

EXPOSURE-DRAFT

1 Inserts for
2 **Spreading the Benefits of the Boom**
3 **Legislation Amendment (Loss**
4 **Carry-back) Bill 2012: Loss Carry-back**
5

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Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Schedules 1 and 2	The day this Act receives the Royal Assent.	

Schedule 1—Main amendments

Income Tax Assessment Act 1997

1 Before Division 164

Insert:

Division 160—Corporate loss carry-back tax offset

Table of Subdivisions

	Guide to Division 160
160-A	Object of this Division
160-B	Entitlement to and amount of loss carry-back tax offset
160-C	Application of Division 165 to loss carry-back

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1 **Guide to Division 160**

2 **160-1 What this Division is about**

3 A corporate tax entity can choose to “carry-back” a tax loss it has
4 for the current income year, or for the preceding income year,
5 against the tax liability it had for either of the 2 income years
6 preceding the current income year.

7 The entity gets a refundable tax offset for the current income year
8 that approximates the tax the entity would save if it deducted the
9 loss in the income year to which the loss is “carried-back”.

10 The refundable tax offset is capped at the lesser of \$1,000,000
11 multiplied by the corporate tax rate, and the entity’s franking
12 account balance.

13 **Subdivision 160-A—Object of this Division**

14 **Table of sections**

15 160-5 Object of this Division

16 **160-5 Object of this Division**

17 The object of this Division is to reduce the tax disincentive for
18 corporate tax entities to take sensible investment risks. The
19 Division does this by allowing such entities to offset their tax
20 losses against their tax liabilities of the 2 previous income years
21 through a refundable tax offset.

22 **Subdivision 160-B—Entitlement to and amount of loss**
23 **carry-back tax offset**

24 **Table of sections**

25 160-10 Entitlement to loss carry-back tax offset
26 160-15 Amount of loss carry-back tax offset
27 160-20 Franking debit arises because of loss carry-back tax offset
28 160-25 Loss carry-back choice
29 160-30 Transferred tax losses etc. not included

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160-10 Entitlement to loss carry-back tax offset

A *corporate tax entity is entitled to a *tax offset (the *loss carry-back tax offset*) for the *current year if the following conditions are satisfied:

- (a) the entity has an *unutilised tax loss for either or both of these income years:
 - (i) the current year;
 - (ii) the income year immediately before the current year (the *middle year*);
- (b) the entity has an *unutilised income tax liability for either or both of these income years:
 - (i) the middle year;
 - (ii) the income year immediately before the middle year (the *earliest year*);
- (c) any of these requirements are satisfied for the current year and each of the 5 income years before the current year:
 - (i) the entity has lodged its *income tax return for the year;
 - (ii) the entity was not required to lodge an income tax return for the year;
 - (iii) the Commissioner has made an assessment of the entity's income tax for the year;
- (d) the entity makes a *loss carry-back choice for the current year in accordance with section 160-25.

Note 1: The entity is entitled to only one loss carry-back tax offset for the current income year. However, that offset has 2 components, one relating to the earliest year and one relating to the middle year: see section 160-15.

Note 2: The loss carry-back tax offset is a refundable tax offset: see section 67-23.

160-15 Amount of loss carry-back tax offset

- (1) Work out the amount of the entity's *loss carry-back tax offset for the *current year as follows:

Method statement

Step 1. The entity's *earliest year carry-back amount* is the sum of the following amounts:

- (a) so much of the *unutilised tax loss for the *current year as the entity's *loss carry-back choice for the

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current year specifies to be carried back to the earliest year;

(b) so much of the unutilised tax loss for the middle year as the choice specifies to be carried back to the earliest year.

The entity's *middle year carry-back amount* is so much of the unutilised tax loss for the current year as the choice specifies to be carried back to the middle year.

Note: If no amount is carried back to a year, the carry-back amount for that year is nil.

Step 2. Work out the entity's *reduced earliest year carry-back amount* by reducing its *earliest year carry-back amount by its *unutilised net exempt income for the earliest year.

Work out the entity's *reduced middle year carry-back amount* by reducing its *middle year carry-back amount by its unutilised net exempt income for the middle year.

