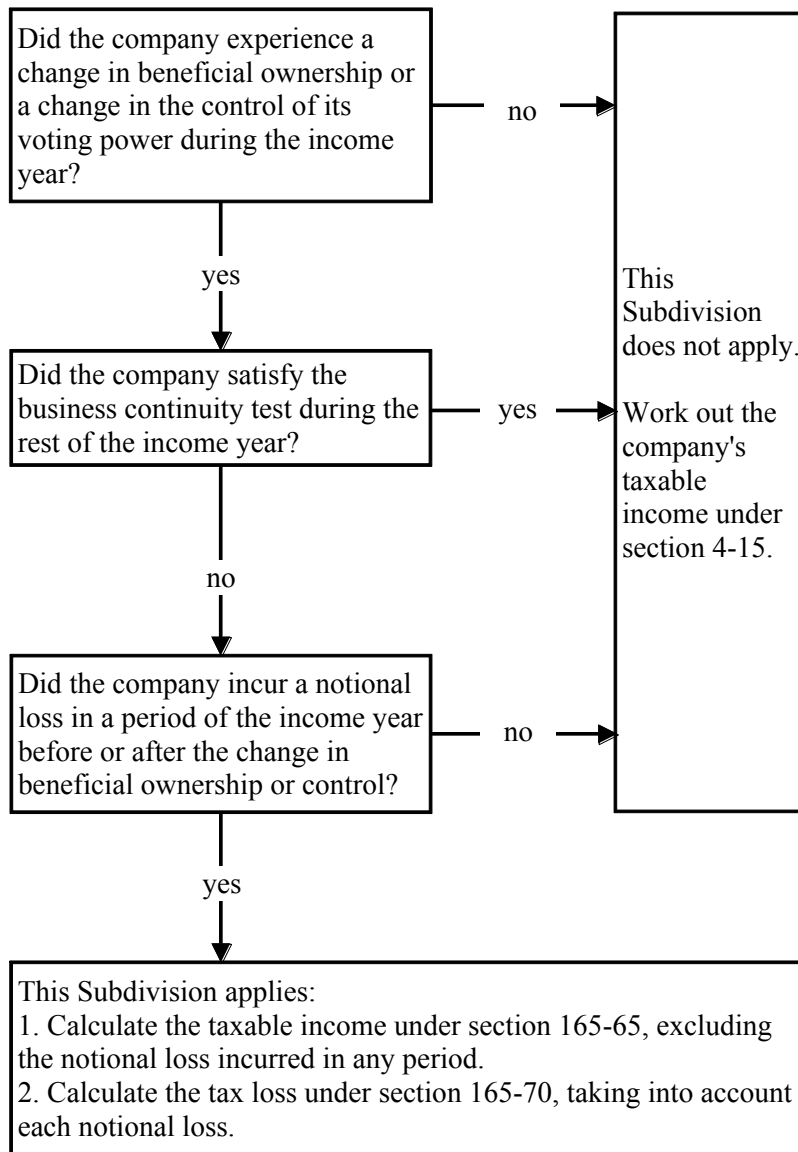
For the special rules that apply if the company was in partnership: see sections 165-75 to 165-90.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**165-30 Flow chart showing the application of this Subdivision**



\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-35

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Note: If the company was a partner during the income year, special rules apply to calculating a notional loss or notional taxable income.

**When a company must work out its taxable income and tax loss under this Subdivision**

**165-35 On a change of ownership, unless the company satisfies the business continuity test**

A company must calculate its taxable income and \*tax loss under this Subdivision unless:

- (a) there are persons who had \*more than a 50% stake in the company during the whole of the income year; or

Note: See section 165-220 for a special alternative to the condition in this paragraph.

- (b) there is only *part* of the income year (a part that started at the start of the income year) during which the same persons had \*more than a 50% stake in the company, but the company satisfies the \*business continuity test for the *rest* of the income year (the ***business continuity test period***); or
- (c) the company was a \*designated infrastructure project entity during the whole of the income year.

Note: See subsection 415-35(7) if there is only part of the income year during which the company was a designated infrastructure project entity.

For the purposes of paragraph (b), apply the business continuity test to the \*business that the company carried on immediately before the time (the ***test time***) when that part ended.

Note 1: For the business continuity test, see Subdivision 165-E.

Note 2: In the case of a widely held or eligible Division 166 company, Subdivision 166-B modifies how this Subdivision applies, unless the company chooses otherwise.

**165-37 Who has more than a 50% stake in the company during a period**

- (1) If:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (a) there are persons who had \*more than 50% of the voting power in the company during the whole of a period (the ***ownership test period***) consisting of the income year or a part of it; and
- (b) there are persons who had rights to \*more than 50% of the company's dividends during the whole of the ownership test period; and
- (c) there are persons who had rights to \*more than 50% of the company's capital distributions during the whole of the ownership test period;

those persons had ***more than a 50% stake*** in the company during the ownership test period.

Note: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

- (2) To work out whether a condition in subsection (1) was satisfied during the \*ownership test period, apply the primary test for that condition unless subsection (3) requires the alternative test to be applied.

For the primary tests: see subsections 165-150(1), 165-155(1) and 165-160(1).

- (3) Apply the alternative test for that condition if one or more other companies beneficially owned \*shares, or interests in shares, in the company at any time during the \*ownership test period.

For the alternative tests: see subsections 165-150(2), 165-155(2) and 165-160(2).

*Conditions in subsection (1) may be treated as having been satisfied in certain circumstances*

- (4) If any of the conditions in subsection (1) have not been satisfied, those conditions are taken to have been satisfied if:
  - (a) they would have been satisfied except for the operation of section 165-165; and
  - (b) the company has information from which it would be reasonable to conclude that less than 50% of the \*notional

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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loss for the \*ownership test period has been reflected in deductions, capital losses, or reduced assessable income, that occurred, or could occur in future, because of the happening of any \*CGT event in relation to any \*direct equity interests or \*indirect equity interests in the company during that period.

- (4A) If the company is:
- (a) a \*non-profit company; or
  - (b) a \*mutual affiliate company; or
  - (c) a \*mutual insurance company;

during the whole of the \*ownership test period, the conditions in paragraphs (1)(b) and (c) are taken to have been satisfied by the company.

*Time of happening of CGT event*

- (5) The happening of a \*CGT event in relation to a \*direct equity interest or \*indirect equity interest in the company that results in the failure of the company to satisfy a condition in subsection (1) is taken, for the purposes of paragraph (4)(b), to have occurred during the \*ownership test period.

**165-40 On a change of control of the voting power in the company, unless the company satisfies the business continuity test**

- (1) A company must calculate its taxable income and tax loss under this Subdivision if, during the income year, a person begins to control, or becomes able to control, the voting power in the company (whether directly, or indirectly through one or more interposed entities) for the purpose, or for purposes including the purpose, of:
- (a) getting some benefit or advantage in relation to how this Act applies; or
  - (b) getting such a benefit or advantage for someone else.

Note 1: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note 2: Subdivision 167-B has special rules for working out voting power in a company whose shares do not all carry the same voting rights, or do not carry all of the voting rights in the company.

- (2) However, that person's control of the voting power, or ability to control it, does not require the company to calculate its taxable income under this Subdivision if the company satisfies the \*business continuity test for the *rest* of the income year (the ***business continuity test period***).
- (3) Apply the \*business continuity test to the \*business that the company carried on immediately before the time (the ***test time***) when the person began to control that voting power, or became able to control it.

For the business continuity test: see Subdivision 165-E.

## Working out the company's taxable income

### 165-45 First, divide the income year into periods

- (1) Divide the income year into periods as follows.
- (2) The first period starts at the start of the income year. Each later period starts immediately after the end of the previous period.
- (3) The last period ends at the end of the income year. Each period (except the last) ends at the *earlier* of:
  - (a) the *latest* time that would result in persons having \*more than a 50% stake in the company during the whole of the period; or
  - (b) the *earliest* time when a person begins to control, or becomes able to control, the voting power in the company (whether directly, or indirectly through one or more interposed entities) for the purpose, or for purposes including the purpose, of:
    - (i) getting some benefit or advantage to do with how this Act applies; or
    - (ii) getting such a benefit or advantage for someone else.

Note: See section 165-255 for the rule about incomplete periods.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 165-50

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- (4) However, what would otherwise be 2 or more successive periods are treated as a single period if the company satisfies the \*business continuity test for all of them, considered as a single period (the ***business continuity test period***). Apply the business continuity test to the \*business the company carried on immediately before the end of the first of the periods (the ***test time***).

Note 1: For the business continuity test, see Subdivision 165-E.

Note 2: See section 165-225 for a special alternative to subsections (3) and (4) of this section.

**165-50 Next, calculate the notional loss or notional taxable income for each period**

- (1) The company has a \*notional loss for a period if the deductions attributed to the period under section 165-55 exceed the assessable income attributed to the period under section 165-60. The ***notional loss*** is the amount of the excess.

For a period during which the company was in partnership, the notional loss is worked out under section 165-75.

- (2) On the other hand, if that assessable income exceeds those deductions, the company has a ***notional taxable income*** for the period, equal to the excess.

For a period during which the company was in partnership, the notional taxable income is worked out under section 165-75.

- (3) If the company has a \*notional loss for *none* of the periods in the income year, this Subdivision has no further application, and the company's taxable income for the income year is calculated in the usual way.

The usual way of working out taxable income is set out in section 4-15.

**165-55 How to attribute deductions to periods**

- (1) The company's deductions for the income year are attributed to periods in the income year as follows.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (2) The following deductions are attributed to each period in proportion to the length of the period:
- (a) deductions for the decline in value of a \*depreciating asset;  
See Division 40.
  - (b) deductions for \*exploration or prospecting, or \*mining capital expenditure, in connection with mining or quarrying;  
See section 40-80 and Subdivisions 40-H and 40-I.
  - (c) deductions for expenditure, deductions for which are spread over 2 or more income years, but not:
    - (i) deductions for exploration or prospecting, or capital expenditure, in connection with mining or quarrying; or  
See Subdivision 40-I.
    - (ii) \*full year deductions (see subsection (5));
  - (d) deductions for expenditure of capital monies in connection with an Australian \*film.  
See former section 124ZAF of the *Income Tax Assessment Act 1936*.
- (3) All other deductions (except \*full year deductions) are attributed to periods as if each period were an income year.
- (4) \*Full year deductions are not attributed to any of the periods. They are brought in at a later stage of the process of calculating the company's taxable income for the income year.
- (5) These are **full year deductions**:
- (a) deductions for bad debts under section 8-1 (about general deductions) or section 25-35 (about bad debts);
  - (b) deductions for losses on debt/equity swaps under section 63E of the *Income Tax Assessment Act 1936*;
  - (c) deductions, so far as they are allowable under Division 8 (which is about deductions) because Subdivision H (Period of deductibility of certain advance expenditure) of Division 3 of Part III of the *Income Tax Assessment Act 1936* applies to the company in relation to the income year;
  - (fa) deductions for payments of pensions, gratuities or retiring allowances under section 25-50;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 165-60

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- (fb) deductions for gifts under Division 30;
- (f) deductions for \*tax losses of earlier income years.

See Division 36.

- (6) However, a deduction for the balance of capital expenditure is *not* a **full year deduction** if the deduction results from the disposal, loss, lapse, termination of use or destruction of the property.

**165-60 How to attribute assessable income to periods**

- (1) The company's assessable income for the income year is attributed to periods in the income year as follows.
- (2) The following amounts are attributed to periods so far as they are reasonably attributable to those periods:
  - (a) amounts included in the company's assessable income under section 97 (Beneficiary of a trust estate who is not under a legal disability) of the *Income Tax Assessment Act 1936*; or
  - (b) amounts included in the company's assessable income under section 98A (Non-resident beneficiaries assessable in respect of certain income) of the *Income Tax Assessment Act 1936*.
- (2A) However, so much of an amount included in the company's assessable income under section 97 or 98A of the *Income Tax Assessment Act 1936* as is a \*capital gain that forms part of a \*net capital gain is not attributed to a period.
- (3) The following items of assessable income are attributed to each period in proportion to the length of the period:
  - (a) insurance recoveries for loss of \*live stock or trees;  
See section 385-130.
  - (b) amounts included in assessable income as a result of elections relating to the forced disposal of live stock;  
See Subdivision 385-E and section 385-160.
  - (c) recoupment of mains electricity connection expenditure.  
See items 1.16 and 2.5 in section 20-30, which lists deductions for which recoupments are assessable under Subdivision 20-A.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (4) An amount included in the company's assessable income under section 385-135 (Election to defer including profit on second wool clip) is attributed to the period when the wool would ordinarily have been shorn.
- (5) An amount included in the company's assessable income that is a \*dividend under:
- (a) section 65 (Payments to associated persons); or
  - (c) section 109 (Excessive payments to shareholders and associates);
- of the *Income Tax Assessment Act 1936* is attributed to the period when the amount was paid or credited, whichever occurred first.
- (6) All other items of assessable income (except \*full year amounts) are attributed to periods as if each period were an income year.
- (6A) A \*net capital gain is not attributed to a period.
- Note: This is because Subdivision 165-CB provides for how the company must work out its net capital gain for the income year.
- (7) **Full year amounts** are amounts referred to in paragraphs (2)(a) and (b), so far as they are *not* reasonably attributable to a period, but do not include any part of a \*capital gain that forms part of a \*net capital gain. Full year amounts are brought in at a later stage of the process of calculating the company's taxable income for the income year.

### **165-65 How to calculate the company's taxable income for the income year**

- (1) The company's **taxable income** for the income year is calculated as follows.
- (2) Add up the \*notional taxable incomes (if any) worked out under section 165-50 or 165-75.

Note: A notional *loss* for a period is *not* taken into account, but counts towards the company's tax loss for the income year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3) Add the \*full year amounts referred to in subsection 165-60(7) (if any) and any \*net capital gain of the company for the income year.
- (4) Subtract the company's \*full year deductions of these kinds:
  - (a) deductions for bad debts under section 8-1 (about general deductions) or section 25-35 (about bad debts);
  - (c) deductions, so far as they are allowable under Division 8 (which is about deductions) because Subdivision H (Period of deductibility of certain advance expenditure) of Division 3 of Part III of the *Income Tax Assessment Act 1936* applies to the company in relation to the income year;unless they exceed the total of the \*notional taxable incomes and the \*full year amounts. (If they equal or exceed that total, the company does not have a taxable income for the income year.)
- (5) If an amount remains, subtract from it the company's other \*full year deductions, in the order shown in subsection 165-55(5), unless they exceed the amount remaining. (If they equal or exceed that amount, the company does not have a taxable income for the income year.)
- (6) If an amount remains, it is the company's **taxable income** for the income year.

**Working out the company's tax loss**

**165-70 How to calculate the company's tax loss for the income year**

- (1) The company's **tax loss** for the income year is calculated as follows.
- (2) Total the \*notional losses worked out under section 165-50 or 165-75.
- (3) Add to the total in subsection (2) the amount (if any) by which the company's \*full year deductions of these kinds:
  - (a) deductions for bad debts under section 8-1 (about general deductions) or section 25-35 (about bad debts);

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (c) deductions, so far as they are allowable under Division 8 (which is about deductions) because Subdivision H (Period of deductibility of certain advance expenditure) of Division 3 of Part III of the *Income Tax Assessment Act 1936* applies to the company in relation to the income year;  
exceed the total of:
- (d) the \*notional taxable incomes (if any); and  
To work out the notional taxable income: see section 165-50.
- (e) the \*full year amounts referred to in section 165-60 (if any);  
and
- (f) any \*net capital gain of the company for the income year.
- (4) If the company \*derived exempt income, subtract its \*net exempt income (worked out under section 36-20).
- (5) Any amount remaining is the company's **tax loss** for the income year, which is called a **loss year**.

Note: The meanings of **tax loss** and **loss year** are modified by section 36-55 for a corporate tax entity that has an amount of excess franking offsets.

To find out *how much* of the tax loss can be deducted in later income years: see Subdivision 165-A.

To find out *how* to deduct it: see section 36-17.

## Special rules that apply if the company is in partnership

### 165-75 How to calculate the company's notional loss or notional taxable income for a period when the company was a partner

- (1) This section applies if at any time during a period the company was a partner in one or more partnerships.
- (2) The company has a \*notional loss for the period if the total (the **loss total**) of:
- (a) the deductions attributed to the period under section 165-55;  
and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-80

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(b) the \*company's share of each \*notional loss (if any) of a partnership for the period;

exceeds the total (the *income total*) of:

(c) the assessable income attributed to the period under section 165-60; and

(d) the \*company's share of each \*notional net income (if any) of a partnership for the period.

The *notional loss* is the amount of the excess.

Note: A notional loss is taken into account in working out the company's tax loss under section 165-70.

(3) On the other hand, if the income total exceeds the loss total, the company has a *notional taxable income* for the period, equal to the excess.

Note: A notional taxable income is taken into account in working out the company's taxable income under section 165-65.

(4) If the company has a \*notional taxable income for *all* periods in the income year, this Subdivision has no further application, and the company's taxable income for the income year is calculated in the usual way.

Note: The usual way of working out taxable income is set out in section 4-15.

**165-80 How to calculate the company's share of a partnership's notional loss or notional net income for a period if both entities have the same income year**

(1) This section applies if at any time during a period the company is a partner in a partnership that has an income year that starts and ends when the company's income year starts and ends.

(2) The partnership's *notional loss* or *notional net income* for the period is calculated in the same way as the \*notional loss or \*notional taxable income of a company.

(3) The *company's share* is calculated by dividing:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- the company's interest in the partnership's net income or partnership loss of the income year;
- by
- the amount of that net income or partnership loss;
- and expressing the result as a percentage.
- (4) However, if the partnership had neither a net income nor a partnership loss, the *company's share* is a percentage that is fair and reasonable having regard to the extent of the company's interest in the partnership.

**165-85 How to calculate the company's share of a partnership's notional loss or notional net income for a period if the entities have different income years**

- (1) This section applies if at any time during a period the company is a partner in a partnership that has an income year that starts and ends at a different time from when the company's income year starts and ends.
- (2) So much of the partnership's net income or partnership loss of an income year as was \*derived during the period is a *notional net income* or *notional loss* of the partnership for the period. (For the purposes of this subsection, the partnership's net income or partnership loss is calculated without taking account of the partnership's \*full year deductions for that income year.)

Note: The partnership's full year deductions are dealt with in section 165-90.

- (3) The *company's share* is calculated by dividing:
- the company's interest in the partnership's net income or partnership loss of that income year;
- by
- the amount of that net income or partnership loss;
- and expressing the result as a percentage.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-90

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**165-90 Company's full year deductions include a share of partnership's full year deductions**

- (1) This section applies if at any time during the income year the company is a partner in a partnership that has one or more \*full year deductions for the income year of the partnership that corresponds to the income year of the company.
- (2) The partnership's \*full year deductions are treated as full year deductions of the company, but only to the extent of the \*company's share.
- (3) If the partnership's income year is the same as the company's, the *company's share* is calculated by dividing:
  - the company's interest in the partnership's net income or partnership loss of the income year;by
  - the amount of that net income or partnership loss;and expressing the result as a percentage.
- (4) However, if the partnership had neither a net income nor a partnership loss, the *company's share* is a percentage that is fair and reasonable having regard to the extent of the company's interest in the partnership.
- (5) If the partnership's income year does not start and end at the same time as the company's income year, the *company's share* is a percentage that is fair and reasonable having regard to all relevant circumstances.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Subdivision 165-CA—Applying net capital losses of earlier income years**

### **Guide to Subdivision 165-CA**

#### **165-93 What this Subdivision is about**

In working out its net capital gain for an income year, a company cannot apply a net capital loss for an earlier income year unless:

- (a) it has the same owners and the same control from the start of the loss year to the end of the income year; or
- (b) it satisfies the business continuity test by carrying on the same business (including entering into no new kinds of transactions and conducting no new kinds of business), or by carrying on a similar business (on or after 1 July 2015).

#### **Table of sections**

##### **Operative provisions**

165-96 When a company cannot apply a net capital loss

#### **Operative provisions**

##### **165-96 When a company cannot apply a net capital loss**

- (1) In working out its \*net capital gain for the \*current year, a company cannot apply a \*net capital loss it has for an earlier income year if Subdivision 165-A would prevent it from deducting the loss for the current year if:
  - (a) the loss were a \*tax loss of the company for that earlier income year; and
  - (b) section 165-20 (about deducting part of a tax loss) were disregarded.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

**Part 3-5** Corporate taxpayers and corporate distributions

**Division 165** Income tax consequences of changing ownership or control of a company

**Section 165-99**

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Note 1: A company's net capital gain for an income year is usually worked out under section 102-5.

Note 2: Subdivision 165-A deals with the deductibility of a company's tax loss for an earlier income year if there has been a change in the ownership or control of the company in the period from the start of the loss year to the end of the income year.

Note 3: Subdivision 165-F may affect the application of Subdivision 165-A.

- (2) If subsection (1) prevents the company from applying the \*net capital loss, it can apply the *part* of the loss that it made during a *part* of that earlier income year, but only if, assuming that part of that income year had been treated as the whole of it, the company would have been entitled to apply the net capital loss.

**Subdivision 165-CB—Working out the net capital gain and the net capital loss for the income year of the change**

**Guide to Subdivision 165-CB**

**165-99 What this Subdivision is about**

A company that has not had the same ownership and control during the income year, and has not satisfied the business continuity test, works out its net capital gain and net capital loss under this Subdivision.

**Table of sections**

**When a company must work out its net capital gain and net capital loss under this Subdivision**

165-102 On a change of ownership, or of control of voting power, unless the company satisfies the business continuity test

**Working out the company's net capital gain and net capital loss**

165-105 First, divide the income year into periods

165-108 Next, calculate the notional net capital gain or notional net capital loss for each period

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- 165-111 How to work out the company's net capital gain
- 165-114 How to work out the company's net capital loss

### **When a company must work out its net capital gain and net capital loss under this Subdivision**

#### **165-102 On a change of ownership, or of control of voting power, unless the company satisfies the business continuity test**

A company must calculate its \*net capital gain and \*net capital loss for the income year under this Subdivision if:

- (a) it must calculate its taxable income and \*tax loss for the income year under Subdivision 165-B; or

Note: Subdivision 165-F may affect the application of Subdivision 165-B.

- (b) it would be required to calculate them under that Subdivision but for subsection 165-50(3) (about cases where that Subdivision would make no difference to the taxable income).

Note: In the case of a widely held or eligible Division 166 company, Subdivision 166-B modifies how this Subdivision applies, unless the company chooses otherwise.

### **Working out the company's net capital gain and net capital loss**

#### **165-105 First, divide the income year into periods**

Divide the income year into periods according to section 165-45 (which is about working out the company's taxable income under Subdivision 165-B).

#### **165-108 Next, calculate the notional net capital gain or notional net capital loss for each period**

- (1) The company has a *notional net capital gain* for a period if the total of the \*capital gains it made during the period exceeds the

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-111

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total of the \*capital losses it made during the period. The **notional net capital gain** is the amount of the excess.

- (2) On the other hand, if the total of those losses exceeds the total of those gains, the company has a **notional net capital loss** for the period, equal to the excess.
- (3) If the company has a \*notional net capital loss for none of the periods in the income year, this Subdivision has no further application, and the company's \*net capital gain for the income year is calculated in the usual way.

The usual way of working out the net capital gain is set out in section 102-5.

*Trust's capital gain attributed to company beneficiary*

- (4) If some or all (the **attributable amount**) of an amount included in the company's assessable income for the income year under:
  - (a) section 97 (Beneficiary of a trust estate who is not under a legal disability) of the *Income Tax Assessment Act 1936*; or
  - (b) section 98A (Non-resident beneficiaries assessable in respect of certain income) of that Act;

is attributable to a \*capital gain that the trust made at a particular time during the period, this section applies to the attributable amount as if it were a \*capital gain made by the company at that time.

**165-111 How to work out the company's net capital gain**

The company's **net capital gain** for the income year is worked out in this way:

**Working out the company's net capital gain**

Step 1. Add up the \*notional net capital gains (if any) worked out under section 165-108.

Note: A notional net capital *loss* for a period is *not* taken into account, but counts towards the company's net capital loss for the income year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- Step 2. Add to the Step 1 amount so much of each amount included in the company's assessable income for the income year under:
- (a) section 97 (Beneficiary of a trust estate who is not under a legal disability) of the *Income Tax Assessment Act 1936*; or
  - (b) section 98A (Non-resident beneficiaries assessable in respect of certain income) of that Act;
- as is attributable to a \*capital gain that the trust made outside the income year.
- Note: This is relevant only if the trust has an income year that starts and ends at a different time from when the company's income year starts and ends.
- Step 3. If the Step 2 amount is *more than* zero, reduce it by applying any unapplied \*net capital losses from previous income years. (If this reduces it to zero, the company has no net capital gain for the income year.)
- Note: To apply net capital losses: see section 102-15.
- Step 4. If the Step 3 amount is *more than* zero, it is the company's ***net capital gain***.

Note: For exceptions and modifications to these rules: see section 102-30.

### 165-114 How to work out the company's net capital loss

The company's ***net capital loss*** for the income year is worked out in this way:

#### **Working out the company's net capital loss**

- Step 1. Add up the \*notional net capital losses (if any) worked out under section 165-108.
- Step 2. If the Step 1 amount is *more than* zero, it is the company's ***net capital loss***.

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115

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Note: For exceptions and modifications to these rules: see section 102-30.

**Subdivision 165-CC—Change of ownership or control of company that has an unrealised net loss**

**Guide to Subdivision 165-CC**

**165-115 What this Subdivision is about**

If a change occurs in the ownership or control of a company that has an unrealised net loss, the company cannot, to the extent of the unrealised net loss, have capital losses taken into account, or deduct revenue losses, in respect of CGT events that happen to CGT assets that it owned at the time of the change, unless it satisfies the business continuity test.

**165-115AA Special rules to save compliance costs**

- (1) A company is exempt from these rules if, at the time of the change in ownership or control, it (together with certain related entities) has a net asset value of not more than \$6,000,000 under the test in section 152-15 (for small business CGT relief).
- (2) In working out whether it has an unrealised net loss, a company can choose to work out the market value of each of its assets individually, or of all of its assets together.
- (3) If a company works out the market value of each of its assets individually, it may choose to exclude every asset that it acquired for less than \$10,000, in which case:
  - (a) unrealised losses and gains on the excluded assets will not be taken into account in calculating the company's unrealised net loss; and
  - (b) losses on the excluded assets will be allowed without the company being subject to the business continuity test.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

## Table of sections

### Operative provisions

- 165-115A Application of Subdivision
- 165-115B What happens when the company makes a capital loss or becomes entitled to a deduction in respect of a CGT asset after a changeover time
- 165-115BA What happens when a CGT event happens after a changeover time to a CGT asset of the company that is trading stock
- 165-115BB Order of application of assets: residual unrealised net loss
- 165-115C Changeover time—change in ownership of company
- 165-115D Changeover time—change in control of company
- 165-115E What is an unrealised net loss
- 165-115F Notional gains and losses

## Operative provisions

### 165-115A Application of Subdivision

#### *Application*

- (1) This Subdivision applies to a company if:
  - (a) a changeover time has occurred or occurs in relation to the company after the commencement time; and
  - (b) at the changeover time the company had an unrealised net loss (see section 165-115E); and
  - (c) either of the following applies:
    - (i) the company makes a \*capital loss, or apart from this Subdivision would be entitled to a deduction, in respect of a \*CGT event that happens to a \*CGT asset referred to in subsection (1A);
    - (ii) the company makes a \*trading stock loss in respect of a CGT asset referred to in subsection (1A) that is an item of \*trading stock; and
  - (d) the company would not, at the changeover time, satisfy the maximum net asset value test under section 152-15.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Section 165-115A**

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*CGT assets in respect of which Subdivision applies*

- (1A) The \*CGT assets for the purposes of paragraph (1)(c) are:
- (a) any CGT asset that the company owned at the changeover time; and
  - (b) any CGT asset that the company did not own at the changeover time but had owned at a previous time, where:
    - (i) a deferral event referred to in subsection 170-255(1) happened before the changeover time; and
    - (ii) the deferral event involved the company as the originating company referred to in that subsection; and
    - (iii) the deferral event would have resulted in the company making a \*capital loss, or becoming entitled to a deduction, in respect of the CGT asset except for section 170-270; and
    - (iv) the company is not taken to have made a capital loss at or before the changeover time, or to have become entitled to a deduction at that time, under section 170-275 in respect of the asset.

*Company may choose to disregard CGT assets acquired for less than \$10,000*

- (1B) A company may choose, for the purposes of the application of this Subdivision to it in respect of a particular changeover time, that every \*CGT asset that has been acquired by it for less than \$10,000 is to be disregarded.

However, the choice does not affect the application of the \*global method of working out whether the company has an unrealised net loss (see subsection 165-115E(2)).

*Time for making choice*

- (1C) A choice under subsection (1B) must be made on or before:
- (a) the day on which the company lodges its \*income tax return for the income year in which the relevant changeover time occurred; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

(b) such later day as the Commissioner allows.

*Trading stock loss*

(1D) A company is taken to have made a **trading stock loss** in respect of an asset that is an item of \*trading stock if, and only if:

- (a) one of the following applies:
  - (i) the company \*disposes of the item;
  - (ii) the item stops being trading stock (within the meaning of section 70-80);
  - (iii) the item is revalued under Division 70; and
- (b) if subparagraph (a)(i) or (ii) applies—the item's \*market value at the time when it is disposed of or stops being trading stock is less than:
  - (i) in respect of an item that has been valued under Division 70—its latest value under the Division; or
  - (ii) otherwise—its cost at that time; and
- (c) if subparagraph (a)(iii) applies—the item's value under the revaluation is less than:
  - (i) in respect of an item that has previously been valued under Division 70—its latest value under that Division before the revaluation; or
  - (ii) otherwise—its cost at the time of the revaluation.

The difference worked out under paragraph (b) or (c), as the case may be, constitutes the amount of the \*trading stock loss.

*Commencement time*

- (2) For the purposes of this Subdivision, the **commencement time** of a company is:
  - (a) if the company was in existence at 1 pm (by legal time in the Australian Capital Territory) on 11 November 1999—that time; or
  - (b) if the company came into existence after that time—the time when it came into existence.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115B

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*Reference time*

- (2A) For the purposes of the application of this Subdivision to a company in relation to a particular time (the *test time*), the *reference time* is:
- (a) if no changeover time occurred in respect of the company before the test time—the commencement time; or
  - (b) otherwise—the time immediately after the last changeover time that occurred in respect of the company before the test time.

*Asset owned at more than one changeover time*

- (3) If:
- (a) 2 or more changeover times have occurred or occur in relation to a company; and
  - (b) the company owned a particular asset at more than one of those changeover times;

this Subdivision applies to the company in respect of that asset only in relation to the later or latest of those changeover times.

Note: For *changeover time* see sections 165-115C and 165-115D.

**165-115B What happens when the company makes a capital loss or becomes entitled to a deduction in respect of a CGT asset after a changeover time**

*Where capital loss or deduction is equal to or less than residual unrealised net loss*

- (1) If the \*capital loss or deduction referred to in subparagraph 165-115A(1)(c)(i) is equal to or less than the company's residual unrealised net loss at the time of the occurrence of the event that resulted in the capital loss or entitled the company to the deduction:
- (a) the capital loss is taken to have been a \*net capital loss; or
  - (b) the deduction is taken to have been a \*tax loss;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

of the company for the income year immediately before the income year in which the changeover time occurred.

*Where capital loss or deduction is greater than residual unrealised net loss*

- (2) If the \*capital loss or deduction referred to in subparagraph 165-115A(1)(c)(i) is greater than the company's residual unrealised net loss at the time of the occurrence of the event that resulted in the capital loss or entitled the company to the deduction:
- (a) the part of the capital loss that is equal to the residual unrealised net loss is taken to have been a \*net capital loss; or
  - (b) the part of the deduction that is equal to the residual unrealised net loss is taken to have been a \*tax loss;
- of the company for the income year immediately before the income year in which the changeover time occurred.

*Company does not meet certain conditions in relation to net capital loss or tax loss*

- (3) The company is taken not to have met, at the changeover time, the conditions in subsections 165-12(2), (3) and (4) in relation to the \*net capital loss or the \*tax loss. The changeover time is the **test time** for applying section 165-13 to the company.

*Need to meet business continuity test*

- (4) The effect of subsection (3) is that the company cannot apply the \*net capital loss (see section 165-10 as it applies because of section 165-96), or deduct the \*tax loss (see section 165-10), unless it meets the condition in section 165-13 (the business continuity test).

*Consequences for net capital loss*

- (5) The \*net capital loss cannot be applied against \*capital gains made in an income year before the income year in which the company

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115BA

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made the capital loss referred to in subparagraph 165-115A(1)(c)(i).

*Consequences for tax loss*

- (6) The \*tax loss cannot be deducted from assessable income \*derived in an income year before the income year in which the company would have been entitled to the deduction referred to in subparagraph 165-115A(1)(c)(i).

Note: For *changeover time* see sections 165-115C and 165-115D.

**165-115BA What happens when a CGT event happens after a changeover time to a CGT asset of the company that is trading stock**

*Application*

- (1) This section applies to the company if, after the changeover time, the company makes a \*trading stock loss in respect of an item of \*trading stock as mentioned in subparagraph 165-115A(1)(c)(ii).

*Where trading stock loss is equal to or less than residual unrealised net loss*

- (2) If the \*trading stock loss is equal to or less than the company's residual unrealised net loss at the time of the occurrence of the trading stock loss, the amount of the trading stock loss is to be included in the company's assessable income.

*Where trading stock loss is greater than unrealised net loss*

- (3) If the \*trading stock loss is greater than the company's residual unrealised net loss at the time of the occurrence of the trading stock loss, the part of the trading stock loss that is equal to the residual unrealised net loss is to be included in the company's assessable income.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



*No increase in assessable income if company satisfies the business continuity test*

- (4) Neither subsection (2) nor (3) applies to the company if the company meets the condition in section 165-13 (the business continuity test).

*Assumptions for purposes of business continuity test*

- (5) In determining whether the company meets the condition in section 165-13, assume:
- (a) that the \*trading stock loss (if subsection (2) applies) or the part of the trading stock loss (if subsection (3) applies) is a \*net capital loss of the company for the income year immediately before the income year in which the changeover time occurred; and
  - (b) that the company failed, at the changeover time, to meet the condition in subsections 165-12(2), (3) and (4) in relation to the net capital loss referred to in paragraph (a); and
  - (c) that the changeover time is the **test time**; and
  - (d) that the \*business continuity test period is the income year in which the loss occurred.

### **165-115BB Order of application of assets: residual unrealised net loss**

*Order in which assets are to be applied*

- (1) In applying subsection 165-115B(2) or 165-115BA(3) in respect of assets that the company owned at the changeover time:
- (a) the company's \*capital losses are taken to have been made, the company is taken to have become entitled to deductions and the company is taken to have made \*trading stock losses in the order in which the events that resulted in the capital losses, deductions or trading stock losses occurred; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115BB

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- (b) if 2 or more such events occurred at the same time, they are taken to have occurred in such order as the company determines.

*Residual unrealised net loss*

- (2) The company's **residual unrealised net loss**, at the time of an event (the **relevant event**) that resulted in the company making a \*capital loss, becoming entitled to a deduction or making a \*trading stock loss, in respect of an asset, is the amount worked out using the following formula:

$$\text{Unrealised net loss} - \begin{array}{l} \text{Previous capital losses, deductions} \\ \text{or trading stock losses} \end{array}$$

where:

**previous capital losses, deductions or trading stock losses** means the total of the following:

- (a) capital losses that the company made, deductions to which the company became entitled, or \*trading stock losses that the company made, as a result of events earlier than the relevant event in respect of assets that the company owned at the \*changeover time;
- (b) each reduction that section 715-105 (as applying to the company as the \*head company of a \*consolidated group or \*MEC group) makes in respect of such an asset because an entity ceased before the time of the relevant event to be a \*subsidiary member of the group (but counting only the greater or greatest such reduction if 2 or more are made for the same asset);

or nil if there are none.

**unrealised net loss** means the company's unrealised net loss at the last changeover time that occurred before the relevant event.

Note: For **changeover time** see sections 165-115C and 165-115D.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

### **165-115C Changeover time—change in ownership of company**

(1) A time (the *test time*) is a *changeover time* in respect of a company if:

- (a) persons who had \*more than 50% of the voting power in the company at the reference time do not have more than 50% of that voting power immediately after the test time; or
- (b) persons who had rights to \*more than 50% of the company's dividends at the reference time do not have rights to more than 50% of those dividends immediately after the test time; or
- (c) persons who had rights to \*more than 50% of the company's capital distributions at the reference time do not have rights to more than 50% of those distributions immediately after the test time.

Note 1: See section 165-150 to work out who had more than 50% of the voting power in the company.

Note 2: See section 165-155 to work out who had rights to more than 50% of the company's dividends.

Note 3: See section 165-160 to work out who had rights to more than 50% of the company's capital distributions.

Note 4: For *reference time* see subsection 165-115A(2A).

Note 5: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

(2) To work out whether paragraph (1)(a), (b) or (c) applied at a particular time, apply the primary test unless subsection (3) requires the alternative test to be applied.

Note: For the primary test see subsections 165-150(1), 165-155(1) and 165-160(1).

(3) Apply the alternative test if one or more other companies beneficially owned \*shares or interests in shares in the company at any time during the period from the reference time to the \*test time.

Note: For the alternative test see subsections 165-150(2), 165-155(2) and 165-160(2).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 165-115D

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- (4) A \*test time that would, apart from this subsection, be a changeover time in respect of the company because of the application of subsection (1) is taken not to be a changeover time if:
- (a) that subsection would not have applied except for the operation of section 165-165; and
  - (b) the company has information from which it would be reasonable to conclude that less than 50% of the company's unrealised net loss at the test time has been reflected in deductions, capital losses, or reduced assessable income, that occurred, or could occur in future, because of the happening of any \*CGT event in relation to any \*direct equity interests or \*indirect equity interests in the company during the period from the reference time to the test time.
- (4A) If the company is:
- (a) a \*non-profit company; or
  - (b) a \*mutual affiliate company; or
  - (c) a \*mutual insurance company;
- during the whole of the period from the reference time to the \*test time, the test time is taken not to be a \*changeover time in respect of the company because of the application of paragraphs (1)(b) and (c).
- (5) The happening of any \*CGT event in relation to a \*direct equity interest or \*indirect equity interest in the company that results in the time of the happening of the event being a changeover time in respect of the company is taken, for the purposes of paragraph (4)(b), to have occurred during the period referred to in that paragraph.

**165-115D Changeover time—change in control of company**

- (1) A time (the *test time*) is also a *changeover time* in respect of a company if, at the test time:
- (a) a person or persons who did not control, and were not able to control, the voting power in the company at the reference

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

time began to control, or became able to control, that voting power immediately after the test time; and

- (b) that person or those persons so began, or became able, to control that voting power for the purpose of:
- (i) getting some benefit or advantage in relation to how this Act applies; or
  - (ii) getting such a benefit or advantage for someone else; or for purposes including that purpose.

Note 1: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

Note 2: Subdivision 167-B has special rules for working out voting power in a company whose shares do not all carry the same voting rights, or do not carry all of the voting rights in the company.

- (2) In this section:

**control** of the voting power in a company means control of that voting power either directly, or indirectly through one or more interposed entities.

### 165-115E What is an unrealised net loss

- (1) The question whether a company has an **unrealised net loss** at a particular time (the **relevant time**) is worked out in this way (the **individual asset method**), unless the company chooses to work it out using the \*global method (set out in subsection (2)).

*Method statement*

- Step 1. Work out under section 165-115F in respect of each \*CGT asset that the company owned at the relevant time any notional capital gain or notional revenue gain or any notional capital loss or notional revenue loss that the company has at that time in respect of the asset.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115E

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The sum of the notional capital gains is the company's ***unrealised capital gain*** at the relevant time.

The sum of the notional capital losses is the company's ***unrealised capital loss*** at the relevant time.

The sum of the notional revenue gains is the company's ***unrealised revenue gain*** at the relevant time.

The sum of the notional revenue losses is the company's ***unrealised revenue loss*** at the relevant time.

Step 2. Add up the unrealised capital gain and the unrealised revenue gain at the relevant time. The total is the ***unrealised gross gain*** at that time.

Step 3. Add up the unrealised capital loss and the unrealised revenue loss at the relevant time. The total is the ***unrealised gross loss*** at that time.

Step 4. If the unrealised gross loss at the relevant time exceeds the unrealised gross gain at that time, the excess is the company's ***preliminary unrealised net loss*** at that time.

Step 5. Add up the company's preliminary unrealised net loss and any \*capital loss, deduction or share of a deduction disregarded under section 170-270 in relation to an asset referred to in paragraph 165-115A(1A)(b). The total is the company's ***unrealised net loss*** at the relevant time.

(2) The ***global method*** of working out whether the company has an ***unrealised net loss*** at the relevant time is as follows:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Method statement*

Step 1. Work out the total \*market value of all \*CGT assets that the company owned at the relevant time (including those it \*acquired for less than \$10,000), using a valuation method that would generally be regarded as appropriate in the circumstances.

Step 2. Work out the total of the \*cost bases of those \*CGT assets at the relevant time.

Note: If a CGT asset that the company owned at the relevant time was also trading stock or a revenue asset at that time, see subsection (3) of this section.

Step 3. If the step 2 amount exceeds the step 1 amount, the excess is the company's ***preliminary unrealised net loss*** at the relevant time.

Step 4. Add up the company's preliminary unrealised net loss and any \*capital loss, deduction or share of a deduction disregarded under section 170-270 in relation to an asset referred to in paragraph 165-115A(1A)(b). The total is the company's ***unrealised net loss*** at the relevant time.

(3) If:

- (a) a \*CGT asset that the company owned at the relevant time was also \*trading stock or a \*revenue asset at that time; and
- (b) the asset's \*cost base at the relevant time is *less than* the amount that would be compared under section 165-115F with the asset's \*market value in working out a notional revenue gain or notional revenue loss that the company has at the relevant time in respect of the asset;

then, for the purposes of step 2 of the method statement in subsection (2) of this section, the amount that would be so compared is to be taken into account *instead of* that cost base.

