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# **Glossary**

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investments Commission
CGT	Capital gains tax
Corporations Act	<i>Corporations Act 2001</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>

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# **General outline and financial impact**

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## **Scrip for scrip alignment**

Schedule # to this Bill amends the *Income Tax Assessment Act 1997* to make it easier for takeovers and mergers regulated by the *Corporations Act 2001* to qualify for the capital gains tax (CGT) scrip for scrip roll-over.

***Date of effect:*** These amendments apply to CGT events that happen on or after 6 January 2010.

***Proposal announced:*** The Assistant Treasurer announced these amendments in Media Release No. 004 of 6 January 2010.

***Financial impact:*** These amendments are expected to have an insignificant revenue impact.

***Compliance cost impact:*** These amendments are expected to have a low overall compliance cost impact. This comprises a low implementation impact and a low decrease in ongoing compliance costs relative to the affected group.

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# **C**hapter #

## **Scrip for scrip alignment**

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### **Outline of chapter**

1.1 Schedule # to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to make it easier for takeovers and mergers regulated by the *Corporations Act 2001* (Corporations Act) to qualify for the capital gains tax (CGT) scrip for scrip roll-over.

1.2 All references to legislative provisions in this chapter are references to the ITAA 1997 unless otherwise stated.

### **Context of amendments**

1.3 The exchange of shares in one company for shares in another company as part of a merger or takeover typically triggers a CGT taxing point and the realisation of a capital gain or capital loss. The capital gain or capital loss is generally calculated by reference to the market value of the proceeds — the replacement shares.

1.4 The scrip for scrip roll-over, contained in Subdivision 124-M, ensures that CGT is not an impediment to takeovers and mergers. It allows taxpayers exchanging shares in one company for shares in another to defer the realisation of any capital gains from this transaction. Relief is also available for the exchange of trust interests. A taxpayer that receives cash in addition to replacement interests may qualify for a partial roll-over.

1.5 A merger or takeover arrangement must meet a number of requirements to qualify for the roll-over. These include:

- that all holders of voting interests in the target entity be able to participate in the arrangement; and
- that this participation must be on substantially the same terms.

1.6 These participation requirements differ to some extent and duplicate to some extent the requirements in the Corporations Act, the principal legislation for regulating member participation. As a result, a

merger or takeover arrangement that meets the requirements of the Corporations Act may not qualify for the scrip for scrip roll-over.

- The Corporations Act requires that, subject to some limited exceptions, all offers under an off-market takeover bid be the same. This ensures equal participation by members.
- Schemes of arrangement provide more flexibility than takeovers and may be used for mergers. A scheme of arrangement is an agreement between a company and its members and/or creditors that may be used as an alternative to a takeover. The Corporations Act ensures the arrangement becomes legally binding on the company's members and creditors if a court approves it. The scheme of arrangement process, including the role of the court, is aimed at protecting members against the scheme operating unfairly.

1.7 These amendments ensure that the scrip for scrip roll-over operates more effectively.

## Summary of new law

1.8 These amendments carve-out arrangements from having to meet the roll-over requirements in paragraphs 124-780(2)(b) and (c) that the arrangement be one in which the target company's shareholders can participate on substantially the same terms if the arrangement includes:

- a takeover bid that complies with key provisions in Chapter 6 of the Corporations Act; and/or
- a compromise or arrangement approved by a Court under Part 5.1 of the Corporations Act (scheme of arrangement).

1.9 These amendments provide a similar carve-out for arrangements involving trusts. Paragraphs 124-781(2)(b) and (c) set out the requirement that the arrangement be one in which the target trust's interest or unit holders can participate on substantially the same terms. However, as trusts cannot undertake schemes of arrangements, this carve-out only applies in relation to complying takeover bids.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>An arrangement may qualify for the scrip for scrip roll-over if:</p> <ul style="list-style-type: none"> <li>• interest holders in the target entity can participate in the merger or takeover on substantially the same terms;</li> <li>• it includes a takeover bid that complies with key provisions in Chapter 6 of the Corporations Act; or</li> <li>• if the target entity is a company — it includes a scheme of arrangement approved by a Court under Part 5.1 of the Corporations Act.</li> </ul>	<p>An arrangement may only qualify for the scrip for scrip roll-over if:</p> <ul style="list-style-type: none"> <li>• interest holders in the target entity can participate in the merger or takeover on substantially the same terms.</li> </ul>

## Detailed explanation of new law

### Replacement of shares

1.10 A taxpayer that exchanges shares (original interests) in one company (the original entity) for shares in another may qualify for the scrip for scrip roll-over if that exchange is in consequence of a single arrangement that meets a number of requirements. Options and rights to acquire shares in the original entity may also be original interests. Subsection 124-780(1) sets out these rules. [*Schedule #, item 1, paragraph 124-780(1)(b)*]

1.11 Broadly, the single arrangement must result in another company (the acquiring entity):

- if it is not a member of a wholly owned group — becoming the owner of at least 80 per cent of the original interests in the original entity; or
- if it is a member of a wholly owned group — increasing the percentage of original interests that it owns in the original entity to at least 80 per cent.

