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Tax and Superannuation Laws Amendment (debt and equity scheme integrity rules) Bill

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details

1.

2. Schedule #	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.
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Schedule #—Debt and equity scheme integrity rules

Part 1—Main amendments

Income Tax Assessment Act 1997

1 Section 974-155

Repeal the section, substitute:

974-155 Aggregate schemes

- (1) For the purposes of this Division, treat 2 or more *schemes as a single aggregate scheme if:
- (a) the pricing, terms and conditions of one or more of the schemes:
 - (i) are dependent on or linked to; or
 - (ii) operate to change the economic consequences of; the pricing, terms and conditions of one or more of the other schemes; and
 - (b) if the schemes were a single aggregate scheme, this would change whether this Division treats an interest as a *debt interest or an *equity interest; and
 - (c) having regard to the following, it would be concluded that the schemes were designed to operate together to produce the schemes' combined economic effect:
 - (i) the nature and extent of any involvement by the parties to one of the schemes in any of the other schemes;
 - (ii) the way the schemes are entered into or carried out;
 - (iii) any dealing, between any of the parties to any of the schemes, that is not at *arm's length;
 - (iv) the relationships between any of the parties to any of the schemes;
 - (v) normal commercial understandings and practices;
 - (vi) any other relevant matters.
- (2) Subsection (1) does not apply to 2 or more *schemes if:

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- (a) the dependence, link or operation referred to in paragraph (1)(a) happens merely because of one or more of the following:
- (i) the use of a return on or of an interest arising from one of the schemes to fund a return on or of an interest arising from another of the schemes, if this is not part of the terms and conditions of any of the schemes;
 - (ii) the holders of 2 or more kinds of interests agreeing to staple the interests so that each kind of interest may only be disposed of or cancelled with the other kinds of interests;
 - (iii) the arranging for an obligation to pay a return on a *debt interest arising from one of the schemes to be subordinate to an obligation to pay a return on a debt interest arising from another of the schemes, if neither obligation is contingent on the performance of the other;
 - (iv) the subjecting of an interest arising from one of the schemes, or assets of the entity that issued the interest, to a security interest (within the meaning of the *Corporations Act 2001*) in order to secure a return on an interest arising from another of the schemes; or
- (b) the Commissioner determines that it would be unreasonable for subsection (1) to apply to the schemes.

Note 1: The Commissioner must have regard to the objects of this Division (see subsection 974-10(5)).

Note 2: Applications, review and other matters relating to these determinations are set out in section 974-112.

- (3) The Minister may, by legislative instrument, declare examples to illustrate the operation of subsection (1) and paragraph (2)(a). Such an example may extend or narrow the operation of that subsection and paragraph.

Note: None of the examples will be exhaustive (see section 15AD of the *Acts Interpretation Act 1901*).

- (4) Subsection (1) does not apply for the purposes of this section or section 974-10 (about the objects of this Division).

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1 **Part 2—Returns or transactions in respect of**
2 **schemes**

3 *Income Tax Assessment Act 1997*

4 **2 At the end of section 26-26**

5 Add:

- 6 (3) An entity cannot deduct under this Act a return that has accrued on
7 a *non-share equity interest if:
8 (a) the entity is not a company; and
9 (b) the entity paid the return; and
10 (c) the return is treated as being paid in respect of the non-share
11 equity interest because of subsection 974-105(1).

12 **3 Section 974-105**

13 Repeal the section, substitute:

14 **974-105 Effect of action taken in relation to interest arising from a**
15 **scheme**

- 16 (1) For the purposes of the provisions listed in subsection (2), if:
17 (a) a *scheme gives rise to a *debt interest in an entity, and the
18 entity pays a return, or undertakes any other transaction, in
19 respect of the scheme or a part of the scheme; or
20 (b) a scheme gives rise to an *equity interest in a company, and
21 the company or a *connected entity of the company pays a
22 return, or undertakes any other transaction, in respect of the
23 scheme or a part of the scheme;
24 treat the return as being paid, or the transaction as being
25 undertaken, in respect of the debt interest or equity interest (and
26 not in respect of the scheme or part of the scheme).

