



Film Licensed Investment Company Act 2005

No. 57, 2005

**An Act to provide for a film licensed investment
company scheme, and for related purposes**

Note: An electronic version of this Act is available in SCALEplus
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**An Act to provide for a film licensed investment
company scheme, and for related purposes**

[Assented to 26 June 2005]

The Parliament of Australia enacts:

Film Licensed Investment Company Act 2005 No. 57, 2005 1

Part 1—Preliminary

1 Short title

This Act may be cited as the *Film Licensed Investment Company Act 2005*.

2 Commencement

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

3 Overview of Act

- (1) This Act sets up a scheme to encourage investment in qualifying Australian films.
- (2) The Act provides for a company to apply for a concessional capital licence. While the licence is in force, the company is able to raise up to \$10 million in each of the 2005-06 and 2006-07 financial years for investment in provisionally certified films.
- (3) The shareholders who purchase shares in the company during the licence period are able to obtain a 100% tax deduction for that investment.
- (4) The scheme begins on the day that the Minister grants the licence and ends on 30 June 2009 (by which time all films must have been completed). The concessional capital licence is in force until 30 June 2007. After the licence period ends the company is able to raise further capital, but those shares will not attract the 100% tax deduction.

Note: For *qualifying Australian film* see subsection 6(1).

4 Objects of the scheme

The objects of the scheme are as follows:

- (a) to encourage the production of qualifying Australian films which portray Australian perspectives and Australia's cultural diversity;
- (b) to encourage the production of qualifying Australian films which are of a high standard and are likely to be commercially successful;
- (c) to support and promote the ongoing development of the Australian film industry through encouraging the use of Australia's creative resources and industry expertise;
- (d) to encourage private sector investment in the Australian film industry;
- (e) to ensure that the level of the Commonwealth's assistance to the Australian film industry is quantifiable, accountable and transparent.

5 Extraterritorial operation

Subparagraph 25(a)(v), section 27, Part 3 and Schedule 1 extend to acts, omissions, matters and things outside Australia, whether or not in a foreign country.

6 Definitions

- (1) In this Act:

ADI (short for authorised deposit-taking institution) means a corporation that is an ADI for the purposes of the *Banking Act 1959*.

allowable deduction percentage has the meaning given by section 37.

Application rules means the rules made by the Minister under section 8.

concessional capital means money paid to the FLIC by a person for the issue, during the licence period, of shares to that person.

concessional capital licence means the licence granted by the Minister under section 14.

film licensed investment company means the company that has been granted the concessional capital licence under section 14 (whether or not the licence has stopped being in force).

FLIC means the film licensed investment company.

invested in a film has the meaning given by subsection (2).

licence period means the period described in subsection 19(3).

non-concessional capital means capital raised by the FLIC after the end of the licence period.

period of the scheme means the period starting on the day the Minister grants the licence under the scheme and ending on 30 June 2009.

provisionally certified film means a film that has been issued with a provisional certificate under section 124ZAB of the *Income Tax Assessment Act 1936*.

qualifying Australian film has the same meaning as it has in Division 10BA of Part III of the *Income Tax Assessment Act 1936*.

Secretary means the Secretary of the Department.

Selection Advisory Panel means a body established under the Application rules to advise the Minister in respect of applications for the concessional capital licence.

unacceptable level of foreign ownership has the meaning given by subsection 27(2).

unacceptable level of individual ownership has the meaning given by subsection 27(3).

- (2) For the purposes of this Act, money is ***invested in a film*** if it is:
- (a) spent by the FLIC as a contribution to the cost of producing the film for the purpose of becoming the first owner, or one of the first owners, of the copyright in the film when the copyright comes into existence; or
 - (b) if the FLIC has contributed to the cost of production of a film for the purpose set out in paragraph (a)—spent by the FLIC

as a contribution to the cost of marketing and distributing the film.

Part 2—The scheme

Division 1—Overview

7 Overview of Part

- (1) This Part sets out the scheme. Division 2 provides for the Minister to make rules that apply to the application process and to determine criteria and procedures for making decisions about granting the licence.
- (2) Division 3 sets out rules for the application process.
- (3) Division 4 sets out the process of granting the licence.
- (4) Division 5 sets out the amount of concessional capital that the FLIC is licensed to raise.
- (5) Division 6 defines the licence period.
- (6) Division 7 sets out the conditions that attach to the scheme (and section 21 allows the Minister to determine further conditions of the scheme by legislative instrument).
- (7) Division 8 sets out how a breach of a condition is to be dealt with.
- (8) Division 9 deals with information and reporting requirements.
- (9) Division 10 deals with a purported transfer of the licence and the allowable deduction percentage.