Paragraph 124-780(2)(a) sets out these rules. [*Schedule #, item 5, paragraph 124-780(2A)(a)*]

### **Example 1.1**

Silver Ltd (Silver) makes a takeover bid that complies with Chapter 6 of the Corporations Act for the voting shares in Gold Ltd (Gold) and subsequently acquires a total of 30 per cent of Gold's voting shares.

This single arrangement does not qualify for the scrip for scrip roll-over as Silver does not become the owner of at least 80 per cent of Gold's voting shares.

1.12 In addition, the single arrangement must include at least:

- a takeover bid for the original interests by the acquiring entity that complies with all applicable provisions listed in section 612 of the Corporations Act (a complying takeover bid); or
- a compromise or arrangement entered into by the original entity under Part 5.1 of the Corporations Act, approved by a Court under paragraph 411(4)(b) of the Corporations Act (an approved scheme of arrangement).

*[Schedule #, item 5, paragraph 124-780(2A)(b)]*

1.13 It is question of fact as to what forms a single arrangement. If there is a close nexus between particular elements of a broader transaction, then those elements form part of the same arrangement.

1.14 If the arrangement consists of a complying takeover bid or an approved scheme of arrangement, then it will meet the requirement set out in paragraph 1.12. An arrangement that comprises a complying takeover bid and/or a scheme of arrangement, and some interrelated and/or interdependent transactions not subject to the Corporations Act, will also meet this requirement.

### **Example 1.2**

Green Ltd (Green) and Yellow Ltd (Yellow) jointly announce a proposal to merge where Yellow's voting shares are transferred to Green.

Yellow's shareholders will participate in the merger on the following basis:

- Green acquires shares owned by a cornerstone shareholder (Blue Ltd) for cash by way of a sale agreement.
- Owners of the remaining voting shares in Yellow receive one share in Green for each share they hold in Yellow. This acquisition is by

way of a scheme of arrangement under Part 5.1 of the Corporations Act.

- The merger is conditional upon Green successfully completing both acquisitions.

Obtaining court approval under paragraph 411(4)(b) of the Corporations Act will satisfy the requirements of paragraph 124-780(2A)(b).

1.15 All the provisions listed in section 612 of the Corporations Act may not be applicable to a specific takeover bid. For example, paragraph 612(f) requires compliance with a number of procedural steps for off-market bids and paragraph 612(g) requires compliance with a number of procedural steps for a market bid. It is only a requirement that the takeover bid comply with the provisions relevant to the bid. There is no specific form that the evidence must take to show that an arrangement includes a complying takeover bid or an approved scheme of arrangement. The available evidence will depend on the types of transactions.

1.16 Takeover transactions are regulated by a number of bodies including the Australian Securities and Investments Commission (ASIC) and the Takeovers Panel. These bodies may have legislative power to modify the application of Chapter 6 in specific circumstances. If a relevant provision listed in Chapter 6 has its application modified by one of these bodies, then the takeover bid need only comply with its modified application.

## **Replacement of trust interests**

1.17 A taxpayer that exchanges trust interests (original interests) in one trust (the original entity) for interests in another may qualify for the scrip for scrip roll-over if that exchange is in consequence of a single arrangement that meets a number of requirements. Options and rights to acquire interests in the original entity may also be original interests. Subsection 124-781(1) sets out these rules. [*Schedule #, item 10, paragraph 124-781(1)(c)*]

1.18 Broadly, the arrangement must result in another trust (the acquiring entity) becoming the owner of at least 80 per cent of the trust voting interests or units. Paragraph 124-781(2)(a) sets out this rule. [*Schedule #, item 15, paragraph 124-781(2A)(a)*]

1.19 In addition, the arrangement must include a complying takeover bid for the original interests by the acquiring entity. [*Schedule #, item 15, paragraph 124-781(2A)(b)*]

1.20 Section 411 of the Corporations Act does not apply to trusts.

## **Application and transitional provisions**

1.21 These amendments apply to CGT events that happen on or after 6 January 2010.