(4) A choice to use the \*global method must be made on or before:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115F

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- (a) the day on which the company lodges its \*income tax return for the income year in which the relevant time occurred; or
- (b) such later day as the Commissioner allows.

**165-115F Notional gains and losses**

- (1) This section applies for the purpose of calculating whether a company has at a particular time (the **relevant time**) a notional capital gain, a notional capital loss, a notional revenue gain or a notional revenue loss in respect of a \*CGT asset that it owned at that time.
- (2) The calculation is to be made on the assumption that the company disposed of the asset at its \*market value at the relevant time.
- (3) In relation to an asset other than an item of \*trading stock:
  - (a) if the company would make a \*capital gain in respect of the disposal of the asset—the company has at the relevant time in respect of the asset a **notional capital gain** equal to the amount of the capital gain; or
  - (b) if an amount (other than a capital gain) would be included in the company's assessable income in respect of the disposal of the asset—the company has at the relevant time in respect of the asset a **notional revenue gain** equal to the amount so included; or
  - (c) if the company would make a \*capital loss in respect of the disposal of the asset—the company has at the relevant time in respect of the asset a **notional capital loss** equal to the amount of the capital loss; or
  - (d) if the company would be entitled to a deduction in respect of the disposal of the asset—the company has at the relevant time in respect of the asset a **notional revenue loss** equal to the amount of the deduction.
- (4) In relation to an asset that is an item of \*trading stock:
  - (a) if the item's \*market value at the relevant time exceeds:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (i) in respect of an item that has been valued under Division 70—the item’s latest valuation under that Division; or
    - (ii) otherwise—the \*cost of the item at the relevant time; the company has at the relevant time in respect of the article a **notional revenue gain** equal to the excess; or
  - (b) if the item’s market value at the relevant time is less than:
    - (i) in respect of an item that has been valued under Division 70—the item’s latest valuation under that Division; or
    - (ii) otherwise—the \*cost of the item at the relevant time; the company has at the relevant time in respect of the article a **notional revenue loss** equal to the difference.
- (5) A company may choose that this section is to apply to the company at the relevant time in respect of an asset to which subsection (6) applied at that time as if references to the \*market value of the asset were references to its \*written down value.
- (6) This subsection applies to an asset at the relevant time if:
- (a) the asset is a \*depreciating asset (not a building or structure) for whose decline in value the company has deducted or can deduct an amount; and
  - (b) the expenditure incurred by the company to \*acquire the asset was less than \$1,000,000 (the expenditure can include the giving of property: see section 103-5); and
  - (c) it would be reasonable for the company to conclude that the \*market value of the asset at that time was not less than 80% of its \*written down value at that time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115GA

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**Subdivision 165-CD—Reductions after alterations in ownership  
or control of loss company**

**Guide to Subdivision 165-CD**

**165-115GA What this Subdivision is about**

This Subdivision prevents multiple recognition of a company's losses when significant equity and debt interests that entities (not individuals) have in the company are realised.

**165-115GB When adjustments must be made**

- (1) The operation of this Subdivision is triggered at an alteration time, which is when:
  - (a) an alteration takes place in the ownership or control of the company; or
  - (b) a liquidator or administrator of the company declares that shares or financial instruments are worthless (CGT event G3).
  
- (2) An alteration time is the trigger for making reductions and other adjustments to the reduced cost base of significant equity and debt interests in the company that are owned by an entity (not an individual) that, alone or with its associates, has a controlling stake in the company and either:
  - (a) has a \*direct equity interest or \*indirect equity interest of at least 10% in the company; or
  - (b) is owed a debt of at least \$10,000 by the company or by another entity that has a significant equity or debt interest in the company.Deductions that relate to such interests held as trading stock or otherwise on revenue account are also reduced.
  
- (3) Adjustments may also be made when such an entity's interests in the company are partly realised within 12 months before an

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

alteration time or if, under an arrangement, such interests are realised partly within that period or at the alteration time and partly at an earlier time.

- (4) However, entities in which there are no interests in respect of which the company's losses have been, or can be, duplicated are not affected by this Subdivision.

### **165-115GC How adjustments are calculated**

- (1) Adjustments are based on the overall loss of the company. This comprises its realised losses and unrealised losses on CGT assets.
- (2) Special rules, directed at saving compliance costs, apply to determine whether unrealised losses have to be counted at an alteration time and, if so, how to work them out.
- (3) The company may not have to calculate its unrealised losses if the alteration time is not also a changeover time for the purposes of Subdivision 165-CC (about change of ownership or control of a company that has an unrealised net loss), and the company has no realised losses.
- (4) The company does not have to count unrealised losses at an alteration time if (together with certain related entities) it has a net asset value of not more than \$6,000,000 under the test in section 152-15 (for small business CGT relief).
- (5) In working out its unrealised losses on CGT assets, the company can choose to work out the \*market value of each of its assets individually, or of all of its assets together.
- (6) If the company works out the \*market value of each of its assets individually, unrealised losses on assets acquired for less than \$10,000 do not have to be calculated at any time.
- (7) Amounts (whether realised or unrealised) counted at a previous alteration time are not counted again at a later alteration time. (This does not apply to unrealised losses worked out by reference to the \*market value of all the company's assets together.)

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Section 165-115H**

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- (8) However, if unrealised amounts are *not* counted at a previous alteration time (for example, because of the \$10,000 exclusion, or because you satisfy the maximum net asset value test in section 152-15) and are not required to be taken into account in adjustments made at that time, they may be counted at a later time as part of a realised loss.
- (9) A formula is provided for making adjustments in straightforward cases if applying the formula gives a reasonable result having regard to the object of the Subdivision. Otherwise, reasonable adjustments must be made having regard to a number of stated factors.
- (10) To help entities to make the adjustments, any entity that, in its own right, has a controlling stake in the company is required to provide a written notice to its associates setting out relevant information. In limited circumstances, the company itself may have to provide a written notice to entities that, to its knowledge, have a significant equity or debt interest in it.

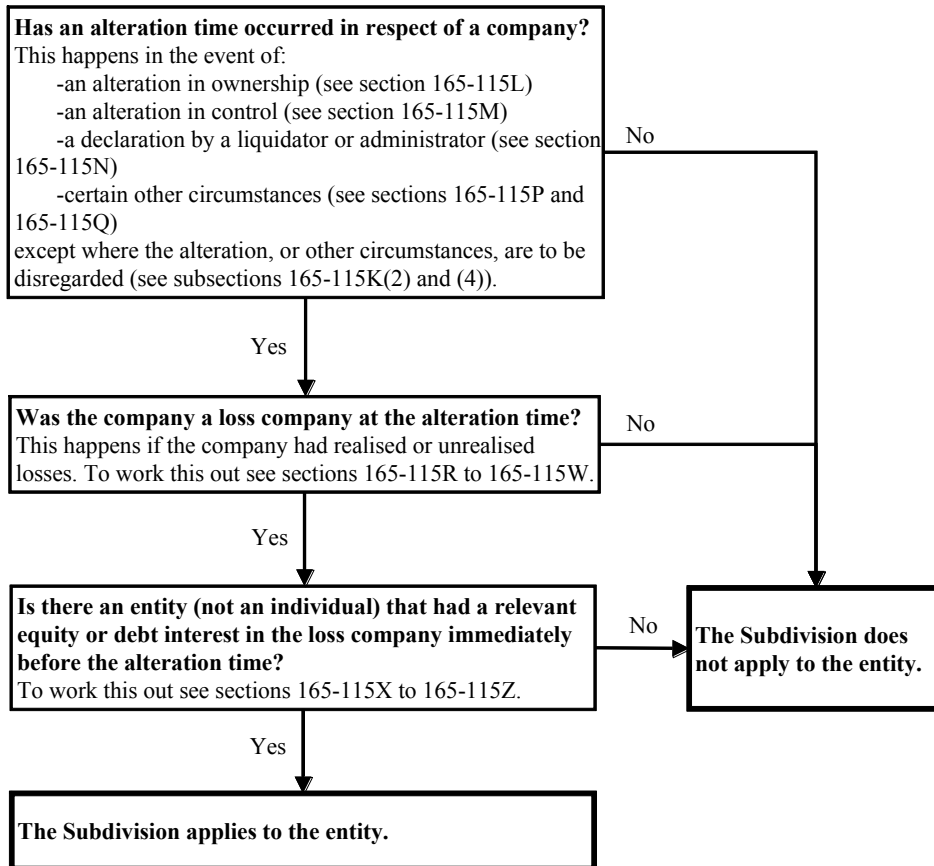
**165-115H How this Subdivision applies**

- (1) This Subdivision provides for certain taxation consequences for an entity (not an individual) that had a significant equity or debt interest in a loss company immediately before an alteration time occurred in respect of the company.
- (2) The following flowchart explains how to work out whether this Subdivision applies to an entity.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Application of Subdivision**



- (3) If this Subdivision applies to an entity, reductions are made to:
- (a) the reduced cost base of the entity's equity or debt (see subsection 165-115ZA(3)); or
  - (b) any deduction to which the entity is entitled in respect of the disposal of the equity or debt (see subsection 165-115ZA(4)); or
  - (c) deductions in respect of, and the cost of, any of the equity or debt that is trading stock (see subsection 165-115ZA(5)).

Example: The following is an example of how this Subdivision operates:

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Facts: Alpha Co acquired 80% of the shares in Beta Co on 5 May 1998 for \$1,000.  
Gamma Co owns 20% of the shares in Beta Co.  
On 6 February 2000, Alpha Co disposed of its shares for \$600.  
At the beginning of the 1999-2000 income year, Beta Co had an unapplied net capital loss of \$500 from the 1998-99 income year. This loss was fully reflected in the market value of shares in Beta Co.  
Alpha Co and Gamma Co are not associated in any way.

Result:

- Step 1: An alteration time occurred in respect of Beta Co as a result of the change in ownership that occurred when Alpha Co sold its shares.
- Step 2: Beta Co was a loss company at the alteration time because it had an unapplied net capital loss from an earlier income year.
- Step 3: Alpha Co had a relevant equity interest in Beta Co immediately before the alteration time because it had a controlling stake and significant interest (80% equity interest). Gamma Co did not have a relevant equity interest in Beta Co because it did not have a controlling stake.
- Step 4: Because Alpha Co had a relevant equity interest in Beta Co, the reduced cost bases of its shares in Beta Co are reduced by 80% of Beta Co's net capital loss:

$$80\% \times \$500 = \$400$$

Alpha Co does not make a capital gain on the disposal of its shares in Beta Co because the capital proceeds (\$600) are less than the cost bases (\$1,000).

Nor did Alpha Co make a capital loss on the disposal of its shares in Beta Co because the capital proceeds (\$600) are not less than the reduced cost bases as further reduced by this Subdivision (\$600).

The net capital loss in Beta Co is not duplicated on the sale of Alpha Co's shares in Beta Co.

- Step 5. There are no notice requirements in this simple case. If Gamma Co and Alpha Co were associates (so that Gamma Co had a relevant equity interest in Beta Co), Alpha Co would need to provide the following information to Gamma Co:
- (a) the alteration time: 6 February 2000;
  - (b) Beta Co's overall loss at the alteration time: \$500;
  - (c) details of the overall loss: a net capital loss of \$500 for the 1998-99 income year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Operative provisions

### 165-115J Object of Subdivision

The main object of this Subdivision is to make appropriate adjustments (under section 165-115ZA) to the tax values of significant equity and debt interests held directly or indirectly by entities other than individuals in a \*loss company whose ownership

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 165-115K

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or control alters.

The purpose of the adjustments is to prevent the duplication of the company's realised and unrealised losses when any of those interests are \*disposed of or otherwise realised. This happens because the company's losses are reflected in the values of the interests.

**165-115K Application and interpretation**

*Application*

- (1) This Subdivision applies if:
- (a) an alteration time occurs in respect of a company; and
  - (b) the company is a \*loss company at the alteration time; and
  - (c) one or more entities had relevant equity interests or relevant debt interests in the company immediately before the alteration time.

Note 1: For **alteration time**, see sections 165-115L, 165-115M, 165-115N, 165-115P and 165-115Q.

Note 2: For **relevant equity interests** and **relevant debt interests**, see sections 165-115X and 165-115Y.

*Alteration time before commencement time to be disregarded*

- (2) An **alteration time** does not include a time before the commencement time.

*Commencement time*

- (3) The **commencement time** for a company is:
- (a) if the company was in existence at 1 pm (by legal time in the Australian Capital Territory) on 11 November 1999—that time; or
  - (b) if the company came into existence after that time—the time when it came into existence.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



*Certain alteration times to be disregarded*

- (4) If:
- (a) a time (the **test time**) would, apart from this subsection, be an alteration time in relation to a company; and
  - (b) the company does not have any losses of the kinds referred to in paragraphs 165-115R(3)(a), (b), (c) and (d) and 165-115S(3)(a) and (b); and
  - (c) the test time is not a changeover time in relation to the company under Subdivision 165-CC; and
  - (d) if the test time were such a changeover time, it would be reasonable for the company to conclude that it would not have an unrealised net loss at that time under section 165-115E;
- the test time is taken not to be an alteration time in relation to the company.

*Application to CGT events other than disposals*

- (5) This Subdivision applies to a \*CGT event (other than a \*disposal) happening in relation to a CGT asset (for example, an interest in a company that is constituted by an equity or debt):
- (a) in the same way as it applies to a disposal of a CGT asset; and
  - (b) as if the asset had been disposed of at the time when the CGT event happens.

**165-115L Alteration time—alteration in ownership of company**

- (1) A time (the **test time**) is an **alteration time** in respect of a company if:
- (a) persons who had \*more than 50% of the voting power in the company at the reference time do not have more than 50% of that voting power immediately after the test time; or
  - (b) persons who had rights to \*more than 50% of the company's dividends at the reference time do not have rights to more

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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than 50% of those dividends immediately after the test time;  
or

- (c) persons who had rights to \*more than 50% of the company's capital distributions at the reference time do not have rights to more than 50% of those distributions immediately after the test time.

Note 1: See section 165-150 to work out who had more than 50% of the voting power in the company.

Note 2: See section 165-155 to work out who had rights to more than 50% of the company's dividends.

Note 3: See section 165-160 to work out who had rights to more than 50% of the company's capital distributions.

Note 4: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

- (2) The *reference time* is:

- (a) if no alteration time occurred in respect of the company before the \*test time—the commencement time; or  
(b) otherwise—the time immediately after the last alteration time.

- (3) To work out whether paragraph (1)(a), (b) or (c) applied at a particular time, apply the primary test unless subsection (4) requires the alternative test to be applied.

Note: For the primary test see subsections 165-150(1), 165-155(1) and 165-160(1).

- (4) Apply the alternative test if one or more other companies beneficially owned \*shares or interests in shares in the company at any time during the period from the reference time to the \*test time.

Note: For the alternative test see subsections 165-150(2), 165-155(2) and 165-160(2).

- (5) If the company is:

- (a) a \*non-profit company; or  
(b) a \*mutual affiliate company; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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(c) a \*mutual insurance company;  
during the whole of the period from the reference time to the \*test time, the test time is taken not to be an \*alteration time in respect of the company because of the application of paragraphs (1)(b) and (c).

### **165-115M Alteration time—alteration in control of company**

- (1) A time (the *test time*) is also an *alteration time* in respect of a company if, at the test time:
- (a) a person or persons who did not control, and were not able to control, the voting power in the company at the reference time began to control, or became able to control, that voting power immediately after the test time; and
  - (b) that person or those persons so began, or became able, to control that voting power for the purpose of:
    - (i) getting some benefit or advantage in relation to how this Act applies; or
    - (ii) getting such a benefit or advantage for someone else; or for purposes including that purpose.

Note 1: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

Note 2: Subdivision 167-B has special rules for working out voting power in a company whose shares do not all carry the same voting rights, or do not carry all of the voting rights in the company.

- (2) The *reference time* is:
- (a) if no alteration time occurred in respect of the company before the \*test time—the commencement time; or
  - (b) otherwise—the time immediately after the last alteration time.

- (3) In this section:

*control* of the voting power in a company means control of that voting power either directly, or indirectly through one or more interposed entities.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115N

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**165-115N Alteration time—declaration by liquidator or administrator**

If a liquidator or administrator makes a declaration referred to in section 104-145 in relation to a company, the time of the declaration is also an *alteration time* in respect of the company.

**165-115P Notional alteration time—disposal of interests in company within 12 months before alteration time**

- (1) This section applies if:
  - (a) an alteration time occurs in respect of a \*loss company; and
  - (b) an entity \*disposed of an interest in the company (an *equity*) or a debt (a *debt*) at a time (the *disposal time*) within 12 months before the alteration time but not earlier than the commencement time; and
  - (c) immediately before the disposal time, the entity had a relevant equity interest or a relevant debt interest in the company that included the equity or debt, or would have had such an interest if any previous disposals of interests or debts by the entity had not occurred; and
  - (d) immediately before the alteration time, the entity had a relevant equity interest or a relevant debt interest in the company, or would have had such an interest if any previous disposals of interests or debts by the entity had not occurred.
- (2) The references in paragraphs (1)(c) and (d) to previous \*disposals of interests or debts by the entity are references to:
  - (a) previous disposals within the period referred to in paragraph (1)(b); and
  - (b) previous disposals before that period if those previous disposals and any one or more of the following:
    - (i) the disposal of the equity or debt;
    - (ii) a disposal referred to in paragraph (a);
    - (iii) a disposal at the alteration time; occurred as part of an \*arrangement.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (3) The time immediately before the \*disposal of the equity or debt is taken to have been an alteration time (a *notional alteration time*) in respect of the company.
- (4) The entity:
  - (a) is taken to have had, immediately before the notional alteration time, a relevant equity interest in the company constituted by the equity or a relevant debt interest in the company constituted by the debt, as the case may be; and
  - (b) is taken not to have had, immediately before the notional alteration time, any other relevant equity interest or relevant debt interest in the company.
- (5) No entity (other than the entity referred to in paragraph (1)(b)) is taken to have had a relevant equity interest or a relevant debt interest in the company immediately before the notional alteration time.
- (6) In applying this Subdivision in relation to the company in respect of a time after a notional alteration time, the notional alteration time is taken not to have occurred.

Note: For *relevant equity interests* and *relevant debt interests*, see sections 165-115X and 165-115Y.

### **165-115Q Notional alteration time—disposal of interests in company earlier than 12 months before alteration time**

- (1) This section applies if:
  - (a) an alteration time occurs in respect of a \*loss company; and
  - (b) an entity that \*disposed of an interest in the company (the *later equity*) or a debt (the *later debt*) at, or within 12 months before, the alteration time also disposed of an interest in the company (the *earlier equity*) or a debt (the *earlier debt*) at a time (the *earlier disposal time*) earlier than 12 months before the alteration time but not earlier than the commencement time; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) the disposal of the later equity or later debt and the disposal of the earlier equity or earlier debt occurred as part of an \*arrangement; and
  - (d) immediately before the earlier disposal time, the entity had a relevant equity interest or a relevant debt interest in the company that included the earlier equity or earlier debt, or would have had such an interest if any previous disposals of interests or debts by the entity had not occurred; and
  - (e) immediately before the alteration time, the entity had a relevant equity interest or a relevant debt interest in the company, or would have had such an interest if any previous disposals of interests or debts by the entity had not occurred.
- (2) The references in paragraphs (1)(d) and (e) to previous \*disposals of interests or debts by the entity are references to:
- (a) previous disposals within the period referred to in paragraph (1)(b); and
  - (b) previous disposals before that period if those previous disposals and any one or more of the following:
    - (i) the disposal of the equity or debt;
    - (ii) a disposal referred to in paragraph (a);
    - (iii) a disposal at the alteration time; occurred as part of an \*arrangement.
- (3) The time immediately before the \*disposal of the earlier equity or earlier debt is taken to have been an alteration time (a **notional alteration time**) in respect of the company.
- (4) The entity:
- (a) is taken to have had, immediately before the notional alteration time, a relevant equity interest in the company constituted by the earlier equity or a relevant debt interest in the company constituted by the earlier debt, as the case may be; and
  - (b) is taken not to have had, immediately before the notional alteration time, any other relevant equity interest or relevant debt interest in the company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (5) No entity (other than the entity referred to in paragraph (1)(b)) is taken to have had a relevant equity interest or a relevant debt interest in the company immediately before the notional alteration time.
- (6) In applying this Subdivision in relation to the company in respect of a time after a notional alteration time, the notional alteration time is taken not to have occurred.

Note: For *relevant equity interests* and *relevant debt interests*, see sections 165-115X and 165-115Y.

### **165-115R When company is a loss company at first or only alteration time in income year**

#### *Application*

- (1) The question whether a company is a **loss company** at the first or only alteration time in a particular income year is to be worked out in this way.

#### *Assumed income year*

- (2) Assume that the period that started at the beginning of the income year and ended at the alteration time is an income year and apply paragraphs (3)(a), (b), (c) and (d) on that assumption.

#### *What is a loss company*

- (3) The company is a **loss company** at the alteration time if:
  - (a) at the beginning of the income year it had a \*tax loss or tax losses for an earlier income year or earlier income years; or
  - (b) at the beginning of the income year it had a \*net capital loss or net capital losses for an earlier income year or earlier income years; or
  - (c) it has a tax loss for the income year, calculated as if the income year were a period for the purposes of Subdivision 165-B; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (d) it has a net capital loss for the income year, calculated as if the income year were a period for the purposes of Subdivision 165-CB; or
- (e) it has an adjusted unrealised loss at the alteration time.

Note: For *adjusted unrealised loss*, see section 165-115U.

*How losses are to be calculated*

- (4) In applying subsection (3):
  - (a) a \*tax loss or \*net capital loss that was taken into account in working out under this section whether the company was a \*loss company at an alteration time in a previous income year is to be disregarded; and
  - (b) Subdivision 170-D is to be disregarded.

*Overall loss*

- (5) The sum of:
  - (a) the amount or amounts of any \*tax loss or tax losses referred to in paragraph (3)(a); and
  - (b) the amount or amounts of any \*net capital loss or net capital losses referred to in paragraph (3)(b); and
  - (c) the amount of any tax loss referred to in paragraph (3)(c); and
  - (d) the amount of any net capital loss referred to in paragraph (3)(d); and
  - (e) the amount of any adjusted unrealised loss referred to in paragraph (3)(e);is the \*loss company's **overall loss** at the alteration time.

Note: The loss company's overall loss is relevant for the purposes of subsections 165-115ZB(3) and (6).

*Certain losses to be disregarded*

- (6) A reference in a paragraph of subsection (3) and in the corresponding paragraph of subsection (5) to a particular loss is a

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



reference only to a loss to the extent to which it represents an outlay or loss of any of the economic resources of the company.

Note: Where the income tax law allows, as all or part of a loss, an amount for the decline in value of a depreciating asset that exceeds the actual economic depreciation or depletion of the asset concerned, the excess is not to be regarded for the purposes of this subsection as representing an outlay or loss of economic resources of the company.

- (6A) Subsection (6) does not apply to paragraphs (3)(e) and (5)(e) if the company has chosen to use the \*global method of working out whether it has an adjusted unrealised loss at the alteration time.

*Amounts of losses may be reduced*

- (7) The amounts referred to in paragraphs (5)(a) to (d) may be reduced under section 165-115T.

### **165-115S When company is a loss company at second or later alteration time in income year**

*Application*

- (1) The question whether a company is a **loss company** at an alteration time (the **current alteration time**) that is the second or a later alteration time in the same income year is to be worked out in this way.

*Assumed income year*

- (2) Assume that the period that started immediately after the last alteration time and ended at the current alteration time is an income year and apply paragraphs (3)(a) and (b) on that assumption.

*What is a loss company*

- (3) The company is a **loss company** at the current alteration time if:
- (a) it has a \*tax loss for the income year, calculated as if the income year were a period for the purposes of Subdivision 165-B; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Section 165-115S**

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- (b) it has a \*net capital loss for the income year, calculated as if the income year were a period for the purposes of Subdivision 165-CB; or
- (c) it has an adjusted unrealised loss at the current alteration time.

Note: For *adjusted unrealised loss*, see section 165-115U.

*How losses are to be calculated*

- (4) In applying subsection (3), Subdivision 170-D is to be disregarded.

*Overall loss*

- (5) The sum of:
  - (a) the amount of any \*tax loss referred to in paragraph (3)(a); and
  - (b) the amount of any \*net capital loss referred to in paragraph (3)(b); and
  - (c) the amount of any adjusted unrealised loss referred to in paragraph (3)(c);

is the \*loss company's **overall loss** at the current alteration time.

Note: The loss company's overall loss is relevant for the purposes of subsections 165-115ZB(3) and (6).

*Certain losses to be disregarded*

- (6) A reference in a paragraph of subsection (3) and in the corresponding paragraph of subsection (5) to a particular loss is a reference only to a loss to the extent to which it represents an outlay or loss of any of the economic resources of the company.

Note: Where the income tax law allows, as all or part of a loss, an amount for the decline in value of a depreciating asset that exceeds the actual economic depreciation or depletion of the asset concerned, the excess is not to be regarded for the purposes of this subsection as representing an outlay or loss of economic resources of the company.

- (6A) Subsection (6) does not apply to paragraphs (3)(c) and (5)(c) if the company has chosen to use the \*global method of working out

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

whether it has an adjusted unrealised loss at the current alteration time.

*Amounts of losses may be reduced*

- (7) The amounts referred to in paragraphs (5)(a) and (b) may be reduced under section 165-115T.

### **165-115T Reduction of certain amounts included in company's overall loss at alteration time**

- (1) In working out under section 165-115R or 165-115S whether a company was a \*loss company at an alteration time (the **current alteration time**), if a loss (the **realised loss**) referred to in paragraph 165-115R(3)(a), (b), (c) or (d) or 165-115S(3)(a) or (b) that the company had at the current alteration time reflected an amount of a notional revenue loss, a trading stock decrease or a notional capital loss included in an adjusted unrealised loss, that the company had at a previous alteration time, the realised loss is taken to be reduced by that amount.

Note 1: For **notional revenue loss** and **notional capital loss** see section 165-115V.

Note 2: For **trading stock decrease** see section 165-115W.

- (2) Subsection (1) does not apply to an adjusted unrealised loss that the company had at a previous alteration time if the company has chosen to use the \*global method of working out whether it has an adjusted unrealised loss at that previous time.

### **165-115U Adjusted unrealised loss**

- (1) The question whether a company has an **adjusted unrealised loss** at an alteration time (the **relevant alteration time**) is worked out in this way (the **individual asset method**), unless the company chooses to work it out using the \*global method (set out in subsection (1B)).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115U

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*Method statement*

Step 1. Work out under section 165-115V or 165-115W in respect of each \*CGT asset that the company owned at the relevant alteration time any notional capital loss, notional revenue loss or trading stock decrease that the company has at that time in respect of the asset.

To the extent that a notional capital loss or a notional revenue loss in respect of an asset at the relevant alteration time reflected an amount that was counted at an earlier alteration time, do not count it again at the relevant alteration time.

Step 2. Add up the notional capital losses and the notional revenue losses that the company had at the relevant alteration time. The total is the company's **nominal unrealised loss** at that time.

Step 3. Add up the trading stock decreases that the company had at the relevant alteration time. The total is the company's **overall trading stock decrease** at that time.

Step 4. The sum of the company's nominal unrealised loss and overall trading stock decrease at the relevant time is the company's **adjusted unrealised loss** at that time.

Note: Certain alteration times are disregarded (see subsections 165-115K(2) and (4)).

(1A) Step 1 in the method statement in subsection (1) does not apply to an amount that was counted at an earlier alteration time if the company has chosen to use the \*global method of working out whether it has an adjusted unrealised loss at that earlier time.

(1B) The **global method** of working out whether the company has an **adjusted unrealised loss** at the relevant alteration time is as follows:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Method statement*

Step 1. Work out the total \*market value of all \*CGT assets that the company owned at the relevant alteration time (including those it \*acquired for less than \$10,000), using a valuation method that would generally be regarded as appropriate in the circumstances.

Step 2. Work out the total of the \*cost bases of those \*CGT assets at the relevant time.

Note: If a CGT asset that the company owned at the relevant time was also trading stock or a revenue asset at that time, see subsection (1C) of this section.

Step 3. If the step 2 amount exceeds the step 1 amount, the excess is the company's ***adjusted unrealised loss*** at the relevant time.

(1C) If:

- (a) a \*CGT asset that the company owned at the relevant alteration time was also \*trading stock or a \*revenue asset at that time; and
- (b) the asset's \*cost base at the relevant alteration time is *less than* the amount that, if the relevant alteration time were a changeover time, would be compared under section 165-115F with the asset's \*market value in working out a notional revenue gain or notional revenue loss that the company would have at the changeover time in respect of the asset;

then, for the purposes of step 2 of the method statement in subsection (1B) of this section, the amount that would be so compared is to be taken into account *instead of* that cost base.

(1D) A choice to use the \*global method must be made on or before:

- (a) the day on which the company lodges its \*income tax return for the income year in which the relevant alteration time occurred; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115V

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(b) such later day as the Commissioner allows.

- (2) However, the company does not have an adjusted unrealised loss at the relevant alteration time if the company would, at that time, satisfy the maximum net asset value test under section 152-15.

**165-115V Notional losses**

- (1) This section applies for the purpose of calculating whether a company has at an alteration time a notional capital loss or a notional revenue loss in respect of a \*CGT asset that it owned at that time.
- (2) However, a company does not have a notional capital loss or a notional revenue loss at an alteration time in respect of a CGT asset that it \*acquired for less than \$10,000.
- (3) The calculation is to be made on the assumption that the company disposed of the asset at its \*market value at the alteration time.
- (4) If the company would make a \*capital loss in respect of the disposal of the asset, the company has at the alteration time in respect of the asset a **notional capital loss** equal to the amount of the capital loss.
- (5) If the company would be entitled to a deduction in respect of the disposal of the asset, the company has at the alteration time in respect of the asset a **notional revenue loss** equal to the amount of the deduction.
- (6) A company may choose that this section is to apply to the company at the alteration time in respect of an asset to which subsection (7) applied at that time as if the reference in subsection (3) to the \*market value of the asset were a reference to its \*written down value.
- (7) This subsection applies to an asset at the alteration time if:
- (a) the asset is a \*depreciating asset (not a building or structure) for whose decline in value the company has deducted or can deduct an amount; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) the expenditure incurred by the company to \*acquire the asset was less than \$1,000,000 (the expenditure can include the giving of property: see section 103-5); and
- (c) it would be reasonable for the company to conclude that the \*market value of the asset at the alteration time was not less than 80% of its \*written down value at that time.

### 165-115W Calculation of trading stock decrease

- (1) The question whether there is a **trading stock decrease** in relation to a company at an alteration time for a \*CGT asset of the company that was an item of \*trading stock at that time is worked out in this way.

*Method statement*

- Step 1. Work out whether the item's \*market value immediately before the alteration time was less than:
- (a) if there was no earlier alteration time in the income year in which that alteration time occurred—the item's value under subsection 70-40(1) at the start of that income year or its cost if subsection 70-40(2) applies; or
  - (b) if there was an earlier alteration time or there were earlier alteration times in that income year—the item's market value immediately before that earlier alteration time or the later or latest of those earlier alteration times, as the case may be, or its cost if the company did not own it at that time.
- Step 2. If the item's \*market value immediately before the alteration time was less than:
- (a) the item's value or cost referred to in paragraph (a) in step 1; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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(b) its market value or cost (as applicable) in paragraph (b) in step 1;

as the case requires, the difference is the **trading stock decrease** for the item.

To the extent (if any) to which the difference reflects an amount counted at an earlier alteration time, do not count that amount again.

Note: Certain alteration times are disregarded (see subsections 165-115K(2) and (4)).

- (1A) Step 2 in the method statement in subsection (1) does not apply to an amount counted at an earlier alteration time if the company has chosen to use the \*global method of working out whether it has an adjusted unrealised loss at that earlier time.
- (2) However, a company does not have a trading stock decrease at an alteration time in respect of an item of \*trading stock that it \*acquired for less than \$10,000.

**165-115X Relevant equity interest**

- (1) An entity (not an individual) has a **relevant equity interest** in a \*loss company at a particular time if:
- (a) at that time the entity has a controlling stake in the loss company (see section 165-115Z); and
  - (b) at that time the entity has an interest (an **equity**) that gives, or interests (each of which is also called an **equity**) that between them give, the entity:
    - (i) the control of, or the ability to control, 10% or more of the voting power in the loss company (either directly, or indirectly through one or more interposed entities); or
    - (ii) the right to receive (either directly, or indirectly through one or more interposed entities) 10% or more of any dividends that the loss company may pay; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (iii) the right to receive (either directly, or indirectly through one or more interposed entities) 10% or more of any distribution of capital of the loss company; and
- (c) the equity or each equity is either:
  - (i) an interest (including a \*share or shares, or an option or right to acquire a share or shares) in the loss company; or
  - (ii) an interest (including an option or right to acquire an interest) held by the entity directly in another entity that has a relevant equity interest or relevant debt interest in the loss company.

Note: For paragraph (b), Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

- (2) The equity or equities constitute the entity's relevant equity interest in the \*loss company.
- (2A) A \*widely held company that, apart from this subsection, would have a relevant equity interest in a \*loss company at a particular time does not have such an interest at that time.
- (2B) Subsection (2A) does not apply if:
  - (a) an entity has a controlling stake in the loss company (see section 165-115Z); and
  - (b) that entity has a direct or indirect interest in, or is owed a debt by, the \*widely held company, being an interest or debt in respect of which:
    - (i) the entity could, if a \*CGT event happened in respect of the interest or debt, make a \*capital loss (other than a capital loss that would be disregarded) that reflects any part of the loss company's overall loss; or
    - (ii) the entity has deducted or can deduct, or could deduct at a later time, an amount in respect of the cost of the \*acquisition, or a net loss on the \*disposal, of the interest or debt, where the deduction reflected or would have

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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reflected, or would reflect, as the case may be, any part of the company's overall loss.

(2C) Subsection (2A) does not apply in respect of a particular time if an entity that had a direct or indirect interest in, or was owed a debt by, the \*widely held company at an earlier time, and had a controlling stake in the loss company (see section 165-115Z) at the earlier time:

- (a) made a capital loss (other than a capital loss that was disregarded) because a \*CGT event happened in respect of the interest or debt, where the capital loss reflected any part of the \*loss company's overall loss; or
- (b) has deducted or could have deducted at an earlier time, or could deduct at a later time, an amount in respect of the cost of the \*acquisition, or a net loss on the \*disposal, of the interest or debt, where the deduction reflected or would have reflected, or would reflect, as the case may be, any part of the company's overall loss.

(3) An entity (the **first entity**) that, apart from this subsection, would have a relevant equity interest in a \*loss company at a particular time does not have such an interest if, at that time, there is no other entity that has a direct or indirect interest in, or is owed a debt by, the first entity, being an interest or debt in respect of which:

- (a) the other entity could, if a \*CGT event happened in respect of the interest or debt, make a \*capital loss (other than a capital loss that would be disregarded) that reflects any part of the loss company's overall loss; or
- (b) the other entity has deducted or can deduct, or could deduct at a later time:
  - (i) an amount in respect of the cost of the \*acquisition of the interest or debt; or
  - (ii) a net loss on the \*disposal of the interest or debt; where the deduction reflected, or would reflect, any part of the loss company's overall loss.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (3A) Subsection (3) does not apply if the first entity is a \*widely held company.
- (4) Subsection (3) does not apply to the first entity in respect of a particular time if an entity that had a direct or indirect interest in, or was owed a debt by, the first entity at an earlier time:
  - (a) made a capital loss (other than a capital loss that was disregarded) because a \*CGT event happened in respect of the interest or debt, where the capital loss reflected any part of the \*loss company's overall loss; or
  - (b) has deducted or could have deducted at an earlier time, or could deduct at a later time, an amount in respect of the cost of the \*acquisition, or a net loss on the \*disposal, of the interest or debt, where the deduction reflected or would have reflected, or would reflect, as the case may be, any part of the company's overall loss.
- (5) An individual is not taken to have a **relevant equity interest** in a \*loss company at any time.
- (6) A partnership that consists only of individuals is not taken to have a **relevant equity interest** in a \*loss company at any time.
- (7) If section 106-30, 106-50 or 106-60 would treat an act referred to in that section that is done in relation to an interest as having been done by an individual, the interest is not a relevant equity interest.

### 165-115Y Relevant debt interest

- (1) An entity (not an individual) has a **relevant debt interest** in a \*loss company at a particular time if, at that time:
  - (a) the entity has a controlling stake in the loss company (see section 165-115Z); and
  - (b) the entity is owed by the loss company a debt of not less than \$10,000 (a **debt**) or debts at least one of which is not less than \$10,000 (each debt of not less than \$10,000 is also called a **debt**).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (2) An entity (not an individual) also has a **relevant debt interest** in a \*loss company at a particular time if, at that time:
- (a) the entity has a controlling stake in the loss company; and
  - (b) the entity is owed by an entity (the **debtor entity**) other than the loss company a debt of not less than \$10,000 (also a **debt**) or debts at least one of which is not less than \$10,000 (each debt of not less than \$10,000 is also called a **debt**); and
  - (c) the debtor entity has a relevant equity interest or a relevant debt interest in the loss company.
- (3) The total of the debts referred to in subsections (1) and (2) constitutes the entity's relevant debt interest in the \*loss company.
- (3A) A \*widely held company that, apart from this subsection, would have a relevant debt interest in a \*loss company at a particular time does not have such an interest at that time.
- (3B) Subsection (3A) does not apply if:
- (a) an entity has a controlling stake in the loss company (see section 165-115Z); and
  - (b) that entity has a direct or indirect interest in, or is owed a debt by, the \*widely held company, being an interest or debt in respect of which:
    - (i) the entity could, if a \*CGT event happened in respect of the interest or debt, make a \*capital loss (other than a capital loss that would be disregarded) that reflects any part of the loss company's overall loss; or
    - (ii) the entity has deducted or can deduct, or could deduct at a later time, an amount in respect of the cost of the \*acquisition, or a net loss on the \*disposal, of the interest or debt, where the deduction reflected or would have reflected, or would reflect, as the case may be, any part of the company's overall loss.
- (3C) Subsection (3A) does not apply in respect of a particular time if an entity that had a direct or indirect interest in, or was owed a debt by, the \*widely held company at an earlier time, and had a

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

controlling stake in the \*loss company (see section 165-115Z) at the earlier time:

- (a) made a \*capital loss (other than a capital loss that was disregarded) because a \*CGT event happened in respect of the interest or debt, where the capital loss reflected any part of the loss company's overall loss; or
  - (b) has deducted or could have deducted at an earlier time, or could deduct at a later time, an amount in respect of the cost of the \*acquisition, or a net loss on the \*disposal, of the interest or debt, where the deduction reflected or would have reflected, or would reflect, as the case may be, any part of the company's overall loss.
- (4) An entity (the **first entity**) that, apart from this subsection, would have a relevant debt interest in a \*loss company at a particular time does not have such an interest if, at that time, there is no other entity that has a direct or indirect interest in, or is owed a debt by, the first entity, being an interest or debt in respect of which:
- (a) the other entity could, if a \*CGT event happened in respect of the interest or debt, make a \*capital loss (other than a capital loss that would be disregarded) that reflects any part of the loss company's overall loss; or
  - (b) the other entity could deduct, or can deduct or could deduct at a later time:
    - (i) an amount in respect of the cost of the \*acquisition of the interest or debt; or
    - (ii) a net loss on the \*disposal of the interest or debt; where the deduction reflects, or would have reflected, any part of the loss company's overall loss.
- (4A) Subsection (4) does not apply if the first entity is a \*widely held company.
- (5) Subsection (4) does not apply to the first entity in respect of a particular time if an entity that had a direct or indirect interest in, or was owed a debt by, the first entity at an earlier time:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) made a capital loss (other than a capital loss that would be disregarded) at an earlier time because a \*CGT event happened in respect of the interest or debt, where the capital loss reflected any part of the \*loss company's overall loss; or
  - (b) has deducted or could have deducted at an earlier time, or could deduct at a later time, an amount in respect of the cost of the \*acquisition, or a net loss on the \*disposal, of the interest or debt, where the deduction reflected or would have reflected, or would reflect, as the case may be, any part of the company's overall loss.
- (6) An individual is not taken to have a **relevant debt interest** in a \*loss company at any time.
  - (7) A partnership that consists only of individuals is not taken to have a **relevant debt interest** in a \*loss company at any time.
  - (8) If section 106-30, 106-50 or 106-60 would treat an act referred to in that section that is done in relation to a debt as having been done by an individual, the debt is not a relevant debt interest.

**165-115Z What constitutes a controlling stake in a company**

- (1) An entity has a **controlling stake in a company** at a particular time if the entity, or the entity and the entity's \*associates between them:
  - (a) are able at that time to exercise, or control the exercise of, more than 50% of the voting power in the company (either directly, or indirectly through one or more interposed entities); or
  - (b) have at that time the right to receive (either directly, or indirectly through one or more interposed entities) more than 50% of any dividends that the company may pay; or
  - (c) have at that time the right to receive (either directly, or indirectly through one or more interposed entities) more than 50% of any distribution of capital of the company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note 1: The effect of subsection (1) is that, if an entity has a controlling stake in a company, each associate of the entity also has a controlling stake in the company.

Note 2: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

(2) If:

(a) apart from this subsection, an interest that gives an entity and its \*associates (if any):

(i) the ability to exercise, or control the exercise of, any of the voting power in a company; or

(ii) the right to receive dividends that a company may pay;  
or

(iii) the right to receive a distribution of capital of a company;

would, in the application of paragraph (1)(a), (b) or (c), be counted more than once; and

(b) the interest is both direct and indirect;  
only the direct interest is to be counted.

