

# EXPOSURE-DRAFT

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Inserts for  
**Tax Laws Amendment (2012 Measures  
No. 4) Bill 2012: Exemption for certain  
income attributable to a permanent  
establishment**

<b>EXPOSURE-DRAFT (06/03/2012)</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 manager regime

### *Income Tax Assessment Act 1997*

#### **1 After Subdivision 842-B**

Insert:

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

#### **Guide to Subdivision 842-I**

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

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 the services of an Australian based entity.

Where the conditions in this Subdivision are satisfied:

- 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 deductions) 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.

The same IMR amounts are disregarded where a beneficiary of a trust, or a partner in a partnership, receives or incurs IMR income, IMR deductions, IMR capital gains or IMR capital losses (whether directly or indirectly through one or more interposed trusts or partnerships).

#### **Table of sections**

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## 13 Operative Provisions

### 14 842-205 Objects of this Subdivision

- 15 (1) The objects of this Subdivision are to:
- 16 (a) ensure that foreign resident funds are not subject to
- 17 Australian tax solely because they engage the services of an
- 18 Australian based entity; and
- 19 (b) ensure that Australian resident taxpayers continue to be
- 20 subject to tax on their world-wide income; and
- 21 (c) ensure that the benefit of these rules is only available to
- 22 foreign resident funds that are widely held and are not owned
- 23 by a small group of investors.
- 24 (2) This is achieved by:
- 25 (a) treating certain \*ordinary income and \*statutory income as
- 26 \*non-assessable non-exempt income; and
- 27 (b) disregarding certain deductions; and
- 28 (c) disregarding certain \*capital gains and \*capital losses; and
- 29 (d) ensuring that such amounts continue to be taken into account
- 30 when they are derived or incurred by an Australian resident;
- 31 and
- 32 (e) requiring foreign resident funds that seek to benefit from
- 33 these rules to pass a widely held test and to establish that they
- 34 are not controlled by a small group of investors.

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## 842-210 Treatment of amounts in respect of an IMR foreign fund that is a corporate tax entity

- (1) This section applies to a \*corporate tax entity that is an \*IMR foreign fund in relation to an income year.

### *Certain amounts disregarded*

- (2) In working out the \*corporate tax entity's taxable income, \*tax loss or \*net capital loss for the income year, apply the following rules:
- (a) treat the entity's \*IMR income for the income year as \*non-assessable non-exempt income;
  - (b) disregard the entity's \*IMR deduction for the income year;
  - (c) disregard the entity's \*IMR capital gain for the income year;
  - (d) disregard the entity's \*IMR capital loss for the income year.

### *Certain losses disregarded*

- (3) The \*corporate tax entity cannot \*utilise a \*tax loss or \*net capital loss in any future income year, to the extent the loss is attributable to \*IMR income, an \*IMR capital gain, an \*IMR deduction or an \*IMR capital loss of the entity.

## 842-213 Treatment of non-resident beneficiary that is not a trust or partnership

- (1) This section applies in relation to an income year if:
- (a) an entity is a beneficiary of a trust in relation to the income year; and
  - (b) the entity is not:
    - (i) a resident of Australia at any time during the income year; nor
    - (ii) a trust or partnership at any time during the income year.

Note: A trust that is an IMR foreign fund is subject to the general tax rules that apply to trusts: see Division 6 of Part III of the *Income Tax Assessment Act 1936*.

- (2) In working out the entity's taxable income, \*tax loss or \*net capital loss for the income year:
- (a) calculate the trust's \*non-IMR net income in relation to the income year; and
  - (b) for the purposes of Division 6 of Part III of the *Income Tax Assessment Act 1936*, replace the entity's share of the trust's

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1 \*net income in relation to the income year with that same  
2 share of the non-IMR net income of the trust for the income  
3 year; and

- 4 (c) for the purposes of subsection 98A(1) of that Act, replace the  
5 reference to the individual interest of the beneficiary in the  
6 net income of the trust with a reference to the individual  
7 interest of the beneficiary in the non-IMR net income of the  
8 trust.

## 9 *Non-IMR net income*

- 10 (3) The trust's ***non-IMR net income*** in relation to the income year is  
11 determined by calculating the \*net income of the trust for the  
12 purposes of Division 6 of Part III of the *Income Tax Assessment*  
13 *Act 1936* on the following assumptions:
- 14 (a) disregard \*IMR income, \*IMR capital gains, \*IMR  
15 deductions and \*IMR capital losses of the trust in relation to  
16 the income year;
- 17 (b) if the trust is a partner in a partnership, or a beneficiary of  
18 another trust—assume that:
- 19 (i) its individual interest in the net income or \*partnership  
20 loss of the partnership (if any) is replaced with its  
21 individual interest in the \*non-IMR partnership net  
22 income or \*non-IMR partnership loss of the partnership;  
23 and
- 24 (ii) the trust's capital gains and capital losses made in  
25 respect of financial arrangements covered by  
26 section 842-245 of the *Income Tax Assessment Act*  
27 *1997* of an IMR foreign fund are disregarded; and
- 28 (iii) its share of the net income of the trust (if any) is  
29 replaced with its share of the non-IMR net income of  
30 the trust.

