

EXPOSURE DRAFT

1 Inserts for
2 **Tax Laws Amendment (2010 Measures**
3 **No. 1) Bill 2010: Division 7A**
4

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5
Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Schedule 7	The day this Act receives the Royal Assent.	
2.		

6
7 **Schedule 7—Distributions to entities**
8 **connected with a private company**
9

10 *Income Tax Assessment Act 1936*

11 **5 Subsection 6(1)**

12 Insert:

13 *corporate limited partnership* has the meaning given by
14 section 94D.

15 **10 Subsection 6(1)**

16 Insert:

17 *dwelling* has the meaning given by the *Income Tax Assessment Act*
18 *1997*.

19 **15 Subsection 6(1)**

20 Insert:

21 *foreign tax* has the meaning given by section 6AB.

22 **20 Subsection 6(1)**

23 Insert:

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1 ***once-only deduction***: a deduction in a year of income in respect of
2 a percentage of expenditure is a ***once-only deduction***, in relation to
3 the expenditure, if no deduction is allowable in respect of a
4 percentage of the expenditure in any other year of income.

5 **25 Subsection 21A(5) (definition of *once-only deduction*)**

6 Repeal the definition.

7 **30 Subsection 26AJ(11) (definition of *once-only deduction*)**

8 Repeal the definition.

9 **35 Section 94B (definition of *corporate limited partnership*)**

10 Repeal the definition.

11 **40 At the end of section 94N**

12 Add:

13 Note: Division 7A (Distributions to entities connected with a private
14 company) applies to certain corporate limited partnerships in the same
15 was as it applies to private companies: see section 109BB.

16 **45 Section 109B**

17 After:

18 An amount may be treated as a dividend even if it is paid or lent by
19 the company to the shareholder or associate through one or more
20 interposed entities. (See Subdivision E.)

21 Insert:

22 This Division also ensures that a trustee cannot shelter trust income
23 at the prevailing company tax rate by:

- 24 (a) creating a present entitlement to a private company
25 without paying it; and
- 26 (b) then distributing the amount of that present
27 entitlement to a shareholder or shareholder's
28 associate of the private company.

29 (See Subdivisions EA and EB.)

30 **50 Subdivision AA of Division 7A of Part III (heading)**

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1 Repeal the heading, substitute:

2 **Subdivision AA—Application of Division**

3 **55 At the end of Subdivision AA of Division 7A of Part III**

4 Add:

5 **109BB Application of Division to closely-held corporate limited**
6 **partnerships**

7 This Division applies to a corporate limited partnership in relation
8 to a year of income in the same way as it applies to a private
9 company in relation to a year of income, if, any time during the
10 year of income:

- 11 (a) the partnership has fewer than 50 members; or
12 (b) any entity has, directly or indirectly, and for the entity's own
13 benefit, an entitlement to a 75% or greater share of the
14 income or capital of the partnership.

15 Example: Michael has an entitlement to an 80% share of the income of 2 fixed
16 trusts. The 2 fixed trusts have, between them, an entitlement to 100%
17 of the income of a corporate limited partnership. For the purposes of
18 paragraph (b), Michael has, indirectly, and for his own benefit, an
19 entitlement to a 75% or greater share of the income of the partnership.

20 **109BC Application of Division to non-resident companies**

- 21 (1) This Division applies, in relation to a payment, loan or debt
22 forgiveness, in relation to a private company that is a non-resident
23 as if:
24 (a) references in this Division to a year of income of the
25 company were references to a tax accounting period (within
26 the meaning of section 317) in relation to the company in
27 relation to a foreign tax imposed by a tax law (within the
28 meaning of section 317) of:
29 (i) if the company is a resident of only one foreign
30 country—that foreign country; or
31 (ii) otherwise—the foreign country to which subsection (2)
32 applies; and
33 (b) references in this Division to the lodgment date for the year
34 of income were references to the due date for lodgment of the
35 company's return of income for the tax accounting period
36 under that tax law.

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- 1 (2) For the purposes of subparagraph (1)(a)(ii), this subsection applies
2 to a foreign country (the *relevant country*) if:
3 (a) the company is a resident of the relevant country; and
4 (b) of all the tax accounting periods:
5 (i) in relation to the company in relation to the foreign
6 taxes imposed by the tax laws of the foreign countries of
7 which the company is resident; and
8 (ii) during which the payment, loan or debt forgiveness is
9 made;
10 the tax accounting period under the tax law of the relevant
11 country ends first; and
12 (c) if more than one of the tax accounting periods mentioned in
13 paragraph (b) end first—the due date for lodgment of the
14 company’s return of income for the tax accounting period
15 under the tax law of the relevant country is not later than the
16 due date for lodgment for any of the other tax accounting
17 periods that end first.

