

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Combating
Multinational Tax Avoidance) Bill 2017:
Diverted profits tax**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1.	The first 1 January, 1 April, 1 July or 1 October to occur after the day this Act receives the Royal Assent.	

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Schedule 1—Diverted profits tax

Administrative Decisions (Judicial Review) Act 1977

1 Paragraph (e) of Schedule 1

After “*Taxation Administration Act 1953*, but only so far as the decisions are made under Part 2-35, 3-10”, insert “, 3-30”.

Income Tax Assessment Act 1936

2 Subsection 6(1) (at the end of the definition of assessment)

Add:

; or (k) the ascertainment of the amount payable under subsection 177N(1) (diverted profits tax).

3 Paragraph 177CB(5)(a)

Omit “section 177DA”, substitute “section 177DA or 177H”.

4 Paragraph 177CB(5)(b)

Omit “section 177DA”, substitute “section 177DA or 177H”.

5 At the end of Part IVA

Add:

177H Diverted profits tax—application

Scheme for a purpose including obtaining a tax benefit etc.

(1) This Part also applies to a scheme if:

(a) it is reasonable to conclude that (having regard to the matters in subsection (2)) the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a principal purpose of, or for more than one principal purpose that includes a purpose of:

(i) enabling a taxpayer (a *relevant taxpayer*) to obtain a tax benefit, or both to obtain a tax benefit and to reduce one or more of the relevant taxpayer’s liabilities to tax under a foreign law, in connection with the scheme; or

(ii) enabling the relevant taxpayer and another taxpayer (or other taxpayers) each to obtain a tax benefit, or both to

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- 1 obtain a tax benefit and to reduce one or more of their
2 liabilities to tax under a foreign law, in connection with
3 the scheme;
- 4 whether or not that person who entered into or carried out the
5 scheme or any part of the scheme is the relevant taxpayer or
6 is the other taxpayer or one of the other taxpayers; and
- 7 (b) the relevant taxpayer is a significant global entity for a year
8 of income in which the relevant taxpayer, or one or more
9 other taxpayers, would (but for this Part):
- 10 (i) obtain a tax benefit; or
11 (ii) reduce one or more of their liabilities to tax under a
12 foreign law;
13 in connection with the scheme; and
- 14 (c) a foreign entity is an associate (within the meaning of
15 section 318) of the relevant taxpayer at any time in the year
16 of income mentioned in paragraph 177H(1)(b); and
- 17 (d) that foreign entity:
- 18 (i) is the person, or one of the persons, who entered into or
19 carried out the scheme or any part of the scheme; or
20 (ii) is otherwise connected with the scheme or any part of
21 the scheme; and
- 22 (e) it is reasonable to conclude that none of the following
23 sections apply in relation to the relevant taxpayer:
- 24 (i) section 177J (\$25 million turnover test);
25 (ii) section 177K (sufficient foreign tax test);
26 (iii) section 177L (sufficient economic substance test).

27 *Have regard to certain matters*

- 28 (2) For the purposes of paragraph (1)(b), have regard to the following
29 matters:
- 30 (a) the matters in subsection 177D(2);
31 (b) without limiting subsection 177D(2), the extent to which
32 non-tax financial benefits that are quantifiable have resulted,
33 will result, or may reasonably be expected to result, from the
34 scheme;
35 (c) the result, in relation to the operation of any foreign law
36 relating to taxation, that (but for this Part) would be achieved
37 by the scheme;
38 (d) the amount of the tax benefit mentioned in paragraph (1)(a).
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Deferral of foreign tax liabilities

- 1
- 2 (3) For the purposes of paragraph (1)(a), a deferral of a taxpayer's
- 3 liabilities to tax under a foreign law is taken to be a reduction of
- 4 those liabilities, unless there are reasonable commercial grounds
- 5 for the deferral.

6 *Tax benefit*

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

11 *Schemes outside Australia*

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

15 *Non-limitation in relation to other provisions in this Part*

- 16 (6) This section:
- 17 (a) does not limit section 177D, 177DA, 177E, 177EA or
- 18 177EB; and
- 19 (b) is not limited by those sections.