- 27 Example: Company A issues a convertible note to Company B. Company C, a
28 connected entity of Company B, provides a binding collateral
29 undertaking to Company A that Company B will exercise the option
30 to convert the note into shares in Company A. The returns on the note
31 are treated as returns in respect of an equity interest in Company A if:
32 (a) a single aggregate scheme results from applying section 974-155
33 to the note and the undertaking; and
34 (b) that scheme gives rise to the equity interest in Company A.

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- (2) The provisions are:
 - (a) the provisions of this Division (other than this section); and
 - (b) any other provision of this Act whose operation depends on an expression whose meaning is given by this Division.

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1 **Part 3—Other amendments**

2 *Income Tax Assessment Act 1936*

3 **4 Subparagraph 128F(1)(c)(ii)**

4 Repeal the subparagraph, substitute:

- 5 (ii) is a result of applying section 974-155 of the *Income*
6 *Tax Assessment Act 1997* (about aggregate schemes) to
7 2 or more schemes, if one or more of those schemes is a
8 non-equity share; or

9 **5 Subparagraph 128F(1A)(d)(ii)**

10 Repeal the subparagraph, substitute:

- 11 (ii) is a result of applying section 974-155 of the *Income*
12 *Tax Assessment Act 1997* (about aggregate schemes) to
13 2 or more schemes, if one or more of those schemes is a
14 non-equity share; or

15 **6 Subparagraph 128F(1B)(b)(ii)**

16 Repeal the subparagraph, substitute:

- 17 (ii) is a result of applying section 974-155 of the *Income*
18 *Tax Assessment Act 1997* (about aggregate schemes) to
19 2 or more schemes, if one or more of those schemes is a
20 non-equity share; or

21 **7 Subsections 128F(15) and (16)**

22 Repeal the subsections, substitute:

- 23 (15) If (apart from this subsection) this section applies to interest paid in
24 respect of:
25 (a) a debt interest to which subparagraph (1)(c)(ii), (1A)(d)(ii) or
26 (1B)(b)(ii) applies; or
27 (b) any of the schemes referred to in that subparagraph that is a
28 debenture;
29 then this section applies only to:
30 (c) interest paid in respect of the non-equity share referred to in
31 that subparagraph; and
32 (d) interest paid in respect of that debenture (if any); and
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(e) interest paid in respect of any of the other schemes referred to in that subparagraph that would be interest to which this section applies in respect of a debt interest if section 974-155 of the *Income Tax Assessment Act 1997* (about aggregate schemes) did not apply to that other scheme.

Note: Subsection 128A(1AB) defines *interest* to include dividends paid in respect of a non-equity share.

Income Tax Assessment Act 1997

8 Section 974-1

Omit “(except for certain interests that fund returns on equity interests)”.

9 At the end of Subdivision 215-B

Add:

215-40 Related schemes

- (1) Subject to subsections (3) [and (4)], 2 *schemes are *related schemes* if they are related to one another in any way.
- (2) Without limiting subsection (1), 2 *schemes are *related schemes* if:
 - (a) the schemes are based on stapled instruments; or
 - (b) one of the schemes would, from a commercial point of view, be unlikely to be entered into unless the other scheme was entered into; or
 - (c) one of the schemes depends for its effect on the operation of the other scheme; or
 - (d) one scheme complements or supplements the other; or
 - (e) there is another scheme to which both the schemes are *related schemes because of a previous application or applications of this subsection.
- (3) Two *schemes are not *related schemes* merely because:
 - (a) one refers to the other; or
 - (b) they have a common party.
- (4) The regulations may specify circumstances in which 2 *schemes:
 - (a) are taken to be *related schemes*; or
 - (b) are taken not to be *related schemes*.

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10 Subsection 820-930(1) (table item 4)

Repeal the item.

11 Subsection 974-10(3)

Omit “combined effect of *related schemes”, substitute “combined operation of a number of *schemes is to”.

12 Paragraphs 974-10(5)(a) and (d)

Repeal the paragraphs.

13 After paragraph 974-10(5)(e)

Insert:

; (f) paragraph 974-155(2)(b).

