

EXPOSURE DRAFT

1 Inserts for

2 **Tax Laws Amendment (2010 Measures**
3 **No. 1) Bill 2010: MIT capital treatment**

4

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7 **Schedule MIT—Managed investment trusts**

8 **Part 1—Amendments**

9 ***Income Tax Assessment Act 1936***

10 Note: The note to the definition of *net income* in subsection 95(1) is altered by omitting
11 “Division 266 or 267 of Schedule 2F” and substituting “Division 266 or 267 of
12 Schedule 2F to this Act or Division 275 of the *Income Tax Assessment Act 1997*”.

13 ***Income Tax Assessment Act 1997***

14 **1 After Part 3-10**

15 Insert:

16 **Part 3-25—Particular kinds of trusts**

17 **Division 275—Australian managed investment trusts**

18 **Table of Subdivisions**

19 Guide to Division 275

20 275-A Choice for capital treatment of MIT gains and losses

21 275-B Carried interests in MIT

22 **Guide to Division 275**

23 **275-1 What this Division is about**

24

<i>[to be completed]</i>

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Subdivision 275-A—Choice for capital treatment of MIT gains and losses

Table of sections

275-5	Extended concept of managed investment trust for the purposes of this Subdivision
275-10	Consequences of making choice—CGT to be primary code for calculating MIT gains or losses
275-15	Covered assets
275-17	MIT not to be corporate unit trust or trading trust
275-20	MIT CGT choices
275-25	Consequences of <i>not</i> making choice—revenue account treatment

275-5 Extended concept of managed investment trust for the purposes of this Subdivision

- (1) For the purposes of this Subdivision, treat a trust as a *managed investment trust in relation to an income year if:
- (a) the condition in item 1 of the table in subsection 12-400(1) in Schedule 1 to the *Taxation Administration Act 1953* is satisfied in relation to the income year; and
 - (b) the trust is operated by a financial services licensee (as defined by section 761A of the *Corporations Act 2001*); and
 - (c) every *member of the trust satisfies at least one of the following requirements:
 - (i) the member is a managed investment trust (whether or not through the operation of this section) in relation to the income year;
 - (ii) the member is an entity covered by paragraph 12-400(2)(a) or (b) in Schedule 1 to the *Taxation Administration Act 1953*.
- (2) For the purposes of this Subdivision, treat a trust as a *managed investment trust in relation to an income year if:
- (a) the condition in item 1 of the table in subsection 12-400(1) in Schedule 1 to the *Taxation Administration Act 1953* is satisfied in relation to the income year; and
 - (b) the trust is operated by a financial services licensee (as defined by section 761A of the *Corporations Act 2001*); and
 - (c) any of the following requirements are satisfied:
 - (i) the trust has at least 50 *members (ignoring objects of a trust and individuals);
 - (ii) the trust is created during the income year;

