Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
ATO	Australian Taxation Office
BOT	Board of Taxation
Commissioner	Commissioner of Taxation
IME	Investment Manager Exemption (UK)
IMR	Investment Manager Regime (Australia)
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
IT(TP)A 1997	*Income Tax (Transitional Provisions) Act 1997*
MIT	managed investment trust
OECD	Organisation for Economic Co-operation and Development
PE	permanent establishment
the previous IMR Act	*Tax Laws Amendment (Investment Manager Regime) Act 2012*
RIS	Regulation Impact Statement
TAA 1953	*Taxation Administration Act 1953*
UK	United Kingdom
US	United States of America

General outline and financial impact

Investment Manager Regime

Schedule 1 to this Bill amends the *Income Tax Assessment Act 1997* to implement the final element of the Investment Manager Regime (IMR) reforms as well as amend some parts of the existing regime. The IMR reforms are designed to attract foreign investment to Australia and promote the use of Australian fund managers by removing tax impediments to investing in Australia. The development and introduction of an IMR was a recommendation of the 2009 report, 'Australia as a Financial Centre: Building on our Strengths — Report by the Australian Financial Centre Forum', commonly known as the 'Johnson Report'.

Date of effect: These amendments apply to assessments for the 2015-16 and later income years. In addition, taxpayers may choose to apply some of the amendments to previous income years.

Proposal announced: The Treasurer and the then Assistant Treasurer announced that the Government would proceed with these amendments in a joint Media Release titled, 'Restoring integrity in the Australian tax system' of 6 November 2013.

On 18 December 2014, the then Acting Assistant Treasurer confirmed the Government's commitment to implementing a practical IMR and to releasing updated exposure draft legislation in early 2015 for public consultation.

Financial impact: This measure is estimated to have an unquantifiable cost to revenue over the forward estimates period.

Chapter 1
Investment Manager Regime

Outline of chapter

1.1 Schedule 1 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to implement the final element of the Investment Manager Regime (IMR) reforms as well as amend some parts of the existing regime. The IMR reforms are designed to attract foreign investment to Australia and promote the use of Australian fund managers by removing tax impediments to investing in Australia. The development and introduction of an IMR was a recommendation of the 2009 report, 'Australia as a Financial Centre: Building on our Strengths — Report by the Australian Financial Centre Forum', commonly known as the 'Johnson Report'.

1.2 All legislative references in this Chapter are to the ITAA 1997 unless otherwise stated.

Context of amendments

1.3 In 2008, the Government established the Australian Financial Centre Forum as a Government and industry partnership to examine ways to position Australia as a leading regional financial services centre. In November 2009, the Forum provided its report to the Government. A copy of the report is available on the Forum's website (www.afcf.treasury.gov.au).

1.4 The Johnson Report noted that features of Australia's tax system could act as an impediment to certain cross-border activities — including certain investments made by foreign investors into or through Australia. The introduction of an IMR to provide specific exemptions from Australian income tax for particular investments of foreign investors was proposed as a means of removing such impediments.

1.5 In August 2011, the Board of Taxation (BOT) made a number of recommendations in respect of the design of an IMR in its report, 'Review of an Investment Manager Regime as it relates to foreign managed funds: a report to the Assistant Treasurer'. The BOT recommended that an exemption style IMR be introduced that would apply to portfolio level investments made into Australia, as well as to certain investments made through Australia that were subject to Australian tax because of the use of

Australian based intermediaries or fund managers. A key recommendation of the BOT was that the IMR should only apply to the investments of foreign funds that are genuinely widely held. A copy of this report is available on the BOT's website (www.taxboard.gov.au).

1.6 Following the release of the BOT's report, the Government announced on 16 December 2011 that it would address the uncertainty faced by foreign investors with respect to aspects of Australia's tax laws when making passive investments into Australian assets and foreign assets.

1.7 There are three elements to the IMR reforms.

- Element 1 was enacted by the *Tax Laws Amendment (Investment Manager Regime) Act 2012* (the previous IMR Act). Element 1 was designed to mitigate the consequences of United States of America (US) accounting standard Financial Interpretation Number 48 by clarifying the tax treatment of past transactions of foreign funds. These amendments are contained in the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997).

