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Inserts for
**Tax Laws Amendment (2012 Measures
No. 3) Bill 2012: Cross-border transfer
pricing**

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If you have any comments on this exposure draft they should be sent before 13 April 2012 to:
transferpricing@treasury.gov.au
or
The Manager
International Tax Integrity Unit
The Treasury
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Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Schedule ? Cross-border transfer pricing	The day this Act receives the Royal Assent.	
2.		
3.		

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Schedule ?—Cross-border transfer pricing

Income Tax Assessment Act 1936

1 At the end of subsection 136AB(1)

Add:

Note: This Division is subject to Subdivision 815-A of the *Income Tax Assessment Act 1997* (about cross-border transfer pricing): see section 815-50 of that Act.

2 Subsection 170(9B)

Omit “or a relevant provision”, substitute “, a relevant provision, or Subdivision 815-A of the *Income Tax Assessment Act 1997*”.

Note: Subdivision 815-A of the *Income Tax Assessment Act 1997* is about cross-border transfer pricing.

3 Paragraph 170(9C)(b)

Omit “or the relevant provision”, substitute “, the relevant provision, or Subdivision 815-A of the *Income Tax Assessment Act 1997*”.

Income Tax Assessment Act 1997

4 Section 10-5 (table item headed “profits”)

Before:

profit-making undertaking or plan 15-15

insert:

cross-border transfer pricing 815-20

5 After Division 802

Insert:

Division 815—Cross-border transfer pricing

Table of Subdivisions

815-A Treaty-equivalent cross-border transfer pricing rules

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Subdivision 815-A—Treaty-equivalent cross-border transfer pricing rules

Guide to Subdivision 815-A

815-5 What this Subdivision is about

The cross-border transfer pricing rules in this Subdivision are equivalent to, but independent of, the transfer pricing rules in Australia's double tax agreements.

Table of sections

Operative provisions

815-10	Object
815-20	When this Subdivision applies
815-22	When an entity gets a <i>transfer pricing benefit</i>
815-25	Cross-border transfer pricing guidance
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815-45	Commissioner may make consequential adjustment
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Operative provisions

815-10 Object

The object of this Subdivision is to ensure the following amounts are appropriately brought to tax in Australia, consistent with the arm's length principle:

- (a) profits which would have accrued to an Australian entity if it had been dealing at *arm's length, but, by reason of non-arm's length conditions operating between the entity and its foreign associated entities, have not so accrued;
- (b) profits which an Australian permanent establishment (within the meaning of the relevant *international tax agreement) of a foreign entity might have been expected to make if it were a distinct and separate entity engaged in the same or similar activities under the same or similar conditions, but dealing wholly independently.

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815-20 When this Subdivision applies

- 1
2 (1) This Subdivision applies to an entity if the entity gets a *transfer
3 pricing benefit at a time when an *international tax agreement
4 containing:
5 (a) for a transfer pricing benefit under paragraph 815-22(1)(a)—
6 an *associated enterprises article; or
7 (b) for a transfer pricing benefit under paragraph 815-22(1)(b)—
8 a *business profits article;
9 applies to the entity.

Meaning of international tax agreement

- 10
11 (2) An *international tax agreement* is an agreement (within the
12 meaning of the *International Tax Agreements Act 1953*) to which
13 that Act gives the force of law.

14
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<i>Consideration is being given to extending this Subdivision to relevant provisions of an international tax sharing treaty.</i>
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Meaning of business profits article

- 16
17 (3) A *business profits article* is:
18 (a) Article 7 of the 2003 United Kingdom convention (within the
19 meaning of the *International Tax Agreements Act 1953*); or
20 (b) a corresponding provision of another *international tax
21 agreement.

Meaning of associated enterprises article

- 22
23 (4) An *associated enterprises article* is:
24 (a) Article 9 of the 2003 United Kingdom convention (within the
25 meaning of the *International Tax Agreements Act 1953*); or
26 (b) a corresponding provision of another *international tax
27 agreement.

