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The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

*Presented and read a first time*

**Tax Laws Amendment (Countering Tax  
Avoidance and Multinational Profit  
Shifting) Bill 2013**

**No.     , 2013**

*(Treasury)*

**A Bill for an Act to amend the law relating to  
taxation, and for related purposes**



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1     **A Bill for an Act to amend the law relating to**  
2     **taxation, and for related purposes**

3     The Parliament of Australia enacts:

4     **1 Short title**

5                     This Act may be cited as the *Tax Laws Amendment (Countering*  
6                     *Tax Avoidance and Multinational Profit Shifting) Act 2013*.

7     **2 Commencement**

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

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	The day this Act receives the Royal Assent.	
3. Schedule 2, Parts 1 to 3	The day this Act receives the Royal Assent.	
4. Schedule 2, Part 4	Immediately after the commencement of the <i>Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No. 1) 2012</i> .	8 September 2012

1 Note: This table relates only to the provisions of this Act as originally  
2 enacted. It will not be amended to deal with any later amendments of  
3 this Act.

4 (2) Any information in column 3 of the table is not part of this Act.  
5 Information may be inserted in this column, or information in it  
6 may be edited, in any published version of this Act.

7 **3 Schedule(s)**

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9 repealed as set out in the applicable items in the Schedule  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

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1 **Schedule 1—General anti-avoidance rules**  
2

3 ***Income Tax Assessment Act 1936***

4 **1 Paragraph 45B(8)(k)**

5 Omit “subparagraphs 177D(b)(i) to (viii)”, substitute  
6 “subsection 177D(2)”.

7 **2 At the end of paragraph 177C(1)(bb)**

8 Add “or”.

9 **3 After paragraph 177C(1)(bb)**

10 Insert:

11 (bc) the taxpayer not being liable to pay withholding tax on an  
12 amount where the taxpayer either would have, or might  
13 reasonably be expected to have, been liable to pay  
14 withholding tax on the amount if the scheme had not been  
15 entered into or carried out;

16 **4 At the end of subsection 177C(1)**

17 Add:

18 ; and (g) in a case to which paragraph (bc) applies—the amount  
19 referred to in that paragraph.

20 **5 Sections 177CA and 177D**

21 Repeal the sections, substitute:

22 **177CB The bases for identifying tax benefits**

23 (1) This section applies to deciding, under section 177C, whether any  
24 of the following (*tax effects*) would have occurred, or might  
25 reasonably be expected to have occurred, if a scheme had not been  
26 entered into or carried out:

27 (a) an amount being included in the assessable income of the  
28 taxpayer;

29 (b) the whole or a part of a deduction not being allowable to the  
30 taxpayer;

- 1 (c) the whole or a part of a capital loss not being incurred by the  
2 taxpayer;
- 3 (d) the whole or a part of a foreign income tax offset not being  
4 allowable to the taxpayer;
- 5 (e) the taxpayer being liable to pay withholding tax on an  
6 amount.
- 7 (2) A decision that a tax effect would have occurred if the scheme had  
8 not been entered into or carried out must be based on a postulate  
9 that comprises only the events or circumstances that actually  
10 happened or existed (other than those that form part of the  
11 scheme).
- 12 (3) A decision that a tax effect might reasonably be expected to have  
13 occurred if the scheme had not been entered into or carried out  
14 must be based on a postulate that is a reasonable alternative to  
15 entering into or carrying out the scheme.
- 16 (4) In determining for the purposes of subsection (3) whether a  
17 postulate is such a reasonable alternative:
- 18 (a) have particular regard to:
- 19 (i) the substance of the scheme; and  
20 (ii) any result or consequence for the taxpayer that is or  
21 would be achieved by the scheme (other than a result in  
22 relation to the operation of this Act); but
- 23 (b) disregard any result in relation to the operation of this Act  
24 that would be achieved by the postulate for any person  
25 (whether or not a party to the scheme).

26 **177D Schemes to which this Part applies**

27 *Scheme for purpose of obtaining a tax benefit*

- 28 (1) This Part applies to a scheme if it would be concluded (having  
29 regard to the matters in subsection (2)) that the person, or one of  
30 the persons, who entered into or carried out the scheme or any part  
31 of the scheme did so for the purpose of:
- 32 (a) enabling a taxpayer (a *relevant taxpayer*) to obtain a tax  
33 benefit in connection with the scheme; or

1 (b) enabling the relevant taxpayer and another taxpayer (or other  
2 taxpayers) each to obtain a tax benefit in connection with the  
3 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 is the  
6 other taxpayer or one of the other taxpayers.

7 *Have regard to certain matters*

- 8 (2) For the purpose of subsection (1), have regard to the following  
9 matters:
- 10 (a) the manner in which the scheme was entered into or carried  
11 out;
  - 12 (b) the form and substance of the scheme;
  - 13 (c) the time at which the scheme was entered into and the length  
14 of the period during which the scheme was carried out;
  - 15 (d) the result in relation to the operation of this Act that, but for  
16 this Part, would be achieved by the scheme;
  - 17 (e) any change in the financial position of the relevant taxpayer  
18 that has resulted, will result, or may reasonably be expected  
19 to result, from the scheme;
  - 20 (f) any change in the financial position of any person who has,  
21 or has had, any connection (whether of a business, family or  
22 other nature) with the relevant taxpayer, being a change that  
23 has resulted, will result or may reasonably be expected to  
24 result, from the scheme;
  - 25 (g) any other consequence for the relevant taxpayer, or for any  
26 person referred to in paragraph (f), of the scheme having  
27 been entered into or carried out;
  - 28 (h) the nature of any connection (whether of a business, family  
29 or other nature) between the relevant taxpayer and any person  
30 referred to in paragraph (f).

31 Note: Section 960-255 of the *Income Tax Assessment Act 1997* may be  
32 relevant to determining family relationships for the purposes of  
33 paragraphs (f) and (h).

34 *Tax benefit*

- 35 (3) Despite subsection (1), this Part applies to the scheme only if the  
36 relevant taxpayer has obtained, or would but for section 177F  
37 obtain, a tax benefit in connection with the scheme.