- Element 2 was also enacted by the previous IMR Act. Element 2 created a new Subdivision 842-I to provide concessional income tax treatment to foreign investors on their share of certain returns or gains from investments of a portfolio nature (membership interests of less than 10 per cent of the total) in assets through Australia by widely held foreign funds.

- This Bill implements the final stage of the IMR reforms by extending the concession to cover investments in Australian assets that are of a portfolio nature. These amendments also remove the portfolio restriction in respect of investments in foreign assets that are made through Australia. The amendments also make significant changes to the criteria that determine when a foreign fund is widely held and simplify the legislative mechanism for providing the IMR concession.

1.8 The IMR regime is designed to place individual foreign investors that invest into Australia through a foreign fund in the same tax position in relation to disposal gains and disposal losses they would have typically been had they made their share of the fund's investments directly (rather than through the fund). The regime is also designed to ensure that when a foreign investor invests through an independent Australian fund manager it will be in the same position, in relation to disposal gains and losses, as if it had invested directly.

1.9 These changes are expected to encourage greater foreign investment to Australia and allow Australian fund managers to actively market their financial services globally, thereby promoting Australia as a regional financial services centre.

Summary of new law

1.10 These amendments replace the existing Subdivision 842-I with a simplified regime that allows foreign entities to qualify for the IMR concession either by investing directly in Australia (the direct IMR concession) or investing in Australia via an Australian fund manager (the indirect IMR concession). An entity may independently qualify for the direct IMR concession or the indirect IMR concession — but in either case the tax consequences are the same.

1.11 As noted in paragraph 1.7, these amendments broaden the scope of the IMR concession and simplify its operation. As part of this, the amendments remove a number of existing concepts and definitions used in Subdivision 842-I.

1.12 In addition, these amendments also make technical changes to the operation of Subdivision 842-1 of the IT(TP)A 1997 to ensure some entities are not inadvertently excluded or disadvantaged in relation to Element 1 of the IMR reforms.

Comparison of key features of new law and current law

New law	***Current law***
Australian income tax consequences that arise in respect of certain gains and losses from portfolio and passive investments into Australia from pooling these investments in a widely-held foreign fund are disregarded.	Certain gains and losses from portfolio and passive investments into Australia, when pooled in a widely-held foreign fund, may be subject to Australian income tax.
Foreign entities that engage an independent Australian fund manager to invest into Australia disregard Australian income tax consequences arising in respect of certain gains and losses from those investments (including portfolio and non-portfolio foreign investments and portfolio Australian investments) to the extent	Foreign entities that engage an Australian fund manager to invest into Australia may be subject to tax in respect of certain gains and losses from those investments.

that the returns or gains are not attributable to Australian real property.	

Detailed explanation of new law

1.13 The IMR concession is designed to remove two impediments arising from Australia's income tax laws that discourage investment from being made into, or through, Australia by foreign entities.

1.14 The first impediment arises from direct investments made by foreign entities into Australian assets that do not relate, directly or indirectly, to Australian real property. Disposal gains on such investments are either taxed on revenue account (as assessable income) or disregarded as a capital gain (because they are not taxable Australian property). In general, whether an investment is held on revenue or capital account is determined by having regard to the purpose and activities of the entity making the investment. For example, a foreign individual who passively invests in such an asset typically realises, on the disposal of that asset, gains of a capital nature rather than as revenue and therefore would not be subject to Australian income tax. By contrast, where such gains are made from pooling investments of a wide base of investors into a fund, having regard to the purpose and activities of such a fund, those disposal gains are more likely to be of a revenue nature and would therefore be subject to Australian income tax.

1.15 The second impediment arises from foreign funds investing through an Australian fund manager. Typically, the use of such a manager constitutes an Australian permanent establishment (PE) or may cause certain returns or gains from these investments having an 'Australian source', which could, in the absence of these amendments, result in certain returns and gains from these investments being taxable in Australia.

What is the IMR concession?

