

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Measures
for Consultation) Bill 2019: hybrid
mismatch rules**

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule #	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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1 Schedule #—Hybrid mismatch rules

2 Part 1—MEC groups

3 *Income Tax Assessment Act 1997*

4 **1 Subsection 832-30(2) (note)**

5 Omit “a member of a consolidated group”, substitute “a subsidiary
6 member of a consolidated group or MEC group”.

7 **2 Subsection 832-325(1) (note 2)**

8 Omit “a member of a consolidated group”, substitute “a subsidiary
9 member of a consolidated group or MEC group”.

10 **3 Subparagraph 832-410(2)(b)(ii)**

11 After “*consolidated group”, insert “or *MEC group”.

12 **4 Subparagraph 832-550(c)(ii)**

13 After “*consolidated group”, insert “or *MEC group”.

14 **5 Application**

15 The amendments made by this Part apply to assessments for income
16 years starting on or after 1 January 2019.

EXPOSURE DRAFT

1 Part 2—State and municipal foreign taxes

2 *Income Tax Assessment Act 1997*

3 **6 Subparagraph 832-110(5)(b)(i)**

4 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
5 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

6 **7 Subsection 832-120(1)**

7 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
8 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

9 **8 Paragraph 832-120(3)(b)**

10 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
11 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

12 **9 Subsection 832-130(1)**

13 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
14 tax)”, substitute “(except a tax covered by subsection (7))”.

15 **10 Subsection 832-130(3)**

16 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
17 tax)”, substitute “(except a tax covered by subsection (7))”.

18 **11 Subsection 832-130(4)**

19 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
20 tax)”, substitute “(except a tax covered by subsection (7))”.

21 **12 Paragraph 832-130(6)(b)**

22 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
23 tax)”, substitute “(except a tax covered by subsection (7))”.

24 **13 At the end of section 832-130**

25 Add:

26 *Certain foreign taxes disregarded in this Division*

27 (7) This subsection covers each of the following:

- 28 (a) *credit absorption tax;
- 29 (b) *unitary tax;

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- 1 (c) withholding-type tax;
2 (d) municipal tax;
3 (e) in the case of a federal foreign country—a State tax.

4 Note: The definitions of *credit absorption tax* and *unitary tax* are in
5 section 770-15.

6 **14 Paragraph 832-235(2)(b)**

7 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
8 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

9 **15 Paragraph 832-325(1)(b)**

10 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
11 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

12 **16 Paragraph 832-325(2)(b)**

13 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
14 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

15 **17 Paragraph 832-480(4)(b)**

16 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
17 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

18 **18 Subparagraph 832-485(4)(a)(ii)**

19 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
20 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

21 **19 Subparagraphs 832-555(9)(b)(i) and (ii)**

22 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
23 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

24 **20 Paragraph 832-625(4)(d)**

25 Omit “(except *credit absorption tax, *unitary tax or a withholding-type
26 tax)”, substitute “(except a tax covered by subsection 832-130(7))”.

27 **21 Application**

28 The amendments made by this Part apply to assessments for income
29 years starting on or after 1 January 2019.

EXPOSURE DRAFT

1 Part 3—Entities

2 *Income Tax Assessment Act 1997*

3 **22 Section 832-30**

4 Repeal the section, substitute:

5 **832-30 How this Division applies to entities**

6 *Identifying payments between entities etc.*

- 7 (1) In determining for the purposes of this Division whether an entity
8 makes or receives a payment, the following are to be disregarded:
9 (a) subsection 701-1(1) (the single entity rule);
10 (b) Part IIIB of the *Income Tax Assessment Act 1936*;
11 (c) any law of a foreign country that, for the purposes of a
12 foreign tax, treats a different entity as having made the
13 payment, or disregards the payment.

14 Note 1: As a consequence of paragraph (1)(a), a member of a consolidated
15 group may be a hybrid payer under section 832-320 or a deducting
16 hybrid under section 832-550 (it cannot be a reverse hybrid because of
17 subparagraph 832-410(2)(b)(ii)).

18 Note 2: Part IIIB of the *Income Tax Assessment Act 1936* (which is about
19 Australian branches of foreign banks) is disregarded because it is
20 separately modified to deal with hybrid mismatches: see Division 5 of
21 that Part.