1 *When schemes entered into etc.*

- 2 (4) Despite subsection (1), this Part applies to the scheme only if:  
3 (a) the scheme has been or is entered into after 27 May 1981; or  
4 (b) the scheme has been or is carried out or commenced to be  
5 carried out after that day (and is not a scheme that was  
6 entered into on or before that day).

7 *Schemes outside Australia*

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

11 **6 Paragraphs 177EA(17)(j) and 177EB(10)(f)**

12 Omit “subparagraphs 177D(b)(i) to (viii)”, substitute  
13 “subsection 177D(2)”.

14 **7 Subsection 177F(1)**

15 Omit “a tax benefit has been obtained, or would but for this section be  
16 obtained, by a taxpayer in connection with a scheme to which this Part  
17 applies,” substitute “this Part applies to a scheme in connection with  
18 which a tax benefit has been obtained, or would but for this section be  
19 obtained.”.

20 **8 Subsection 177F(2A)**

21 Omit “section 177CA”, substitute “paragraph 177C(1)(bc)”.

22 ***Taxation Administration Act 1953***

23 **9 Paragraph 18-40(1)(a) in Schedule 1**

24 Omit “section 177CA”, substitute “paragraph 177C(1)(bc)”.

25 **10 Application**

26 The amendments made by this Schedule apply in relation to all schemes  
27 except schemes that were entered into, or that were commenced to be  
28 carried out, on or before 15 November 2012.

1 **Schedule 2—Modernisation of transfer pricing**  
2 **rules**

3 **Part 1—Main amendments**

4 *Income Tax Assessment Act 1936*

5 **1 Division 13 of Part III**

6 Repeal the Division.

7 *Income Tax Assessment Act 1997*

8 **2 At the end of Division 815**

9 Add:

10 **Subdivision 815-B—Arm’s length principle for cross-border**  
11 **conditions between entities**

12 **Guide to Subdivision 815-B**

13 **815-101 What this Subdivision is about**

14 This Subdivision applies if an entity would otherwise get a tax  
15 advantage in Australia from cross-border conditions that are  
16 inconsistent with the internationally accepted arm’s length  
17 principle.

18 The entity is treated for income tax and withholding tax purposes  
19 as if arm’s length conditions had operated.

20 **Table of sections**

21 **Operative provisions**

22	815-105	Object
23	815-110	Operation of Subdivision
24	815-115	Substitution of arm’s length conditions
25	815-120	When an entity gets a <i>transfer pricing benefit</i>
26	815-125	Meaning of <i>arm’s length conditions</i>

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## Schedule 2 Modernisation of transfer pricing rules

### Part 1 Main amendments

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1	815-130	Relevance of actual commercial or financial relations
2	815-135	Guidance
3	815-140	Modification for thin capitalisation
4	815-145	Consequential adjustments
5	815-150	Amendment of assessments

## 6 Operative provisions

### 7 815-105 Object

- 8 (1) The object of this Subdivision is to ensure that the amount brought  
9 to tax in Australia from cross-border conditions between entities is  
10 not less than it would be if those conditions reflected:
- 11 (a) the arm's length contribution made by Australian operations  
12 through functions performed, assets used and risks assumed;  
13 and  
14 (b) the conditions that might be expected to operate between  
15 entities dealing at \*arm's length.
- 16 (2) The Subdivision does this by specifying that, where an entity  
17 would otherwise get a tax advantage from actual conditions that  
18 differ from \*arm's length conditions, the arm's length conditions  
19 are taken to operate for income tax and withholding tax purposes.

### 20 815-110 Operation of Subdivision

- 21 (1) Nothing in the provisions of this Act other than this Subdivision  
22 limits the operation of this Subdivision.
- 23 (2) Nothing in this Subdivision limits Division 820 (about thin  
24 capitalisation) in its application to reduce, or further reduce, \*debt  
25 deductions of an entity.

### 26 815-115 Substitution of arm's length conditions

- 27 (1) For the purposes covered by subsection (2), if an entity gets a  
28 \*transfer pricing benefit from conditions that operate between the  
29 entity and another entity in connection with their commercial or  
30 financial relations:
- 31 (a) those conditions are taken not to operate; and  
32 (b) instead, the \*arm's length conditions are taken to operate.

1 Note 1: The conditions that operate include, but are not limited to, such things  
2 as price, gross margin, net profit, and the division of profit between  
3 the entities.

4 Note 2: There are special rules about documentation that affect when an entity  
5 has a reasonably arguable position about the application (or  
6 non-application) of this Subdivision: see Subdivision 284-E in  
7 Schedule 1 to the *Taxation Administration Act 1953*.

8 (2) The purposes covered by this subsection are:

- 9 (a) if the \*transfer pricing benefit arises under  
10 subparagraph 815-120(1)(c)(i)—working out the amount (if  
11 any) of the entity’s taxable income for the income year; and  
12 (b) if the transfer pricing benefit arises under  
13 subparagraph 815-120(1)(c)(ii)—working out the amount (if  
14 any) of the entity’s loss of a particular \*sort for the income  
15 year; and  
16 (c) if the transfer pricing benefit arises under  
17 subparagraph 815-120(1)(c)(iii)—working out the amount (if  
18 any) of the entity’s \*tax offsets for the income year; and  
19 (d) if the transfer pricing benefit arises under  
20 subparagraph 815-120(1)(c)(iv)—working out the amount (if  
21 any) of \*withholding tax payable by the entity in respect of  
22 interest or royalties.

23 **815-120 When an entity gets a *transfer pricing benefit***

24 (1) An entity gets a ***transfer pricing benefit*** from conditions that  
25 operate between the entity and another entity in connection with  
26 their commercial or financial relations if:

- 27 (a) those conditions (the ***actual conditions***) differ from the  
28 \*arm’s length conditions; and  
29 (b) the actual conditions satisfy the cross-border test in  
30 subsection (3) for the entity; and  
31 (c) had the arm’s length conditions operated, instead of the  
32 actual conditions, one or more of the following would, apart  
33 from this Subdivision, apply:  
34 (i) the amount of the entity’s taxable income for an income  
35 year would be *greater*;  
36 (ii) the amount of the entity’s loss of a particular \*sort for an  
37 income year would be *less*;

**Schedule 2** Modernisation of transfer pricing rules

**Part 1** Main amendments

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- 1 (iii) the amount of the entity's \*tax offsets for an income  
2 year would be *less*;  
3 (iv) an amount of \*withholding tax payable in respect of  
4 interest or royalties by the entity would be *greater*.

