

EXPOSURE DRAFT

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Inserts for
**Tax Laws Amendment (2009 Measures
No. 6) Bill 2009: Company losses**

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Commencement information

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

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Schedule ??—Company losses

Part 1—Changes in company ownership

Division 1—Main amendments

Income Tax Assessment Act 1997

1 After Division 166

Insert:

Division 167—Special provisions for companies whose shares have unequal rights to dividends, capital distributions or voting power

Table of Subdivisions

Guide to Division 167

167-A Rights to dividends and capital distributions of such companies

167-B Voting power in such companies

Guide to Division 167

167-1 What this Division is about

Companies whose shares do not all have the same rights to dividends, capital distributions or voting power may test the possession of those rights in a way analogous to a company whose shares are all of a single class with the same rights.

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Subdivision 167-A—Rights to dividends and capital distributions of such companies

Guide to Subdivision 167-A

167-5 What this Subdivision is about

Companies whose shares do not all have the same rights to dividends or capital distributions may test the possession of those rights in a way analogous to a company whose shares are all of a single class with the same rights.

Table of sections

Operative provisions

167-10	When this Subdivision applies
167-15	Debt interests may be disregarded
167-20	Secondary share classes may be disregarded
167-25	Shares taken to have fixed rights to dividends and capital distributions
167-30	Unsatisfied conditions capable of being satisfied cannot be reconsidered for later income years

Operative provisions

167-10 When this Subdivision applies

When this Subdivision applies

- (1) This Subdivision applies in relation to a company (the *subject company*) if:
- (a) a condition in an item of the following table cannot be satisfied for the subject company at the time or times set out in that item; and
 - (b) the subject company, or another company (the *holding company*) that has a *shareholding interest in the subject company, has an *unfixed share structure at that time or at each of those times.

Note: There may be more than one holding company.

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When this Subdivision applies

Item	This condition cannot be satisfied (the <i>unsatisfied condition</i>) ...	at this time or times (the <i>test times</i>) ...
1	a condition that there must be persons who have rights to: <ul style="list-style-type: none"> (a) * more than 50% of the subject company's dividends; or (b) * more than 50% of the subject company's capital distributions; 	all times during a period
2	the condition in: <ul style="list-style-type: none"> (a) subsection 166-145(3) (rights to dividends); or (b) subsection 166-145(4) (rights to capital distributions); or (c) paragraph 166-270(2)(c) (minimum percentage of rights to dividends and capital); 	the 2 times referred to in that subsection or paragraph
3	the condition in: <ul style="list-style-type: none"> (a) paragraph 165-115C(1)(b) or 165-115L(1)(b) (rights to dividends); or (b) paragraph 165-115C(1)(c) or 165-115L(1)(c) (rights to capital distributions); 	the 2 times referred to in that paragraph
4	a condition relevant to this Part: <ul style="list-style-type: none"> (a) that requires one or more entities to have rights to receive a percentage of the subject company's: <ul style="list-style-type: none"> (i) *dividends; or (ii) capital distributions; that is higher than or lower than a particular limit, or within 2 particular limits; and (b) that is not a condition covered by another table item, or the condition in paragraph 166-245(5)(b); 	a particular time

- 1 Note 1: The method statement in subsection 167-25(2) applies with
 2 modifications if this Subdivision applies because of table item 3 or 4
 3 (see subsections 167-25(5) and (6)).
- 4 Note 2: Table item 1 covers conditions in subsections 165-12(3) and (4),
 5 165-37(1), 165-123(3) and (4), 175-10(3), 175-45(3) and 175-85(3).
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1 Note 3: Table item 4 covers conditions in subsections 165-115X(1),
2 165-115Z(1), 166-175(1), 166-225(1), 166-230(1), 166-240(1),
3 166-255(1), 166-260(1) and (3), 170-260(3) and 170-265(2), and in
4 the definition of *eligible Division 166 company* in subsection
5 995-1(1).