Division 2—Minister to make certain determinations concerning the application process and decision-making criteria

8 Application rules

The Minister must, by legislative instrument, determine rules concerning the application process under the scheme. The rules may provide for all or any of the following matters:

- (a) the method of calling for applications;
- (b) the closing date for a round of applications;
- (c) the form of the application and the documentation that must accompany an application;
- (d) the establishing of a Selection Advisory Panel to advise the Minister in respect of the applications including the membership of the panel and tenure of panel members;
- (e) the rules governing the operation of the Selection Advisory Panel;
- (f) any other matter relevant to the application process under the scheme.

9 Minister must determine decision-making criteria and procedures

- (1) The Minister must, by legislative instrument, determine criteria to be applied and procedures to be complied with by the Minister in deciding whether, and to whom, to grant the concessional capital licence under the scheme.
- (2) The Minister must also determine the weight to be given to each criterion.

Division 3—The application process

10 Rounds of applications

- (1) The Minister may call for applications for the concessional capital licence under the scheme from interested persons.
- (2) If, in the first round of applications, the Minister does not grant the licence, the Minister may call for one or more further rounds of applications.

11 Applications

- (1) A company may apply for the licence to raise concessional capital under the scheme.
- (2) The application must:
 - (a) be in the form specified in the Application rules; and
 - (b) provide such information as is required by the Application rules; and
 - (c) be given to the Minister.
- (3) A person may apply under this section for the licence if:
 - (a) the person has applied to register a company under the *Corporations Act 2001*; and
 - (b) the company will, if registered, meet the conditions set out in section 13.

12 Further information

- (1) The Minister may ask the applicant, in writing, to give to the Minister, within the period specified in the request, further information about the application.
- (2) The Minister may refuse to consider the application unless the applicant provides the information within the period specified in the request.

Division 4—Grant of licence

13 Conditions on grant of licence

A company may only be granted the concessional capital licence if all of the following conditions are met:

- (a) the company is registered under the *Corporations Act 2001*;
- (b) the company has not started business or exercised any borrowing power;
- (c) the company's central management and control is ordinarily exercised in a place in Australia;
- (d) the chair of the company (however described) and all of the directors of the company are Australian citizens;
- (e) the company's constitution provides that all of the shares in the company are to be fully paid and of the same class.

14 Grant of concessional capital licence

Subject to this Part, the Minister may grant a company the licence to raise concessional capital.

15 Form of licence

The concessional capital licence under the scheme must:

- (a) be in writing; and
- (b) set out the effect of section 18; and
- (c) state the conditions of the scheme to which the FLIC is subject; and
- (d) state that the conditions of the scheme determined by the Minister under section 21 may be altered at any time after consultation with the FLIC.

16 Minister is to have regard to recommendations of Selection Advisory Panel

The Minister must have regard to the recommendations of the Selection Advisory Panel in deciding whether to grant the

Section 17

concessional capital licence to a particular applicant under the scheme.

Note: For *Selection Advisory Panel* see subsection 6(1).

17 Notice of refusal to grant licence

- (1) If the Minister refuses to grant an application for the concessional capital licence, the Minister must notify the applicant in writing of the refusal.
- (2) The notice must include the reasons for the decision.

**Division 5—Amount of concessional capital FLIC is
licensed to raise**

18 Amount of concessional capital FLIC is licensed to raise

- (1) The maximum amount of concessional capital that the FLIC is licensed to raise in the financial year starting on 1 July 2005 is \$10 million.
- (2) The maximum amount of concessional capital that the FLIC is licensed to raise in the financial year starting on 1 July 2006 is \$10 million.

Division 6—Licence period

19 Licence period

- (1) The concessional capital licence comes into force on the day on which it is granted.
- (2) The concessional capital licence stops being in force:
 - (a) if the licence is revoked—on the day specified by the Minister under section 33 as the day on which the revocation takes effect; or
 - (b) otherwise—on 30 June 2007.
- (3) The *licence period* is the period during which the licence is in force.

Division 7—Conditions of scheme

20 General

- (1) The conditions of the scheme are set out in:
 - (a) sections 22 to 28; and
 - (b) a determination made under section 21.
- (2) The conditions apply for the period of the scheme.

Note: The scheme ends on 30 June 2009.
- (3) The conditions do not limit the operation of the *Corporations Act 2001* in relation to the FLIC.

21 Conditions in a legislative instrument

- (1) The Minister may, by legislative instrument, determine conditions that are to apply to the FLIC under the scheme.
- (2) The Minister may revoke or vary these conditions (including adding new conditions) at any time after consulting the FLIC.

22 Fundraising conditions

The FLIC must comply with the following conditions as to raising capital:

- (a) the FLIC must raise \$5 million of concessional capital during the period of 12 months starting on the day on which the licence is granted;
- (b) the FLIC must not, in a financial year referred to in section 18, raise more than the amount of concessional capital it is licensed to raise under section 18 for that financial year;
- (c) the FLIC must not issue debentures or convertible notes;
- (d) the FLIC must not borrow money during the licence period except during the financial year starting on 1 July 2005 and then only for the short-term purpose of meeting the costs of its administrative expenses;

- (e) the FLIC must not raise non-concessional capital before 1 July 2007.