5 *Absence of condition*

- 6 (2) For the purposes of subsection (1), there is taken to be a difference  
7 between the actual conditions and the \*arm's length conditions if:  
8 (a) an actual condition exists that is not one of the arm's length  
9 conditions; or  
10 (b) a condition does not exist in the actual conditions but is one  
11 of the arm's length conditions.

12 *Cross-border test*

- 13 (3) Conditions that operate between an entity and another entity in  
14 connection with their commercial or financial relations satisfy the  
15 cross-border test if:  
16 (a) the conditions meet the overseas requirement in the following  
17 table for either or both of the entities; or  
18 (b) the conditions operate in connection with a \*business that the  
19 entity carries on in an \*area covered by an international tax  
20 sharing treaty.  
21

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**Overseas requirement**

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<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b>The conditions meet the overseas requirement for this type of entity:</b>	<b>if:</b>
1	any of the following: (a) an Australian resident; (b) a resident trust estate for the purposes of Division 6 of Part III of the <i>Income Tax Assessment Act 1936</i> ; (c) a partnership in which all of the partners are, directly or indirectly through one or more interposed partnerships, Australian residents or resident trust estates	the conditions operate at or through an *overseas permanent establishment of the entity.
2	an entity not covered by column 1 of item 1	the conditions do not operate

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**Overseas requirement**

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<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b>The conditions meet the overseas requirement for this type of entity:</b>	<b>if:</b>
		solely at or through an *Australian permanent establishment of the entity.

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- 1 (4) For the purposes of the table in subsection (3), treat any entity that  
2 is an Australian resident as not being an Australian resident if:  
3 (a) the entity is also a resident in a country that has entered into  
4 an \*international tax agreement with Australia containing a  
5 \*residence article; and  
6 (b) under that residence article, the entity is taken, for the  
7 purposes of the agreement, to be a resident only of that other  
8 country.

9 *Nil amounts*

- 10 (5) For the purposes of this section and section 815-145:  
11 (a) treat an entity that has no taxable income for an income year  
12 as having a taxable income for the year of a nil amount; and  
13 (b) treat an entity that has no loss of a particular \*sort for an  
14 income year as having a loss of that sort for the year of a nil  
15 amount; and  
16 (c) treat an entity that has no \*tax offsets for an income year as  
17 having tax offsets for the year of a nil amount.

18 *Meaning of residence article*

- 19 (6) A *residence article* is:  
20 (a) Article 4 of the United Kingdom convention (within the  
21 meaning of the *International Tax Agreements Act 1953*); or  
22 (b) a corresponding provision of another \*international tax  
23 agreement.

24 **815-125 Meaning of arm's length conditions**

- 25 (1) The *arm's length conditions*, in relation to conditions that operate  
26 between an entity and another entity, are the conditions that might

1 be expected to operate between independent entities dealing wholly  
2 independently with one another in comparable circumstances.

3 *Most appropriate and reliable method to be used*

- 4 (2) In identifying the \*arm's length conditions, use the method, or the  
5 combination of methods, that is the most appropriate and reliable,  
6 having regard to all relevant factors, including the following:
- 7 (a) the respective strengths and weaknesses of the possible  
8 methods in their application to the actual conditions;
  - 9 (b) the circumstances, including the functions performed, assets  
10 used and risks borne by the entities;
  - 11 (c) the availability of reliable information required to apply a  
12 particular method;
  - 13 (d) the degree of comparability between the actual circumstances  
14 and the comparable circumstances, including the reliability of  
15 any adjustments to eliminate the effect of material  
16 differences between those circumstances.

17 Note: The possible methods include the methods set out in the documents  
18 mentioned in section 815-135 (about relevant guidance material).

19 *Comparability of circumstances*

- 20 (3) In identifying comparable circumstances for the purpose of this  
21 section, regard must be had to all relevant factors, including the  
22 following:
- 23 (a) the functions performed, assets used and risks borne by the  
24 entities;
  - 25 (b) the characteristics of any property or services transferred;
  - 26 (c) the terms of any relevant contracts between the entities;
  - 27 (d) the economic circumstances;
  - 28 (e) the business strategies of the entities.
- 29 (4) For the purposes of this section, circumstances are comparable to  
30 actual circumstances if, to the extent (if any) that the circumstances  
31 differ from the actual circumstances:
- 32 (a) the difference does not materially affect a condition that is  
33 relevant to the method; or
  - 34 (b) a reasonably accurate adjustment can be made to eliminate  
35 the effect of the difference on a condition that is relevant to  
36 the method.

1 **815-130 Relevance of actual commercial or financial relations**

2 *Basic rule*

- 3 (1) The identification of the \*arm's length conditions must:  
4 (a) be based on the commercial or financial relations in  
5 connection with which the actual conditions operate; and  
6 (b) have regard to both the form and substance of those relations.

7 *Exceptions*

- 8 (2) Despite paragraph (1)(b), disregard the form of the actual  
9 commercial or financial relations to the extent (if any) that it is  
10 inconsistent with the substance of those relations.
- 11 (3) Despite subsection (1), if:  
12 (a) independent entities dealing wholly independently with one  
13 another in comparable circumstances would not have entered  
14 into the actual commercial or financial relations; and  
15 (b) independent entities dealing wholly independently with one  
16 another in comparable circumstances would have entered into  
17 other commercial or financial relations; and  
18 (c) those other commercial or financial relations differ in  
19 substance from the actual commercial or financial relations;  
20 the identification of the \*arm's length conditions must be based on  
21 those other commercial or financial relations.
- 22 (4) Despite subsection (1), if independent entities dealing wholly  
23 independently with one another in comparable circumstances  
24 would not have entered into commercial or financial relations, the  
25 identification of the \*arm's length conditions is to be based on that  
26 absence of commercial or financial relations.
- 27 (5) Subsections 815-125(3) and (4) (about comparability of  
28 circumstances) apply for the purposes of this section.