14 Section 974-15

Repeal the section, substitute:

974-15 Meaning of *debt interest*

- (1) A *scheme gives rise to a *debt interest* in an entity if the scheme, when it comes into existence, satisfies the debt test in subsection 974-20(1) in relation to the entity.

Note 1: A debt interest can also arise under section 974-65 (Commissioner’s discretion).

Note 2: Section 974-55 defines various aspects of the debt interest that arises.

Note 3: Some schemes are treated as a single aggregate scheme (see section 974-155) and a single scheme may be treated as several separate schemes (see section 974-150).

- (2) However, if:

- (a) the *scheme giving rise to the *debt interest is the result of applying section 974-155 to 2 or more schemes; and
 - (b) one or more of those schemes are schemes for hedging or managing financial risk (the *hedging schemes*); and
 - (c) after disregarding the hedging schemes:
 - (i) each of the remaining schemes; or
 - (ii) an aggregate scheme (whether resulting from applying section 974-155 or not) consisting only of the remaining schemes;
- would give rise to a debt interest in the entity;

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1 then, for the purposes of Division 820 (the thin capitalisation
2 rules), treat the first-mentioned debt interest as if it had arisen only
3 from those remaining schemes.

4 Note: This means that the losses associated with the hedging schemes are
5 not debt deductions under section 820-40.

6 **15 Subparagraph 974-25(1)(c)(iii)**

7 Omit “; and”, substitute “.”.

8 **16 Paragraph 974-25(1)(d)**

9 Repeal the paragraph.

10 **17 Subsection 974-55(1)**

11 Omit “*scheme, or 2 or more *related schemes, give”, substitute
12 “*scheme gives”.

13 **18 Paragraphs 974-55(1)(a), (d) and (e)**

14 Omit “or any of the schemes”.

15 **19 Subsection 974-60(1)**

16 Omit “, or a number of *related schemes together,”.

17 **20 Subsection 974-60(3) (method statement, step 1)**

18 Omit “or schemes”.

19 **21 Section 974-70**

20 Repeal the section, substitute:

21 **974-70 Meaning of *equity interest* in a company**

22 A *scheme gives rise to an *equity interest* in a company if, when
23 the scheme comes into existence:

- 24 (a) the scheme satisfies the equity test in subsection 974-75(1) in
25 relation to the company because of the existence of an
26 interest; and
27 (b) the interest is not characterised as a *debt interest in the
28 company, or a *connected entity of the company, under
29 Subdivision 974-B.

30 Note 1: Section 974-95 defines various aspects of the equity interest that
31 arises.

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1 Note 2: Some schemes are treated as a single aggregate scheme (see
2 section 974-155) and a single scheme may be treated as several
3 separate schemes (see section 974-150).

4 **22 Section 974-80**

5 Repeal the section.

6 **23 Paragraph 974-85(4)(a)**

7 Omit “or paragraph 974-80(2)(a)”.

8 **24 Subsections 974-95(2) and (3)**

9 Repeal the subsections.

10 **25 Paragraph 974-110(1)(a)**

11 Omit “*scheme or schemes give”, substitute “*scheme gives”.

12 **26 Paragraphs 974-110(1)(b) and (c)**

13 Repeal the paragraphs, substitute:

14 (b) the scheme is later changed, including by part of the scheme
15 ceasing to exist; and

16 (c) the scheme as it exists immediately after the change would
17 give rise to an equity interest (or a debt interest) in the
18 company if it came into existence when the change occurred;
19 and

20 **27 Subsection 974-110(1)**

21 Omit “scheme or schemes as they exist” (second occurring), substitute
22 “scheme as it exists”.

23 **28 Subsection 974-110(1) (note 2)**

24 Repeal the note, substitute:

25 Note 2: This section can apply multiple times to an interest so that, for
26 example, an interest that is equity when issued may change to debt
27 because of one change and then back to equity after a later change.

28 **29 Paragraph 974-110(1A)(c)**

29 Omit “subsequently”, substitute “later”.

30 **30 Subsection 974-110(1A) (note 2)**

31 Repeal the note, substitute:

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Note 2: This section can apply multiple times to an interest so that, for example, an interest that is equity when issued may change to debt because of one change and then back to equity after a later change.