23 Investment conditions

The FLIC must comply with the following conditions as to investment of capital raised under the scheme:

- (a) the FLIC must invest its concessional capital (less the allowable deduction percentage) in 2 or more provisionally certified films on or before 30 June 2008;
- (b) the FLIC must invest its non-concessional capital in 2 or more provisionally certified films (whether or not those films are the same films as those referred to in paragraph (a)) on or before 30 June 2008;
- (c) the FLIC must not start the investment referred to in paragraphs (a) and (b) before:
 - (i) the FLIC has raised \$5 million of concessional capital; or
 - (ii) a period of 12 months has elapsed since the licence was granted;
- (d) the FLIC must not invest more than half as much capital (whether concessional capital or non-concessional capital) as a contribution to marketing and distributing a film as it spends as a contribution to the cost of producing that film.

Note 1: The Minister determines the FLIC's allowable deduction percentage under section 37.

Note 2: For *provisionally certified film* see subsection 6(1).

24 Conditions relating to returns to shareholders

- (1) The FLIC must comply with the following conditions as to distributions to shareholders:
 - (a) returns attributable to capital (whether concessional or non-concessional capital) invested by the FLIC in a provisionally certified film must be distributed to shareholders;
 - (b) any distribution to shareholders must be in equal proportion to the number of shares held by them.

- (2) Despite paragraph (1)(a), returns described in that paragraph may be invested in an account with an ADI for a reasonable period pending a distribution to shareholders.

25 Film conditions

The FLIC must comply with the following conditions in respect of a film it invests in under the scheme:

- (a) the film must not be developed or produced by a person who is:
- (i) the holder of a licence allocated by the Australian Communications and Media Authority under the *Broadcasting Services Act 1992*; or
 - (ii) the provider of a broadcasting service in accordance with a class licence determined by the Australian Communications and Media Authority under section 117 of the *Broadcasting Services Act 1992*; or
 - (iii) the Australian Broadcasting Corporation; or
 - (iv) the Special Broadcasting Service; or
 - (v) an associate of one of the persons mentioned in subparagraph (i) or (ii);
- (b) the film must receive a final certificate under section 124ZAC of the *Income Tax Assessment Act 1936* on or before 30 June 2009.

Note: For *associate* (and for other definitions relevant to the definition of *associate*) see Schedule 1.

26 Preconditions and conditions in the Minister's determination under section 21

The FLIC must:

- (a) continue to comply with the conditions on grant of licence set out in paragraphs 13(a), (c), (d) and (e); and
- (b) comply with the conditions set out in a determination made under section 21.

27 Ownership condition

- (1) The FLIC must not have an unacceptable level of foreign ownership or an unacceptable level of individual ownership.
- (2) For the purposes of this Act, the FLIC has an *unacceptable level of foreign ownership* if a group of foreign persons hold, in total, a particular stake in the FLIC of more than 33%.
- (3) For the purposes of this Act, the FLIC has an *unacceptable level of individual ownership* if a person holds a particular stake in the FLIC of more than 33%.
- (4) Schedule 1 sets out definitions of expressions used in this section.

Note 1: The limits on the ownership of the FLIC relate to a person's *stake* in the FLIC.

Note 2: For *stake* see Schedule 1.

28 Other conditions

The FLIC must comply with the following conditions:

- (a) the FLIC must not purport to transfer the licence to another person;
- (b) the FLIC must comply with the reporting requirements set out in a determination made under section 35 and with any request for further information made under subsection 35(4);
- (c) the FLIC must notify each shareholder in writing of any decision taken by the Minister in relation to the FLIC under section 32 in respect of a breach of a condition;
- (d) the FLIC must keep concessional and non-concessional capital separate and for that purpose must maintain separate accounts with an ADI for its concessional capital and non-concessional capital.

Division 8—Breach of conditions

29 Minister to notify FLIC of suspected breach of conditions

If the Minister is of the opinion that there may be grounds for deciding that the FLIC is in breach of a condition of the scheme, the Minister must:

- (a) give the FLIC written notice of the Minister's opinion specifying the reasons for the opinion; and
- (b) invite the FLIC to make a written submission to the Minister within 28 days.

Note: The conditions of the scheme are set out in sections 22 to 28 and a determination made under section 21.

30 Minister may seek information

The Minister may ask the FLIC, in writing, to give to the Minister, within the period specified in the request, information for the purposes of making a decision under section 32.

31 Minister must consider FLIC's submission and information

In making a decision under section 32 in respect of the FLIC, the Minister must have regard to the matters raised in the FLIC's submission (if any) and any information received by the Minister under section 30.