29 **815-135 Guidance**

- 30 (1) For the purpose of determining the effect this Subdivision has in  
31 relation to an entity, identify \*arm's length conditions so as best to  
32 achieve consistency with the documents covered by this section.

- 1 (2) The documents covered by this section are as follows:
- 2 (a) the Transfer Pricing Guidelines for Multinational Enterprises
- 3 and Tax Administrations, as approved by the Council of the
- 4 Organisation for Economic Cooperation and Development
- 5 and last amended on 22 July 2010;
- 6 (b) a document, or part of a document, prescribed by the
- 7 regulations for the purposes of this paragraph.
- 8 (3) However, the document mentioned in paragraph (2)(a) is not
- 9 covered by this section if the regulations so prescribe.
- 10 (4) Regulations made for the purposes of paragraph (2)(b) or
- 11 subsection (3) may prescribe different documents or parts of
- 12 documents for different circumstances.

### 13 **815-140 Modification for thin capitalisation**

- 14 (1) This section modifies the way an entity to which section 815-115
- 15 applies works out its taxable income, or its loss of a particular
- 16 \*sort, for an income year, if:
- 17 (a) Division 820 (about thin capitalisation) applies to the entity
- 18 for the income year; and
- 19 (b) the \*arm's length conditions affect costs that are \*debt
- 20 deductions of the entity for the income year.
- 21 (2) If working out what those costs would be if the \*arm's length
- 22 conditions had operated involves applying a rate to a \*debt interest:
- 23 (a) work out the rate as if the arm's length conditions had
- 24 operated; but
- 25 (b) apply the rate to the debt interest the entity actually issued.
- 26 Note: Division 820 may apply to reduce or further reduce debt deductions.

### 27 **815-145 Consequential adjustments**

- 28 (1) The Commissioner may make a determination under subsection (2)
- 29 in relation to an entity (the *disadvantaged entity*) if:
- 30 (a) \*arm's length conditions are taken by section 815-115 to
- 31 operate; and
- 32 (b) the Commissioner considers that, if the arm's length
- 33 conditions, instead of the actual conditions, had operated:

- 1 (i) the amount of the disadvantaged entity's taxable income  
2 for an income year might have been expected to be *less*  
3 than its actual amount; or  
4 (ii) the amount of the disadvantaged entity's loss of a  
5 particular \*sort for an income year might have been  
6 expected to be *greater* than its actual amount; or  
7 (iii) the amount of the disadvantaged entity's \*tax offsets for  
8 an income year might have been expected to be *greater*  
9 than their actual amount; or  
10 (iv) an amount of \*withholding tax payable in respect of  
11 interest or royalties by the disadvantaged entity might  
12 have been expected to be *less* than its actual amount;  
13 and  
14 (c) the Commissioner considers that it is fair and reasonable that  
15 the actual amount mentioned in subparagraph (b)(i), (ii), (iii)  
16 or (iv) (as the case requires) be adjusted accordingly.
- 17 (2) For the purpose of adjusting an amount as mentioned in  
18 paragraph (1)(c), the Commissioner may make a determination  
19 stating the amount that is (and has been at all times) the amount of  
20 the disadvantaged entity's:  
21 (a) taxable income for the income year; or  
22 (b) loss of a particular \*sort for the income year; or  
23 (c) \*tax offsets, or tax offset of a particular kind, for the income  
24 year; or  
25 (d) \*withholding tax payable in respect of interest or royalties.
- 26 (3) The Commissioner may take such action as the Commissioner  
27 considers necessary to give effect to a determination under this  
28 section.
- 29 (4) The Commissioner must give a copy of a determination under this  
30 section to the disadvantaged entity.
- 31 (5) A failure to comply with subsection (4) does not affect the validity  
32 of the determination.
- 33 (6) To avoid doubt, the Commissioner may include all or any  
34 determinations under this section in relation to a particular entity,  
35 including determinations of different kinds, in the same document.

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### Part 1 Main amendments

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- 1 (7) An entity may give the Commissioner a written request to make a  
2 determination under this section relating to the entity. The  
3 Commissioner must decide whether or not to grant the request, and  
4 give the entity notice of the Commissioner's decision.
- 5 (8) If the entity is dissatisfied with the Commissioner's decision, the  
6 entity may object, in the manner set out in Part IVC of the *Taxation*  
7 *Administration Act 1953*, against that decision.

#### 8 **815-150 Amendment of assessments**

- 9 (1) Section 170 of the *Income Tax Assessment Act 1936* does not  
10 prevent the amendment of an assessment of an entity for an income  
11 year if:  
12 (a) the amendment is made within 7 years after the day on which  
13 the Commissioner gives notice of the assessment to the  
14 entity; and  
15 (b) the amendment is made for the purpose of giving effect to  
16 section 815-115.
- 17 (2) Section 170 of the *Income Tax Assessment Act 1936* does not  
18 prevent the amendment of an assessment at any time for the  
19 purpose of giving effect to section 815-145.

#### 20 **Subdivision 815-C—Arm's length principle for permanent** 21 **establishments**

#### 22 **Guide to Subdivision 815-C**

#### 23 **815-201 What this Subdivision is about**

24 

25 This Subdivision applies the internationally accepted arm's length principle in the context of permanent establishments (PEs).
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#### 26 **Table of sections**

27 <b>Operative provisions</b>	
28 815-205	Object
29 815-210	Operation of Subdivision
30 815-215	Substitution of arm's length profits

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1	815-220	When an entity gets a <i>transfer pricing benefit</i>
2	815-225	Meaning of <i>arm's length profits</i>
3	815-230	Source rules for certain arm's length profits
4	815-235	Guidance
5	815-240	Amendment of assessments

## 6 **Operative provisions**

### 7 **815-205 Object**

8 The object of this Subdivision is to ensure that the amount brought  
9 to tax in Australia by entities operating \*permanent establishments  
10 is not less than it would be if the permanent establishment were a  
11 distinct and separate entity engaged in the same or comparable  
12 activities under the same or comparable circumstances, but dealing  
13 wholly independently with the other part of the entity.