31 Subsections 974-110(2) and (3)

Repeal the subsections, substitute:

Entering into a new scheme

(2) If:

- (a) a *scheme gives rise to a *debt interest (or an *equity interest) in a company; and
- (b) the company later enters into, participates in or causes another entity to enter into or participate in one or more *schemes (the *later schemes*); and
- (c) a scheme (the *new scheme*) resulting from applying section 974-155 to the schemes mentioned in paragraphs (a) and (b) gives rise to an equity interest (or a debt interest) in the company;

this Division applies as if the new scheme comes into existence when the last later scheme is entered into.

Note 1: This means the characterisation of the interest changes at that time.

Note 2: This section can apply multiple times to an interest so that, for example, an interest that is equity when issued may change to debt because of one change and then back to equity after a later change.

Note 3: There will be an adjustment to the company's non-share capital account when the change occurs (see subsections 164-15(2) and 164-20(3)).

All earlier changes to be taken into account

(3) In applying paragraphs (1)(c), (1A)(e) and (2)(c) to the *scheme, take into account:

- (a) all changes to the scheme that happen before the change or before the last later scheme is entered into; and
- (b) all schemes entered into before the change or before the last later scheme is entered into; and
- (c) all changes to schemes referred to in paragraph (b) that happen before the change or before the last later scheme is entered into.

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1 **32 Paragraphs 974-112(1)(a) and (d)**

2 Repeal the paragraphs.

3 **33 At the end of subsection 974-112(1)**

4 Add:

5 ; (f) paragraph 974-155(2)(b).

6 **34 Subsection 974-112(3) (note)**

7 Repeal the note, substitute:

8 Note: Paragraph (b) may apply, for example, if the effect of the
9 determination applied for would be to allow, or to prevent, a scheme
10 giving rise to a debt interest or an equity interest.

11 **35 Section 974-150 (heading)**

12 Repeal the heading, substitute:

13 **974-150 Deemed separate schemes**

14 **36 Subsection 974-150(1)**

15 Repeal the subsection, substitute:

16 (1) The Commissioner may determine that what would otherwise be a
17 single *scheme is to be treated for the purposes of this Division as
18 2 or more separate schemes.

19 **37 Subsection 974-150(3)**

20 Repeal the subsection, substitute:

21 (3) The regulations may provide that, in the circumstances specified in
22 the regulations, what would otherwise be a single *scheme is to be
23 treated for the purposes of this Division as 2 or more separate
24 schemes.

25 (4) Subsections (1) and (3) do not apply to a *scheme that is the result
26 of applying section 974-155 to 2 or more *schemes.

27 **38 Subsection 995-1(1) (definition of *related scheme*)**

28 Omit “section 974-155”, substitute “section 215-40”.

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1 **39 Subsection 995-1(1) (note at the end of the definition of**
2 ***scheme*)**

3 Repeal the note, substitute:

- 4 Note: For the debt and equity interest rules in Division 974:
- 5 (a) a single scheme may sometimes be treated as 2 or more separate
 - 6 schemes (see section 974-150); and
 - 7 (b) 2 or more schemes may sometimes be treated as a single
 - 8 aggregate scheme (see section 974-155).

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1 **Part 4—Application and transitional provisions**

2 **40 Application of amendments**

3 The amendments made by this Schedule apply in relation to schemes
4 entered into at or after the commencement of this Schedule.

5 **41 Transitional—protection for anticipating announcement**

6 (1) Section 170B of the *Income Tax Assessment Act 1936* also applies as if
7 the following additional announcement were listed in the table in
8 subsection (8) of that section:

14 Budget Paper No. 2, Budget Measures 2011-12, Part 1, 10 May 2011
topic headed “Debt/equity tax rules — clarification of
the scope of an integrity provision”.

9 (2) Subsection 170B(3) and paragraph 170B(8)(b) of that Act also apply in
10 relation to that announcement as if references in those provisions to
11 14 December 2013 were references to the day before this Schedule
12 commences.