

EXPOSURE-DRAFT

1
2
3
4
5

Inserts for
**Tax Laws Amendment (Cross-Border
Transfer Pricing) Bill 2013:
Modernisation of transfer pricing rules**

EXPOSURE DRAFT

**If you have any comments on this exposure draft they should
be sent by 20 December 2012 to:
transferpricing@treasury.gov.au
or
The Manager
International Tax Integrity Unit
The Treasury
Langton Crescent
Parkes ACT 2600**

6

Commencement information

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

7

EXPOSURE-DRAFT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Schedule 1—Amendments

Part 1—Main amendments

Income Tax Assessment Act 1936

1 Division 13 of Part III

Repeal the Division.

Income Tax Assessment Act 1997

2 At the end of Division 815

Add:

Subdivision 815-B—Arm’s length principle for cross-border conditions between entities

Guide to Subdivision 815-B

815-101 What this Subdivision is about

This Subdivision applies if an entity would otherwise get a tax advantage in Australia from cross-border conditions that are inconsistent with the internationally accepted arm’s length principle.

The entity is treated for income tax purposes as if arm’s length conditions had operated.

The Subdivision is to be interpreted consistently with relevant guidance published by the Organisation for Economic Cooperation and Development.

Table of sections

Operative provisions

815-105	Object
815-110	Operation of Subdivision
815-115	Substitution of arm’s length conditions
815-120	When an entity gets a <i>transfer pricing benefit</i>

EXPOSURE-DRAFT

1	815-125	Meaning of <i>arm's length conditions</i>
2	815-130	Guidance
3	815-135	Modification for thin capitalisation
4	815-140	Consequential adjustments
5	815-145	Amendment of assessments

6 **Operative provisions**

7 **815-105 Object**

- 8 (1) The object of this Subdivision is to ensure that the amount brought
9 to tax in Australia from cross-border conditions between entities is
10 not less than it would be if those conditions reflected:
- 11 (a) the arm's length contribution made by Australian operations
12 through functions performed, assets used and risks assumed;
13 and
- 14 (b) the conditions that might be expected to operate between
15 entities dealing at *arm's length.
- 16 (2) The Subdivision does this by specifying that, where an entity
17 would otherwise get a tax advantage from actual conditions that
18 differ from *arm's length conditions, the arm's length conditions
19 are taken to operate for income tax purposes.

20 **815-110 Operation of Subdivision**

- 21 (1) Nothing in the provisions of this Act other than this Subdivision
22 limits the operation of this Subdivision.
- 23 (2) Nothing in this Subdivision limits Division 820 (about thin
24 capitalisation) in its application to reduce, or further reduce, *debt
25 deductions of an entity.

26 **815-115 Substitution of arm's length conditions**

- 27 (1) For the purposes covered by subsection (2) for an income year:
- 28 (a) if an entity gets a *transfer pricing benefit in the income year
29 from conditions that operate between the entity and another
30 entity in connection with their commercial or financial
31 relations, those conditions are taken not to operate; and
32 (b) instead, the *arm's length conditions are taken to operate.

33 Note: The conditions that operate include, but are not limited to, such things
34 as price, gross margin, net profit, and the division of profit between
35 the entities.

EXPOSURE-DRAFT

-
- 1 (2) The purposes covered by this subsection are:
2 (a) working out the amount (if any) of the entity's taxable
3 income for the income year; and
4 (b) working out the amount (if any) of the entity's loss of a
5 particular *sort for the income year; and
6 (c) working out the amount (if any) of the entity's *tax offsets
7 for the income year.

8 **815-120 When an entity gets a *transfer pricing benefit***

- 9 (1) An entity gets a *transfer pricing benefit* in an income year from
10 conditions that operate between the entity and another entity in
11 connection with their commercial or financial relations if:
12 (a) those conditions (the *actual conditions*) differ from the
13 *arm's length conditions; and
14 (b) the actual conditions meet the cross-border requirement in
15 subsection (3) for the entity; and
16 (c) if the arm's length conditions, instead of the actual
17 conditions, had operated, one or more of the following
18 would, apart from this Subdivision, apply:
19 (i) the amount of the entity's taxable income for the
20 income year would be *greater*;
21 (ii) the amount of the entity's loss of a particular *sort for
22 the income year would be *less*;
23 (iii) the amount of the entity's *tax offsets for the income
24 year would be *less*.