### 14 **815-210 Operation of Subdivision**

- 15 (1) Nothing in the provisions of this Act other than this Subdivision  
16 limits the operation of this Subdivision.
- 17 (2) Nothing in this Subdivision limits Division 820 (about thin  
18 capitalisation) in its application to reduce, or further reduce, \*debt  
19 deductions of an entity.
- 20 (3) For the purposes of this Subdivision, a branch to which  
21 subsection 160ZZW(2) of the *Income Tax Assessment Act 1936*  
22 (about certain Australian branches of foreign banks) applies is  
23 taken not to be, and not to have been at any time since its  
24 establishment, a \*permanent establishment in Australia of the bank.

### 25 **815-215 Substitution of arm's length profits**

- 26 (1) For the purposes covered by subsection (2), if an entity gets a  
27 \*transfer pricing benefit from the attribution of profits to a \*PE of  
28 the entity:
- 29 (a) the amount of profits actually attributed to the PE is taken not  
30 to have been so attributed; and
- 31 (b) instead, the \*arm's length profits are taken to have been  
32 attributed to the PE.

## Schedule 2 Modernisation of transfer pricing rules

### Part 1 Main amendments

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1 Note: There are special rules about documentation that affect when an entity  
2 has a reasonably arguable position about the application (or  
3 non-application) of this Subdivision: see Subdivision 284-E in  
4 Schedule 1 to the *Taxation Administration Act 1953*.

- 5 (2) The purposes covered by this subsection are:
- 6 (a) if the \*transfer pricing benefit arises under  
7 subparagraph 815-220(1)(b)(i)—working out the amount (if  
8 any) of the entity's taxable income for the income year; and
  - 9 (b) if the transfer pricing benefit arises under  
10 subparagraph 815-220(1)(b)(ii)—working out the amount (if  
11 any) of a loss of a particular \*sort for the income year; and
  - 12 (c) if the transfer pricing benefit arises under  
13 subparagraph 815-220(1)(b)(iii)—working out the amount (if  
14 any) of the entity's \*tax offsets for the income year.

#### 15 **815-220 When an entity gets a *transfer pricing benefit***

- 16 (1) An entity gets a ***transfer pricing benefit*** from the attribution of  
17 profits to a \*PE of the entity if:
- 18 (a) the amount of profits (the ***actual profits***) attributed to the PE  
19 differs from the \*arm's length profits for the PE; and
  - 20 (b) had the arm's length profits, instead of the actual profits,  
21 been attributed to the PE, one or more of the following  
22 would, apart from this Subdivision, apply:
    - 23 (i) the amount of the entity's taxable income for an income  
24 year would be *greater*;
    - 25 (ii) the amount of the entity's loss of a particular \*sort for an  
26 income year would be *less*;
    - 27 (iii) the amount of the entity's \*tax offsets for an income  
28 year would be *less*.

#### 29 *Nil amounts*

- 30 (2) For the purposes of this section:
- 31 (a) treat an entity that has no taxable income for an income year  
32 as having a taxable income for the year of a nil amount; and
  - 33 (b) treat an entity that has no loss of a particular \*sort for an  
34 income year as having a loss of that sort for the year of a nil  
35 amount; and

- 1 (c) treat an entity that has no \*tax offsets for an income year as  
2 having tax offsets for the year of a nil amount.

3 **815-225 Meaning of *arm's length profits***

- 4 (1) The *arm's length profits* for a \*PE of an entity are worked out by  
5 allocating the actual expenditure and income of the entity between  
6 the PE and the entity so that the profits attributed to the PE equal  
7 the profits the PE might be expected to make if:  
8 (a) the PE were a distinct and separate entity; and  
9 (b) the activities and circumstances of the PE, including the  
10 functions performed, assets used and risks borne by the PE,  
11 were those of that separate entity; and  
12 (c) the conditions that operated between that separate entity and  
13 the entity of which it is a PE were the \*arm's length  
14 conditions.
- 15 (2) The conditions to which the \*arm's length conditions mentioned in  
16 paragraph (1)(c) relate are the conditions that would operate  
17 between the separate entity and the entity of which it is a \*PE if the  
18 assumptions in paragraphs (1)(a) and (b) were made.
- 19 (3) For the purposes of subsection (1):  
20 (a) the actual expenditure of an entity is taken to include losses  
21 and outgoings; and  
22 (b) the actual income of an entity is taken to include any amount  
23 that is, or is to be, included in the entity's assessable income.

24 **815-230 Source rules for certain arm's length profits**

- 25 (1) The \*arm's length profits for a \*PE in Australia are taken, for the  
26 purposes of this Act, to be attributable to sources in Australia.
- 27 (2) The \*arm's length profits for a \*PE in an \*area covered by an  
28 international tax sharing treaty are taken, for the purposes of this  
29 Act, to be attributable to sources in that area.

30 **815-235 Guidance**

- 31 (1) For the purpose of determining the effect this Subdivision has in  
32 relation to an entity, work out \*arm's length profits, and identify  
33 \*arm's length conditions, so as best to achieve consistency with:

## Schedule 2 Modernisation of transfer pricing rules

### Part 1 Main amendments

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- 1 (a) the documents covered by this section; and  
2 (b) subject to paragraph (a), the documents covered by  
3 section 815-135.
- 4 (2) The documents covered by this section are as follows:  
5 (a) the Model Tax Convention on Income and on Capital, and its  
6 Commentaries, as adopted by the Council of the Organisation  
7 for Economic Cooperation and Development and last  
8 amended on 22 July 2010, to the extent that document  
9 extracts the text of Article 7 and its Commentary as they read  
10 before 22 July 2010;  
11 (b) a document, or part of a document, prescribed by the  
12 regulations for the purposes of this paragraph.
- 13 (3) However, the document mentioned in paragraph (2)(a) is not  
14 covered by this section if the regulations so prescribe.
- 15 (4) A document covered by section 815-135 is to be disregarded for  
16 the purposes of this section if the regulations so prescribe.
- 17 (5) Regulations made for the purposes of paragraph (2)(b),  
18 subsection (3) or subsection (4) may prescribe different documents  
19 or parts of documents for different circumstances.

#### 20 **815-240 Amendment of assessments**

- 21 Section 170 of the *Income Tax Assessment Act 1936* does not  
22 prevent the amendment of an assessment of an entity for an income  
23 year if:  
24 (a) the amendment is made within 7 years after the day on which  
25 the Commissioner gives notice of the assessment to the  
26 entity; and  
27 (b) the amendment is made for the purpose of giving effect to  
28 section 815-215.