1.16 The ***IMR concession*** disregards certain Australian income tax consequences arising to foreign entities, including individuals, companies, beneficiaries of non-resident trusts and partners in partnerships. ***[Schedule 1, item 1, subsection 842-220(1)]***

1.17 Consistent with Australia's existing arrangements for the taxation of trusts and partnerships, specific rules apply to non-resident trusts and partnerships to ensure the IMR concession flows through to foreign beneficiaries and foreign partners. For example, a foreign beneficiary of a non-resident trust applies the IMR concession to the extent necessary to work out their assessable income in Australia. These rules are necessary because of the flow through nature of trusts and partnerships and the existing income tax arrangements in Divisions 5 (partnerships) and 6 (trusts) of the *Income Tax Assessment Act 1936* (ITAA 1936). ***[Schedule 1, item 1, subsection 842-220(2)]***

What entities qualify for the concession?

1.18 The concept of an ***IMR entity*** forms a key building block in determining whether a foreign investor receives the IMR concession. Only certain income derived by an IMR entity may qualify for the concession. However, as noted above, should foreign investors invest through a non-resident trust or partnership then those consequences will flow through to the foreign beneficiaries or foreign partners.

Example 1.1

> Rick and Carlie are beneficiaries of Walkers Worldwide (a non-resident trust) and are each entitled to one per cent of its income. Assume Walkers Worldwide qualifies as an IMR entity and has net income of $100.
>
> Rick is an Australian resident. Because of his residency status and Walkers Wordwide's status as a trust, the IMR concession has no application in working out Rick's assessable income. As such, for the purposes of determining Rick's share of the net income of the trust, Walkers Worldwide has a net income of $100. Rick's assessable income includes his share ($1) of the net income of Walkers Worldwide.
>
> Carlie is a foreign investor. For the purposes of working out Carlie's assessable income (which includes her share of the net income of Walkers Worldwide), the IMR concession applies in calculating the net income of Walkers Worldwide. Assuming for this purpose, all of Walkers Worldwide's income qualifies for the IMR concession, Walkers Worldwide's income of $100 would be non-assessable non-exempt income, resulting in it having no net income. The benefit of the IMR concession flows through to Carlie as she would consequently have no assessable trust distribution and (as a result of Walkers Worldwide's income being made non-assessable non-exempt) no capital gain in respect of her trust interest.

1.19 Given the objectives of the IMR reforms, an entity will only be an IMR entity in relation to an income year if it:

- is a 'foreign resident' (and not a 'resident trust for CGT purposes') at all times during the year; and

- does not carry on a ‘trading business’ in Australia or control, or be able to control (either directly or indirectly) the affairs or operations of such a business at any time during that year.

[Schedule 1, item 1, section 842-230]

1.20 ‘Foreign resident’ and ‘resident trust for CGT purposes’ are existing Australian income tax law concepts and are defined in subsection 995-1(1). ‘Foreign resident’ is defined as not being an Australian resident. This rule ensures that look-through vehicles that do not have a residency status for Australian income tax purposes can satisfy this requirement.

1.21 The concept of a ‘trading business’ is contained in section 102M of the ITAA 1936. The requirement not to be, or control, such a business ensures that the IMR concession applies to passive types of income.

1.22 As Australia’s tax system operates on an income year basis, these rules similarly operate on an income year basis. This means that an entity which initially qualifies as an IMR entity will need to assess on an ongoing basis that it continues to meet these requirements.

What are the tax consequences of the concession?

1.23 The IMR concession operates by:

- treating certain amounts of income that would otherwise be ‘assessable income’ as ‘non-assessable non-exempt income’;
- denying certain ‘deductions’; and
- disregarding certain ‘capital gains’ and ‘capital losses’.

‘Assessable income’, ‘non-assessable non-exempt income’, ‘deductions’, ‘capital gains’ and ‘capital losses’ are all core Australian income tax concepts and are defined in subsection 995-1(1). ***[Schedule 1, item 1, subsection 842-225(1)]***

1.24 The IMR concession applies to disposal gains and losses from financial arrangements and to gains and losses from derivative financial arrangements. The concepts of ‘a financial arrangement’ and ‘a derivative financial arrangement’ are defined in Division 230 and both constitute an ***IMR financial arrangement*** as defined under these amendments.