32 Powers of the Minister in relation to breaches of conditions

- (1) If the Minister is satisfied that the FLIC has breached a condition of the scheme the Minister may decide:
 - (a) not to take any action in respect of the breach (other than to take the breach into account in determining a course of action in respect of any further breaches of conditions by the FLIC);
or
 - (b) to take action under the following subsections.

Part 2 The scheme

Division 8 Breach of conditions

Section 32

Note: A decision of the Minister under this section is a reviewable decision (see section 42).

(2) The Minister may take any or all of the following actions in respect of the breach:

- (a) give the FLIC written notice of a day by which the breach of condition must be remedied;
- (b) if the breach occurred during the licence period—revoke the licence;
- (c) decide to remove the concessional status of shares that were issued to shareholders by the FLIC during the licence period.

Note: Section 375-865 of the *Income Tax Assessment Act 1997* provides that shareholders whose shares are affected by a decision under this paragraph lose their entitlement to a deduction for the shares.

(3) If the FLIC has been notified of a day under paragraph (2)(a) and does not remedy the breach of condition by that day, the Minister may make such decision under subsection (1) as the Minister thinks appropriate.

(4) If the Minister, in respect of a breach of condition by the FLIC:

- (a) makes a decision under paragraph 32(1)(a); or
- (b) revokes the FLIC's licence; or
- (c) decides to remove the concessional status of shares in the FLIC;

the Minister must, within 28 days of making the decision, notify the Commissioner of Taxation in writing of the decision.

(5) The Minister must:

- (a) give written notice of a decision of the Minister under this section to the FLIC; and
- (b) include reasons for the decision in the notice.

Note: The FLIC is required as a condition of the scheme to notify each of its shareholders if the Minister makes a decision under this section in respect of a breach by the FLIC of a condition (see paragraph 28(c)).

33 Revocation of licence

- (1) If the Minister decides to revoke the FLIC's licence, the notice given under subsection 32(5) must specify the day on which the revocation takes effect.
- (2) The day specified by the Minister must be no earlier than the seventh day after the day on which the Minister makes a decision under section 32 to revoke the licence.
- (3) The revocation of the licence takes effect on the day specified by the Minister.
- (4) If:
 - (a) the Minister decides to revoke the FLIC's licence under section 32; and
 - (b) the FLIC has, at the day of the revocation, raised an amount of concessional capital;the revocation of the licence does not of itself remove the concessional status of shares issued by the FLIC before the revocation.

34 FLIC must invest in provisionally certified films within 6 months if licence revoked

- (1) If the Minister revokes the FLIC's licence under section 32 but does not decide to remove the concessional status of the shares in the FLIC, the FLIC must ensure that the concessional capital is invested in provisionally certified films within 6 months from the day on which the revocation of the licence took effect.
- (2) If the Minister is of the opinion that there may be grounds for deciding that the FLIC has not complied with subsection (1), the Minister may ask the FLIC, in writing, to give the Minister, within the period specified in the request, information for the purposes of making a decision under subsection (4).
- (3) In making a decision under subsection (4) in respect of the FLIC, the Minister must have regard to the matters raised in the information received by the Minister under subsection (2).

Part 2 The scheme

Division 8 Breach of conditions

Section 34

- (4) If the Minister is satisfied that the FLIC has not complied with subsection (1), the Minister may decide to remove the concessional status of shares that were issued to shareholders by the FLIC during the licence period.

Note 1: A decision of the Minister under this subsection is a reviewable decision (see section 42).

Note 2: Section 375-865 of the *Income Tax Assessment Act 1997* provides that shareholders whose shares are affected by a decision under this subsection lose their entitlement to a deduction for the shares.

- (5) The Minister must:
- (a) give written notice of a decision of the Minister under subsection (4) to the FLIC; and
 - (b) if the Minister decides to remove the concessional status of the shares—include reasons for the decision in the notice.
- (6) If the Minister decides under this section to remove the concessional status of shares the Minister must, within 28 days of doing so, notify the Commissioner of Taxation of that decision.

Division 9—Information and reporting requirements

35 Reporting requirements

- (1) For the purposes of:
 - (a) monitoring compliance with the Act; and
 - (b) evaluating the scheme;the Minister may, by legislative instrument, determine reporting requirements that the FLIC must comply with.
- (2) Subject to subsection (3), the Minister may only require the FLIC to give a report on 30 June 2006 and at 6 monthly intervals after that.
- (3) Reporting requirements determined under subsection (1) for the purpose of monitoring compliance with section 34 may require the FLIC to give a report to the Minister within 6 months of the date of the revocation of the licence.
- (4) The Minister may ask the FLIC, in writing, to give to the Minister, within the period specified in the request, further information concerning any report made by the FLIC.