20 **177J Diverted profits tax—\$25 million turnover test**

- 21 (1) This section applies in relation to the relevant taxpayer if:
- 22 (a) the sum of:
- 23 (i) the turnover of the relevant taxpayer for the financial
- 24 year corresponding to the year of income mentioned in
- 25 paragraph 177H(1)(b); and
- 26 (ii) the turnover of each entity covered by subsection (2) for
- 27 that financial year;
- 28 does not exceed \$25 million; and
- 29 (b) none of the following have artificially booked turnover
- 30 outside Australia:
- 31 (i) the relevant taxpayer;
- 32 (ii) an entity covered by subsection (2).

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- 1 (2) An entity is covered by this subsection if for the year of income
2 mentioned in paragraph 177H(1)(b):
3 (a) the entity is an Australian entity; and
4 (b) both the entity and the relevant taxpayer:
5 (i) are members of the same global group; and
6 (ii) are significant global entities because they are members
7 of that group.

8 **177K Diverted profits tax—sufficient foreign tax test**

- 9 (1) This section applies in relation to the relevant taxpayer if the
10 amount worked out under subsection (2) (foreign tax liability)
11 equals or exceeds 80% of the amount worked out under
12 subsection (4) (Australian tax liability).

13 *Foreign tax liability*

- 14 (2) The amount is the total of the increases in foreign tax liability of
15 each entity covered by subsection (3) that results, will result, or
16 may reasonably be expected to result, from the scheme during a
17 foreign tax period that corresponds to the year of income
18 mentioned in paragraph 177H(1)(b).
- 19 (3) An entity is covered by this subsection if:
20 (a) the entity is a foreign entity; and
21 (b) the entity:
22 (i) is the person, or one of the persons, who entered into or
23 carried out the scheme or any part of the scheme; or
24 (ii) is otherwise connected with the scheme or any part of
25 the scheme.

26 *Australian tax liability*

- 27 (4) The amount is:
28 (a) if the tax benefit mentioned in subsection 177H(4) is a tax
29 benefit mentioned in paragraph 177C(1)(a), (b), (ba) or
30 (bc)—the amount of the tax benefit multiplied by the
31 *[standard Australian corporate tax rate]*; or
32 (b) otherwise—the amount of the tax benefit.

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177L Diverted profits tax—sufficient economic substance test

- (1) This section applies in relation to the relevant taxpayer if the income derived, received or made as a result of the scheme by each entity covered by subsection (2) reasonably reflects the economic substance of the entity's activities in connection with the scheme.
- (2) This subsection covers an entity if any of the following apply:
- (a) the entity entered into or carried out the scheme or any part of the scheme;
 - (b) the entity is otherwise connected with the scheme or any part of the scheme.

177M Diverted profits tax—consequences

If this Part applies to a scheme because of section 177H:

- (a) section 177N applies to the relevant taxpayer mentioned in section 177H; and
- (b) the Commissioner cannot make a determination under section 177F in relation to the scheme merely because of section 177H.

177N Diverted profits tax—liability

- (1) The relevant taxpayer is liable to pay tax at the rate declared by the Parliament on:
- (a) if the tax benefit mentioned in subsection 177H(4) is a tax benefit mentioned in paragraph 177C(1)(a), (b), (ba) or (bc)—the amount of the tax benefit; or
 - (b) otherwise—the amount of the tax benefit divided by the *[standard Australian corporate tax rate]*.

Note 1: The tax is imposed by the *Diverted Profits Tax Act 2017* and the rate of the tax is set out in that Act. *[The rate will be set at 40%.]*

Note 2: The ***DPT liability amount*** is the amount of tax to which the relevant taxpayer is liable (see subsection 145-5(2) in Schedule 1 to the *Tax Administration Act 1953*).

Income Tax Assessment Act 1997

6 Subsection 995-1(1)

Insert:

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1 *DPT liability amount* has the meaning given by
2 subsection 145-5(2) in Schedule 1 to the *Taxation Administration*
3 *Act 1953*.

4 **7 Subsection 995-1(1)**

5 Insert:

6 *DPT restricted evidence* has the meaning given by
7 subsection 145-25(2) in Schedule 1 to the *Taxation Administration*
8 *Act 1953*.