1.25 However, consistent with the design principle that the IMR concession does not provide foreign investors with a more advantageous outcome in relation to gains that would otherwise be taxable in Australia as a capital gain, particular financial arrangements are excluded from the definition of an IMR financial arrangement. Specifically, a 'financial arrangement' that arises from, or relates to, a 'CGT asset' that is 'taxable Australian property' or an 'indirect Australian real property interest' is not an IMR financial arrangement. 'CGT assets' are defined in subsection 995-1(1) and the concepts of 'taxable Australian real property' and 'indirect Australian real property interest' are contained in sections 855-20 and 855-25 respectively. ***[Schedule 1, item 1, subsection 842-225(1) and section 842-235]***

Qualifying for the direct IMR concession

1.26 An IMR entity may qualify for the direct IMR concession in relation to an income year if:

- it is a widely held entity during the whole of the year;
- the interest of the entity in the issuer of, or counterparty to, the IMR financial arrangement does not pass the 'non-portfolio interest test'; and
- none of the returns, gains or losses from the arrangement are attributable to a 'permanent establishment' in Australia.

[Schedule 1, item 1, subsection 842-225(2)]

1.27 The 'non-portfolio interest test' is set out in section 960-195. Not passing the non-portfolio interest test requires the holding entity and its associates to hold direct participation interests of less than 10 per cent. The purpose of this rule is to ensure that the IMR concession applies in respect of passive, rather than active business income. This rule complements the requirement that the IMR entity not carry on or control a trading business in Australia.

1.28 The direct IMR concession does not apply to disposal gains or losses that are attributable to an Australian PE. Instead the indirect IMR concession may apply if the Australian PE is an independent Australian fund manager. ***[Schedule 1, item 1, paragraph 842-225(2)(c) and subsection 842-225(3)]***

1.29 The concept of a 'permanent establishment' is set out in either an applicable international tax agreement or, if no double tax agreement applies, subsection 6(1) of the ITAA 1936.

Example 1.2

Bonjour Investments Ltd is a foreign investment entity based outside of Australia. It has an office in Australia that constitutes an Australian

PE. Bonjour Investments Ltd makes portfolio investments directly into Australia (that is, not through its office). Any gains or losses made on disposal of those investments will not be attributable to that PE in Australia and therefore, subject to satisfying the other relevant criteria, Bonjour Investments Ltd may be entitled to the direct IMR concession.

The fact that Bonjour Investments has an Australian PE does not disqualify it from accessing the IMR concession.

What is an IMR widely held entity?

1.30 To provide flexibility, an IMR entity may qualify as being widely held in one of two ways. Specific types of widely held entities automatically qualify whereas other entities need to meet specific membership requirements. This approach provides a balance between minimising compliance costs for industry and ensuring that, consistent with the BOT's recommendations, only genuinely widely held entities qualify for the concession. In addition, these amendments provide, in effect, a temporary exception to the widely held rule to alleviate the cliff-edge nature of the test. This rule is discussed further in paragraph 1.42.

Specific types of widely held entities

1.31 A 'foreign life insurance company' as defined in subsection 995-1(1) as well as an entity covered in subsection 12-402(3) of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) (with the exception of paragraph (e)) automatically qualifies as an IMR widely held entity. The entities listed in subsection 12-402(3) of Schedule 1 to the TAA 1953 are entities that are taken to be widely held under the rules relating to managed investment trusts (MITs). Alternative rules apply to entities covered by paragraph 12-402(3)(e) of Schedule 1 to the TAA 1953 — these rules are explained in paragraph 1.36. ***[Schedule 1, item 1, paragraphs 842-250(1)(a) and (b)]***

1.32 To provide ongoing flexibility, the regulations may prescribe additional types of entities. ***[Schedule 1, item 1, paragraph 842-250(1)(c)]***

Widely held entities based on membership interests

1.33 Alternatively, an IMR entity with membership interests may also qualify as an IMR widely held entity if:

- no member of the entity has a total participation interest in the entity of 20 per cent or more; or
- there are no five or fewer members who have a combined participation interest of at least 50 per cent.

[Schedule 1, item 1, paragraph 842-250(2)(a)]

1.34 These rules are based on the requirements in the United Kingdom's (UK) Investment Manager Exemption (IME). Similarly with the UK IME, either of the above tests, not both, may be satisfied in order for the IMR entity to be widely held. Therefore, if a fund has six members with equal interests in the IMR entity, then despite the fund having five members who hold the majority of interests in the fund, it will nevertheless be an IMR widely held entity because each member's interest in the fund is less than 20 per cent.