36 Provision of information to the Commissioner of Taxation

- (1) The Secretary must advise the Commissioner of Taxation as soon as possible after the end of the financial years starting on 1 July 2005 and 1 July 2006 of the following information in respect of the FLIC:
 - (a) the name and registered address of the FLIC;
 - (b) the details of any breach of conditions by the FLIC during the year;
 - (c) the details of a decision taken by the Minister under section 32 in respect of the breach;
 - (d) all other matters that:
 - (i) the Secretary and the Commissioner of Taxation agree are to be provided; and

Part 2 The scheme

Division 9 Information and reporting requirements

Section 36

- (ii) are necessary to the administration of Subdivision 375-H of the *Income Tax Assessment Act 1997*.
- (2) The Secretary must advise the Commissioner of Taxation as soon as possible after the end of the financial years starting on 1 July 2005 and 1 July 2006 of the following information in respect of the FLIC:
 - (a) the number of shares issued during the year by the FLIC; and
 - (b) the names and addresses of the shareholders to whom the shares were issued and the amount paid by each shareholder for the shares.
- (3) The Secretary's advice must be in writing.

Division 10—Other requirements

37 Minister may determine allowable percentage for administrative costs

- (1) The Minister may, in writing, determine the FLIC's allowable deduction percentage.
- (2) The FLIC's allowable deduction percentage is a percentage of the concessional capital raised by the FLIC that may be used by the FLIC to meet the costs of its administration.
- (3) The Minister may, after consultation with the FLIC, amend a determination under subsection (1) to increase the allowable deduction percentage.

38 Transfer of licence void

The purported transfer of the licence is void.

Part 3—Offences concerning ownership restrictions

39 Meaning of terms used in this Part

Schedule 1 sets out definitions of expressions used in this Part.

40 Acquisitions of shares

A person commits an offence if:

- (a) either:
 - (i) the person acquires shares in a company; or
 - (ii) the person, and one or more other persons under an arrangement, acquire shares in a company; and
- (b) the acquisition has the result, in relation to the FLIC, that:
 - (i) an unacceptable foreign ownership situation comes into existence in relation to the FLIC; or
 - (ii) if an unacceptable foreign ownership situation already exists in relation to the FLIC because there is a group of foreign persons who hold, in total, a particular type of stake in the FLIC of more than 33%—there is an increase in the total of any type of stake held by any group of foreign persons in the FLIC; or
 - (iii) an unacceptable individual ownership situation comes into existence in relation to the FLIC; or
 - (iv) if an unacceptable individual ownership situation already exists in relation to the FLIC because there is one or more individuals who hold a particular type of stake in the FLIC of more than 33%—there is an increase in the type of stake held by any of those persons in the FLIC.

Penalty: 400 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

41 Anti-avoidance

- (1) If:
- (a) one or more persons enter into, begin to carry out or carry out a scheme; and
 - (b) the Minister has reasonable grounds to believe that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the restriction on ownership levels set out in section 27; and
 - (c) as a result of the scheme or a part of the scheme, a person (the *stakeholder*) increases the stakeholder's stake in the FLIC;
- the Minister may give the stakeholder a written direction to cease holding that stake within a reasonable time specified in the notice.
- (2) The Minister must include in the notice the reasons for the Minister's decision to give the notice.
- (3) A person commits an offence if:
- (a) the person has been given a direction under subsection (1); and
 - (b) the person engages in conduct; and
 - (c) the person's conduct breaches the direction.

Penalty: 400 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Part 4—General administrative matters of the scheme

42 Review of decisions

An application may be made to the Administrative Appeals Tribunal for review of a decision:

- (a) under paragraph 32(1)(a), not to take any action in respect of a breach (other than to take the breach into account in determining a course of action in respect of any further breaches of conditions); and
- (b) under paragraph 32(2)(a), to impose a day by which a breach of a condition must be remedied; and
- (c) under paragraph 32(2)(b), to revoke the licence; and
- (d) under paragraph 32(2)(c), to remove the concessional status of shares that were issued to shareholders by the FLIC during the licence period; and
- (e) under subsection 34(4), to remove the concessional status of shares that were issued to shareholders by the FLIC during the licence period.

43 Delegation

The Minister may, in writing, delegate to:

- (a) the Secretary of the Department; or
- (b) an SES employee, or acting SES employee, in the Department;

the Minister's powers under sections 12 and 30 and under subsections 34(2) and 35(4) to ask the FLIC for further information.

Schedule 1—Ownership definitions

Note: See section 27.

1 Object

The object of this Schedule is to define terms used in the conditions of the scheme set out in subparagraph 25(a)(v) (which deals with film making restrictions), section 27 (which deals with ownership restrictions) and in Part 3 (which sets out offences concerning ownership restrictions).