6 *Meaning of unfixed share structure*

- 7 (2) A company has an *unfixed share structure* at a particular time if,
8 at that time, its *shares do not all have the same rights to any
9 *dividends, or capital distributions, of the company.

10 **167-15 Debt interests may be disregarded**

11 An unsatisfied condition may be reconsidered after disregarding, at
12 the test times, any *debt interests in:

- 13 (a) the subject company; or
14 (b) the holding company; or
15 (c) both the subject company and the holding company.

16 Note: There may be more than one holding company.

17 **167-20 Secondary share classes may be disregarded**

18 If:

- 19 (a) an unsatisfied condition remains unsatisfied after being
20 reconsidered under section 167-15; and
21 (b) after disregarding any *debt interests in a company (whether
22 the subject company or a holding company) there is in the
23 company:
24 (i) a *principal class of shares at the test times; and
25 (ii) at least one other class of *shares at one or more of the
26 test times; and
27 (c) the *market value of each of those other classes of shares, at
28 each of the test times when those shares were *on issue, does
29 not exceed 10% of the sum (the *total market value*) of the
30 market values of all of the shares (disregarding any debt
31 interests) in the company at that time; and
32 (d) if there were 2 or more of those other classes of shares on
33 issue at one or more of the test times—the sum of the market
34 values of all of the shares in those classes does not exceed
35 25% of the total market value;

36 then the unsatisfied condition may be reconsidered as if the shares
37 in the company at the test times consisted solely of the principal
38 class of shares.

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Note: If this Subdivision applies in relation to a single test time, then the market values for paragraph (c) are only worked out at that time.

167-25 Shares taken to have fixed rights to dividends and capital distributions

When this section applies

- (1) This section applies if:
- (a) an unsatisfied condition remains unsatisfied after being reconsidered under section 167-20; or
 - (b) an unsatisfied condition remains unsatisfied after being reconsidered under section 167-15 and could not be reconsidered under section 167-20.

Note: This section will not apply if the condition was capable of being satisfied for an earlier income year (see section 167-30).

How to fix rights to dividends and capital distributions

- (2) The unsatisfied condition may be reconsidered as if the *shares in a company (whether the subject company or a holding company) at the test times consisted solely of the following shares (the **remaining shares**):

- (a) if the unsatisfied condition was reconsidered under section 167-20—the *principal class of shares;
- (b) otherwise—all shares other than any *debt interests in the company;

and as if those remaining shares had the relative rights to receive dividends, and capital distributions, worked out as follows.

Method statement

Step 1. From any of the following events that happened between the first and last test time, work out which event happened last (the **last event**):

- (a) the first test time;
- (b) an issue of *shares of a class of remaining shares;
- (c) a variation of the rights attached to any remaining shares to receive *dividends and/or capital distributions;
- (d) a cancellation of any remaining shares.

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Step 2. Determine if it is reasonably practicable for the company to work out the relative market value of each remaining share at the following time or times (the *valuing time(s)*):

- (a) if the last event is the first test time or an issue of *shares—immediately after the time of that event;
- (b) if the last event is a variation of the rights attached to any remaining shares—immediately before and after the time of that event;
- (c) if the last event is a cancellation of any remaining shares—immediately before the time of that event.

Step 3. If the answer to step 2 is yes, the relative rights of each remaining share to receive *dividends, and capital distributions, at the valuing time(s) are worked out under subsection (3).

Step 4. If the answer to step 2 is no, the relative rights of each remaining share to receive *dividends, and capital distributions, at the valuing time(s) are worked out under subsection (4).

Step 5. If the last event is a variation of the rights attached to any remaining shares:

- (a) the rights of a *share worked out under step 3 or 4 at the earlier valuing time are taken to exist for the share at each of the test times when the share was *on issue before the last event; and
- (b) the rights of a *share worked out under step 3 or 4 at the later valuing time are taken to exist for the share at each of the test times when the share was *on issue after the last event.

For a last event of a different kind, the rights of a *share worked out under step 3 or 4 are taken to exist for the share at each of the test times when the share was *on issue.