31 Note: The non-IMR net income of the trust is used to determine the amount  
32 that is included in the assessable income of the entity referred to in  
33 subsection (1). The trust's non-IMR net income does not impact the  
34 share of the net income of an entity that is not covered by  
35 subsection (1). For example, this will be the case if the entity is an  
36 Australian resident at any time in the income year.

## 37 **842-216 Treatment of a non-resident partner that is not a trust or** 38 **partnership**

- 39 (1) This section applies in relation to an income year if:

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- 1 (a) an entity is a partner in a partnership in relation to the income  
2 year; and  
3 (b) the entity is not:  
4 (i) an Australian resident at any time during the income  
5 year; nor  
6 (ii) a trust or a partnership at any time during the income  
7 year.

8 Note: A partnership that is an IMR foreign fund is subject to the general tax  
9 rules that apply to partnerships subject to the modifications set out in  
10 this Subdivision: see Division 5 of Part III of the *Income Tax*  
11 *Assessment Act 1936*.

- 12 (2) In working out the entity's taxable income, \*tax loss or \*net capital  
13 loss for the income year:  
14 (a) calculate the partnership's \*non-IMR partnership net income  
15 or \*non-IMR partnership loss in relation to the income year;  
16 and  
17 (b) for the purposes of Division 5 of Part III of the *Income Tax*  
18 *Assessment Act 1936*, replace the entity's individual interest  
19 in the partnership's \*net income or \*partnership loss (as the  
20 case may be) with that same interest in the non-IMR  
21 partnership net income or non-IMR partnership loss of the  
22 partnership (as the case may be); and  
23 (c) disregard the entity's \*capital gains and \*capital losses made  
24 in respect of financial arrangements covered by  
25 section 842-245 of the \*IMR foreign fund.

26 ***Non-IMR partnership net income and non-IMR partnership loss***

- 27 (3) The partnership's ***non-IMR partnership net income*** or ***non-IMR***  
28 ***partnership loss*** in relation to the income year is determined by  
29 calculating the \*net income or \*partnership loss of the partnership  
30 for the purposes of Division 5 of Part III of the *Income Tax*  
31 *Assessment Act 1936* as follows:  
32 (a) disregard \*IMR income and \*IMR deductions of the  
33 partnership in relation to the income year;  
34 (b) if the partnership is a partner in another partnership, or a  
35 beneficiary of a trust—assume that:  
36 (i) its individual interest in the net income or partnership  
37 loss of the partnership (if any) is replaced by its  
38 individual interest in the non-IMR partnership net  
39 income or non-IMR partnership loss of the partnership;  
40 and

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- 1 (ii) the entity's capital gains and capital losses made in  
2 respect of financial arrangements covered by  
3 section 842-245 of the *Income Tax Assessment Act*  
4 *1997* of an IMR foreign fund are disregarded; and  
5 (iii) its share of the net income of the trust (if any) is  
6 replaced by its share of the \*non-IMR net income of the  
7 trust.

8 Note: The non-IMR partnership net income of the partnership is used to  
9 determine the amount that is included in the assessable income of the  
10 entity referred to in subsection (1). The partnership's non-IMR net  
11 income does not impact an entity's individual interest in the net  
12 income of a partnership if the entity is not covered by subsection (1).  
13 For example, this will be the case if the entity is an Australian resident  
14 at any time in the income year.

## 15 **842-220 IMR foreign fund**

16 An entity is an *IMR foreign fund* in relation to an income year if:

- 17 (a) the entity:  
18 (i) is not an Australian resident at any time during the  
19 income year; and  
20 (ii) is not a resident trust estate for the purposes of  
21 subsection 95(2) of the *Income Tax Assessment Act*  
22 *1936* at any time during the income year; and  
23 (b) the entity does not carry on a \*business in Australia other  
24 than carrying on an eligible investment business (within the  
25 meaning of section 102M of the *Income Tax Assessment Act*  
26 *1936*) at any time during the income year; and  
27 (c) the entity:  
28 (i) is widely held at all times during the income year (see  
29 subsection 842-230(1)) and does *not* breach the  
30 requirement in subsection 842-230(3) (about the  
31 concentration test); or  
32 (ii) is covered by paragraph 842-230(2)(a), (b) or (c) (about  
33 foreign widely held entities) and does *not* breach the  
34 requirement in subsection 842-230(3) (about the  
35 concentration test).

