

EXPOSURE DRAFT

1 Inserts for

2 **Tax Laws Amendment (2009 Budget**
3 **Measures No. 2) Bill 2009: Employee**
4 **share schemes**

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Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details

1. Schedule 1	The later of: (a) the day this Act receives the Royal Assent; and (b) the day the <i>Income Tax (TFN Withholding Tax (ESS)) Act 2009</i> receives the Royal Assent. However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	
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2.

7 **Schedule 1—Employee share schemes**

8 **Part 1—Main amendments**

9 *Income Tax Assessment Act 1997*

10 **1 At the end of Part 2-40**

11 Add:

12 **Division 83A—Employee share schemes**

13 **Table of Subdivisions**

14 Guide to Division 83A

15 83A-A Objects of Division and key concepts

16 83A-B Immediate inclusion of discount in assessable income

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- 1 83A-C Deferred inclusion of gain in assessable income
2 83A-D Deduction for employer
3 83A-E Miscellaneous

4 **Guide to Division 83A**

5 **@83A-1 What this Division is about**

6 Your assessable income includes discounts on shares, rights and
7 stapled securities you (or your associate) acquire under an
8 employee share scheme.

9 You may be entitled:

- 10 (a) to have the amount included in your assessable
11 income reduced; or
12 (b) to have the income year in which it is included
13 deferred.

14 **Subdivision 83A-A—Objects of Division and key concepts**

15 **Table of sections**

- 16 @83A-5 Objects of Division
17 @83A-10 Meaning of *ESS interest* and *employee share scheme*

18 **@83A-5 Objects of Division**

19 The objects of this Division are:

- 20 (a) to ensure that benefits provided to employees under
21 *employee share schemes are subject to income tax at the
22 employees' marginal rates under *income tax law (instead of
23 being subject to *fringe benefits tax law); and
24 (b) to increase the extent to which the interests of employees are
25 aligned with those of their employers, by providing a tax
26 concession to encourage lower and middle income earners to
27 acquire *shares under such schemes.

28 **@83A-10 Meaning of *ESS interest* and *employee share scheme***

- 29 (1) An *ESS interest*, in a company, is a beneficial interest in:
30 (a) a *share in the company; or
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1 (b) a right to acquire a beneficial interest in a share in the
2 company.

3 (2) An *employee share scheme* is a scheme under which a company
4 provides *ESS interests in itself to, and only to, employees, or
5 *associates of employees, (including past or prospective
6 employees) of:

7 (a) the company; or

8 (b) a *subsidiary of the company.

9 Note: See section @83A-325 for relationships similar to employment.

10 **Subdivision 83A-B—Immediate inclusion of discount in** 11 **assessable income**

12 **Guide to Subdivision 83A-B**

13 **@83A-15 What this Subdivision is about**

14 Generally, a discount you receive on shares, rights or stapled
15 securities you acquire under an employee share scheme is included
16 in your assessable income when you acquire the beneficial interest
17 in those shares, rights or securities.

18 You may be entitled to reduce the amount included in your
19 assessable income if you meet certain conditions which seek to
20 limit the concession to genuine schemes broadly available to all
21 permanent employees who do not already have anything other than
22 a minor interest in their employer.

23 The income year in which you are taxed may be deferred if there is
24 a real risk of forfeiture, or you acquired the shares, rights or
25 securities under particular salary sacrifice arrangements (see
26 Subdivision 83A-C).

27 If you are a foreign resident, only the part of the discount that
28 relates to your employment in Australia is included in your
29 assessable income.

30 **Table of sections**

31 **Operative provisions**

32 @83A-20 Application of Subdivision

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- 1 @83A-25 Discount to be included in assessable income
2 @83A-30 Amount for which discounted ESS interest acquired
3 @83A-35 Reduction of amounts included in assessable income

4 **Operative provisions**

5 **@83A-20 Application of Subdivision**

- 6 (1) This Subdivision applies to an *ESS interest if you acquire the
7 interest under an *employee share scheme at a discount.
- 8 Note 1: This Subdivision does not apply if Subdivision 83A-C applies: see
9 section @83A-105.
- 10 Note 2: If an associate of yours acquires an interest in relation to your
11 employment, this Division applies as if you, rather than your
12 associate, acquired the interest: see section @83A-305.
- 13 Note 3: Regulations made for the purposes of section @83A-315 may be
14 relevant to working out whether you acquire the ESS interest at a
15 discount.
- 16 (2) However, this Subdivision does not apply if the *ESS interest is a
17 beneficial interest in a *share that you acquire as a result of
18 exercising a right, if you acquired a beneficial interest in the right
19 under an *employee share scheme.

20 **@83A-25 Discount to be included in assessable income**

- 21 (1) Your assessable income for the income year in which you acquire
22 the *ESS interest includes the discount given in relation to the
23 interest.
- 24 (2) Treat an amount included in your assessable income under
25 subsection (1) as being from a source other than an *Australian
26 source to the extent that it relates to your employment outside
27 Australia.

28 **@83A-30 Amount for which discounted ESS interest acquired**

29 For the purposes of this Act (other than this Division), the *ESS
30 interest is taken to have been acquired for its *market value (rather
31 than for its discounted value).

32 Note: The regulations may substitute a different amount for the market value
33 of the ESS interest: see section @83A-315.

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@83A-35 Reduction of amounts included in assessable income

Reduction and income test

- (1) Reduce the total amount included in your assessable income under subsection @83A-25(1) for an income year by the lesser of:
 - (a) the total of the amounts included in your assessable income under that subsection, for the income year, for *ESS interests to which subsections (3) to (9) of this section apply; and
 - (b) \$1,000.
- (2) However, only make the reduction if the sum of the following equals or falls short of \$180,000:
 - (a) your taxable income for the income year (including any amount that would be included in your taxable income if you ignored this section);
 - (b) your *reportable fringe benefits total for the income year;
 - (c) your *reportable superannuation contributions (if any) for the income year;
 - (d) your *total net investment loss for the income year.

Employment

- (3) This subsection applies to an *ESS interest in a company if, when you acquire the interest, you are employed by:
 - (a) the company; or
 - (b) a *subsidiary of the company.

Employee share scheme relates only to ordinary shares

- (4) This subsection applies to an *ESS interest you acquire under an *employee share scheme if, when you acquire the interest, all the ESS interests available for acquisition under the scheme relate to ordinary *shares.

Integrity rule about share trading and investment companies.

- (5) This subsection applies to an *ESS interest in a company if, when you acquire the interest:
 - (a) the predominant business of the company (whether or not stated in its constituent documents) is not the acquisition, sale or holding of *shares, securities or other investments (whether directly or indirectly through one or more companies, partnerships or trusts); or

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- 1 (b) you are not employed by the company; or
2 (c) you are not also employed by any other company that is:
3 (i) a *subsidiary of the first company; or
4 (ii) a holding company (within the meaning of the
5 *Corporations Act 2001*) of the first company; or
6 (iii) a subsidiary of a holding company (within the meaning
7 of the *Corporations Act 2001*) of the first company.

8 *Scheme must be non-discriminatory*

- 9 (6) This subsection applies to an *ESS interest you acquire under an
10 *employee share scheme if, when you acquire the interest, both:
11 (a) the employee share scheme; and
12 (b) any scheme for the provision of financial assistance in
13 respect of acquisitions of ESS interests under the employee
14 share scheme;
15 are operated on a non-discriminatory basis in relation to at least
16 75% of the permanent employees of your employer.