**165-115ZA Reductions and other consequences if entity has relevant equity interest or relevant debt interest in loss company immediately before alteration time**

*Application of section*

(1) This section applies to an entity (an *affected entity*) that has a relevant equity interest or a relevant debt interest, or both, in a \*loss company immediately before a time (a *relevant time*) that is an alteration time in respect of the loss company.

Note: This section and section 165-115ZB can apply differently for a company that has used the global method of working out whether it has an adjusted unrealised loss at an alteration time. See section 165-115ZD.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*Application of section nullified in certain circumstances*

- (2) However, if:
- (a) this section has applied to an entity in respect of a debt owed to the entity; and
  - (b) Subdivisions 245-C to 245-G (which relate to the forgiveness of commercial debts) also applied in respect of the debt at the same time or at a later time;
- any reductions or other consequences affecting the entity in respect of the debt under this section are taken not to have occurred or to have been required to occur.

Note: An amendment of an assessment can be made at any time to give effect to this subsection (see subsection 170(10AA) of the *Income Tax Assessment Act 1936*).

*Reduction of reduced cost base*

- (3) The \*reduced cost base of an equity or debt that was \*acquired on or after 20 September 1985 is to be reduced immediately before the relevant time by the adjustment amount calculated under section 165-115ZB.

*Reduction of deduction—equity or debt is not trading stock*

- (4) If an equity or debt is not an item of \*trading stock of the affected entity immediately before the relevant time, any amount that the entity can deduct in respect of the disposal of any of the equity or debt is to be reduced by the adjustment amount calculated under section 165-115ZB.

*Reduction of cost—equity or debt is trading stock*

- (5) If:
- (a) an equity or debt is an item of \*trading stock of the affected entity immediately before the relevant time; and
  - (b) the \*cost for the purposes of Division 70 of the equity or debt exceeds its \*market value immediately before the relevant time;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



then, subject to any later application or applications of this Subdivision, the cost of the equity or debt for the purposes of Division 70, and any deduction for an outlay to \*acquire it, are reduced by the lesser of the following amounts or, if they are equal, by one of them:

- (c) the adjustment amount calculated under section 165-115ZB;
- (d) the amount of the excess referred to in paragraph (b).

*Subsection (4) to apply only in respect of certain income years*

- (6) For the purpose of working out:
  - (a) deductions under section 8-1; or
  - (b) whether an amount is included in assessable income under subsection 70-35(2); or
  - (c) whether an amount can be deducted under subsection 70-35(3);subsection (5) applies only in respect of income years ending after the later of the following:
  - (d) the commencement time;
  - (e) the time 12 months before the relevant time.

*Further election to value trading stock*

- (7) If an election has been made under section 70-45 to value an item of \*trading stock on hand at the end of an income year otherwise than at its \*cost and subsection (5) applies in respect of it, a further election may be made under that section to value the item of trading stock at cost.

*Previous applications of this section in relation to trading stock to be taken into account*

- (8) In applying this section to the affected entity in respect of an equity or debt that is \*trading stock of the entity, any previous applications of this section to the entity in respect of the equity or debt are to be taken into account.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*Cost of equity or debt that becomes trading stock after relevant time*

(9) If:

- (a) an equity or debt becomes an item of \*trading stock of the affected entity after the relevant time; and
- (b) had the equity or debt been an item of trading stock of the affected entity at an earlier time that was, or at 2 or more earlier times each of which was, the relevant time for the purposes of a previous application or previous applications of this section, its \*cost for the purposes of Division 70 would have exceeded its \*market value at the earlier time or at one of the earlier times;

its cost for the purposes of Division 70 is taken to be its market value at the earlier time or the smallest of its market values at the earlier times.

*Reduction of proceeds of disposal of trading stock*

(10) If:

- (a) an equity or debt was an item of \*trading stock of the affected entity immediately before a relevant time or became such an item of trading stock after a relevant time; and
- (b) the equity or debt is \*disposed of by the entity after the relevant time concerned; and
- (c) the equity or debt is an item of trading stock of the affected entity at the time of the disposal; and
- (d) the proceeds of the disposal exceed the \*market value of the equity or debt immediately before the relevant time concerned or the market value of the equity or debt immediately before any previous relevant time;

the proceeds of the disposal are taken to be reduced by so much of the amount or the total of the amounts of any reductions made by any previous application or applications of subsection (5) in relation to the affected entity in respect of the equity or debt as does not exceed the excess amount or the greater or greatest of the excess amounts referred to in paragraph (d).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**165-115ZB Adjustment amounts for the purposes of section 165-115ZA**

- (1A) This section has effect for the purposes of:
- (a) section 165-115ZA; and
  - (b) sections 715-255 and 715-270 (about effect of alteration time for head company on membership interests of leaving entity just before leaving time).

*Calculation of adjustment amount*

- (1) An adjustment amount in relation to an equity or debt is to be worked out by the affected entity, and applied by it in making reductions:
- (a) if subsection (2) applies—in accordance with subsection (3); or
  - (b) otherwise—in accordance with subsection (6).

*Selection of method of calculation*

- (2) This subsection applies if:
- (a) the affected entity has a relevant equity interest, but does not have a relevant debt interest, in the \*loss company immediately before the alteration time and:
    - (i) all the \*shares in the loss company are of the same class and have the same \*market value; and
    - (ii) the equity consists only of a share or shares in the loss company; or
  - (b) the affected entity has both a relevant equity interest, and a relevant debt interest under subsection 165-115Y(1), in the loss company immediately before the alteration time and:
    - (i) all the shares in the loss company are of the same class and have the same market value; and
    - (ii) the equity consists only of a share or shares in the loss company; and
    - (iii) the debt consists of a single debt or 2 or more debts of the same kind;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115ZB

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and the reductions that would result from the application of subsection (3) would be reasonable in the circumstances.

*Formula method*

- (3) The **adjustment amount** to be worked out under this subsection is the amount worked out using the formula:

$$\frac{\text{The number of shares in the loss company constituted by the equity immediately before the alteration time}}{\text{The total number of shares in the loss company immediately before the alteration time}} \times \text{The amount of the loss company's overall loss at the alteration time}$$

and the amount so worked out is to be applied in making reductions as follows:

- (a) the adjustment amount is to be applied in relation to the \*share or shares constituting the equity; and
- (b) if there is an amount remaining after making reductions in relation to those shares—the amount remaining is to be applied in relation to any debt or, if there is a debt consisting of 2 or more separate debts, in relation to those debts.

*Applying adjustment amount under formula method to shares*

- (4) If the adjustment amount referred to in subsection (3) is to be applied in relation to an equity consisting of 2 or more \*shares:
- (a) it is to be applied equally among the shares; and
  - (b) if there is any amount remaining after the application of part of the adjustment amount to a share, the amount remaining is to be applied to any other share, or equally among any other shares, to the maximum extent possible.

*Applying adjustment amount under formula method to debt*

- (5) If the adjustment amount referred to in subsection (3) or part of it is to be applied in relation to a debt (the **overall debt**) and the overall debt consists of 2 or more debts (the **constituent debts**), the

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

amount to be applied in relation to each constituent debt is the amount worked out using the formula:

$$\frac{\text{The adjustment amount or part of the adjustment amount}}{\text{The amount of the overall debt}} \times \frac{\text{The amount of the constituent debt}}{\text{The amount of the overall debt}}$$

*Non-formula method*

- (6) The **adjustment amount** to be worked out under this subsection is the amount that is appropriate having regard to:
- (a) the object of this Subdivision and other matters set out in section 165-115J; and
  - (b) the extent of the affected entity's relevant equity interests or relevant debt interests, as the case may be, in the \*loss company immediately before the alteration time; and
  - (c) when, and under what circumstances, the relevant equity interests or relevant debt interests were \*acquired by the affected entity; and
  - (d) the loss company's overall loss at the alteration time; and
  - (e) the extent to which that overall loss has reduced the \*market values of the equity or debt; and
  - (f) to prevent double counting, the extent of any adjustments required under this Subdivision because of any application of this Subdivision to another loss company in which the affected entity has a relevant equity interest or relevant debt interest;

and the amount so worked out is to be applied in making reductions in an appropriate way.

*How to work out the extent to which the overall loss has reduced the market value of an equity or debt*

- (7) To avoid doubt in applying paragraph (6)(e) in relation to an equity or a debt, if factors other than an overall loss altered the \*market value of the equity or debt, the extent to which the overall loss reduced that market value is taken to be the extent to which that

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Section 165-115ZC**

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market value would have been reduced apart from those other factors.

Note 1: For a company's **overall loss** see subsections 165-115R(5) and 165-115S(5).

Note 2: An example of a factor other than the overall loss is the unrealised value of assets (including assets in respect of which there is an unrealised gain) of the loss company, whether or not generated by outlays or economic losses reflected in the loss for income tax purposes.

**165-115ZC Notices to be given**

*Application*

- (1) This section applies when an alteration time occurs in respect of a \*loss company.

Note: Section 165-115ZC of the *Income Tax (Transitional Provisions) Act 1997* affects the operation of this section.

*Controlling entity*

- (2) For the purposes of this section, an entity is a **controlling entity** of a \*loss company if:
- (a) the entity is not an individual; and
  - (b) the entity, disregarding any of its \*associates, has a controlling stake in the loss company; and
  - (c) no other entity (except an individual or 2 or more individuals between them) has a controlling stake in the entity.

*Foreign resident controlling entity to be disregarded in certain circumstances*

- (3) If:
- (a) apart from this subsection, an entity that is a foreign resident would be a controlling entity of a \*loss company; and
  - (b) there is an entity that is an Australian resident and would be a controlling entity of the loss company if all the foreign

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

residents that held direct or indirect interests in the Australian resident were individuals;  
then, for the purposes of this section, the entity referred to in paragraph (a) is taken not to be a controlling entity of the company but the Australian resident is taken to be a controlling entity of the company.

*Notice by controlling entity of loss company*

- (4) An entity that was a controlling entity of the \*loss company immediately before the alteration time must, before the end of 6 months after the latest of the following:
- (a) the alteration time;
  - (b) the day on which the *New Business Tax System (Miscellaneous) Act (No. 2) 2000* received the Royal Assent;
  - (c) the time (if any) specified by the Commissioner;
- give a written notice, setting out the information mentioned in subsection (6), to each of its \*associates that, to the loss company's knowledge, had a relevant equity interest or relevant debt interest in the loss company immediately before the alteration time.

Penalty: 30 penalty units.

*Notice by loss company*

- (5) If:
- (a) there was no controlling entity of the \*loss company immediately before the alteration time; or
  - (b) no entity that was a controlling entity of the loss company immediately before the alteration time told the loss company in writing, within 2 months after the later of the following:
    - (i) the alteration time;
    - (ii) the day on which the *New Business Tax System (Miscellaneous) Act (No. 2) 2000* received the Royal Assent;
- that it had given, or proposed to give, notices to its associates under subsection (4);

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115ZC

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the loss company must, before the end of 6 months after the latest of the following:

- (c) the alteration time;
  - (d) the day on which the *New Business Tax System (Miscellaneous) Act (No. 2) 2000* received the Royal Assent;
  - (e) the time (if any) specified by the Commissioner;
- give a written notice, setting out the information mentioned in subsection (6), to each entity that, to the loss company's knowledge, had a relevant equity interest or relevant debt interest in the company immediately before the alteration time.

Penalty: 30 penalty units.

*Offences are strict liability*

- (5A) An offence under subsection (4) or (5) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

*Information to be included in notice*

- (6) The information to be contained in a notice given under subsection (4) or (5) must include:
- (a) the time that is the alteration time; and
  - (b) the amount of the \*loss company's overall loss at that time; and
  - (c) for each income year for which the loss company had at that time a \*tax loss or \*net capital loss referred to in subsection 165-115R(3) or 165-115S(3)—the type and amount of the loss; and
  - (d) the amount of any adjusted unrealised loss that the loss company had at that time; and
  - (e) particulars (for the purpose of assisting the entity to whom the notice is given (the *recipient*) to comply with the requirements of this Subdivision) of the amounts, proportions, and times of \*acquisition, of all relevant equity interests and relevant debt interests in the loss company held

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



by entities through which the recipient had relevant equity interests or relevant debt interests in the loss company.

*Entity or loss company not required to give information about matters that are not known to it*

- (7) An entity or \*loss company is not required by this section to set out information in a notice unless:
- (a) the information is known to the entity or company; or
  - (b) the entity or company could reasonably be expected to know the information and can readily obtain it.

*Commissioner's power to specify a later time for giving notice*

- (7A) The Commissioner may, by written notice given to an entity, or \*loss company, that is required to give a notice under subsection (4) or (5), specify a time later than the alteration time as the start of the 6 months mentioned in the subsection.

*Commissioner's power to waive requirement for notice*

- (7B) The Commissioner may give an entity or \*loss company a written declaration that subsection (4) or (5) does not apply to require the entity or company to give a notice relating to the alteration time. If the Commissioner does so, the subsection does not apply in relation to the alteration time.

*Considerations relating to Commissioner's powers*

- (7C) In deciding whether to specify a time for the purposes of subsection (4) or (5) or declare that the subsection does not apply, the Commissioner must consider:
- (a) the consequences of doing so for each entity to which notice must be given under the subsection (apart from any such declaration); and
  - (b) any other matters that the Commissioner considers relevant.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-115ZD

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*Obligations of person not affected by failure to give notice*

- (8) Any failure by an entity or the \*loss company to give a notice to a person under this section does not affect any obligation of the person to comply with the requirements of this Subdivision.

**165-115ZD Adjustment (or further adjustment) for interest realised at a loss after global method has been used**

- (1) This section affects how sections 165-115ZA and 165-115ZB apply to an interest (the *equity*) in, or a debt owed by, a company if, apart from this section, a loss (the *realised loss*):
- (a) would be \*realised for income tax purposes by a \*realisation event that happens to the equity or debt; or
  - (b) would be so realised but for Subdivision 170-D (which defers realisation of capital losses and deductions);
- and the company chose to use the \*global method of working out whether it had an adjusted unrealised loss at the last alteration time:
- (c) that happened for the company before the realisation event; and
  - (d) immediately before which the equity or debt was, or was part of:
    - (i) if the company was a \*loss company at that alteration time—a relevant equity interest, or a relevant debt interest, that an entity had in the company; or
    - (ii) otherwise—what would have been such an interest if the company had been a loss company at that alteration time.

Note: If that last alteration time is before the day on which the *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Act 2002* received the Royal Assent, the owner of the equity or debt may choose to apply section 165-115ZD of the *Income Tax (Transitional Provisions) Act 1997* instead of this section.

- (2) In addition to any application to the equity or debt, in relation to that last alteration time, that sections 165-115ZA and 165-115ZB have apart from this section, those sections apply (and are taken

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

always to have applied) to the equity or debt, in relation to that last alteration time, as if:

- (a) the company had an adjusted unrealised loss at that time worked out under this section; and
  - (b) the company were therefore a \*loss company at that time; and
  - (c) that adjusted unrealised loss were the company's overall loss at that time.
- (3) For the purposes of how sections 165-115ZA and 165-115ZB apply because of this section, the adjustment amount under section 165-115ZB is to be worked out and applied in accordance with subsection 165-115ZB(6) (the non-formula method).

*Adjusted unrealised loss worked out under this section*

- (4) The adjusted unrealised loss referred to in paragraph (2)(a) is worked out using this method statement:

*Method statement*

- Step 1. Add up the amount or value of each thing covered by subsection (5). (If the total exceeds the realised loss, reduce the total by the excess.)
- Step 2. Reduce the step 1 amount by so much of the realised loss as it is reasonable to conclude is attributable to *none* of these:
- (a) a notional capital loss, or a notional revenue loss, that the company has at that last alteration time in respect of a \*CGT asset;
  - (b) a trading stock decrease in relation to that time for a CGT asset that was \*trading stock of the company at that time.

Note: If the equity or debt is a revenue asset, the realised loss is different from the loss referred to in subsection (1): see subsection (9).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

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**Division 165** Income tax consequences of changing ownership or control of a company

Section 165-115ZD

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- (5) This subsection covers each thing covered by an item in the table, except to the extent that:
- (a) it is reasonable to conclude that the thing was *not* attributable to value that is reflected in what would, if that last alteration time had been a \*changeover time for the company, be a notional capital gain or notional revenue gain that the company had under section 165-115F at that changeover time in respect of a \*CGT asset; or
  - (b) the thing has resulted in a reduction of the \*reduced cost base of the equity or debt.

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**Things that might expose an unrealised loss netted off by use of global method**

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<b>Item</b>	<b>Thing covered</b>
1	A *dividend that the company pays during the period referred to in subsection (6)
2	A thing that is taken under this Act to be a dividend and that the company pays during the period referred to in subsection (6)
3	A distribution of income or capital to a *member that the company makes during the period referred to in subsection (6) and is not covered by item 1 or 2
4	An amount of income tax to which the company becomes liable at any time, to the extent that it is reasonably attributable to a realisation event that happens, during the period referred to in subsection (6), to a *CGT asset (in its character as a CGT asset, *trading stock or a *revenue asset) that the company owned at that last alteration time and *acquired for not less than \$10,000
5	A loss or outgoing to which the company becomes liable at any time, to the extent that it is reasonably attributable to a realisation event of the kind referred to in item 4

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Things that might expose an unrealised loss netted off by use of global method**

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**Item    Thing covered**

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- 6        The difference between:
- (a) the \*capital proceeds (as worked out under subsection (7)) of a \*CGT event:
    - (i) that happens, during the period referred to in subsection (6), to a \*CGT asset that the company owned at that last alteration time and \*acquired for not less than \$10,000; and
    - (ii) as a result of which the asset is \*acquired by an entity that is an \*associate of the company at the time of the CGT event; and
  - (b) the \*market value of the asset at the time of the CGT event;
- but only if those capital proceeds are *less than* that market value
- 
- (6) The period starts at that last alteration time and ends at the earlier of:
- (a) the time of the \*realisation event referred to in paragraph (1)(a); or
  - (b) the time immediately before the earliest time when the equity or debt is no longer, or is no longer part of:
    - (i) if the company was a \*loss company at that last alteration time—a relevant equity interest, or a relevant debt interest, that an entity has in the company; or
    - (ii) otherwise—what would have been such an interest if the company had been a loss company at that last alteration time.
- (7) For the purposes of item 6 of the table in subsection (5), the \*capital proceeds of the \*CGT event are to be worked out:
- (a) under subsection 116-20(1) only; and
  - (b) disregarding subsection 103-10(1) and paragraph 103-10(2)(a) (about entitlement to receive money or property).

*Notices under section 165-115ZC not affected*

- (8) To avoid doubt:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 165-117

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- (a) a notice need not be given under section 165-115ZC because of this section; and
- (b) this section does not affect the requirements that apply to a notice that otherwise must be given under that section.

*If equity or debt is a revenue asset*

- (9) If the equity or debt is a \*revenue asset at the time of the \*realisation event, subsection (4) applies on the basis that the realised loss is the total of:
  - (a) the loss (if any) \*realised for income tax purposes by the realisation event happening to the equity or debt in its character as a \*CGT asset; and
  - (b) the loss (if any) realised for income tax purposes by the realisation event happening to the equity or debt in its character as a revenue asset.

**Subdivision 165-C—Deducting bad debts**

**Guide to Subdivision 165-C**

**165-117 What this Subdivision is about**

A company cannot deduct a bad debt unless:

- (a) if the debt was incurred in an earlier income year—the company had the same owners and the same control throughout the period from the day on which the debt was incurred to the end of the income year in which it writes off the debt as bad; or
- (b) if the debt was incurred in the current year—the company had the same owners and the same control during the income year both before and after the debt was incurred;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

or, if there has been a change of ownership or control, the company satisfies the business continuity test by carrying on the same business (including entering into no new kinds of transactions and conducting no new kinds of business), or by carrying on a similar business (on or after 1 July 2015).

Note: The exceptions mentioned in this section apply differently in relation to designated infrastructure project entities: see section 415-40.

## Table of sections

### Operative provisions

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- 165-120 To deduct a bad debt
- 165-123 Company must maintain the same owners
- 165-126 Alternatively, the company must satisfy the business continuity test
- 165-129 Same people must control the voting power, or the company must satisfy the business continuity test
- 165-132 When tax losses resulting from bad debts cannot be deducted

## Operative provisions

### 165-119 Application of Subdivision

This Subdivision applies to a debt only to the extent (if any) to which Subdivision 165-CC does not apply in respect of the debt.

Note: Subdivision 165-CC applies to certain capital losses or tax losses of a company to the extent to which the capital loss or tax loss does not exceed the company's unrealised net loss.

### 165-120 To deduct a bad debt

- (1) A company cannot deduct a debt (or part of a debt) that it writes off as bad in the \*current year unless:
  - (a) it meets the conditions in section 165-123 (which is about the company maintaining the same owners); or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

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**Section 165-120**

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Note: See section 165-230 for a special alternative to the condition in this paragraph.

- (b) the Commissioner thinks it would be unreasonable to require the company to meet the conditions in that section, having regard to the entities that beneficially owned the shares in the company when (in the Commissioner's opinion) the debt (or part) became bad; or
- (c) the company meets the condition in section 165-126 (which is about the company satisfying the business continuity test).

Note 1: In the case of a widely held or eligible Division 166 company, Subdivision 166-C modifies how this Subdivision applies, unless the company chooses otherwise.

Note 2: Normally bad debts are deductible under section 8-1 or 25-35.

Note 3: Subdivisions 709-D and 719-I modify how this Subdivision operates in relation to a company that used to be a member of a consolidated group or MEC group and that writes off as bad a debt that used to be owed to a member of the group.

- (2) The conditions in section 165-123 or 165-126 apply to different periods, depending on whether the debt was incurred in the \*current year or an earlier income year:

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**Meaning of *first continuity period* and *second continuity period***

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<b>In this case:</b>	<b>the <i>first continuity period</i>:</b>	<b>and the <i>second continuity period</i>:</b>
the debt was incurred in an earlier income year	<ul style="list-style-type: none"><li>• starts on the day when the debt was incurred; and</li><li>• ends at the end of that income year</li></ul>	is the *current year
the debt was incurred in the *current year (but not on the last day of it)	<ul style="list-style-type: none"><li>• starts on the first day of the *current year; and</li><li>• ends on the day when the debt was incurred</li></ul>	<ul style="list-style-type: none"><li>• starts on the day after the debt was incurred; and</li><li>• ends on the last day of the *current year</li></ul>

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3) A company cannot deduct a debt (or part of a debt) that it writes off as bad on the last day of the \*current year if the debt was also incurred on that day.

### **165-123 Company must maintain the same owners**

#### *Ownership test period*

- (1) In determining whether section 165-120 prevents a company from deducting a debt or a part of a debt, the **ownership test period** is the period from the start of the \*first continuity period to the end of the \*second continuity period.

Note: See section 165-255 for the rule about incomplete test periods.

#### *Voting power*

- (2) There must be persons who had \*more than 50% of the voting power in the company at all times during the \*ownership test period.

Note 1: See section 165-150 to work out who had more than 50% of the voting power.

Note 2: Subdivision 167-B has special rules for working out voting power in a company whose shares do not all carry the same voting rights, or do not carry all of the voting rights in the company.

#### *Rights to dividends*

- (3) There must be persons who had rights to \*more than 50% of the company's dividends at all times during the \*ownership test period.

Note 1: See section 165-155 to work out who had rights to more than 50% of the company's dividends.

Note 2: Subdivision 167-A has special rules for working out rights to dividends in a company whose shares do not all carry the same rights to dividends.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 165-123

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*Rights to capital distributions*

- (4) There must be persons who had rights to \*more than 50% of the company's capital distributions at all times during the \*ownership test period.

Note 1: See section 165-160 to work out who had rights to more than 50% of the company's capital distributions.

Note 2: Subdivision 167-A has special rules for working out rights to capital distributions in a company whose shares do not all carry the same rights to capital distributions.

*When to apply the primary test*

- (5) To work out whether a condition in this section was satisfied at all times during the \*ownership test period, apply the primary test for that condition unless subsection (6) requires the alternative test to be applied.

Note: For the primary test, see subsections 165-150(1), 165-155(1) and 165-160(1).

*When to apply the alternative test*

- (6) Apply the alternative test for that condition if one or more other companies beneficially owned \*shares or interests in shares in the company at any time during the \*ownership test period.

Note: For the alternative test, see subsections 165-150(2), 165-155(2) and 165-160(2).

*Conditions in subsections (2), (3) and (4) may be treated as having been satisfied in certain circumstances*

- (7) If any of the conditions in subsections (2), (3) and (4) have not been satisfied, those conditions are taken to have been satisfied if:
- (a) they would have been satisfied except for the operation of section 165-165; and
  - (b) the company has information from which it would be reasonable to conclude that less than 50% of the debt or of the part of a debt has been reflected in deductions, capital

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

losses, or reduced assessable income, that occurred, or could occur in future, because of the happening of any \*CGT event in relation to any \*direct equity interests or \*indirect equity interests in the company during the \*ownership test period.

(7A) If the company is:

- (a) a \*non-profit company; or
- (b) a \*mutual affiliate company; or
- (c) a \*mutual insurance company;

during the whole of the \*ownership test period, the conditions in subsections (3) and (4) are taken to have been satisfied by the company.

*Time of happening of CGT event*

- (8) The happening of any \*CGT event in relation to a \*direct equity interest or \*indirect equity interest in the company that results in the failure of the company to satisfy a condition in subsection (2), (3) or (4) is taken, for the purposes of paragraph (7)(b), to have occurred during the \*ownership test period.

### **165-126 Alternatively, the company must satisfy the business continuity test**

- (1) This section sets out the condition that a company must meet to be able to deduct a debt or part of a debt that it writes off as bad in the \*current year if:
- (a) either:
    - (i) the company fails to meet a condition in subsection 165-123(2), (3) or (4); or
    - (ii) it is not practicable to show that the company meets the conditions in those subsections; and
  - (b) paragraph 165-120(1)(b) (about the Commissioner thinking it is unreasonable to require the company to meet the conditions in section 165-123) does not apply.

Note Other provisions may treat the company as meeting, or failing to meet, the conditions in subsections 165-123(2), (3) and (4).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 165-129

- (2) The company must satisfy the \*business continuity test for the \*second continuity period (the **business continuity test period**). Apply the test to the \*business the company carried on immediately before the time (the **test time**) shown in the relevant item of the table.

Test time		
Item	If:	The test time is:
1	It is practicable to show there is a period that meets these conditions: (a) the period starts at the start of the *first continuity period; (b) the company would meet the conditions in subsections 165-123(2), (3) and (4) if the period were the *ownership test period for the purposes of this Act	The latest time that it is practicable to show is in the period
2	Item 1 does not apply and either: (a) the debt was incurred before the *current year; or (b) the company came into being during the current year	The end of the day on which the debt was incurred
3	All these conditions are met: (a) item 1 does not apply; (b) the debt was incurred in the *current year; (c) the company was in being throughout the current year	The start of the current year

For the business continuity test: see Subdivision 165-E.

**165-129 Same people must control the voting power, or the company must satisfy the business continuity test**

- (1) Even if section 165-120 does not prevent a company from deducting a bad debt (or part of one), it cannot deduct the bad debt (or that part of it) if:
- (a) for some or all of the part of the \*ownership test period that started at the end of the \*first continuity period, a person controlled, or was able to control, the voting power in the

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

company (whether directly, or indirectly through one or more interposed entities); and

- (b) for some or all of the \*first continuity period, that person did *not* control, and was not *able* to control, that voting power (directly, or indirectly in that way); and
- (c) that person began to control, or became able to control, that voting power (directly, or indirectly in that way) for the purpose of:
  - (i) getting some benefit or advantage in relation to how this Act applies; or
  - (ii) getting such a benefit or advantage for someone else; or for purposes including that purpose.

Note 1: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

Note 2: Subdivision 167-B has special rules for working out voting power in a company whose shares do not all carry the same voting rights, or do not carry all of the voting rights in the company.

- (2) However, that person's control of the voting power, or ability to control it, does not prevent the company from deducting the bad debt (or that part of it) if the company satisfies the \*business continuity test for the \*second continuity period (the ***business continuity test period***).
- (3) Apply the \*business continuity test to the \*business that the company carried on immediately before the time (the ***test time***) when the person began to control that voting power, or became able to control it.

For the business continuity test: see Subdivision 165-E.

### **165-132 When tax losses resulting from bad debts cannot be deducted**

- (1) If:
  - (a) a company can deduct a debt (or part of a debt) that it wrote off as bad in an income year; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 165-132

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- (b) because the company failed to meet a condition in section 165-123 (about the company maintaining the same owners), it could not have deducted the debt (or part) apart from section 165-126 (about the company satisfying the business continuity test); and
- (c) the company wrote off the debt *after* the \*test time worked out under section 165-126; and
- (d) because of the deduction, the company has a \*tax loss for that income year, or there was an increase in the amount of its \*tax loss for that income year; and
- (e) the company carried on a \*business during that income year for the purpose, or for purposes including the purpose, of securing a deduction for the debt (or part) by relying on section 165-126;

the company cannot deduct the \*tax loss for a later income year, or cannot deduct it to the extent of the increase, unless it also satisfies the \*business continuity test for the later income year (the *business continuity test period*).

- (2) Apply the test to the \*business that the company carried on immediately before the \*test time worked out for section 165-126.

For the business continuity test: see Subdivision 165-E.

### **Subdivision 165-D—Tests for finding out whether the company has maintained the same owners**

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Rules affecting the operation of the tests**

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- 165-202 Shares held by government entities and charities etc.
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**The primary and alternative tests**

**165-150 Who has more than 50% of the voting power in the company**

*The primary test*

- (1) Applying the primary test: if there are persons who, at a particular time, beneficially own (between them) \*shares that carry (between them) the right to exercise more than 50% of the voting power in the company, those persons have **more than 50% of the voting power** in the company at that time.

*The alternative test*

- (2) Applying the alternative test: if it is the case, or it is reasonable to assume, that there are persons (none of them companies or \*trustees) who (between them) at a particular time control, or are able to control (whether directly, or indirectly through one or more interposed entities) the voting power in the company, those persons have **more than 50% of the voting power** in the company at that time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-155

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**165-155 Who has rights to more than 50% of the company's dividends**

*The primary test*

- (1) Applying the primary test: if there are persons who, at a particular time, beneficially own (between them) \*shares that carry (between them) the right to receive more than 50% of any \*dividends that the company may pay, those persons have rights to **more than 50% of the company's dividends** at that time.

*The alternative test*

- (2) Applying the alternative test: if it is the case, or it is reasonable to assume, that there are persons (none of them companies) who (between them) at a particular time have the right to receive for their own benefit (whether directly or \*indirectly) more than 50% of any \*dividends that the company may pay, those persons have rights to **more than 50% of the company's dividends** at that time.

**165-160 Who has rights to more than 50% of the company's capital distributions**

*The primary test*

- (1) Applying the primary test: if there are persons who, at a particular time, beneficially own (between them) \*shares that carry (between them) the right to receive more than 50% of any distribution of capital of the company, those persons have rights to **more than 50% of the company's capital distributions** at that time.

*The alternative test*

- (2) Applying the alternative test: if it is the case, or it is reasonable to assume, that there are persons (none of them companies) who (between them) at a particular time have the right to receive for their own benefit (whether directly or \*indirectly) more than 50% of any distribution of capital of the company, those persons have

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



rights to *more than 50% of the company's capital distributions* at that time.

### **165-165 Rules about tests for a condition or occurrence of a circumstance**

*Exactly the same shares or interests must continue to be held*

- (1) For the purpose of determining whether a company has satisfied a condition or whether a time is a changeover time or an alteration time in respect of a company:
- (a) a condition that has to be satisfied is not satisfied; or
  - (b) a time that, apart from this subsection, would not be a changeover time or alteration time is taken to be a changeover time or alteration time, as the case may be;
- unless, at all relevant times:
- (c) the only \*shares in the company that are taken into account are exactly the same shares and are held by the same persons; and
  - (d) the only interests in any other entity (including shares in another company) that are taken into account are exactly the same interests and are beneficially owned by the same persons.

*What happens in case of share splitting*

- (2) If:
- (a) a particular \*share (an *old share*) in a company of which a person is the beneficial owner at the start of a \*test period is divided into 2 or more new shares; and
  - (b) the person becomes the beneficial owner of each of the new shares immediately after the division takes place and remains the beneficial owner until the end of that period;
- the new shares are taken to be exactly the same shares as the old share.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-165

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*What happens in case of splitting of units in a unit trust*

- (3) If:
- (a) a particular unit (the **old unit**) in a unit trust of which a person is the holder at the start of a \*test period is divided into 2 or more new units; and
  - (b) the person becomes the holder of each of the new units immediately after the division takes place and remains the holder until the end of that period;
- the new units are taken to be exactly the same units as the old unit.

*What happens in case of consolidation of shares*

- (4) If:
- (a) a particular \*share (an **old share**) in a company of which a person is the beneficial owner at the start of a \*test period, and other shares (each of which also called an **old share**) in the company of which the person is the beneficial owner at the start of that period, are consolidated into a new share; and
  - (b) the person becomes the beneficial owner of the new share immediately after the consolidation takes place;
- the new share is taken to be exactly the same share as the old shares.

*What happens in case of consolidation of units in a unit trust*

- (5) If:
- (a) a particular unit (an **old unit**) in a unit trust of which a person is the holder at the start of a \*test period and other units (each of which also called an **old unit**) in the trust of which the person is the holder at the start of that period are consolidated into a new unit; and
  - (b) the person becomes the holder of the new unit immediately after the consolidation takes place;
- the new unit is taken to be exactly the same unit as the old units.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Test period*

- (6) A **test period** is:
- (a) for the purpose of determining whether a condition in section 165-12 has been satisfied—the \*ownership test period; or
  - (b) for the purpose of determining whether a test time is a changeover time for the purposes of section 165-115C—the period between the reference time referred to in subsection 165-115A(2A) and the test time; or
  - (c) for the purpose of determining whether a test time is an alteration time for the purposes of section 165-115L—the period between the reference time referred to in subsection 165-115L(2) and the test time.

*Satisfaction by primary test by public company*

- (7) A \*public company is taken to satisfy the primary test if it is reasonable to assume that the test is satisfied.

### **165-175 Tests can be satisfied by a single person**

To avoid doubt, a test for a condition can be satisfied by one person.

### **Rules affecting the operation of the tests**

#### **165-180 Arrangements affecting beneficial ownership of shares**

- (1) For the purposes of a test, the Commissioner may treat a person as not having beneficially owned particular \*shares at a particular time if the conditions in subsections (2) and (3) are met.

Example: The Commissioner may treat a person as not having beneficially owned redeemable shares at a particular time if the conditions in subsections (2) and (3) are met in respect of those shares.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-185

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- (2) An \*arrangement must have been entered into at some time that in any way (directly or indirectly) related to, affected, or depended for its operation on:
  - (a) the beneficial interest in the \*shares, or the value of that beneficial interest; or
  - (b) a right carried by, or relating to, the shares; or
  - (c) the exercise of such a right.
- (3) The \*arrangement must also have been entered into for the purpose, or for purposes including the purpose, of eliminating or reducing a liability of an entity to pay income tax for a \*financial year.

**165-185 Shares treated as not having carried rights**

- (1) In applying a test for the purposes of this Division other than Subdivision 165-CC, \*shares are taken *not* to have carried particular rights during a part of the \*ownership test period if the Commissioner is satisfied that:
  - (a) the shares *stopped* carrying those rights after the ownership test period; or
  - (b) the shares will or may *stop* carrying those rights after the ownership test period;because of:
  - (c) the company's \*constitution as in force at some time *during* the ownership test period; or
  - (d) an \*arrangement entered into before or during the ownership test period.
- (2) In applying a test for the purposes of Subdivision 165-CC, \*shares are taken not to have carried particular rights after a particular time if the Commissioner is satisfied that:
  - (a) the shares *stopped* carrying those rights after that time; or
  - (b) the shares will or may *stop* carrying those rights after that time;because of:
  - (c) the company's \*constitution as in force at any time; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (d) an \*arrangement entered into at any time.

### **165-190 Shares treated as always having carried rights**

- (1) In applying a test for the purposes of this Division other than Subdivision 165-CC, \*shares are taken to have carried particular rights *at all times* during a part of the \*ownership test period if the Commissioner is satisfied that:
- (a) the shares *started* to carry those rights after the ownership test period; or
  - (b) the shares will or may *start* to carry those rights after the ownership test period;
- because of:
- (c) the company's \*constitution as in force at some time *during* the ownership test period; or
  - (d) an \*arrangement entered into before or during the ownership test period.
- (2) In applying a test for the purposes of Subdivision 165-CC, \*shares are taken to have carried particular rights after a particular time if the Commissioner is satisfied that:
- (a) the shares *started* to carry those rights after that time; or
  - (b) the shares will or may *start* to carry those rights after that time;
- because of:
- (c) the company's \*constitution as in force at any time; or
  - (d) an \*arrangement entered into at any time.

### **165-200 Rules do not affect totals of shares, units in unit trusts or rights carried by shares and units**

- (1) Sections 165-165, 165-180, 165-185 and 165-190 do not affect how \*shares, and rights carried by \*shares, are counted for the purposes of determining:
- (a) the total voting power in the company; or
  - (b) the total \*dividends that the company may pay; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) the total distributions of capital of the company.
- (2) Section 165-165 does not affect how units in a unit trust, or the rights carried by such units, are counted for the purposes of determining the total rights, or the total rights of a particular kind, in the trust of the holders of such units.

**165-202 Shares held by government entities and charities etc.**

- (1) For the purposes of a test, \*shares that are beneficially owned by each of the following entities are taken to be beneficially owned instead by a person (who is not a company):
  - (a) the Commonwealth, a State or a Territory;
  - (b) a municipal corporation;
  - (c) a \*local governing body;
  - (d) the government of a foreign country, or of part of a foreign country;
  - (e) a company, established under a law, in which no person has a \*membership interest;
  - (f) a \*non-profit company;
  - (g) a charity that is not a trust;
  - (h) a \*complying superannuation fund;
  - (i) a superannuation fund that is established in a foreign country and is regulated under a \*foreign law;
  - (j) a \*complying approved deposit fund;
  - (k) a \*special company;
  - (l) a \*managed investment scheme.
- (2) For the purposes of a test, \*shares that are beneficially owned through a charity that is a trust are taken to be beneficially owned instead by a person (who is neither a company nor a trustee).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **165-203 Companies where no shares have been issued**

For the purposes of a test, if no \*shares have been issued in a company, each \*membership interest in the company is taken to be a share in the company.

### **165-205 Death of share owner**

- (1) If an individual beneficially owns \*shares in a company when he or she dies, this section applies if and while the shares:
  - (a) are owned by the trustee of the deceased's estate; or
  - (b) are beneficially owned by someone who receives them as a beneficiary of the deceased's estate.
  
- (2) For the purposes of a test:
  - (a) the \*shares are taken to continue to be beneficially owned by the deceased; and
  - (b) as a result of being taken to continue to beneficially own the shares, the deceased is taken to continue:
    - (i) to have any rights to exercise, or to be able to control (whether directly, or indirectly through one or more interposed entities), any of the voting power in the company; and
    - (ii) to have any rights to receive for the deceased's own benefit (whether directly or \*indirectly) any \*dividends that the company may pay; and
    - (iii) to have any rights to receive for the deceased's own benefit (whether directly or indirectly) any distributions of capital of the company.

### **165-207 Trustees of family trusts**

- (1) This section applies if one or more trustees of a \*family trust:
  - (a) owns \*shares in a company; or
  - (b) controls, or is able to control, (whether directly, or indirectly through one or more interposed entities) voting power in a company; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) has a right to receive (whether directly, or \*indirectly through one or more interposed entities) a percentage of a \*dividend or a distribution of capital of a company.
- (2) For the purposes of a primary test, a single notional entity that is a person (but is neither a company nor a trustee) is taken to own the \*shares beneficially.
- Note: For a primary test, see subsections 165-150(1), 165-155(1) and 165-160(1).
- (3) For the purposes of an alternative test, a single notional entity that is a person (but is neither a company nor a trustee) is taken:
- (a) to control, or have the ability to control, the voting power in the company; or
- (b) to have the right to receive (whether directly or \*indirectly) the percentage of the \*dividend or distribution for the entity's own benefit.
- Note: For an alternative test, see subsections 165-150(2), 165-155(2) and 165-160(2).
- (4) If a trustee of the trust is subsequently replaced by another trustee of the trust, the same single notional entity is taken:
- (a) to own the \*shares beneficially; or
- (b) to control, or have the ability to control, the voting power in the company; or
- (c) to have the right to receive (whether directly or \*indirectly) the percentage of the \*dividend or distribution for the entity's own benefit.

**165-208 Companies in liquidation etc.**

- (1) For the purposes of a primary test or an alternative test, an entity is not prevented from:
- (a) beneficially owning \*shares in a company; or
- (b) having the right to exercise, controlling, or being able to control, voting power in a company; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) having the right to receive any \*dividends that a company may pay; or
  - (d) having the right to receive any distribution of capital of a company;
- merely because:
- (e) the company is or becomes:
    - (i) a Chapter 5 body corporate within the meaning of the *Corporations Act 2001*; or
    - (ii) an entity with a similar status under a \*foreign law to a Chapter 5 body corporate; or
  - (f) either:
    - (i) a provisional liquidator is appointed to the company under section 472 of the *Corporations Act 2001*; or
    - (ii) a person with a similar status under a foreign law to a provisional liquidator is appointed to the company.

Note 1: For a primary test, see subsections 165-150(1), 165-155(1) and 165-160(1).

Note 2: For an alternative test, see subsections 165-150(2), 165-155(2) and 165-160(2).

- (2) For the purposes of a primary test or an alternative test, a company (the ***stakeholding company***) is not prevented from:
    - (a) beneficially owning \*shares in another company, or any other interest in another entity; or
    - (b) having the right to exercise, controlling, or being able to control, voting power in another company or any other entity; or
    - (c) having the right to receive any \*dividends that another company or any other entity may pay; or
    - (d) having the right to receive any distribution of capital of another company or of any other entity;
- merely because:
- (e) the stakeholding company is or becomes:
    - (i) a Chapter 5 body corporate within the meaning of the *Corporations Act 2001*; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (ii) an entity with a similar status under a \*foreign law to a Chapter 5 body corporate; or
- (f) either:
  - (i) a provisional liquidator is appointed to the stakeholding company under section 472 of the *Corporations Act 2001*; or
  - (ii) a person with a similar status under a foreign law to a provisional liquidator is appointed to the stakeholding company.