1 **Subdivision 815-D—Special rules for trusts and partnerships**

2 **Guide to Subdivision 815-D**

3 **815-301 What this Subdivision is about**

4 This Subdivision provides special rules about the way  
5 Subdivisions 815-B and 815-C apply to trusts and partnerships.

6 **Table of sections**

7 **Operative provisions**

8 815-305 Special rule for trusts

9 815-310 Special rules for partnerships

10 **Operative provisions**

11 **815-305 Special rule for trusts**

12 Subdivisions 815-B and 815-C apply in relation to the \*net income  
13 of a trust in the same way those Subdivisions apply in relation to  
14 the taxable income of an entity other than a trust.

15 **815-310 Special rules for partnerships**

16 (1) Subdivisions 815-B and 815-C apply in relation to the \*net income  
17 of a partnership in the same way those Subdivisions apply in  
18 relation to the taxable income of an entity other than a partnership.

19 (2) Subdivisions 815-B and 815-C apply in relation to a \*partnership  
20 loss of a partnership in the same way those Subdivisions apply in  
21 relation to a \*tax loss of an entity other than a partnership.

22 ***Taxation Administration Act 1953***

23 **3 After subsection 284-145(2A) in Schedule 1**

24 Insert:

25 (2B) You are also liable to an administrative penalty if:

**Schedule 2** Modernisation of transfer pricing rules  
**Part 1** Main amendments

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- 1 (a) to give effect to Subdivision 815-B or 815-C of the *Income*  
2 *Tax Assessment Act 1997* (also the ***adjustment provision***) in  
3 relation to a \*scheme, the Commissioner:  
4 (i) amends your assessment for an income year; or  
5 (ii) serves you with one or more notices under  
6 subsection 128C(7) of the *Income Tax Assessment Act*  
7 *1936* in respect of income that is taken because of the  
8 application of the adjustment provision to have been  
9 derived in the income year; and  
10 (b) as a result, you are liable to pay an additional amount of  
11 income tax or \*withholding tax (as the case requires).

12 Note: Subdivisions 815-B and 815-C of the *Income Tax Assessment Act*  
13 *1997* apply the arm's length principle (about transfer pricing) to  
14 entities and permanent establishments respectively.

15 **4 At the end of section 284-150 in Schedule 1**

16 Add:

17 *Scheme shortfall amount for cross-border transfer pricing*

- 18 (4) Despite subsection (2), your ***scheme shortfall amount*** for a  
19 \*scheme to which subsection 284-145(2B) applies is the total  
20 amount of additional income tax and \*withholding tax you are  
21 liable to pay as mentioned in that subsection.  
22 (5) Disregard your \*scheme shortfall amount for a \*scheme to which  
23 subsection 284-145(1) applies to the extent that scheme shortfall  
24 amount is attributable to additional tax that is, or is part of, your  
25 scheme shortfall amount for a scheme to which  
26 subsection 284-145(2B) applies.

27 **5 Section 284-160 in Schedule 1**

28 Repeal the section, substitute:

29 **284-160 Base penalty amount: schemes**

- 30 (1) The ***base penalty amount*** for a \*scheme to which  
31 subsection 284-145(1) applies is, subject to section 284-224:  
32 (a) 50% of your \*scheme shortfall amount; or  
33 (b) 25% of your scheme shortfall amount if it is \*reasonably  
34 arguable that the adjustment provision does not apply.



1 Add:

2 **284-165 Exception—threshold for penalty arising from cross-border**  
3 **transfer pricing**

- 4 (1) You are not liable to an administrative penalty under  
5 subsection 284-145(2B) if your \*scheme shortfall amount is equal  
6 to or less than your \*reasonably arguable threshold.
- 7 (2) You are also not liable to an administrative penalty under that  
8 subsection if:
- 9 (a) you have the \*scheme shortfall amount because of  
10 section 284-30 (about trusts); and
- 11 (b) the amount by which the trust would, apart from the  
12 application of Subdivision 815-B or 815-C of the *Income Tax*  
13 *Assessment Act 1997*, have had a greater \*net income, or a  
14 lesser \*tax loss, is equal to or less than the trust's \*reasonably  
15 arguable threshold.
- 16 (3) You are also not liable to an administrative penalty under that  
17 subsection if:
- 18 (a) you have the \*scheme shortfall amount because you are a  
19 partner in a partnership that participated in the \*scheme; and
- 20 (b) the amount by which the partnership would, apart from the  
21 application of Subdivision 815-B or 815-C of that Act, have  
22 had a greater \*net income, or a lesser \*partnership loss, is  
23 equal to or less than the partnership's \*reasonably arguable  
24 threshold.

25 *Nil amounts*

- 26 (4) For the purposes of this section:
- 27 (a) treat a trust or a partnership that has no \*net income for an  
28 income year as having a net income for the year of a nil  
29 amount; and
- 30 (b) treat a trust that has no \*tax loss for an income year as having  
31 a tax loss for the year of a nil amount; and
- 32 (c) treat a partnership that has no \*partnership loss for an income  
33 year as having a partnership loss for the year of a nil amount.

34 **7 At the end of Division 284 in Schedule 1**

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Add:

**Subdivision 284-E—Special rules about unarguable positions  
for cross-border transfer pricing**

**Table of sections**

284-250	Undocumented transfer pricing treatment not reasonably arguable
284-255	Documentation requirements

**284-250 Undocumented transfer pricing treatment not reasonably  
arguable**

This Division has effect in relation to an entity as if a matter was not \*reasonably arguable if:

- (a) the matter is a particular way of applying (including not applying) Subdivision 815-B or 815-C of the *Income Tax Assessment Act 1997* to a matter (or identical matters); and
- (b) the entity does not have records that meet the requirements in this Subdivision for the application of the Subdivision mentioned in paragraph (a) to that matter (or those matters) in that way.

Note: For the Commissioner’s power to remit an administrative penalty imposed by this Part, see section 298-20.