17 *No risk of losing interest or share under the conditions of the*
18 *scheme*

- 19 (7) This subsection applies to an *ESS interest you acquire under an
20 *employee share scheme if, when you acquire the interest:
21 (a) if the ESS interest is a beneficial interest in a *share—there is
22 no real risk that, under the conditions of the scheme, you will
23 lose the ESS interest other than by disposing of it; or
24 (b) if the ESS interest is a beneficial interest in a right to acquire
25 a beneficial interest in a *share:
26 (i) there is no real risk that, under the conditions of the
27 scheme, you will lose the ESS interest other than by
28 disposing of it, exercising the right or letting the right
29 lapse; and
30 (ii) there is no real risk that, under the conditions of the
31 scheme, if you exercise the right, you will lose the
32 beneficial interest in the share other than by disposing
33 of it.

34 *Minimum holding period*

- 35 (8) This subsection applies to an *ESS interest you acquire under an
36 *employee share scheme if, at all times during the period that:
37 (a) starts when you acquire the interest; and

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- 1 (b) ends at the earlier of:
2 (i) 3 years later; and
3 (ii) when you cease being employed by your employer;
4 the scheme is operated so that:
5 (c) you are not permitted to dispose of:
6 (i) any ESS interest (the *scheme interest*) you acquire
7 under the scheme; or
8 (ii) a beneficial interest in a *share you acquire as a result of
9 a scheme interest;
10 before the earlier of:
11 (iii) the end of the period of 3 years after you acquire the
12 scheme interest; and
13 (iv) when you cease being employed by your employer; and
14 (d) everyone else who acquires ESS interests under the scheme is
15 subject to a corresponding restriction.

16 *5% limit on shareholding and voting power*

- 17 (9) This subsection applies to an *ESS interest in a company if,
18 immediately after you acquire the interest:
19 (a) you do not hold a beneficial interest in more than 5% of the
20 shares in the company; and
21 (b) you are not in a position to cast, or to control the casting of,
22 more than 5% of the maximum number of votes that might be
23 cast at a general meeting of the company.

24 **Subdivision 83A-C—Deferred inclusion of gain in assessable**
25 **income**

26 **Guide to Subdivision 83A-C**

27 **@83A-100 What this Subdivision is about**

28 If there is a real risk you might forfeit the share, right or stapled
29 security you acquired under an employee share scheme, you don't
30 include the discount in your assessable income when you acquired
31 it. Instead, in the first income year you are able to dispose of the
32 share, right or security, your assessable income will include any
33 gain you have made to that time. If you cease employment earlier,
34 or if 7 years pass, the gain is included in that income year instead.

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A share, right or stapled security you acquire under salary sacrifice arrangements can also be subject to this deferred taxing point if you get no more than \$5,000 worth of shares under those arrangements.

Table of sections

Main provisions

@83A-105	Application of Subdivision
@83A-110	Amount to be included in assessable income
@83A-115	ESS deferred taxing point
@83A-120	Tax treatment of ESS interests held after ESS deferred taxing points

Takeovers and restructures

@83A-125	Takeovers and restructures
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Main provisions

@83A-105 Application of Subdivision

Scope of Subdivision

- (1) This Subdivision applies, and Subdivision 83A-B does not apply, to an *ESS interest in a company if:
- (a) Subdivision 83A-B would, apart from this section, apply to the interest (see section @83A-20); and
 - (b) subsections @83A-35(3), (4), (5), and (9) apply to the interest; and
 - (c) if the interest is a beneficial interest in a *share:
 - (i) subsection (2) of this section applies to the interest; and
 - (ii) subsection (3) or (4) applies to the interest; and
 - (d) if the interest is a beneficial interest in a right to acquire a beneficial interest in a share—subsection (3) applies to the interest.

Note: Subsections @83A-35(3), (4), (5), and (9) contain conditions relating to the following:

- (a) your employment;
- (b) the types of shares available under the employee share scheme;
- (c) share trading and investment companies;
- (d) your shareholding and voting power in the company.

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Scheme must be non-discriminatory

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- 2 (2) This subsection applies to an *ESS interest you acquire under an
3 *employee share scheme if, when you acquire the interest, at least
4 75% of the permanent employees of your employer are, or at some
5 earlier time had been, entitled to acquire:
- 6 (a) ESS interests under the scheme; or
7 (b) ESS interests in:
- 8 (i) your employer; or
9 (ii) a holding company (within the meaning of the
10 *Corporations Act 2001*) of your employer;
11 under another employee share scheme.

12 *Real risk of losing interest or share under the conditions of the*
13 *scheme*

- 14 (3) This subsection applies to an *ESS interest you acquire under an
15 *employee share scheme if, when you acquire the interest:
- 16 (a) if the ESS interest is a beneficial interest in a *share—there is
17 a real risk that, under the conditions of the scheme, you will
18 lose the ESS interest other than by disposing of it; or
19 (b) if the ESS interest is a beneficial interest in a right to acquire
20 a beneficial interest in a share:
- 21 (i) there is a real risk that, under the conditions of the
22 scheme, you will lose the ESS interest other than by
23 disposing of it, exercising the right or letting the right
24 lapse; or
25 (ii) there is a real risk that, under the conditions of the
26 scheme, if you exercise the right, you will lose the
27 beneficial interest in the share other than by disposing
28 of it.

29 *Salary sacrifice arrangement*

- 30 (4) This subsection applies to an *ESS interest you acquire under an
31 *employee share scheme during an income year at a discount if:
- 32 (a) the interest is provided:
- 33 (i) because you agreed to acquire the interest in return for a
34 reduction in your salary or wages that would not have
35 happened apart from the agreement; or
36 (ii) as part of your remuneration package, in circumstances
37 where it is reasonable to conclude that your salary or

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- 1 wages would be greater if the interest was not made part
2 of that package; and
- 3 (b) at the time you acquire the interest:
- 4 (i) the discount equals the *market value of the ESS
5 interest; and
- 6 (ii) the only ESS interests available for acquisition under
7 the scheme are beneficial interests in *shares; and
- 8 (iii) the governing rules of the scheme expressly state that
9 this Subdivision applies to the scheme; and
- 10 (c) the total *market value of the *ESS interests in your employer
11 and any holding company (within the meaning of the
12 *Corporations Act 2001*) of your employer:
- 13 (i) that you acquire during the year under any employee
14 share scheme or schemes; and
- 15 (ii) to which both this Subdivision and this subsection
16 apply;
- 17 does not exceed \$5,000.
- 18 (5) For the purposes of paragraph (4)(c), work out the market value of
19 each *ESS interest as at the time you acquire it.
- 20 Note: The regulations may substitute a different amount for the market value
21 of an ESS interest: see section @83A-315.

22 @83A-110 Amount to be included in assessable income

- 23 (1) Your assessable income for the income year in which the *ESS
24 deferred taxing point for the *ESS interest occurs includes the
25 *market value of the interest at the ESS deferred taxing point,
26 reduced by the *cost base of the interest.
- 27 Note: The regulations may substitute a different amount for the market value
28 of the ESS interest: see section @83A-315.
- 29 (2) Treat an amount included in your assessable income under
30 subsection (1) as being from a source other than an *Australian
31 source to the extent that it relates to your employment outside
32 Australia.

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1 **@83A-115 ESS deferred taxing point**

2 *Shares*

- 3 (1) The ***ESS deferred taxing point*** for the *ESS interest is the earliest
4 of the following times, if the ESS interest is a beneficial interest in
5 a *share:
6 (a) the earliest time when:
7 (i) there is no real risk that, under the conditions of the
8 *employee share scheme, you will lose the ESS interest
9 other than by disposing of it; and
10 (ii) if, at the time you acquired the interest, the scheme
11 genuinely restricted you immediately disposing of the
12 interest—the scheme no longer so restricts you;
13 (b) the time when the employment in respect of which you
14 acquired the interest ends;
15 (c) the end of the 7 year period starting when you acquired the
16 interest.
17 (2) However, the ***ESS deferred taxing point*** for the *ESS interest is
18 the time you dispose of the interest if you do so within 30 days
19 after the time worked out under subsection (1).