815-22 When an entity gets a transfer pricing benefit

- 28
29 (1) An entity gets a *transfer pricing benefit* at a time if:
30 (a) all of the following are satisfied at the time:
31 (i) the entity is an Australian resident;
32 (ii) the requirements in the *associated enterprises article for
33 the application of that article to the entity are met;
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- 1 (iii) an amount of profits (within the meaning of the article)
2 which, but for the conditions mentioned in the article,
3 might have been expected to accrue to the entity, has, by
4 reason of those conditions, not so accrued; or
- 5 (b) both of the following are satisfied at the time:
- 6 (i) the entity has a permanent establishment (within the
7 meaning of the *international tax agreement) in
8 Australia;
- 9 (ii) the amount of profits attributed to the permanent
10 establishment falls short of the amount of profits (within
11 the meaning of the *business profits article) the
12 permanent establishment might be expected to make if it
13 were a distinct and separate entity engaged, and dealing,
14 in the manner mentioned in the article.
- 15 Note: The meaning of “profits” in an international tax agreement is affected
16 by subsection 3(2) of the *International Tax Agreements Act 1953*.
- 17 (2) The amount of the *transfer pricing benefit is:
- 18 (a) the amount of profits mentioned in subparagraph (1)(a)(iii);
19 or
20 (b) the amount of the shortfall of profits mentioned in
21 subparagraph (1)(b)(ii).
- 22 (3) In working out whether an entity gets a *transfer pricing benefit,
23 and the amount of the benefit, interpret:
- 24 (a) this Subdivision; and
25 (b) the *business profits article or *associated enterprise article
26 (as the case requires);
27 so as to best achieve consistency with the documents covered by
28 section 815-25, to the extent the documents are relevant.
- 29 (4) However, if Division 820 (about thin capitalisation) applies to the
30 entity for an income year, to the extent the costs relating to a *debt
31 interest the entity has are relevant, the following principles apply in
32 working out the amount of the *transfer pricing benefit:
- 33 (a) the rate of return for the debt interest is to be worked out so
34 as to best achieve the consistency mentioned in
35 subsection (3);
36 (b) that rate of return is to be applied to the actual value of the
37 debt interest.
- 38 (5) To avoid doubt, in working out the rate of return for a *debt
39 interest under paragraph (4)(a), a reduced value for the debt
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1 interest is to be used, if that best achieves the consistency
2 mentioned in subsection (3).

3 Note 1: The reduced value may be the arm's length value of the debt interest.

4 Note 2: Division 820 may apply to further reduce debt deductions.

5 **815-25 Cross-border transfer pricing guidance**

- 6 (1) The documents covered by this section are as follows:
- 7 (a) the document entitled "Model Tax Convention on Income
8 and on Capital" and published by the Organisation for
9 Economic Cooperation and Development on 22 July 2010;
 - 10 (b) the document entitled "Transfer Pricing Guidelines for
11 Multinational Enterprises and Tax Administrations" and
12 published by that organisation on 18 August 2010;
 - 13 (c) a document, or part of a document, prescribed by the
14 regulations for the purposes of this paragraph.
- 15 (2) However, a document, or a part of a document, mentioned in
16 paragraph (1)(a) or (b) is not covered by this section if the
17 regulations so prescribe.
- 18 (3) Regulations made for the purposes of paragraph (1)(c) or
19 subsection (2) may prescribe different documents or parts of
20 documents for different circumstances.

21 **815-30 Commissioner may ensure transfer pricing benefit is taxed**

- 22 (1) The Commissioner may make one or more of the following
23 determinations, in writing, for the purpose of ensuring a *transfer
24 pricing benefit an entity gets is subject to tax in one or more
25 income years (as appropriate to the case):
- 26 (a) a determination of an amount by which the taxable income of
27 the entity for an income year is increased;
 - 28 (b) a determination of an amount by which the tax loss of the
29 entity for an income year is decreased;
 - 30 (c) a determination of an amount by which the entity's *net
31 capital losses for an income year are decreased.
- 32 (2) If the Commissioner makes a determination under subsection (1),
33 the determination is taken to be attributable, to the relevant extent,
34 to such of the following as the Commissioner may determine:

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- 1 (a) an increase of a particular amount in assessable income of the
2 entity for an income year under a particular provision of this
3 Act;
- 4 (b) a decrease of a particular amount in particular deductions of
5 the entity for an income year;
- 6 (c) an increase of a particular amount in particular capital gains
7 of the entity for an income year;
- 8 (d) a decrease of a particular amount in particular capital losses
9 of the entity for an income year.
- 10 (3) If Division 820 (about thin capitalisation) applies to the entity for
11 an income year for which the Commissioner makes a
12 determination under subsection (1), the Commissioner must make
13 a determination under subsection (2) relating to the *debt
14 deductions of the entity.
- 15 (4) The Commissioner may take such action as the Commissioner
16 considers necessary to give effect to the determination.
- 17 (5) The Commissioner must give a copy of a determination under this
18 section to the entity.
- 19 (6) A failure to comply with subsection (5) does not affect the validity
20 of the determination.
- 21 (7) To avoid doubt:
- 22 (a) determinations relating to different income years may be
23 included in the same document; and
- 24 (b) determinations under subsection (1) relating to different
25 amounts for the same income year may be included in the
26 same document; and
- 27 (c) a determination under subsection (1) may be combined in the
28 same document as a determination under subsection (2); and
- 29 (d) determinations under subsection (2) relating to different
30 amounts of income, deductions, capital gains and capital
31 losses may be included in the same document.