25 *Absence of condition*

- 26 (2) For the purposes of subsection (1), there is taken to be a difference
27 between the actual conditions and the *arm's length conditions if:
28 (a) an actual condition exists that is not one of the arm's length
29 conditions; or
30 (b) a condition does not exist in the actual conditions but is one
31 of the arm's length conditions.

32 *Cross-border requirement*

- 33 (3) The actual conditions meet the cross-border requirement for an
34 entity if one or more of the following applies:
35 (a) the other entity is:
36 (i) not an Australian resident; and

EXPOSURE-DRAFT

-
- 1 (ii) not a resident trust estate for the purposes of Division 6
2 of Part III of the *Income Tax Assessment Act 1936* (a
3 ***resident trust estate***) in respect of the income year; and
4 (iii) not a partnership in which all of the partners are,
5 directly or indirectly through one or more interposed
6 partnerships, Australian residents or resident trust
7 estates;
8 (b) the conditions operate between the entity and an *overseas
9 permanent establishment of the other entity;
10 (c) the conditions operate in connection with a business the
11 entity carries on in an *area covered by an international tax
12 sharing treaty.

13 *Nil amounts*

- 14 (4) For the purposes of this section and sections 815-140 and 815-305:
15 (a) treat an entity that has no taxable income for an income year
16 as having a taxable income for the year of a nil amount; and
17 (b) treat an entity that has no loss of a particular *sort for an
18 income year as having a loss of that sort for the year of a nil
19 amount; and
20 (c) treat an entity that has no *tax offsets for an income year as
21 having tax offsets for the year of a nil amount.

22 **815-125 Meaning of *arm's length conditions***

- 23 (1) The ***arm's length conditions***, in relation to conditions that operate
24 between an entity and another entity, are the conditions that might
25 be expected to operate between independent entities dealing wholly
26 independently with one another in comparable circumstances.

27 *Most appropriate and reliable method to be used*

- 28 (2) In identifying the *arm's length conditions, use the method, or the
29 combination of methods, that is the most appropriate and reliable,
30 having regard to all relevant factors, including the following:
31 (a) the respective strengths and weaknesses of the possible
32 methods in their application to the actual conditions;
33 (b) the circumstances, including the functions performed, assets
34 used and risks borne by the entities;
35 (c) the availability of reliable information required to apply a
36 particular method;

EXPOSURE-DRAFT

1 (d) the degree of comparability between the actual circumstances
2 and the comparable circumstances, including the reliability of
3 any adjustments to eliminate the effect of material
4 differences between those circumstances.

5 Note: The possible methods include the methods set out in the documents
6 mentioned in section 815-130 (about relevant guidance material).

7 *Comparability of circumstances*

- 8 (3) In identifying comparable circumstances for the purpose of this
9 section, regard must be had to all relevant factors, including the
10 following:
- 11 (a) the functions performed, assets used and risks borne by the
12 entities;
 - 13 (b) the characteristics of any property or services transferred;
 - 14 (c) the terms of any relevant contracts between the entities;
 - 15 (d) the economic circumstances;
 - 16 (e) the business strategies of the entities.
- 17 (4) For the purposes of this section, circumstances are comparable to
18 actual circumstances if, to the extent (if any) that the circumstances
19 differ from the actual circumstances:
- 20 (a) the difference does not materially affect a condition that is
21 relevant to the method; or
 - 22 (b) a reasonably accurate adjustment can be made to eliminate
23 the effect of the difference on a condition that is relevant to
24 the method.

25 *Relevance of economic substance*

- 26 (5) In identifying the *arm's length conditions, have regard to the
27 economic substance of what was actually done.
- 28 (6) However, it is not a requirement in identifying the *arm's length
29 conditions that the economic substance of what independent
30 entities dealing wholly independently with one another in
31 comparable circumstances might be expected to have done be the
32 same as the economic substance of what was actually done.
- 33 (7) Despite subsection (6), if independent entities dealing wholly
34 independently with one another in comparable circumstances
35 would not be expected to have done anything, the economic
36 substance of which is substantially similar to the economic

EXPOSURE-DRAFT

1 substance of what was actually done, the *arm's length conditions
2 are to be identified as if what was actually done had not been done.

- 3 (8) To avoid doubt, the legal form of what was actually done does not
4 limit the identification of the *arm's length conditions.