Step 3. The entity's *earliest year offset component* is the lesser of the following amounts:

(a) its *reduced earliest year carry-back amount multiplied by the *corporate tax rate for the *current year;

(b) its *unutilised income tax liability for the earliest year.

The entity's *middle year offset component* is the lesser of the following amounts:

(c) its *reduced middle year carry-back amount for the current year multiplied by the corporate tax rate for the current year;

(d) its unutilised income tax liability for the middle year.

Step 4. The amount of the entity's *loss carry-back tax offset for the *current year is the least of the following amounts:

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| (a) the sum of the entity's *earliest year offset component and *middle year offset component; |
| (b) the entity's *franking account balance at the end of the current year; |
| (c) \$1,000,000 multiplied by the *corporate tax rate for the current year. |

Example: Redom Pty Ltd has at the end of the 2013-14 income year:

- an unutilised tax loss of \$900,000 for that year and a franking account balance of \$350,000; and
- for the 2011-12 income year—an unutilised income tax liability of \$120,000 and unutilised net exempt income of \$5,000; and
- for the 2012-13 income year—an unutilised income tax liability of \$210,000.

Redom chooses to carry back \$405,000 of its unutilised tax loss for the 2013-14 year to the 2011-12 year and \$495,000 of that loss to the 2012-13 year.

Redom's loss carry-back tax offset for the 2013-14 year is \$268,500, made up of these components:

- an earliest year offset component of \$120,000, calculated by multiplying the \$400,000 reduced earliest year carry-back amount by the corporate tax rate of 30%. (Note that the \$405,000 earliest year carry-back amount was reduced by the unutilised net exempt income of \$5,000, resulting in a reduced earliest year carry-back amount of \$400,000.)
- a middle year offset component of \$148,500, calculated by multiplying the \$495,000 reduced middle year carry-back amount by the corporate tax rate of 30%.

The sum of the 2 components is \$268,500 (which is less than Redom's \$350,000 franking account balance at the end of the 2013-14 year). If that sum had exceeded that balance, the amount of the offset would have been limited under step 4 to that balance.

Redom's franking account will be debited under section 160-20 by the amount of the offset.

- (2) Paragraph (b) of step 4 of the method statement in subsection (1) does not apply if the entity was a *foreign resident (other than an *NZ franking company) for:
- (a) if the entity's *earliest year carry-back amount is not nil—more than half of the earliest year; and
 - (b) if the entity's *middle year carry-back amount is not nil—more than half of the middle year.

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160-20 Franking debit arises because of loss carry-back tax offset

- 1 (1) A *franking debit arises in the entity's *franking account equal to
2 the amount of the offset.
3
- 4 (2) The *franking debit arises when the assessment of the entity's *tax
5 offset refunds for the *current year is made.
- 6 (3) However, if paragraph (b) of step 4 of the method statement in
7 subsection 160-15(1) does not apply to the entity (see subsection
8 160-15(2)), the *franking debit does not arise under subsection (1)
9 of this section to the extent the entity's *franking account would be
10 in *deficit immediately after the debit.

11 160-25 Loss carry-back choice

- 12 (1) The entity may make a *loss carry-back choice* for the *current year
13 that specifies:
 - 14 (a) how much of the entity's *unutilised tax loss for the current
15 year (if any) is to be carried back to the earliest year; and
 - 16 (b) how much of the entity's unutilised tax loss for the middle
17 year (if any) is to be carried back to the earliest year; and
 - 18 (c) how much of the entity's unutilised tax loss for the current
19 year (if any) is to be carried back to the middle year.
- 20 Note: See section 160-10 and Subdivision 160-C for limits on the extent to
21 which carrying back an amount will result in a loss carry-back tax
22 offset.
- 23 (2) The choice must be made in the *approved form by:
 - 24 (a) the day the entity lodges its *income tax return for the
25 *current year; or
 - 26 (b) such later day as the Commissioner allows.

27 160-30 Transferred tax losses etc. not included

- 28 The following *tax losses cannot be specified in any *loss
29 carry-back choice made by any entity for any income year:
- 30 (a) a tax loss that has been transferred under Division 170;
 - 31 (b) a tax loss arising under section 36-55 from excess franking
32 offsets.