**165-209 Dual listed companies**

Section 165-150 does not apply to \*shares that are \*dual listed company voting shares.

**Subdivision 165-E—Business continuity test**

**165-210 The business continuity test—carrying on the same business**

- (1) A company satisfies the *business continuity test* if throughout the \*business continuity test period it carries on the same \*business as it carried on immediately before the \*test time.
- (2) However, the company does *not* satisfy the \*business continuity test under this section if, at any time during the \*business continuity test period, it \*derives assessable income from:
  - (a) a \*business of a kind that it did not carry on before the \*test time; or
  - (b) a transaction of a kind that it had not entered into in the course of its business operations before the \*test time.
- (3) The company also does *not* satisfy the \*business continuity test under this section if, before the \*test time, it:
  - (a) started to carry on a \*business it had not previously carried on; or
  - (b) in the course of its business operations, entered into a transaction of a kind that it had not previously entered into;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

and did so for the purpose, or for purposes including the purpose, of being taken to have carried on throughout the \*business continuity test period the same business as it carried on immediately before the test time.

- (4) So far as the \*business continuity test under this section is applied for the purpose of Subdivision 165-B (which is about working out the taxable income and \*tax loss for the income year of change of ownership or control), the company also does *not* satisfy the test if, at any time during the \*business continuity test period, it incurs expenditure:
- (a) in carrying on a \*business of a kind that it did not carry on before the \*test time; or
  - (b) as a result of a transaction of a kind that it had not entered into in the course of its business operations before the test time.

### **165-211 The business continuity test—carrying on a similar business**

- (1) A company also satisfies the *business continuity test* in relation to:
- (a) a \*tax loss for an income year starting on or after 1 July 2015; or
  - (b) taxable income for an income year starting on or after 1 July 2015; or
  - (c) a \*net capital loss for an income year starting on or after 1 July 2015; or
  - (d) a debt, incurred in an income year starting on or after 1 July 2015, that the company writes off as bad;
- if throughout the \*business continuity test period it carries on a business (its *current business*) that is similar to the \*business it carried on immediately before the \*test time (its *former business*).
- (2) Without limiting the matters that may be taken into account in ascertaining whether the company's current business is similar to its former business, the following must be taken into account:
- (a) the extent to which the assets (including goodwill) that are used in its current business to generate assessable income

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- throughout the \*business continuity test period were also used in its former business to generate assessable income;
- (b) the extent to which the activities and operations from which its current business generated assessable income throughout the business continuity test period were also the activities and operations from which its former business generated assessable income;
  - (c) the identity of its current business and the identity of its former business;
  - (d) the extent to which any changes to its former business result from development or commercialisation of assets, products, processes, services or marketing or organisational methods of the former business.
- (3) However, the company does *not* satisfy the \*business continuity test under this section if, before the \*test time, it:
- (a) started to carry on a \*business it had not previously carried on; or
  - (b) in the course of its business operations, entered into a transaction of a kind that it had not previously entered into; and did so for the purpose, or for purposes including the purpose, of being taken to have carried on throughout the \*business continuity test period a business that is similar to the business it carried on immediately before the test time.

**165-212D Restructure of MDOs etc.**

- (1) An \*MDO does not fail to satisfy the \*business continuity test merely because, before 1 July 2003:
- (a) the MDO restructured the way it \*provides medical indemnity cover; or
  - (b) the MDO ceased to provide medical indemnity cover; in order to comply with the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (2) A \*general insurance company which is an \*associate of an \*MDO does not fail to satisfy the \*business continuity test merely because, before 1 July 2003:
- (a) the MDO restructured the way it \*provides medical indemnity cover; or
  - (b) the MDO ceased to provide medical indemnity cover; in order to comply with the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

**165-212E Entry history rule does not apply for the purposes of sections 165-210 and 165-211**

For the purposes of sections 165-210 and 165-211, section 701-5 (the entry history rule) does not operate in relation to an entity becoming a \*subsidiary member of a \*consolidated group or a \*MEC group.

**Subdivision 165-F—Special provisions relating to ownership by non-fixed trusts**

**Table of sections**

165-215	Special alternative to change of ownership test for Subdivision 165-A
165-220	Special alternative to change of ownership test for Subdivision 165-B
165-225	Special way of dividing the income year under Subdivision 165-B
165-230	Special alternative to change of ownership test for Subdivision 165-C
165-235	Information about non-fixed trusts with interests in company
165-240	Notices where requirements of section 165-235 are met
165-245	When an entity has a fixed entitlement to income or capital of a company

**165-215 Special alternative to change of ownership test for Subdivision 165-A**

- (1) If a company does not meet the conditions in section 165-12, it is nevertheless taken to meet the conditions if it meets the conditions in this section.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*First condition*

- (2) At all times during the \*ownership test period:
- (a) both:
    - (i) persons must have held \*fixed entitlements to all of the income and capital of the company; and
    - (ii) \*non-fixed trusts, other than \*family trusts, must have held fixed entitlements to a 50% or greater share of the income or a 50% or greater share of the capital of the company; or
  - (b) both:
    - (i) a \*fixed trust or a company (which trust or company is the **holding entity**) must have held, directly or indirectly, fixed entitlements to all of the income and capital of the company; and
    - (ii) non-fixed trusts, other than \*family trusts, must have held fixed entitlements to a 50% or greater share of the income or a 50% or greater share of the capital of the holding entity.

*Second condition*

- (3) The persons holding \*fixed entitlements to shares of the income, and the persons holding fixed entitlements to shares of the capital, of:
- (a) in a paragraph (2)(a) case—the company; or
  - (b) in a paragraph (2)(b) case—the holding entity;
- at the beginning of the \*loss year must have held those entitlements to those shares at all times during the \*ownership test period.

*Third condition*

- (4) At the beginning of the \*loss year:
- (a) individuals must not have had (between them), directly or indirectly, and for their own benefit, \*fixed entitlements to a greater than 50% share of the income of the company; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) individuals must not have had (between them), directly or indirectly, and for their own benefit, fixed entitlements to a greater than 50% share of the capital of the company.

*Fourth condition*

- (5) It must be the case that, for each \*non-fixed trust (other than an \*excepted trust) that, at any time during the \*ownership test period, held directly or indirectly a \*fixed entitlement to a share of the income or capital of the company, section 267-20 in Schedule 2F to the *Income Tax Assessment Act 1936* would not have prevented the non-fixed trust from deducting the \*tax loss concerned if it, rather than the company, had incurred the tax loss.

Note: See section 165-245 for when an entity is taken to have held or had, directly or indirectly, a fixed entitlement to a share of income or capital of a company.

**165-220 Special alternative to change of ownership test for Subdivision 165-B**

- (1) If the company does not meet the condition in paragraph 165-35(a), it is nevertheless taken to meet the condition if it meets the conditions in this section.

*First condition*

- (2) At all times during the income year:
- (a) both:
- (i) persons must have held \*fixed entitlements to all of the income and capital of the company; and
  - (ii) \*non-fixed trusts, other than \*family trusts, must have held fixed entitlements to a 50% or greater share of the income or a 50% or greater share of the capital of the company; or
- (b) both:
- (i) a \*fixed trust or a company (which trust or company is the **holding entity**) must have held, directly or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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indirectly, fixed entitlements to all of the income and capital of the company; and

- (ii) non-fixed trusts, other than family trusts, must have held fixed entitlements to a 50% or greater share of the income or a 50% or greater share of the capital of the holding entity.

*Second condition*

- (3) The persons holding \*fixed entitlements to shares of the income, and the persons holding fixed entitlements to shares of the capital, of:
  - (a) in a paragraph (2)(a) case—the company; or
  - (b) in a paragraph (2)(b) case—the holding entity;at the beginning of the income year must have held those entitlements to those shares at all times during the income year.

*Third condition*

- (4) At the beginning of the income year:
  - (a) individuals must not have had (between them), directly or indirectly, and for their own benefit, \*fixed entitlements to a greater than 50% share of the income of the company; or
  - (b) individuals must not have had (between them), directly or indirectly, and for their own benefit, fixed entitlements to a greater than 50% share of the capital of the company.

*Fourth condition*

- (5) It must be the case that, for each \*non-fixed trust (other than an \*excepted trust) that, at any time in the income year, held directly or indirectly a \*fixed entitlement to a share of the income or capital of the company, section 267-60 in Schedule 2F to the *Income Tax Assessment Act 1936* does not require the non-fixed trust to work out its net income and \*tax loss for the income year under Division 268.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



Note: See section 165-245 for when an entity is taken to have held or had, directly or indirectly, a fixed entitlement to a share of income or capital of a company.

**165-225 Special way of dividing the income year under  
Subdivision 165-B**

- (1) If:
- (a) the company is required to calculate:
    - (i) its taxable income and \*tax loss for the income year under Subdivision 165-B; and
    - (ii) its \*net capital gain and \*net capital loss for the income year under Subdivision 165-CB; and
  - (b) the company meets the requirements of subsections 165-220(2) and (4);
- then, in dividing the income year into periods, apply subsection (2) of this section instead of subsections 165-45(3) and (4).
- (2) The last period ends at the end of the income year. Each period (except the last) ends at the earliest of:
- (a) the latest time that would result in the persons holding \*fixed entitlements to shares of the income or shares of the capital of:
    - (i) if the company meets the requirements of paragraph 165-220(2)(a)—the company; or
    - (ii) if the company meets the requirements of paragraph 165-220(2)(b)—the holding entity mentioned in that paragraph;and the percentages of the shares that they hold, remaining the same during the whole of the period; and
  - (b) the times that, for all of the \*non-fixed trusts, other than \*excepted trusts, holding directly or indirectly a fixed entitlement to a share of the income or capital of the company at any time during the income year, are the latest times that would result in individuals having \*more than a 50% stake in their income or capital; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-230

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- (c) the earliest time in the period when a group (within the meaning of Schedule 2F to the *Income Tax Assessment Act 1936*) begins to \*control a non-fixed trust, other than an excepted trust, that holds directly or indirectly a fixed entitlement to a share of the income or capital of the company at any time during the income year.

Note: See section 165-245 for when an entity is taken to have held or had, directly or indirectly, a fixed entitlement to a share of income or capital of a company.

**165-230 Special alternative to change of ownership test for Subdivision 165-C**

- (1) If a company does not meet the conditions in section 165-123, it is nevertheless taken to meet the conditions if it meets the conditions in this section.

*First condition*

- (2) At all times during the \*ownership test period:
- (a) both:
- (i) persons must have held \*fixed entitlements to all of the income and capital of the company; and
  - (ii) \*non-fixed trusts, other than \*family trusts, must have held fixed entitlements to a 50% or greater share of the income or a 50% or greater share of the capital of the company; or
- (b) both:
- (i) a \*fixed trust or a company (which trust or company is the **holding entity**) must have held, directly or indirectly, fixed entitlements to all of the income and capital of the company; and
  - (ii) non-fixed trusts, other than family trusts, must have held fixed entitlements to a 50% or greater share of the income or a 50% or greater share of the capital of the holding entity.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Second condition*

- (3) The persons holding \*fixed entitlements to shares of the income, and the persons holding fixed entitlements to shares of the capital, of:
- (a) in a paragraph (2)(a) case—the company; or
  - (b) in a paragraph (2)(b) case—the holding entity;
- at the beginning of the \*first continuity period must have held those entitlements to those shares at all times during the \*ownership test period.

*Third condition*

- (4) At the beginning of the \*first continuity period:
- (a) individuals must not have had (between them), directly or indirectly, and for their own benefit, \*fixed entitlements to a greater than 50% share of the income of the company; or
  - (b) individuals must not have had (between them), directly or indirectly, and for their own benefit, fixed entitlements to a greater than 50% share of the capital of the company.

*Fourth condition*

- (5) It must be the case that, for each \*non-fixed trust (other than an \*excepted trust) that, at any time during the \*ownership test period, held directly or indirectly a \*fixed entitlement to a share of the income or capital of the company, section 267-25 in Schedule 2F to the *Income Tax Assessment Act 1936* would not have prevented the non-fixed trust from deducting the amount in respect of the debt if it, rather than the company, would otherwise be entitled to deduct the amount.

Note: See section 165-245 for when an entity is taken to have held or had, directly or indirectly, a fixed entitlement to a share of income or capital of a company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 165-235

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**165-235 Information about non-fixed trusts with interests in company**

*Notice about foreign resident non-fixed trust*

- (1) The Commissioner may give the company a notice in accordance with section 165-240 if the requirements of subsections (2) to (5) of this section are met.

*Tax detriment under Division 165*

- (2) In its \*income tax return for the income year:
- (a) the company must have deducted a \*tax loss from a \*loss year where it would not be allowed to deduct the tax loss unless it met the conditions in section 165-215; or
  - (b) the company must not have calculated:
    - (i) its taxable income and tax loss for the income year under Subdivision 165-B; and
    - (ii) its \*net capital gain and \*net capital loss for the income year under Subdivision 165-CB; where it would have been required to calculate them unless it met the conditions in section 165-220; or
  - (c) the company must have applied a net capital loss for an earlier income year in working out its net capital gain where it would not have been allowed to apply the loss unless it met the conditions in section 165-215 as applied on the assumption mentioned in subsection 165-96(1); or
  - (d) the company must have deducted a debt that it wrote off as bad in the income year where it would not be allowed to deduct the debt unless it met the conditions in section 165-230.

*Information about non-fixed trust*

- (3) In order to determine whether it meets the conditions concerned, the Commissioner must need information about a \*non-fixed trust mentioned in:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (a) if paragraph (2)(a) applies—subsection 165-215(5); or
- (b) if paragraph (2)(b) applies—subsection 165-220(5); or
- (c) if paragraph (2)(c) applies—subsection 165-215(5) as applied on the assumption mentioned in subsection 165-96(1); or
- (d) if paragraph (2)(d) applies—subsection 165-230(5).

*Foreign resident trust*

- (4) When the Commissioner gives the notice:
  - (a) a trustee of the \*non-fixed trust must be a foreign resident; or
  - (b) the central management and control of the non-fixed trust must be outside Australia.

*When notice must be given*

- (5) The Commissioner must give the notice before the later of:
  - (a) 5 years after the income year; and
  - (b) the end of the period during which the company is required by section 262A of the *Income Tax Assessment Act 1936* to retain records in relation to that income year.

**165-240 Notices where requirements of section 165-235 are met**

*Information required*

- (1) The notice that the Commissioner may give if the requirements of subsections 165-235(2) to (5) are met must require the company to give the Commissioner specified information that is relevant in determining whether:
  - (a) if paragraph 165-235(2)(a) applies—the requirements of subsection 165-215(5); or
  - (b) if paragraph 165-235(2)(b) applies—the requirements of subsection 165-220(5); or
  - (c) if paragraph 165-235(2)(c) applies—the requirements of subsection 165-215(5) as applied on the assumption mentioned in subsection 165-96(1); or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Section 165-240**

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(d) if paragraph 165-235(2)(d) applies—the requirements of subsection 165-230(5);  
are satisfied in relation to the \*non-fixed trust mentioned in subsections 165-235(3) and (4).

*Company knowledge*

- (2) The information need not be within the knowledge of the company at the time the notice is given.

*Period for giving information*

- (3) The notice must specify a period within which the company is to give the information. The period must not end earlier than 21 days after the day on which the Commissioner gives the notice.

*Consequence of not giving the information*

- (4) If the company does not give the information within the period or within such further period as the Commissioner allows, the company is taken not to meet, and never to have met, the conditions mentioned in whichever paragraph of subsection 165-235(2) is applicable.

*Application of Subdivision 165-B*

- (5) If, because of subsection (4), the company is required to calculate under Subdivision 165-B its taxable income and \*tax loss for the income year concerned, that Subdivision is to be applied as if it required the income year to be divided into such periods as would result in the highest possible taxable income for the income year.

*Application of Subdivision 165-CB*

- (6) If, because of subsection (4), the company is required to calculate under Subdivision 165-CB its \*net capital gain and \*net capital loss for the income year concerned, that Subdivision is to be applied as if it required the income year to be divided into such periods as would result in the highest net capital gain for the income year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

### **165-245 When an entity has a fixed entitlement to income or capital of a company**

For the purposes of this Act, an entity is taken to have held or had, directly or indirectly, a \*fixed entitlement to a share of income or capital of a company at a time if and only if the entity held or had, directly or indirectly, that fixed entitlement at that time for the purposes of Schedule 2F to the *Income Tax Assessment Act 1936*.

### **Subdivision 165-G—Other special provisions**

#### **Table of sections**

165-250	Control of companies in liquidation etc.
165-255	Incomplete periods

#### **165-250 Control of companies in liquidation etc.**

- (1) For the purposes of sections 165-15, 165-40, 165-115D, 165-115M and 165-129, a person is not prevented from controlling, or being or becoming able to control, voting power in a company merely because:
  - (a) the company is or becomes:
    - (i) a Chapter 5 body corporate within the meaning of the *Corporations Act 2001*; or
    - (ii) an entity with a similar status under a \*foreign law to a Chapter 5 body corporate; or
  - (b) either:
    - (i) a provisional liquidator is appointed to the company under section 472 of the *Corporations Act 2001*; or
    - (ii) a person with a similar status under a foreign law to a provisional liquidator is appointed to the company.
- (2) For the purposes of sections 165-15, 165-40, 165-115D, 165-115M and 165-129, a company (the **stakeholding company**) is not prevented from controlling, or being or becoming able to control, voting power in another company merely because:
  - (a) the stakeholding company is or becomes:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

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**Section 165-255**

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- (i) a Chapter 5 body corporate within the meaning of the *Corporations Act 2001*; or
  - (ii) an entity with a similar status under a \*foreign law to a Chapter 5 body corporate; or
- (b) either:
- (i) a provisional liquidator is appointed to the stakeholding company under section 472 of the *Corporations Act 2001*; or
  - (ii) a person with a similar status under a foreign law to a provisional liquidator is appointed to the stakeholding company.

**165-255 Incomplete periods**

(1) If:

- (a) this Division or Division 166 requires a company to meet or satisfy a condition or test, or work out an amount, for a period; and
- (b) the company is only in existence after the beginning of the period;

then the period is taken to start on the first day that the company is in existence.

(2) If:

- (a) this Division or Division 166 requires a company to meet or satisfy a condition or test, or work out an amount, for a period; and
- (b) the company ceases to be in existence before the end of the period;

then the period is taken to end on the day the company ceases to be in existence.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Division 166—Income tax consequences of changing ownership or control of a widely held or eligible Division 166 company**

### **Table of Subdivisions**

Guide to Division 166

- 166-AA The object of this Division
- 166-A Deducting tax losses of earlier income years
- 166-B Working out the taxable income, tax loss, net capital gain and net capital loss for the income year of the change
- 166-C Deducting bad debts
- 166-CA Changeover times and alteration times
- 166-D Tests for finding out whether the widely held or eligible Division 166 company has maintained the same owners
- 166-E Concessional tracing rules

### **Guide to Division 166**

#### **166-1 What this Division is about**

This Division modifies the way the rules in Division 165 apply to a widely held or eligible Division 166 company by making it easier for the company to apply the rules.

If the company has maintained the same owners as between certain points of time, it does not need to prove it has maintained the same owners throughout the periods in between.

In certain cases, special concessional tracing rules deem entities to hold voting, dividend or capital stakes in the company so that the company does not have to trace through to the ultimate beneficial owners of the stakes.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Part 3-5** Corporate taxpayers and corporate distributions

**Division 166** Income tax consequences of changing ownership or control of a widely held or eligible Division 166 company

Section 166-3

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**Subdivision 166-AA—The object of this Division**

**166-3 The object of this Division**

- (1) The object of this Division is to make it easier for a \*widely held company, or an \*eligible Division 166 company, to apply the rules in Division 165 (because of the difficulty the company might have under that Division in actually tracing through to the ultimate beneficial owners of \*voting stakes, \*dividend stakes and \*capital stakes in the company).
- (2) This Division makes it easier to apply the rules in Division 165 by:
  - (a) making it unnecessary for the company to prove that it has maintained the same owners throughout a period, if the company had the same owners at certain test times; and
  - (b) making it unnecessary for the company to trace through to the ultimate beneficial owners of:
    - (i) \*voting stakes, \*dividend stakes and \*capital stakes in the company held by certain entities (whether directly, or \*indirectly through one or more interposed entities); and
    - (ii) small voting stakes, dividend stakes and capital stakes in the company.

**Subdivision 166-A—Deducting tax losses of earlier income years**

**Table of sections**

166-5	How Subdivision 165-A applies to a widely held or eligible Division 166 company
166-15	Companies can choose that this Subdivision is not to apply to them

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**166-5 How Subdivision 165-A applies to a widely held or eligible  
Division 166 company**

- (1) This Subdivision modifies the way Subdivision 165-A applies to a company that is:
- (a) a \*widely held company at all times during the income year;  
or
  - (b) an \*eligible Division 166 company at all times during the income year; or
  - (c) a widely held company for a part of the income year and an eligible Division 166 company for the rest of the income year.

Note 1: Subdivision 165-A is about the conditions a company must meet before it can deduct a tax loss for an earlier income year.

Note 2: A company can choose that this Subdivision is not to apply to it: see section 166-15.

Note 3: See section 165-255 for the rule about incomplete income years.

*Meaning of test period*

- (2) The company's **test period** is the period consisting of the \*loss year, the income year and any intervening period.

Note: See section 165-255 for the rule about incomplete test periods.

*Substantial continuity of ownership*

- (3) The company is taken to have met the conditions in section 165-12 (which is about the company maintaining the same owners) if there is \*substantial continuity of ownership of the company as between the start of the \*test period and:
- (a) the end of each income year in that period; and
  - (b) the \*end of each \*corporate change in that period.

Note: See sections 166-145 and 166-175 to work out whether there is substantial continuity of ownership and a corporate change.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

**Part 3-5** Corporate taxpayers and corporate distributions

**Division 166** Income tax consequences of changing ownership or control of a widely held or eligible Division 166 company

Section 166-15

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*No substantial continuity of ownership*

- (4) The company is taken to have *failed* to meet the conditions in section 165-12 if there is *no* \*substantial continuity of ownership of the company as between the start of the \*test period and:
- (a) the end of an income year in that period; or
  - (b) the \*end of a \*corporate change in that period.

*Satisfies the business continuity test*

- (5) However, if the company satisfies the \*business continuity test for the income year (the ***business continuity test period***), it is taken to have satisfied the condition in section 165-13.

Note 1: For the business continuity test, see Subdivision 165-E.

Note 2: See section 165-255 for the rule about incomplete test periods.

- (6) Apply the \*business continuity test to the \*business that the company carried on immediately before the earlier of the following times (the ***test time***):
- (a) the end of the first income year;
  - (b) the first time in the test period that a \*corporate change in the company \*ends;
- for which there is no \*substantial continuity of ownership of the company as between the start of the \*test period and that time.

**166-15 Companies can choose that this Subdivision is not to apply to them**

- (1) The company can choose that Subdivision 165-A is to apply to it for the income year *without* the modifications made by this Subdivision.
- (2) The company must choose on or before the day it lodges its \*income tax return for the income year, or before a later day if the Commissioner allows.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Subdivision 166-B—Working out the taxable income, tax loss,  
net capital gain and net capital loss for the income  
year of the change**

**Table of sections**

166-20	How Subdivisions 165-B and 165-CB apply to a widely held or eligible Division 166 company
166-25	How to work out the taxable income, tax loss, net capital gain and net capital loss
166-35	Companies can choose that this Subdivision is not to apply to them

**166-20 How Subdivisions 165-B and 165-CB apply to a widely held or eligible Division 166 company**

- (1) This Subdivision modifies how Subdivisions 165-B and 165-CB apply to a company that is:
- (a) a \*widely held company at all times during the income year (the *test period*); or
  - (b) an \*eligible Division 166 company at all times during the income year (the *test period*); or
  - (c) a widely held company for a part of the income year and an eligible Division 166 company for the rest of the income year (the whole year being the *test period*).

Note 1: Subdivision 165-B is about when a company must calculate its taxable income and tax loss for the income year in a special way.  
Subdivision 165-CB is about when a company must calculate its net capital gain and net capital loss for the income year in a special way.

Note 2: A company can choose that this Subdivision is not to apply to it: see section 166-35.

Note 3: See section 165-255 for the rule about incomplete test periods.

*No corporate change etc.*

- (2) If:
- (a) *no* \*corporate change in the company \*ends at any time in the \*test period; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Division 166** Income tax consequences of changing ownership or control of a widely held or eligible Division 166 company

Section 166-20

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- (b) a corporate change in the company \*ends during the test period, but there is \*substantial continuity of ownership as between the start of the test period and immediately after the corporate change ends;

the company is taken to have met the condition in paragraph 165-35(a) (which is about there being persons having \*more than a 50% stake in it during the whole of the income year).

Note: See sections 166-145 and 166-175 to work out whether there is substantial continuity of ownership and a corporate change.

*Corporate change*

- (3) If:

- (a) a \*corporate change in the company \*ends at any time in the \*test period; and
- (b) there is no \*substantial continuity of ownership as between the start of the test period and immediately after the corporate change ends;

then the company is taken to have *failed* to meet the condition in paragraph 165-35(a).

*Satisfies the business continuity test*

- (4) However, if the company satisfies the \*business continuity test for the rest of the income year (the ***business continuity test period***) after the first time (the ***test time***) in the \*test period that a \*corporate change in the company \*ended, the company is taken to have satisfied the condition in paragraph 165-35(b).

Note 1: For the business continuity test, see Subdivision 165-E.

Note 2: See section 165-255 for the rule about incomplete test periods.

- (5) Apply the \*business continuity test to the \*business that the company carried on immediately before the \*test time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**166-25 How to work out the taxable income, tax loss, net capital gain and net capital loss**

- (1) If the company must calculate its taxable income and \*tax loss for the income year under Subdivision 165-B, and its \*net capital gain and \*net capital loss under Subdivision 165-CB, then, in dividing the income year into periods, apply subsection (2) of this section instead of subsection 165-45(3).
- (2) The last period ends at the end of the income year. Each period (except the last) ends at the *earlier* of:
  - (a) the *earliest* time when:
    - (i) a \*corporate change in the company \*ends; and
    - (ii) there is no \*substantial continuity of ownership of the company as between the start of the \*test period and that time; or
  - (b) the *earliest* time when a person begins to control, or becomes able to control, the voting power in the company (whether directly, or indirectly through one or more interposed entities) for the purpose, or for purposes including the purpose, of:
    - (i) getting some benefit or advantage to do with how this Act applies; or
    - (ii) getting such a benefit or advantage for someone else.

Note: See sections 166-145 and 166-175 to work out whether there is substantial continuity of ownership and a corporate change.

**166-35 Companies can choose that this Subdivision is not to apply to them**

- (1) The company can choose that Subdivisions 165-B and 165-CB are to apply to it for the income year *without* the modifications made by this Subdivision.
- (2) The company must choose on or before the day it lodges its \*income tax return for the income year, or before a later day if the Commissioner allows.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 166-40

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**Subdivision 166-C—Deducting bad debts**

**Table of sections**

166-40	How Subdivision 165-C applies to a widely held or eligible Division 166 company
166-50	Companies can choose that this Subdivision is not to apply to them

**166-40 How Subdivision 165-C applies to a widely held or eligible Division 166 company**

- (1) This Subdivision modifies the way Subdivision 165-C applies to a company that is:
- (a) a \*widely held company at all times during the \*current year; or
  - (b) an \*eligible Division 166 company at all times during the current year; or
  - (c) a widely held company for a part of the current year and an eligible Division 166 company for the rest of the current year.

Note 1: Subdivision 165-C is about the conditions a company must meet before it can deduct a bad debt.

Note 2: A company can choose that this Subdivision is not to apply to it: see section 166-50.

Note 3: See section 165-255 for the rule about incomplete current years.

*Meaning of test period*

- (2) The company's *test period* is the period:
- (a) that begins at whichever of the following times the company chooses:
    - (i) the start of the income year in which the debt was incurred;
    - (ii) the start of the \*first continuity period; and
  - (b) that ends at the end of the \*second continuity period; and includes any intervening period.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note: See section 165-255 for the rule about incomplete test periods.

*Substantial continuity of ownership*

- (3) The company is taken to have met the conditions in section 165-123 (about the company maintaining the same owners) if there is \*substantial continuity of ownership of the company as between the start of the \*test period and:
- (a) the end of each income year in that period; and
  - (b) the \*end of each \*corporate change in that period.

Note: See sections 166-145 and 166-175 to work out whether there is substantial continuity of ownership and a corporate change.

*No substantial continuity of ownership*

- (4) The company is taken to have *failed* to meet the conditions in section 165-123 if there is *no* \*substantial continuity of ownership of the company as between the start of the \*test period and:
- (a) the end of an income year in that period; or
  - (b) the \*end of a \*corporate change in that period.

*Satisfies the business continuity test*

- (5) However, if the company satisfies the \*business continuity test for the \*second continuity period (the ***business continuity test period***), it is taken to have satisfied the condition in section 165-126.

Note 1: For the business continuity test, see Subdivision 165-E.

Note 2: See section 165-255 for the rule about incomplete test periods.

- (6) Apply the \*business continuity test to the \*business that the company carried on immediately before the earlier of the following times (the ***test time***):
- (a) the end of the first income year;
  - (b) the first time in the test period that a \*corporate change in the company \*ends;
- for which there is no \*substantial continuity of ownership of the company as between the start of the \*test period and that time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

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Section 166-50

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**166-50 Companies can choose that this Subdivision is not to apply to them**

- (1) The company can choose that Subdivision 165-C is to apply to it for the income year *without* the modifications made by this Subdivision.
- (2) The company must choose on or before the day it lodges its \*income tax return for the income year, or before a later day if the Commissioner allows.

**Subdivision 166-CA—Changeover times and alteration times**

**Table of sections**

166-80	How Subdivision 165-CC or 165-CD applies to a widely held or eligible Division 166 company
166-90	Companies can choose that this Subdivision is not to apply to them

**166-80 How Subdivision 165-CC or 165-CD applies to a widely held or eligible Division 166 company**

- (1) This Subdivision modifies the way in which:
  - (a) Subdivision 165-CC applies in determining whether a changeover time (within the meaning of section 165-115C) has occurred; or
  - (b) Subdivision 165-CD applies in determining whether an alteration time (within the meaning of section 165-115L) has occurred;in relation to a company that is:
  - (c) a \*widely held company at all times during the income year; or
  - (d) an \*eligible Division 166 company at all times during the income year; or
  - (e) a widely held company for a part of the income year and an eligible Division 166 company for the rest of the income year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 166-80

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- Note 1: Subdivision 165-CC is about the conditions a company that has an unrealised net loss must satisfy before it can have capital losses taken into account or deduct revenue losses. Subdivision 165-CD provides for reductions in cost bases and certain other reductions after alterations have occurred in the ownership or control of a loss company.
- Note 2: A company can choose that this Subdivision is not to apply to it: see section 166-90.
- Note 3: See section 165-255 for the rule about incomplete income years.

*Meaning of test period and test time*

- (2) The company's *test period* is the period starting at the time that is the reference time for the purposes of Subdivision 165-CC or section 165-115L, as the case may be, and ending at each of the following times (the *test time*):
- (a) the end of the income year in which the reference time occurred;
  - (b) the end of a later income year;
  - (c) the \*end of a \*corporate change in the company.

- Note 1: See section 165-255 for the rule about incomplete test periods.
- Note 2: See section 166-175 to work out whether there is a corporate change.

*Substantial continuity of ownership*

- (3) A changeover time or an alteration time is taken not to have occurred in respect of the company during the test period if there is \*substantial continuity of ownership of the company as between the start of the \*test period and the \*test time.

- Note: See section 166-145 to work out whether there is substantial continuity of ownership.

*No substantial continuity of ownership*

- (4) Subsections (5) and (6) have effect if there is no \*substantial continuity of ownership of the company as between the start of the \*test period and the \*test time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (5) The \*test time is taken to have been a changeover time or an alteration time, as the case may be, in respect of the company.
- (6) No other time during the \*test period is a changeover time or an alteration time in respect of the company.

**166-90 Companies can choose that this Subdivision is not to apply to them**

- (1) The company can choose that Subdivision 165-CC or 165-CD is to apply to it in respect of a \*test period for the purposes of section 166-80 *without* the modifications made by this Subdivision.
- (2) The company must choose on or before the day it lodges its \*income tax return for the income year in which the \*test period begins, or before a later day if the Commissioner allows.

**Subdivision 166-D—Tests for finding out whether the widely held or eligible Division 166 company has maintained the same owners**

**Guide to Subdivision 166-D**

**166-135 What this Subdivision is about**

This Subdivision has the tests to work out whether a widely held or eligible Division 166 company has maintained the same owners as between different times. (Subdivision 166-E has rules which make it easier for the company to satisfy these tests.)

This Subdivision also defines when there has been a corporate change in the company.

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**The ownership tests: substantial continuity of ownership**

166-145 The ownership tests: substantial continuity of ownership

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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166-165 Relationship with rules in Division 165

**Corporate change in a company**

166-175 Corporate change in a company

**The ownership tests: substantial continuity of ownership**

**166-145 The ownership tests: substantial continuity of ownership**

- (1) There is *substantial continuity of ownership* of the company as between the start of the \*test period and another time in the test period if (and only if) the conditions in this section are met.

Note: Section 166-165, and Subdivision 166-E, affect how this section is applied.

*Voting power*

- (2) There must be persons (none of them companies or trustees) who had \*more than 50% of the voting power in the company at the start of the \*test period. Also, those persons must have had \*more than 50% of the voting power in the company immediately after the other time in the test period.

Note 1: To work out who had more than 50% of the voting power, see section 165-150.

Note 2: Subdivision 167-B has special rules for working out voting power in a company whose shares do not all carry the same voting rights, or do not carry all of the voting rights in the company.

*Rights to dividends*

- (3) There must be persons (none of them companies) who had rights to \*more than 50% of the company's dividends at the start of the \*test period. Also, those persons must have had rights to \*more than 50% of the company's dividends immediately after the other time in the test period.

Note 1: To work out who had rights to more than 50% of the company's dividends, see section 165-155.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note 2: Subdivision 167-A has special rules for working out rights to dividends in a company whose shares do not all carry the same rights to dividends.

*Rights to capital distributions*

- (4) There must be persons (none of them companies) who had rights to \*more than 50% of the company's capital distributions at the start of the \*test period. Also, those persons must have had rights to \*more than 50% of the company's capital distributions immediately after the other time in the test period.

Note 1: To work out who had rights to more than 50% of the company's capital distributions, see section 165-160.

Note 2: Subdivision 167-A has special rules for working out rights to capital distributions in a company whose shares do not all carry the same rights to capital distributions.

*When to apply the test*

- (5) To work out whether a condition in this section was satisfied at a time (the **ownership test time**), apply the alternative test for that condition.

Note: For the alternative test, see subsections 165-150(2), 165-155(2) and 165-160(2).

*Conditions in subsections (3) and (4) satisfied by non-profit and mutual companies*

- (6) If the company is:
- (a) a \*non-profit company; or
  - (b) a \*mutual affiliate company; or
  - (c) a \*mutual insurance company;
- during the whole of the \*test period, the conditions in subsections (3) and (4) are taken to have been satisfied by the company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

### **166-165 Relationship with rules in Division 165**

- (1) The provisions of Subdivision 165-D (other than section 165-165) apply for the purposes of the tests in section 166-145.
- (2) The following provisions apply for the purposes of the tests in section 166-145 as if the reference to a particular time were a reference to the \*ownership test time:
  - (a) section 165-180 (which is about arrangements affecting beneficial ownership of shares);
  - (b) subsection 165-185(2) (which treats some shares as never having carried rights);
  - (c) subsection 165-190(2) (which treats some shares as always having carried rights).

### **Corporate change in a company**

#### **166-175 Corporate change in a company**

##### *Meaning of corporate change*

- (1) There is a **corporate change** in a company if:
  - (a) there is a \*takeover bid for \*shares in the company; or
  - (b) there is a scheme of arrangement, involving more than 50% of the company's shares, that has been approved by a court; or
  - (c) there is any other arrangement, involving the acquisition of more than 50% of the company's shares, that is regulated under the *Corporations Act 2001* or a \*foreign law; or
  - (d) there is an issue of \*shares in the company that results in an increase of 20% or more in:
    - (i) the issued share capital of the company; or
    - (ii) the number of the company's shares on issue; or
  - (e) there is a corporate change in another company which beneficially owns one or more of the following stakes in the first company:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (i) a \*voting stake that carries rights to more than 50% of the voting power of the first company;
- (ii) a \*dividend stake that carries rights to receive more than 50% of any dividends the first company may pay;
- (iii) a \*capital stake that carries rights to receive more than 50% of any distribution of capital of the first company; (whether the other company owns those stakes directly, or \*indirectly through one or more interposed entities).

Note: For paragraph (e), Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

*When a corporate change ends*

- (2) A \*corporate change *ends*:
  - (a) if paragraph (1)(a) applies (or paragraph (1)(e) applies because of paragraph (1)(a))—at the latest time when a \*bid period of the \*takeover bid ends; and
  - (b) if paragraph (1)(b) or (c) applies (or paragraph (1)(e) applies because of paragraph (1)(b) or (c))—when the scheme of arrangement or other arrangement ends; and
  - (c) if paragraph (1)(d) applies (or paragraph (1)(e) applies because of paragraph (1)(d))—when the offer period for the issue of \*shares ends.

**Subdivision 166-E—Concessional tracing rules**

**Guide to Subdivision 166-E**

**166-215 What this Subdivision is about**

This Subdivision has rules which make it easier for a widely held or eligible Division 166 company to satisfy the ownership tests in Subdivision 166-D.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



Special concessional tracing rules deem entities to hold the following stakes in the company so that the company does not have to trace through to the beneficial owners of the stakes:

- (a) stakes of less than 10% in the company;
- (b) stakes of between 10% and 50% that are held by widely held companies;
- (c) stakes that are held by complying superannuation funds, complying approved deposit funds, special companies and managed investment schemes;
- (d) stakes in interposed foreign listed companies that are held as bearer shares;
- (e) stakes in interposed foreign listed companies that are held by depository entities.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Application of this Subdivision**

**166-220 Application of this Subdivision**

This Subdivision applies to a company (the *tested company*) that is:

- (a) a \*widely held company at all times during the income year; or
- (b) an \*eligible Division 166 company at all times during the income year; or
- (c) a widely held company for a part of the income year and an eligible Division 166 company for the rest of the income year.

Note: See section 165-255 for the rule about incomplete income years.

**Stakes of less than 10% in the tested company**

**166-225 Direct stakes of less than 10% in the tested company**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if:
  - (a) a \*voting stake that carries rights to less than 10% of the voting power in the company is held directly in the company; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) a \*dividend stake that carries the right to receive less than 10% of any dividends that the company may pay is held directly in the company; or
- (c) a \*capital stake that carries the right to receive less than 10% of any distribution of capital of the company is held directly in the company.

Note 1: Other rules might affect this provision: see sections 166-270, 166-275 and 166-280.

Note 2: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

*Notional shareholder*

- (2) The tests are applied to the tested company as if, at the \*ownership test time, a single notional entity:
  - (a) directly controlled the voting power that is carried by each such \*voting stake; and
  - (b) had the right to receive, for its own benefit and directly:
    - (i) any \*dividends the tested company may pay in respect of each such \*dividend stake; and
    - (ii) any distributions of capital of the tested company in respect of each such \*capital stake; and
  - (c) were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

- (3) To avoid doubt, the single notional entity mentioned in subsection (2) is a different single notional entity from the one mentioned in section 165-207 and the one mentioned in section 166-255.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**166-230 Indirect stakes of less than 10% in the tested company**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if it is the case, or it is reasonable to assume that:
- (a) an entity (the **stakeholder**) indirectly holds any of these stakes in the tested company:
    - (i) a \*voting stake that carries rights to less than 10% of the voting power in the company; or
    - (ii) a \*dividend stake that carries the right to receive less than 10% of any dividends that the company may pay; or
    - (iii) a \*capital stake that carries the right to receive less than 10% of any distribution of capital of the company; and
  - (b) either:
    - (i) the stakeholder indirectly holds the stake in the tested company by holding \*shares directly in a company (the **top interposed entity**) that is interposed between the stakeholder and the tested company; or
    - (ii) the stakeholder indirectly holds the stake in the tested company by holding another interest directly in an entity (the **top interposed entity**) that is not a company and that is interposed between the stakeholder and the tested company.

Note 1: There might also be other entities interposed between the top interposed entity and the tested company.

Note 2: Other rules might affect this provision: see subsection (3) and sections 166-272, 166-275 and 166-280.

Note 3: For paragraph (a), Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*Top interposed entity deemed to hold stakes directly in the tested company*

- (2) The tests are applied to the tested company as if, at the \*ownership test time:
- (a) if the stake is a \*voting stake—the top interposed entity controls, or is able to control, the voting power in the tested company that is carried by that stake at that time; and
  - (b) if the stake is a \*dividend stake—the top interposed entity \*indirectly had the right to receive, for its own benefit, any \*dividends the tested company may pay in respect of that stake at that time; and
  - (c) if the stake is a \*capital stake—the top interposed entity indirectly had the right to receive, for its own benefit, any distributions of capital of the tested company in respect of that stake at that time; and
  - (d) in any case—the top interposed entity were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

*Acquisition of top interposed entity by another entity*

- (3) If:
- (a) a new entity (the ***new interposed entity***) acquires all the \*shares or other interests in the top interposed entity (the ***old interposed entity***); and
  - (b) the new interposed entity has the same classes of shares or other interests as the old interposed entity; and
  - (c) if the new interposed entity is a company—the shares are not \*redeemable shares; and
  - (d) in any case—each stakeholder holds the same proportion, or a reasonably equivalent proportion, of the total \*voting stakes, \*dividend stakes or \*capital stakes in the new interposed entity immediately after the acquisition as the

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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stakeholder held in the old interposed entity immediately before the acquisition;

then, at all times that the old interposed entity held or is taken to have held a stake in the tested company, the new interposed entity is taken to have held that stake.