5 **815-130 Guidance**

- 6 (1) This Subdivision is to be interpreted so as best to achieve
7 consistency with the documents covered by this section (except
8 where the contrary intention appears).
- 9 (2) The documents covered by this section are as follows:
10 (a) the Transfer Pricing Guidelines for Multinational Enterprises
11 and Tax Administrations, as approved by the Council of the
12 Organisation for Economic Cooperation and Development
13 and last amended on 22 July 2010;
14 (b) a document, or part of a document, prescribed by the
15 regulations for the purposes of this paragraph.
- 16 (3) However, the document mentioned in paragraph (2)(a) is not
17 covered by this section if the regulations so prescribe.
- 18 (4) Regulations made for the purposes of paragraph (2)(b) or
19 subsection (3) may prescribe different documents or parts of
20 documents for different circumstances.

21 **815-135 Modification for thin capitalisation**

- 22 (1) This section modifies the way an entity to which section 815-115
23 applies works out its taxable income or its loss of a particular *sort,
24 for an income year, if:
25 (a) Division 820 (about thin capitalisation) applies to the entity
26 for the income year; and
27 (b) the *arm's length conditions affect costs that are *debt
28 deductions of the entity for the income year.
- 29 (2) If working out what those costs would be if the *arm's length
30 conditions had operated involves applying a rate to a *debt interest:
31 (a) work out the rate as if the *arm's length conditions had
32 operated; but
33 (b) apply the rate to the debt interest the entity actually issued.

34 Note: Division 820 may apply to reduce or further reduce debt deductions.

EXPOSURE-DRAFT

815-140 Consequential adjustments

- 1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
- (1) The Commissioner may make a determination under subsection (2) in relation to an entity (the *disadvantaged entity*) if:
 - (a) *arm's length conditions are taken by section 815-115 to operate; and
 - (b) the Commissioner considers that, if the arm's length conditions, instead of the actual conditions, had operated:
 - (i) the amount of the disadvantaged entity's taxable income for an income year might have been expected to be *less* than its actual amount; or
 - (ii) the amount of the disadvantaged entity's loss of a particular *sort for an income year might have been expected to be *greater* than its actual amount; or
 - (iii) the amount of the disadvantaged entity's *tax offsets for an income year might have been expected to be *greater* than their actual amount; or
 - (iv) an amount of *withholding tax payable in respect of interest or royalties by the disadvantaged entity might have been expected to be *less* than its actual amount; and
 - (c) the Commissioner considers that it is fair and reasonable that the actual amount mentioned in subparagraph (b)(i), (ii), or (iii) (as the case requires) be adjusted accordingly.
 - (2) For the purpose of adjusting an amount as mentioned in paragraph (1)(c), the Commissioner may make a determination stating the amount that is (and has been at all times) the amount of the disadvantaged entity's:
 - (a) taxable income for the income year; or
 - (b) loss of a particular *sort for the income year; or
 - (c) *tax offsets, or tax offset of a particular kind, for the income year; or
 - (d) *withholding tax payable in respect of interest or royalties.
 - (3) The Commissioner may take such action as the Commissioner considers necessary to give effect to a determination under this section.
 - (4) The Commissioner must give a copy of a determination under this section to the disadvantaged entity.
 - (5) A failure to comply with subsection (4) does not affect the validity of the determination.
-

EXPOSURE-DRAFT

1
2
3
4
5
6
7
8
9
10

-
- (6) To avoid doubt, the Commissioner may include all or any determinations under this section in relation to a particular entity, including determinations of different kinds, in the same document.
- (7) An entity may give the Commissioner a written request to make a determination under this section relating to the entity. The Commissioner must decide whether or not to grant the request, and give the entity notice of the Commissioner's decision.
- (8) If the entity is dissatisfied with the Commissioner's decision, the entity may object, in the manner set out in Part IVC of the *Taxation Administration Act 1953*, against that decision.

11 **815-145 Amendment of assessments**

12
13
14
15
16
17
18
19
20
21
22

- (1) Section 170 of the *Income Tax Assessment Act 1936* does not prevent the amendment of an assessment of an entity for an income year if:
- (a) the amendment is made within 8 years after the day on which the Commissioner gives notice of the assessment to the entity; and
 - (b) the amendment is made for the purpose of giving effect to section 815-115.
- (2) Section 170 of the *Income Tax Assessment Act 1936* does not prevent the amendment of an assessment at any time for the purpose of giving effect to section 815-140.