20 *Rights*

- 21 (3) The ***ESS deferred taxing point*** for the *ESS interest is the earliest
22 of the following times, if the ESS interest is a beneficial interest in
23 a right to acquire a beneficial interest in a *share:
24 (a) the earliest time when:
25 (i) there is no real risk that, under the conditions of the
26 *employee share scheme, you will lose the ESS interest
27 other than by disposing of it, exercising the right or
28 letting the right lapse; and
29 (ii) if, at the time you acquired the ESS interest, the scheme
30 genuinely restricted you immediately disposing of the
31 ESS interest—the scheme no longer so restricts you;
32 (b) the earliest time when:
33 (i) there is no real risk that, under the conditions of the
34 scheme, you will lose the ESS interest other than by
35 disposing of it, exercising the right or letting the right
36 lapse; and

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- 1 (ii) if, at the time you acquired the ESS interest, the scheme
2 genuinely restricted you immediately exercising the
3 right—the scheme no longer so restricts you; and
4 (iii) there is no real risk that, under the conditions of the
5 scheme, if you exercise the right, you will lose the
6 beneficial interest in the share other than by disposing
7 of it; and
8 (iv) if, at the time you acquired the ESS interest, the scheme
9 genuinely restricted you immediately disposing of the
10 beneficial interest in the share if you exercised the
11 right—the scheme no longer so restricts you;
12 (c) the time when the employment in respect of which you
13 acquired the ESS interest ends;
14 (d) the end of the 7 year period starting when you acquired the
15 ESS interest.
- 16 (4) However, the *ESS deferred taxing point* for the *ESS interest is
17 the earlier of the following times, if that time occurs within 30 days
18 after the time worked out under subsection (3):
19 (a) the time you dispose of the ESS interest (other than by
20 exercising the right);
21 (b) if you exercise the right—the time you dispose of the
22 beneficial interest in the *share.

23 @83A-120 Tax treatment of ESS interests held after ESS deferred 24 taxing points

25 For the purposes of this Act (other than this Division), the *ESS
26 interest is taken to have been acquired immediately after the *ESS
27 deferred taxing point for the interest for its *market value, unless
28 the ESS deferred taxing point occurs at the time the interest is
29 disposed of.

30 Note: The regulations may substitute a different amount for the market value
31 of the ESS interest: see section @83A-315.

32 Takeovers and restructures

33 @83A-125 Takeovers and restructures

34 *Object and scope*

- 35 (1) The object of this section is to allow this Division to continue to
36 apply if:

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- (a) at least one of the following applies:
 - (i) an *arrangement (the *takeover*) is entered into that is intended to result in a company (the *old company*) becoming a *100% subsidiary of another company;
 - (ii) *ESS interests in a company (the *old company*) acquired under *employee share schemes can reasonably be regarded as having been replaced, wholly or partly, by ESS interests in one or more other companies as a result of a change (the *restructure*) in the ownership (including the structure of the ownership) of the old company; and
 - (b) just before the takeover or restructure, you held ESS interests (the *old interests*) in the old company that you acquired under an employee share scheme.

Treat new interests as continuations of old interests

- (2) For the purposes of this Division, treat any *ESS interests (the *new interests*) in a company (the *new company*) that you acquire in connection with the takeover or restructure as a continuation of the old interests, to the extent that:
 - (a) as a result of the arrangement or change, you stop holding the old interests; and
 - (b) the new interests can reasonably be regarded as matching any of the old interests.

Note: In determining to what extent something can reasonably be regarded as matching any of the old interests, one of the factors to consider is the respective market values of that thing and of the old interests.

- (3) Subsection (2) only applies if the new interests relate to ordinary *shares.

Old interest not matched by new interests

- (4) For the purposes of this Division, treat yourself as having disposed of the old interests to the extent that, in connection with the takeover or restructure, you acquire anything that:
 - (a) can reasonably be regarded as matching any of the old interests; but
 - (b) is not treated by subsection (2) as a continuation of those interests.

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Continuation of your employment

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- 2 (5) For the purposes of this Division, treat your employment by:
- 3 (a) the new company; or
- 4 (b) a *subsidiary of the new company; or
- 5 (c) a holding company (within the meaning of the *Corporations*
- 6 *Act 2001*) of the new company; or
- 7 (d) a subsidiary of a holding company (within the meaning of the
- 8 *Corporations Act 2001*) of the new company;
- 9 as a continuation of the employment in respect of which you
- 10 acquired the old interests.

11 *Apportionment of cost base of old interests*

- 12 (6) Treat yourself as having given, as consideration for the assets
- 13 mentioned in subsection (7), the amount worked out by
- 14 apportioning among those assets, according to their respective
- 15 *market values immediately after the takeover or restructure, the
- 16 total of:
- 17 (a) the *cost bases of the old interests when you stop holding
- 18 them; and
- 19 (b) the cost bases of the assets mentioned in paragraph (7)(b)
- 20 immediately after the takeover or restructure (ignoring the
- 21 effect of this subsection).
- 22 (7) The assets are:
- 23 (a) the things that:
- 24 (i) you acquired in connection with the takeover or
- 25 restructure; and
- 26 (ii) can reasonably be regarded as matching the old
- 27 interests;
- 28 (including all of the new interests); and
- 29 (b) in a case covered by subparagraph (1)(a)(ii)—any *ESS
- 30 interests in the old company that:
- 31 (i) you held just before, and continue to hold just after, the
- 32 restructure; and
- 33 (ii) that can reasonably be regarded as matching the old
- 34 interests.

35 *Exceptions*

- 36 (8) This section only applies if:
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- 1 (a) at or about the time you acquire the new interests, you are
2 employed as mentioned in subsection (5); and
3 (b) at the time you acquire the new interests:
4 (i) you do not hold a beneficial interest in more than 5% of
5 the * shares in the new company; and
6 (ii) you are not in a position to cast, or to control the casting
7 of, more than 5% of the maximum number of votes that
8 might be cast at a general meeting of the new company.

9 **Subdivision 83A-D—Deduction for employer**

10 **Guide to Subdivision 83A-D**

11 **@83A-200 What this Subdivision is about**

12 You can deduct an amount for shares, rights or stapled securities
13 you provide to your employees under an employee share scheme if
14 they are eligible for a reduction in their assessable income under
15 section @83A-35. The amount you can deduct is equal to that
16 reduction.

17 You must defer any deduction you are entitled to for amounts you
18 provide to finance your employees acquiring interests in shares,
19 rights or stapled securities under an employee share scheme until
20 the employees have actually acquired those interests.

21 **Table of sections**

22	Operative provisions	
23	@83A-205	Deduction for employer
24	@83A-210	Timing of general deductions

25 **Operative provisions**

26 **@83A-205 Deduction for employer**

- 27 (1) You can deduct an amount for an income year if:
28 (a) during the year you provided one or more *ESS interests to
29 an individual under an *employee share scheme; and
30 (b) you did so as:
31 (i) the employer of the individual; or

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- 1 (ii) a holding company (within the meaning of the
2 *Corporations Act 2001*) of the employer of the
3 individual; and
4 (c) section @83A-35 applies to reduce the amount included in
5 the individual's assessable income under subsection
6 @83A-25(1) in relation to some or all of the interests.
- 7 (2) Disregard subsection @83A-35(2) (income test) for the purposes
8 of paragraph (1)(c) of this section.
- 9 (3) The amount of the deduction is the amount of the reduction
10 mentioned in paragraph (1)(c).