18 60 At the end of subsection 109C(3)

19 Add:

- 20 ; and (d) a grant of a lease, or a licence or other right to use an asset, to
21 the entity (other than a transfer of property to the entity).

22 Example: Yacht builder Mainbrace Enterprises Pty Ltd owns a yacht for the
23 purpose of sales demonstrations. The private company allows one of
24 its shareholders to use the yacht on weekends. Subject to
25 subsections (3B) and (3C), the company is taken to have made a
26 payment to the shareholder.

27 65 Subsection 109C(4)

28 Repeal the subsection, substitute:

29 *Certain leases, licences and other rights are not payments*

- 30 (3B) Paragraph (3)(d) does not apply if the lease, licence or other right
31 would, if provided to an employee in respect of his or her
32 employment, be a minor benefit under section 58P of the *Fringe*
33 *Benefits Tax Assessment Act 1986*.
- 34 (3C) Paragraph (3)(d) does not apply to the extent that, if the entity had
35 paid expenditure in respect of the lease, licence or other right, a
36 once-only deduction would have been allowable to the entity in
37 respect of the expenditure (ignoring:
38 (a) section 82A (Deductions for expenses of self-education); and

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1 (b) Divisions 28 (Car expenses) and 900 (Substantiation rules) of
2 the *Income Tax Assessment Act 1997*).

3 (3D) Paragraph (3)(d) does not apply to a licence or other right to use a
4 dwelling, if:

- 5 (a) the entity carries on a business; and
6 (b) the entity is or has been granted a lease, licence or other right
7 to use:
8 (i) the land or water on which the dwelling is situated; or
9 (ii) land or water adjacent to the land or water on which the
10 dwelling is situated; or
11 (iii) the building in which the dwelling is situated;
12 for the primary purpose of carrying on that business; and
13 (c) the licence or other right to use the dwelling was granted for
14 the purpose of enabling the entity to utilise the lease, licence
15 or other right mentioned in paragraph (b); and
16 (d) the area of the dwelling is less than 10% of the area of the
17 land, water or building mentioned in paragraph (b).

18 Note: For the meaning of *land*, see paragraph 22(1)(a) of the *Acts*
19 *Interpretation Act 1901*.

20 (3E) Section 118-120 of the *Income Tax Assessment Act 1997*
21 (Extension to adjacent land) applies in relation to subsection (3D)
22 of this section in the same way as it applies in relation to
23 Subdivision 118-B of that Act.

24 *Value of payment*

- 25 (4) The amount of a payment consisting of a transfer, lease, licence or
26 other right to which paragraph (3)(c) or (d) applies is:
27 (a) the amount that would have been paid for the transfer, lease,
28 licence or other right by parties dealing at arm's length; less
29 (b) any consideration given by the entity for the transfer, lease,
30 licence or other right.

31 The amount of the payment is nil if the consideration equals or
32 exceeds the amount that would have been paid at arm's length for
33 the transfer, lease, licence or other right.

34 **70 At the end of subsection 109D(6)**

35 Add:

36 Note: For the lodgment day for a private company that is a non-resident, see
37 section 109BC.

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75 Subsection 109R(2)

Repeal the subsection, substitute:

(2) A payment must not be taken into account if:

- (a) a reasonable person would conclude (having regard to all the circumstances) that, when the payment was made, the entity intended to obtain a loan or loans from the private company of a total amount similar to, or larger than, the payment; or
- (b) both of the following subparagraphs apply:
 - (i) the entity obtained, before the payment was made, a loan or loans from the private company of a total amount similar to, or larger than, the amount of the payment;
 - (ii) a reasonable person would conclude (having regard to all the circumstances) that the entity obtained the loan or loans in order to make the payment.

80 Paragraph 109XA(1)(a)

After “a payment”, insert “(including a payment through an interposed entity as described in section 109XF)”.

85 At the end of paragraph 109XA(1)(c)

Add:

Note: For entitlements through interposed trusts, see section 109XG.