**284-255 Documentation requirements**

- (1) Records kept by an entity meet the requirements in this Subdivision for the application (or non-application) of Subdivision 815-B or 815-C of the *Income Tax Assessment Act 1997* to a matter (or identical matters) in a particular way if the records:
  - (a) are prepared before the time by which the entity lodges its \*income tax return for the income year relevant to the matter (or matters); and
  - (b) are in English, or readily accessible and convertible into English; and
  - (c) explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters); and
  - (d) explain why the application of the Subdivision to the matter (or matters) in that way best achieves the consistency



1 **Part 2—Other amendments**

2 ***Income Tax Assessment Act 1936***

3 **8 Subsection 6(1) (definition of *international tax sharing***  
4 ***treaty*)**

5 Repeal the definition.

6 **9 Section 102AAZA**

7 Repeal the section.

8 **10 At the end of subsection 160ZZW(2)**

9 Add:

10 Note: For cross-border transfer pricing, the rules in Subdivision 815-B of the  
11 *Income Tax Assessment Act 1997* apply to the separate legal entity,  
12 rather than the rules for permanent establishments in  
13 Subdivision 815-C: see subsection 815-210(3) of that Act.

14 **11 Subsection 160ZZW(5)**

15 Repeal the subsection.

16 **12 Subsections 170(9B) and (9C)**

17 Repeal the subsections.

18 **13 Subsection 170(10) (table item 24)**

19 Repeal the item.

20 **14 Subsection 170(14) (definition of *double taxation***  
21 ***agreement*)**

22 Repeal the definition.

23 **15 Subsection 170(14) (definition of *prescribed provision*)**

24 Repeal the definition.

25 **16 Subsection 170(14) (definition of *relevant provision*)**

26 Repeal the definition.

27 **17 Paragraph 389(a)**

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1 Omit “subsection 136AF(1A),”.

2 **18 Section 400**

3 Repeal the section, substitute:

4 **400 Modified cross-border requirement for transfer pricing**

5 (1) This section applies in calculating the attributable income of the  
6 eligible CFC.

7 (2) Conditions that operate between the eligible CFC and another  
8 entity do not satisfy the cross-border test in subsection 815-120(3)  
9 of the *Income Tax Assessment Act 1997* if:

10 (a) the other entity is a CFC; and

11 (b) the eligible CFC and the other entity are residents of the same  
12 listed country (disregarding section 383 of this Act).

13 **19 Subsection 434(3)**

14 Repeal the subsection, substitute:

15 (3) If:

16 (a) arm’s length conditions are taken by Subdivision 815-B of  
17 the *Income Tax Assessment Act 1997* to operate for purposes  
18 relating to the company; and

19 (b) had those conditions operated, an amount described in any of  
20 the paragraphs of subsection (1) as being an amount shown in  
21 the recognised accounts of the company for the statutory  
22 account period would have been different;

23 then the different amount is substituted for the amount shown in  
24 the recognised accounts.

25 ***Income Tax Assessment Act 1997***

26 **20 Section 10-5 (table item headed “avoidance of tax”)**

27 Omit:

profits shifted out of Australia ..... 136AD, 136AE

28 **21 Section 10-5 (after table item headed “trading stock”)**

29 Insert:

**transfer pricing**

arm's length principle for cross-border conditions  
between entities ..... Subdivision 815-B  
arm's length principle for permanent establishments ..... Subdivision 815-C

1 **22 Section 12-5 (table item headed "tax avoidance schemes")**

2 Omit:  
international profit shifting, transfer pricing ..... **136AA to 136AF**

3 **23 Section 12-5 (table item headed "transfer pricing")**

4 Repeal the item, substitute:  
**transfer pricing**  
arm's length principle for cross-border conditions  
between entities ..... Subdivision 815-B  
arm's length principle for permanent establishments ..... Subdivision 815-C

5 **24 Section 70-20 (note 1)**

6 Omit "Note 1", substitute "Note".

7 **25 Section 70-20 (note 2)**

8 Repeal the note.

9 **26 Section 355-400 (note 1)**

10 Omit "Note 1", substitute "Note".

11 **27 Section 355-400 (note 2)**

12 Repeal the note.

13 **28 Section 420-20 (note)**

14 Repeal the note.

15 **29 Section 420-30 (note)**

16 Repeal the note.

17 **30 Paragraph 802-35(1)(c)**

18 Omit "international tax sharing treaty (as defined in  
19 subsection 136AA(1) of the *Income Tax Assessment Act 1936*)",  
20 substitute "international tax sharing treaty".

1 **31 Paragraph 802-35(2)(c)**

2 Omit “international tax sharing treaty (as defined in  
3 subsection 136AA(1) of the *Income Tax Assessment Act 1936*”,  
4 substitute “\*international tax sharing treaty”.

5 **32 At the end of section 815-10**

6 Add:

7 Note: This Subdivision does not apply to income years to which  
8 Subdivisions 815-B and 815-C apply: see section 815-1 of the *Income*  
9 *Tax (Transitional Provisions) Act 1997*.

10 **33 Subsection 815-40(2)**

11 Before “section 136AB”, insert “former”.

12 **34 Section 820-30 (note)**

13 Omit “Subdivision 815-A”, substitute “Division 815”.

14 **35 Subparagraph 842-250(1)(c)(ii)**

15 Repeal the subparagraph, substitute:

16 (ii) in respect of a fund that is resident in a country that has  
17 not entered into an international tax agreement with  
18 Australia containing a business profits article—amounts  
19 included in the assessable income of the fund are treated  
20 as having a source in Australia because of  
21 subsection 815-230(1); or

22 **36 Subsection 995-1(1)**

23 Insert:

24 *area covered by an international tax sharing treaty*: if, under an  
25 \*international tax sharing treaty, Australia and another country  
26 share tax revenues from activities undertaken in an area identified  
27 by or under the treaty, that area is an *area covered by an*  
28 *international tax sharing treaty*.

29 **37 Subsection 995-1(1)**

30 Insert:

31 *arm’s length conditions* has the meaning given by  
32 section 815-125.

1 **38 Subsection 995-1(1)**

2 Insert:

3 *arm's length profits* has the meaning given by section 815-225.