11 *Deduction to be apportioned if interested provided by multiple*
12 *entities*

- 13 (4) The amount of the deduction worked out under subsection (3) must
14 be apportioned between 2 or more entities on a reasonable basis if
15 the entities jointly provide an *ESS interest for which an amount
16 can be deducted under subsection (1).

17 @83A-210 Timing of general deductions

18 If, at a particular time, you provide another entity with money or
19 other property:

- 20 (a) under an *arrangement; and
21 (b) for the purpose of enabling an individual (the *ultimate*
22 *beneficiary*) to acquire, directly or indirectly, an *ESS
23 interest under an *employee share scheme in relation to the
24 ultimate beneficiary's employment (including past or
25 prospective employment);

26 then, for the purpose of determining the income year (if any) in
27 which you can deduct an amount in respect of the provision of the
28 money or other property, you are taken to have provided the money
29 or other property not before the time when the ultimate beneficiary
30 acquires the interest.

31 Subdivision 83A-E—Miscellaneous

32 Table of sections

33	@83A-305	Acquisition by associates
34	@83A-310	Forfeiture etc. of ESS interest
35	@83A-315	Market value and amount of discount
36	@83A-320	Interests in a trust

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1	@83A-325	Application of Division to relationships similar to employment
2	@83A-330	Application of Division to ceasing employment
3	@83A-335	Application of Division to stapled securities

4 @83A-305 Acquisition by associates

5 If an *associate (other than an *employee share trust) of an
6 individual acquires an *ESS interest in relation to the individual's
7 employment (including past or prospective employment), then, for
8 the purposes of this Division:

- 9 (a) treat the interest as having being acquired by the individual
10 (instead of the associate); and
11 (b) treat any circumstance, right or obligation existing or not
12 existing in relation to the interest in relation to the associate
13 as existing or not existing in relation to the individual; and
14 (c) treat anything done or not done by or in relation to the
15 associate in relation to the interest as being done or not done
16 by or in relation to the individual.

17 Example 1: The following are attributed to the employee, rather than to the
18 associate:

- 19 (a) the associate's voting rights;
20 (b) the associate's ability or inability to dispose of the ESS interest;
21 (c) whether there is a real risk that the associate may lose the ESS
22 interest;
23 (d) the associate's cost base for the ESS interest.

24 Example 2: If the associate disposes of the ESS interest, the employee is taken to
25 have disposed of the ESS interest instead.

26 @83A-310 Forfeiture etc. of ESS interest

27 This Division (apart from this Subdivision) is taken never to have
28 applied in relation to an *ESS interest acquired by an individual
29 under an *employee share scheme if:

- 30 (a) disregarding this section, an amount is included in the
31 individual's assessable income under this Division in relation
32 to the interest; and
33 (b) either:
34 (i) the individual forfeits the interest; or
35 (ii) in the case of an ESS interest that is a beneficial interest
36 in a right—the individual loses the interest without
37 having disposed of the interest or exercised the right;
38 and
39 (c) the forfeiture or loss is not the result of:
-

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- 1 (i) a choice made by the individual; or
2 (ii) a condition of the scheme that has the direct effect of
3 protecting (wholly or partly) the individual against a fall
4 in the *market value of the interest.

5 @83A-315 Market value and amount of discount

- 6 (1) Whenever this Division uses the *market value of an *ESS interest,
7 instead use the amount specified in the regulations for the purposes
8 of this section in relation to the interest, if the regulations specify
9 such an amount.
- 10 (2) Furthermore, if the regulations specify such an amount, use that
11 amount instead of the *market value of the interest in working out:
12 (a) whether there is a discount given in relation to interest; and
13 (b) if so—the amount of the discount.

14 @83A-320 Interests in a trust

- 15 (1) This section applies if, at a time:
16 (a) you hold an interest in a trust whose assets include *shares;
17 and
18 (b) that interest corresponds to a particular number of the shares
19 (even if the interest does not correspond to particular shares).
- 20 (2) For the purposes of this Division, treat yourself as holding at that
21 time a beneficial interest in a number of the *shares included in the
22 assets of the trust equal to the number mentioned in
23 paragraph (1)(b).
- 24 (3) If there are 2 or more classes of *shares included in the assets of
25 the trust, this section operates separately in relation to each class as
26 if the shares in that class were all the shares included in the assets
27 of the trust.
- 28 (4) This section applies to rights to acquire beneficial interests in
29 *shares in the same way it applies to shares.

30 @83A-325 Application of Division to relationships similar to 31 employment

32 This Division applies to an individual covered by column 1 of an
33 item in the table as if:

EXPOSURE DRAFT

- 1 (a) he or she were employed by the entity referred to in column 2
2 of that item; and
3 (b) the thing referred to column 3 of that item constituted that
4 employment.
5

Application of Division to relationships similar to employment

Item	Column 1 This Division applies to an individual who:	Column 2 as if he or she were employed by:	Column 3 and this constituted that employment:
1	receives, or is entitled to receive, *work and income support withholding payments (otherwise than as an employee)	the entity that pays or provides the work and income support withholding payments (or is liable to do so)	the relationship because of which the entity pays or provides the work and income support withholding payments to the individual (or is liable to do so).
2	is engaged in service in a foreign country as the holder of an office	the entity by whom the individual is so engaged	the holding of the office.
3	provides services to an entity (other than services covered by a previous item in this table and services provided as an employee)	the entity	the *arrangement between the individual and the entity under which those services are provided.

6 **@83A-330 Application of Division to ceasing employment**

- 7 For the purposes of this Division, you are treated as ceasing
8 employment when you are no longer employed by any of the
9 following:
10 (a) your employer in that employment;
11 (b) a holding company (within the meaning of the *Corporations*
12 *Act 2001*) of your employer;
13 (c) a *subsidiary of your employer;
14 (d) a *subsidiary of a holding company (within the meaning of
15 the *Corporations Act 2001*) of your employer.

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@83A-335 Application of Division to stapled securities

Application of Division to stapled securities

- (1) This Division applies in relation to a stapled security in the same way as it applies in relation to a *share in a company, if at least one of the *ownership interests that are stapled together to form the stapled security is a share in the company.

Note: This means the Division also applies to rights to acquire such a stapled security in the same way it applies to rights to acquire a share.

- (2) This Division applies in relation to a stapled security in the same way as it applies in relation to an ordinary *share in a company, if at least one of the *ownership interests that are stapled together to form the stapled security is an ordinary share in the company.

- (3) For the purposes of this Division, in relation to a stapled security or right to acquire a beneficial interest in a stapled security, a company is taken to include (as part of the company) each *stapled entity for the stapled security, if at least one of the *ownership interests that are stapled together to form the stapled security is a *share in the company.