23
24

Subdivision 815-C—Arm's length principle for permanent establishments

25

Guide to Subdivision 815-C

26

815-201 What this Subdivision is about

27
28

This Subdivision applies the internationally accepted arm's length principle in the context of permanent establishments (PEs).

29

Table of sections

30
31
32

Operative provisions	
815-205	Object
815-210	Operation of Subdivision

EXPOSURE-DRAFT

1	815-215	Substitution of arm's length profits
2	815-220	When an entity gets a <i>transfer pricing benefit</i>
3	815-225	Meaning of <i>arm's length profits</i>
4	815-230	Guidance
5	815-235	Amendment of assessments

6 **Operative provisions**

7 **815-205 Object**

8 The object of this Subdivision is to ensure that the amount brought
9 to tax in Australia by entities operating *permanent establishments
10 is not less than it would be if the permanent establishment were a
11 distinct and separate entity engaged in the same or comparable
12 activities under the same or comparable circumstances, but dealing
13 wholly independently with the other part of the entity.

14 **815-210 Operation of Subdivision**

- 15 (1) Nothing in the provisions of this Act other than this Subdivision
16 limits the operation of this Subdivision.
- 17 (2) Nothing in this Subdivision limits Division 820 (about thin
18 capitalisation) in its application to reduce, or further reduce, *debt
19 deductions of an entity.

20 **815-215 Substitution of arm's length profits**

- 21 (1) For the purposes covered by subsection (2) for an income year:
- 22 (a) if an entity gets a *transfer pricing benefit from the attribution
23 of profits to a *PE of the entity, the amount of profits actually
24 attributed to the PE is taken not to have been so attributed;
25 and
- 26 (b) instead, the *arm's length profits are taken to have been
27 attributed to the PE.
- 28 (2) The purposes covered by this subsection are:
- 29 (a) working out the amount (if any) of the entity's taxable
30 income for the income year; and
- 31 (b) working out the amount (if any) of a loss of a particular *sort
32 for the income year; and
- 33 (c) working out the amount (if any) of the entity's *tax offsets
34 for the income year.

EXPOSURE-DRAFT

1 815-220 When an entity gets a *transfer pricing benefit*

- 2 (1) An entity gets a *transfer pricing benefit* in an income year from
3 the attribution of profits to a *PE if:
4 (a) the entity carries on a business at or through the PE; and
5 (b) the amount of profits (the *actual profits*) attributed to the PE
6 differs from the *arm's length profits for the PE; and
7 (c) had the arm's length profits, instead of the actual profits,
8 been attributed to the PE, one or more of the following
9 would, apart from this Subdivision, apply:
10 (i) the amount of the entity's taxable income for the
11 income year would be *greater*;
12 (ii) the amount of the entity's loss of a particular *sort for
13 the income year would be *less*;
14 (iii) the amount of the entity's *tax offsets for the income
15 year would be *less*.

16 *Nil amounts*

- 17 (2) For the purposes of this section and section 815-310:
18 (a) treat an entity that has no taxable income for an income year
19 as having a taxable income for the year of a nil amount; and
20 (b) treat an entity that has no loss of a particular *sort for an
21 income year as having a loss of that sort for the year of a nil
22 amount; and
23 (c) treat an entity that has no *tax offsets for an income year as
24 having tax offsets for the year of a nil amount.

25 815-225 Meaning of *arm's length profits*

- 26 (1) The *arm's length profits* for a *PE of an entity are worked out by
27 allocating the actual expenditure and income of the entity between
28 the PE and the entity so that the profits attributed to the PE equal
29 the profits the PE might be expected to make if:
30 (a) the PE were a distinct and separate entity; and
31 (b) that separate entity were engaged in the same or comparable
32 activities under the same or comparable circumstances; and
33 (c) the conditions that operated between that separate entity and
34 the entity of which it is a PE, in relation to the conditions
35 assumed because of paragraphs (a) and (b) to operate, were
36 the *arm's length conditions.

- 37 (2) For the purposes of subsection (1):

EXPOSURE-DRAFT

-
- 1 (a) the actual expenditure of an entity is taken to include losses
2 and outgoings; and
3 (b) the actual income of an entity is taken to include any amount
4 that is, or is to be, included in the entity's assessable income.
- 5 (3) The *arm's length profits for a *PE in Australia are taken, for the
6 purposes of this Act, to be attributable to sources in Australia.