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- 1 (iii) the trust ceases to exist during the income year, and was
2 a managed investment trust (whether or not through the
3 operation of this section, but disregarding
4 subparagraph (ii)) in relation to the previous income
5 year.
- 6 (3) For the purposes of this Subdivision, treat an entity as a *managed
7 investment trust in relation to an income year if:
8 (a) the entity would be a managed investment trust in relation to
9 the income year if item 2 of the table in subsection 12-400(1)
10 in Schedule 1 to the *Taxation Administration Act 1953* were
11 disregarded; and
12 (b) the entity is a managed investment scheme (as defined by
13 section 9 of the *Corporations Act 2001*); and
14 (c) the entity would be required under that Act to be operated by
15 a financial services licensee (as defined by section 761A of
16 that Act) but for any of the following:
17 (i) subsection 5A(4) of that Act (about the Crown not being
18 bound by Chapter 6CA or 7 of that Act);
19 (ii) any instrument issued by ASIC under that Act that has
20 effect in relation to the entity or the scheme.
- 21 (4) For the purposes of this Subdivision, treat an entity as a *managed
22 investment trust in relation to an income year if:
23 (a) the condition in item 1 of the table in subsection 12-400(1) in
24 Schedule 1 to the *Taxation Administration Act 1953* is
25 satisfied; and
26 (b) every *member of the trust is a managed investment trust
27 (whether or not through the operation of this section) in
28 relation to the income year.
- 29 (5) For the purposes of this Subdivision, treat a trust as a *managed
30 investment trust in relation to an income year if:
31 (a) the trustee of the trust does not make a *fund payment in
32 relation to the income year; and
33 (b) the trust would be a managed investment trust (whether or
34 not through the operation of this section) if the trustee of the
35 trust had made the first fund payment in relation to the
36 income year on the first day of the income year; and
37 (c) the trust would be a managed investment trust (whether or
38 not through the operation of this section) if the trustee of the
39 trust had made the first fund payment in relation to the
40 income year on the last day of the income year.
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- 1 (6) If, apart from a particular circumstance, a trust would be treated
2 under this section as a *managed investment trust in relation to an
3 income year, treat the trust as a managed investment trust in
4 relation to the income year for the purposes of this Subdivision if:
5 (a) the circumstance is temporary; and
6 (b) the circumstance arose outside the control of the trustee of
7 the trust; and
8 (c) it is fair and reasonable to treat the trust as a managed
9 investment trust in relation to the income year, having regard
10 to the following matters:
11 (i) the matters in paragraphs (a) and (b);
12 (ii) the nature of the circumstance;
13 (iii) the actions (if any) taken by the trustee of the trust to
14 address or remove the circumstance, and the speed with
15 which such actions are taken;
16 (iv) the extent to which treating the trust as a managed
17 investment trust in relation to the income year would
18 increase or reduce the amount of tax otherwise payable
19 by the trustee, the beneficiaries of the trust or any other
20 entity;
21 (v) any other relevant matter.
- 22 (7) Despite the previous subsections of this section, do *not* treat a trust
23 as a *managed investment trust in relation to an income year if it is
24 a closely held trust (within the meaning of section 272-105 in
25 Schedule 2F to the *Income Tax Assessment Act 1936*) at any time
26 in the income year.
- 27 (8) A requirement in paragraph (1)(b), subparagraph (c)(ii),
28 paragraph (2)(b), subparagraph (2)(c)(i), paragraph (3)(b) or (c) or
29 paragraph (4)(a) is satisfied if, and only if, it is satisfied:
30 (a) at the time the trustee of the trust makes the first *fund
31 payment in relation to the income year; or
32 (b) if the trustee does not make such a payment in relation to the
33 income year — at both the start and the end of the income
34 year.

35 **275-10 Consequences of making choice—CGT to be primary code** 36 **for calculating MIT gains or losses**

- 37 (1) The modifications in subsection (2) apply if:
38 (a) a *CGT event happens at a time involving a *CGT asset; and
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- 1 (b) the CGT asset is owned at that time by an entity that is a
2 *managed investment trust in relation to the income year in
3 which the time occurs; and
4 (c) the CGT event happens because of a *disposal or other
5 realisation of the asset; and
6 (d) the asset is covered by section 275-15; and
7 (e) the entity meets the requirement in section 275-17 at the
8 time; and
9 (f) a choice under section 275-20 covering the entity is in force
10 for the income year in which the time occurs.

- 11 (2) These provisions do not apply to the *CGT event:
12 (a) sections 6-5 (about *ordinary income), 8-1 (about amounts
13 you can deduct), and 15-15 and 25-40 (about profit-making
14 undertakings or plans);
15 (b) sections 25A and 52 of the *Income Tax Assessment Act 1936*
16 (about profit-making undertakings or schemes);
17 (c) section 118-20;
18 (d) Division 70 and section 118-25.

19 *General exceptions*

- 20 (3) The provisions referred to in subsection (2) can apply to the *CGT
21 event if a *capital gain or *capital loss from the event is disregarded
22 because of one of the provisions in this table:
23

Where gain or loss disregarded because of CGT provision

Item	Provision	Brief description
1	Paragraph 104-15(4)(a)	Title in a CGT asset does not pass when a hire purchase or similar agreement ends
2	Section 118-60	Certain gifts
3	Section 118-13	Shares in a PDF

24 *Trading stock and profit-making undertakings or plans involving*
25 *land etc.*

- 26 (4) The provisions referred to in subsection (2) can also apply to the
27 *CGT event if:
28 (a) where the *CGT asset is land (including an interest in land),
29 or a right or option to *acquire or *dispose of land (including
30 an interest in land):
31 (i) the CGT asset is *trading stock; or
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- 1 (ii) the circumstances existing at the time of the event
2 would, disregarding this Subdivision, give rise to an
3 amount being included in the assessable income of the
4 entity under section 15-15 or to a deduction under
5 section 25-40 (about profit-making undertakings or
6 plans) for the entity; and
7 (b) where paragraph (a) does not apply:
8 (i) the CGT asset was treated as trading stock in the
9 *managed investment trust's financial report for the
10 most recent income year ending before the time of the
11 event; and
12 (ii) the CGT asset was treated as trading stock in the
13 *income tax return for the managed investment trust for
14 the most recent income year ending before the time of
15 the event; and
16 (iii) the managed investment trust acquired the CGT asset in
17 an income year for which the choice mentioned in
18 paragraph (1)(e) was not in force.