Note: This method statement is modified if this Subdivision applies because of table item 3 or 4 in subsection 167-10(1) (see subsections (5) and (6) of this section).

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Fixing rights when you can work out relative market values

- 1
- 2 (3) For the purposes of step 3, a *share is taken to carry the following
- 3 percentage of the rights to receive *dividends, and capital
- 4 distributions, from the company:

5

$$\frac{\text{*Share's *market value}}{\text{Sum of market values of all of the remaining shares in the company}} \times 100$$

6 where market value is worked out at the (or at each of the) valuing

7 time(s).

8 *Fixing rights when you cannot work out relative market values*

- 9 (4) For the purposes of step 4, at the (or at each of the) valuing time(s),
- 10 a *share is taken to carry such percentage of the rights to receive
- 11 *dividends, and capital distributions, from the company as is
- 12 reasonable having regard to the purpose of the unsatisfied
- 13 condition. In working out what is reasonable, regard must be had to
- 14 the following:

- 15 (a) the company's *constitution;
- 16 (b) any agreements between the company and either or both of
- 17 the following:
- 18 (i) any or all of the shareholders in the company;
- 19 (ii) any or all of the *associates of a shareholder in the
- 20 company;
- 21 (c) any statement by the company of its policy in paying
- 22 dividends or making capital distributions;
- 23 (d) the ability of an entity to control (whether directly, or
- 24 indirectly through one or more interposed entities) how the
- 25 company pays dividends or makes capital distributions;
- 26 (e) how the company has previously paid dividends or made
- 27 capital distributions;
- 28 (f) whether all classes of share carry substantially the same
- 29 rights to receive dividends and capital distributions;
- 30 (g) the principle that a *tax loss should only be deductible if a
- 31 majority of the persons owning or controlling the company is
- 32 maintained.

33 *Modifications if Subdivision applies because of table item 3*

- 34 (5) If this Subdivision applies in relation to a company because of
- 35 table item 3 in subsection 167-10(1), then the method statement in

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1 subsection (2) of this section applies as if the references to the first
2 test time in steps 1 and 2 were references to the company's
3 reference time (worked out under subsection 165-115A(2A) or
4 165-115M(2), as the case requires).

5 *Modifications if Subdivision applies in relation to a particular time*

- 6 (6) If this Subdivision applies in relation to a company because of
7 table item 4 in subsection 167-10(1), then the method statement in
8 subsection (2) of this section applies as if:
9 (a) the references to the first test time in steps 1 and 2 were
10 modified as set out in the following table; and
11 (b) the reference to the last test time in step 1 were a reference to
12 the test time.
13

Item	For the condition specified in this provision:	The references to the first test time in steps 1 and 2 apply as if they were references to:
1	Subparagraph 165-115X(1)(b)(ii) or (iii) Paragraph 165-115Z(1)(b) or (c)	The company's reference time (worked out under subsection 165-115M(2))
2	Subparagraph 166-175(1)(e)(ii) or (iii) Paragraph 166-225(1)(b) or (c) Subparagraph 166-230(1)(a)(ii) or (iii) Paragraph 166-240(1)(b) or (c) Subparagraph 166-255(1)(e)(ii) or (iii) Subparagraph 166-260(1)(e)(ii) or (iii) Paragraph 166-260(3)(b) or (c) Subparagraph (b)(ii) or (iii) of the definition of <i>eligible Division 166 company</i> in subsection 995-1(1)	The start of the company's *loss year
3	Paragraph 170-260(3)(b) or (c) Paragraph 170-265(2)(b) or (c)	The time that the deferral event referred to in paragraph 170-255(1)(a) happens involving the company

14 **167-30 Unsatisfied conditions capable of being satisfied cannot be**
15 **reconsidered for later income years**

16 Section 167-25 does not apply in relation to an unsatisfied
17 condition if:

- 18 (a) the unsatisfied condition:

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- 1 (i) is a condition mentioned in table item 1 or 2 of
2 subsection 167-10(1); and
3 (ii) must be satisfied for the subject company to deduct a
4 *tax loss, or apply a *net capital loss, for an income
5 year; and
6 (b) the subject company could have deducted or applied the loss
7 for an earlier income year if the unsatisfied condition could
8 have been satisfied for that earlier income year.