90 After subsection 109XA(1)

Insert:

Loan repayments

(1A) Disregard paragraph (1)(b) if:

- (a) subsection (1) has previously applied because the trustee made a payment (the *original transaction*) to the shareholder, or to an associate of the shareholder, during a previous year of income; and
- (b) the shareholder, or an associate of the shareholder, makes a loan or loans to the trustee; and
- (c) either:
 - (i) a reasonable person would conclude (having regard to all the circumstances) that at the time the original transaction took place the shareholder, or an associate of

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- 1 the shareholder, intended to make the loan or loans to
2 the trustee; or
3 (ii) the shareholder, or an associate of the shareholder, made
4 the loan or loans to the trustee before the time the
5 original transaction took place and a reasonable person
6 would conclude (having regard to all the circumstances)
7 that the trustee obtained the loan or loans in order to
8 make the payment; and
9 (d) the actual transaction is applied to repay all or a part of the
10 loan or loans.

11 (1B) For the purposes of applying section 109XB in a case covered by
12 subsections (1) and (1A) of this section, disregard section 109J
13 (Payments discharging pecuniary obligations not treated as
14 dividends).

15 **95 Paragraph 109XA(2)(a)**

16 After “a loan”, insert “(including a loan through an interposed entity as
17 described in section 109XF)”.

18 **100 At the end of paragraph 109XA(2)(b)**

19 Add:

20 Note: For entitlements through interposed trusts, see section 109XG.

21 **105 At the end of paragraph 109XA(3)(b)**

22 Add:

23 Note: For entitlements through interposed trusts, see section 109XG.

24 **110 Subsection 109XB(1)**

25 After “dividend”, insert “paid by the company at the end of the year of
26 income of the company in which the actual transaction took place”.

27 **115 Subsection 109XC(8)**

28 Omit “paragraphs 109R(3)(a), (b) and (ba)”, substitute “paragraph
29 109R(3)(a)”.

30 **120 At the end of Subdivision EA of Division 7A of Part III**

31 Add:

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109XD Forgiveness of loan debt does not give rise to assessable income if loan gives rise to assessable income

An amount is not included in the assessable income for a year of income of the shareholder or associate referred to in subsection 109XA(3) because of the forgiveness of an amount of a debt resulting from a loan if, because of the loan, an amount was included in the assessable income of the shareholder or associate under section 109XB in that or an earlier year of income.

125 After Subdivision EA of Division 7A of Part III

Insert:

Subdivision EB—Unpaid present entitlements—interposed entities

109XE Simplified outline of this Subdivision

The following is a simplified outline of this Subdivision:

Payments and loans

This Subdivision allows an amount to be included in an entity's (the *target entity's*) assessable income under Subdivision EA if an entity interposed between a trustee and the target entity makes a payment or loan to the target entity under an arrangement involving the trustee.

This result is achieved by treating the trustee as making a payment or loan of an amount determined by the Commissioner to the target entity (according to whether the interposed entity made a payment or loan to the target entity).

The arrangement must involve the trustee and one or more interposed entities in making payments or loans for the purpose of the target entity receiving a payment or loan from an interposed entity.

If the target entity repays a fraction of the loan made by the interposed entity, the target entity is treated as repaying the same fraction of the loan taken to have been made by the trustee.

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1 Some provisions that prevent payments or loans from giving rise to
2 assessable income do not apply to payments or loans this
3 Subdivision treats a trustee as making.

4 *Present entitlements*

5 This Subdivision similarly allows an amount to be included in an
6 entity's assessable income under Subdivision EA if a private
7 company is or becomes presently entitled to an amount from the
8 net income of a trust estate interposed between the private
9 company and another trust estate (the *target trust*) under an
10 arrangement involving the target trust.

11 **109XF Payments and loans through interposed entities**

12 *Payments and loans by a trustee through interposed entities*

- 13 (1) For the purposes of paragraphs 109XA(1)(a), (1A)(a) and
14 109XA(2)(a), a trustee is taken to have made a payment or loan to
15 a shareholder, or to an associate of a shareholder, (the *target entity*)
16 of a private company if:
- 17 (a) the trustee makes a payment or loan to another entity (the
18 *first interposed entity*) that is interposed between:
 - 19 (i) the trustee; and
 - 20 (ii) the target entity; and
 - 21 (b) a reasonable person would conclude (having regard to all the
22 circumstances) that the trustee made the payment or loan
23 solely or mainly as part of an arrangement involving a
24 payment or loan to the target entity; and
 - 25 (c) either:
 - 26 (i) the first interposed entity makes a payment or loan to
27 the target entity; or
 - 28 (ii) another entity interposed between the trustee and the
29 target entity makes a payment or loan to the target
30 entity.