Treatment of outgoings to acquire trading stock

- 19
20 (5) The modifications in subsection (6) apply if:
21 (a) an entity that is a *managed investment trust in relation to the
22 income year *acquires a *CGT asset at a time in that income
23 year; and
24 (b) the CGT asset is an item of *trading stock; and
25 (c) the CGT asset is *not* land (including an interest in land), or a
26 right or option to acquire or *dispose of land (including an
27 interest in land); and
28 (d) the entity incurs an outgoing in connection with acquiring the
29 asset; and
30 (e) the asset is covered by section 275-15; and
31 (f) the entity meets the requirement in section 275-17 at the
32 time; and
33 (g) a choice under section 275-20 covering the entity is in force
34 for the income year in which the time occurs.
35 (6) These provisions do not apply to the *acquisition:
36 (a) section 8-1 (about amounts you can deduct);
37 (b) Division 70.

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275-15 Covered assets

- 1
- 2 (1) An asset is covered by this section if it is any of the following:
- 3 (a) a *share in a company;
- 4 (b) a unit in a unit trust;
- 5 (c) land (including an interest in land);
- 6 (d) a right or option to *acquire or *dispose of an asset of a kind
- 7 mentioned in paragraph (a), (b) or (c).
- 8 (2) However, the asset is *not* covered by this section if it is any of the
- 9 following:
- 10 (a) a *Division 230 financial arrangement;
- 11 (b) a *debt interest.

275-17 MIT not to be corporate unit trust or trading trust

- 12
- 13 (1) An entity that is a trust meets the requirement in this section at a
- 14 time if the entity is *not* any of the following at that time:
- 15 (a) a corporate unit trust (within the meaning of section 102J of
- 16 the *Income Tax Assessment Act 1936*) in relation to the year
- 17 of income in which the time occurs;
- 18 (b) a trading trust for the purposes of Division 6C of that Act in
- 19 relation to that year of income.
- 20 (2) If, apart from a particular circumstance, a trust would meet the
- 21 requirement in paragraph (1)(b) at a time, the trust also meets the
- 22 requirement in this section at a time if:
- 23 (a) the circumstance is temporary; and
- 24 (b) the circumstance arose outside the control of the trustee of
- 25 the trust; and
- 26 (c) the trustee of the trust is *not* liable to pay income tax on the
- 27 net income of the trust under section 102S of the *Income Tax*
- 28 *Assessment Act 1936* for the income year in which the time
- 29 occurs; and
- 30 (d) it is fair and reasonable to treat the trust as meeting the
- 31 requirement in this section at that time, having regard to the
- 32 following matters:
- 33 (i) the matters in paragraphs (a), (b) and (c);
- 34 (ii) the nature of the circumstance;
- 35 (iii) the actions (if any) taken by the trustee of the trust to
- 36 address or remove the circumstance, and the speed with
- 37 which such actions are taken;

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- 1 (iv) the extent to which treating the trust as meeting the
2 requirement in this section at that time would increase
3 or reduce the amount of tax otherwise payable by the
4 trustee, the beneficiaries of the trust or any other entity;
5 (v) any other relevant matter.

6 **275-20 MIT CGT choices**

- 7 (1) The trustee of an entity that is a *managed investment trust may
8 make a choice under this section that covers the managed
9 investment trust.
- 10 (2) The choice must be made in the *approved form.
- 11 (3) The choice can be made only:
- 12 (a) if the entity became a *managed investment trust in the
13 2009-10 income year or a later income year (whether or not
14 the entity existed before it became a managed investment
15 trust)—on or before the day it is required to lodge its *income
16 tax return for income year in which it became a managed
17 investment trust; or
- 18 (b) otherwise—on or before the latest of the following days:
- 19 (i) the last day in the 3 month period starting on the day on
20 which this section commences;
- 21 (ii) the last day of the 2009-10 income year;
- 22 (iii) if the Commissioner allows a later day for the managed
23 investment trust—that later day.
- 24 (4) The choice, once made, cannot be revoked.
- 25 (5) The choice is in force:
- 26 (a) in the circumstances mentioned in paragraph (3)(a)—for the
27 income year in which the entity became a managed
28 investment trust (whether or not the entity existed before it
29 became a managed investment trust) and later income years;
30 or
- 31 (b) in the circumstances mentioned in paragraph (3)(b)—for the
32 2008-09 income year and later income years.