- (4) Except for the purposes of determining whether a time is an alteration time (within the meaning of section 165-115L), section 166-272 (which is about the same shares or interests) is to be disregarded when applying subsection (3).

*Acquisition of tested company by new interposed entity*

- (5) If:

- (a) a new entity (the ***new interposed entity***) that is a company acquires all the \*shares in the tested company; and
- (b) assuming that the time immediately before the acquisition had been an \*ownership test time, section 166-225 would have applied the tests to the tested company as if there were a single notional entity as described in subsection 166-225(2) in respect of some or all of the \*voting stakes, \*dividend stakes or \*capital stakes in the tested company; and
- (c) the new interposed entity has the same classes of shares as the tested company; and
- (d) the shares are not \*redeemable shares; and
- (e) each entity that held a proportion of the voting stakes, dividend stakes or capital stakes in the tested company immediately before the acquisition (disregarding section 166-225) holds the same proportion, or a reasonably equivalent proportion, of that kind of stake in the new interposed entity immediately after the acquisition;

then, at all times that the single notional entity mentioned in paragraph (b) held or is taken to have held a stake in the tested company, the new interposed entity is taken to have held that stake.

- (6) Except for the purposes of determining whether a time is an alteration time (within the meaning of section 165-115L),

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

section 166-272 (which is about the same shares or interests) is to be disregarded when applying subsection (5) of this section.

### 166-235 Voting, dividend and capital stakes

#### *Meaning of voting stake*

- (1) An entity holds a **voting stake** in a company if:
  - (a) the entity is the registered holder of \*shares in the company;  
and
  - (b) the shares carry rights to exercise voting power in the company.
- (2) An entity (the **stakeholder**) also holds a **voting stake** in a company if:
  - (a) one or more other entities are interposed between the company and the stakeholder; and
  - (b) the stakeholder controls, or is able to control, voting power in the company indirectly through the interposed entity or entities.

Note: For working out the size of a voting stake (for example, for paragraph 166-225(1)(a)), Subdivision 167-B has special rules for working out voting power in a company whose shares do not all carry the same voting rights, or do not carry all of the voting rights in the company.

#### *Meaning of dividend stake*

- (3) An entity holds a **dividend stake** in a company if:
  - (a) the entity is the registered holder of \*shares in the company;  
and
  - (b) the shares carry rights to all or any \*dividends that the company may pay.
- (4) An entity (the **stakeholder**) also holds a **dividend stake** in a company if:
  - (a) one or more other entities are interposed between the company and the stakeholder; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) the stakeholder has the right to receive, for its own benefit and \*indirectly through the interposed entity or entities, all or any \*dividends that the company may pay.

Note: For working out the size of a dividend stake (for example, for paragraph 166-225(1)(b)), Subdivision 167-A has special rules for a company whose shares do not all carry the same rights to dividends.

*Meaning of capital stake*

- (5) An entity holds a **capital stake** in a company if:
  - (a) the entity is the registered holder of \*shares in the company; and
  - (b) the shares carry rights to all or any of a distribution of capital of the company.
- (6) An entity (the **stakeholder**) also holds a **capital stake** in a company if:
  - (a) one or more other entities are interposed between the company and the stakeholder; and
  - (b) the stakeholder has the right to receive, for its own benefit and \*indirectly through the interposed entity or entities, all or any of a distribution of capital of the company.

Note: For working out the size of a capital stake (for example, for paragraph 166-225(1)(c)), Subdivision 167-A has special rules for a company whose shares do not all carry the same rights to capital distributions.

*Stakes held by nominees*

- (7) For the purposes of sections 166-225 and 166-230, if:
  - (a) an entity (the **nominee entity**) holds a \*voting stake, a \*dividend stake, or a \*capital stake, in a company; and
  - (b) the nominee entity is itself a company; and
  - (c) the nominee entity holds the stake as a nominee for more than one other entity;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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then, for each entity for whom a part of the stake is held by the nominee entity, that entity's part of the stake may be treated instead as a separate stake.

## **Stakes held directly and/or indirectly by widely held companies**

### **166-240 Stakes held directly and/or indirectly by widely held companies**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if a \*widely held company directly or indirectly (through one or more interposed entities), or both directly and indirectly, holds any of the following:
- (a) a \*voting stake that carries rights to between 10% and 50% (inclusive) of the voting power in the company;
  - (b) a \*dividend stake that carries the right to receive between 10% and 50% (inclusive) of any dividends that the company may pay;
  - (c) a \*capital stake that carries the right to receive between 10% and 50% (inclusive) of any distribution of capital of the company.
- Note 1: Other rules might affect this provision: see subsections (3) and (4) and sections 166-272, 166-275 and 166-280.
- Note 2: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.
- (2) The tests are applied to the tested company as if, at the \*ownership test time:
- (a) if the stake is a \*voting stake—the \*widely held company controls, or is able to control, the voting power in the tested company that is carried by that stake at that time; and
  - (b) if the stake is a \*dividend stake—the widely held company had the right to receive (whether directly or \*indirectly), for its own benefit, any \*dividends the tested company may pay in respect of that stake at that time; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) if the stake is a \*capital stake—the widely held company had the right to receive (whether directly or indirectly), for its own benefit, any distributions of capital of the tested company in respect of that stake at that time; and
- (d) in any case—the widely held company were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

*Exception*

- (3) This section does not apply in respect of a \*widely held company if the company is not a widely held company for the whole income year in which the \*ownership test time occurs.

Note: See section 165-255 for the rule about incomplete periods.

*Acquisition of widely held company by another entity*

- (4) If:
  - (a) a new company acquires all the \*shares in the \*widely held company; and
  - (b) immediately before the acquisition, the shares in the widely held company were listed for quotation in the official list of an \*approved stock exchange; and
  - (c) immediately after the acquisition, the shares in the new company are listed for quotation in the official list of an approved stock exchange; and
  - (d) the new company has the same classes of shares (not being \*redeemable shares) as the widely held company; and
  - (e) each entity that held stakes in the widely held company immediately before the acquisition holds the same proportion of the total \*voting stakes, \*dividend stakes or \*capital stakes in the new company immediately after the acquisition as the entity held in the widely held company immediately before the acquisition;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

then, at all times that the widely held company held or is taken to have held a stake in the tested company, the new company is taken to have held that stake.

- (5) Except for the purposes of determining whether a time is an alteration time (within the meaning of section 165-115L), section 166-272 (which is about same shares or interests) is to be disregarded when applying subsection (4).

### **166-245 Stakes held by other entities**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if:
- (a) an entity mentioned in subsection (2) directly or indirectly (through one or more interposed entities) holds a \*voting stake, a \*dividend stake or a \*capital stake in the company; and
  - (b) neither the entity nor another entity has, under section 166-225, 166-230 or 166-240, been taken to control voting power or have rights in respect of the stake; and
  - (c) the entity mentioned in subsection (2) satisfies the condition in subsection (3).

Note: Other rules might affect this provision: see sections 166-272, 166-275 and 166-280.

- (2) For the purposes of subsection (1), these are the entities:
- (a) a \*superannuation fund; and
  - (b) an \*approved deposit fund; and
  - (c) a \*special company; and
  - (d) a \*managed investment scheme; and
  - (e) any other entity, or entity of a kind, prescribed by the regulations.
- (3) For the purposes of paragraph (1)(c), an entity satisfies the condition in this subsection if at all times during the income year of the tested company in which the \*ownership test time occurs:
- (a) if the entity is a \*superannuation fund:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (i) the fund is a \*complying superannuation fund; or
- (ii) the fund is a superannuation fund that is established in a foreign country and is regulated under a \*foreign law; or
- (b) if the entity is an \*approved deposit fund—the fund is a \*complying approved deposit fund; or
- (c) if the entity is a \*special company—the company is a special company; or
- (d) if the entity is a \*managed investment scheme:
  - (i) the scheme is registered under the *Corporations Act 2001*; or
  - (ii) the entity is recognised, under a \*foreign law relating to corporate regulation, as an entity with a similar status to a managed investment scheme; or
- (e) if the entity is an entity, or an entity of a kind, prescribed by the regulations—the entity meets any conditions prescribed by the regulations.

Note: See section 165-255 for the rule about incomplete periods.

*If the entity has 10 members or fewer*

- (4) If the entity has 10 \*members or fewer, the tests are applied to the tested company as if, at the \*ownership test time:
  - (a) if the stake is a \*voting stake—each member controls, or is able to control, an equal proportion of the voting power in the tested company that is carried by that stake at that time; and
  - (b) if the stake is a \*dividend stake—each member had the right to receive (whether directly or \*indirectly), for its own benefit, an equal proportion of any \*dividends the tested company may pay in respect of that stake at that time; and
  - (c) if the stake is a \*capital stake—each member had the right to receive (whether directly or indirectly), for its own benefit, an equal proportion of any distributions of capital of the tested company in respect of that stake at that time; and
  - (d) in any case—each member were a person (other than a company or a trustee).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- Note 1: If each member's proportion of the voting power, the dividends or the distributions is less than 10%, then subsections (5) and (6) apply instead.
- Note 2: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

*If the entity has more than 10 members etc.*

- (5) The ownership tests are applied as set out in subsection (6) if:
- (a) the entity has more than 10 \*members; or
  - (b) under subsection (4):
    - (i) the proportion of the voting power in the company that each member controls, or is able to control, is less than 10% of the total voting power; or
    - (ii) the proportion of the \*dividends that the tested company may pay for the benefit of each member is less than 10% of the total dividends; or
    - (iii) the proportion of the distributions of capital that the tested company may pay for the benefit of each member is less than 10% of the total distributions.
- (6) The ownership tests are applied to the tested company as if, at the \*ownership test time:
- (a) if the stake is a \*voting stake—the entity controls, or is able to control, the voting power in the tested company that is carried by that stake at that time; and
  - (b) if the stake is a \*dividend stake—the entity had the right to receive (whether directly or \*indirectly), for its own benefit, any \*dividends the tested company may pay in respect of that stake at that time; and
  - (c) if the stake is a \*capital stake—the entity had the right to receive (whether directly or indirectly), for its own benefit, any distributions of capital of the tested company in respect of that stake at that time; and
  - (d) in any case—the entity were a person (other than a company or a trustee).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 166-255

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Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

**When identity of foreign stakeholders is not known**

**166-255 Bearer shares in foreign listed companies**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if:
- (a) at the \*ownership test time, it is the case, or it is reasonable to assume, that persons (none of them companies or trustees) hold a \*voting stake, a \*dividend stake or a \*capital stake in the tested company; and
  - (b) an entity has not, under section 166-225, 166-230, 166-240 or 166-245, been taken to control voting power or have rights in respect of the stake; and
  - (c) another company (the *foreign listed company*) is interposed, at that time, between those persons and the tested company; and
  - (d) at all times during the income year of the tested company in which the ownership test time occurs, the \*principal class of shares in the foreign listed company is listed for quotation in the official list of an \*approved stock exchange; and
  - (e) at the ownership test time:
    - (i) voting stakes that carry rights to 50% or more of the voting power in the foreign listed company; or
    - (ii) dividend stakes that carry rights to receive 50% or more of any dividends that the foreign listed company may pay; or
    - (iii) capital stakes that carry rights to receive 50% or more of any distribution of capital of the foreign listed company; as the case requires, are directly held by way of bearer shares; and
  - (f) the beneficial owners of some or all of those bearer shares have not been disclosed to the foreign listed company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- Note 1: See section 165-255 for the rule about incomplete test periods.
- Note 2: Other rules might affect this provision: see sections 166-270, 166-275 and 166-280.
- Note 3: For paragraph (e), Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

- (2) The tests are applied to the tested company as if, at the \*ownership test time, for each of those bearer shares whose owners have not been disclosed:
- (a) a single notional entity controls, or is able to control, the voting power in the tested company that is carried by those shares at that time; and
  - (b) the entity \*indirectly had the right to receive, for its own benefit:
    - (i) any \*dividends the tested company may pay in respect of those shares at that time; and
    - (ii) any distributions of capital of the tested company in respect of those shares at that time; and
  - (c) the entity were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

- (3) To avoid doubt, the single notional entity mentioned in subsection (2) is a different single notional entity from the one mentioned in section 165-207 and the one mentioned in section 166-225.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 166-260

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**166-260 Depository entities holding stakes in foreign listed companies**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if:
- (a) at the \*ownership test time, it is the case, or it is reasonable to assume, that persons (none of them companies or trustees) have a \*voting stake, a \*dividend stake or a \*capital stake in the tested company; and
  - (b) an entity has not, under section 166-225, 166-230, 166-240, 166-245 or 166-255, been taken to control voting power or have rights in respect of the stake; and
  - (c) another company (the *foreign listed company*) is interposed, at that time, between those persons and the tested company; and
  - (d) at all times during the income year of the tested company in which the ownership test time occurs, the \*principal class of shares in the foreign listed company is listed for quotation in the official list of an \*approved stock exchange; and
  - (e) at the ownership test time:
    - (i) voting stakes that carry rights to 50% or more of the voting power in the foreign listed company; or
    - (ii) dividend stakes that carry rights to receive 50% or more of any dividends that the foreign listed company may pay; or
    - (iii) capital stakes that carry rights to receive 50% or more of any distribution of capital of the foreign listed company; as the case requires, are directly held by one or more \*depository entities (see subsection (3)); and
  - (f) a law of a foreign country, or a part of a foreign country, in which the approved stock exchange is located, prevents the disclosure of the beneficial owners of some or all of those shares that are held by the depository entities; and
  - (g) the beneficial owners of some or all of the shares held by the depository entities have not been disclosed to the foreign listed company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



Section 166-260

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Note 1: See section 165-255 for the rule about incomplete test periods.

Note 2: This rule might not apply in all circumstances: see sections 166-275 and 166-280.

Note 3: For paragraph (e), Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

- (2) The tests are applied to the tested company as if, at the \*ownership test time, for each of those \*shares held by a \*depository entity whose owners have not been disclosed, the depository entity:
- (a) controls, or is able to control, the voting power in the tested company that is carried by those shares at that time; and
  - (b) \*indirectly had the right to receive, for its own benefit:
    - (i) any \*dividends the tested company may pay in respect of those shares at that time; and
    - (ii) any distributions of capital of the tested company in respect of those shares at that time; and
  - (c) were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

- (3) If the effect of subsection (2) is that the \*depository entity is taken to hold:
- (a) a \*voting stake that carries rights to less than 10% of the voting power in the tested company; or
  - (b) a \*dividend stake that carries the right to receive less than 10% of any dividends that the tested company may pay; or
  - (c) a \*capital stake that carries the right to receive less than 10% of any distribution of capital of the tested company;
- then neither section 166-225 nor section 166-230 applies in respect of that stake.

Note: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (4) If the \*depository entity (the *old depository entity*) is subsequently replaced by another depository entity (the *new depository entity*), then, at all times that the old depository entity held or is taken to have held a stake in the tested company, the new entity is taken to have held that stake.
- (5) A *depository entity* is an entity:
- (a) that is a central securities repository; and
  - (b) that provides custody of share certificates; and
  - (c) that provides services for the exchange of shares.

**Other rules relating to voting power and rights**

**166-265 Persons who actually control voting power or have rights are taken not to control power or have rights**

If any of sections 166-225, 166-230, 166-240, 166-245, 166-255 or 166-260 apply, the ownership tests in section 166-145 are also applied to the tested company as if, at the \*ownership test time:

- (a) the persons who control, or are able to control, the voting power in the tested company (whether directly, or indirectly through one or more interposed entities) that is carried by each \*voting stake in the tested company mentioned in that section had *not* had that control; and
- (b) the persons who have the right to receive for their own benefit (whether directly, or \*indirectly through one or more interposed entities):
  - (i) any \*dividends that the tested company may pay in respect of each \*dividend stake in the tested company mentioned in that section; and
  - (ii) any distributions of capital of the tested company in respect of each \*capital stake in the tested company mentioned in that section;had *not* had that right.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**166-270 Single notional entity stakeholders taken to have minimum voting control, dividend rights and capital rights**

*Minimum control of voting power*

- (1) If:
- (a) the \*ownership test time is after the start of the \*test period; and
  - (b) a single notional entity mentioned in section 166-225 or 166-255 has voting power in a company; and
  - (c) the voting power that the entity has at the ownership test time is greater than the voting power that the entity had at the start of the test period;
- then the entity is taken to have voting power in the company at the ownership test time only to the extent that it had it at the start of the test period.

*Minimum percentage of rights to dividends and capital*

- (2) If:
- (a) the \*ownership test time is after the start of the \*test period; and
  - (b) a single notional entity mentioned in section 166-225 or 166-255 has a percentage of rights to the \*dividends or distributions of capital of a company; and
  - (c) the percentage that the entity has rights to at the ownership test time is greater than the percentage (the ***lower percentage***) of the dividends or distributions of capital of the company that the entity had rights to at the start of the test period;
- then the entity is taken to have rights to the lower percentage of the dividends or distributions of capital at the ownership test time.

*Acquisition of tested company by new interposed entity—minimum control of voting power*

- (3) If:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) the \*ownership test time is after the start of the \*test period; and
  - (b) at the start of the test period, a single notional entity mentioned in section 166-225 had voting power in a company (disregarding subsection 166-230(5)); and
  - (c) under subsection 166-230(5), a new interposed entity is taken to have held that voting power at the start of the test period; and
  - (d) at the ownership test time, the voting power in the company held indirectly by stakeholders covered by subsection 166-230(1) is greater than the voting power that the single notional entity had at the start of the test period;
- then the stakeholders referred to in paragraph (d) are, collectively, taken to have indirect voting power in the company at the ownership test time only to the extent that the single notional entity had it at the start of the test period.

*Acquisition of tested company by new interposed entity—minimum percentage of rights to dividends and capital*

- (4) If:
- (a) the \*ownership test time is after the start of the \*test period; and
  - (b) at the start of the test period, a single notional entity mentioned in section 166-225 had a percentage of rights to the \*dividends or distributions of capital of a company (disregarding subsection 166-230(5)); and
  - (c) under subsection 166-230(5), a new interposed entity is taken to have had those rights at the start of the test period; and
  - (d) the percentage that stakeholders covered by subsection 166-230(1) have rights to indirectly at the ownership test time is greater than the percentage (the **lower percentage**) of the dividends or distributions of capital of the company that the single notional entity had rights to at the start of the test period;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

then the stakeholders referred to in paragraph (d) are, collectively, taken to have indirect rights to the lower percentage of the dividends or distributions of capital at the ownership test time.

### **166-272 Same shares or interests to be held**

#### *Application*

- (1) This section modifies how the ownership tests in section 166-145 are applied to a \*voting stake, a \*dividend stake or a \*capital stake in the tested company held by one of the following entities (the **stakeholder**):
- (a) a top interposed entity mentioned in section 166-230 (which is about indirect stakes of less than 10%);
  - (b) a \*widely held company mentioned in section 166-240;
  - (c) an entity mentioned in subsection 166-245(2) (which is about stakes held by other entities);
  - (d) a \*depository entity mentioned in section 166-260;
- (whether directly, or \*indirectly through one or more interposed entities).

#### *Exactly the same shares or interests must continue to be held*

- (2) For the purpose of determining whether the tested company has satisfied a condition or whether a time is a changeover time or an alteration time in respect of the tested company:
- (a) a condition that has to be satisfied is not satisfied; or
  - (b) a time that, apart from this subsection, would not be a changeover time or alteration time is taken to be a changeover time or alteration time, as the case may be;
- unless, at all relevant times:
- (c) the only \*shares in the tested company that are taken into account are exactly the same shares and are held by the same persons; and
  - (d) the only interests (including shares) in any other entity that is interposed between the stakeholder and the tested company

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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that are taken into account are exactly the same interests and are held by the same persons.

*What happens in case of share splitting*

(3) If:

- (a) a particular \*share (an **old share**) in a company of which the stakeholder, or an entity interposed between the stakeholder and the tested company, is the holder at the start of the \*test period is divided into 2 or more new shares during that period; and
- (b) the stakeholder or entity becomes the holder of each of the new shares immediately after the division takes place and remains the holder until the end of that period;

the new shares are taken to be exactly the same shares as the old share.

*What happens in case of splitting of units in a unit trust*

(4) If:

- (a) a particular unit (an **old unit**) in a unit trust of which the stakeholder, or an entity interposed between the stakeholder and the tested company, is the holder at the start of the \*test period is divided into 2 or more new units during that period; and
- (b) the stakeholder or entity becomes the holder of each of the new units immediately after the division takes place and remains the holder until the end of that period;

the new units are taken to be exactly the same units as the old unit.

*What happens in case of consolidation of shares*

(5) If:

- (a) a particular \*share (an **old share**) in a company of which the stakeholder, or an entity interposed between the stakeholder and the tested company, is the holder at the start of the \*test period, and other shares (each of which is also called an **old**

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*share*) in the company of which the stakeholder or entity is the holder at the start of that period, are consolidated into a new share during that period; and

- (b) the stakeholder or entity becomes the holder of the new share immediately after the consolidation takes place;  
the new share is taken to be exactly the same share as the old shares.

*What happens in case of consolidation of units in a unit trust*

- (6) If:
- (a) a particular unit (an *old unit*) in a unit trust of which the stakeholder, or an entity interposed between the stakeholder and the tested company, is the holder at the start of the \*test period and other units (each of which is also called an *old unit*) in the trust of which the stakeholder or entity is the holder at the start of that period are consolidated into a new unit during that period; and
- (b) the stakeholder or entity becomes the holder of the new unit immediately after the consolidation takes place;  
the new unit is taken to be exactly the same unit as the old units.

*Totals of shares or rights not affected*

- (7) This section does not affect how \*shares, and rights carried by shares, are counted for the purpose of determining:
- (a) the total voting power in the tested company; or  
(b) the total dividends that the tested company may pay; or  
(c) the total distributions of capital of the tested company.

*Conditions in section 166-145 may be treated as having been satisfied in certain circumstances*

- (8) If any of the conditions in section 166-145 have not been satisfied, those conditions are taken to have been satisfied if:
- (a) they would have been satisfied except for the operation of subsection (2) of this section; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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(b) the tested company has information from which it would be reasonable to conclude that less than 50% of:

- (i) the \*tax loss; or
- (ii) the \*notional loss; or
- (iii) the bad debt; or
- (iv) the unrealised net loss (within the meaning of section 165-115E);

as the case requires, has been reflected in deductions, capital losses, or reduced assessable income, that occurred, or could occur in future, because of the happening of any \*CGT event in relation to any \*direct equity interests or \*indirect equity interests held in the tested company by the stakeholder, or an entity interposed between the stakeholder and the tested company, during the \*test period.

*Subsection (8) not to apply for purpose of determining whether an alteration time has occurred*

- (9) However, subsection (8) does not apply in relation to any of the conditions in section 166-145 in so far as those conditions have effect for the purpose of determining whether an alteration time (within the meaning of section 165-115L) has occurred.

*Time of happening of CGT event*

- (10) The happening of any \*CGT event in relation to a \*direct equity interest or \*indirect equity interest in the tested company that results in the failure of the tested company to satisfy a condition in section 166-145 is taken, for the purposes of paragraph (8)(b), to have occurred during the \*test period.

**When the rules in this Subdivision do not apply**

**166-275 Rules in this Subdivision intended to be concessional**

A company is taken to have met the conditions in section 165-12, paragraph 165-35(a) or section 165-123, or a changeover time or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



an alteration time is taken not to have occurred in respect of a company, (as the case requires), if:

- (a) a \*tracing rule modifies how the ownership tests in section 166-145 apply to the tested company in respect of a \*voting stake, a \*dividend stake or a \*capital stake; and
- (b) the company fails the tests (whether at the time of applying the tracing rule or at another time); and
- (c) the company believes, on reasonable grounds, that if the tracing rule did not modify how the tests apply to the company in respect of that stake, it would not fail the tests.

Example: 11 people own shareholdings of 9% in the listed company. Under section 166-225, one notional shareholder is deemed to hold all of those shareholdings. 2 of the people sell their shareholdings so that 9 of the original 11 people now own shareholdings of 11%. Without the rule in this section, the company would fail the ownership tests (as the rule in section 166-225 no longer applies).

### **166-280 Controlled test companies**

- (1) A \*tracing rule does not modify how the ownership tests in section 166-145 apply to the tested company in respect of all or part of the voting power in the tested company, or all or some of the rights to \*dividends of, or capital in, the tested company, if:
  - (a) either:
    - (i) an entity (the **controlling entity**) directly holds that power or has those rights; or
    - (ii) an entity (the **controlling entity**) indirectly holds that power or has those rights through one or more interposed entities; and
  - (b) the tested company is sufficiently influenced (within the meaning of paragraph 318(6)(b) of the *Income Tax Assessment Act 1936*) by the controlling entity.

Note: However, a tracing rule can modify how the ownership tests in section 166-145 apply to the tested company in respect of voting power or dividend or capital rights held by entities other than controlling entities.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (2) A \*tracing rule does not modify how the ownership tests in section 166-145 apply to the tested company in respect of all or part of the voting power in the tested company if:
- (a) the tested company is a \*widely held company; and
  - (b) that voting power:
    - (i) is more than 25% of the total voting power in the tested company and is controlled (whether directly, or indirectly through one or more interposed entities) by a natural person, together with his or her \*associates; or
    - (ii) is more than 50% of the total voting power in the tested company and is controlled (whether directly, or indirectly through one or more interposed entities) by a trustee or company, together with its associates.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Division 167—Companies whose shares carry unequal rights to dividends, capital distributions or voting power**

### **Table of Subdivisions**

Guide to Division 167
167-A Rights to dividends or capital distributions
167-B Voting power

### **Guide to Division 167**

#### **167-1 What this Division is about**

This Division modifies the way conditions relating to this Part apply to companies whose shares:

- (a) do not all carry the same rights to dividends or capital distributions; or
- (b) do not all carry the same voting rights, or do not carry all of the voting rights in the company.

#### **Subdivision 167-A—Rights to dividends or capital distributions**

### **Guide to Subdivision 167-A**

#### **167-5 What this Subdivision is about**

Companies whose shares do not all carry the same rights to dividends or capital distributions may test the possession of those rights similarly to companies whose shares are all of a single class with the same rights.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

**Part 3-5** Corporate taxpayers and corporate distributions

**Division 167** Companies whose shares carry unequal rights to dividends, capital distributions or voting power

Section 167-7

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**167-7 Simplified outline of this Subdivision**

If a condition of the continuity of ownership test cannot be worked out for a company:

- (a) because of its unequal share structure; or
  - (b) because of a holding company's unequal share structure;
- an entity can choose to reconsider that condition in up to 3 ways.

The first way involves disregarding debt interests.

The second way involves disregarding debt interests and secondary share classes.

The third way involves disregarding those shares, and treating the remaining shares as carrying certain percentages of the rights to receive dividends and capital distributions.

The second way can only be tried after the first way, while the third way can only be tried after the second way.

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167-10	When this Subdivision applies
167-15	First way—disregard debt interests
167-20	Second way—also disregard secondary share classes
167-25	Third way—treat remaining shares as having fixed rights to dividends and capital distributions
167-30	Fixing rights if practicable to work out market values
167-35	Fixing rights if impracticable to work out market values etc.
167-40	The valuing times for conditions listed in subsection 167-10(1)

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Operative provisions

### 167-10 When this Subdivision applies

*When this Subdivision applies*

- (1) This Subdivision applies in relation to a company if:
- (a) as described in the following table, a condition (the ***unsatisfied condition***) cannot be worked out for the company for a particular period (the ***test period***); and
  - (b) at one or more times during the test period:
    - (i) the company; or
    - (ii) a company that has a \*shareholding interest in it; (an ***unequally structured company***) has an \*unequal share structure.

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**Conditions that can be reconsidered under this Subdivision**

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Item	Column 1 Each of the following provisions contains a condition:	Column 2 that cannot be worked out for:
1	(a) subsection 165-12(3) or (4); (b) paragraph 165-37(1)(b) or (c); (c) subsection 165-123(3) or (4); (d) paragraph 175-10(3)(b) or (c), 175-45(3)(b) or (c) or 175-85(3)(b) or (c); (e) subparagraph (b)(ii) or (iii) of the definition of <b><i>eligible Division 166</i></b> <b><i>company</i></b> in subsection 995-1(1)	a period that is all or part of the period to which that provision relates

Note: Each of these conditions is about rights to the company's dividends or capital distributions.

- (2) This Subdivision also applies in relation to a company if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) as described in the following table, a condition (the ***unsatisfied condition***) cannot be worked out for the company for a particular time (the ***test time***); and
- (b) at the test time, the company, or a company that has a \*shareholding interest in it, (an ***unequally structured company***) has an \*unequal share structure.

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**Conditions that can be reconsidered under this Subdivision**

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<b>Item</b>	<b>Column 1 Each of the following provisions contains a condition:</b>	<b>Column 2 that cannot be worked out for:</b>
1	(a) paragraph 165-115C(1)(b) or (c) or 165-115L(1)(b) or (c); (b) subparagraph 165-115X(1)(b)(ii) or (iii); (c) paragraph 165-115Z(1)(b) or (c); (d) subsection 166-145(3) or (4); (e) subparagraph 166-175(1)(e)(ii) or (iii); (f) paragraph 166-225(1)(b) or (c); (g) subparagraph 166-230(1)(a)(ii) or (iii); (h) paragraph 166-240(1)(b) or (c); (i) subparagraph 166-255(1)(e)(ii) or (iii) or 166-260(1)(e)(ii) or (iii); (j) paragraph 166-260(3)(b) or (c) or 166-270(2)(c); (k) paragraph 170-260(3)(b) or (c) or 170-265(2)(b) or (c)	a time that is the time, or one of the times, to which that provision relates

Note 1: Each of these conditions is about rights to the company's dividends or capital distributions.

Note 2: If a condition cannot be worked out for several of the times to which the provision relates, apply this Subdivision separately for each of those times.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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*Meaning of **unequal share structure***

- (3) A company has an **unequal share structure** at a particular time if, at that time:
- (a) the company's \*shares do not all carry the same rights to \*dividends, or capital distributions, of the company; or
  - (b) some or all of the company's shares carry discretionary rights to dividends, or capital distributions, of the company; or
  - (c) the company is a \*co-operative company that has \*on issue one or more interests (other than shares) in the company's capital.

**167-15 First way—disregard debt interests**

- (1) The unsatisfied condition may be reconsidered by disregarding any \*debt interests in each unequally structured company.
- (2) The way an entity prepares its \*income tax return is sufficient evidence of it choosing to work out the unsatisfied condition under subsection (1).

**167-20 Second way—also disregard secondary share classes**

- (1) This section applies in relation to each unequally structured company if:
  - (a) despite section 167-15, the unsatisfied condition cannot be worked out; and
  - (b) on the last day of the test period or at the test time (as appropriate), there is \*on issue in that company one or more classes of \*shares (the **secondary share classes**) other than:
    - (i) the class or classes of ordinary or common shares that represent the majority of that company's value; and
    - (ii) \*debt interests; and
  - (c) it is reasonable to conclude that the total \*market value of the secondary share classes does not exceed 25% of the total market value of all of that company's shares (other than debt interests); and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Part 3-5** Corporate taxpayers and corporate distributions

**Division 167** Companies whose shares carry unequal rights to dividends, capital distributions or voting power

**Section 167-25**

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- (d) for one or more of the secondary share classes, it is reasonable to conclude that the market value of each of them does not exceed 10% of the total market value of all of that company's shares (other than debt interests).

Note: This section can apply separately for each unequally structured company.

- (2) For the purposes of subsection (1), use \*market values on the last day of the test period, or at the test time, (as appropriate).
- (3) The unsatisfied condition may be reconsidered by disregarding:
  - (a) those of the secondary share classes that, under paragraph (1)(d), caused this section to apply; and
  - (b) any \*debt interests in that company.
- (4) The way an entity prepares its \*income tax return is sufficient evidence of it choosing to work out the unsatisfied condition under subsection (3).

**167-25 Third way—treat remaining shares as having fixed rights to dividends and capital distributions**

*When this section applies*

- (1) This section applies if, despite sections 167-15 and 167-20, the unsatisfied condition cannot be worked out for the test period or test time (as appropriate).

*How to fix rights to dividends and capital distributions*

- (2) The unsatisfied condition may be reconsidered by applying subsections (3) and (4) to each unequally structured company. When doing this for an unsatisfied condition listed in subsection 167-10(1), assume:
  - (a) that the test period consists only of the valuing times worked out under section 167-40; and
  - (b) that each of those valuing times is a test time.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



Section 167-30

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- (3) Firstly, disregard any \*debt interests in that company and any of its \*shares that can be disregarded under subsection 167-20(3).
- (4) Secondly, treat each of that company's remaining \*shares \*on issue at the test time as having at that time the percentage of the rights to receive \*dividends, and capital distributions, worked out either:
- (a) under section 167-30; or
  - (b) under section 167-35 if:
    - (i) it is not reasonably practicable to work out the market values of each of those remaining shares; or
    - (ii) the sum of the \*market values of all of those remaining shares is nil.

Note: The remaining shares are those remaining after disregarding the shares mentioned in subsection (3).

*Evidence of a choice under this section*

- (5) The way an entity prepares its \*income tax return is sufficient evidence of it choosing to work out the unsatisfied condition under this section.

### **167-30 Fixing rights if practicable to work out market values**

Each remaining \*share is treated at the test time as carrying the following percentage of the rights to receive \*dividends, and capital distributions, from the company:

$$\frac{\text{*Share's *market value}}{\text{Sum of market values of all of the remaining shares in the company}} \times 100$$

where market value is worked out at the test time.

### **167-35 Fixing rights if impracticable to work out market values etc.**

- (1) Each remaining \*share is treated at the test time as carrying such a percentage of the rights to receive \*dividends, and capital distributions, from the company as is reasonable worked out:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Section 167-40**

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- (a) at the test time; and
  - (b) having regard to the purpose of the unsatisfied condition.
- (2) In working out what is reasonable for subsection (1), have regard to the following:
- (a) the company's \*constitution;
  - (b) any agreements between the company and either or both of the following:
    - (i) any or all of the shareholders in the company;
    - (ii) any or all of the \*associates of a shareholder in the company;
  - (c) any statement by the company of its policy in paying \*dividends or making capital distributions;
  - (d) the ability of an entity to control (whether directly, or indirectly through one or more interposed entities) how the company pays dividends or makes capital distributions;
  - (e) how the company has previously paid dividends or made capital distributions;
  - (f) whether all classes of \*shares carry substantially the same rights to receive dividends and capital distributions;
  - (g) the principle that:
    - (i) a \*tax loss or bad debt should only be deductible; and
    - (ii) a \*net capital loss should only be applied;if a majority of the persons entitled to the benefits of dividend and capital distributions of the company is maintained.

**167-40 The valuing times for conditions listed in subsection 167-10(1)**

- (1) For the purposes of subsection 167-25(2), the valuing times for the test period are:
- (a) the time the test period starts; and
  - (b) the time just before, and the time just after, any of the following events that happen during the test period:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 167-75

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- (i) the issue of \*shares of a class of remaining shares;
  - (ii) the variation of rights attached to any remaining shares to receive \*dividends or capital distributions;
  - (iii) the redemption or cancellation of any remaining shares; and
- (c) the time the test period ends.
- (2) For paragraph (1)(b), disregard a time if it is outside the test period.

### **Subdivision 167-B—Voting power**

#### **Guide to Subdivision 167-B**

##### **167-75 What this Subdivision is about**

Companies whose shares:

- (a) do not all carry the same voting rights; or
  - (b) do not carry all of the voting rights in the company;
- may test the possession of voting rights similarly to companies whose shares are all of a single class with the same rights.

#### **Table of sections**

##### **Operative provisions**

167-80	When this Subdivision applies
167-85	Different method for working out voting power
167-90	Dual listed companies

#### **Operative provisions**

##### **167-80 When this Subdivision applies**

- (1) For the purposes of this Part, voting power in a company at one or more times can be worked out under section 167-85 if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Section 167-85**

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- (a) the company's \*shares do not all, at those times, carry the same voting rights for all matters affecting the company; or
- (b) the company's shares do not carry all of the voting rights in the company;

whether this is because of the company's \*constitution, an \*arrangement or some other reason.

Note: Disregard dual listed company voting shares (see section 167-90).

- (2) Further, if those times are consecutive times during a period, the voting power in the company can be worked out under section 167-85 as if that period consists only of:
  - (a) the time that period starts; and
  - (b) each later time (if any) during that period when there is a change in the maximum number of votes any entity could cast on a poll described in paragraph 167-85(1)(a) or (b).

**167-85 Different method for working out voting power**

- (1) An entity may choose whether voting power in the company at a particular time is worked out solely by reference to:
  - (a) the maximum number of votes that could be cast on a poll on the election of a director of the company, if such a poll were to be held at that time; or
  - (b) the maximum number of votes that could be cast on a poll on an amendment to the company's \*constitution, other than an amendment altering:
    - (i) the rights carried by any of the company's \*shares; or
    - (ii) other forms of voting power in the company;if such a poll were to be held at that time.
- (2) The way the entity prepares its \*income tax return is sufficient evidence of it making a choice under subsection (1).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**167-90 Dual listed companies**

For the purposes of this Subdivision, disregard \*shares that are  
\*dual listed company voting shares.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 170-1

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## **Division 170—Treatment of certain company groups for income tax purposes**

### **Table of Subdivisions**

- 170-A Transfer of tax losses within certain wholly-owned groups of companies
- 170-B Transfer of net capital losses within certain wholly-owned groups of companies
- 170-C Provisions applying to both transfers of tax losses and transfers of net capital losses within wholly-owned groups of companies
- 170-D Transactions by a company that is a member of a linked group

### **Subdivision 170-A—Transfer of tax losses within certain wholly-owned groups of companies**

#### **Guide to Subdivision 170-A**

##### **170-1 What this Subdivision is about**

A company can transfer a surplus amount of its tax loss to another company so that the other company can deduct the amount in the income year of the transfer. One of the companies must be an Australian branch of a foreign bank, and both companies must be members of the same wholly-owned group.

#### **Table of sections**

- 170-5 Basic principles for transferring tax losses

##### **Effect of transferring a tax loss**

- 170-10 When a company can transfer a tax loss
- 170-15 Income company is taken to have incurred transferred loss
- 170-20 Who can deduct transferred loss

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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170-25 Tax treatment of consideration for transferred tax loss

**Conditions for transfer**

- 170-30 Companies must be in existence and members of the same wholly-owned group etc.
- 170-32 Tax loss incurred by the loss company because of a transfer under Subdivision 707-A
- 170-33 Alternative test of relations between the loss company and other companies
- 170-35 The loss company
- 170-40 The income company
- 170-42 If the income company has become the head company of a consolidated group or MEC group
- 170-45 Maximum amount that can be transferred
- 170-50 Transfer by written agreement
- 170-55 Losses must be transferred in order they are incurred
- 170-60 Income company cannot transfer transferred tax loss

**Effect of agreement to transfer more than can be transferred**

- 170-65 Agreement transfers as much as can be transferred
- 170-70 Amendment of assessments

**Australian permanent establishments of foreign financial entities**

- 170-75 Treatment like Australian branches of foreign banks

**170-5 Basic principles for transferring tax losses**

- (1) A company can transfer a tax loss to another company so that the other company can deduct it in the income year of the transfer.
- (2) Both companies must be members of the same wholly-owned group. There are other eligibility requirements that they must also satisfy.
- (2A) One of the companies must be an Australian branch of a foreign bank. The other company must be:
  - (a) the head company of a consolidated group or MEC group; or
  - (b) *not* a member of a consolidatable group.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

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**Division 170** Treatment of certain company groups for income tax purposes

**Section 170-10**

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Note: This Subdivision applies to Australian permanent establishments of foreign entities that are financial entities in the same way as it applies to Australian branches of foreign banks. See section 170-75.

- (3) The transferred loss must be “surplus” in the sense that the transferring company cannot use it because there is not enough assessable income to offset it. The other company must have enough assessable income to offset the transferred tax loss.
- (4) Neither company must be prevented from deducting the loss by Division 165 or 175.

Note: Division 165 deals with the income tax consequences of changing ownership or control of a company. Division 175 deals with using a company’s tax losses to avoid income tax.

- (5) The tax loss is transferred by an agreement between the 2 companies.
- (6) The tax loss can be transferred in the same year as it is incurred. In that case different rules apply.

**Effect of transferring a tax loss**

**170-10 When a company can transfer a tax loss**

- (1) A company (the *loss company*) can transfer an amount of its \*tax loss for an income year (the *loss year*) to another company (the *income company*) if the conditions in this Subdivision are met.
- (2) The amount transferred can be the whole or part of the \*tax loss.

Note: A PDF cannot transfer a tax loss, except one for a period before it became a PDF: see section 195-10.

**170-15 Income company is taken to have incurred transferred loss**

- (1) If an amount of a \*tax loss is transferred, the amount is taken to be a tax loss incurred by the \*income company in the \*loss year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (2) However, if the \*loss year is the same as the income year of the transfer, the \*income company is taken to have incurred the \*tax loss in the income year before the loss year.

Note: This rule is needed because Division 36 allows a tax loss to be deducted only if it was incurred in an *earlier* income year.

- (3) Despite subsection (1), if the \*tax loss is transferred because the conditions in section 170-32 are met, the \*income company is taken to have incurred the tax loss for the income year for which the first prior transferor mentioned in that section incurred the tax loss.
- (4) Despite subsection (1), if the \*tax loss is transferred because the condition in subsection 170-42(4) is met, the \*income company is taken to have incurred the tax loss for the income year for which that subsection assumes the income company incurred the tax loss.

### **170-20 Who can deduct transferred loss**

- (1) If an amount of a \*tax loss is transferred, the \*income company can deduct the amount in accordance with section 36-17 (which is about how to deduct a tax loss), but only for the income year of the income company for which the amount is transferred. That income year is called the *deduction year*.
- (2) The \*loss company can no longer \*utilise the transferred amount and is taken not to have incurred the \*tax loss to the extent of that amount.

