

# EXPOSURE DRAFT

1 Inserts for  
2 **Exposure Draft Bill 2011: Exemption for**  
3 **certain income attributable to a**  
4 **permanent establishment**

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<b>EXPOSURE DRAFT (16/08/2011)</b>
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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. Schedule	The day this Act receives the Royal Assent.	
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**Schedule—Investment management regime**

4  
*Income Tax Assessment Act 1997*

5  
**1 After Subdivision 842-B**

6 Insert:

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**Subdivision 842-I—Investment management regime: foreign  
managed funds**

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**Guide to Subdivision 842-I**

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**842-200 What this Subdivision is about**

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This Subdivision includes rules about the taxing arrangements for certain foreign funds which have investment income or losses which are treated as being attributable to a permanent establishment in Australia solely because the fund retains an Australian based investment manager.

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Where the conditions in this Subdivision are satisfied:

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- returns or gains relating to certain investments (known as IMR income) are non-assessable non-exempt income; and
  - deductions and losses relating to certain investments (known as IMR losses) are disregarded; and
  - capital gains relating to certain investments (known as IMR capital gains) are disregarded; and
  - capital losses relating to certain investments (known as IMR capital losses) are disregarded.

25  
**Table of sections**

26  
**842-205 Objects of this Subdivision**

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(1) The objects of this Subdivision are to:

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- 1 (a) encourage the competitiveness of Australian based  
2 investment managers; and  
3 (b) to ensure that non-residents are not inappropriately subjected  
4 to Australian tax solely because they retain an Australian  
5 based investment manager.
- 6 (2) This is achieved by:  
7 (a) treating certain income as \*non-assessable non-exempt  
8 income; and  
9 (b) disregarding certain deductions; and  
10 (c) disregarding certain \*capital gains and \*capital losses; and  
11 (d) ensuring that such amounts continue to be taken into account  
12 when they are derived or incurred by a resident of Australia.

## 13 **842-210 Certain amounts in respect of IMR foreign funds and** 14 **trustees of IMR foreign funds are disregarded**

- 15 (1) Subsection (2) applies in relation to an income year of an entity if:  
16 (a) the entity is an \*IMR foreign fund or the trustee of an IMR  
17 foreign fund; and  
18 (b) the entity does not have a place of business in Australia, but  
19 is treated as having a permanent establishment in Australia  
20 solely as a result of engaging an Australian based investment  
21 manager who habitually exercises a general authority to  
22 negotiate and conclude contracts on behalf of the entity.
- 23 (2) In working out the entity's taxable income for the income year (or  
24 the amount in respect of which a trustee is assessed and liable to  
25 pay tax) apply the following rules:  
26 (a) treat the entity's \*IMR income for the income year as  
27 \*non-assessable non-exempt income;  
28 (b) disregard the entity's \*IMR loss for the income year;  
29 (c) disregard the entity's \*IMR capital gain for the income year;  
30 (d) disregard the entity's \*IMR capital loss for the income year.

## 31 **842-215 IMR foreign fund**

- 32 An entity is an *IMR foreign fund* in relation to an income year if:  
33 (a) the entity is not a resident of Australia at any time during the  
34 income year; and  
35 (b) the entity is recognised under a \*foreign law as being used for  
36 collective investment by means of pooling the contributions  
37 of its \*members as consideration to acquire rights to benefits
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- 1 produced by the entity at all times during the income year;  
2 and
- 3 (c) the members of the entity do not have day-to-day control  
4 over the operation of the entity at any time during the income  
5 year; and
- 6 (d) the entity does not carry on a trading business in Australia for  
7 the purpose of section 102M of the *Income Tax Assessment*  
8 *Act 1936* at any time during the income year; and
- 9 (e) subject to section 842-230 (wind-down phases), the entity is  
10 widely-held for the purposes of section 842-235 at all times  
11 during the income year; and
- 12 (f) subject to section 842-230 (wind-down phases), the entity is  
13 not closely held for the purpose of section 842-240 at any  
14 time during the income year.