1.35 To determine whether any member has a participation interest of 20 per cent or more or whether five or fewer members have a total participation interest of 50 per cent or more, these amendments provide specific tracing rules. To ensure these tracing rules can apply to a range of foreign entities that may invest through an IMR entity, without providing opportunities for entities to manipulate their total level of interest, an individual with a membership interest indirectly through one or more interposed entities is treated as the 'member' of the test entity (and the interposed entities are ignored). In addition, an object of a trust is treated as not being a member of the trust. An entity, and each of its affiliates (as defined in section 328-130), are together treated as being one entity. An entity that is a nominee of another entity is treated as not having rights in the test entity — instead the other entity is taken to have those rights. ***[Schedule 1, item 1, subsections 842-260(1) to (5)]***

1.36 A member of an IMR entity that automatically qualifies as a widely held entity (as set out in paragraphs 1.31 and 1.32) or a member that is a foreign collective investment vehicle within the meaning of paragraph 12-402(3)(e) of Schedule 1 to the TAA 1953 does not need to satisfy these participation percentages. However, if other members of the IMR entity breach the resulting participation percentages then the IMR entity will not be an IMR widely held entity. ***[Schedule 1, item 1, subsection 842-260(6)]***

1.37 The widely held test is designed to ensure that the IMR entity has wide membership and so does not test who controls the voting power of the IMR entity (which may sometimes be its fund manager). Accordingly, the criteria in paragraph 350(1)(b) of the ITAA 1936 can be ignored in determining whether an entity has a direct interest in another entity. ***[Schedule 1, item 1, subsection 842-260(7)]***

Special rules for starting up, winding down and temporary circumstances outside an IMR entity's control

1.38 In addition, specific rules apply when the IMR entity is starting up or winding down. These rules recognise that in some circumstances an

IMR entity may take some time to grow an investment base that can attract a sufficient level of membership to meet the widely held test. Similarly, an IMR entity may no longer meet the widely held test once it sends notices to its members of the decision to wind down its investment activities.

1.39 Provided an IMR entity is being actively marketed with the intention of becoming widely held within 18 months after accepting its first member, then the IMR entity will be taken to be widely held during this period. However, should the IMR entity not actually become widely held by the end of this period, then it will be taken to have never been widely held. In these cases the IMR entity may need to subsequently lodge an income tax return, or an amended income tax return, for the relevant period. ***[Schedule 1, item 1, paragraph 842-250(2)(b) and subsection 842-250(3)]***

1.40 It will be a question of fact whether an IMR entity is being actively marketed. This requires evidence of ongoing genuine attempts to obtain third party investment into the entity to meet the widely held test.

1.41 In addition, if an IMR entity's activities and investments are being wound down and it has sent notices to its members notifying them of this fact then the entity will be widely held during this period. This accommodates situations where investors withdraw their funds once they have been notified of the fund being wound down. ***[Schedule 1, item 1, paragraph 842-250(2)(c)]***

1.42 In some cases, an IMR entity may temporarily stop being widely held due to a reason beyond its control. For example, it is common for foreign investment entities to have substantial keystone investors, such as a life insurance company, a complying superannuation fund or another type of IMR widely held entity. The sudden and unexpected exit of such a keystone investor may result in an IMR entity failing the widely held test.

1.43 In these circumstances, having regard to the actions of the IMR entity to resolve these issues (and the speed with which they are taken), the IMR entity may continue to be treated as being widely held if it is fair and reasonable to do so. There are no limits on what actions the IMR entity could take and, depending on the circumstances, this may include winding down the entity. However, it is important to note that this rule applies only in relation to temporary circumstances — in this case, 'temporary' takes its ordinary meaning. ***[Schedule 1, item 1, section 842-265]***

1.44 This rule provides an opportunity for the IMR entity to rectify the breach of the widely held test without losing the benefit of the IMR concession.