33 **275-25 Consequences of *not* making choice—revenue account** 34 **treatment**

- 35 (1) This section applies if:
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- 1 (a) the requirements in subsection 275-10(1) are met in relation
2 to a *CGT asset held by a *managed investment trust, apart
3 from the requirement in paragraph 275-10(1)(e); and
4 (b) the CGT asset is not:
5 (i) land (including an interest in land); or
6 (ii) a right or option to *acquire or *dispose of land
7 (including an interest in land); and
8 (c) the *managed investment trust disposes of, ceases to own or
9 otherwise realises the asset; and
10 (d) disregarding this section:
11 (i) the net proceeds (if any) from the disposal, cessation or
12 realisation would not be reflected in an amount being
13 included in the assessable income of the managed
14 investment trust (other than under Part 3-1 or 3-3); and
15 (ii) the gain or profit (if any) on the disposal, cessation or
16 realisation would not be reflected in an amount being
17 included in the assessable income of the managed
18 investment trust (other than under Part 3-1 or 3-3); and
19 (iii) the loss (if any) on the disposal, cessation or realisation
20 would not be reflected in an amount being deductible by
21 the managed investment trust.
- 22 (2) For the purposes of this Act, treat the disposal, cessation of
23 ownership of or realisation of the asset in the same way as the
24 disposal, cessation of ownership of or realisation of a *revenue
25 asset.

26 **Subdivision 275-B—Carried interests in MIT**

27 **Table of sections**

28 275-100 Gains etc. from carried interests included in assessable income

29 **275-100 Gains etc. from carried interests included in assessable** 30 **income**

- 31 (1) This section applies if:
32 (a) you hold a *CGT asset that carries an entitlement to a
33 distribution from an entity that is a *managed investment
34 trust in relation to an income year; and
35 (b) the entitlement to such a distribution is contingent upon the
36 attainment of profits by the managed investment trust; and

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- 1 (c) you *acquired the asset because of services you or your
2 *associate provided, or will provide, to the managed
3 investment trust; and
- 4 (d) you or your *associate provided, or will provide, those
5 services:
- 6 (i) as a manager of the managed investment trust; or
7 (ii) as an associate of a manager of the managed investment
8 trust; or
9 (iii) as an employee of a manager of the managed investment
10 trust; or
11 (iv) as an associate of an employee of a manager of the
12 managed investment trust; and
- 13 (e) any of the following apply:
- 14 (i) you become entitled in the income year to such a
15 distribution (regardless of whether the distribution is
16 made immediately, or is to be made in the future);
17 (ii) a *CGT event happens in relation to the asset in the
18 income year.
- 19 (2) Include in your assessable income for the income year:
- 20 (a) the amount of the distribution; or
21 (b) the amount of your gain on the CGT event.
- 22 (3) For the purposes of this section, treat a trust as a *managed
23 investment trust in relation to an income year if it is treated as a
24 managed investment trust for the year under Subdivision 275-A.
- 25 (4) Subsection (2) does not apply to the extent that the amount is
26 included in your assessable income as:
- 27 (a) *ordinary income under section 6-5; or
28 (b) *statutory income under a section of this Act, other than:
29 (i) this section; or
30 (ii) a provision in Part 3-1 or 3-3.
- 31 (5) Subdivision 115-C does not apply to:
- 32 (a) the amount of the distribution; or
33 (b) the amount of your gain on the CGT event;
34 if that amount is included in your assessable income under
35 subsection (2) or an amount referable to that amount is included in
36 your assessable income under Division 6 of Part III of the *Income*
37 *Tax Assessment Act 1936*.
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2 Subsection 995-1(1) (definition of *instalment income*)

Omit “and 45-465”, substitute “, 45-286 and 45-465”.

Income Tax (Transitional Provisions) Act 1997

3 After Part 3-10

Insert:

Part 3-25—Particular kinds of trusts

Division 275—Australian managed investment trusts

Table of Subdivisions

275-A Choice for capital treatment of MIT gains and losses

Subdivision 275-A—Choice for capital treatment of MIT gains and losses

Table of sections

275-10 Consequences of making choice—Commissioner cannot make certain amendments to previous assessments

275-10 Consequences of making choice—Commissioner cannot make certain amendments to previous assessments

(1) This section applies if:

(a) the trustee of a managed investment trust makes a choice under section 275-20 of the Income Tax Assessment Act 1997 covering the trust that is in force for the 2008-09 income year; and