## 15 **842-220 IMR income and IMR loss**

- 16 (1) The ***IMR income*** of an \*IMR foreign fund for an income year is  
17 the amount of the fund's assessable income for the income year to  
18 the extent that:
- 19 (a) the assessable income is attributable to a return or gain from  
20 a \*financial arrangement covered by section 842-225; and
- 21 (b) amounts are included in the assessable income only because:
- 22 (i) the income or gains of the fund are treated as having a  
23 source in Australia because of Article 21 of the 2003  
24 United Kingdom Convention (within the meaning of the  
25 *International Tax Agreements Act 1953*) or a  
26 corresponding provision of another agreement (within  
27 the meaning of that Act), or subsections 11(3), 11S(2)  
28 or 11ZF(2) of that Act; or
- 29 (ii) the Commissioner makes a determination under  
30 section 136AE of the *Income Tax Assessment Act 1936*;  
31 or
- 32 (iii) the financial arrangement is a \*CGT asset covered by  
33 item 3 of the table in section 855-15; or
- 34 (iv) the financial arrangement is a CGT asset covered by  
35 item 4 of the table in section 855-15 because it is an  
36 option or right to \*acquire a CGT asset covered by  
37 item 3 of that table.
- 38 (2) The ***IMR loss*** of an \*IMR foreign fund for an income year is the  
39 amount of the fund's deductions for the income year to the extent  
40 to which they are attributable to gaining the fund's \*IMR income.
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- 1 (3) To avoid doubt, disregard subsection 842-210(2) for the purposes  
2 of this section.

## 3 **842-222 IMR capital gain and IMR capital loss**

- 4 (1) The *IMR capital gain* of an \*IMR foreign fund for an income year  
5 is the amount of the fund's \*capital gains made in the income year  
6 that:  
7 (a) are capital gains from \*CGT assets covered by subsection (3);  
8 and  
9 (b) are attributable to a return or gain from a \*financial  
10 arrangement covered by section 842-225.
- 11 (2) The *IMR capital loss* of an \*IMR foreign fund for an income year  
12 is the amount of the fund's \*capital losses made in the income year  
13 that:  
14 (a) are capital losses from \*CGT assets covered by  
15 subsection (3); and  
16 (b) are attributable to a \*financial arrangement covered by  
17 section 842-225.
- 18 (3) A \*CGT asset is covered by this subsection if:  
19 (a) it is covered by item 3 of the table in section 855-15; or  
20 (b) it is covered by item 4 of the table in section 855-15 because  
21 it is an option or right to \*acquire a CGT asset covered by  
22 item 3 of that table.
- 23 (4) To avoid doubt, disregard subsection 842-210(2) for the purposes  
24 of this section.

## 25 **842-225 Financial arrangements covered by this section**

- 26 (1) A \*financial arrangement is covered by this section unless  
27 subsection (2), (3) or (4) applies.
- 28 (2) A \*financial arrangement is *not* covered by this section if:  
29 (a) the \*financial arrangement is:  
30 (i) a \*debt interest or an \*equity interest issued by an entity;  
31 or  
32 (ii) a \*derivative financial arrangement that relates to a debt  
33 interest or an equity interest issued by an entity; and  
34 (b) the \*IMR foreign fund has a \*total participation interest in the  
35 entity of 10% or more.