9 **8 Subsection 995-1(1) (at the end of the definition of *period of*** 10 ***review*)**

11 Add:

12 Note: For the purposes of diverted profits tax, this definition is modified in
13 respect of the assessment of a DPT liability amount (see
14 section 145-15 in Schedule 1 to the *Taxation Administration Act*
15 *1953*).

16 ***Taxation Administration Act 1953***

17 **9 At the end of Chapter 3 in Schedule 1**

18 Add:

19 **Part 3-30—Diverted profits tax**

20 **Division 145—Assessments of diverted profits tax**

21 **145-5 DPT assessments—modified application of Division 155**

- 22 (1) In applying Division 155 in relation to a *DPT liability amount:
- 23 (a) apply the provisions of that Division with the modifications
24 set out in sections 145-10 to 145-25; and
- 25 (b) disregard sections 155-15, 155-20, 155-25, 155-30, 155-40,
26 155-45, 155-50, 155-70 and 155-55.
- 27 (2) A *DPT liability amount* is an amount of tax payable as a result of
28 subsection 177N(1) of the *Income Tax Assessment Act 1936* by a
29 relevant taxpayer mentioned in that subsection.

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145-10 When DPT assessments can be made

2 Despite subsection 155-5(1), the Commissioner can make an
3 assessment of the *DPT liability amount only at a time in the
4 period:

- 5 (a) starting on the day on which the Commissioner first gives the
6 entity that is the subject of the assessment a notice of
7 assessment under Part IV of the *Income Tax Assessment Act*
8 *1936* for the income year mentioned in paragraph 177H(1)(b)
9 of the *Income Tax Assessment Act 1936* (as that paragraph
10 applies in relation to the DPT liability amount); and
11 (b) ending on the last day of the period of 7 years starting the day
12 after that day.

145-15 Period of review of DPT assessments

14 (1) Despite subsection 155-35(2), the *period of review*, for the
15 assessment of the *DPT liability amount, is:

- 16 (a) the period:
- 17 (i) starting on the day on which the Commissioner first
18 gives notice of the assessment to the entity that is the
19 subject of the assessment under section 155-10; and
20 (ii) ending on the last day of the period of 12 months
21 starting the day after that day; or
- 22 (b) if:
- 23 (i) the entity, by written notice given to the Commissioner,
24 specifies a shorter period in accordance with
25 subsection (2); and
26 (ii) the Federal Court of Australia has not made an order
27 under subsection (3) in respect of the written notice;
28 that shorter period; and
- 29 (c) if the period of review is extended under
30 subsection 155-35(3) or (4)—the period as so extended.

31 (2) For the purposes of subparagraph (1)(b)(i), the shorter period must:

- 32 (a) start on the day mentioned in subparagraph (1)(a)(i); and
33 (b) end on a day that is at least 30 days after the day on which
34 the entity gives the written notice to the Commissioner.

35 (3) For the purposes of subparagraph (1)(b)(ii), the Federal Court of
36 Australia may make an order under this subsection in respect of the
37 written notice if:

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- 1 (a) the Commissioner has started to examine the entity's affairs
2 in relation to the assessment; and
3 (b) the Commissioner has not completed the examination within
4 the shorter period specified in the written notice; and
5 (c) the Commissioner, within 30 days after the day on which the
6 entity gives the written notice to the Commissioner, applies
7 to the Court for the order; and
8 (d) the Court is satisfied that it was not reasonably practicable, or
9 it was inappropriate, for the Commissioner to complete the
10 examination within the shorter period specified in the written
11 notice, because of:
12 (i) any action taken by the entity; or
13 (ii) any failure by the entity to take action that it would have
14 been reasonable for the entity to take.
- 15 (4) Despite subsection 155-35(5), in relation to the assessment of the
16 *DPT liability amount:
17 (a) an order may be made under subsection 155-35(3) only once;
18 and
19 (b) consent may be given under subsection 155-35(4) only once.

20 **145-20 Review of assessments**

- 21 (1) Section 155-90 does not apply during the *period of review
22 mentioned in section 145-15.
- 23 (2) In applying Part IVC as a result of section 155-90 after the end of
24 that *period of review:
25 (a) have regard only to the provisions of that Part mentioned in
26 subsection (3); and
27 (b) apply those provisions with the modifications set out in
28 subsection (4); and
29 (c) disregard the other provisions of that Part; and
30 (d) apply section 145-25 (restricted DPT evidence).
- 31 (3) For the purposes of paragraph (2)(a), the provisions of that Part are
32 as follows:
33 (a) sections 14ZL and 14ZP;
34 (b) subsection 14ZR(1);
35 (c) subsection 14ZZ(1);
36 (d) Division 5 (apart from section 14ZZS).