- 22 (2) In addition, in the case of a trust or partnership, the trust or
23 partnership, instead of a trustee or partner, is taken, for the
24 purposes of this Division, to do the following things:
25 (a) make or receive a payment;
26 (b) hold, acquire or dispose of an asset, interest or other
27 property;
28 (c) enter into or carry out a *scheme or a part of a scheme.

29 *Identifying income or profits of entities*

- 30 (3) For the purposes of this Division, things recognised in accordance
31 with subsection (1) or (2) as being done by an entity are to be taken
32 into account in identifying the income or profits of the entity.

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Assessable income and deductions

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- 2 (4) A reference in this Division to an amount being included in the
3 assessable income of an entity, or being allowable, or not
4 allowable, as a deduction to an entity, is taken in the case of a trust
5 or partnership in respect of which *net income is being calculated
6 to be a reference to an amount that is included, allowable or not
7 allowable, as the case requires, in determining that net income.

8 *This section does not make a non-legal person a taxpayer*

- 9 (5) Nothing in this section affects whether or not an entity is a *liable
10 entity (see section 832-325).

11 Note: A trust that is not a member of a consolidated group or MEC group
12 can only be a deducting hybrid if the trust itself is a liable entity in a
13 country other than Australia: see paragraph 832-550(c).

14 *This section does not affect the interpretation of other provisions*

- 15 (6) Nothing in this section limits, by implication, any other provision
16 of this Act.

17 **23 Subsection 832-320(1) (note)**

18 Before “identified”, insert “generally”.

19 **24 Subsections 832-325(1) and (2) (note 1)**

20 Before “identified”, insert “generally”.

21 **25 At the end of subsection 832-325(2) (after note 2)**

22 Add:

23 Note 3: Another example is a test entity that is a trust to which Division 6 of
24 Part III of the *Income Tax Assessment Act 1936* applies. Each
25 beneficiary who is presently entitled to a share of the income of the
26 trust and who is not under any legal disability, and the trustee of the
27 trust, are liable entities in respect of the income or profits of the trust.

28 **26 Subsection 832-410(1) (note)**

29 Before “identified”, insert “generally”.

30 **27 Application**

31 The amendments made by this Part apply to assessments for income
32 years starting on or after 1 January 2019.

EXPOSURE DRAFT

1 Part 4—Dual inclusion income

2 *Income Tax Assessment Act 1997*

3 **28 Paragraph 832-680(4)(b)**

4 Omit “at a time”.

5 **29 Paragraphs 832-680(4)(c), (d) and (e)**

6 Repeal the paragraphs, substitute:

7 (c) it is reasonable to conclude that:

8 (i) the payment was funded by an amount of income or
9 profits of the other member (the *funding income or*
10 *profits*); and

11 (ii) an outcome mentioned in subsection (1) arose for the
12 funding income or profits in the country mentioned in
13 paragraph (a) of this subsection (including as a result of
14 a previous operation of subsection (5)); and

15 (d) the funding income or profits were not *dual inclusion
16 income in the country.

17 Note: Because subparagraph (c)(ii) recognises a tax outcome that arises
18 through a previous operation of subsection (5), the tax outcome can
19 effectively be passed through a chain of payments.

20 **30 Subsection 832-680(5)**

21 Repeal the subsection, substitute:

22 (5) The outcome mentioned in subparagraph (4)(c)(ii) is taken to have
23 arisen for the on-payment amount in the income year, or foreign
24 tax period (as the case requires) in which the payment was
25 received, for the purposes of:

26 (a) this section; and

27 (b) sections 832-330 and 832-335 (about neutralising amounts
28 and adjustments for hybrid payer mismatches); and

29 (c) sections 832-560 and 832-565 (about neutralising amounts
30 and adjustments for deducting hybrid mismatches).

31 **31 Application**

32 The amendments made by this Part apply to assessments for income
33 years starting on or after 1 January 2019.

EXPOSURE DRAFT

1 Part 5—Hybrid entities integrity rule

2 *Income Tax Assessment Act 1997*

3 **32 After subsection 832-240(2)**

4 Insert:

5 (2A) Subsection (2) does not apply if, on the assumption that
6 subsections 832-180(2) and 832-725(6) were disregarded, no
7 amount would have been allowable as a deduction in respect of the
8 payment because of subsection 832-725(3).