## 36 **842-225 Wind-down phases**

- 37 If:  
38 (a) the entity ceases to exist during the income year; and  
39 (b) the entity was an \*IMR foreign fund in relation to the  
40 preceding income year;
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1 treat the requirements in paragraph 842-220(c) as being satisfied.

## 2 **842-230 Widely held requirements**

- 3 (1) An entity is *widely held* for the purposes of subparagraph  
4 842-220(c)(i) if:
- 5 (a) units or shares in the entity are listed for quotation in the  
6 official list of an \*approved stock exchange; or
  - 7 (b) the entity has at least 25 \*members (ignoring objects of a  
8 trust); or
  - 9 (c) one or more of the entities covered by subsection (2) have a  
10 \*total participation interest in the entity of more than 25%; or
  - 11 (d) the entity is wholly owned, directly or indirectly, by one or  
12 more entities that satisfy the requirements in paragraph (a),  
13 (b) or (c); or
  - 14 (e) the entity is an entity specified in the regulations.

### 15 *Foreign widely held entities*

- 16 (2) An entity is covered by this subsection if:
- 17 (a) it is a life insurance company that is not an Australian  
18 resident at any time during the income year; or
  - 19 (b) it is a \*foreign superannuation fund, being a fund that has at  
20 least 50 \*members; or
  - 21 (c) it is an entity that is a fund established by an \*exempt foreign  
22 government agency for the principal purposes of funding  
23 pensions (including disability and similar benefits) for the  
24 citizens or other contributors of a foreign country.

### 25 *Concentration test*

- 26 (3) The requirement in this subsection is that 10 or fewer entities must  
27 not have a \*total participation interest in the entity mentioned in  
28 subsection (1) or (2) of 50% or more.
- 29 (4) In determining the number of entities for the purposes of  
30 subsection (3), do not count the following:
- 31 (a) an \*IMR foreign fund;
  - 32 (b) an entity that satisfies the requirement in paragraph (1)(d),  
33 (2)(a), (2)(b) or (2)(c);
  - 34 (c) an entity that holds an \*indirect participation interest in  
35 another entity through one or more entities covered by  
36 paragraph (a) or (b) of this subsection.



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## 1 842-235 *IMR income and IMR deduction*

- 2 (1) The ***IMR income*** of an \*IMR foreign fund for an income year is  
3 the amount of the fund's assessable income for the income year to  
4 the extent that:
- 5 (a) the assessable income is attributable to a return or gain from  
6 a \*financial arrangement covered by section 842-245; and
  - 7 (b) the fund does not have a place of business in Australia, but  
8 has a \*permanent establishment in Australia solely as a result  
9 of engaging an entity that is a resident of Australia to  
10 habitually exercise a general authority to negotiate and  
11 conclude contracts on its behalf; and
  - 12 (c) amounts are included in the assessable income only because:
    - 13 (i) in respect of an entity that is resident in a country that  
14 has entered into an agreement (within the meaning of  
15 the *International Tax Agreements Act 1953*) with  
16 Australia—they are treated as having a source in  
17 Australia because the amounts are attributable to a  
18 permanent establishment of the fund in Australia; or
    - 19 (ii) in respect of an entity that is resident in a country that  
20 has not entered into an agreement (within the meaning  
21 of the *International Tax Agreements Act 1953*) with  
22 Australia—the Commissioner makes a determination  
23 under section 136AE of the *Income Tax Assessment Act*  
24 *1936*; or
    - 25 (iii) the financial arrangement is a \*CGT asset covered by  
26 item 3 of the table in section 855-15; or
    - 27 (iv) the financial arrangement is a CGT asset covered by  
28 item 4 of the table in section 855-15 because it is an  
29 option or right to \*acquire a CGT asset covered by  
30 item 3 of that table.
- 31 (2) The ***IMR deduction*** of an \*IMR foreign fund for an income year is  
32 the amount of the fund's deductions for the income year to the  
33 extent to which they are attributable to gaining the fund's \*IMR  
34 income.
- 35 (3) Disregard subsection 842-210(2) (which is about certain amounts  
36 of an IMR foreign fund being disregarded) for the purposes of this  
37 section.