2 Definitions

In subparagraph 25(a)(v), section 27, Part 3 and in this Schedule:

acquisition includes an agreement to acquire, but does not include:

- (a) an acquisition by will or by devolution by operation of law;
or
- (b) an acquisition by way of enforcement of a loan security.

aggregate substantial interest, in relation to a trust estate, has the meaning given by clause 13.

agreement means any agreement, whether formal or informal and whether express or implied.

arrangement has the meaning given by clause 4.

associate has the meaning given by clause 5.

company means a body corporate.

constituent document, in relation to a company, means:

- (a) the memorandum and articles of association of the company;
or
- (b) any rules or other documents constituting the company or governing its activities.

direct control interest has the meaning given by clause 12.

Clause 2

director includes any person occupying the position of director of a company, by whatever name called.

discretionary trust means a trust where:

- (a) a person (who may include the trustee) is empowered (either unconditionally or on the fulfilment of a condition) to exercise any power of appointment or other discretion; and
- (b) the exercise of the power or discretion, or the failure to exercise the power or discretion, has the effect of determining, to any extent, either or both of the following:
 - (i) the identities of those who may benefit under the trust;
 - (ii) how beneficiaries are to benefit, as between themselves, under the trust.

foreign citizen means an individual who is not an Australian citizen.

foreign company means a company incorporated outside Australia.

foreign person means:

- (a) a foreign citizen not ordinarily resident in Australia; or
- (b) a company where:
 - (i) a foreign citizen not ordinarily resident in Australia; or
 - (ii) a foreign company;holds a particular type of stake in the company of more than 33%; or
- (c) a company where a group of 2 or more persons, each of whom is either:
 - (i) a foreign citizen not ordinarily resident in Australia; or
 - (ii) a foreign company;holds, in total, a particular type of stake in the company of more than 33%; or
- (d) the trustee of a trust estate in which a foreign citizen not ordinarily resident in Australia or a foreign company holds a substantial interest; or
- (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a foreign citizen not ordinarily resident in Australia or a foreign company, hold an aggregate substantial interest.

group includes:

- (a) one person alone; or
- (b) a number of persons, even if they are not in any way associated with each other or acting together.

increase, in relation to a stake in a company, includes an increase from a starting point of nil.

interest in a share has the meaning given by clause 8.

lending money includes providing non-equity finance where the provision of the finance may reasonably be regarded as equivalent to lending money.

loan security means a security held solely for the purposes of a moneylending agreement.

moneylending agreement means an agreement entered into in good faith in the ordinary course of carrying on a business of lending money, but does not include an agreement dealing with any matter unrelated to the carrying on of that business.

officer, in relation to a company, includes:

- (a) a director, secretary or employee of the company; or
- (b) a receiver and manager of any part of the undertaking of the company appointed under a power contained in any instrument; or
- (c) a liquidator of the company appointed in a voluntary winding-up.

ordinarily resident in Australia has the meaning given by clause 3.

ownership provisions means subparagraph 25(a)(v), section 27, Part 3 and this Schedule.

power to appoint a director of a company has a meaning affected by clause 6.

relative, in relation to a person, means:

- (a) the person's spouse; or

Clause 3

- (b) another person who, although not legally married to the person, lives with the person on a bona fide domestic basis as the husband or wife of the person; or
- (c) a parent or remoter lineal ancestor of the person; or
- (d) a son, daughter or remoter issue of the person; or
- (e) a brother or sister of the person.

scheme means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

share, in relation to a company, means a share in the share capital of the company, and includes:

- (a) stock into which any or all of the share capital of the company has been converted; or
- (b) an interest in such a share or in such stock.

stake, in relation to a company, has the meaning given by clause 11.

substantial interest, in relation to a trust estate, has the meaning given by clause 13.

voting power has the meaning given by clause 10.

3 When foreign citizens are ordinarily resident in Australia

For the purposes of the ownership provisions, a foreign citizen is *ordinarily resident in Australia* at a particular time if, and only if:

- (a) the foreign citizen has been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and
- (b) at that time, one of the following subparagraphs applies:
 - (i) the foreign citizen is in Australia and has permission to remain in Australia indefinitely;

- (ii) the foreign citizen is not in Australia but has a right to re-enter Australia and, on re-entry, to be granted permission to remain in Australia indefinitely;
- (iii) the foreign citizen is in Australia and has a special category visa under section 32 of the *Migration Act 1958*;
- (iv) the foreign citizen is not in Australia and, on re-entry to Australia, would have the right to be granted a special category visa under section 32 of the *Migration Act 1958*.

4 Entering into an agreement or arrangement

- (1) For the purposes of the ownership provisions, a person is taken to have ***proposed to enter into an agreement or arrangement*** if the person takes part in, or proposes to take part in, negotiations with a view to entering into the agreement or arrangement.
- (2) A reference in the ownership provisions to ***entering into an agreement or arrangement*** includes a reference to altering or varying an agreement or arrangement.
- (3) A reference in the ownership provisions to ***entering into an arrangement*** is a reference to entering into any formal or informal scheme, arrangement or understanding, whether expressly or by implication and, without limiting the generality of the foregoing, includes a reference to:
 - (a) entering into an agreement; or
 - (b) creating a trust, whether express or implied; or
 - (c) entering into a transaction;and a reference in the ownership provisions to an ***arrangement*** is to be construed accordingly.
- (4) A reference in the ownership provisions to an ***arrangement*** does not include a reference to a moneylending agreement.