### **170-25 Tax treatment of consideration for transferred tax loss**

- (1) If the \*loss company receives any consideration from the \*income company for the amount of the \*tax loss:
- (a) so much of the consideration as is given for the amount of the tax loss is neither assessable income nor exempt income of the loss company; and
  - (b) a \*capital gain does not accrue to the loss company because of the receipt of the consideration.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

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**Division 170** Treatment of certain company groups for income tax purposes

Section 170-30

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Note: However, the consideration may affect how section 170-210 modifies the cost base of direct and indirect interests in the loss company.

- (2) If the \*income company gives any consideration to the \*loss company for the amount of the \*tax loss:
- (a) the income company cannot deduct the amount or value of the consideration; and
  - (b) the income company does not incur a \*capital loss because of the giving of the consideration.

Note: However, the consideration may affect how section 170-215 modifies the cost base of direct and indirect interests in the income company.

**Conditions for transfer**

**170-30 Companies must be in existence and members of the same wholly-owned group etc.**

- (1) Both companies must be in existence during at least part of each of the following income years:
- (a) the \*loss year; and
  - (b) the \*deduction year; and
  - (c) any intervening income year.

Note: In some cases, this condition may not apply, or may be taken to be met even if it is not actually met. See sections 170-32 and 170-33.

- (2) Also, both companies must be members of the same \*wholly-owned group during the whole or part of those income years when both companies were in existence.

Note: In some cases, this condition may not apply, or may be taken to be met even if it is not actually met. See sections 170-32 and 170-33.

- (3) One of the companies must be an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank.

Note: The Australian branch can be taken to be a separate entity from the foreign bank for this Subdivision. See Part IIIB of the *Income Tax Assessment Act 1936*.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

(4) The other company must be covered by an item of this table.

<b>The other company</b>		
<b>Item</b>	<b>The other company must:</b>	<b>At this time:</b>
1	Be the *head company of a *consolidated group	The end of the *deduction year or, if the company ceases to be in existence during the deduction year, just before the cessation
2	Be the *head company of a *MEC group	The end of the *deduction year or, if the group ceases to exist during the deduction year because the company ceases to be in existence, just before the cessation
3	Not be a *member of a *consolidatable group	The end of the *deduction year or, if the company ceases to be in existence during the deduction year, just before the cessation

**170-32 Tax loss incurred by the loss company because of a transfer under Subdivision 707-A**

*When the conditions in this section apply*

- (1) The conditions in this section apply instead of the conditions in subsections 170-30(1) and (2) if:
- (a) the \*income company is an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank; and
  - (b) the \*loss company incurred the \*tax loss because of one or more transfers of the tax loss under Subdivision 707-A.

*Conditions*

- (2) Each transferor (*prior transferor*) of the \*tax loss under Subdivision 707-A must have been a company.
- (3) It must have been possible to meet the conditions in subsections 170-30(1) and (2) in relation to the \*loss company and the \*income company assuming:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-33

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- (a) the \*loss year were so much of the income year in which the \*tax loss was transferred to the loss company under Subdivision 707-A as occurred after the transfer; and
  - (b) so much (if any) of the \*deduction year as occurred before the transfer were disregarded.
- (4) The \*income company and each prior transferor must both be in existence during at least part of each of these periods:
- (a) the period consisting of:
    - (i) if the prior transferor incurred the \*tax loss apart from Subdivision 707-A—the \*loss year; or
    - (ii) if the prior transferor incurred the tax loss because of a transfer under Subdivision 707-A (other than a transfer from the prior transferor to itself)—so much of the income year in which the transfer occurred as was after the transfer (but before any later transfer of the loss from the prior transferor under that Subdivision);
  - (b) so much of the income year during which the tax loss was transferred under Subdivision 707-A from the prior transferor to another company as occurs before the transfer (but after the start of the period described in paragraph (a));
  - (c) any intervening income year.
- (5) The \*income company must be a member of the same \*wholly-owned group as each prior transferor during the whole or part of the periods described in subsection (4) for the prior transferor when both were in existence.

**170-33 Alternative test of relations between the loss company and other companies**

- (1) The conditions in subsections 170-30(1) and (2) are taken to be met in relation to the \*loss company and the \*income company if:
- (a) the loss company is an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) the income company is covered by item 1 or 2 of the table in subsection 170-30(4) (because the company is the \*head company of a \*consolidated group or \*MEC group at the time described in that item); and
- (c) the relevant circumstances in this section exist.

*Circumstances*

- (2) One circumstance is that there is another company (the **first link company**) in relation to which all these conditions are met:
  - (a) the first link company became a \*subsidiary member of a \*consolidated group or \*MEC group after the start of the \*loss year but before the time described in the item of the table in subsection 170-30(4) that covers the \*income company;
  - (b) the \*tax loss could have been transferred from the \*loss company to the first link company under this Subdivision (apart from subsection 170-30(4) and this section) for a \*deduction year consisting of the \*trial year for the first link company becoming a subsidiary member of that group had:
    - (i) the first link company continued to be \*in existence as a separate entity (rather than being part of the head company of that group) when it was a subsidiary member of that group; and
    - (ii) the trial year not started before the start of the loss year; and
    - (iii) the first link company had enough assessable income for the trial year;
  - (c) the tax loss would have been incurred by the income company because of one or more transfers under Subdivision 707-A assuming the tax loss had been made by the first link company (apart from that Subdivision) for the loss year.
- (3) If the condition in paragraph (2)(c) could be met only if there had been a transfer described in that paragraph involving a company other than the first link company and the \*income company, another circumstance is that the other company and the \*loss

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-35

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company were \*in existence and members of the same  
\*wholly-owned group for the period:

- (a) starting when the \*tax loss would have been transferred under Subdivision 707-A *to* the other company as described in that paragraph; and
  - (b) ending when the tax loss would have been transferred under Subdivision 707-A *from* the other company as described in that paragraph.
- (4) It does not matter whether or not any of the transfers mentioned in subsection (3) would have involved the first link company or the \*income company as well as the other company.
- (5) Another circumstance is that the conditions in subsections 170-30(1) and (2) would have been met for the \*loss company and the \*income company assuming:
- (a) the \*loss year consisted of the part of the income year in which the \*tax loss would have been transferred to the income company under Subdivision 707-A as described in paragraph (2)(c) occurring after the time the transfer would have occurred; and
  - (b) so much (if any) of the \*deduction year as occurred before the time the transfer would have occurred were disregarded.

**170-35 The loss company**

- (1) The \*loss company:
  - (a) must be an Australian resident and not a \*prescribed dual resident; and
  - (b) must not be a \*dual resident investment company in either the \*loss year or the \*deduction year.
- (2) If the \*loss year and the \*deduction year are the same, it must be the case that the \*loss company was *not* required to calculate the \*tax loss:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) under section 165-70 (because of a change in ownership or control); or
  - (b) under section 175-35 (because of injected income or deductions).
- (3) Also, it must be the case that neither Subdivision 165-A nor Subdivision 175-A would have prevented the \*loss company from deducting the \*tax loss in the \*deduction year if it had had enough assessable income (including \*assessable film income) to offset the tax loss.

Note 1: Subdivision 165-A deals with the deductibility of a company's tax loss for an earlier income year if there has been a change in the ownership or control of the company in the loss year or the income year. Subdivision 175-A is about the Commissioner preventing a company from getting certain tax benefits through its unused tax losses.

Note 2: Division 707 affects the operation of Subdivision 165-A if the loss company incurred the tax loss because of a transfer under Subdivision 707-A.

#### **170-40 The income company**

- (1) The \*income company must be an Australian resident and not a \*prescribed dual resident.
- (2) It must not be prevented by Division 165 or 175 from deducting the transferred amount in the \*deduction year. Those Divisions do not apply to the \*income company if the \*loss year and the \*deduction year are the same.

Note 1: Division 165 deals with the income tax consequences of changing ownership or control of a company. Division 175 deals with using a company's tax losses to avoid income tax.

Note 2: The condition in subsection (2) may not apply in some cases. See section 170-42.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 170-42

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**170-42 If the income company has become the head company of a consolidated group or MEC group**

- (1) The condition in subsection (2) of this section applies to the \*income company instead of the condition in subsection 170-40(2) if the conditions in subsections 170-30(1) and (2) are met in relation to the \*loss company and the income company apart from section 170-33 and either:
- (a) both these circumstances exist:
    - (i) after the start of the \*loss year but before the relevant time described in subsection 170-30(4), the income company became the \*head company of a \*consolidated group or of a \*MEC group that came into existence after the start of the loss year;
    - (ii) the loss year and \*deduction year are not the same; or
  - (b) all these circumstances exist:
    - (i) the income company is, at the relevant time described in subsection 170-30(4), the head company of a MEC group;
    - (ii) before that time but after the end of the loss year, the MEC group was involved in an application event described in section 719-300 (but not covered by subsection 719-300(4) or (5));
    - (iii) the income company would be taken under section 719-305 to have transferred losses to itself under Subdivision 707-A, assuming it had made losses while head company of the group or of a consolidated group involved in the event;
    - (iv) the MEC group or consolidated group came into existence before the start of the \*loss year.

Note: An application event involves either expanding an existing MEC group by including extra eligible tier-1 companies of the top company for the group or creating a MEC group because more companies become eligible tier-1 companies of the top company of which the head company of a consolidated group is an eligible tier-1 company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (2) The \*income company must have been able to deduct the \*tax loss in the \*deduction year assuming that it had incurred the tax loss for the \*loss year.
- (3) The condition in subsection (4) of this section applies to the \*income company instead of the condition in subsection 170-40(2) if the conditions in subsections 170-30(1) and (2) are met in relation to the \*loss company and the income company because of section 170-33.
- (4) The \*income company must have been able to deduct the \*tax loss in the \*deduction year assuming that it had incurred the tax loss, for the income year in which the loss would have been transferred to it as described in paragraph 170-33(2)(c), because of one or more transfers under Subdivision 707-A described in that paragraph.

#### **170-45 Maximum amount that can be transferred**

*Loss company can only transfer what it cannot use itself*

- (1) The amount transferred cannot exceed what would be the amount of the \*loss company's \*unutilised \*tax loss at the end of the \*deduction year if the loss company utilised the tax loss to the greatest extent possible.

*Transferred loss must not exceed what the income company can use*

- (2) The amount transferred also cannot exceed the amount worked out as follows:

*Method statement*

Step 1. Add together the \*income company's assessable income and \*net exempt income (if any) for the \*deduction year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-45

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- Step 2. Subtract the \*income company's deductions for the \*deduction year, except deductions for amounts of \*tax losses transferred to the income company (by the \*loss company or any other company).
- Step 3. Subtract the \*income company's deductions for the \*deduction year for amounts of \*tax losses transferred to the income company (by the \*loss company or any other company) by agreements made *before* the agreement by which the first amount is transferred.

Example: In the deduction year:

- the income company has assessable income of \$60,000, net exempt income of \$10,000 and deductions of \$25,000 (apart from the transferred loss); and
- another company, being a member of the same wholly-owned group as the income company, transferred a tax loss of \$15,000 to the income company; and
- the loss company incurred a tax loss of \$50,000.

Of the \$50,000 loss, the loss company can transfer no more than \$30,000 ( $\$60,000 + \$10,000 - \$25,000 - \$15,000$ ) to the income company.

- (3) Subsection (2) does not apply if the \*tax loss is a \*film loss. In that case, the amount transferred also cannot exceed the amount worked out as follows:

*Method statement*

- Step 1. Add together the \*income company's \*net assessable film income and \*net exempt film income (if any) for the \*deduction year.
- Step 2. Subtract the \*income company's deductions for the \*deduction year for amounts of \*film losses transferred to the income company (by the \*loss company or any other company) by agreements made *before* the agreement by which the first amount is transferred.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (4) Subsections (2) and (3) do not apply if the transfer occurs because either or both of the conditions in subsections 170-42(2) and (4) are met. In that case, the amount transferred also cannot exceed the amount worked out as follows:

*Method statement*

Step 1. Identify each \*bundle of losses that, on the assumption in subsection 170-42(2) or (4) (as appropriate), would have included the \*tax loss or \*film loss (as appropriate).

Note 1: There will be 2 or more bundles of losses identified if both of the conditions in subsections 170-42(2) and (4) are met.

Note 2: There will be more than 1 bundle of losses identified on the basis of the assumption in paragraph 170-42(4) if the conditions in subsections 170-30(1) and (2) are met in relation to the loss company and the income company because of multiple applications of section 170-33 each involving a different first link company.

Step 2. For each \*bundle identified, work out how much of the \*tax loss or \*film loss (as appropriate) the \*income company would have been able to deduct in the \*deduction year assuming that:

- (a) the loss could have been deducted in that year only after the deduction in that year of any other losses of that \*sort that would have been included in the bundle, other than losses (the *transferable losses*) that could be transferred from the \*loss company to the income company for that year; and
- (b) if the bundle would have included 2 or more transferable losses of that sort—those losses could have been deducted only in the order in which the loss company incurred them.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-50

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Note 1: If the assumption in subsection 170-42(2) is relevant to the bundle, it would have included losses incurred by the income company and transferred (or taken to be transferred) to the company (from itself) under Subdivision 707-A.

Note 2: If the assumption in paragraph 170-42(4) is relevant to the bundle, it would have included losses actually incurred by the first link company and transferred (by one or more transfers under Subdivision 707-A) to the income company.

Step 3. Total every result of step 2 for the \*tax loss or \*film loss (as appropriate).

**170-50 Transfer by written agreement**

- (1) The transfer must be made by a written agreement between the \*loss company and the \*income company.
- (2) The agreement must:
  - (a) specify the income year of the transfer (which may be earlier than the income year in which the agreement is made); and
  - (b) specify the amount of the \*tax loss being transferred; and
  - (c) be signed by the public officer of each company; and
  - (d) be made on or before the day of lodgement of the \*income company's \*income tax return for the \*deduction year, or within such further time as the Commissioner allows.

Note: The agreement will usually be made in the next income year *after* the one for which the income company will deduct the loss.

**170-55 Losses must be transferred in order they are incurred**

- (1) If the \*loss company has 2 or more \*tax losses (other than \*film losses) that it can transfer in the \*deduction year, it can transfer them only in the order in which it incurred them.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (2) If the \*loss company has 2 or more \*film losses that it can transfer in the \*deduction year, it can transfer them only in the order in which it incurred them.
- (3) If:
  - (a) the \*loss company has 2 or more \*tax losses, or 2 or more \*film losses, it can transfer for the \*deduction year; and
  - (b) it incurred at least one of those losses apart from Subdivision 707-A and at least one of those losses because of a transfer under that Subdivision;it can transfer under this Subdivision the losses it incurred because of a transfer under Subdivision 707-A only *after* transferring under this Subdivision the losses it incurred apart from that Subdivision.
- (4) For the purposes of subsection (3), treat a loss incurred by the company both apart from that Subdivision and because of a transfer under that Subdivision as a loss incurred because of a transfer under that Subdivision.
- (5) Subsections (1) and (2) have effect subject to subsection (3).

#### **170-60 Income company cannot transfer transferred tax loss**

The \*income company cannot transfer an amount of a \*tax loss transferred to it, or any part of the amount.

#### **Effect of agreement to transfer more than can be transferred**

#### **170-65 Agreement transfers as much as can be transferred**

- (1) If the amount specified in an agreement exceeds the maximum amount that the \*loss company can transfer to the \*income company in the \*deduction year, only that maximum amount is taken to have been transferred.
- (2) One reason why an agreement might specify more than can be transferred is that an assessment has been amended since the agreement.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-70

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**170-70 Amendment of assessments**

The Commissioner may amend an assessment to disallow a deduction for a transferred amount of a \*tax loss:

- (a) if the agreement to transfer the tax loss is ineffective because the \*loss company did not actually incur the loss; or
- (b) to the extent that section 170-65 reduces the transferred amount of a tax loss because the loss company did not actually incur some of it.

The Commissioner may do so despite section 170 (Amendment of assessments) of the *Income Tax Assessment Act 1936*.

**Australian permanent establishments of foreign financial entities**

**170-75 Treatment like Australian branches of foreign banks**

- (1) The object of this section is to let \*tax losses be transferred under this Subdivision to and from \*Australian permanent establishments of \*foreign entities that are \*financial entities in the same way as tax losses can be transferred to and from Australian branches of \*foreign banks.
- (2) This Subdivision (except this section) applies to an \*Australian permanent establishment of a \*foreign entity that is a \*financial entity in the same way as this Subdivision applies to an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Subdivision 170-B—Transfer of net capital losses within certain wholly-owned groups of companies**

### **Guide to Subdivision 170-B**

#### **170-101 What this Subdivision is about**

A company can transfer a surplus amount of its net capital loss to another company so that the other company can apply the amount in working out its net capital gain for the income year of the transfer. One of the companies must be an Australian branch of a foreign bank, and both companies must be members of the same wholly-owned group.

#### **Table of sections**

170-105 Basic principles for transferring a net capital loss

##### **Effect of transferring a net capital loss**

170-110 When a company can transfer a net capital loss

170-115 Who can apply transferred loss

170-120 Gain company is taken to have made transferred loss

170-125 Tax treatment of consideration for transferred tax loss

##### **Conditions for transfer**

170-130 Companies must be in existence and members of the same wholly-owned group etc.

170-132 Net capital loss made by the loss company because of a transfer under Subdivision 707-A

170-133 Alternative test of relations between the loss company and other companies

170-135 The loss company

170-140 The gain company

170-142 If the gain company has become the head company of a consolidated group or MEC group

170-145 Maximum amount that can be transferred

170-150 Transfer by written agreement

170-155 Losses must be transferred in order they are made

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

**Part 3-5** Corporate taxpayers and corporate distributions

**Division 170** Treatment of certain company groups for income tax purposes

**Section 170-105**

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170-160 Gain company cannot transfer transferred net capital loss

**Effect of agreement to transfer more than can be transferred**

170-165 Agreement transfers as much as can be transferred

170-170 Amendment of assessments

**Australian permanent establishments of foreign financial entities**

170-174 Treatment like Australian branches of foreign banks

**170-105 Basic principles for transferring a net capital loss**

- (1) A company can transfer a net capital loss (except a net capital loss from collectables) to another company so that the other company can apply it in working out its net capital gain for the income year of the transfer.
  - (2) Both companies must be members of the same wholly-owned group. There are other eligibility requirements that they must also satisfy.
  - (2A) One of the companies must be an Australian branch of a foreign bank. The other company must be:
    - (a) the head company of a consolidated group or MEC group; or
    - (b) *not* a member of a consolidatable group.
- Note: This Subdivision applies to Australian permanent establishments of foreign entities that are financial entities in the same way as it applies to Australian branches of foreign banks. See section 170-174.
- (3) The transferred loss must be “surplus” in the sense that, for the income year of the transfer, the transferring company does not have enough capital gains against which to apply it. The other company must have enough capital gains against which to apply it.
  - (5) Neither company must be prevented by Subdivision 165-CA or 175-CA from applying the loss in working out its net capital gain for the income year of the transfer.

Note: Subdivision 165-CA deals with the consequences of changing ownership or control of a company. Subdivision 175-CA deals with using a company’s net capital losses to avoid income tax.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (6) The net capital loss is transferred by an agreement between the 2 companies.
- (7) The net capital loss can be transferred in the same year as it is made. In that case different rules apply.
- (8) The provisions of Subdivision 170-C (so far as they relate to the transfer of net capital losses) are to be disregarded in applying the provisions of this Subdivision where the relevant agreement referred to in section 170-150 was made before 22 February 1999.

## Effect of transferring a net capital loss

### 170-110 When a company can transfer a net capital loss

- (1) A company (the *loss company*) can transfer an amount of its \*net capital loss for an income year (the *capital loss year*) to another company (the *gain company*) if the conditions in this Subdivision are met.
- (2) The amount transferred can be the whole or part of the \*net capital loss.

Note: A PDF cannot transfer a net capital loss, except one for a period before it became a PDF: see section 195-30 of the *Income Tax Assessment Act 1997*.

### 170-115 Who can apply transferred loss

- (1) If an amount of a \*net capital loss is transferred, the gain company can apply the amount in working out its \*net capital gain, but only for the income year of the gain company for which the amount is transferred. That income year is called the *application year*.

Note: A company's net capital gain or net capital loss for an income year is usually worked out under section 102-5 or 102-10.

- (2) The loss company can no longer \*utilise the transferred amount and is taken not to have made the \*net capital loss to the extent of that amount.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-120

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- (3) Despite subsection (1), if the \*net capital loss is transferred because the conditions in section 170-132 are met, the gain company is taken to have made the net capital loss for the income year for which the first prior transferor mentioned in that section made the net capital loss.
- (4) Despite subsection (1), if the \*net capital loss is transferred because the condition in subsection 170-142(4) is met, the gain company is taken to have made the net capital loss for the income year for which that subsection assumes the gain company made the net capital loss.

**170-120 Gain company is taken to have made transferred loss**

- (1) If an amount of a \*net capital loss is transferred, the amount is taken to be a \*net capital loss of the gain company for the capital loss year.
- (2) However, if the capital loss year is the same as the application year, the amount is taken to be a \*capital loss of the gain company for the application year.

**170-125 Tax treatment of consideration for transferred tax loss**

- (1) If the loss company receives consideration from the gain company for the transferred amount:
  - (a) the consideration is neither assessable income nor \*exempt income of the loss company; and
  - (b) the loss company does not make a \*capital gain because of receiving the consideration.

Note: However, the consideration may affect how section 170-220 modifies the cost base of direct and indirect interests in the loss company.

- (2) If the gain company gives consideration to the loss company for the transferred amount:
  - (a) the gain company cannot deduct the consideration; and
  - (b) the gain company does not make a \*capital loss because of giving the consideration.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Note: However, the consideration may affect how section 170-225 modifies the cost base of direct and indirect interests in the gain company.

### Conditions for transfer

#### 170-130 Companies must be in existence and members of the same wholly-owned group etc.

- (1) Both companies must be in existence during at least part of each of the following income years:
- (a) the capital loss year; and
  - (b) the application year; and
  - (c) any intervening income year.

Note: In some cases, this condition may not apply, or may be taken to be met even if it is not actually met. See sections 170-132 and 170-133.

- (2) Also, both companies must be members of the same \*wholly-owned group at all times during those income years when both companies were in existence.

Note: In some cases, this condition may not apply, or may be taken to be met even if it is not actually met. See sections 170-132 and 170-133.

- (3) One of the companies must be an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank.

Note: The Australian branch can be taken to be a separate entity from the foreign bank for this Subdivision. See Part IIIB of the *Income Tax Assessment Act 1936*.

- (4) The other company must be covered by an item of this table.

<b>The other company</b>		
<b>Item</b>	<b>The other company must:</b>	<b>At this time:</b>
1	Be the *head company of a *consolidated group	The end of the application year or, if the company ceases to be in existence during the application year, just before the cessation

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-132

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<b>The other company</b>		
<b>Item</b>	<b>The other company must:</b>	<b>At this time:</b>
2	Be the *head company of a *MEC group	The end of the application year or, if the group ceases to exist during the application year because the company ceases to be in existence, just before the cessation
3	Not be a *member of a *consolidatable group	The end of the application year or, if the company ceases to be in existence during the application year, just before the cessation

**170-132 Net capital loss made by the loss company because of a transfer under Subdivision 707-A**

*When the conditions in this section apply*

- (1) The conditions in this section apply instead of the conditions in subsections 170-130(1) and (2) if:
  - (a) the gain company is an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank; and
  - (b) the \*loss company made the \*net capital loss because of one or more transfers of the net capital loss under Subdivision 707-A.

*Conditions*

- (2) Each transferor (*prior transferor*) of the \*net capital loss under Subdivision 707-A must have been a company.
- (3) It must have been possible to meet the conditions in subsections 170-130(1) and (2) in relation to the \*loss company and the gain company assuming:
  - (a) the capital loss year were so much of the income year in which the \*net capital loss was transferred to the loss

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- company under Subdivision 707-A as occurred after the transfer; and
- (b) so much (if any) of the application year as occurred before the transfer were disregarded.
- (4) The gain company and each prior transferor must both be in existence during at least part of each of these periods:
- (a) the period consisting of:
- (i) if the prior transferor made the \*net capital loss apart from Subdivision 707-A—the capital loss year; or
- (ii) if the prior transferor made the net capital loss because of a transfer under Subdivision 707-A (other than a transfer from the prior transferor to itself)—so much of the income year in which the transfer occurred as was after the transfer (but before any later transfer of the loss from the prior transferor under that Subdivision);
- (b) so much of the income year during which the net capital loss was transferred under Subdivision 707-A from the prior transferor to another company as occurs before the transfer (but after the start of the period described in paragraph (a));
- (c) any intervening income year.
- (5) The gain company must be a member of the same \*wholly-owned group as each prior transferor during the whole or part of the periods described in subsection (4) for the prior transferor when both were in existence.

### **170-133 Alternative test of relations between the loss company and other companies**

- (1) The conditions in subsections 170-130(1) and (2) are taken to be met in relation to the \*loss company and the gain company if:
- (a) the loss company is an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank; and
- (b) the gain company is covered by item 1 or 2 of the table in subsection 170-130(4) (because the company is the \*head

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-133

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company of a \*consolidated group or \*MEC group at the time described in that item); and

(c) the relevant circumstances in this section exist.

*Circumstances*

- (2) One circumstance is that there is another company (the **first link company**) in relation to which all these conditions are met:
- (a) the first link company became a \*subsidiary member of a \*consolidated group or \*MEC group after the start of the capital loss year but before the time described in the item of the table in subsection 170-130(4) that covers the gain company;
  - (b) the \*net capital loss could have been transferred from the \*loss company to the first link company under this Subdivision (apart from subsection 170-130(4) and this section) for an application year consisting of the \*trial year for the first link company becoming a subsidiary member of that group had:
    - (i) the first link company continued to be in existence as a separate entity (rather than being part of the head company of that group) when it was a subsidiary member of that group; and
    - (ii) the trial year not started before the start of the capital loss year; and
    - (iii) the first link company had enough \*capital gains for the trial year;
  - (c) the net capital loss would have been made by the gain company because of one or more transfers under Subdivision 707-A assuming the net capital loss had been made by the first link company (apart from that Subdivision) for the capital loss year.
- (3) If the condition in paragraph (2)(c) could be met only if there had been a transfer described in that paragraph involving a company other than the first link company and the gain company, another circumstance is that the other company and the \*loss company

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

were in existence and members of the same \*wholly-owned group for the period:

- (a) starting when the \*net capital loss would have been transferred under Subdivision 707-A *to* the other company as described in that paragraph; and
  - (b) ending when the net capital loss would have been transferred under Subdivision 707-A *from* the other company as described in that paragraph.
- (4) It does not matter whether or not any of the transfers mentioned in subsection (3) would have involved the first link company or the gain company as well as the other company.
- (5) Another circumstance is that the conditions in subsection 170-130(1) and (2) would have been met for the \*loss company and the gain company assuming:
- (a) the capital loss year consisted of the part of the income year in which the \*net capital loss would have been transferred to the gain company under Subdivision 707-A as described in paragraph (2)(c) occurring after the time the transfer would have occurred; and
  - (b) so much (if any) of the application year as occurred before the time the transfer would have occurred were disregarded.

### **170-135 The loss company**

- (1) The loss company:
- (a) must be an Australian resident (but not a \*prescribed dual resident) throughout the capital loss year; and
  - (b) must not be a \*dual resident investment company in either the capital loss year or the application year.
- (2) It must be the case that the loss company was *not* required to calculate the \*net capital loss:
- (a) under section 165-114 (because of a change in ownership or control); or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) under section 175-75 (because of an injected capital gain or loss).
- (3) Also, it must be the case that neither Subdivision 165-CA nor Subdivision 175-CA would have prevented the loss company from applying the \*net capital loss in working out its \*net capital gain for the application year if it had made enough \*capital gains in that year.

Note 1: Subdivision 165-CA deals with the consequences of changing ownership or control of a company. Subdivision 175-CA deals with using a company's net capital losses to avoid income tax.

Note 2: Division 707 affects the operation of Subdivision 165-CA if the loss company made the net capital loss because of a transfer under Subdivision 707-A.

Note 3: A company's net capital gain or net capital loss for an income year is usually worked out under section 102-5 or 102-10.

**170-140 The gain company**

- (1) The gain company must be an Australian resident throughout the application year.
- (2) If the capital loss year and the application year are *not* the same, the gain company must not be prevented by Subdivision 165-CA or 175-CA from applying the transferred amount in working out its \*net capital gain for the application year.

Note 1: Subdivision 165-CA deals with the consequences of changing ownership or control of a company. Subdivision 175-CA deals with using a company's net capital losses to avoid income tax.

Note 2: A company's net capital gain or net capital loss for an income year is usually worked out under section 102-5 or 102-10.

Note 3: The condition in subsection (2) may not apply in some cases. See section 170-142.

- (3) If the capital loss year and the application year *are* the same, it must be the case that the gain company was *not* required to calculate its own \*net capital gain or \*net capital loss for the application year:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) under Subdivision 165-CB (because of a change in ownership or control); or
- (b) under section 175-75 (because of an injected capital gain or loss).

Note: In deciding whether paragraph (b) applies, remember that the transferred amount is taken to be a capital loss of the gain company for the application year (because of subsection 170-120(2)).

**170-142 If the gain company has become the head company of a consolidated group or MEC group**

- (1) The condition in subsection (2) of this section applies to the gain company instead of the condition in subsection 170-140(2) if the conditions in subsections 170-130(1) and (2) are met in relation to the \*loss company and the gain company apart from section 170-133 and either:
  - (a) both these circumstances exist:
    - (i) after the start of the capital loss year but before the relevant time described in subsection 170-130(4), the gain company became the \*head company of a \*consolidated group or of a \*MEC group that came into existence after the start of the capital loss year;
    - (ii) the capital loss year and application year are not the same; or
  - (b) all these circumstances exist:
    - (i) the gain company is, at the relevant time described in subsection 170-130(4), the head company of a MEC group;
    - (ii) before that time but after the end of the capital loss year, the MEC group was involved in an application event described in section 719-300 (but not covered by subsection 719-300(4) or (5));
    - (iii) the gain company would be taken under section 719-305 to have transferred losses to itself under Subdivision 707-A, assuming it had made losses while

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-145

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head company of the group or of a consolidated group involved in the event;

- (iv) the MEC group or consolidated group came into existence before the start of the capital loss year.

Note: An application event involves either expanding an existing MEC group by including extra eligible tier-1 companies of the top company for the group or creating a MEC group because more companies become eligible tier-1 companies of the top company of which the head company of a consolidated group is an eligible tier-1 company.

- (2) The gain company must have been able to apply the \*net capital loss in working out its \*net capital gain for the application year assuming that it had made the net capital loss for the capital loss year.
- (3) The condition in subsection (4) of this section applies to the gain company instead of the condition in subsection 170-140(2) if the conditions in subsections 170-130(1) and (2) are met in relation to the \*loss company and the gain company because of section 170-133.
- (4) The gain company must have been able to apply the \*net capital loss in working out its \*net capital gain for the application year assuming that it had made the net capital loss, for the income year in which the loss would have been transferred to it as described in paragraph 170-133(2)(c), because of one or more transfers under Subdivision 707-A described in that paragraph.

**170-145 Maximum amount that can be transferred**

*Loss company can only transfer what it cannot use itself*

- (1) The amount transferred cannot exceed what would be the amount of the \*loss company's \*unutilised \*net capital loss at the end of the application year if the loss company utilised the net capital loss to the greatest extent possible.

Note: If the capital loss year and the application year are the same, the *whole* of the net capital loss would be unutilised, because section 102-5 does

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

not allow a net capital loss to be applied in the income year in which it was made.

Example: In the application year the loss company has:

- a net capital loss from an earlier income year of \$25,000; and
- other capital losses totalling \$10,000; and
- capital gains totalling \$20,000;

Of the \$25,000 loss, the loss company can transfer to the gain company no more than:

$$\$25,000 - \left( \$20,000 - \$10,000 \right) = \$15,000$$

*Transferred loss must not exceed what the gain company can use*

- (5) No amount can be transferred if, apart from the operation of this section, the gain company would *not* have a \*net capital gain for the application year.
- (6) The amount transferred also cannot exceed the amount worked out as follows:

*Method statement*

- Step 1. Work out what, apart from the operation of this section, would have been the gain company's \*net capital gain for the application year.
- Step 2. Subtract each amount that:
  - (a) the gain company can apply under section 170-115 in working out its \*net capital gain for the application year; and
  - (b) was transferred to the gain company (by the loss company or any other company) by an agreement made *before* the agreement by which the first amount is transferred.

Example: In the application year:

- the gain company has capital gains totalling \$60,000 and capital losses totalling \$25,000; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 170-145

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- another company, being a member of the same wholly-owned group as the gain company, transferred a net capital loss of \$15,000 to the gain company; and
- the loss company incurred a net capital loss of \$50,000.

Of the \$50,000 loss, the loss company can transfer to the gain company no more than:

$$\$60,000 - \$25,000 - \$15,000 = \$20,000$$

- (7) Subsection (6) does not apply if the transfer occurs because either or both of the conditions in subsections 170-142(2) and (4) are met. In that case, the amount transferred also cannot exceed the amount worked out as follows:

*Method statement*

Step 1. Identify each \*bundle of losses that, on the assumption in subsection 170-142(2) or (4) (as appropriate), would have included the \*net capital loss.

Note 1: There will be 2 or more bundles of losses identified if both of the conditions in subsections 170-142(2) and (4) are met.

Note 2: There will be more than 1 bundle of losses identified on the basis of the assumption in paragraph 170-142(4) if the conditions in subsections 170-130(1) and (2) are met in relation to the loss company and the gain company because of multiple applications of section 170-133 each involving a different first link company.

Step 2. For each \*bundle identified, work out how much of the \*net capital loss the gain company would have been able to apply in working out its \*net capital gain for the application year assuming that:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) the loss could have been applied in that year only after the application in that year of any other losses of that \*sort that would have been included in the bundle, other than losses (the *transferable losses*) that could be transferred from the \*loss company to the gain company for that year; and
- (b) if the bundle would have included 2 or more transferable losses of that sort—those losses could have been applied only in the order in which the loss company made them.

Note 1: If the assumption in subsection 170-142(2) is relevant to the bundle, it would have included losses made by the gain company and transferred (or taken to be transferred) to the company (from itself) under Subdivision 707-A.

Note 2: If the assumption in paragraph 170-142(4) is relevant to the bundle, it would have included losses actually made by the first link company and transferred (by one or more transfers under Subdivision 707-A) to the gain company.

Step 3. Total every result of step 2 for the \*net capital loss.

### 170-150 Transfer by written agreement

- (1) The transfer must be made by a written agreement between the loss company and the gain company.
- (2) The agreement must:
  - (a) specify the income year of the transfer (which may be earlier than the income year in which the agreement is made); and
  - (b) specify the amount of the \*net capital loss being transferred; and
  - (c) be signed by the public officer of each company; and
  - (d) be made on or before the day of lodgment of the gain company's \*income tax return for the application year, or within such further time as the Commissioner allows.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 170-155

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Note: The agreement will usually be made in the next income year *after* the one for which the gain company will apply the loss.

**170-155 Losses must be transferred in order they are made**

- (1) If the loss company has 2 or more \*net capital losses that it can transfer in the application year, it can transfer them only in the order in which it made them.
- (2) If:
  - (a) the \*loss company has 2 or more \*net capital losses it can transfer for the application year; and
  - (b) it made at least one of those losses apart from Subdivision 707-A and at least one of those losses because of a transfer under that Subdivision;  
it can transfer under this Subdivision the losses it made because of a transfer under Subdivision 707-A only *after* transferring under this Subdivision the losses it made apart from that Subdivision.
- (3) For the purposes of subsection (2), treat a loss made by the company both apart from Subdivision 707-A and because of a transfer under that Subdivision as a loss made because of a transfer under that Subdivision.
- (4) Subsection (1) has effect subject to subsection (2).

**170-160 Gain company cannot transfer transferred net capital loss**

The gain company cannot transfer an amount of a \*net capital loss transferred to it, or any part of the amount.

**Effect of agreement to transfer more than can be transferred**

**170-165 Agreement transfers as much as can be transferred**

- (1) If the amount specified in an agreement exceeds the maximum amount that the loss company can transfer to the gain company in the application year, only that maximum amount is taken to have been transferred.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (2) One reason why an agreement might specify more than can be transferred is that an assessment has been amended since the agreement.

### **170-170 Amendment of assessments**

The Commissioner may amend an assessment to \*disallow a transferred amount of a \*net capital loss:

- (a) if the agreement to transfer the net capital loss is ineffective because the loss company did not actually make the loss; or
- (b) to the extent that section 170-165 reduces the transferred amount because the loss company did not actually make some of it.

The Commissioner may do so despite section 170 (Amendment of assessments) of the *Income Tax Assessment Act 1936*.

Note: This Subdivision is disregarded in calculating the attributable income of a CFC: see section 410 of the *Income Tax Assessment Act 1936*.

### **Australian permanent establishments of foreign financial entities**

#### **170-174 Treatment like Australian branches of foreign banks**

- (1) The object of this section is to let \*net capital losses be transferred under this Subdivision to and from \*Australian permanent establishments of \*foreign entities that are \*financial entities in the same way as net capital losses can be transferred to and from Australian branches of \*foreign banks.
- (2) This Subdivision (except this section) applies to an \*Australian permanent establishment of a \*foreign entity that is a \*financial entity in the same way as this Subdivision applies to an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 170-201

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**Subdivision 170-C—Provisions applying to both transfers of tax losses and transfers of net capital losses within wholly-owned groups of companies**

**Guide to Subdivision 170-C**

**170-201 What this Subdivision is about**

If a tax loss or a net capital loss is transferred between companies in the same wholly-owned group, this Subdivision provides for adjustments to:

- (a) the cost base and reduced cost base of direct and indirect equity interests held by group companies in the loss company, or in the income company or gain company; and
- (b) the reduced cost base of direct and indirect debt interest held by group companies in the loss company; and
- (c) the cost base and reduced cost base of direct and indirect debt interests held by group companies in the income company or gain company.

**Table of sections**

**Operative provisions**

170-205	Object of Subdivision
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170-215	Transfer of tax loss: direct and indirect interests in the income company
170-220	Transfer of net capital loss: direct and indirect interests in the loss company
170-225	Transfer of net capital loss: direct and indirect interests in the gain company

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Operative provisions

### 170-205 Object of Subdivision

#### *Interests in the loss company*

- (1) The main object of this Subdivision is to ensure that, if an amount of a \*tax loss or \*net capital loss is transferred by a company to another company in the same \*wholly-owned group, the loss transferred is not duplicated by a member of the group.
- (2) Duplication could occur by the making of a \*capital loss, or the reduction of a \*capital gain, from a \*CGT event that happens in relation to an equity interest held (directly or indirectly) in the loss company or by the making of a capital loss in relation to a debt interest held (directly or indirectly) in the loss company.

#### *Interests in the income company or gain company*

- (3) This Subdivision may also require an adjustment to the cost base and reduced cost base of an equity or debt interest held (directly or indirectly) by a group company in the income company or gain company.
- (4) This adjustment is to reflect an increase in the \*market value of the interest because of the transfer of the loss if the increase is still reflected in the market value of the interest when a \*CGT event happens in relation to the interest.

### 170-210 Transfer of tax loss: direct and indirect interests in the loss company

- (1) If:
  - (a) an amount of a \*tax loss is transferred by a company to another company; and
  - (b) Subdivision 170-A applies in respect of the transfer; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) a company (the **group company**) holds a \*share in the loss company or is owed a debt by the loss company in respect of a loan; and
  - (d) the group company \*acquired the share or debt on or after 20 September 1985; and
  - (e) throughout the deduction year, the group company is a member of the same \*wholly-owned group as the loss company (disregarding a period when either was not in existence); and
  - (f) a \*CGT event happens in relation to the share or debt on or after the commencement of this section; and
  - (g) the relevant agreement referred to in section 170-50 is made on or after that commencement;
- the \*cost base and \*reduced cost base of the share or the reduced cost base of the debt is reduced in accordance with subsection (3).

(2) If:

- (a) an amount of a \*tax loss is transferred by a company to another company; and
- (b) Subdivision 170-A applies in respect of the transfer; and
- (c) a company (the **group company**) holds a \*share in another company or is owed a debt by another company in respect of a loan; and
- (d) the group company \*acquired the share or debt on or after 20 September 1985; and
- (e) the money that the group company paid for the share, or the borrowed money, has been applied (directly, or indirectly through one or more interposed entities):
  - (i) in the other company or a third company acquiring shares in the loss company; or
  - (ii) in a \*borrowing by the loss company from the other company or from a third company; and
- (f) throughout the deduction year, the group company, the other company and the third company (if any) are all members of the same \*wholly-owned group as the loss company

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (disregarding, for a particular company, a period when it was not in existence); and
- (g) a \*CGT event happens in relation to the share or debt on or after the commencement of this section; and
  - (h) the relevant agreement referred to in section 170-50 is made on or after that commencement;
- the \*cost base and \*reduced cost base of the share or the reduced cost base of the debt is reduced in accordance with subsection (3).
- (3) The \*cost base and \*reduced cost base of the share or the reduced cost base of the debt is reduced by an amount that is appropriate having regard to:
- (aa) the main object of this Subdivision and other matters mentioned in subsections 170-205(1) and (2); and
  - (a) the group company's direct or indirect interest in the loss company; and
  - (ba) any reduction in the reduced cost base made under Subdivision 165-CD; and
  - (b) the amount of the loss transferred; and
  - (c) the extent to which the loss reduced the \*market value of the share or debt; and
  - (d) any consideration received by the loss company for the loss transferred; and
  - (e) whether, because of a dividend or dividends paid by the loss company, the consideration is no longer reflected (wholly or partly) in the market value of the share or debt when a \*CGT event happens in relation to it.
- (3A) To avoid doubt in applying paragraph (3)(c) in relation to a \*share or debt, if factors other than the loss altered the \*market value of the share or debt, the extent to which the loss reduced that market value is taken to be the extent to which that market value would have been reduced apart from those other factors.