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## 842-240 *IMR capital gain and IMR capital loss*

- 1
- 2 (1) The *IMR capital gain* of an \*IMR foreign fund for an income year
- 3 is the sum of the fund's \*capital gains made in the income year in
- 4 respect of a \*CGT asset covered by subsection (3) which is a
- 5 \*financial arrangement covered by section 842-245.
- 6 (2) The *IMR capital loss* of an \*IMR foreign fund for an income year
- 7 is the sum of the fund's \*capital losses made in the income year in
- 8 respect of a \*CGT asset covered by subsection (3) and which is a
- 9 \*financial arrangement covered by section 842-245.
- 10 (3) A \*CGT asset is covered by this subsection if:
- 11 (a) it is covered by item 3 of the table in section 855-15; or
- 12 (b) it is covered by item 4 of the table in section 855-15 because
- 13 it is an option or right to \*acquire a CGT asset covered by
- 14 item 3 of that table.
- 15 (4) Disregard subsection 842-210(2) (which is about certain amounts
- 16 of an IMR foreign fund being disregarded) for the purposes of this
- 17 section.

## 842-245 **Financial arrangements covered by this section**

- 18
- 19 (1) A \*financial arrangement is covered by this section unless
- 20 subsection (2), (3) or (4) applies.
- 21 (2) A \*financial arrangement is *not* covered by this section if:
- 22 (a) the financial arrangement is:
- 23 (i) a \*debt interest or an \*equity interest; or
- 24 (ii) the result of a financing arrangement for the entity that
- 25 is neither a debt interest nor an equity interest; or
- 26 (iii) a \*derivative financial arrangement that relates to such
- 27 financial arrangements; and
- 28 (b) the \*IMR foreign fund has a \*total participation interest in
- 29 that entity of 10% or more.
- 30 (3) A \*financial arrangement is *not* covered by this section if:
- 31 (a) the financial arrangement is a \*derivative financial
- 32 arrangement that relates to a \*CGT asset; and
- 33 (b) the CGT asset is:
- 34 (i) \*taxable Australian real property (see section 855-20);
- 35 or

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1 (ii) an \*indirect Australian real property interest (see  
2 section 855-25).

3 (4) A \*financial arrangement is *not* covered by this section if its terms  
4 allow the \*IMR foreign fund to:

5 (a) vote at a meeting of the Board of Directors (or other  
6 governing body) of the issuer of the financial arrangement; or

7 (b) participate in making financial, operating or policy decisions  
8 in respect of the operation of the issuer of the financial  
9 arrangement; or

10 (c) deal with the assets of the issuer of the financial arrangement.

11 (5) Subsection (4) does not apply if the only situation in which the  
12 terms of the \*financial arrangement allow the \*IMR foreign fund to  
13 do a thing mentioned in paragraph (4)(a), (b) or (c) is where the  
14 issuer breaches the terms of the financial arrangement.

## 15 **2 Subsection 995-1(1)**

16 Insert:

17 *IMR capital gain* has the meaning given by subsection 842-240(1).

## 18 **3 Subsection 995-1(1)**

19 Insert:

20 *IMR capital loss* has the meaning given by subsection 842-240(2).

## 21 **4 Subsection 995-1(1)**

22 Insert:

23 *IMR deduction* has the meaning given by subsection 842-235(2).

## 24 **5 Subsection 995-1(1)**

25 Insert:

26 *IMR foreign fund* has the meaning given by section 842-220.

## 27 **6 Subsection 995-1(1)**

28 Insert:

29 *IMR income* has the meaning given by subsection 842-235(1).

## 30 **7 Subsection 995-1(1)**

31 Insert:

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1                    *non-IMR net income* has the meaning given by subsection  
2                    842-213(3).

## 3        **8 Subsection 995-1(1)**

4                    Insert:

5                    *non-IMR partnership loss* has the meaning given by subsection  
6                    842-216(3).

## 7        **9 Subsection 995-1(1)**

8                    Insert:

9                    *non-IMR partnership net income* has the meaning given by  
10                    subsection 842-216(3).

## 11       **10 Application**

12                    The amendments made by this Schedule apply to assessments for the  
13                    2010-11 income year and later income years.

14  
15                    *Note: Provisions will be drafted to ensure that a trust that has a tax loss in*  
16                    *respect of its non-IMR net income will only be able to claim a deduction in*  
17                    *future years in respect of that loss to the extent that the loss offsets other*  
18                    *non-IMR net income.*

19  
20                    *Note: Provisions will be drafted to ensure that subsections 98(2A), (3) and (4),*  
21                    *and sections 99, 99A and 99E of Part III of the Income Tax Assessment Act*  
22                    *1936 do not give rise to tax in respect of IMR income or IMR capital gains.*

23  
24                    *Note: These provisions will be redrafted to ensure that this Subdivision*  
25                    *interacts correctly with Division 6E of Part III of the Income Tax Assessment*  
26                    *Act 1936 which deals with assessable amounts in relation to capital gains,*  
27                    *franked distributions and franking credits.*