5 Associates

- (1) For the purposes of the ownership provisions, the following persons are ***associates*** of a person:
-

Clause 5

- (a) a relative of the person;
 - (b) a partner of the person;
 - (c) a company of which the person is an officer;
 - (d) if the person is a company—an officer of the company;
 - (e) an employee or employer of the person;
 - (f) an officer of a company of which the person is an officer;
 - (g) an employee of an individual of whom the person is an employee;
 - (h) the trustee of a discretionary trust where the person or another person who is an associate of the person by virtue of another paragraph of this subclause benefits, or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust, either directly or through any interposed companies, partnerships or trusts;
 - (i) a company whose directors are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person;
 - (j) a company where the person is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the company;
 - (k) a company in which the person has, apart from this paragraph, a particular type of stake of more than 33%;
 - (l) if the person is a company—a person who holds, apart from this paragraph, a particular type of stake in the company of more than 33%;
 - (m) a person who is, because of this subclause, an associate of any other person who is an associate of the person (including a person who is an associate of the person by any other application or applications of this paragraph).
- (2) If a person (the *first person*) enters, or proposes to enter, into an arrangement with another person (the *second person*) that relates to any of the following matters:
- (a) the first person and the second person being in a position, by acting together, to control any of the voting power in a company;
 - (b) the power of the first person and the second person, by acting together, to appoint or remove a director of a company;

- (c) the situation where one or more of the directors of a company are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the first person and the second person acting together;

then, the second person is taken to be an associate of the first person for the purposes of the application of a provision of the ownership provisions in relation to the matter concerned.

6 Power to appoint director

- (1) A reference in the ownership provisions to a ***power to appoint a director*** includes a reference to such a power whether exercisable with or without the consent or concurrence of any other person.
- (2) For the purposes of the ownership provisions, a person is taken to have the power to appoint a director if:
- (a) the person has the power (whether exercisable with or without the consent or concurrence of any other person) to veto such an appointment; or
 - (b) a person's appointment as a director of the company follows necessarily from that person being a director or other officer of the first-mentioned person.

7 Meaning of *entitled to acquire*

For the purposes of the ownership provisions, a person is ***entitled to acquire*** any thing if the person is absolutely or contingently entitled to acquire it, whether because of any constituent document of a company, the exercise of any right or option or for any other reason.

8 Meaning of *interest in a share*

- (1) Subject to this clause, for the purposes of the ownership provisions, a person holds an ***interest in a share*** if the person has any legal or equitable interest in the share.
- (2) For the purposes of the ownership provisions, a person is taken to hold an ***interest in a share*** if:
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Clause 9

- (a) the person has entered into a contract to purchase the share;
or
 - (b) the person has a right (otherwise than because of having an interest under a trust) to have the share transferred to the person or to the person's order (whether the right is exercisable presently or in the future and whether or not on the fulfilment of a condition); or
 - (c) the person has a right to acquire the share, or an interest in the share, under an option (whether the right is exercisable presently or in the future and whether or not on the fulfilment of a condition); or
 - (d) the person is otherwise entitled to acquire the share or an interest in the share; or
 - (e) the person is entitled (otherwise than because of having been appointed as a proxy or representative to vote at a meeting of members of the company or of a class of its members) to exercise or control the exercise of a right attached to the share.
- (3) Subclause (2) does not, by implication, limit subclause (1).
- (4) A person is taken to hold an *interest in a share* even if the person holds the interest in the share jointly with another person.
- (5) For the purpose of determining whether a person holds an interest in a share, it is immaterial that the interest cannot be related to a particular share.
- (6) An interest in a share is not to be disregarded only because of:
- (a) its remoteness; or
 - (b) the manner in which it arose; or
 - (c) the fact that the exercise of a right conferred by the interest is, or is capable of being made, subject to restraint or restriction.

9 Certain interests in shares to be disregarded

- (1) For the purposes of the ownership provisions, an interest in a share held by a person whose ordinary business includes the lending of

money (if the person holds the interest as a loan security) must be disregarded.

- (2) For the purposes of the ownership provisions, if:
- (a) a person holds an interest in a share as a loan security; and
 - (b) the ordinary business of the person includes the lending of money; and
 - (c) the loan security is enforced; and
 - (d) as a result of the enforcement of the loan security, the person becomes the holder of the share; and
 - (e) the person holds the share for a continuous period (the ***holding period***) beginning at the time when the security was enforced;
- the person's interest in the share must be disregarded at all times during so much of the holding period as occurs during whichever of the following periods is applicable:
- (f) the period of 90 days beginning when the security was enforced; or
 - (g) if the Minister, by written notice given to the person, allows a longer period—the end of that longer period.