Note: An example of a factor other than the loss is the unrealised value of assets (including assets in respect of which there is an unrealised gain) of the loss company, whether or not generated by outlays or economic losses reflected in the loss for income tax purposes.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3B) This section applies to a \*tax loss only to the extent that the loss represents an outlay or loss of any of the economic resources of the \*loss company.

Note: Where the income tax law allows, as all or part of a loss, an amount for the decline in value of a depreciating asset that exceeds the actual economic depreciation or depletion of the asset concerned, the excess is not to be regarded for the purposes of this subsection as representing an outlay or loss of economic resources of the company.

- (4) Any reduction is to be made immediately before a \*CGT event happens in relation to the share or debt and is to have effect from that time or the end of the deduction year, whichever is the earlier.

Note 1: For *deduction year* see subsection 170-20(1).

Note 2: Subsection (4) is relevant for indexing elements of a cost base (see sections 114-1 and 114-15).

**170-215 Transfer of tax loss: direct and indirect interests in the income company**

- (1) If:

- (a) an amount of a \*tax loss is transferred by a company to another company; and
- (b) Subdivision 170-A applies in respect of the transfer; and
- (c) a company (the *group company*) holds a \*share in the income company or is owed a debt by the income company in respect of a loan; and
- (d) the group company \*acquired the share or debt on or after 20 September 1985; and
- (e) throughout the deduction year, the group company is a member of the same \*wholly-owned group as the income company (disregarding a period when either was not in existence); and
- (f) a \*CGT event happens in relation to the share or debt on or after the commencement of this section; and
- (g) the relevant agreement referred to in section 170-50 is made on or after that commencement; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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(h) there are shares in, or debts owed by, the \*loss company the \*reduced cost base of at least one of which has been reduced by subsection 170-210(1) or (2);  
the \*cost base and \*reduced cost base of the share or debt are increased in accordance with subsection (3).

(2) If:

- (a) an amount of a \*tax loss is transferred by a company to another company; and
- (b) Subdivision 170-A applies in respect of the transfer; and
- (c) a company (the **group company**) holds a \*share in another company or is owed a debt by another company in respect of a loan; and
- (d) the group company \*acquired the share or debt on or after 20 September 1985; and
- (e) the money that the group company paid for the share, or the borrowed money, has been applied (directly, or indirectly through one or more interposed entities):
  - (i) in the other company or a third company acquiring shares in the income company; or
  - (ii) in a \*borrowing by the income company from the other company or from a third company; and
- (f) throughout the deduction year, the group company, the other company and the third company (if any) are all members of the same \*wholly-owned group as the income company (disregarding, for a particular company, a period when it was not in existence); and
- (g) a \*CGT event happens in relation to the share or debt on or after the commencement of this section; and
- (h) the relevant agreement referred to in section 170-50 is made on or after that commencement; and
- (i) there are shares in, or debts owed by, the \*loss company the \*reduced cost base of at least one of which has been reduced by subsection 170-210(1) or (2);  
the \*cost base and \*reduced cost base of the share or debt are increased in accordance with subsection (3).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3) The \*cost base and \*reduced cost base are increased by an amount that is appropriate having regard to:
- (aa) the matters mentioned in subsections 170-205(3) and (4); and
  - (ab) the amounts of any reductions to the cost base and reduced cost base of \*shares, and to the reduced cost base of debts, under subsection 170-210(3); and
  - (a) the group company's direct or indirect interest in the income company; and
  - (b) the amount of the loss transferred; and
  - (c) any consideration given by the income company for the loss transferred.

Note: This is because the consideration may be less than the commercial value of the loss transferred.

- (4) However, the increase cannot exceed the increase in the \*market value of the \*share or debt that results from the transfer of the loss. (If no increase in that market value results, for example because the consideration paid for the transfer of the loss equals the commercial value of the loss transferred, then there is no increase in the \*cost base and \*reduced cost base.)

- (4A) No increase is to be made to the extent that the \*tax loss transferred does not represent an outlay or loss of any of the economic resources of the company that transferred the tax loss.

Note: Where the income tax law allows, as all or part of a loss, an amount for the decline in value of a depreciating asset that exceeds the actual economic depreciation or depletion of the asset concerned, the excess is not to be regarded for the purposes of this subsection as representing an outlay or loss of economic resources of the company.

- (5) Any increase is to be made immediately before a \*CGT event happens in relation to the share or debt and is to have effect from that time or the end of the deduction year, whichever is the earlier.

Note: This subsection is relevant for indexing elements of a cost base (see sections 114-1 and 114-15).

- (6) No increase is to be made to the \*cost base and \*reduced cost base of a share or debt to the extent to which, because of a dividend or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

dividends paid by the income company, the increase in the \*market value of the share or debt that resulted from the transfer of the loss is no longer in existence at the time when a \*CGT event happens in relation to the share or debt.

Note: For *deduction year* see subsection 170-20(1).

### **170-220 Transfer of net capital loss: direct and indirect interests in the loss company**

(1) If:

- (a) an amount of a \*net capital loss is transferred by a company to another company; and
- (b) Subdivision 170-B applies in respect of the transfer; and
- (c) a company (the *group company*) holds a \*share in the loss company or is owed a debt by the loss company in respect of a loan; and
- (d) the group company \*acquired the share or debt on or after 20 September 1985; and
- (e) throughout the application year, the group company is a member of the same \*wholly-owned group as the loss company (disregarding a period when either was not in existence); and
- (f) the relevant agreement referred to in section 170-150 is made on or after the commencement of this section;

the \*cost base and \*reduced cost base of the share or the reduced cost base of the debt is reduced in accordance with subsection (3).

(2) If:

- (a) an amount of a \*net capital loss is transferred by a company to another company; and
- (b) Subdivision 170-B applies in respect of the transfer; and
- (c) a company (the *group company*) holds a \*share in another company or is owed a debt by another company in respect of a loan; and
- (d) the group company \*acquired the share or debt on or after 20 September 1985; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (e) the money that the group company paid for the share, or the borrowed money, has been applied (directly, or indirectly through one or more interposed entities):
    - (i) in the other company or a third company acquiring shares in the loss company; or
    - (ii) in a \*borrowing by the loss company from the other company or from a third company; and
  - (f) throughout the application year, the group company, the other company and the third company (if any) are all members of the same \*wholly-owned group as the loss company (disregarding, for a particular company, a period when it was not in existence); and
  - (g) the relevant agreement referred to in section 170-150 is made on or after the commencement of this section;
- the \*cost base and \*reduced cost base of the share or the reduced cost base of the debt is reduced in accordance with subsection (3).
- (3) The \*cost base and \*reduced cost base of the share or the reduced cost base of the debt is reduced by an amount that is appropriate having regard to:
- (aa) the main object of this Subdivision and other matters mentioned in subsections 170-205(1) and (2); and
  - (a) the group company's direct or indirect interest in the loss company; and
  - (ba) any reduction in the reduced cost base made under Subdivision 165-CD; and
  - (b) the amount of the loss transferred; and
  - (c) the extent to which the loss reduced the \*market value of the share or debt; and
  - (d) any consideration received by the loss company for the loss transferred; and
  - (e) whether, because of a dividend or dividends paid by the loss company, the consideration is no longer reflected (wholly or partly) in the market value of the share or debt when a \*CGT event happens in relation to it.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3A) To avoid doubt in applying paragraph (3)(c) in relation to a \*share or debt, if factors other than the loss altered the \*market value of the share or debt, the extent to which the loss reduced that market value is taken to be the extent to which that market value would have been reduced apart from those other factors.

Note: An example of a factor other than the loss is the unrealised value of assets (including assets in respect of which there is an unrealised gain) of the loss company, whether or not generated by outlays or economic losses reflected in the loss for income tax purposes.

- (3B) This section applies to a \*net capital loss only to the extent that the loss represents an outlay or loss of any of the economic resources of the \*loss company.

Note: Where the income tax law allows, as all or part of a loss, an amount for the decline in value of a depreciating asset that exceeds the actual economic depreciation or depletion of the asset concerned, the excess is not to be regarded for the purposes of this subsection as representing an outlay or loss of economic resources of the company.

- (4) Any reduction is to be made immediately before a \*CGT event happens in relation to the share or debt and is to have effect from that time or the end of the application year, whichever is the earlier.

Note 1: Subsection (4) is relevant for indexing elements of a cost base (see sections 114-1 and 114-15).

Note 2: Reductions under former subsection 160ZP(13) of the *Income Tax Assessment Act 1936* are also relevant: see section 170-220 of the *Income Tax (Transitional Provisions) Act 1997*.

Note 3: For *applicable year* see subsection 170-115(1).

### **170-225 Transfer of net capital loss: direct and indirect interests in the gain company**

- (1) If:
- (a) an amount of a \*net capital loss is transferred by a company to another company; and
  - (b) Subdivision 170-B applies in respect of the transfer; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) a company (the *group company*) holds a \*share in the gain company or is owed a debt by the gain company in respect of a loan; and
  - (d) the group company \*acquired the share or debt on or after 20 September 1985; and
  - (e) throughout the application year, the group company is a member of the same \*wholly-owned group as the gain company (disregarding a period when either was not in existence); and
  - (f) the relevant agreement referred to in section 170-150 is made on or after the commencement of this section; and
  - (g) there are shares in, or debts owed by, the \*loss company the \*cost base and \*reduced cost base of at least one of which have been reduced by subsection 170-220(1) or (2);  
the \*cost base and \*reduced cost base of the share or debt are increased in accordance with subsection (3).
- (2) If:
- (a) an amount of a \*net capital loss is transferred by a company to another company; and
  - (b) Subdivision 170-B applies in respect of the transfer; and
  - (c) a company (the *group company*) holds a \*share in another company or is owed a debt by another company in respect of a loan; and
  - (d) the group company \*acquired the share or debt on or after 20 September 1985; and
  - (e) the money that the group company paid for the share, or the borrowed money, has been applied (directly, or indirectly through one or more interposed entities):
    - (i) in the other company or a third company acquiring shares in the gain company; or
    - (ii) in a \*borrowing by the gain company from the other company or from a third company; and
  - (f) throughout the application year, the group company, the other company and the third company (if any) are all members of the same \*wholly-owned group as the gain

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- company (disregarding, for a particular company, a period when it was not in existence); and
- (g) the relevant agreement referred to in section 170-150 is made on or after the commencement of this section; and
  - (h) there are shares in, or debts owed by, the \*loss company the \*cost base and \*reduced cost base of at least one of which have been reduced by subsection 170-220(1) or (2);
- the \*cost base and \*reduced cost base of the share or debt are increased in accordance with subsection (3).
- (3) The \*cost base and \*reduced cost base are increased by an amount that is appropriate having regard to:
- (aa) the matters mentioned in subsections 170-205(3) and (4); and
  - (ab) the amounts of any reductions to the cost base and reduced cost base of \*shares, and to the reduced cost base of debts, under subsection 170-220(3); and
- (a) the group company's direct or indirect interest in the gain company; and
  - (b) the amount of the loss transferred; and
  - (c) any consideration given by the gain company for the loss transferred.
- Note: This is because the consideration may be less than the commercial value of the loss transferred.
- (4) However, the increase cannot exceed the increase in the \*market value of the \*share or debt that results from the transfer of the loss. (If no increase in that market value results, for example because the consideration paid for the transfer of the loss equals the commercial value of the loss transferred, then there is no increase in the \*cost base and \*reduced cost base.)
- (4A) No increase is to be made to the extent that the \*net capital loss transferred does not represent an outlay or loss of any of the economic resources of the company that transferred the net capital loss.

Note: Where the income tax law allows, as all or part of a loss, an amount for the decline in value of a depreciating asset that exceeds the actual

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

**Part 3-5** Corporate taxpayers and corporate distributions

**Division 170** Treatment of certain company groups for income tax purposes

**Section 170-250**

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economic depreciation or depletion of the asset concerned, the excess is not to be regarded for the purposes of this subsection as representing an outlay or loss of economic resources of the company.

- (5) Any increase is to be made immediately before a \*CGT event happens in relation to the share or debt and is to have effect from that time or the end of the application year, whichever is the earlier.

Note: This subsection is relevant for indexing elements of a cost base (see sections 114-1 and 114-15).

- (6) No increase is to be made to the \*cost base and \*reduced cost base of a share or debt to the extent to which, because of a dividend or dividends paid by the gain company, the increase in the \*market value of the share or debt that resulted from the transfer of the loss is no longer in existence at the time when a \*CGT event happens in relation to the share or debt.

Note: Increases under former subsections 160ZP(14) and (15) of the *Income Tax Assessment Act 1936* are also relevant: see section 170-225 of the *Income Tax (Transitional Provisions) Act 1997*.

**Subdivision 170-D—Transactions by a company that is a member of a linked group**

**Guide to Subdivision 170-D**

**170-250 What this Subdivision is about**

This Subdivision provides that there is a deferral of a \*capital loss or deduction if a company (the *originating company*) that is a member of a \*linked group disposes of a \*CGT asset to, or creates a CGT asset in, another entity that:

- (a) is a company that is also a member of the linked group; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) is a connected entity of the originating company or an \*associate of such a connected entity;

and the disposal or creation of the asset would have resulted in the originating company making a capital loss or becoming entitled to a deduction.

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## Operative provisions

### 170-255 Application of Subdivision

- (1) This Subdivision applies if:
- (a) an event (the *deferral event*) happens involving a company (the *originating company*) and another entity; and
  - (b) one or more of the following apply:
    - (i) the deferral event is a \*CGT event that would have resulted in the originating company making a \*capital loss (except a capital loss that would be disregarded under a provision of this Act other than this Subdivision);
    - (ii) the deferral event would have resulted in the originating company becoming entitled to a deduction in respect of the disposal of a CGT asset or of an interest in a CGT asset;
    - (iii) if the originating company is a partner in a partnership—the deferral event would have resulted in

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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the partnership becoming entitled to a deduction in respect of the disposal of a CGT asset or of an interest in a CGT asset; and

(c) if subparagraph (b)(i) applies—the CGT event is one of the following:

- (i) CGT events A1 and B1 (a *disposal case*);
- (ii) CGT events D1, D2, D3 and F1 (a *creation case*); and

Note: The full list of CGT events is in section 104-5.

(d) one of the following applies:

- (i) the originating company is an Australian resident at the time of the deferral event;
- (ii) if the deferral event is a CGT event D1—the \*CGT asset that is the subject of the creation of the contractual or other rights is \*taxable Australian property;
- (iii) if the deferral event is a CGT event A1, B1 or F1—the asset or the subject of the lease, as the case may be, was \*taxable Australian property immediately before the deferral event;
- (iv) if the deferral event is a CGT event D2—the option was taxable Australian property immediately after the deferral event;
- (v) if subparagraph (b)(ii) or (iii) applies—the originating company is a foreign resident at the time of the deferral event; and

(e) at the time of the deferral event, the originating company is a member of a \*linked group and one of the following applies:

- (i) the other entity is a company that is not a connected entity of the originating company and is a member of that linked group;
- (ii) the other entity is a connected entity of the originating company;
- (iii) the other entity is an \*associate of such a connected entity.

(2) Despite subsection (1):

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (a) this Subdivision does not apply because of \*CGT event B1 if title in the \*CGT asset does not pass to the other entity when the agreement ends; and
- (b) this Subdivision does not apply if the deferral event involves the \*acquisition of a greater than 50% interest in a CGT asset by an entity other than an entity referred to in subparagraph (1)(e)(i), (ii) or (iii).

### **170-260 Linked group**

- (1) Companies that are linked to one another are a **linked group**.
  - (2) Two companies are **linked** to each other if:
    - (a) one of them has a controlling stake in the other; or
    - (b) the same entity has a controlling stake in each of them.
  - (3) For the purposes of this section, an entity has a **controlling stake in a company** at a particular time if the entity, or the entity and the entity's \*associates between them:
    - (a) are able at that time to exercise, or control the exercise of, more than 50% of the voting power in the company (either directly, or indirectly through one or more interposed entities); or
    - (b) have at that time the right to receive for their own benefit (either directly, or indirectly through one or more interposed entities) more than 50% of any dividends that the company may pay; or
    - (c) have at that time the right to receive for their own benefit (either directly, or indirectly through one or more interposed entities) more than 50% of any distribution of capital of the company.
- Note: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.
- (4) If:
    - (a) apart from this subsection, an interest that gives an entity and its \*associates (if any):

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (i) the ability to exercise, or control the exercise of, any of the voting power in a company; or
  - (ii) the right to receive dividends that a company may pay; or
  - (iii) the right to receive a distribution of capital of a company;
- would, in the application of paragraph (3)(a), (b) or (c), be counted more than once; and
- (b) the interest is both direct and indirect; only the direct interest is to be counted.

**170-265 Connected entity**

- (1) An entity is a **connected entity** of the originating company at a particular time if, at that time:
  - (a) the entity is a trustee of a trust and either:
    - (i) if the trust is a \*fixed trust—one or more companies that are members of the \*linked group of which the originating company is a member, or one or more of those companies and their \*associates, between them have the right to receive for their own benefit (either directly, or indirectly through one or more interposed entities) more than 50% of any distribution to beneficiaries of the trust of income or corpus of the trust; or
    - (ii) if the trust is not a fixed trust—any company that is a member of the linked group of which the originating company is a member or any associate of such a company benefits or is capable of benefiting under the trust; or
  - (b) the entity is an individual who has a controlling stake in the company.
- (2) For the purposes of paragraph (1)(b), an individual has a controlling stake in a company at a particular time if the individual, or the individual and his or her \*associates between them:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) are able at that time to exercise, or control the exercise of, more than 50% of the voting power in the company (either directly, or indirectly through one or more interposed entities); or
- (b) have at that time the right to receive for their own benefit (either directly, or indirectly through one or more interposed entities) more than 50% of any dividends that the company may pay; or
- (c) have at that time the right to receive for their own benefit (either directly, or indirectly through one or more interposed entities) more than 50% of any distribution of capital of the company.

Note: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

(3) If:

- (a) apart from this subsection, an interest that gives an entity and its \*associates (if any):
  - (i) the ability to exercise, or control the exercise of, any of the voting power in a company; or
  - (ii) the right to receive dividends that a company may pay; or
  - (iii) the right to receive a distribution of capital of a company;would, in the application of paragraph (2)(a), (b) or (c), be counted more than once; and
- (b) the interest is both direct and indirect;  
only the direct interest is to be counted.

### **170-270 Immediate consequences for originating company**

- (1) If, apart from this Subdivision:
  - (a) the originating company would have made a \*capital loss (except a capital loss that would be disregarded under a provision of this Act other than this Subdivision) as a result of the deferral event; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (b) the originating company would have become entitled to a deduction in respect of the deferral event; or
  - (c) where the originating company is a partner in a partnership—the partnership would have become entitled to a deduction in respect of the deferral event;
- the capital loss, the deduction or the partner's share of the deduction, as the case may be, is disregarded.
- (2) To avoid doubt, the amount of the \*capital loss, deduction, or partnership deduction, referred to in this section is:
    - (a) the amount remaining after applying Division 723 or section 727-615; or
    - (b) nil, if none of the amount remains after applying that section or Division.

Note: Division 723 and section 727-615 reduce a loss realised for income tax purposes by a realisation event happening to a non-depreciating asset (in the case of Division 723) or an affected interest in a losing entity under an indirect value shift (in the case of section 727-615).

**170-275 Subsequent consequences for originating company**

- (1) If, at a time after the deferral event, any one or more of the following events (the *new events*) happens:
  - (a) the \*CGT asset \*acquired by the other entity referred to in paragraph 170-255(1)(a) (the *relevant CGT asset*), or a greater than 50% interest in it, ceases to exist;
  - (b) the relevant CGT asset, or a greater than 50% interest in it, is acquired by an entity that is none of the following:
    - (i) a member of the \*linked group of which the originating company is a member;
    - (ii) a connected entity of the originating company;
    - (iii) an \*associate of such a connected entity;
  - (c) if the relevant CGT asset is acquired by a company that is a member of that linked group—that company ceases to be a member of that linked group;
  - (d) the originating company ceases to be a member of that linked group;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (e) if the relevant CGT asset is acquired by an entity that is a connected entity of the originating company or is an associate of such a connected entity—that entity ceases to be such a connected entity or ceases to be an associate of such a connected entity, as the case may be;
- the originating company is taken, immediately before the time of the happening of the new event or the earliest of the new events, as the case may be, to have made a \*capital loss equal to the amount of the capital loss referred to in section 170-270 or to have become entitled to a deduction equal to the deduction, or the share of the deduction, referred to in that section, as the case may be.
- (2) If the \*capital loss referred to in section 170-270 would have been made from a \*personal use asset or from a \*collectable, any corresponding capital loss that the originating company is taken by subsection (1) of this section to have made is taken to have been made from a personal use asset or from a collectable, as the case may be.

### **170-280 What happens if certain events happen in respect of the asset**

- (1) This section applies if, as a result of the occurrence of a new event in respect of a \*CGT asset, the originating company is taken by subsection 170-275(1) to have made a \*capital loss or to be entitled to a deduction and, within 4 years after the occurrence of the new event, one of the following events (*further events*) occurs:
- (a) the asset or a greater than 50% interest in it is \*acquired by the originating company or by an entity that, at the time of the acquisition, is:
    - (i) a company that is a member of the \*linked group of which the originating company is a member; or
    - (ii) a connected entity of the originating company; or
    - (iii) an \*associate of such a connected entity;
  - (b) a company that owns the asset or a greater than 50% interest in it becomes a member of the linked group of which the originating company is a member;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (c) the originating company becomes a member of a linked group another member of which owns the asset or a greater than 50% interest in it;
  - (d) an entity that owns the asset or a greater than 50% interest in it becomes:
    - (i) a connected entity of the originating company; or
    - (ii) an associate of such a connected entity.
- (1A) If the originating company has information from which it would be reasonable to conclude that, if the \*CGT asset involved were owned by the originating company immediately after the further event, \*majority underlying interests in the asset immediately after the further event would not have been had by \*ultimate owners who had majority underlying interests in the asset immediately before the deferral event, the further event is taken not to have occurred.
- (2) The company is taken not to have made the \*capital loss or not to have been entitled to the deduction, as the case may be.
- (3) If, at a time after the further event, any one or more of the following events (the *realisation events*) happens:
- (a) the \*CGT asset referred to in subsection (1) (the *relevant CGT asset*), or a greater than 50% interest in it, ceases to exist;
  - (b) the relevant CGT asset, or a greater than 50% interest in it, is \*acquired by an entity that is none of the following:
    - (i) a member of the linked group of which the originating company is a member;
    - (ii) a connected entity of the originating company;
    - (iii) an \*associate of such a connected entity;
  - (c) if the relevant CGT asset is acquired by a company that is a member of that linked group—that company ceases to be a member of that linked group;
  - (d) the originating company ceases to be a member of that linked group;

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (e) if the relevant CGT asset is acquired by an entity that is a connected entity of the originating company or is an associate of such a connected entity—that entity ceases to be such a connected entity or ceases to be an associate of such a connected entity, as the case may be;
- the originating company is taken, immediately before the time of the happening of the realisation event or the earliest of the realisation events, as the case may be, to have made a \*capital loss equal to the amount of the capital loss referred to in subsection (2) or to have become entitled to a deduction equal to the deduction referred to in that subsection, as the case may be.
- (4) If the \*capital loss referred to in subsection (2) would have been made from a \*personal use asset or from a \*collectable, any corresponding capital loss that the originating company is taken by subsection (3) to have made is taken to have been made from a personal use asset or from a collectable, as the case may be.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 175-1

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## Division 175—Use of a company's tax losses or deductions to avoid income tax

### Table of Subdivisions

Guide to Division 175

- 175-A Tax benefits from unused tax losses
- 175-B Tax benefits from unused deductions
- 175-CA Tax benefits from unused net capital losses of earlier income years
- 175-CB Tax benefits from unused capital losses of the current year
- 175-C Tax benefits from unused bad debt deductions
- 175-D Common rules

### Guide to Division 175

#### 175-1 What this Division is about

The Commissioner can reverse the effect of schemes that, in order to avoid tax, bring together in the same company:

- assessable income; and
- tax losses, current year deductions, or deductions for bad debts, that apart from the scheme would not be fully used.

#### Subdivision 175-A—Tax benefits from unused tax losses

##### Table of sections

- 175-5 When Commissioner can disallow deduction for tax loss
- 175-10 First case: income or capital gain injected into company because of available tax loss
- 175-15 Second case: someone else obtains a tax benefit because of tax loss available to company

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **175-5 When Commissioner can disallow deduction for tax loss**

- (1) This Subdivision sets out cases where the Commissioner may disallow some or all of a \*tax loss (or of part of a tax loss) (the ***excluded loss***) as a deduction in calculating a company's taxable income of an income year after the \*loss year.
- (2) However, the Commissioner cannot disallow the \*excluded loss if the company:
  - (a) fails to meet a condition in section 165-12 (which is about the company maintaining the same owners) in respect of the \*loss year or the income year; but
  - (b) meets the condition in section 165-13 in respect of the income year by satisfying the \*business continuity test under section 165-210.

### **175-10 First case: income or capital gain injected into company because of available tax loss**

- (1) The Commissioner may disallow the \*excluded loss if, during the income year, the company \*derived assessable income, or a \*capital gain accrued to the company, some or all of which (the ***injected amount***) would not have been derived, or would not have accrued, if the excluded loss had not been available to be taken into account for the purposes of:
  - Division 36 (which is about tax losses of earlier years);
  - Division 165 (which is about the income tax consequences of changing ownership or control of a company);
  - former Subdivision 375-G (which is about film losses).
- (2) However, the Commissioner cannot disallow the \*excluded loss if the \*continuing shareholders will benefit from the derivation or accrual of the \*injected amount to an extent that the Commissioner thinks fair and reasonable having regard to their respective rights and interests in the company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**Chapter 3** Specialist liability rules

**Part 3-5** Corporate taxpayers and corporate distributions

**Division 175** Use of a company's tax losses or deductions to avoid income tax

**Section 175-15**

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Note: Section 175-100 allows the Commissioner to disallow an excluded loss of an insolvent company.

(3) The *continuing shareholders* are:

- (a) all of the persons who had \*more than 50% of the voting power in the company during the whole (or the relevant part) of the \*loss year and during the whole of the income year; and
- (b) all of the persons who had rights to \*more than 50% of the company's dividends during the whole (or the relevant part) of the loss year and during the whole of the income year; and
- (c) all of the persons who had rights to \*more than 50% of the company's capital distributions during the whole (or the relevant part) of the loss year and during the whole of the income year.

To find out who they were, apply whichever tests are applied in order to determine whether the company can deduct the \*tax loss (or the part of the tax loss) in the first place.

Note 1: See section 165-12 (which is about the company maintaining the same owners).

Note 2: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

**175-15 Second case: someone else obtains a tax benefit because of tax loss available to company**

- (1) The Commissioner may disallow the \*excluded loss if:
  - (a) a person has obtained or will obtain a tax benefit in connection with a \*scheme; and
  - (b) the scheme would not have been entered into or carried out if the excluded loss had not been available to be taken into account for the purposes of:
    - Division 36 (which is about tax losses of earlier years);
    - Division 165 (which is about the income tax consequences of changing ownership or control of a company);

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- former Subdivision 375-G (which is about film losses).
- (2) However, the Commissioner cannot disallow the \*excluded loss if:
- (a) the person had a \*shareholding interest in the company at some time during the income year; and
  - (b) the Commissioner considers the tax benefit to be fair and reasonable having regard to that shareholding interest.
- Note: Section 175-100 allows the Commissioner to disallow an excluded loss of an insolvent company.
- (3) An expression means the same in this section as in Part IVA of the *Income Tax Assessment Act 1936*.

### **Subdivision 175-B—Tax benefits from unused deductions**

#### **Table of sections**

175-20	Income or capital gain injected into company because of available deductions
175-25	Deduction injected into company because of available income or capital gain
175-30	Someone else obtains a tax benefit because of a deduction, income or capital gain available to company
175-35	Tax loss resulting from disallowed deductions

#### **175-20 Income or capital gain injected into company because of available deductions**

- (1) The Commissioner may disallow deductions of a company (or parts of them) for an income year if:
- (a) the company has \*derived assessable income, or a \*capital gain accrued to the company, some or all of which (the ***injected amount***) would not have been derived, or would not have accrued, if the company did not have those deductions; and
  - (b) the income was derived, or the capital gain accrued, in that income year.

The disallowed deductions and parts of deductions may exceed the \*injected amount.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Chapter 3** Specialist liability rules

**Part 3-5** Corporate taxpayers and corporate distributions

**Division 175** Use of a company's tax losses or deductions to avoid income tax

**Section 175-25**

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Note: The disallowance may result in a tax loss for the income year. See section 175-35.

- (2) The Commissioner cannot disallow the deductions or parts of the deductions if the \*continuing shareholders will benefit from the derivation of the \*injected amount to an extent that the Commissioner thinks fair and reasonable having regard to their respective \*shareholding interests in the company.

Note: Section 175-100 allows the Commissioner to disallow the whole or part of any deductions of an insolvent company.

- (3) The *continuing shareholders* are the individuals who had \*shareholding interests in the company both immediately before the \*injected amount was \*derived, and immediately afterwards.

**175-25 Deduction injected into company because of available income or capital gain**

- (1) The Commissioner may disallow a deduction of a company for an income year to the extent that the company would not have incurred the loss, outgoing or expenditure that the deduction is for if it had not \*derived some or all of the assessable income it derived in that income year, or had not made some or all of a \*capital gain it made in that income year.

Note: The disallowance may result in a tax loss for the income year. See section 175-35.

- (2) The Commissioner cannot disallow any of the deduction if:
- (a) the \*continuing shareholders will benefit from any profit or advantage that has arisen or might arise directly or indirectly from the loss, outgoing or expenditure being incurred; and
  - (b) the Commissioner thinks that the extent to which they will benefit is fair and reasonable having regard to their respective \*shareholding interests in the company.

Note: Section 175-100 allows the Commissioner to disallow a deduction of an insolvent company.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3) The *continuing shareholders* are the individuals who had \*shareholding interests in the company both immediately before the loss, outgoing or expenditure was incurred, and immediately afterwards.

**175-30 Someone else obtains a tax benefit because of a deduction, income or capital gain available to company**

- (1) The Commissioner may disallow a deduction of a company if:
- (a) a person (other than the company) has obtained or will obtain a tax benefit in connection with a \*scheme; and
  - (b) the scheme would not have been entered into or carried out if the company had not incurred some or all (the *available expense*) of the loss, outgoing or expenditure that the deduction is for.

However, the deduction may be disallowed only to the extent of the available expense.

- (2) The Commissioner may disallow deductions of a company (or parts of them) if:
- (a) a person has obtained or will obtain a tax benefit in connection with a \*scheme; and
  - (b) the scheme would not have been entered into or carried out if some or all (the *available amount*) of the assessable income that the company \*derived or of a \*capital gain that accrued to the company:
    - (i) before it incurred the losses, outgoings or expenditure that the deductions were for; and
    - (ii) in the same income year as it incurred them;had not been derived or had not accrued, as the case may be.
- The disallowed deductions and parts of deductions may exceed the available amount.

Note: The disallowance may result in a tax loss for the income year. See section 175-35.

- (3) An expression means the same in this section as in Part IVA of the *Income Tax Assessment Act 1936*.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 175-35

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- (4) The Commissioner cannot disallow under this section if:
- (a) the person who has obtained or will obtain the tax benefit had a \*shareholding interest in the company at some time during the income year; and
  - (b) the Commissioner considers the tax benefit to be fair and reasonable having regard to that shareholding interest.

Note: Section 175-100 allows the Commissioner to disallow the whole or part of any deductions of an insolvent company.

**175-35 Tax loss resulting from disallowed deductions**

- (1) If a company has a taxable income for an income year because the Commissioner disallows under this Subdivision deductions of the company for the income year (or parts of them), the company may also have a \*tax loss for the income year.
- (2) The company's **tax loss** for the income year is calculated as follows.
- (3) Total what the Commissioner has disallowed under this Subdivision.
- (4) If the company has \*exempt income for the income year, subtract its \*net exempt income.
- (5) Any amount remaining is the company's **tax loss** for the income year, which is called a **loss year**.

Note: The meanings of **tax loss** and **loss year** are modified by section 36-55 for a corporate tax entity that has an amount of excess franking offsets.

To find out *how much* of the tax loss can be deducted in later income years: see Subdivision 165-A.

To find out *how* to deduct it: see section 36-17.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Subdivision 175-CA—Tax benefits from unused net capital losses of earlier income years**

### **Table of sections**

175-40	When Commissioner can disallow net capital loss of earlier income year
175-45	First case: capital gain injected into company because of available net capital loss
175-50	Second case: someone else obtains a tax benefit because of net capital loss available to company

### **175-40 When Commissioner can disallow net capital loss of earlier income year**

- (1) This Subdivision sets out cases where the Commissioner may prevent a company, in working out its \*net capital gain for an income year, from applying some or all of a \*net capital loss it has for an earlier income year (or of part of one) (the *excluded loss*). This is called *disallowing* the excluded loss.

Note: A company's net capital gain for an income year is usually worked out under section 102-5.

- (2) However, the Commissioner cannot \*disallow the \*excluded loss if, in determining (under section 165-96) whether Subdivision 165-A would prevent the company from deducting the loss (or the part of the loss) for the income year if the loss were a \*tax loss of the company for that earlier income year, the company:
- (a) would fail to meet a condition in section 165-12 (which is about the company maintaining the same owners) in respect of the income year; but
  - (b) would meet the condition in section 165-13 in respect of the income year by satisfying the \*business continuity test under section 165-210.

Note: Subdivision 165-A deals with the deductibility of a company's tax loss for an earlier income year if there has been a change in the ownership or control of the company in the period from the start of the loss year to the end of the income year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 175-45

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**175-45 First case: capital gain injected into company because of available net capital loss**

- (1) The Commissioner may \*disallow the \*excluded loss if, during the income year, the company made a \*capital gain some or all of which (the *injected capital gain*) it would not have made if the excluded loss had not been available to be applied in working out the company's \*net capital gain for the income year (or for some other income year).
- (2) However, the Commissioner cannot \*disallow the \*excluded loss if the \*continuing shareholders will benefit from the making of the injected capital gain to an extent that the Commissioner thinks fair and reasonable having regard to their respective rights and interests in the company.

Note: Section 175-100 allows the Commissioner to disallow an excluded loss of an insolvent company.

- (3) The *continuing shareholders* are:
  - (a) all of the persons who had \*more than 50% of the voting power in the company during the whole (or the relevant part) of the earlier income year and during the whole of the income year; and
  - (b) all of the persons who had rights to \*more than 50% of the company's dividends during the whole (or the relevant part) of the earlier income year and during the whole of the income year; and
  - (c) all of the persons who had rights to \*more than 50% of the company's capital distributions during the whole (or the relevant part) of the earlier income year and during the whole of the income year.

To find out who they were, apply whichever tests are applied in order to determine (under section 165-96) whether Subdivision 165-A would prevent the company from deducting the loss for the current year if it were a \*tax loss of the company for that earlier income year.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note 1: See section 165-12 (which is about the company maintaining the same owners).

Note 2: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

### **175-50 Second case: someone else obtains a tax benefit because of net capital loss available to company**

- (1) The Commissioner may \*disallow the \*excluded loss if:
  - (a) a person has obtained or will obtain a tax benefit in connection with a \*scheme; and
  - (b) the scheme would not have been entered into or carried out if the excluded loss had not been available to be applied in working out the company's \*net capital gain for the income year (or for some other income year).
- (2) However, the Commissioner cannot \*disallow the \*excluded loss if:
  - (a) the person had a \*shareholding interest in the company at some time during the income year; and
  - (b) the Commissioner considers the tax benefit to be fair and reasonable having regard to that shareholding interest.

Note: Section 175-100 allows the Commissioner to disallow an excluded loss of an insolvent company.

- (3) An expression means the same in this section as in Part IVA of the *Income Tax Assessment Act 1936*.

### **Subdivision 175-CB—Tax benefits from unused capital losses of the current year**

#### **Table of sections**

175-55	When Commissioner can disallow capital loss of current year
175-60	Capital gain injected into company because of available capital loss
175-65	Capital loss injected into company because of available capital gain
175-70	Someone else obtains a tax benefit because of capital loss or gain available to company
175-75	Net capital loss resulting from disallowed capital losses

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 175-55

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**175-55 When Commissioner can disallow capital loss of current year**

This Subdivision sets out cases where the Commissioner may prevent a company, in working out its \*net capital gain or \*net capital loss for an income year, from applying all or part of a \*capital loss it made during the income year. This is called *disallowing* the capital loss or part.

**175-60 Capital gain injected into company because of available capital loss**

- (1) The Commissioner may \*disallow \*capital losses of a company (or parts of them) for an income year if:
  - (a) the company has made a \*capital gain some or all of which (the *injected capital gain*) it would not have made if it did not have those capital losses; and
  - (b) the injected capital gain was made in that income year.

The disallowed capital losses and parts of capital losses may exceed the amount of the injected capital gain.

Note: The disallowance may result in a net capital loss for the income year: see section 175-75.

- (2) The Commissioner cannot \*disallow the \*capital losses or parts of the capital losses if the \*continuing shareholders will benefit from the making of the injected capital gain to an extent that the Commissioner thinks fair and reasonable having regard to their respective \*shareholding interests in the company.

Note: Section 175-100 allows the Commissioner to disallow capital losses or parts of capital losses of an insolvent company.

- (3) The *continuing shareholders* are the individuals who had \*shareholding interests in the company both immediately before the \*injected capital gain was made, and immediately afterwards.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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### **175-65 Capital loss injected into company because of available capital gain**

- (1) The Commissioner may \*disallow a \*capital loss of a company for an income year to the extent that the company would not have made the loss if it had not also made some or all of a \*capital gain it made in that income year.

Note: The disallowance may result in a tax loss for the income year: see section 175-75.

- (2) The Commissioner cannot \*disallow any of the \*capital loss if:
- (a) the \*continuing shareholders will benefit from any profit or advantage that has arisen or might arise directly or indirectly from the loss being made; and
  - (b) the Commissioner thinks that the extent to which they will benefit is fair and reasonable having regard to their respective \*shareholding interests in the company.

Note: Section 175-100 allows the Commissioner to disallow a capital loss of an insolvent company.

- (3) The *continuing shareholders* are the individuals who had \*shareholding interests in the company both immediately before the \*capital loss was made, and immediately afterwards.

### **175-70 Someone else obtains a tax benefit because of capital loss or gain available to company**

- (1) The Commissioner may \*disallow a \*capital loss of a company if:
- (a) a person (other than the company) has obtained or will obtain a tax benefit in connection with a \*scheme; and
  - (b) the scheme would not have been entered into or carried out if the company had not made some or all (the *available capital loss*) of the capital loss.

However, the capital loss may be disallowed only to the extent of the available capital loss.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 175-75

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- (2) The Commissioner may \*disallow \*capital losses of a company (or parts of them) if:
- (a) a person has obtained or will obtain a tax benefit in connection with a \*scheme; and
  - (b) the scheme would not have been entered into or carried out if the company had not made some or all (the **available capital gains**) of the \*capital gains it made:
    - (i) before it made the capital losses; and
    - (ii) in the same income year as it made them.

The disallowed capital losses and parts of capital losses may exceed the amount of the available capital gains.

Note: The disallowance may result in a tax loss for the income year: see section 175-75.

- (3) An expression means the same in this section as in Part IVA of the *Income Tax Assessment Act 1936*.

- (4) The Commissioner cannot \*disallow under this section if:
- (a) the person who has obtained or will obtain the tax benefit had a \*shareholding interest in the company at some time during the income year; and
  - (b) the Commissioner considers the tax benefit to be fair and reasonable having regard to that shareholding interest.

Note: Section 175-100 allows the Commissioner to disallow the whole or part of any capital losses of an insolvent company.

**175-75 Net capital loss resulting from disallowed capital losses**

If a company has a \*net capital gain for an income year because the Commissioner \*disallows under this Subdivision \*capital losses of the company for the income year (or parts of them), the company also has a **net capital loss** for the income year equal to the total of those losses and parts of losses.

To find out *how much* of the net capital loss can be applied in later income years: see Subdivision 165-CA.

To find out *how* to apply it: see sections 102-5 and 102-15.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Subdivision 175-C—Tax benefits from unused bad debt deductions**

### **Table of sections**

175-80	When Commissioner can disallow deduction for bad debt
175-85	First case: income or capital gain injected into company because of available bad debt
175-90	Second case: someone else obtains a tax benefit because of bad debt deduction available to company

### **175-80 When Commissioner can disallow deduction for bad debt**

- (1) This Subdivision sets out cases where the Commissioner may disallow some or all of a deduction for a debt (or part of a debt) that is owed to a company and is written off as bad in the income year.
- (2) However, the Commissioner cannot disallow any of the deduction if the company:
  - (a) fails to meet a condition in section 165-123 (about the company maintaining the same owners) in respect of the \*first continuity period or the \*second continuity period; but
  - (b) meets the condition in section 165-126 by satisfying the \*business continuity test under section 165-210.

### **175-85 First case: income or capital gain injected into company because of available bad debt**

- (1) The Commissioner may disallow some or all of the deduction if the company would not have had some or all (the *injected amount*) of its assessable income or \*capital gains for the income year if:
  - (a) the debt had not been incurred; and
  - (b) the debt (or the relevant part of the debt) had not been written off (or able to be written off) as bad.
- (2) However, the Commissioner cannot disallow any of the deduction if the \*continuing shareholders will benefit from the company

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Section 175-90**

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having the injected amount to an extent that the Commissioner thinks fair and reasonable having regard to their respective rights and interests in the company.

Note: Section 175-100 allows the Commissioner to disallow some or all of a deduction of an insolvent company.