31 *This section operates regardless of certain factors*

- 32 (2) For the purposes of this section, it does not matter:
33 (a) whether the interposed entity made the payment or loan to
34 the target entity before, after or at the same time as the first

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- 1 interposed entity received the payment or loan from the
2 trustee; or
3 (b) whether or not the interposed entity paid or lent the target
4 entity the same amount as the trustee paid or lent the first
5 interposed entity.

6 *Amount of payment or loan*

- 7 (3) The amount the trustee is taken to have paid or lent the target entity
8 is the amount (if any) determined by the Commissioner.
- 9 (4) In determining the amount of the payment or loan, the
10 Commissioner must take account of:
- 11 (a) the amount the interposed entity paid or lent the target entity;
12 and
13 (b) how much (if any) of that amount the Commissioner believes
14 represented consideration payable to the target entity by:
15 (i) the trustee; or
16 (ii) any of the interposed entities;
17 for anything (assuming that the consideration payable equals
18 that for similar transactions at arm's length).

19 *Timing of payment or loan*

- 20 (5) The trustee is taken to have made the payment or loan at the time
21 the interposed entity made the payment or loan mentioned in
22 paragraph (1)(c) to the target entity.

23 *Notional loans*

- 24 (6) Subsections (7) to (9) apply if a notional loan arises under
25 subsection (1) because an entity interposed between the trustee and
26 the target entity makes a loan (the actual loan) to the target entity.
- 27 (7) When working out whether an amount is included in the assessable
28 income of the target entity under section 109XB as a result of a
29 notional loan, and the amount included in assessable income,
30 assume that the target entity repays an amount of the notional loan
31 equal to the amount worked out using the formula:

32
$$\text{Repayment made by target} \times \frac{\text{Amount of notional loan}}{\text{Amount actually lent to target entity}}$$

entity to lender

33 where:

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1 *amount actually lent to target entity* is the amount the interposed
2 entity lent to the target entity.

3 *repayment made by target entity to lender* is the amount of any
4 repayment made by the target entity of the loan the interposed
5 entity made to the target entity.

- 6 (8) For the purposes of section 109E (Amalgamated loan from a
7 previous year treated as dividend if minimum repayment not
8 made):
- 9 (a) treat the notional loan as an amalgamated loan from the
10 private company to the target entity; and
 - 11 (b) treat the amount of the notional loan worked out under
12 subsection (3) of this section as the amount of the
13 amalgamated loan; and
 - 14 (c) treat the agreement under which the actual loan was made as
15 the agreement under which the amalgamated loan was made;
16 and
 - 17 (d) treat repayments by the target entity of the amount of the
18 notional loan worked out under subsection (7) as payments
19 by the target entity to the private company in relation to the
20 amalgamated loan.
- 21 (9) For the purposes of section 109N (about certain loans not being
22 treated as dividends), treat the agreement under which the actual
23 loan was made as the agreement under which the notional loan was
24 made.

25 **109XG Entitlements to trust income through interposed trusts**

26 *Entitlements through interposed trusts*

- 27 (1) For the purposes of paragraphs 109XA(1)(c), (2)(b) and (3)(b), a
28 private company is taken to be or to become entitled to an amount
29 from the net income of a trust estate (the *target trust*) if:
- 30 (a) the company is or becomes presently entitled to an amount
31 from the net income of another trust estate (the *first*
32 *interposed trust*) that is interposed between the target trust
33 and the company; and
 - 34 (b) a reasonable person would conclude (having regard to all the
35 circumstances) that the company is or becomes so entitled
36 solely or mainly as part of an arrangement involving an
37 entitlement to an amount from the target trust; and
 - 38 (c) either:

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- 1 (i) the first interposed trust is or becomes presently entitled
2 to an amount from the net income of the target trust; or
3 (ii) another trust interposed between the target trust and the
4 company is or becomes presently entitled to an amount
5 from the net income of the target trust.

6 *This section operates regardless of certain factors*

- 7 (2) For the purposes of this section, it does not matter:
8 (a) whether the company became or becomes entitled to the
9 amount from the net income of the first interposed trust
10 before, after or at the same time as the interposed trust
11 became or becomes presently entitled to an amount from the
12 net income of the target trust; or
13 (b) whether or not the company became presently entitled to the
14 same amount as the amount to which the interposed trust
15 become entitled.

16 *This section does not operate if this Subdivision would otherwise*
17 *apply*

- 18 (3) Subsection (1) does not apply if an amount is included in the
19 assessable income of a shareholder, or an associate of a
20 shareholder, of the company under this Subdivision (as it applies
21 apart from this section) as a result of the present entitlement of the
22 first interposed trust.