Qualifying for the indirect IMR concession

1.45 As noted in paragraph 1.10, an entity may qualify for either the direct IMR concession or the indirect IMR concession. In determining whether an IMR entity qualifies for the indirect IMR concession, it does not matter whether or not it also qualifies for the direct IMR investment concession.

1.46 An IMR entity may qualify for the indirect IMR concession in relation to an income year if:

- the IMR financial arrangement is made on the IMR entity's behalf by an independent Australian fund manager; and
- if the issuer, or counterparty to, the IMR financial arrangement is an Australian resident (or a resident trust for CGT purposes) — then the interest in the entity does not pass the 'non-portfolio interest test'.

Of note, the requirement to not pass the non-portfolio interest test only applies in relation to interests in Australian residents. There is no equivalent requirement in relation to foreign residents. Paragraphs 1.24, 1.25 and 1.27 provide further information about IMR financial arrangements and the non-portfolio interest test. ***[Schedule 1, item 1, subsection 842-225(3)]***

What is an independent Australian fund manager?

1.47 To qualify as an independent Australian fund manager, the managing entity must be an Australian resident and carry out investment management activities (within the ordinary meaning of that term) for the IMR entity in the ordinary course of its business. In addition, the managing entity must, having regard to the Organisation for Economic Co-operation and Development (OECD) transfer pricing guidelines, receive an amount equivalent to arm's length level of remuneration for its services. ***[Schedule 1, item 1, paragraphs 842-270(1)(a), (b) and (c) and subsection 842-270(2)]***

1.48 In addition, to ensure the relationship between the IMR entity and managing entity is genuinely independent, either:

- the IMR entity must be widely held; or
- no more than 70 per cent of the managing entity's income for the income year is received from the IMR entity or its 'connected entities' as defined in subsection 995-1(1) ('the 70 per cent or less test').

[Schedule 1, item 1, subparagraphs 842-270(1)(d)(i) and (ii)]

1.49 For the same reason, there are also consequences if the fund manager has a right to receive 20 per cent or more of the IMR entity's profits. These consequences are set out in paragraphs 1.51 to 1.54.

Example 1.3

> Three foreign investors, Ly, Ivar and Tanya, form a partnership to invest in Australian shares. Ly, Ivar and Tanya engage an Australian investment manager, Tayler, on a commercial basis to acquire and sell shares on their behalf. Tayler is based in Australia and buys and sells shares for a wide range of Australian and international clients.
>
> In 2016-17, Tayler makes a total of 100 transactions, of which 20 are made on behalf of Ly, Ivar and Tanya. Assuming that Tayler receives the same amount of revenue for each transaction, then the 70 per cent or less test is satisfied as only 20 per cent of Tayler's income for 2016-17 is received from Ly, Ivar and Tanya.

1.50 Recognising that newly formed managing entities may not be able to satisfy the 70 per cent or less test, if the managing entity has been carrying out investment management activities for 18 months or less then it need only take all reasonable steps to ensure its proportion of income from the IMR entity and its connected entities is reduced to 70 per cent or less. This will be a question of fact. ***[Schedule 1, item 1, subparagraph 842-270(1)(d)(iii)]***

Example 1.4

> Further to Example 1.3.
>
> Ly, Ivar and Tanya also engage another Australian investment manager Philomena to make various investments on their behalf. Philomena has only recently become an investment manager and so has no other clients. Accordingly, 100 per cent of Philomena's income is received from Ly, Ivar and Michael.
>
> However, as Philomena is actively seeking out new clients to provide investment management services, she is taking reasonable steps to bring her income from Ly, Ivar and Tanya below the 70 per cent threshold.

Consequences if an independent Australian fund manager is entitled to a share of at least 20 per cent of the IMR entity's profits

1.51 If the independent Australian fund manager as well as any entities connected with the fund manager have a right to receive, either directly or indirectly, more than 20 per cent of IMR entity's profits for that year, then the IMR concession is reduced by an equivalent amount. For example, if an independent Australian fund manager has an entitlement to receive 30 per cent of the IMR entity's profits, then the IMR concession is reduced by 30 per cent. Assuming the IMR entity would otherwise have $100 of non-assessable non-exempt income as a result of the IMR concession, then this would be reduced to $70. ***[Schedule 1, item 1, subsections 842-275(1) and (2)]***