Taxation Administration Act 1953

2 At the end of Division 14 in Schedule 1

Add:

Subdivision 14-C—Shares and rights under employee share schemes

Table of sections

14-155	Liability for TFN withholding tax (ESS)
14-160	Provider may recover TFN withholding tax (ESS) from individual
14-165	Application of rules in Division 18
14-175	Overpayment of TFN withholding tax (ESS)
14-180	Application of certain provisions of Division 83A of the <i>Income Tax Assessment Act 1997</i>

14-155 Liability for TFN withholding tax (ESS)

- (1) *TFN withholding tax (ESS) is payable if:

EXPOSURE DRAFT

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- 1 (a) a company (the *provider*) provides one or more *ESS
2 interests to an individual under an *employee share scheme;
3 and
4 (b) as a result, an amount is included in the individual's
5 assessable income under Division 83A of the *Income Tax*
6 *Assessment Act 1997* for an income year; and
7 (c) the individual has quoted neither of the following to the
8 provider before the end of the income year:
9 (i) if the individual acquired the interests in relation to any
10 services provided to the provider, or to a *subsidiary of
11 the provider, in the course or furtherance of an
12 *enterprise *carried on by the individual—the
13 individual's *ABN;
14 (ii) in any case—the individual's *tax file number.
- 15 (2) For the purposes of paragraph (1)(b), disregard section @83A-35
16 of the *Income Tax Assessment Act 1997* (about reducing the
17 amount included in the individual's assessable income).
- 18 (3) The *TFN withholding Tax (ESS) is payable by the provider.
- 19 (4) The *TFN withholding tax (ESS) is due and payable at the end of
20 21 days after the end of the income year referred to in
21 paragraph (1)(b).
- 22 Note 1: When it is due and payable, the TFN withholding tax (ESS) is payable
23 to the Commissioner: see paragraph 255-5(1)(b).
- 24 Note 2: The provider must pay the TFN withholding tax (ESS) to the
25 Commissioner in accordance with Subdivision 16-B: see subsection
26 16-70(4). If any of it remains unpaid, the provider is liable to pay
27 general interest charge: see section 16-80.
- 28 Note 3: The Commissioner may defer the time at which TFN withholding tax
29 (ESS) becomes due and payable: see section 255-10.

14-160 Provider may recover TFN withholding tax (ESS) from individual

- 30
31
- 32 (1) The provider may recover from the individual as a debt any of the
33 *TFN withholding tax (ESS) the provider pays.
- 34 (2) The provider is entitled to set off an amount that the provider can
35 recover from the individual under this section against a debt due by
36 the provider to the individual.

EXPOSURE DRAFT

14-165 Application of rules in Division 18

These provisions:

- (a) subsection 18-15(1) (about credits for amounts withheld from withholding payments); and
- (b) sections 18-65 and 18-70 (about refunds of amounts withheld in error);

apply as if any of the *TFN withholding tax (ESS) that has been paid were an amount withheld under section 12-35 from a *withholding payment made to the individual and covered by that section.

14-175 Overpayment of TFN withholding tax (ESS)

If *TFN withholding tax (ESS) has been overpaid:

- (a) the Commissioner must refund the amount overpaid; and
- (b) the individual is not entitled to a credit under section 18-15 in respect of the amount overpaid.

14-180 Application of certain provisions of Division 83A of the *Income Tax Assessment Act 1997*

The following provisions of the *Income Tax Assessment Act 1997* have effect for the purposes of this Subdivision in the same way as they have for the purposes of Division 83A of that Act:

- (a) section @83A-125 (about takeovers and restructures);
- (b) section @83A-305 (about associates);
- (c) section @83A-325 (about relationships similar to employment);
- (d) section @83A-335 (about stapled securities).

3 After subsection 16-70(3) in Schedule 1 (before the note)

Insert:

- (4) An entity that must pay an amount to the Commissioner under Subdivision 14-C must do so in accordance with sections 16-80 and 16-85.

4 Section 16-80 in Schedule 1

Omit “or (3)”, substitute “, (3) or (4)”.

5 After Division 391 in Schedule 1

EXPOSURE DRAFT

1 Insert:

2 **Division 392—Employee share scheme reporting**

3 **Table of Subdivisions**

4 Guide to Division 392

5 392-A Statements

6 392-B Miscellaneous

7 **Guide to Division 392**

8 **392-1 What this Division is about**

9 A company that provides ESS interests to an individual under an
10 employee share scheme during a year must, at the end of the year
11 (and, in certain cases, at the end of a later year), give certain
12 information to the Commissioner and to the individual.

13 Note: For the tax treatment of employee share schemes, see
14 Division 83A of the *Income Tax Assessment Act 1997*.

15 **Subdivision 392-A—Statements**

16 **Table of sections**

17 392-5 Statements by providers

18 392-10 Change or omission in information given to the Commissioner

19 **392-5 Statements by providers**

20 *Statements*

- 21 (1) An entity (the *provider*) must give a statement to the
22 Commissioner and to an individual for a *financial year if:
- 23 (a) both of the following subparagraphs apply:
- 24 (i) the provider provides *ESS interests to the individual
25 during the year;
- 26 (ii) Subdivision 83A-B or 83A-C of the *Income Tax*
27 *Assessment Act 1997* (about employee share schemes)
28 applies to the interests; or
- 29 (b) all of the following subparagraphs apply:
- 30 (i) the provider has provided ESS interests to the individual
31 (whether during the year or during an earlier year);

EXPOSURE DRAFT

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- 1 (ii) Subdivision 83A-C of the *Income Tax Assessment Act*
2 *1997* (about employee share schemes) applies to the
3 interests;
4 (iii) the *ESS deferred taxing point for the interests occurs
5 during the year.

6 Note: Section 286-75 provides an administrative penalty for breach of this
7 subsection.

8 *Form of statements*

- 9 (2) The statement must be in the *approved form.
- 10 (3) The *approved form may require the statement to contain the
11 following information:
- 12 (a) the provider's *ABN;
- 13 (b) the following information about the individual:
- 14 (i) the individual's name and address;
- 15 (ii) if the individual has quoted his or her *tax file number to
16 the provider—that tax file number;
- 17 (iii) if the provider acquired the interests in relation to any
18 services provided to the provider, or to a *subsidiary of
19 the provider, in the course or furtherance of an
20 *enterprise *carried on by the individual, and the
21 individual has *quoted his or her ABN to the provider—
22 that ABN;
- 23 (c) the following information about any interests to which both
24 paragraph (1)(a) of this section and Subdivision 83A-B of the
25 *Income Tax Assessment Act 1997* apply:
- 26 (i) the number of the interests;
- 27 (ii) the amount paid, at or before the time of acquisition,
28 towards acquiring the interests;
- 29 (iii) the provider's estimate of the *market value of the
30 interests at the time of acquisition;
- 31 (iv) the amount of *TFN withholding tax (ESS) the provider
32 paid in respect of the interests during the year;
- 33 (d) the following information about any interests to which both
34 paragraph (1)(a) of this section and Subdivision 83A-C of the
35 *Income Tax Assessment Act 1997* apply:
- 36 (i) the number of the interests;
- 37 (ii) the amount paid, at or before the time of acquisition,
38 towards acquiring the interests;
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EXPOSURE DRAFT

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- 1 (e) the following information about any interests to which
2 paragraph (1)(b) applies:
3 (i) the number of the interests;
4 (ii) the amount paid, after the time of acquisition but not
5 after the *ESS deferred taxing point, towards acquiring
6 the interests;
7 (iii) the provider's estimate of the market value of the
8 interests at the ESS deferred taxing point;
9 (iv) the amount of TFN withholding tax (ESS) the provider
10 paid in respect of the interests during the year.

11 Note: Regulations made for the purposes of section @83A-315 of the
12 *Income Tax Assessment Act 1997* may substitute a different amount
13 for the market value of the ESS interests: see section 392-15 in this
14 Schedule.

- 15 (5) Subsection (4) does not limit the information that the *approved
16 form may require the statement to contain.

17 *When statements must be given*

- 18 (6) The statement must be given:
19 (a) to the individual no later than 14 July after the end of the
20 year; and
21 (b) to the Commissioner no later than 14 August after the end of
22 the year.

23 Note: Section 388-55 allows the Commissioner to defer the time for giving
24 an approved form.

25 **392-10 Change or omission in information given to the** 26 **Commissioner**

- 27 (1) If the provider becomes aware of a material change or material
28 omission in any information given to the individual or the
29 Commissioner under this Division, the provider must:
30 (a) tell the individual or the Commissioner, as applicable, of the
31 change in the *approved form; or
32 (b) give the omitted information to the individual or the
33 Commissioner, as applicable, in the approved form.
- 34 (2) Information required by subsection (1) must be given no later than
35 30 days after the provider becomes aware of the change or
36 omission.