7 **815-230 Guidance**

- 8 (1) This Subdivision, and section 815-125, as it applies for the
9 purposes of this Subdivision, are to be interpreted so as best to
10 achieve consistency with:
11 (a) the documents covered by this section; and
12 (b) subject to paragraph (a), the documents covered by
13 section 815-130;
14 (except where the contrary intention appears).
- 15 (2) The documents covered by this section are as follows:
16 (a) the Model Tax Convention on Income and on Capital, and its
17 Commentaries, as adopted by the Council of the Organisation
18 for Economic Cooperation and Development and last
19 amended on 22 July 2010, to the extent that document
20 extracts the text of Article 7 and its Commentary as they read
21 before 22 July 2010;
22 (b) a document, or part of a document, prescribed by the
23 regulations for the purposes of this paragraph.
- 24 (3) However, the document mentioned in paragraph (2)(a) is not
25 covered by this section if the regulations so prescribe.
- 26 (4) A document covered by section 815-130 is to be disregarded for
27 the purposes of this section if the regulations so prescribe.
- 28 (5) Regulations made for the purposes of paragraph (2)(b),
29 subsection (3) or subsection (4) may prescribe different documents
30 or parts of documents for different circumstances.

31 **815-235 Amendment of assessments**

32 Section 170 of the *Income Tax Assessment Act 1936* does not
33 prevent the amendment of an assessment of an entity for an income
34 year if:

EXPOSURE-DRAFT

-
- 1 (a) the amendment is made within 8 years after the day on which
2 the Commissioner gives notice of the assessment to the
3 entity; and
4 (b) the amendment is made for the purpose of giving effect to
5 section 815-215.

6 **Subdivision 815-D—Record keeping requirements**

7 **Guide to Subdivision 815-D**

8 **815-301 What this Subdivision is about**

9 This Subdivision sets out optional record keeping requirements and
10 related provisions for entities affected by Subdivision 815-B or
11 815-C.

12 Records that meet the requirements in this Subdivision are
13 necessary (but not sufficient) to establish a reasonably arguable
14 position about the application of those Subdivisions.

15 **Table of sections**

16 **Operative provisions**

- 17 815-305 Records about arm's length principle for cross-border conditions between
18 entities
19 815-310 Records about arm's length principle for permanent establishments

20 **Operative provisions**

21 **815-305 Records about arm's length principle for cross-border 22 conditions between entities**

- 23 (1) An entity may keep records that meet the requirements in this
24 Subdivision for an income year.

25 Note: An entity that does not keep these records is treated as not having a
26 reasonably arguable position: see section 284-180 in Schedule 1 to the
27 *Taxation Administration Act 1953*.

- 28 (2) The records must explain:

- 29 (a) the way in which the entity, or the entity's agent, treated
30 Subdivision 815-B as applying to the entity (including not
31 applying to the entity) in relation to the income year; and

EXPOSURE-DRAFT

-
- 1 (b) why the application of Subdivision 815-B to the entity in that
2 way best achieves consistency with the documents covered
3 by section 815-130.
- 4 (3) The records must be in English, or be readily accessible and
5 convertible into English.
- 6 (4) Without limiting subsection (2), for all conditions operating in the
7 income year that meet the cross-border requirement in subsection
8 815-120(3) for the entity, the records must:
- 9 (a) identify the actual conditions and the *arm's length
10 conditions; and
- 11 (b) contain particulars about the method used and comparable
12 circumstances relevant to identifying the arm's length
13 conditions; and
- 14 (c) set out the amount (if any) by which any of the following
15 would, apart from Subdivision 815-B, be different if the
16 arm's length conditions, instead of the actual conditions, had
17 operated:
- 18 (i) the amount of the entity's taxable income for the
19 income year (if any);
- 20 (ii) the amount of the entity's loss of a particular *sort for
21 the income year (if any);
- 22 (iii) the amount of the entity's *tax offsets for the income
23 year (if any);
- 24 (iv) the amounts that are elements in the calculation of those
25 amounts (unless it is not reasonable in the circumstances
26 to do so).
- 27 (5) The entity must prepare the records before the time by which the
28 entity lodges its *income tax return for the income year.