23 *Amount of entitlement*

- 24 (4) The amount the private company is taken to be or to become
25 entitled to from the net income of the target trust is the amount (if
26 any) determined by the Commissioner.
- 27 (5) In determining the amount of the entitlement, the Commissioner
28 must take account of:
29 (a) the amount the private company is or becomes entitled to
30 from the net income of the first interposed trust; and
31 (b) how much (if any) of that amount the Commissioner believes
32 represented consideration payable to the private company by:
33 (i) the target trust; or
34 (ii) any of the interposed trusts;
35 for anything (assuming that the consideration payable equals
36 that for similar transactions at arm's length).

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Timing of entitlement

- (6) The company is taken to be or to become entitled to the amount from the net income of the target trust at the time the company is or becomes entitled to the amount from the net income of the first interposed trust mentioned in paragraph (1)(a).

130 Subsection 109Y(2) (formula)

Repeal the formula, substitute:

$$\text{Net assets} + \text{Division 7A amounts} - \text{Non-commercial loans} - \text{Paid-up share value} - \text{Repayments of non-commercial loans}$$

135 Subsection 109Y(2)

Insert:

Division 7A amounts is the total of any amounts the company is taken under section 109C or 109F to have paid as dividends in the year of income apart from this section.

140 Subsection 109Y(2) (definition of *non-commercial loans*)

Repeal the definition, substitute:

non-commercial loans means the total of:

(a) any amounts that:

- (i) the company is taken under former section 108, or section 109D or 109E, to have paid as dividends in earlier years of income; and
- (ii) are shown as assets in the company's accounting records at the end of year of income; and

(b) any amounts that are included in the assessable income of shareholders, or associates of shareholders, of the company under section 109XB as if the amounts were dividends paid by the company in earlier years of income.

Note: The total amount worked out under paragraph (b) might be reduced under subsection (2A).

145 Subsection 109Y(2) (paragraphs (a) and (b) of the definition of *repayments of non-commercial loans*)

Omit "109E", substitute "109E,".

150 After subsection 109Y(2)

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1 Insert:

- 2 (2A) Reduce the total of the amounts worked out under paragraph (b) of
3 the definition of *non-commercial loans* in subsection (2) by the
4 total of the unfranked parts of any dividends:
5 (a) that are distributed by the company; and
6 (b) to which section 109ZCA applies.

7 **155 At the end of Subdivision F of Division 7A of Part III**

8 Add:

9 **109ZCA Treatment of dividend that is reduced on account of an** 10 **amount included in assessable income under Subdivision** 11 **EA**

- 12 (1) This section sets out special rules for dealing with a dividend (the
13 *later dividend*) distributed by a private company if:
14 (a) an amount is included in the assessable income of a
15 shareholder, or an associate of a shareholder, of the company
16 under section 109XB because of a loan made to the
17 shareholder or associate by a trustee in relation to a present
18 entitlement of the company to an amount from the net
19 income of the trust estate; and
20 (b) subsection 109XA(2) applied to the loan; and
21 (c) some or all of the later dividend is applied to repay all or a
22 part of the loan.
- 23 (2) The amount of the later dividend applied is taken not to be a
24 dividend for the purposes of this Act, except Part 3-6 of the *Income*
25 *Tax Assessment Act 1997* (which deals with franking of
26 distributions).
- 27 (3) However, if the amount set off or applied exceeds the amount of
28 the later dividend that is neither:
29 (a) the franked part of that dividend; nor
30 (b) the part of that dividend that has been franked with an
31 exempting credit;
32 the excess is still a dividend.
- 33 Note: This prevents double taxation by ensuring that the entity's assessable
34 income does not include the amount of the later dividend that is not
35 paid to the entity (except to the extent that that amount is franked).
- 36 (4) An amount that is taken not to be a dividend under subsection (2)
37 is not assessable income and is not exempt income.

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1 **160 Subparagraph 485AA(1)(a)(i)**

2 Omit “for the purposes of Division 5A of Part III”.

3 ***Income Tax Assessment Act 1997***

4 **165 Section 11-55 (table item headed “dividends”)**

5 Omit:

later dividend set off against amount taken to be dividend. **109ZC(3)**

6 Substitute:

later dividend set off against amount taken to be dividend. **109ZC(3),
109ZCA(4)**

7 **170 Application**

8 The amendments made by this Schedule apply in relation to:

9 (a) payments made; and

10 (b) loans made; and

11 (c) debts forgiven;

12 on or after 1 July 2009.