37 Note 1: Section 388-55 allows the Commissioner to defer the time for giving
38 an approved form.

EXPOSURE DRAFT

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Note 2: Section 286-75 provides an administrative penalty for breach of this section.

Subdivision 392-B—Miscellaneous

Table of sections

392-15 Application of certain provisions of Division 83A of the *Income Tax Assessment Act 1997*

392-15 Application of certain provisions of Division 83A of the *Income Tax Assessment Act 1997*

The following provisions of the *Income Tax Assessment Act 1997* have effect for the purposes of this Division in the same way as they have for the purposes of Division 83A of that Act:

- (a) section @83A-125 (about takeovers and restructures);
- (b) section @83A-305 (about associates);
- (c) section @83A-315 (about market values and discounts);
- (d) section @83A-325 (about relationships similar to employment);
- (e) section @83A-335 (about stapled securities).

EXPOSURE DRAFT

1 Part 2—Consequential amendments

2 *A New Tax System (Goods and Services Tax) Act 1999*

3 **6 Paragraphs 84-14(a) and (b)**

4 Repeal the paragraphs, substitute:

- 5 (a) the *recipient of the supply is not an entity that has acquired,
6 or may in the future acquire, an ESS interest (within the
7 meaning of the *ITAA 1997) under the scheme; and
8 (b) Subdivision 83A-B or 83A-C of the ITAA 1997 applies to
9 any ESS interest (within the meaning of that Act) acquired
10 under the scheme; and

11 **7 Section 195-1 (definition of *employee share scheme*)**

12 Omit “section 139C (including as affected by Subdivision DB of
13 Division 13A of Part III) of the *ITAA 1936”, substitute “the *ITAA
14 1997”.

15 *Fringe Benefits Tax Assessment Act 1986*

16 **8 Subsection 136(1) (paragraphs (h) to (hc) of the definition 17 of *fringe benefit*)**

18 Repeal the paragraphs, substitute:

- 19 (h) a benefit constituted by the acquisition of an ESS interest
20 under an employee share scheme (within the meaning of the
21 *Income Tax Assessment Act 1997*) to which
22 Subdivision 83A-B or 83A-C of that Act applies; or
23 (ha) a benefit constituted by the acquisition of money or property
24 by an employee share trust (within the meaning of the
25 *Income Tax Assessment Act 1997*); or

26 *Income Tax Assessment Act 1936*

27 **9 Subsection 6(1) (paragraph (n) of the definition of *passive 28 income*)**

29 Omit “Division 13A”, substitute “Division 83A of the *Income Tax
30 Assessment Act 1997* (about employee share schemes)”.

31 **10 Subsection 6BA(3)**

32 Omit “(other than section 26AAC)”.

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11 At the end of section 21A

Add:

- (7) This section does not apply to an ESS interest (within the meaning of the *Income Tax Assessment Act 1997*) to which Subdivision 83A-B or 83A-C of that Act (about employee share schemes) applies.

12 Subsection 23AF(18) (paragraph (a) of the definition of *eligible foreign remuneration*)

Omit “Division 13A”, substitute “Division 83A of the *Income Tax Assessment Act 1997* (about employee share schemes)”.

13 Subsection 23AF(18) (paragraph (b) of the definition of *eligible foreign remuneration*)

Omit “Division 13A”, substitute “that Division”.

14 Subsection 23AG(7) (definition of *foreign earnings*)

Omit “Division 13A”, substitute “Division 83A of the *Income Tax Assessment Act 1997* (about employee share schemes)”.

15 Sections 26AAC and 26AAD

Repeal the sections.

16 Section 109H

Omit “shares, rights or stapled securities”, substitute “ESS interests”.

17 Section 109NB

Repeal the section, substitute:

109NB Loans to purchase shares under employee share schemes not treated as dividends

A private company is not taken under section 109D to pay a dividend because of a loan made solely for the purpose of enabling the shareholder, or an associate of the shareholder, to acquire an ESS interest under an employee share scheme (within the meaning of the *Income Tax Assessment Act 1997*) to which:

- (a) Subdivision 83A-B and subsections @83A-35(3) to (9) of that Act apply; or
(b) Subdivision 83A-C of that Act applies.
-

EXPOSURE DRAFT

18 Division 13A of Part III

Repeal the Division.

19 Subsection 170(10AA) (after table item 25)

Insert:

30 Division 83A Employee share schemes

20 Section 530A

Repeal the section, substitute:

530A Reduction of foreign investment fund income because of employee share scheme

- (1) This section applies if a taxpayer acquires an ESS interest (within the meaning of the *Income Tax Assessment Act 1997*) to which Subdivision 83A-C of that Act (about employee share schemes) applies.
- (2) The foreign investment fund income of the taxpayer for a notional accounting period of the FIF, to the extent that the income relates to the interest, is zero if, for the whole of the period, the following conditions are satisfied:
 - (a) the taxpayer holds the interest;
 - (b) the interest is an interest in the FIF;
 - (c) the ESS deferred taxing point (within the meaning of the *Income Tax Assessment Act 1997*) for the interest has not occurred.
- (3) The foreign investment fund income of the taxpayer for a notional accounting period of the FIF is to be reduced by an amount equal to any increase in the market value of the interest during a period (if any):
 - (a) that forms part of the notional accounting period; and
 - (b) for the whole of which, the following conditions are satisfied:
 - (i) the taxpayer holds the interest;
 - (ii) the interest is an interest in the FIF;
 - (iii) the ESS deferred taxing point (within the meaning of the *Income Tax Assessment Act 1997*) for the interest has not occurred.
- (4) Section @83A-315 of the *Income Tax Assessment Act 1997* (about market values of ESS interests) applies to subsection (3) of this section in the same way as it applies to Division 83A of that Act.

EXPOSURE DRAFT

Income Tax Assessment Act 1997

21 Section 10-5 (table item headed “shares”)

Repeal:

employee share acquisition schemes **26AAC, 139 to 139GH**

Substitute:

employee share schemes Subdivisions 83A-B and 83A-C

22 Section 12-5 (table item headed “shares”)

Repeal:

employee share acquisition schemes, deduction for provider of qualifying shares or rights **139DC**

Substitute:

employee share schemes, deduction for provider of ESS interests Subdivision 83A-D

23 At the end of subsection 15-2(3)

Add:

; (e) *ESS interests to which Subdivision 83A-B or 83A-C (about employee share schemes) applies.

24 Paragraph 59-40(2)(d)

Repeal the paragraph, substitute:

(d) if you acquired a beneficial interest in the rights under an *employee share scheme—neither Subdivision 83A-B nor 83A-C (about employee share schemes) applies to the beneficial interest;

25 Paragraph 82-135(m)

Omit “Division 13A of Part III of the *Income Tax Assessment Act 1936*”, substitute “Division 83A of this Act”.

26 Subsection 104-60(5) (note)

Omit “section 130-90”, substitute “section 130-80”.

27 Subsection 104-75(4) (note)

Omit “section 130-90”, substitute “section 130-80”.

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28 Subsection 104-75(6) (note)

Omit “section 130-90”, substitute “section 130-80”.

29 Subsections 104-145(7) and (8)

Repeal the subsections, substitute:

(7) You cannot choose to make a *capital loss for a *share, or a right to acquire a beneficial interest in a share, if:

(a) you acquired the beneficial interest (the *ESS interest*) in the share or right under an *employee share scheme; and

(b) subsequent to an amount being included in your assessable income under Division 83A (about employee share schemes) in relation to the ESS interest, section @83A-310 (about forfeiture) applies in relation to ESS interest.

30 Subsection 104-160(6)

Repeal the subsection.