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Subdivision 160-C—Application of Division 165 to loss carry-back

Table of sections

160-100 Application of Division 165 to loss carry-back

160-100 Application of Division 165 to loss carry-back

- (1) The *corporate tax entity cannot specify in its *loss carry-back choice for the *current year that an amount of an *unutilised tax loss for an income year (the *carry-back loss*) is to be carried back to a previous year (the *gain year*) unless it meets the conditions in Division 165 as modified by this section.
- (2) For the purposes of subsection (1), apply Division 165 with the following modifications:
 - (a) treat a condition (however described) in that Division for deducting a *tax loss as instead being a condition for carrying back the carry-back loss to the gain year;
 - (b) treat a reference in that Division or Division 166 to the *loss year as instead being a reference to the gain year;
 - (c) make the detailed modifications set out in the following subsections of this section.

Note: Division 165 is about the income tax consequences of changing ownership or control of a company.

Detailed modifications

- (3) Despite paragraph (2)(b), treat the references in section 165-20 to the *loss year as being instead references to the *current year.
- (4) Disregard subsection 165-115B(6). Instead, the *tax loss mentioned in that subsection cannot be carried back if the *current year occurs after the year in which the company would have been entitled to the deduction referred to in subparagraph 165-115A(1)(c)(i).
- (5) Disregard sections 165-215 and 165-235 (ownership of non-fixed trusts).
- (6) To avoid doubt, this section does not affect subsection 165-70(5).

2 Before Subdivision 960-C

Insert:

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1 Subdivision 960-B—Utilisation of tax attributes

2 Table of sections

3	960-20	Utilisation of losses
4	960-25	Utilisation of net exempt income
5	960-30	Income tax liability, utilisation of income tax liability etc.

6 960-20 Utilisation of losses

7 (1) An entity's *unutilised tax loss* for an income year is the amount of
8 the entity's *tax loss for the income year to the extent the entity has
9 not already *utilised the tax loss.

10 (2) An entity *utilises* a loss:

11 (a) in the case of a *tax loss—to the extent that:

12 (i) the entity deducts the tax loss from an amount of the
13 entity's assessable income or *net exempt income; and

14 (ii) the entity carries the tax loss back to an income year
15 under step 1 of the method statement in subsection
16 160-15(1) (which is a step in calculating a *loss
17 carry-back tax offset); and

18 (b) in the case of a *net capital loss—to the extent that the entity
19 applies the net capital loss to reduce an amount of the entity's
20 *capital gains.

21 960-25 Utilisation of net exempt income

22 (1) An entity's *unutilised net exempt income* for an income year is the
23 amount of its *net exempt income for the year to the extent the
24 entity has not already *utilised the net exempt income.

25 (2) An entity *utilises* its *net exempt income for an income year to the
26 extent that:

27 (a) the entity takes the net exempt income into account in
28 determining the entity's *tax loss (if any) for that year; and

29 (b) because of the net exempt income, the entity has reduced the
30 extent to which the entity's tax loss (if any) for that year can
31 be deducted in that year or a later income year; and

32 (c) because of the net exempt income, the entity reduces an
33 amount under step 2 of the method statement in subsection
34 160-15(1) (which is a step in calculating a *loss carry-back
35 tax offset).

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960-30 Income tax liability, utilisation of income tax liability etc.

- (1) An entity's *income tax liability* for an income year is the amount of income tax that the entity owes (as mentioned in step 4 of the method statement in subsection 4-10(3)) for the financial year applicable to the entity under subsection 4-10(2).
- (2) An entity's *unutilised income tax liability* for an income year is the amount of the entity's *income tax liability for the year to the extent the entity has not already *utilised the income tax liability.
- (3) An entity that is entitled to a *loss carry-back tax offset in an income year *utilises*, in the income year, its *income tax liability for an earlier income year (the *utilisation year*) by an amount equal to:
- (a) if the utilisation year is, for the purposes of working out the loss carry-back tax offset in the *current year, the earliest year—its *earliest year offset component; or
 - (b) if the utilisation year is, for the purposes of working out the loss carry-back tax offset in the current year, the middle year—its *middle year offset component.