(b) the Commissioner made an assessment (the *previous assessment*) for a previous income year for any of the following entities:

(i) the trustee of the managed investment trust;

(ii) a beneficiary of the managed investment trust; and

(c) the previous assessment was made on the basis that:

(i) a CGT event happened at a time involving a CGT asset that was owned by the managed investment trust; and

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- 1 (ii) a gain or loss was realised for income tax purposes
2 because of the circumstances that gave rise to the CGT
3 event; and
- 4 (d) the previous assessment was also made on the basis that:
- 5 (i) the gain or loss should be reflected in the net income of
6 the managed investment trust for that previous income
7 year; or
- 8 (ii) the gain or loss should be reflected in a tax loss or net
9 capital loss of the managed investment trust for that
10 previous income year; and
- 11 (e) the previous assessment was also made on one of these bases:
- 12 (i) the CGT asset was a revenue asset;
- 13 (ii) the CGT asset was *not* a revenue asset; and
- 14 (f) if Subdivision 275-A of the *Income Tax Assessment Act 1997*
15 (and any other provision of that Act or of the *Income Tax*
16 *Assessment Act 1936*, to the extent that it relates to that
17 Subdivision) had applied in relation to the CGT event or
18 assessment, none of the provisions mentioned in subsection
19 275-10(2) of the *Income Tax Assessment Act 1997* would
20 have applied at the time of the CGT event in relation to the
21 asset.
- 22 (2) The Commissioner cannot amend the previous assessment on the
23 basis that:
- 24 (a) if subparagraph (1)(e)(i) applies—the CGT asset should *not*
25 have been treated as a revenue asset; or
- 26 (b) if subparagraph (1)(e)(ii) applies—the CGT asset should
27 have been treated as a revenue asset.
- 28 (3) Subsection (2) applies despite any other provision of this Act (apart
29 from subsection (4) of this section), the *Income Tax Assessment*
30 *Act 1997* and the *Income Tax Assessment Act 1936*.
- 31 (4) Subsection (2) does not apply in any of these cases:
- 32 (a) if the entity for which the assessment was made gives the
33 Commissioner a written consent to the amendment;
- 34 (b) if the Commissioner may amend the assessment in
35 accordance with item 5 (fraud or evasion) or 6 (review or
36 appeal) of the table in subsection 170(1) of the *Income Tax*
37 *Assessment Act 1936*;
- 38 (c) if the amendment is made for the purpose of giving effect to
39 a prescribed provision or a relevant provision.
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Taxation Administration Act 1953

4 After section 45-285 in Schedule 1

Insert:

45-286 Instalment income includes distributions by certain managed investment trusts

Your *instalment income* for a period includes trust income or trust capital that a trust distributes to you, or applies for your benefit, during that period if:

- (a) the income or capital is not included in your instalment income under section 45-280 or section 45-285; and
- (b) the trust satisfies the condition in item 1 of the table in subsection 12-400(1) in Schedule 1 to the *Taxation Administration Act 1953* in relation to the income year that is or includes that period; and
- (c) the trust is:
 - (i) a *managed investment trust for that income year; or
 - (ii) treated as a managed investment trust for that income year for the purposes of Subdivision 275-A of the *Income Tax Assessment Act 1997*; and
- (d) the trust meets the requirement in section 275-17 of the *Income Tax Assessment Act 1997* throughout the income year.

(It does not matter whether the trust income or trust capital is included in your assessable income for the income year that is or includes that period.)

5 Application of amendments

- (1) The amendments made by this Schedule apply in relation to CGT events that happen on or after the start of the 2008-09 income year.
- (2) Despite subitem (1), subsections 275-10(5) and (6) of the *Income Tax Assessment Act 1997* as inserted by this Schedule apply in relation to acquisitions of assets that happen on or after the start of the 2008-09 income year.
- (3) Despite subitem (1), section 275-25 of the *Income Tax Assessment Act 1997* as inserted by this Schedule applies in relation to:
 - (a) disposals of assets; and
 - (b) cessations of ownership of assets; and

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- (c) other realisations of assets;
that happen on or after the commencement of this item.
 - (4) Despite subitem (1), Subdivision 275-B of the *Income Tax Assessment Act 1997* as inserted by this Schedule applies in relation to:
 - (a) entitlements to distributions that arise on or after the commencement of this item; and
 - (b) disposals of assets that happen on or after the commencement of this item.
 - (5) Despite subitem (1), the amendment made by item 4 of this Schedule applies in relation to distributions or applications of benefits that are made on or after the commencement of this item.
-