31 Section 109-55 (table item 12)

Repeal the item.

32 Section 109-60 (after table item 11)

Insert:

11A	You acquire an *ESS interest and Subdivision 83A-C (about employee share schemes) applies to the interest	at the *ESS deferred taxing point for the interest	section @83A-120
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33 Section 112-75

Repeal the section.

34 Section 112-97 (at the end of the table)

Add:

32	You acquire an *ESS interest and Subdivision 83A-B or 83A-C (about employee share schemes) applies to the interest	First element of cost base and reduced cost base	sections @83A-30 and @83A-120
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35 Subsection 115-30(1) (table item 8)

Repeal the item.

EXPOSURE DRAFT

36 Subsections 115-30(1A) and (1B)

Repeal the subsections.

37 At the end of section 116-30

Add:

Employee share schemes

(6) This section does not apply to *CGT event A1 or C2 to the extent that the CGT event is constituted by you:

- (a) forfeiting an *ESS interest; or
- (b) losing an ESS interest that is a beneficial interest in a right, without you having disposed of the interest or exercised the right;

if Subdivision 83A-C (about employee share schemes) applies to the interest.

38 Subsections 125-75(2) and (3)

Repeal the subsections, substitute:

(2) An *ownership interest, in a company, that is owned by an entity is disregarded under subsection (1) if:

- (a) the entity acquired a beneficial interest in the ownership interest under an *employee share scheme; and
- (b) either Subdivision 83A-B and subsections @83A-35(3) to (9), or Subdivision 83A-C, applies to the beneficial interest; and
- (c) the ownership interest is not a fully-paid ordinary *share.

(3) An *ownership interest, in a trust, that is owned by an entity is disregarded under subsection (1) if:

- (a) both of the following would apply if Division 83A (about employee share schemes) applied to ownership interests in trusts in the same way as it applies to *shares:
 - (i) the entity acquired a beneficial interest in the ownership interest under an *employee share scheme;
 - (ii) either Subdivision 83A-B and subsections @83A-35(3) to (9), or Subdivision 83A-C, applies to the beneficial interest; and
- (b) the ownership interest is not a fully-paid unit.

39 Subsection 130-40(1) (note)

EXPOSURE DRAFT

1 Repeal the note, substitute:

2 Note: For rights acquired under employee share schemes, see Division 83A,
3 Subdivision 130-D and Division 134.

4 **40 Subdivision 130-D**

5 Repeal the Subdivision, substitute:

6 **Subdivision 130-D—Employee share schemes**

7 **Table of sections**

8	130-75	Object of Subdivision
9	130-80	ESS interests acquired under employee share schemes
10	130-85	Application of certain provisions of Division 83A

11 **130-75 Object of Subdivision**

- 12 (1) The object of this Subdivision is to recognise that Division 83A
13 contains the primary rules for taxing gains on *ESS interests
14 acquired under *employee share schemes.
- 15 (2) Capital gains tax generally does not apply to these interests until
16 after Division 83A has applied to them.

17 **130-80 ESS interests acquired under employee share schemes**

18 *Employees*

- 19 (1) Disregard any *capital gain or *capital loss to the extent that it
20 results from a *CGT event that:
- 21 (a) happens to an *ESS interest you acquire under an *employee
22 share scheme for which an amount will be, but has not yet
23 been, included in your assessable income under Division 83A
24 (about employee share schemes); and
25 (b) is not CGT event E4, G1 or K8.

26 *Employee share trusts*

- 27 (2) Disregard any *capital gain or *capital loss an *employee share
28 trust, or beneficiary of an employee share trust, makes, to the
29 extent that it results from a *CGT event in the following
30 circumstances:
- 31 (a) the beneficiary acquires an *ESS interest under an *employee
32 share scheme;

EXPOSURE DRAFT

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- 1 (b) the CGT event occurs because the beneficiary becomes
2 absolutely entitled to the ESS interest;
3 (c) an amount is, or will be, included in the beneficiary's
4 assessable income under Division 83A (about employee
5 share schemes) in relation to the acquisition of the ESS
6 interest.

- 7 (3) An *employee share trust* is a trust whose sole activities are:
8 (a) obtaining *ESS interests in a company; and
9 (b) providing those interests to employees, or to *associates of
10 employees, of:
11 (i) the company; or
12 (ii) a *subsidiary of the company.

13 *Miscellaneous*

- 14 (4) For the purposes of this section, disregard section @83A-35 (about
15 reducing the amount included in assessable income under
16 Subdivision 83A-B).

17 **130-85 Application of certain provisions of Division 83A**

18 The following provisions have effect for the purposes of this
19 Subdivision in the same way as they have for the purposes of
20 Division 83A:

- 21 (a) section @83A-125 (about takeovers and restructures);
22 (b) section @83A-305 (about associates);
23 (c) section @83A-325 (about relationships similar to
24 employment);
25 (d) section @83A-335 (about stapled securities).

26 **41 Section 134-1 (note 3)**

27 Repeal the note, substitute:

28 Note 3: Item 1 in the table is modified for ESS interests acquired under
29 employee share schemes: see Division 83A and section 112-97.

30 Note 4: This Division has no operation in relation to an option acquired under
31 an employee share scheme if the option is exercised before the ESS
32 deferred taxing point for the option: see Subdivision 130-D.
33 Division 83A applies instead.

34 **42 Section 208-190**

35 After "hold shares", insert "acquired".

EXPOSURE DRAFT

43 Sections 208-205 to 208-215

Repeal the sections, substitute:

208-205 Distributions to employees acquiring shares under eligible employee share schemes

Division 207 also applies to a *franked distribution made by an *exempting entity if:

- (a) the distribution is made to an individual who, at the time the distribution is made, is an employee of:
 - (i) the exempting entity; or
 - (ii) a *subsidiary of the exempting entity; and
- (b) the employee acquired a beneficial interest in the *share on which the distribution is made:
 - (i) under an *employee share scheme; and
 - (ii) in circumstances specified as relevant in section 208-215; and
- (c) the employee does not hold that beneficial interest as a trustee.

208-215 Eligible employee share schemes

- (1) An individual acquires a beneficial interest in a *share in a company under an *employee share scheme in circumstances that are relevant for the purposes of paragraphs 208-205(b) and 208-235(b) if:
 - (a) all the *ESS interests available for acquisition under the scheme relate to:
 - (i) ordinary shares; or
 - (ii) preference shares to which are attached substantially the same rights as are attached to ordinary shares; and
 - (b) immediately after the individual acquires the interest:
 - (i) he or she does not hold a beneficial interest in more than 5% of the shares in the company; and
 - (ii) he or she is not in a position to control, or to control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the company; and
 - (c) the share is not a *non-equity share.
- (2) An individual also acquires a beneficial interest in a *share in a company under an *employee share scheme in circumstances that

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1 are relevant for the purposes of paragraphs 208-205(b) and
2 208-235(b) if:

- 3 (a) the share is part of a stapled security; and
4 (b) Subdivision 83A-B or 83A-C (about employee share
5 schemes) applies to the beneficial interest in the stapled
6 security.

7 **44 Section 208-235**

8 Repeal the section, substitute:

9 **208-235 Distributions to employees acquiring shares under eligible** 10 **employee share schemes**

11 Division 207 also applies to a *distribution *franked with an
12 exempting credit made by a *former exempting entity as if it were
13 a *franked distribution if:

- 14 (a) the distribution is made to an individual who, at the time the
15 distribution is made, is an employee of:
16 (i) the former exempting entity; or
17 (ii) a *subsidiary of the former exempting entity; and
18 (b) the employee acquired a beneficial interest in the *share on
19 which the distribution is made:
20 (i) under an *employee share scheme; and
21 (ii) in circumstances specified as relevant in
22 section 208-215; and
23 (c) the employee does not hold that beneficial interest as a
24 trustee.