Income Tax (Transitional Provisions) Act 1997

3 Before Division 165

Insert:

Division 160—Loss carry-back tax offset

Table of Subdivisions

160-A	Application of Division 160 of the Income Tax Assessment Act 1997
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Subdivision 160-A—Application of Division 160 of the Income Tax Assessment Act 1997

Table of sections

160-1	Application of Division 160 of the <i>Income Tax Assessment Act 1997</i>
160-5	Modification for 2012-13 income year—no carry-back to 2010-11 income year

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1 **160-1 Application of Division 160 of the *Income Tax Assessment Act***
2 ***1997***

3 Division 160 of the *Income Tax Assessment Act 1997* applies to
4 assessments for the 2012-13 income year and later income years.

5 **160-5 Modification for 2012-13 income year—no carry-back to**
6 **2010-11 income year**

- 7 (1) This section applies to assessments for the 2012-13 income year.
- 8 (2) Despite step 3 of the method statement in subsection 160-15(1) of
9 the *Income Tax Assessment Act 1997*, the earliest year offset
10 component mentioned in that subsection is treated as being nil.
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Schedule 2—Consequential amendments

Income Tax Assessment Act 1936

1 Subsection 6(1) (after paragraph (a) of the definition of assessment)

Insert:

- (aa) the ascertainment of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or

2 Subsection 6(1)

Insert:

loss carry-back tax offset has the same meaning as in the *Income Tax Assessment Act 1997*.

3 Subsection 6(1)

Insert:

tax offset refund, of a taxpayer for a year of income, means a refund the taxpayer can get as mentioned in item 40 of the table in subsection 63-10(1) of the *Income Tax Assessment Act 1997* (refundable tax offsets) for the year of income.

4 After paragraph 161AA(b)

Insert:

- (ba) the total of its tax offset refunds for that year of income (or that it can get no such refund for that year of income); or

5 Section 166

Repeal the section, substitute:

166 Assessment

From the returns, and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of:

- (a) the amount of the taxable income (or that there is no taxable income) of any taxpayer; and

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-
- 1 (b) the amount of the tax payable thereon (or that no tax is
2 payable); and
3 (c) the total of the taxpayer's tax offset refunds (or that the
4 taxpayer can get no such refunds).

6 Paragraph 166A(3)(c)

6 Repeal the paragraph, substitute:

- 7 (c) the Commissioner is taken to have made an assessment of:
8 (i) the taxable income or net income (or an assessment that
9 there is no taxable income or net income); and
10 (ii) the tax payable on that income (or that no tax is
11 payable); and
12 (iii) the total of the taxpayer's tax offset refunds for the year
13 of income (or that the taxpayer can get no such refunds);
14 in accordance with what the taxpayer specified in the return;

7 Section 167

16 Repeal the section, substitute:

167 Default assessment

- 18 (1) This section applies if:
19 (a) any person makes default in furnishing a return; or
20 (b) the Commissioner is not satisfied with the return furnished by
21 any person; or
22 (c) the Commissioner has reason to believe that any person who
23 has not furnished a return has derived taxable income.
- 24 (2) The Commissioner may make an assessment of:
25 (a) the amount upon which in his or her judgement income tax
26 ought to be levied; and
27 (b) the total of the tax offset refunds which in the
28 Commissioner's judgement the taxpayer ought to be able to
29 get for the year of income (or that the taxpayer can get no
30 such refunds).
- 31 (3) For the purpose of section 166:
32 (a) the amount assessed as mentioned in paragraph (2)(a) is
33 treated as the taxable income of that person; and
34 (b) the total assessed as mentioned in paragraph (2)(b) is treated
35 as the total of the taxpayer's tax offset refunds for the year of
36 income.

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8 Subsection 168(1)

Repeal the subsection, substitute:

- (1) The Commissioner may at any time during any year, or after its expiration, make an assessment of:
 - (a) the taxable income derived (or that there is no taxable income) in that year or any part of it by any taxpayer; and
 - (b) the tax payable thereon (or that no tax is payable); and
 - (c) the total of the taxpayer's tax offset refunds for that year or that part of it (or that the taxpayer can get no such refunds).