815-45 Commissioner may make consequential adjustment

- 32
- 33 (1) The Commissioner may make a determination under subsection (2)
34 in relation to an entity if:
- 35 (a) the Commissioner makes a determination under
36 section 815-30 to bring a *transfer pricing benefit an entity
37 gets to tax; and
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- (b) if the transfer pricing benefit arose under paragraph 815-22(1)(a)—the Commissioner considers that, but for the conditions mentioned in the *associated enterprises article, the entity, or another entity, might have been expected to have:
- (i) a smaller taxable income for one or more income years; or
 - or
 - (ii) a greater tax loss for one or more income years; or
 - (iii) a greater amount of *net capital losses for one or more income years; or
 - (iv) a smaller amount of *withholding tax payable in respect of interest or royalties; and
- (c) if the transfer pricing benefit arose under paragraph 815-22(1)(b)—the Commissioner considers that, if the permanent establishment were a distinct and separate entity engaged, and dealing, in the manner mentioned in the *business profits article, the entity, or another entity, might be expected to have:
- (i) a smaller taxable income for one or more income years; or
 - or
 - (ii) a greater tax loss for one or more income years; or
 - (iii) a greater amount of net capital losses for one or more income years; or
 - (iv) a smaller amount of withholding tax payable in respect of interest or royalties; and
- (d) the Commissioner considers that it is fair and reasonable that the amounts mentioned in paragraph (b) or (c) (as the case requires) be adjusted accordingly.
- (2) The Commissioner may make one or more of the following determinations, in writing, for the purpose of adjusting an amount as mentioned in paragraph (1)(b) or (c):
- (a) a determination of an amount by which the taxable income of the entity for an income year is decreased;
 - (b) a determination of an amount by which the tax loss of the entity for an income year is increased;
 - (c) a determination of an amount by which the *net capital losses of the entity for an income year are increased;
 - (d) a determination of an amount by which the *withholding tax payable by the entity in respect of interest or royalties is decreased.
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- 1 (3) The Commissioner may take such action as the Commissioner
2 considers necessary to give effect to the determination.
- 3 (4) An entity may give the Commissioner a written request to make a
4 determination under this section relating to the entity. The
5 Commissioner must decide whether or not to grant the request, and
6 give the entity notice of the Commissioner's decision.
- 7 (5) The Commissioner must give a copy of a determination under this
8 section to the entity.
- 9 (6) A failure to comply with subsection (5) does not affect the validity
10 of the determination.
- 11 (7) To avoid doubt, determinations relating to different income years
12 may be included in the same document.
- 13 (8) If an entity is dissatisfied with the Commissioner's decision, the
14 entity may object, in the manner set out in Part IVC of the *Taxation*
15 *Administration Act 1953*, against that decision.

16 **815-50 No double taxation**

- 17 (1) An amount of a *transfer pricing benefit that is subject to tax under
18 this Subdivision is not to be subject to tax again under another
19 provision of this Act.
- 20 (2) Subsection (1) has effect despite section 136AB of the *Income Tax*
21 *Assessment Act 1936*.
- 22 (3) Nothing in this Subdivision limits Division 820 (about thin
23 capitalisation) in its application to further reduce *debt deductions
24 of an entity.

25 **6 At the end of section 820-30**

26 Add:

27 Note: This Division applies in relation to debt deductions of an entity as
28 reduced, if required, in accordance with Subdivision 815-A (about
29 cross-border transfer pricing).

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

31 Insert:

32 *associated enterprises article* has the meaning given by subsection
33 815-20(4).

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8 Subsection 995-1(1)

Insert:

business profits article has the meaning given by subsection 815-20(3).

9 Subsection 995-1(1)

Insert:

international tax agreement has the meaning given by subsection 815-20(2).

10 Subsection 995-1(1)

Insert:

transfer pricing benefit has the meaning given by section 815-22.

Income Tax (Transitional Provisions) Act 1997

11 Before Division 820

Insert:

Division 815—Cross-border transfer pricing

Table of Subdivisions

815-A Treaty-equivalent cross-border transfer pricing rules

Subdivision 815-A—Treaty-equivalent cross-border transfer pricing rules

Table of sections

815-10 Application of Subdivision 815-A of the *Income Tax Assessment Act 1997*

815-25 Cross-border transfer pricing guidance

815-10 Application of Subdivision 815-A of the *Income Tax Assessment Act 1997*

Subdivision 815-A of the *Income Tax Assessment Act 1997* applies to income years beginning on and after 1 July 2004.

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1 **815-25 Cross-border transfer pricing guidance**

2 Despite section 815-25 of the *Income Tax Assessment Act 1997*,
3 the documents covered by that section for an income year before
4 the 2012-2013 income year are taken to be as follows:

- 5 (a) the document entitled “Model Tax Convention on Income
6 and on Capital” and last published by the Organisation for
7 Economic Cooperation and Development before the start of
8 the income year; and
9 (b) the document entitled “Transfer Pricing Guidelines for
10 Multinational Enterprises and Tax Administrations” and last
11 published by that organisation before the start of the income
12 year.

13