9 **Subdivision 167-B—Voting power in such companies**

10 **Guide to Subdivision 167-B**

11 **167-75 What this Subdivision is about**

12 Companies whose shares do not all have the same voting rights
13 may test the possession of those rights in a way analogous to a
14 company whose shares are all of a single class with the same
15 rights.

16 **Table of sections**

17	Operative provisions
18	167-80 Working out voting power in such companies

19 **Operative provisions**

20 **167-80 Working out voting power in such companies**

- 21 (1) This section applies if, when working out an entity's voting power
22 in a company at a particular time for the purposes of this Part, the
23 shares in the company do not all at that time have the same voting
24 rights for all matters affecting the company.
- 25 (2) The entity's voting power in the company at that time is worked
26 out solely by reference to the maximum number of votes that could
27 be cast on a poll:
- 28 (a) if the election of the company's directors is determined by
29 the casting of votes attached to *shares—on the election of a
30 director of the company; or
31 (b) otherwise—on the adoption of a *constitution for the
32 company or the amendment of the company's constitution;

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1 if such a poll were to be held at that time.

2 **Division 2—Other amendments**

3 *Income Tax Assessment Act 1997*

4 **2 Subsection 165-12(2) (note)**

5 Omit “Note”, substitute “Note 1”.

6 **3 At the end of subsection 165-12(2)**

7 Add:

8 Note 2: This condition is reconsidered for companies with shares having
9 unequal voting rights (see Subdivision 167-B).

10 **4 Subsection 165-12(3) (note)**

11 Omit “Note”, substitute “Note 1”.

12 **5 At the end of subsection 165-12(3)**

13 Add:

14 Note 2: This condition is reconsidered for companies with shares having
15 unequal distribution rights (see Subdivision 167-A).

16 **6 Subsection 165-12(4) (note)**

17 Omit “Note”, substitute “Note 1”.

18 **7 At the end of subsection 165-12(4)**

19 Add:

20 Note 2: This condition is reconsidered for companies with shares having
21 unequal distribution rights (see Subdivision 167-A).

22 **8 At the end of subsection 165-37(1)**

23 Add:

24 Note: These conditions are reconsidered for companies with shares having
25 unequal voting rights and/or unequal distribution rights (see
26 Division 167).

27 **9 At the end of subsection 165-115C(1)**

28 Add:

29 Note 5: These conditions are reconsidered for companies with shares having
30 unequal voting rights and/or unequal distribution rights (see
31 Division 167).

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10 At the end of subsection 165-115L(1)

Add:

Note 4: These conditions are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

11 At the end of subsection 165-115X(1)

Add:

Note: The conditions in paragraph (b) are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

12 Subsection 165-115Z(1) (note)

Omit “Note”, substitute “Note 1”.

13 At the end of subsection 165-115Z(1)

Add:

Note 2: These conditions are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

14 Subsection 165-123(2) (note)

Repeal the note, substitute:

Note 1: See section 165-150 to work out who had more than 50% of the voting power.

Note 2: This condition is reconsidered for companies with shares having unequal voting rights (see Subdivision 167-B).

15 Subsection 165-123(3) (note)

Repeal the note, substitute:

Note 1: See section 165-155 to work out who had rights to more than 50% of the company’s dividends.

Note 2: This condition is reconsidered for companies with shares having unequal distribution rights (see Subdivision 167-A).

16 Subsection 165-123(4) (note)

Omit “Note”, substitute “Note 1”.

17 At the end of subsection 165-123(4)

Add:

Note 2: This condition is reconsidered for companies with shares having unequal distribution rights (see Subdivision 167-A).

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18 Subsection 166-145(2) (note)

Repeal the note, substitute:

Note 1: To work out who had more than 50% of the voting power, see section 165-150.