- (3) The *continuing shareholders* are:
- (a) all of the persons who had \*more than 50% of the voting power in the company throughout the \*first continuity period and the \*second continuity period; and
  - (b) all of the persons who had rights to \*more than 50% of the company's dividends throughout the \*first continuity period and the \*second continuity period; and
  - (c) all of the persons who had rights to \*more than 50% of the company's capital distributions throughout the \*first continuity period and the \*second continuity period.

To find out who they were, apply whichever tests are applied in order to determine whether the company can deduct the debt (or the relevant part of the debt) in the first place.

Note 1: See section 165-123 (about the company maintaining the same owners).

Note 2: Division 167 has special rules for working out rights to voting power, dividends and capital distributions in a company whose shares do not all carry the same rights to those matters.

**175-90 Second case: someone else obtains a tax benefit because of bad debt deduction available to company**

- (1) The Commissioner may disallow some or all of the deduction if:
- (a) a person has obtained or will obtain a tax benefit in connection with a \*scheme; and
  - (b) the scheme would not have been entered into or carried out if the debt had not been incurred and the debt (or the relevant part of the debt) had not been written off (or able to be written off) as bad.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

(2) However, the Commissioner cannot disallow any of the deduction if:

- (a) the person had a \*shareholding interest in the company at some time during the income year; and
- (b) the Commissioner considers the tax benefit to be fair and reasonable having regard to that shareholding interest.

Note: Section 175-100 allows the Commissioner to disallow some or all of a deduction of an insolvent company.

(3) An expression means the same in this section as in Part IVA of the *Income Tax Assessment Act 1936*.

### **Subdivision 175-D—Common rules**

#### **Table of sections**

175-95	When a person has a shareholding interest in the company
175-100	Commissioner may disallow excluded losses etc. of insolvent companies

#### **175-95 When a person has a shareholding interest in the company**

- (1) A person has a ***shareholding interest*** in the company if the person is:
- (a) the beneficial owner; or
  - (b) the trustee of a \*family trust who is the owner;
- of:
- (c) \*shares in the company; or
  - (d) an interest in \*shares in the company.
- (2) A person also has a ***shareholding interest*** in the company if:
- (a) the person has a shareholding interest in another company; and
  - (b) the other company has a shareholding interest in the company (including one resulting from any other application or applications of this subsection).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 175-100

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**175-100 Commissioner may disallow excluded losses etc. of insolvent companies**

Despite a subsection listed in column 1, the Commissioner may, under a subsection listed in column 2, disallow some or all of an \*excluded loss, deduction, or \*capital loss, of a company (as the case requires) if:

- (a) the company is or becomes:
  - (i) a Chapter 5 body corporate within the meaning of the *Corporations Act 2001*; or
  - (ii) an entity with a similar status under a \*foreign law to a Chapter 5 body corporate; and
- (b) the company is insolvent (within the meaning of section 9 of the *Corporations Act 2001*) when the administration begins.

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**Commissioner may disallow excluded losses etc. for insolvent companies**

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<b>Item</b>	<b>Column 1 Despite this subsection...</b>	<b>Column 2 the Commissioner may disallow under this subsection:</b>
1	Subsection 175-10(2)	Subsection 175-10(1)
2	Subsection 175-15(2)	Subsection 175-15(1)
3	Subsection 175-20(2)	Subsection 175-20(1)
4	Subsection 175-25(2)	Subsection 175-25(1)
5	Subsection 175-30(4)	Subsection 175-30(1) or (2)
6	Subsection 175-45(2)	Subsection 175-45(1)
7	Subsection 175-50(2)	Subsection 175-50(1)
8	Subsection 175-60(2)	Subsection 175-60(1)
9	Subsection 175-65(2)	Subsection 175-65(1)
10	Subsection 175-70(4)	Subsection 175-70(1) or (2)
11	Subsection 175-85(2)	Subsection 175-85(1)
11	Subsection 175-90(2)	Subsection 175-90(1)

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Division 180—Information about family trusts with interests in companies**

### **Table of Subdivisions**

	Guide to Division 180
180-A	Information relevant to Division 165
180-B	Information relevant to Division 175

### **Guide to Division 180**

#### **180-1 What this Division is about**

If a company would only avoid the tax consequences of Division 165 or 175 because of interests held by a foreign resident family trust, the Commissioner may require the company to give certain information about the family trust. If it is not given, the company does not avoid the tax consequences of that Division.

#### **Subdivision 180-A—Information relevant to Division 165**

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

180-5	Information about family trusts with interests in companies
180-10	Notice where requirements of section 180-5 are met

#### **180-5 Information about family trusts with interests in companies**

##### *Notice about company*

- (1) The Commissioner may give a company a notice in accordance with section 180-10 if the requirements of this section are met.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 180-5

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*Tax detriment under Division 165*

- (2) In its \*income tax return for an income year:
- (a) the company must have deducted a \*tax loss from a \*loss year where it would not be allowed to deduct the tax loss if it did not meet the conditions in section 165-12; or
  - (b) the company must not have calculated:
    - (i) its taxable income and tax loss under Subdivision 165-B; and
    - (ii) its \*net capital gain and \*net capital loss under Subdivision 165-CB;where it would have been required to calculate them under that Subdivision if it did not satisfy the requirements of paragraph 165-35(a); or
  - (c) the company must have applied a \*net capital loss from an earlier income year in working out its net capital gain where it would not have been allowed to apply the loss if it did not meet the condition in section 165-12 as applied on the assumption mentioned in subsection 165-96(1); or
  - (d) the company must have deducted a debt that it wrote off as bad in the income year where it would not be allowed to deduct the debt if it did not satisfy the requirements of paragraph 165-120(1)(a) or (b).

*Role of family trust*

- (3) The Commissioner must be satisfied that the company:
- (a) if paragraph (2)(a) applies—meets the conditions in section 165-12; or
  - (b) if paragraph (2)(b) applies—satisfies the requirements of paragraph 165-35(a); or
  - (c) if paragraph (2)(c) applies—meets the conditions in section 165-12 as applied on the assumption mentioned in subsection 165-96(1); or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



(d) if paragraph (2)(d) applies—satisfies the requirements of paragraph 165-120(1)(a) or (b);  
but it would not do so unless one or more trusts were \*family trusts.

*Foreign resident trust*

- (4) When the Commissioner gives the notice, for at least one of the \*family trusts:
- (a) a trustee of the trust must be a foreign resident; or
  - (b) the central management and control of the trust must be outside Australia.

*When notice must be given*

- (5) The Commissioner must give the notice before the later of:
- (a) 5 years after the income year to which the return relates; and
  - (b) the end of the period during which the company is required by section 262A of the *Income Tax Assessment Act 1936* to retain records in relation to that income year.

**180-10 Notice where requirements of section 180-5 are met**

*Information required*

- (1) The notice that the Commissioner may give if the requirements of section 180-5 are met must require the company to give the Commissioner specified information about conferrals of present entitlements to, and distributions (within the meaning of Subdivision 272-B in Schedule 2F to the *Income Tax Assessment Act 1936*) of, income and capital, since the start of:
- (a) if paragraph 180-5(2)(a) applies—the \*loss year mentioned in that paragraph; or
  - (b) if paragraph 180-5(2)(b) applies—the income year for which that paragraph is being applied; or
  - (c) if paragraph 180-5(2)(c) applies—the earlier income year mentioned in that paragraph; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Section 180-10**

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(d) if paragraph 180-5(2)(d) applies:

- (i) where the debt mentioned in that paragraph was incurred in an earlier income year—the day on which the debt was incurred; or
- (ii) where the debt mentioned in that paragraph was incurred in the income year mentioned in that paragraph—that income year;

by all of the \*family trusts meeting the requirements of paragraph 180-5(4)(a) or (b).

*Company knowledge*

- (2) The information need not be within the knowledge of the company at the time the notice is given.

*Period for giving information*

- (3) The notice must specify a period within which the company is to give the information. The period must not end earlier than 21 days after the day on which the Commissioner gives the notice.

*Consequence of not giving the information*

- (4) If the company does not give the information within the period or within such further period as the Commissioner allows:
  - (a) if paragraph 180-5(2)(a) applies—the company is not entitled, and is taken never to have been entitled, to deduct the \*tax loss; or
  - (b) if paragraph 180-5(2)(b) applies—the company is required, and taken always to have been required:
    - (i) to calculate its taxable income and tax loss for the income year under Subdivision 165-B; and
    - (ii) to calculate its \*net capital gain and \*net capital loss for the income year under Subdivision 165-CB; or
  - (c) if paragraph 180-5(2)(c) applies—the company is not entitled, and is taken never to have been entitled, to apply the net capital loss; or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (d) if paragraph 180-5(2)(d) applies—the company is not entitled, and is taken never to have been entitled, to deduct the debt.
- (5) If, because of paragraph (4)(b), the company is required to calculate under Subdivision 165-B its taxable income and \*tax loss for the income year concerned, that Subdivision is to be applied as if it required the income year to be divided into such periods as would result in the highest possible taxable income for the income year.
- (6) If, because of paragraph (4)(b), the company is required to calculate under Subdivision 165-CB its \*net capital gain and \*net capital loss for the income year concerned, that Subdivision is to be applied as if it required the income year to be divided into such periods as would result in the highest net capital gain for the income year.

*No offences or penalties*

- (7) To avoid doubt, subsections (4) to (6) do not cause the company to commit any offence or be liable to any penalty under Part 4-25 in Schedule 1 to the *Taxation Administration Act 1953* for:
  - (a) deducting the \*tax loss; or
  - (b) not calculating its taxable income and tax loss under Subdivision 165-B as it applies in accordance with subsection (5) of this section; or
  - (c) not calculating its \*net capital gain and \*net capital loss under Subdivision 165-CB as it applies in accordance with subsection (6) of this section; or
  - (d) applying the net capital loss; or
  - (e) deducting the debt;in the company's \*income tax return.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 180-15

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**Subdivision 180-B—Information relevant to Division 175**

**Table of sections**

180-15	Information about family trusts with interests in companies
180-20	Notice where requirements of section 180-15 are met

**180-15 Information about family trusts with interests in companies**

*Notice about company*

- (1) The Commissioner may give a company a notice in accordance with section 180-20 if the requirements of this section are met.

*Tax detriment under Division 175*

- (2) The Commissioner:
- (a) must have been prevented by subsection 175-10(2) or 175-15(2) from disallowing, as a deduction for an income year, the whole or part of a \*tax loss from a \*loss year; or
  - (b) must have been prevented by subsection 175-20(2), 175-25(2) or 175-30(4) from disallowing the whole or part of a deduction for an income year; or
  - (c) must have been prevented by subsection 175-45(2) or 175-50(2) from disallowing, in working out the \*net capital gain or \*net capital loss for an income year, the whole or part of a \*net capital loss for an earlier income year (or a part of one); or
  - (d) must have been prevented by subsection 175-60(2), 175-65(2) or 175-70(4) from disallowing, in working out its net capital gain or net capital loss for an income year, the whole or part of a \*capital loss made during the income year; or
  - (e) must have been prevented by subsection 175-85(2) or 175-90(2) from disallowing, as a deduction for an income year, the whole or part of a debt.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Role of family trust*

- (3) A \*family trust must have been:
- (a) one of the \*continuing shareholders mentioned in subsection 175-10(2), 175-20(2), 175-25(2), 175-45(2), 175-60(2), 175-65(2) or 175-85(2); or
  - (b) the person who had the \*shareholding interest mentioned in subsection 175-15(2), 175-30(4), 175-50(2), 175-70(4) or 175-90(2);
- as the case requires.

*Foreign resident trust*

- (4) When the Commissioner gives the notice:
- (a) a trustee of the \*family trust must be a foreign resident; or
  - (b) the central management and control of the \*family trust must be outside Australia.

*When notice must be given*

- (5) The Commissioner must give the notice before the later of:
- (a) 5 years after the income year mentioned in subsection (2); and
  - (b) the end of the period during which the company is required by section 262A of the *Income Tax Assessment Act 1936* to retain records in relation to that income year.

**180-20 Notice where requirements of section 180-15 are met**

*Information required*

- (1) The notice that the Commissioner may give if the requirements of section 180-15 are met must require the company to give the Commissioner specified information about conferrals of present entitlements to, and distributions (within the meaning of Subdivision 272-B in Schedule 2F to the *Income Tax Assessment Act 1936*) of, income and capital by the \*family trust since the start of:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**Section 180-20**

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- (a) the \*loss year mentioned in paragraph 180-15(2)(a); or
- (b) the income year mentioned in paragraph 180-15(2)(b) or (d);  
or
- (c) the earlier income year mentioned in paragraph 180-15(2)(c);  
or
- (d) if the debt mentioned in paragraph 180-15(2)(e) was incurred  
in the income year mentioned in that paragraph—that income  
year; or
- (e) if the debt mentioned in paragraph 180-15(2)(e) was incurred  
in an earlier income year than the one mentioned in that  
paragraph—the day on which the debt was incurred.

*Company knowledge*

- (2) The information need not be within the knowledge of the company  
at the time the notice is given.

*Period for giving information*

- (3) The notice must specify a period within which the company is to  
give the information. The period must not end earlier than 21 days  
after the day on which the Commissioner gives the notice.

*Consequence of not giving the information*

- (4) If the company does not give the information within the period or  
within such further period as the Commissioner allows:
  - (a) subsection 175-10(2), 175-15(2), 175-20(2), 175-25(2),  
175-30(4), 175-85(2) or 175-90(2) does not prevent the  
Commissioner from disallowing the deduction; or
  - (b) subsection 175-45(2) or 175-50(2) does not prevent the  
Commissioner from \*disallowing the \*net capital loss; or
  - (c) subsection 175-60(2), 175-65(2) or 175-70(4) does not  
prevent the Commissioner from \*disallowing the \*capital  
loss;as the case requires.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*No offences or penalties*

- (5) To avoid doubt, subsection (4) does not cause the company to commit any offence or be liable to any penalty under Part 4-25 in Schedule 1 to the *Taxation Administration Act 1953* for claiming the deduction, or applying the \*net capital loss or \*capital loss, in the company's \*income tax return.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 195-1

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## **Division 195—Special types of company**

### **Table of Subdivisions**

- 195-A Pooled development funds (PDFs)
- 195-B Limited partnerships

### **Subdivision 195-A—Pooled development funds (PDFs)**

#### **Guide to Subdivision 195-A**

##### **195-1 What this Subdivision is about**

This Subdivision contains rules about the income tax treatment of:

- pooled development funds (PDFs)
- shares in PDFs.

### **Table of sections**

#### **Working out a PDF's taxable income and tax loss**

- 195-5 Deductibility of PDF tax losses
- 195-10 PDF cannot transfer tax loss
- 195-15 Tax loss for year in which company becomes a PDF

#### **Working out a PDF's net capital gain and net capital loss**

- 195-25 Applying a PDF's net capital losses
- 195-30 PDF cannot transfer net capital loss
- 195-35 Net capital loss for year in which company becomes a PDF

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## Working out a PDF's taxable income and tax loss

### 195-5 Deductibility of PDF tax losses

If a company is a \*PDF at the end of an income year for which it has a \*tax loss, it can deduct the tax loss in a later income year only if it is a PDF throughout the later income year.

### 195-10 PDF cannot transfer tax loss

If a company is a \*PDF at the end of an income year for which it has a \*tax loss, it cannot transfer any amount of the tax loss under Subdivision 170-A (which is about the transfer of tax losses within certain wholly-owned groups of companies).

### 195-15 Tax loss for year in which company becomes a PDF

- (1) This section applies if a company becomes a \*PDF during an income year and is still a PDF at the end of it.
- (2) Divide the income year into periods as follows:
  - (a) the **non-PDF period** is the period beginning at the start of the income year and ending when the company becomes a \*PDF;
  - (b) the **PDF period** is the rest of the income year.
- (3) For each period, work out whether the company has a taxable income or a \*tax loss (or both), treating each period as if it were an income year.
- (4) If the company has:
  - (a) a taxable income for the non-PDF period; and
  - (b) a \*tax loss for the PDF period;that tax loss is a tax loss of the company for the income year.

Note: The company can only deduct the tax loss while it is a PDF: see section 195-5.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 195-25

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- (5) If the company has a \*tax loss for the non-PDF period:
- (a) section 195-5 does *not* prevent the company from deducting its tax loss for the income year in a later income year; and
  - (b) section 195-10 does *not* prevent the company from transferring an amount of the tax loss under Subdivision 170-A (which is about the transfer of tax losses within certain wholly-owned groups of companies);
- to the extent that the tax loss does not exceed the tax loss for the non-PDF period.
- (6) These rules apply in addition to the other rules about how \*tax losses are applied or transferred.

The other rules start in Division 36 (which is about tax losses of earlier income years).

## **Working out a PDF's net capital gain and net capital loss**

### **195-25 Applying a PDF's net capital losses**

If a company is a \*PDF at the end of an income year for which it has a \*net capital loss, it can apply the loss in working out its \*net capital gain for a later income year only if it is a PDF throughout the last day of the later income year.

### **195-30 PDF cannot transfer net capital loss**

If a company is a \*PDF at the end of an income year for which it has a \*net capital loss, it cannot transfer any amount of the loss under Subdivision 170-B (which is about the transfer of net capital losses within certain wholly-owned groups of companies).

### **195-35 Net capital loss for year in which company becomes a PDF**

- (1) This section applies if a company becomes a \*PDF during an income year and is still a PDF at the end of it.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (2) Divide the income year into periods according to subsection 195-15(2) (about working out the company's tax loss for the income year).
- (3) For each period, work out whether the company has a \*net capital gain or a \*net capital loss (or both), treating each period as if it were an income year.
- (4) If the company has:
  - (a) a \*net capital gain for the non-PDF period; and
  - (b) a \*net capital loss for the PDF period;that loss is a net capital loss of the company for the income year.

Note: The company can only apply the loss while it is a PDF: see section 195-25.

- (5) If the company has a \*net capital loss for the non-PDF period:
  - (a) section 195-25 does *not* prevent the company from applying its \*net capital loss for the income year in working out its \*net capital gain for a later income year; and
  - (b) section 195-30 does *not* prevent the company from transferring an amount of its net capital loss for the income year under Subdivision 170-B (which is about the transfer of net capital losses within certain wholly-owned groups of companies);to the extent that its net capital loss for the income year does not exceed its net capital loss for the non-PDF period.
- (6) These rules apply in addition to the other rules about how \*net capital losses are applied or transferred.

The other rules start in Division 102 (about net capital gains and losses).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Section 195-60

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## Subdivision 195-B—Limited partnerships

### Guide to Subdivision 195-B

#### 195-60 What this Subdivision is about

This Subdivision contains rules about the income tax treatment of limited partnerships that become, or cease to be, venture capital limited partnerships, early stage venture capital limited partnerships, Australian venture capital funds of funds or venture capital management partnerships.

It also allows the Commissioner to determine how to take account of limited partnerships having income years of less than 12 months when they become, or cease to be, venture capital limited partnerships, early stage venture capital limited partnerships, Australian venture capital funds of funds or venture capital management partnerships.

#### Table of sections

##### Operative provisions

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|--------|--|
| 195-65 | Tax losses cannot be transferred to a VCLP, an ESVCLP, an AFOF or a VCMP                     |
| 195-70 | Previous tax losses can be deducted after ceasing to be a VCLP, an ESVCLP, an AFOF or a VCMP |
| 195-75 | Determinations to take account of income years of less than 12 months                        |

#### Operative provisions

##### 195-65 Tax losses cannot be transferred to a VCLP, an ESVCLP, an AFOF or a VCMP

A \*limited partnership's \*tax loss for a \*loss year cannot be deducted in a later income year during which the partnership is a \*VCLP, an \*ESVCLP, an \*AFOF or a \*VCMP.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

**195-70 Previous tax losses can be deducted after ceasing to be a VCLP, an ESVCLP, an AFOF or a VCMP**

This Subdivision does not prevent a \*limited partnership that has ceased to be a \*VCLP, an \*ESVCLP, an \*AFOF or a \*VCMP from deducting, in an income year, a \*tax loss for a \*loss year that occurred before the partnership was a VCLP, ESVCLP, AFOF or VCMP.

**195-75 Determinations to take account of income years of less than 12 months**

- (1) The Commissioner may, by legislative instrument, make a determination modifying the operation of one or more provisions of this Act in relation to limited partnerships whose accounting periods commence or end under section 18A of the *Income Tax Assessment Act 1936*.
- (2) A determination can only be made in order to take account of the fact that such accounting periods are of less than 12 months' duration.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Division 197—Tainted share capital accounts**

### **Table of Subdivisions**

#### Guide to Division 197

- 197-A What transfers into a company's share capital account does this Division apply to?
- 197-B Consequence of transfer: franking debit arises
- 197-C Consequence of transfer: tainting of share capital account

### **Guide to Division 197**

#### **197-1 What this Division is about**

This Division:

- (a) applies to certain amounts transferred to a company's share capital account (see Subdivision 197-A); and
- (b) provides for a franking debit to arise if such an amount is transferred to the share capital account (see Subdivision 197-B); and
- (c) provides for the tainting of the share capital account if such an amount is transferred, for how the account may be untainted, and for consequences that flow from untainting the account (see Subdivision 197-C).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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## **Subdivision 197-A—What transfers into a company’s share capital account does this Division apply to?**

### **Table of sections**

197-5	Division generally applies to an amount transferred to share capital account from another account
197-10	Exclusion for amounts that could be identified as share capital
197-15	Exclusion for amounts transferred under debt/equity swaps
197-20	Exclusion for amounts transferred leading to there being no shares with a par value—non-Corporations Act companies
197-25	Exclusion for transfers from option premium reserves
197-30	Exclusion for transfers made in connection with demutualisations of non-insurance etc. companies
197-35	Exclusion for transfers made in connection with demutualisations of insurance etc. companies
197-37	Exclusion for transfers made in connection with demutualisations of private health insurers
197-38	Exclusion for transfers connected with demutualisations of friendly society health or life insurers
197-40	Exclusion for post-demutualisation transfers relating to life insurance companies
197-42	Exclusion for exploration credits

### **197-5 Division generally applies to an amount transferred to share capital account from another account**

- (1) Subject to subsection (2), this Division applies to an amount (the ***transferred amount***) that is transferred to a company’s \*share capital account from another of the company’s accounts, if the company was an Australian resident immediately before the time of the transfer.

Note: If a company has 2 or more share capital accounts, those accounts are taken to be a single account (see subsection 975-300(2)).

- (2) The other provisions of this Subdivision may stop this Division from applying to some or all of the transferred amount. If those other provisions stop this Division from applying to only some of the transferred amount, this Division (other than this Subdivision) applies to the balance of the transferred amount as if only that

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Section 197-10

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balance of the amount had been transferred to the company's  
\*share capital account.

**197-10 Exclusion for amounts that could be identified as share capital**

This Division does not apply to the transferred amount if it could, at all times before the transfer, be identified in the books of the company as an amount of share capital.

**197-15 Exclusion for amounts transferred under debt/equity swaps**

- (1) Subject to subsection (2), this Division does not apply to the transferred amount if:
  - (a) the transfer is under an \*arrangement under which:
    - (i) a person discharges, releases or otherwise extinguishes the whole or a part of a debt that the company owes to the person; and
    - (ii) the discharge, release or extinguishment is in return for the company issuing \*shares (other than redeemable preference shares) in the company to the person; and
  - (b) the transfer is a credit to the \*share capital account that is made because of the issue of the shares in return for the discharge, release or extinguishment of the debt.
- (2) If the transferred amount exceeds the lesser of:
  - (a) the \*market value of the \*shares issued by the company; and
  - (b) so much of the debt as is discharged, released or extinguished in return for the shares;subsection (1) does not stop this Division from applying to the amount of the excess.

**197-20 Exclusion for amounts transferred leading to there being no shares with a par value—non-Corporations Act companies**

This Division does not apply to the transferred amount if:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



- (a) immediately before the transfer of the amount, the company was not incorporated under the *Corporations Act 2001*; and
- (b) the transfer is under, or in accordance with, an \*Australian law that requires or allows either or both of the following to become part of the company's \*share capital account:
  - (i) the company's share premium account;
  - (ii) the company's capital redemption reserve; and
- (c) the transfer is made as part of a process that leads to there being no \*shares in the company that have a par value; and
- (d) the amount is transferred from the company's share premium account or capital redemption reserve.

### **197-25 Exclusion for transfers from option premium reserves**

This Division does not apply to the transferred amount if:

- (a) it is transferred from an option premium reserve of the company; and
- (b) the transfer is because of the exercise of options to acquire \*shares in the company; and
- (c) premiums in respect of those options were credited to the option premium reserve.

### **197-30 Exclusion for transfers made in connection with demutualisations of non-insurance etc. companies**

- (1) Subject to subsection (2), this Division does not apply to the transferred amount if:
  - (a) the amount is transferred in connection with a demutualisation of the company; and
  - (b) Division 326 in Schedule 2H to the *Income Tax Assessment Act 1936* applies to the demutualisation; and
  - (c) the transfer occurs within the limitation period in relation to the demutualisation (see subsection 326-20(3) in that Schedule).
- (2) If the sum of:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) the transferred amount; and
- (b) any other amounts that were previously transferred to the company's \*share capital account, from another account of the company, in connection with the demutualisation;

exceeds the total capital contributions amount described in whichever of subsections (3) and (4) applies, subsection (1) does not stop this Division from applying to so much of the transferred amount as equals the lesser of the transferred amount and the amount of the excess.

Note: If there are several transfers of amounts to the company's share capital account in connection with the demutualisation, this section must be applied separately in relation to each transferred amount, in the order in which the transfers are made.

- (3) If the company was not formed by the merger of 2 or more mutual entities, the ***total capital contributions amount*** referred to in subsection (2) is the sum of all the capital amounts:
  - (a) that were contributed to the company by \*members of the company before its demutualisation; and
  - (b) in respect of which deductions are not allowable to the members; and
  - (c) that were not payments for goods or services provided by the company.
- (4) If the company was formed by the merger of 2 or more mutual entities, the ***total capital contributions amount*** referred to in subsection (2) is the sum of:
  - (a) all the capital amounts:
    - (i) that were contributed to the company, before its demutualisation, by persons who became \*members of the company at or after the time when the merger took place; and
    - (ii) in respect of which deductions are not allowable to those members; and
    - (iii) that were not payments for goods or services provided by the company; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) the \*market values, at the time of the merger, of the entities that merged to form the company, as determined by a qualified valuer.

**197-35 Exclusion for transfers made in connection with demutualisations of insurance etc. companies**

- (1) Subject to subsection (2), this Division does not apply to the transferred amount if:
  - (a) the amount is transferred in connection with the demutualisation of a company; and
  - (b) the demutualisation is implemented in accordance with a demutualisation method specified in Division 9AA of Part III of the *Income Tax Assessment Act 1936*; and
  - (c) the transfer occurs within the listing period in relation to the demutualisation (see subsection 121AE(6) of that Act); and
  - (d) the company (the **issuing company**) to whose \*share capital account the amount is transferred is:
    - (i) if the demutualisation method is the method specified in section 121AF or 121AG of the *Income Tax Assessment Act 1936*—the demutualising company; or
    - (ii) if the demutualisation method is the method specified in section 121AH, 121AI, 121AJ, 121AK or 121AL of the *Income Tax Assessment Act 1936*—the company issuing the ordinary shares referred to in that section.
- (2) If the sum of:
  - (a) the transferred amount; and
  - (b) all amounts that were previously transferred to the issuing company's \*share capital account, from another account of the company, in connection with the demutualisation; and
  - (c) all amounts that were previously transferred to the issuing company's retained profit account in connection with the demutualisation;exceeds the listing day company valuation amount (see subsection (3)), subsection (1) does not stop this Division from

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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applying to so much of the transferred amount as equals the lesser of the transferred amount and the amount of the excess.

Note: If there are several transfers of amounts to the issuing company's share capital account, this section must be applied separately in relation to each transferred amount, in the order in which the transfers are made.

- (3) The *listing day company valuation amount* has the same meaning as it has for the purposes of table 1 in section 121AS of the *Income Tax Assessment Act 1936*, as that table applies in relation to the demutualising company (see note 3 to that table).

**197-37 Exclusion for transfers made in connection with demutualisations of private health insurers**

- (1) Subject to subsection (2), this Division does not apply to the transferred amount if:
- (a) the amount is transferred in connection with a demutualisation of a company; and
  - (b) Division 315 (about demutualisations of private health insurers) applies to the demutualisation; and
  - (c) the company (the *issuing company*) to whose \*share capital account the amount is transferred is either:
    - (i) the demutualising health insurer; or
    - (ii) the company mentioned in subparagraph 315-85(1)(a)(iii) issuing shares that are assets covered by section 315-85 (*demutualisation assets*).
- (2) Subsection (1) does not stop this Division from applying to so much, if any, of the transferred amount as exceeds the sum of the amounts worked out under subsection (3) for each demutualisation asset that is a share issued:
- (a) by the issuing company under the demutualisation; and
  - (b) to an entity that is either:
    - (i) covered by section 315-90 (about participating policy holders); or

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (ii) the trustee of a trust covered by Subdivision 315-C (about the lost policy holders trust).
- (3) The amount worked out under this subsection for a share is:
  - (a) the \*market value of the share on the day it is issued; or
  - (b) if the share is in a company covered by subparagraph 315-85(1)(a)(iii) that owns other assets in addition to the shares in the demutualising health insurer—worked out using the method statement in subsection 315-210(2).

### **197-38 Exclusion for transfers connected with demutualisations of friendly society health or life insurers**

- (1) Subject to subsection (2), this Division does not apply to the transferred amount if:
  - (a) the amount is transferred in connection with a demutualisation of a company; and
  - (b) Division 316 (about demutualisations of friendly society health and life insurers) applies in relation to the demutualisation; and
  - (c) the company (the *issuing company*) to whose \*share capital account the amount is transferred is either:
    - (i) the \*friendly society described in that Division; or
    - (ii) the company that owns all the shares in the friendly society.
- (2) Subsection (1) does not stop this Division from applying to so much, if any, of the transferred amount as exceeds the sum of the \*cost bases of \*shares in the issuing company that:
  - (a) are demutualisation assets (see section 316-110); and
  - (b) are issued to an entity covered by section 316-115.

Note: Section 316-115 identifies entities connected directly or indirectly with the friendly society and affected by the special cost base rules in section 316-105.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (3) For the purposes of subsection (2), work out the \*cost base of a \*share on the day on which it is issued, taking account of section 316-105.

**197-40 Exclusion for post-demutualisation transfers relating to life insurance companies**

- (1) Subject to subsection (2), this Division does not apply to the transferred amount if:
- (a) a \*life insurance company (the *demutualised company*) has demutualised; and
  - (b) the demutualisation was implemented in accordance with a demutualisation method specified in Division 9AA of Part III of the *Income Tax Assessment Act 1936*; and
  - (c) the amount is transferred after the end of the listing period in relation to the demutualisation (see subsection 121AE(6) of that Act); and
  - (d) the company transferring the amount to its \*share capital account is either:
    - (i) the demutualised company (whichever demutualisation method was used); or
    - (ii) if the demutualisation method was the method specified in section 121AH, 121AI, 121AJ, 121AK or 121AL of the *Income Tax Assessment Act 1936*—the company (the *issuing company*) that issued the ordinary shares referred to in that section; and
  - (e) if subparagraph (d)(i) applies—the following conditions are satisfied in relation to the transferred amount:
    - (i) the amount is transferred from an account of the demutualised company consisting of shareholders' capital (within the meaning of the *Life Insurance Act 1995*) in relation to a statutory fund (within the meaning of that Act);
    - (ii) the amount was part of such an account at the time of the demutualisation; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (f) if subparagraph (d)(ii) applies—the amount is transferred from a capital reserve created at the time of or in connection with the demutualisation.
- (2) If the sum of:
- (a) the transferred amount; and
  - (b) all amounts that were previously transferred to the demutualised company's \*share capital account, from another account of the demutualised company, as described in subsection (1); and
  - (c) if the demutualisation method was the method specified in section 121AH, 121AI, 121AJ, 121AK or 121AL of the *Income Tax Assessment Act 1936*—all amounts that were previously transferred to the issuing company's share capital account, from another account of the issuing company, as described in subsection (1); and
  - (d) all amounts that were previously transferred, in connection with the demutualisation, to the share capital account of the issuing company (within the meaning of section 197-35) as described in subsection 197-35(1), or to its retained profit account as described in paragraph 197-35(2)(c);
- exceeds the listing day company valuation amount (see subsection (3)), subsection (1) does not stop this Division from applying to so much of the transferred amount as equals the lesser of the transferred amount and the amount of the excess.
- Note: If there are several transfers of amounts to the share capital account of the demutualised company or the issuing company, this section must be applied separately in relation to each transferred amount, in the order in which the transfers are made.
- (3) The **listing day company valuation amount** has the same meaning as it has for the purposes of table 1 in section 121AS of the *Income Tax Assessment Act 1936*, as that table applies in relation to the demutualised company (see note 3 to that table).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**197-42 Exclusion for exploration credits**

This Division does not apply to the transferred amount if:

- (a) the company transferring the amount is a \*greenfields minerals explorer; and
- (b) the amount is transferred in connection with the creation of \*exploration credits.

**Subdivision 197-B—Consequence of transfer: franking debit arises**

**Table of sections**

197-45 A franking debit arises in relation to the transfer

**197-45 A franking debit arises in relation to the transfer**

- (1) A \*franking debit arises in a company's \*franking account if an amount (the *transferred amount*) to which this Division applies is transferred to the company's \*share capital account. The debit arises immediately before the end of the \*franking period in which the transfer of the amount occurs.
- (2) The amount of the \*franking debit is calculated in accordance with the formula:

$$\text{Transferred amount} \times \frac{\text{Applicable franking percentage}}{\text{Applicable gross-up rate}}$$

where:

*applicable franking percentage* means:

- (a) if, before the debit arises, the \*benchmark franking percentage for the \*franking period in which the transfer of the amount occurs has already been set by section 203-30— that percentage; or
- (b) otherwise—100%.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.



*applicable gross-up rate* means the company's \*corporate tax gross-up rate for the income year in which the franking debit arises.

### **Subdivision 197-C—Consequence of transfer: tainting of share capital account**

#### **Table of sections**

197-50	The share capital account becomes tainted (if it is not already tainted)
197-55	Choosing to untaint a tainted share capital account
197-60	Choosing to untaint—liability to untainting tax
197-65	Choosing to untaint—further franking debits may arise
197-70	Due date for payment of untainting tax
197-75	General interest charge for late payment of untainting tax
197-80	Notice of liability to pay untainting tax
197-85	Evidentiary effect of notice of liability to pay untainting tax

#### **197-50 The share capital account becomes tainted (if it is not already tainted)**

- (1) A company's \*share capital account becomes *tainted* when an amount to which this Division applies is transferred to the account, if, at the time of the transfer, the account is not already tainted (because of the application of this section in relation to a previous transfer).

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

- (2) The \*share capital account remains *tainted* until the company chooses to untaint the account (see section 197-55).

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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Note: If, after a choice to untaint is made, the company's share capital account becomes tainted again, the account remains tainted until a fresh choice to untaint is made.

- (3) The **tainting amount**, for a company's \*share capital account that is \*tainted at a particular time, means the sum of:
- (a) the amount transferred to the company's share capital account that most recently caused the account to become tainted; and
  - (b) any other amounts to which this Division applies that have been transferred to the company's share capital account since the transfer referred to in paragraph (a) and before the particular time.

**197-55 Choosing to untaint a tainted share capital account**

- (1) A company with a \*share capital account that is \*tainted may make a choice in the \*approved form given to the Commissioner to untaint the account.
- (2) The choice can be made at any time, but cannot be revoked.

Note: The choice has no effect in relation to a subsequent tainting of the share capital account that occurs after the choice is made.

**197-60 Choosing to untaint—liability to untainting tax**

*Definitions*

- (1) For the purpose of this section:
  - (a) a company whose \*share capital account is \*tainted is a **company with only lower tax members in relation to the tainting period** if, throughout the tainting period, all \*members of the company were covered by one, or a combination of 2 or more, of the following subparagraphs:
    - (i) other companies;
    - (ii) \*complying superannuation entities;
    - (iii) foreign residents; and

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

- (b) a company whose share capital account is tainted is a **company with higher tax members in relation to the tainting period** if it is not a company with only lower tax members in relation to the tainting period.

For this purpose, the **tainting period** is the period beginning when the share capital account most recently became tainted and ending when the company chooses to untaint the account.

*Liability to untainting tax*

- (2) A company that chooses to untaint its \*share capital account is liable to pay tax, known as **untainting tax**, equal to the amount calculated in accordance with the formula:

$$\text{Applicable tax amount} - \left( \begin{array}{l} \text{Section 197-45} \\ \text{franking debits} \end{array} + \begin{array}{l} \text{Section 197-65} \\ \text{franking debits} \end{array} \right)$$

where:

**applicable tax amount** has the meaning given by subsection (3).

**section 197-45 franking debits** means the total \*franking debits arising under section 197-45 because of the transfer of the amounts that made up the \*tainting amount at the time of the choice.

**section 197-65 franking debits** means the total (if any) \*franking debits arising under section 197-65 because of the choice to untaint.

Note: The payment of untainting tax does not give rise to a franking credit.

- (3) In subsection (2), the **applicable tax amount** is the amount calculated in accordance with the formula:

$$\left( \begin{array}{l} \text{*Tainting amount} \\ \text{at time of choice} \\ \text{to untaint} \end{array} + \begin{array}{l} \text{Notional} \\ \text{franking amount} \end{array} \right) \times \text{Applicable tax rate}$$

where:

**applicable tax rate** means:

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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- (a) for a company with only lower tax members in relation to the tainting period—the company’s \*corporate tax rate for imputation purposes for the income year in which the choice is made; or
- (b) for a company with higher tax members in relation to the tainting period—the sum of:
  - (i) the maximum rate specified in column 2 of the table in Part I of Schedule 7 to the *Income Tax Rates Act 1986* that applies for the income year in which the choice is made; and
  - (ii) 3%.

Note: The 3% referred to in subparagraph (b)(ii) relates to rates of Medicare levy and surcharge.

**notional franking amount** has the meaning given by subsection (4).

- (4) In subsection (3), the **notional franking amount** is the amount calculated in accordance with the formula:

$$\text{*Tainting amount at time of choice to untaint} \times \frac{1}{\text{Applicable gross-up rate}}$$

where:

**applicable gross-up rate** means the company’s \*corporate tax gross-up rate for the income year in which the choice is made.

*Temporary budget repair levy*

- (5) If the income year in which the choice is made corresponds to a temporary budget repair levy year (within the meaning of section 4-11 of the *Income Tax (Transitional Provisions) Act 1997*), increase the applicable tax rate calculated under subsection (3) by 2 percentage points.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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**197-65 Choosing to untaint—further franking debits may arise**

*When this section applies*

- (1) This section applies if:
- (a) a company chooses to untaint its \*share capital account; and
  - (b) the applicable franking percentage (within the meaning of subsection (3)) is higher than the percentage that was the \*benchmark franking percentage in relation to the \*franking period in which the transfer of an amount (the **transferred amount**) that is, or is part of, the \*tainting amount occurred.

Note: If paragraph (b) is satisfied in relation to 2 or more amounts, this section is to be applied separately in relation to each of those amounts (so a separate franking debit will arise in relation to each of those amounts).

*Franking debit arises in relation to making the choice*

- (2) A \*franking debit arises in the company's \*franking account in relation to the transferred amount. The debit arises immediately before the end of the \*franking period in which the choice to untaint is made.
- (3) The amount of the \*franking debit is the amount by which the amount calculated in accordance with the following formula exceeds the amount of the franking debit that arose under section 197-45 in relation to the transferred amount:

$$\text{Transferred amount} \times \frac{\text{Applicable franking percentage}}{\text{Applicable gross-up rate}}$$

where:

**applicable franking percentage** means:

- (a) if, before the debit arises, the \*benchmark franking percentage for the \*franking period in which the choice to untaint is made has already been set by section 203-30—that percentage; or
- (b) otherwise—100%.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

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***applicable gross-up rate*** means the company's \*corporate tax gross-up rate for the income year in which the franking debit arises.

**197-70 Due date for payment of untainting tax**

\*Untainting tax is due and payable at the end of 21 days after the end of the \*franking period in which the choice to untaint was made.

Note: For provisions about collection and recovery of untainting tax, see Part 4-15 in Schedule 1 to the *Taxation Administration Act 1953*.

**197-75 General interest charge for late payment of untainting tax**

If any of the \*untainting tax that a company is liable to pay remains unpaid 60 days after the day by which it is due to be paid, the company is liable to pay the \*general interest charge on the unpaid amount for each day in the period that:

- (a) started at the beginning of the 60th day after the day by which the untainting tax was due to be paid; and
- (b) ends at the end of the last day on which, at the end of the day, any of the following remains unpaid:
  - (i) the untainting tax;
  - (ii) general interest charge on any of the untainting tax.

**197-80 Notice of liability to pay untainting tax**

- (1) The Commissioner may give a company, by post or otherwise, a notice specifying:
  - (a) the amount of any \*untainting tax that the Commissioner has ascertained is payable by the company; and
  - (b) the day on which that tax became or will become due and payable.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

*Effect of notice on liability etc.*

- (2) Subject to section 197-85, the amount of the liability of a company to \*untainting tax, and the due date for payment of the tax, are not dependent on, or in any way affected by, the giving of a notice.

*Amendment of notice*

- (3) The Commissioner may at any time amend a notice. An amended notice is a notice for the purposes of this section.

*Inconsistency between notices*

- (4) If there is an inconsistency between notices that relate to the same subject matter, the later notice prevails to the extent of the inconsistency.

*Objections*

- (5) A company that is dissatisfied with a notice made in relation to the company may object against the notice in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

**197-85 Evidentiary effect of notice of liability to pay untainting tax**

- (1) The production of:
- (a) a notice given under section 197-80; or
  - (b) a document that is signed by the Commissioner and appears to be a copy of such a notice;
- is conclusive evidence that:
- (c) the notice was duly given; and
  - (d) the amount of \*untainting tax specified in the notice became due and payable by the company to which it was given on the day specified in the notice.
- (2) Subsection (1) does not apply in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the review.

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\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.