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- 1 (4) For the purposes of paragraph (2)(b), the modifications are as
2 follows:
- 3 (a) treat the Commissioner’s decision to make the assessment of
4 the *DPT liability amount as an objection decision;
- 5 (b) treat subsection 14ZZ(1) as reading “The entity that is the
6 subject of the DPT assessment may appeal to the Federal
7 Court of Australia against the objection decision.”;
- 8 (c) treat the reference in section 14ZZN to “within 60 days after
9 the person appealing is served with notice of the decision” as
10 being a reference to “within 30 days after the end of the
11 period of review mentioned in section 145-15 in Schedule 1
12 to the *Taxation Administration Act 1953*”.
- 13 (d) disregard paragraph 14ZZO(a);
- 14 (e) treat paragraph 14ZZO(b) as reading “the appellant has the
15 burden of proving that the DPT assessment is excessive or
16 otherwise incorrect and what the DPT assessment should
17 have been”;
- 18 (f) treat the reference in section 14ZZR to a taxation decision as
19 being a reference to the Commissioner’s decision to make the
20 *DPT assessment;
- 21 (g) disregard section 14ZZS.

22 **145-25 Restricted DPT evidence**

- 23 (1) *Restricted DPT evidence is not admissible in evidence in
24 proceedings under Part IVC on an appeal to the Federal Court of
25 Australia related to the *DPT assessment.
- 26 (2) ***Restricted DPT evidence*** means information or documents that:
- 27 (a) the entity that is the subject of the *DPT assessment (or an
28 associate (within the meaning of section 318) of that entity),
29 had in its custody or under its control at a time before, during
30 or after the *period of review; and
- 31 (b) the Commissioner did not have in his or her custody or under
32 his or her control at any time in the period of review.
- 33 (3) Subsection (1) does not prevent *restricted DPT evidence from
34 being admissible in evidence in the proceedings if:
- 35 (a) the Commissioner consents to the admission of the restricted
36 DPT evidence in accordance with subsection (4); or

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- 1 (b) the court in which the proceedings take place considers that
2 the admission of the restricted DPT evidence is necessary in
3 the interests of justice.
- 4 (4) For the purposes of paragraph (3)(a), the Commissioner may give
5 the consent if the Commissioner considers that it is reasonable to
6 do so.
- 7 (5) In making a decision under paragraph (3)(a) or (b), the
8 Commissioner or the court must have regard to:
- 9 (a) whether, because of the absence of the *restricted DPT
10 evidence, the remaining information or documents that are
11 relevant to the proceedings are, or are likely to be,
12 misleading; and
- 13 (b) whether it was reasonable for the entity that is the subject of
14 the *DPT assessment (or the associate of that entity
15 mentioned in paragraph (2)(a)) to have given the
16 Commissioner the *restricted DPT evidence within the
17 *period of review.
- 18 (6) The Commissioner must give a consent for the purposes of
19 paragraph (3)(a) if failure to do so would have the effect, for the
20 purposes of the Constitution, of making any tax or penalty
21 incontestable.
- 22 (7) A consent for the purposes of paragraph (3)(a) is to be in writing.
- 23 (8) If the Commissioner gives a consent for the purposes of
24 paragraph (3)(a), the Commissioner must give the entity that is the
25 subject of the *DPT assessment a copy of the consent as soon as
26 practicable afterwards.

10 At the end of subsection 155-5(2) in Schedule 1

27 Add:

28 ; (j) a *DPT liability amount.

29 Note: This Division has a modified operation in relation to DPT
30 liability amounts (see Division 145).
31

32 11 Application

- 33 (1) The amendments made by this Schedule apply on or after 1 July 2017 in
34 connection with a scheme, whether or not the scheme was entered into,
35 or was commenced to be carried out, before that day.

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- 1 (2) Despite subitem (1), the amendments made by this Schedule do not
2 apply in relation to tax benefits that a taxpayer derives, makes or
3 receives before that day.