9 At the end of section 175A

Add:

- (3) Subsection (2) does not prevent the taxpayer objecting under subsection (1) against an assessment to the extent it ascertains the total of the taxpayer's tax offset refunds. Subsection (2) continues to apply to the extent the assessment ascertains the matters mentioned in paragraphs (2)(a) and (b).

10 After paragraph 177C(1)(bb)

Insert:

- ; or (bc) a loss carry-back tax offset being allowable to the taxpayer where the whole or a part of that loss carry-back tax offset would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out;

11 At the end of subsection 177C(1)

Add:

- ; and (g) in a case where paragraph (bc) applies—the amount of the whole of the loss carry-back tax offset or of the part of the loss carry-back tax offset, as the case may be, referred to in that paragraph.

12 At the end of subsection 177C(2)

Add:

- ; and (e) a loss carry-back tax offset being allowable to the taxpayer the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer if the scheme had not been entered into or carried out, where:

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- 1 (i) the allowance of the loss carry-back tax offset to the
2 taxpayer is attributable to the making of a declaration,
3 agreement, election, selection or choice, the giving of a
4 notice or the exercise of an option by any person, being
5 a declaration, agreement, election, selection, choice,
6 notice or option expressly provided for by this Act; and
7 (ii) the scheme was not entered into or carried out by any
8 person for the purpose of creating any circumstance or
9 state of affairs the existence of which is necessary to
10 enable the declaration, agreement, election, selection,
11 choice, notice or option to be made, given or exercised,
12 as the case may be.

13 **13 Subsection 177C(3)**

14 After “or (d)(i)”, insert “or (e)(i)”.

15 **14 After paragraph 177C(3)(ca)**

16 Insert:

17 ; or (cb) the allowance of a loss carry-back tax offset to a taxpayer;

18 **15 At the end of subsection 177C(3)**

19 Add:

20 ; or (h) the loss carry-back tax offset would not have been allowable.

21 **16 After paragraph 177F(1)(d)**

22 Insert:

23 ; or (e) in the case of a tax benefit that is referable to a loss
24 carry-back tax offset, or a part of a loss carry-back tax offset,
25 being allowable to the taxpayer—determine that the whole or
26 a part of the loss carry-back tax offset, or the part of the loss
27 carry-back tax offset, as the case may be, is not to be
28 allowable to the taxpayer;

29 **17 After paragraph 177F(3)(d)**

30 Insert:

31 ; or (e) if, in the opinion of the Commissioner:

32 (i) an amount would have been allowed, or would be
33 allowable, to the relevant taxpayer as a loss carry-back
34 tax offset if the scheme had not been entered into or
35 carried out, being an amount that was not allowed or
36 would not, apart from this subsection, be allowable, as

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1 the case may be, as a loss carry-back tax offset to the
2 relevant taxpayer; and

3 (ii) it is fair and reasonable that the amount, or a part of the
4 amount, should be allowable as a loss carry-back tax
5 offset to the relevant taxpayer;

6 determine that that amount or that part, as the case may be,
7 should have been allowed or is allowable, as the case may be,
8 as a loss carry-back tax offset to the relevant taxpayer;

9 *Income Tax Assessment Act 1997*

10 **18 Subsection 36-17(2)**

11 Omit “tax loss”, substitute “*unutilised tax loss”.

12 **19 Paragraph 36-17(3)(a)**

13 Omit “tax loss”, substitute “*unutilised tax loss”.

14 **20 Paragraph 36-17(3)(b)**

15 Omit “undeducted amount of the tax loss”, substitute “unutilised tax
16 loss (not including any part utilised by being deducted as mentioned in
17 paragraph (a))”.