Note 2: This condition is reconsidered for companies with shares having unequal voting rights (see Subdivision 167-B).

19 Subsection 166-145(3) (note)

Repeal the note, substitute:

Note 1: To work out who had rights to more than 50% of the company's dividends, see section 165-155.

Note 2: This condition is reconsidered for companies with shares having unequal distribution rights (see Subdivision 167-A).

20 Subsection 166-145(4) (note)

Omit "Note", substitute "Note 1".

21 At the end of subsection 166-145(4)

Add:

Note 2: This condition is reconsidered for companies with shares having unequal distribution rights (see Subdivision 167-A).

22 At the end of subsection 166-175(1)

Add:

Note: The conditions in paragraph (e) are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

23 Subsection 166-225(1) (note)

Omit "Note", substitute "Note 1".

24 At the end of subsection 166-225(1)

Add:

Note 2: These conditions are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

25 At the end of subsection 166-230(1)

Add:

Note 3: The conditions in paragraphs (a) are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

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26 Subsection 166-240(1) (note)

Omit “Note”, substitute “Note 1”.

27 At the end of subsection 166-240(1)

Add:

Note 2: These conditions are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

28 At the end of subsection 166-255(1)

Add:

Note 3: The conditions in paragraph (e) are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

29 At the end of subsection 166-260(1)

Add:

Note 3: The conditions in paragraph (e) are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

30 At the end of subsection 166-260(3)

Add:

Note: These conditions are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

31 At the end of subsection 170-260(3)

Add:

Note: These conditions are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

32 At the end of subsection 170-265(2)

Add:

Note: These conditions are reconsidered for companies with shares having unequal voting rights and/or unequal distribution rights (see Division 167).

33 Subsection 175-10(3) (note)

Repeal the note, substitute:

Note 1: See section 165-12 (which is about the company maintaining the same owners).

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1 Note 2: These conditions are reconsidered for companies with shares having
2 unequal voting rights and/or unequal distribution rights (see
3 Division 167).

4 **34 Subsection 175-45(3) (note)**

5 Repeal the note, substitute:

6 Note 1: See section 165-12 (which is about the company maintaining the same
7 owners).

8 Note 2: These conditions are reconsidered for companies with shares having
9 unequal voting rights and/or unequal distribution rights (see
10 Division 167).

11 **35 Subsection 175-85(3) (note)**

12 Repeal the note, substitute:

13 Note 1: See section 165-123 (about the company maintaining the same
14 owners).

15 Note 2: These conditions are reconsidered for companies with shares having
16 unequal voting rights and/or unequal distribution rights (see
17 Division 167).

18 **36 Subsection 707-205(1)**

19 Omit “Divisions 165 and 166”, substitute “Divisions 165, 166 and 167”.

20 **37 Subsection 707-205(2)**

21 Omit “Division 166”, substitute “Divisions 166 and 167”.

22 **38 At the end of section 707-210**

23 Add:

24 *Applying section 167-25*

25 (8) In working out whether section 167-25 applies to allow the latest
26 transferee to *utilise the loss for the income year, section 167-30
27 has effect as if references in that section to the subject company
28 were references to the latest transferee.

29 **39 At the end of section 719-260**

30 Add:

31 *Applying section 167-25*

32 (5) In working out whether section 167-25 applies to allow the focal
33 company to *utilise the loss for the claim year, section 167-30 has

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1 effect as if references in that section to the subject company were
2 references to the focal company.

3 **40 Subsection 995-1(1) (at the end of the definition of *eligible***
4 ***Division 166 company*)**

5 Add:

6 Note: The conditions in subparagraphs (b)(i), (ii) and (iii) are reconsidered
7 for companies with shares having unequal voting rights and/or
8 unequal distribution rights (see Division 167).

9 **41 Subsection 995-1(1)**

10 Insert:

11 *unfixed share structure* has the meaning given by subsection
12 167-10(2).