9 **33 After subsection 832-565(2)**

10 Insert:

11 (2A) Subsection (2) does not apply if:
12 (a) the amount that was not allowable as a deduction under
13 section 832-530 relates to a payment; and
14 (b) on the assumption that subsection 832-530(2) were
15 disregarded, no amount would have been allowable as a
16 deduction in respect of the payment because of
17 subsection 832-725(3).

18 **34 Section 832-720**

19 Omit “an Australian deduction of an entity (the *paying entity*) for a
20 payment of interest (or a payment of a similar character)”, substitute “an
21 Australian deduction for a payment of interest (or a payment of a
22 similar character) made by an entity (the *paying entity*)”.

23 **35 Section 832-720**

24 Omit “a purpose of enabling a deduction to be obtained in respect of the
25 payment, or”, substitute “a purpose of enabling a deduction to be
26 obtained in respect of the payment, and”.

27 **36 Paragraph 832-725(1)(e)**

28 Omit “the paying entity”, substitute “an entity”.

29 **37 Subsection 832-725(3)**

30 Repeal the subsection, substitute:

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1 (3) The entity mentioned in paragraph (1)(e) is not entitled to the
2 deduction mentioned in that paragraph.

3 **38 Subsection 832-725(6)**

4 Omit “a *deducting hybrid mismatch”.

5 **39 At the end of section 832-725**

6 Add:

7 (7) Subsection (3) does not apply to the extent that an amount to which
8 the payment relates was not allowable as a deduction under
9 subsection 832-530(2).

10 **40 Application**

11 The amendments made by this Part apply to assessments for income
12 years starting on or after 2 April 2019.

EXPOSURE DRAFT

Part 6—Foreign income tax deductions for regulatory capital

Income Tax Assessment Act 1997

41 Section 207-158

Repeal the section, substitute:

207-158 Distributions entitled to a foreign income tax deduction

- (1) This section applies to a *franked distribution if:
- (a) all or part of the distribution gives rise to a *foreign income tax deduction; and
 - (b) the distribution is not made in respect of a *non-share equity interest to which the exception in subsection (2) applies.

Exception for distributions made under certain regulatory capital instruments

- (2) The exception in this subsection applies to a *non-share equity interest if:
- (a) the interest forms part (either on a solo or consolidated basis) of the Additional Tier 1 capital of an *ADI, *general insurance company or *life insurance company for the purposes of the applicable prudential standards (see subsection (3)); and
 - (b) the ADI, general insurance company or life insurance company notifies the Commissioner that the ADI, general insurance company or life insurance company will not claim any amount of a *foreign income tax deduction to which distributions on the interest give rise.
- (3) For the purposes of paragraph (2)(a), the applicable prudential standards are:
- (a) for an *ADI—the *prudential standards;
 - (b) for a *general insurance company—prudential standards determined by *APRA and in force under section 32 of the *Insurance Act 1973*;
 - (c) for a *life insurance company—prudential standards determined by APRA and in force under section 230A of the *Life Insurance Act 1995*.

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1 (4) A notification under paragraph (2)(b) must be made:

2 (a) in the *approved form; and

3 (b) on or before:

4 (i) the day by which the *distribution statement is required
5 to be given for the first *frankable distribution made in
6 respect of the *non-share equity interest; or

7 (ii) a later day allowed by the Commissioner.

8 Note: For when a distribution statement is required to be given, see
9 Subdivision 202-E.

10 (5) A choice under paragraph (2)(b) cannot be revoked.

11 **42 Transitional provision—interests already on issue**

12 In determining for the purposes of subparagraph 207-158(4)(b)(i) of the
13 *Income Tax Assessment Act 1997*, as inserted by this Part, whether a
14 distribution is the first frankable distribution made in respect of a
15 non-share equity interest, have regard only to distributions made:

16 (a) unless paragraph (b) applies—on or after the day this Act
17 receives the Royal Assent; or

18 (b) if subitem 10(2) of Schedule 2 to the *Treasury Laws*
19 *Amendment (Tax Integrity and Other Measures No. 2) Act*
20 *2018* applies in relation to the interest—on or after the later
21 of:

22 (i) the first scheduled call date referred to in paragraph (b)
23 of that subitem; and

24 (ii) the day this Act receives the Royal Assent.

25 **43 Application provision**

26 The amendments made by this Part apply in relation to distributions
27 made on or after 1 January 2019.