18 **21 Paragraph 36-17(4)(b)**

19 Omit “*tax loss”, substitute “*unutilised tax loss”.

20 **22 Subsection 36-17(5) (example)**

21 Omit “a tax loss”, substitute “an unutilised tax loss”.

22 **23 Subsection 36-17(7)**

23 Omit “*tax losses”, substitute “*unutilised tax losses”.

24 **24 Subsection 36-17(8)**

25 Omit “A *tax loss”, substitute “An *unutilised tax loss”.

26 **25 Subsection 36-17(9)**

27 Omit “a *tax loss”, substitute “an *unutilised tax loss”.

28 **26 Paragraph 36-17(10)(a)**

29 Omit “a *tax loss”, substitute “an *unutilised tax loss”.

30 **27 After paragraph 36-17(10)(c)**

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Insert:

(d) the entity's *earliest year carry-back amount or *middle year carry-back amount for an earlier year;

28 Section 67-23 (after table item 12)

Insert:

14 corporate loss carry-back the *tax offset available under Division 160

29 Section 165-1

After:

- whether it can deduct its tax losses of earlier income years; and

insert:

- whether it can carry back a tax loss to earlier income years (see Subdivision 160-C); and

30 At the end of section 165-5

Add:

Note: Subdivision 160-C applies to this Division, with modifications, so that a condition in this Division for deducting a tax loss is also a condition for carrying back the carry-back loss to an earlier year.

31 Paragraph 165-115R(3)(a)

Omit "undeducted *tax loss or undeducted tax losses", substitute "*unutilised tax loss or unutilised tax losses".

32 Paragraph 165-115R(3)(c)

Omit "tax loss", substitute "*tax loss".

33 Paragraph 165-115R(4)(a)

Omit "undeducted *tax loss", substitute "*unutilised tax loss".

34 Subsection 205-30(1) (after table item 7)

Insert:

7AA a *franking debit arises the amount of the debit at the time
under subsection 160-20(1) specified in subsection provided by

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because a *corporate tax entity is entitled to a *loss carry-back tax offset	160-20(1)	subsection 160-20(2)
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1 **35 Subsection 707-110(2)**

2 Repeal the subsection.

3 **36 Subsection 995-1(1) (definition of *current year*)**

4 Repeal the definition, substitute:

5 *current year* means the income year for which you are working out
6 your assessable income, deductions and tax offsets.

7 **37 Subsection 995-1(1)**

8 Insert:

9 *earliest year carry-back amount* has the meaning given by step 1
10 of the method statement in subsection 160-15(1).

11 **38 Subsection 995-1(1)**

12 Insert:

13 *earliest year offset component* has the meaning given by step 3 of
14 the method statement in subsection 160-15(1).

15 **39 Subsection 995-1(1)**

16 Insert:

17 *income tax liability* has the meaning given by section 960-30.

18 **40 Subsection 995-1(1)**

19 Insert:

20 *loss carry-back choice* has the meaning given by section 160-25.

21 **41 Subsection 995-1(1)**

22 Insert:

23 *loss carry-back tax offset* has the meaning given by
24 section 160-10.

25 **42 Subsection 995-1(1)**

26 Insert:

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1 *middle year carry-back amount* has the meaning given by step 1
2 of the method statement in subsection 160-15(1).

3 **43 Subsection 995-1(1)**

4 Insert:

5 *middle year offset component* has the meaning given by step 3 of
6 the method statement in subsection 160-15(1).

7 **44 Subsection 995-1(1)**

8 Insert:

9 *reduced earliest year carry-back amount* has the meaning given
10 by step 2 of the method statement in subsection 160-15(1).

11 **45 Subsection 995-1(1)**

12 Insert:

13 *reduced middle year carry-back amount* has the meaning given by
14 step 2 of the method statement in subsection 160-15(1).

15 **46 Subsection 995-1(1)**

16 Insert:

17 *tax offset refund* has the same meaning as in the *Income Tax*
18 *Assessment Act 1936*.

19 **47 Subsection 995-1(1)**

20 Insert:

21 *unutilised income tax liability* has the meaning given by
22 section 960-30.

23 **48 Subsection 995-1(1)**

24 Insert:

25 *unutilised net exempt income* has the meaning given by
26 section 960-25.

27 **49 Subsection 995-1(1)**

28 Insert:

29 *unutilised tax loss* has the meaning given by section 960-20.

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1 **50 Subsection 995-1(1) (definition of *utilise*)**

2 Repeal the definition, substitute:

3 *utilise* has the meaning given by:

- 4 (a) for a *tax loss—section 960-20; and
5 (b) for a *net capital loss—section 960-20; and
6 (c) for *net exempt income—section 960-25; and
7 (d) for *income tax liability—section 960-30.

8