4 **39 Subsection 995-1(1)**

5 Insert:

6 *international tax sharing treaty*:

- 7 (a) means an agreement between Australia and another country  
8 under which Australia and the other country share tax  
9 revenues from activities undertaken in an area identified by  
10 or under the agreement; and  
11 (b) does not include an agreement within the meaning of the  
12 *International Tax Agreements Act 1953*.

13 **40 Subsection 995-1(1)**

14 Insert:

15 *PE*: see *permanent establishment*.

16 **41 Subsection 995-1(1)**

17 Insert:

18 *reasonably arguable threshold* for an income year has the  
19 meaning given by subsection 284-90(3) in Schedule 1 to the  
20 *Taxation Administration Act 1953*.

21 **42 Subsection 995-1(1)**

22 Insert:

23 *residence article* has the meaning given by subsection 815-120(6).

24 **43 Subsection 995-1(1) (definition of *transfer pricing benefit*)**

25 Repeal the definition, substitute:

26 *transfer pricing benefit* has the meaning given by sections 815-15,  
27 815-120 and 815-220.

1 ***Taxation Administration Act 1953***

2 **44 At the end of subsection 284-15(1) in Schedule 1**

3 Add:

4 Note: For the effect of transfer pricing documentation on when a matter is  
5 reasonably arguable, see Subdivision 284-E.

6 **45 Subsection 284-90(1) in Schedule 1 (table item 4, column  
7 headed “In this situation:”)**

8 Omit “the greater of \$10,000 or 1% of the income tax payable, or  
9 \*MRRT payable, by you for the income year, worked out on the basis of  
10 your \*income tax return or \*MRRT return”, substitute “your \*reasonably  
11 arguable threshold”.

12 **46 Subsection 284-90(1) in Schedule 1 (table item 5, column  
13 headed “In this situation:”)**

14 Omit “the greater of \$20,000 or 2% of the trust’s net income (if any) for  
15 that year worked out on the basis of the trust’s \*income tax return”,  
16 substitute “the trust’s \*reasonably arguable threshold”.

17 **47 Subsection 284-90(1) in Schedule 1 (table item 6, column  
18 headed “In this situation:”)**

19 Omit “the greater of \$20,000 or 2% of the partnership net income (if  
20 any) for that year, worked out on the basis of the partnership’s \*income  
21 tax return”, substitute “the partnership’s \*reasonably arguable  
22 threshold”.

23 **48 At the end of section 284-90 in Schedule 1**

24 Add:

25 (3) An entity’s *reasonably arguable threshold* for an income year is:

26 (a) unless paragraph (b) applies—the greater of the following  
27 amounts:

28 (i) \$10,000;

29 (ii) 1% of the income tax payable, or \*MRRT payable (as  
30 the case requires), by the entity for the income year,  
31 worked out on the basis of the entity’s \*income tax  
32 return or \*MRRT return (as the case requires); or

- 1 (b) if the entity is a trust or partnership—the greater of the  
2 following amounts:  
3 (i) \$20,000;  
4 (ii) 2% of the entity's \*net income (if any) for the income  
5 year worked out on the basis of the entity's \*income tax  
6 return.

7 **49 Subsection 284-145(2) in Schedule 1**

8 Repeal the subsection.

1 **Part 3—Application**

2 **50 Application**

3 The amendments made by Parts 1 and 2 of this Schedule (except item 2)  
4 apply:

- 5 (a) in respect of tax other than withholding tax—in relation to  
6 income years starting on or after the date mentioned in  
7 subsection 815-15(2) of the *Income Tax (Transitional*  
8 *Provisions) Act 1997*, as inserted by this Part; and  
9 (b) in respect of withholding tax—in relation to income derived,  
10 or taken to be derived, in income years starting on or after  
11 that date.

12 Note: For the application of Subdivisions 815-B, 815-C and 815-D of the *Income Tax*  
13 *Assessment Act 1997*, as inserted by item 2, see Division 815 of the *Income Tax*  
14 *(Transitional Provisions) Act 1997*.

15 ***Income Tax (Transitional Provisions) Act 1997***

16 **51 Subdivision 815-A (heading)**

17 Repeal the heading, substitute:

18 **Subdivision 815-A—Cross-border transfer pricing**

19 **52 Section 815-1**

20 Before “Subdivision 815-A”, insert “(1)”.

21 **53 At the end of section 815-1**

22 Add:

- 23 (2) However, Subdivision 815-A does not apply to an income year to  
24 which Subdivisions 815-B and 815-C of that Act apply.

25 Note: For the income years to which Subdivisions 815-B and 815-C apply,  
26 see section 815-15 of this Act.

27 **54 At the end of Subdivision 815-A**

28 Add:

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1 **815-15 Application of Subdivisions 815-B, 815-C and 815-D of the**  
2 ***Income Tax Assessment Act 1997***

3 (1) Subdivisions 815-B, 815-C and 815-D of the *Income Tax*  
4 *Assessment Act 1997* apply:

5 (a) in respect of tax other than withholding tax—in relation to  
6 income years starting on or after the date mentioned in  
7 subsection (2); and

8 (b) in respect of withholding tax—in relation to income derived,  
9 or taken to be derived, in income years starting on or after  
10 that date.

11 *Start date for transfer pricing amendments*

12 (2) The date is the earlier of:

13 (a) 1 July 2013; and

14 (b) the day the *Tax Laws Amendment (Countering Tax*  
15 *Avoidance and Multinational Profit Shifting) Act 2013*  
16 receives the Royal Assent.

1 **Part 4—Minor amendments relating to**  
2 **treaty-equivalent transfer pricing rules**

3 ***Income Tax Assessment Act 1997***

4 **55 Subparagraph 815-35(1)(b)(ii)**

5 Omit “tax loss”, substitute “\*tax loss”.

6 **56 Subparagraph 815-35(2)(b)(ii)**

7 Omit “tax loss”, substitute “\*tax loss”.

8 **57 Subsection 815-35(10)**

9 Omit “an entity”, substitute “the entity”.

10 ***Taxation Administration Act 1953***

11 **58 Paragraph 284-160(b) in Schedule 1**

12 After “subsection 284-145(2)”, insert “or (2A)”.

13 **59 Application**

14 The amendment made by item 58 applies to income years starting on or  
15 after 1 July 2012.