25 **45 Paragraph 208-240(b)**

26 Omit “natural persons”, substitute “individuals”.

27 **46 Paragraphs 208-240(c) and (d)**

28 Omit “persons mentioned in paragraph (b)”, substitute “individuals”.

29 **47 Paragraph 208-240(e)**

30 Omit “a person”, substitute “an individual”.

31 **48 Paragraph 208-240(f)**

32 Omit “the person” (first occurring), substitute “the individual mentioned
33 in paragraph (e)”.

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1 49 Paragraph 208-240(f)

2 Omit “the person mentioned in paragraph (b)”, substitute “that
3 individual”.

4 50 Paragraph 208-240(g)

5 Omit “the person”, substitute “the individual”.

6 51 Subsection 247-15(3)

7 Repeal the subsection, substitute:

8 (3) This Division does not apply to a *capital protected borrowing if:

9 (a) an *ESS interest is acquired under the borrowing; and

10 (b) Subdivision 83A-B or 83A-C (about employee share
11 schemes) applies to the ESS interest.

12 52 Paragraph 703-35(4)(b)

13 Omit “subsection (7)”, substitute “subsection (5)”.

14 53 Subsections 703-35(5), (6) and (7)

15 Repeal the subsections, substitute:

16 (5) A *share or *membership interest in a company may be disregarded
17 under subsection (4) if:

18 (a) the entity who holds the beneficial interest in the share or
19 membership interest acquired that beneficial interest:

20 (i) under an *employee share scheme; or

21 (ii) by exercising a right, a beneficial interest in which was
22 acquired under an employee share scheme; and

23 (b) paragraphs @83A-105(1)(a) and (b) and subsection
24 @83A-105(2) apply to the beneficial interest acquired under
25 the scheme; and

26 (c) in the case of a membership interest—the interest is part of a
27 stapled security.

28 54 Paragraph 707-325(5)(b)

29 Repeal the paragraph, substitute:

30 (b) in association with the acquisition of a *share in a company
31 in relation to which the conditions in subsection 703-35(5)
32 are met; or

33 55 Subsection 707-325(5) (note)

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1 Omit “and section 139CD of the *Income Tax Assessment Act 1936*
2 deal”, substitute “deals”.

3 **56 Subsection 709-80(1) (note 1)**

4 Omit “held”, substitute “acquired”.

5 **57 Subsection 713-140(5) (table item 3)**

6 Repeal the item, substitute:

3	<i>Income Tax Assessment Act 1997</i>	Division 83A	The Division does not apply in relation to an *ESS interest acquired under an *employee share scheme before the day specified in the choice if the Division did not apply in relation to the interest before that day.
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7 **58 Subsections 719-30(3), (4) and (5)**

8 Repeal the subsections, substitute:

- 9 (3) A *share or *membership interest in a company is covered by this
10 subsection if:
- 11 (a) the entity who holds the beneficial interest in the share or
12 membership interest acquired that beneficial interest:
 - 13 (i) under an *employee share scheme; or
 - 14 (ii) by exercising a right, a beneficial interest in which was
15 acquired under an employee share scheme; and
 - 16 (b) paragraphs @83A-105(1)(a) and (b) and subsection
17 @83A-105(2) apply to the beneficial interest acquired under
18 the scheme; and
 - 19 (c) in the case of a membership interest—the interest is part of a
20 stapled security.

21 **59 Paragraph 768-910(3)(d)**

22 Omit “Division 13A of Part III of the *Income Tax Assessment Act*
23 *1936*”, substitute “Division 83A (about employee share schemes)”.

24 **60 Subsections 768-910(4), (5) and (6)**

25 Repeal the subsections.

26 **61 Sections 768-920 to 768-945**

27 Repeal the sections.

28 **62 Subsection 768-955(2) (2nd sentence)**

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1 Repeal the sentence.

2 **63 Subsection 768-955(4)**

3 Repeal the subsection, substitute:

4 (4) This section does not apply to an *ESS interest if:

5 (a) Subdivision 83A-C (about employee share schemes) applies
6 to the interest; and

7 (b) the *ESS deferred taxing point for the interest has not yet
8 occurred.

9 **64 Subsection 855-45(4)**

10 Repeal the section, substitute:

11 (4) This section does not apply to an *ESS interest if:

12 (a) Subdivision 83-C (about employee share schemes) applies to
13 the interest; and

14 (b) the *ESS deferred taxing point for the interest has not yet
15 occurred.

16 **65 Subsection 995-1(1) (definition of *cessation time*)**

17 Repeal the definition.

18 **66 Subsection 995-1(1) (definition of *employee share*
19 *scheme*)**

20 Repeal the definition, substitute:

21 *employee share scheme* has the meaning given by subsection
22 @83A-10(2).

23 **67 Subsection 995-1(1) (definition of *employee share trust*)**

24 Repeal the definition, substitute:

25 *employee share trust* has the meaning given by subsection
26 130-80(3).

27 **68 Subsection 995-1(1)**

28 Insert:

29 *ESS deferred taxing point*, for an *ESS interest, has the meaning
30 given by section @83A-115.

31 Note: ESS is short for employee share scheme.

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69 Subsection 995-1(1)

Insert:

ESS interest, in a company, has the meaning given by subsection @83A-10(1).

Note: ESS is short for employee share scheme.

70 Subsection 995-1(1) (definition of *qualifying right*)

Repeal the definition.

71 Subsection 995-1(1) (definition of *qualifying share*)

Repeal the definition.

72 Subsection 995-1(1) (definition of *subsidiary*)

Repeal the definition, substitute:

subsidiary: the question whether a company is a *subsidiary* of another company is to be determined in the same way as the question whether a corporation is a subsidiary of another corporation is determined under the *Corporations Act 2001*.

Note: The expression *100% subsidiary* has the meaning given by section 975-505.

73 Subsection 995-1(1)

Insert:

TFN withholding tax (ESS) means tax payable in accordance with section 14-155 in Schedule 1 to the *Taxation Administration Act 1953*.

74 Subsection 995-1(1)

Insert:

work and income support withholding payments means work and income support related withholding payments and benefits, within the meaning given by the *Income Tax Assessment Act 1936*.

Income Tax (Transitional Provisions) Act 1997

[to be completed.]

EXPOSURE DRAFT

1 *Taxation Administration Act 1953*

2 **75 Paragraphs 14-5(3)(d) and (e) in Schedule 1**

3 Repeal the paragraphs, substitute:

- 4 (d) a benefit constituted by the acquisition of an *ESS interest
5 *under an employee share scheme to which
6 Subdivision 83A-B or 83A-C of the *Income Tax Assessment*
7 *Act 1997* applies.

8 **76 Subsection 250-10(2) in Schedule 1 (after table item 95)**

9 Insert:

100 TFN withholding tax 14-155 in *Taxation Administration Act 1953*
(ESS) Schedule 1

10 **77 After subsection 286-75(2B) in Schedule 1**

11 Insert:

12 (2BA) You are also liable to an administrative penalty if:

- 13 (a) you are required under Division 392 (Employee share
14 scheme reporting) to give a statement to an entity (other than
15 the Commissioner) in the *approved form by a particular day;
16 and
17 (b) you do not give the statement in the approved form to the
18 entity by that day.

19 **78 Paragraph 286-80(2)(a) in Schedule 1**

20 After “(2B)”, insert “, (2BA)”.

21 **79 Subsection 446-5(6) in Schedule 1 (table item 5)**

22 Omit “section 130-90”, substitute “section 130-80”.
23

EXPOSURE DRAFT

1 **Part 3—Application and transitional provisions**

2 *[to be completed.]*