29 **815-310 Records about arm's length principle for permanent** 30 **establishments**

- 31 (1) An entity may keep records that meet the requirements in this
32 Subdivision for an income year.
- 33 Note: An entity that does not keep these records is treated as not having a
34 reasonably arguable position: see section 284-180 in Schedule 1 to the
35 *Taxation Administration Act 1953*.
- 36 (2) The records must explain:
- 37 (a) the way in which the entity, or the entity's agent, treated
38 Subdivision 815-C as applying to the entity (including not
-

EXPOSURE-DRAFT

-
- 1 applying to the entity) in relation to a *PE the entity has in
2 the income year; and
- 3 (b) why the application of Subdivision 815-C to the entity in that
4 way best achieves consistency with the documents covered
5 by section 815-230.
- 6 (3) The records must be in English, or be readily accessible and
7 convertible into English.
- 8 (4) Without limiting subsection (2), for each *PE the entity has in the
9 income year, the records must:
- 10 (a) identify the actual profits mentioned in paragraph
11 815-220(1)(b) and the *arm's length profits; and
- 12 (b) contain particulars about the following things relevant to
13 working out the arm's length profits:
- 14 (i) the activities and circumstances assumed because of
15 paragraphs 815-225(1)(a) and (b);
- 16 (ii) the particulars mentioned in paragraph 815-305(4)(b)
17 for the *arm's length conditions; and
- 18 (c) set out the amount (if any) by which any of the following
19 would, apart from Subdivision 815-C, be different if the
20 arm's length profits, instead of the actual profits, had been
21 attributed to the PE:
- 22 (i) the amount of the entity's taxable income for the
23 income year (if any);
- 24 (ii) the amount of the entity's loss of a particular *sort for
25 the income year (if any);
- 26 (iii) the amount of the entity's *tax offsets for the income
27 year (if any);
- 28 (iv) the amounts that are elements in the calculation of those
29 amounts (unless it is not reasonable in the circumstances
30 to do so).
- 31 (5) The entity must prepare the records before the time by which the
32 entity lodges its *income tax return for the income year.

EXPOSURE-DRAFT

1 Subdivision 815-E—Special rules for trusts and partnerships

2 Guide to Subdivision 815-E

3 815-401 What this Subdivision is about

4 This Subdivision provides special rules about the way
5 Subdivisions 815-B, 815-C and 815-D apply to trusts and
6 partnerships.

7 Table of sections

8 Operative provisions

9 815-405 Special rule for trusts

10 815-410 Special rules for partnerships

11 Operative provisions

12 815-405 Special rule for trusts

13 Subdivisions 815-B, 815-C and 815-D apply in relation to the *net
14 income of a trust in the same way those Subdivisions apply in
15 relation to the taxable income of an entity other than a trust.

16 815-410 Special rules for partnerships

17 (1) Subdivisions 815-B, 815-C and 815-D apply in relation to the *net
18 income of a partnership in the same way those Subdivisions apply
19 in relation to the taxable income of an entity other than a
20 partnership.

21 (2) Subdivisions 815-B, 815-C and 815-D apply in relation to a
22 *partnership loss of a partnership in the same way those
23 Subdivisions apply in relation to a *tax loss of an entity other than
24 a partnership.

25 *Taxation Administration Act 1953*

26 3 At the end of subsection 284-15(1) in Schedule 1

27 Add:

28 Note: For the effect of transfer pricing documentation, see section 284-180.

EXPOSURE-DRAFT

4 After subsection 284-145(2A) in Schedule 1

Insert:

(2B) You are also liable to an administrative penalty if:

(a) you are liable to pay an additional amount of income tax because the Commissioner amends your assessment for an income year to give effect to Subdivision 815-B or 815-C of the *Income Tax Assessment Act 1997* in relation to a *scheme; and

(b) subparagraph (1)(b)(i) is not satisfied for the scheme.

Note: Subdivisions 815-B and 815-C of the *Income Tax Assessment Act 1997* apply the arm's length principle (about transfer pricing) to entities and permanent establishments respectively.

5 After subsection 284-150(2) in Schedule 1

Insert:

(2A) However, the *scheme shortfall amount* for a *scheme to which subsection 285-145(2B) applies is the amount of additional tax you are liable to pay as mentioned in that subsection.