13 **Division 3—Application**

14 **42 Application**

15 *Definitions*

16 (1) In this item:

17 *Subdivision 167-A amendments* means:

- 18 (a) Subdivision 167-A of the *Income Tax Assessment Act 1997*
19 (as inserted by this Part); and
20 (b) the other amendments made by this Part, to the extent to
21 which they relate to that Subdivision.

22 *Subdivision 167-B amendments* means:

- 23 (a) Subdivision 167-B of the *Income Tax Assessment Act 1997*
24 (as inserted by this Part); and
25 (b) the other amendments made by this Part, to the extent to
26 which they relate to that Subdivision.

27 *Subdivision 167-A amendments*

28 (2) The Subdivision 167-A amendments apply:

- 29 (a) to any tax loss for an income year commencing on or after
30 1 July 2002; and
31 (b) to any net capital loss for an income year commencing on or
32 after 1 July 2002; and
33 (c) to any deduction in respect of a bad debt that is claimed in an
34 income year commencing on or after 1 July 2002; and

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- 1 (d) in determining whether any changeover time or alteration
2 time occurred on or after 1 July 2002.
- 3 (3) The Subdivision 167-A amendments also apply to:
- 4 (a) any tax loss of a company:
- 5 (i) for an income year commencing on or before 30 June
6 2002; and
- 7 (ii) that could have been deducted, in accordance with
8 Divisions 165 and 166 as in force at that time, in the
9 first income year commencing after 30 June 2002 if the
10 deduction had not been limited by the company's
11 income for that income year; and
- 12 (b) any net capital loss of a company:
- 13 (i) for an income year commencing on or before 30 June
14 2002; and
- 15 (ii) that could have been applied, in accordance with
16 Divisions 165 and 166 as in force at that time, in the
17 first income year commencing after 30 June 2002 if the
18 application of the loss had not been limited by the
19 company's capital gains for that income year.

20 *Subdivision 167-B amendments*

- 21 (4) The Subdivision 167-B amendments apply:
- 22 (a) to any tax loss for an income year commencing on or after
23 1 July 2007; and
- 24 (b) to any net capital loss for an income year commencing on or
25 after 1 July 2007; and
- 26 (c) to any deduction in respect of a bad debt that is claimed in an
27 income year commencing on or after 1 July 2007; and
- 28 (d) in determining whether any changeover time or alteration
29 time occurred on or after 1 July 2007.
- 30 (5) The Subdivision 167-B amendments also apply to:
- 31 (a) any tax loss of a company:
- 32 (i) for an income year commencing on or before 30 June
33 2007; and
- 34 (ii) that could have been deducted, in accordance with
35 Divisions 165 and 166 as in force at that time, in the
36 first income year commencing after 30 June 2007 if the
37 deduction had not been limited by the company's
38 income for that income year; and
- 39 (b) any net capital loss of a company:
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- (i) for an income year commencing on or before 30 June 2007; and
 - (ii) that could have been applied, in accordance with Divisions 165 and 166 as in force at that time, in the first income year commencing after 30 June 2007 if the application of the loss had not been limited by the company's capital gains for that income year.

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2 **Part 2—Same business test**

3 *Income Tax Assessment Act 1997*

4 **43 Section 165-212E**

5 Repeal the section, substitute:

6 **165-212E Entry history rule does not apply for the purposes of** 7 **section 165-210**

8 For the purposes of section 165-210, section 701-5 (the entry
9 history rule) does not operate in relation to an entity becoming a
10 *subsidiary member of a *consolidated group or a *MEC group.

11 **44 Application**

12 The amendment made by this Part applies on and after 1 July 2002.

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2 **Part 3—Transitional**

3 **45 Transitional—amendment of assessments**

4 Section 170 of the *Income Tax Assessment Act 1936* does not prevent
5 the amendment of an assessment if:

- 6 (a) the assessment was made before the commencement of this
7 Schedule; and
8 (b) the amendment is made within 4 years after that
9 commencement; and
10 (c) the amendment is made for the purpose of giving effect to
11 this Schedule.