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- 1 (3) A \*financial arrangement is *not* covered by this section if:  
2 (a) the \*financial arrangement is a \*derivative financial  
3 arrangement that relates to a \*CGT asset; and  
4 (b) the CGT asset is:  
5 (i) \*taxable Australian real property (see section 855-20);  
6 or  
7 (ii) an \*indirect Australian real property interest (see  
8 section 855-25).
- 9 (4) A \*financial arrangement is *not* covered by this section if its terms  
10 allow the \*IMR foreign fund to:  
11 (a) vote at a meeting of the Board of Directors (or other  
12 governing body) of the issuer of the financial arrangement; or  
13 (b) participate in making financial, operating or policy decisions  
14 in respect of the operation of the issuer of the financial  
15 arrangement; or  
16 (c) deal with the assets of the issuer of the financial arrangement.
- 17 (5) Subsection (4) does not apply if the only situation in which the  
18 terms of the \*financial arrangement allow the \*IMR foreign fund to  
19 do a thing mentioned in paragraph (4)(a), (b) or (c) is where the  
20 issuer breaches the terms of the financial arrangement.

## 21 **842-230 Wind-down phases**

22 Treat the requirements in paragraphs 842-215(1)(e) and (f) as  
23 being satisfied if the entity ceases to exist during the income year,  
24 and was an \*IMR foreign fund in relation to the previous income  
25 year.

## 26 **842-235 Widely-held requirements**

- 27 (1) The purpose of this section is to apply subsections 12-402(1A), (2),  
28 (3), (4), (5), (6) and (7) and section 12-402A in Schedule 1 to the  
29 *Taxation Administration Act 1953* to this Subdivision for the  
30 purpose of determining whether an entity is widely-held for the  
31 purposes of paragraph 842-215(1)(e).
- 32 (2) An entity is widely-held for the purpose of this section if it satisfies  
33 the requirements in:  
34 (a) subsections 12-402(1A), (2), (3), (4), (5), (6) and (7) in  
35 Schedule 1 to the *Taxation Administration Act 1953* subject  
36 to the modifications in subsections (3) and (4); and

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1 (b) section 12-402A in Schedule 1 to the *Taxation*  
2 *Administration Act 1953* subject to the modifications in  
3 subsections (3) and (4).

4 (3) For the purposes of subsection (2), treat the entity as a trust, and  
5 membership interests in the entity as units in the trust.

6 (4) For the purposes of subsection (2), the modifications in this  
7 subsection are as follows:

8 (a) disregard the words “, at the time the payment mentioned in  
9 paragraph 12-400(1)(a) is made” in subsection 12-402(1A);  
10 and

11 (b) disregard the words “in Australia” in paragraph  
12 12-402(1A)(a); and

13 (c) treat an entity as being covered by subsection 12-402(3) if it  
14 is an \*IMR foreign fund in relation to the income year for the  
15 purpose of section 842-215.

## 16 **842-240 Entity must not be closely-held**

17 (1) The purpose of this section is to apply section 12-402B in  
18 Schedule 1 to the *Taxation Administration Act 1953* to this  
19 Subdivision for the purpose of determining whether an entity is  
20 closely-held as mentioned in paragraph 842-215(1)(f).

21 (2) An entity is closely held for the purpose of this section if it satisfies  
22 the requirements in paragraphs 12-402B(1)(b) and (c) in  
23 Schedule 1 to the *Taxation Administration Act 1953* subject to the  
24 modification in subsection (3).

25 (3) For the purpose of subsection (2), treat the entity as a trust, and  
26 membership interests in the entity as units in the trust.

## 27 **2 Subsection 995-1(1)**

28 Insert:

29 *IMR capital gain* has the meaning given by subsection 842-222(1).

## 30 **3 Subsection 995-1(1)**

31 Insert:

32 *IMR capital loss* has the meaning given by subsection 842-222(2).

## 33 **4 Subsection 995-1(1)**

34 Insert:

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*IMR foreign fund* has the meaning given by section 842-215.

## **5 Subsection 995-1(1)**

Insert:

*IMR income* has the meaning given by subsection 842-220(1).

## **6 Subsection 995-1(1)**

Insert:

*IMR loss* has the meaning given by subsection 842-220(2).

## **7 Application**

The amendments made by this Schedule apply to assessments for the 2010-11 income year and later income years.