10 Voting power

- (1) A reference in the ownership provisions to the ***voting power*** in a company is a reference to the total rights of shareholders to vote, or participate in any decision-making, concerning any of the following:
- (a) the making of distributions of capital or profits of the company to its shareholders;
 - (b) the constituent document of the company;
 - (c) any variation of the share capital of the company.
- (2) A reference in the ownership provisions to ***control of the voting power*** in a company is a reference to control that is direct or indirect, including control that is exercisable as a result of or by means of arrangements or practices:
- (a) whether or not having legal or equitable force; and
 - (b) whether or not based on legal or equitable rights.

Clause 11

- (3) If the percentage of total rights to vote or participate in decision-making differs as between different types of voting or decision-making, the highest of those percentages applies for the purposes of this clause.
- (4) If a company:
 - (a) is limited both by shares and by guarantee; or
 - (b) does not have a share capital;this clause has effect as if the members or policy holders of the company were shareholders in the company.

11 Stake in a company

- (1) A particular type of *stake* that a person holds in a company at a particular time is the aggregate of:
 - (a) the direct control interests in the company of that type that the person holds at that time; and
 - (b) the direct control interests in the company of that type held at that time by associates of the person.
- (2) In calculating the stake that a person holds in a company, a direct control interest held because of subclause 12(5) is not to be counted under paragraph (1)(a) to the extent to which it is calculated by reference to a direct control interest in the company that is taken into account under paragraph (1)(b).
- (3) For the purpose of calculating the total of the stakes of a particular type that a group of persons holds in a company, if a particular stake that a person holds in a company would be counted more than once because the person is an associate of one or more other persons in the group, that interest is to be counted only once.

12 Direct control interests in a company

- (1) A person holds a *direct control interest* in a company at a particular time equal to the percentage of the total paid-up share capital of the company in which the person holds an interest at that time.

- (2) A person also holds a **direct control interest** in a company at a particular time equal to the percentage of the voting power in the company that the person is in a position to control at that time.
- (3) A person also holds a **direct control interest** in a company at a particular time equal to the percentage that the person holds, or is entitled to acquire, at that time of the total rights to distributions of capital or profits of the company to its shareholders on winding-up.
- (4) A person also holds a **direct control interest** in a company at a particular time equal to the percentage that the person holds, or is entitled to acquire, at that time of the total rights to distributions of capital or profits of the company to its shareholders, otherwise than on winding-up.
- (5) Subject to subsection (6), if:
- (a) a person holds a particular type of direct control interest (including a direct control interest that is taken to be held because of one or more previous applications of this subclause) in a company (the **first level company**); and
 - (b) the first level company holds the same type of direct control interest in another company (the **second level company**);
- the person is taken to hold that type of direct control interest in the second level company equal to the percentage worked out using the formula:
- $$\text{First level percentage} \times \text{Second level percentage}$$
- where:
- first level percentage** means the percentage of the direct control interest held by the person in the first level company.
- second level percentage** means the percentage of the direct control interest held by the first level company in the second level company.
- (6) In determining, for the purposes of subsection 27(2) or subparagraph 40(b)(ii), the total of the stakes of a particular type that a group of foreign persons holds in the FLIC, if:
- (a) a foreign company (the **first company**) holds that type of direct control interest in the FLIC; and

Clause 13

- (b) in a case where that interest is held because of subclause (5)—that interest was not worked out under that subclause on the basis that one or more foreign companies were interposed between the first company and the FLIC; and
 - (c) apart from this subclause, a foreign person other than the first company would be taken under subclause (5) to hold that type of direct control interest in the FLIC equal to a particular percentage; and
 - (d) the direct control interest mentioned in paragraph (c) was worked out under subclause (5) directly or indirectly by reference to the direct control interest mentioned in paragraph (a);
- the direct control interest mentioned in paragraph (c) is not to be counted.
- (7) For the purposes of subclause (6), a *foreign company* is a company that is a foreign person.

13 Substantial interests in trust estates

- (1) For the purposes of the ownership provisions:
 - (a) a person is taken to hold a *substantial interest* in a trust estate if the person, alone or together with an associate or associates, holds a beneficial interest in more than 33% of the corpus or income of the trust estate; and
 - (b) 2 or more persons are taken to hold an *aggregate substantial interest* in a trust estate if the persons, together with an associate or associates, hold, in the aggregate, beneficial interests in more than 33% of the corpus or income of the trust estate.
- (2) For the purposes of subclause (1), if, under the terms of a trust, a trustee has a power or discretion as to the distribution of the income or corpus of the trust estate to beneficiaries, each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or corpus of the trust estate that the trustee is empowered to distribute to that beneficiary.

*[Minister's second reading speech made in—
House of Representatives on 26 May 2005
Senate on 16 June 2005]*

(81/05)

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