1.52 Recognising that some commercial arrangements may result in an independent Australian fund manager occasionally receiving more than 20 per cent of the IMR entity's profits in an income year then an IMR entity may apply to the Commissioner of Taxation (Commissioner) to determine that it does not need to reduce the IMR concession if the Commissioner is satisfied that the IMR entity intends for the independent Australian fund manager to not have such a right within five years and that, accordingly, investment in the IMR entity is being actively marketed. Such an application must be made in the 'approved form'. ***[Schedule 1, item 1, subsections 842-275(3) and (4)]***

1.53 The concept of an approved form is used in the taxation laws to provide the Commissioner with administrative flexibility to specify the precise form of information required and the manner of providing it. Section 388-50 of Schedule 1 to the TAA 1953 provides the legislative basis for the use of approved forms.

1.54 An entity that is dissatisfied with a decision of the Commissioner to not make such a determination may object that decision. This process is set out in Part IVC of the TAA 1953. ***[Schedule 1, item 1, subsection 842-275(5)]***

Consequential and other amendments

1.55 These amendments include guide material and an objects clause for Subdivision 842-I. ***[Schedule 1, item 1, sections 842-200 and 842-205]***

1.56 These amendments add a reference to the IMR concession to the list of non-assessable non-exempt provisions in section 11-55. ***[Schedule 1, item 4]***

1.57 These amendments remove redundant definitions in the dictionary in subsection 995-1(1) arising from the repeal of the previous Subdivision 842-I and replace them with references to new IMR-related definitions. ***[Schedule 1, items 5, 6, 8, 9 and 11]***

1.58 These amendments also exclude business carried on by a partnership that solely relates to IMR financial arrangements from being used to determine if the partnership carries on business in Australia for the purposes of section 94T of the ITAA 1936 and would therefore be a resident for tax purposes. Importantly, these amendments do not ignore business carried on by the partnership (or the fund manager) for the purposes of the central management and control test in the limited partnership definition in subparagraph 94T(1)(f)(ii). ***[Schedule 1, items 2 and 3]***

'IMR foreign fund' technical corrections

1.59 These amendments also correct several technical deficiencies with the original definition of an 'IMR foreign fund' in Subdivision 842-I. Whilst the new Subdivision 842-I no longer relies on the concept of an 'IMR foreign fund' (instead relying on the concept of an 'IMR entity'), the definition of an IMR foreign fund continues to have ongoing application in relation to Element 1 of the IMR regime (Financial Interpretation Number 48). Accordingly, these amendments provide foreign entities with the choice of applying alternative tests to determine whether they are an IMR foreign fund for the purposes of the earlier amendments. ***[Schedule 1, item 12, subsection 842-209(2) of the IT(TP)A 1997]***

1.60 These tests incorporate the definition of 'IMR entity' but with some modifications to better match the earlier requirements to be an IMR foreign fund — this includes deeming the entity as not controlling or able to control the affairs or operations of an Australian trading business and that it meets the requirements to be a widely held IMR entity based on its membership interests. ***[Schedule 1, item 12, subsection 842-209(4), (5) and (6) of the IT(TP)A 1997]***

Application and transitional provisions

1.61 These amendments commence on Royal Assent.

1.62 These amendments apply to assessments for the 2015-16 income year and later income years. ***[Schedule 1, item 12, paragraph 842-207(1)(a) of the IT(TP)A 1997]***

1.63 In addition, a taxpayer may choose to apply the new Subdivision 842-I, with the exception of the direct concession, to assessments for the 2011-12, 2012-13, 2013-14 and 2014-15 income years. The way the taxpayer has prepared their income tax return is sufficient evidence of them making such a choice. As the direct concession was not part of Element 1 and Element 2 of the IMR, it is not available for previous income years. ***[Schedule 1, item 12, paragraph 842-207(1)(b) and subsections 842-207(2), (3) and (4) of the IT(TP)A 1997]***

1.64 The IMR foreign fund technical corrections, in effect, apply on an optional basis to the 2010-11 and earlier income years. The way a taxpayer has, or has not prepared, their income tax return is sufficient evidence of them making such a choice. ***[Schedule 1, item 12, subsections 842-209(1) and (3) of the IT(TP)A 1997]***