6 At the end of Subdivision 284-C in Schedule 1

Add:

284-165 Exception—threshold for penalty arising from arm's length principle

(1) You are not liable to an administrative penalty under subsection 284-145(2B) if your *scheme shortfall amount is equal to or less than the greater of the following amounts:

(a) \$10,000;

(b) 1% of the income tax payable by you for the income year, worked out on the basis of your *income tax return.

(2) You are also not liable to an administrative penalty under that subsection if:

(a) you have the *scheme shortfall amount because of section 284-30 (about trusts); and

(b) the amount by which the trust would, apart from the application of Subdivision 815-B or 815-C of the *Income Tax Assessment Act 1997*, have had a greater *net income, or a lesser *tax loss, is equal to or less than the greater of the following amounts:

EXPOSURE-DRAFT

-
- 1 (i) \$20,000;
- 2 (ii) 2% of the trust's net income (if any) for that year
- 3 worked out on the basis of the trust's *income tax
- 4 return.
- 5 (3) You are also not liable to an administrative penalty under that
- 6 subsection if:
- 7 (a) you have the *scheme shortfall amount because you are a
- 8 partner in a partnership that participated in the *scheme; and
- 9 (b) the amount by which the partnership would, apart from the
- 10 application of Subdivision 815-B or 815-C of that Act, have
- 11 had a greater *net income, or a lesser *partnership loss, is
- 12 equal to or less than the greater of the following amounts:
- 13 (i) \$20,000;
- 14 (ii) 2% of the partnership's net income (if any) for that year
- 15 worked out on the basis of the partnership's *income tax
- 16 return.

17 *Nil amounts*

- 18 (4) For the purposes this section:
- 19 (a) treat a trust that has no *net income for an income year as
- 20 having a net income for the year of a nil amount; and
- 21 (b) treat a partnership that has no net income for an income year
- 22 as having a net income for the year of a nil amount; and
- 23 (c) treat a partnership that has no *partnership loss for an income
- 24 year as having a partnership loss for the year of a nil amount.

25 **7 After Subdivision 284-C in Schedule 1**

26 Insert:

27 **Subdivision 284-CA—Special rules for transfer pricing**

28 **Table of sections**

29 284-180 Effect of adequate documentation on whether transfer pricing treatment is

30 reasonably arguable

31 **284-180 Effect of adequate documentation on whether transfer**

32 **pricing treatment is reasonably arguable**

- 33 (1) This section applies to an entity in an income year if:
- 34 (a) the entity or the entity's agent treated, or made a statement
- 35 treating, Subdivision 815-B or 815-C of the *Income Tax*

EXPOSURE-DRAFT

1
2
3
4
5
6
7
8
9
10
11

Assessment Act 1997 as applying to the entity in a particular way (including not applying to the entity); and

(b) the entity does not have records that meet the requirements in Subdivision 815-D of the *Income Tax Assessment Act 1997* for the application of that Subdivision in that way.

(2) This Division has effect in relation to the entity as if it were not *reasonably arguable that Subdivision 815-B or 815-C of that Act applied in that way.

8 Subdivision 284-D in Schedule 1 (heading)

Omit “and 284-C”, substitute “, 284-C and 284-CA”.

EXPOSURE-DRAFT

1

2 **Part 2—Other amendments**

3 *Income Tax Assessment Act 1997*

4 **9 Subsection 995-1(1)**

5 Insert:

6 *area covered by an international tax sharing treaty*: if, under an
7 *international tax sharing treaty, Australia and another country
8 share tax revenues from activities undertaken in an area identified
9 by or under the treaty, that area is an *area covered by an*
10 *international tax sharing treaty*.

11 **10 Subsection 995-1(1)**

12 Insert:

13 *arm's length conditions* has the meaning given by
14 section 815-125.

15 **11 Subsection 995-1(1)**

16 Insert:

17 *arm's length profits* has the meaning given by section 815-225.

18 **12 Subsection 995-1(1)**

19 Insert:

20 *international tax sharing treaty* has the meaning given by the
21 *Income Tax Assessment Act 1936*.

22 **13 Subsection 995-1(1)**

23 Insert:

24 *PE*: see *permanent establishment*.

25 **14 Subsection 995-1(1) (definition of *transfer pricing benefit*)**

26 Repeal the definition, substitute:

27 *transfer pricing benefit* has the meaning given by sections 815-15,
28 815-120 and 815-220.