

EXPOSURE-DRAFT

1 Inserts for
2 **Tax Laws Amendment (2013**
3 **Miscellaneous Measures No. 1) Bill 2013:**
4 **Investment Manager Regime**
5

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6

Commencement information

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

7 **Schedule 00—Investment Manager Regime**
8

9 *Income Tax Assessment Act 1997*

10 **1 Section 842-200**

11 Omit:

12 This Subdivision includes rules about the taxation of certain
13 foreign funds with investment income or losses which are treated
14 as being attributable to a permanent establishment in Australia
15 solely because the fund retains the services of an Australian based
16 agent, manager or service provider.

17 substitute:

18 This Subdivision includes rules about the taxation of certain
19 foreign funds.

20 **2 Section 842-200**

21 Omit “financial arrangements” (wherever occurring), substitute “certain
22 financial arrangements”.

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3 Subsection 842-205(1)

Repeal the subsection, substitute:

(1) The objects of this Subdivision are:

(a) to remove uncertainty from Australia's income taxation laws that may impede:

(i) particular kinds of international investment into Australia; and

(ii) the use of Australian agents, managers and service providers by foreign managed funds that have a wide membership and are residents of *information exchange countries; and

(b) to ensure that Australia continues to tax Australian resident taxpayers on their worldwide income and continues to tax foreign resident taxpayers on their returns and gains from most *taxable Australian property.

4 Paragraph 842-205(2)(d)

Omit "concentration test", substitute "closely held test".

5 Paragraph 842-215(2)(a)

Omit "a resident of Australia", substitute "an Australian resident".

6 Sections 842-230, 842-235 and 842-240

Repeal the sections, substitute.

842-230 IMR foreign fund

(1) An entity is an *IMR foreign fund* in relation to an income year if:

(a) the entity:

(i) is not an Australian resident at any time during the income year; and

(ii) is not a resident trust estate for the purposes of subsection 95(2) of the *Income Tax Assessment Act 1936* at any time during the income year; and

(aa) the entity is a resident of an *information exchange country (as determined in accordance with subsection 12-390(7) in Schedule 1 to the *Taxation Administration Act 1953*) at all times during the income year; and

(b) the entity:

(i) does not carry on a trading business (within the meaning of section 102M of the *Income Tax Assessment Act*

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- 1 1936) in Australia at any time during the income year;
2 and
3 (ii) does not control, and is not able to control, directly or
4 indirectly, the affairs or operations of such a trading
5 business in Australia at any time during the income
6 year; and
7 (c) the entity meets the requirement in subsection (2) at all times
8 during the income year; and
9 (d) the entity gives the Commissioner a statement for that year in
10 accordance with section 395-5 (Annual information
11 statement) in Schedule 1 to the *Taxation Administration Act*
12 1953.
- 13 (2) The entity meets the requirement in this subsection at a time if it:
14 (a) satisfies the widely held test in section 842-240 at that time;
15 and
16 (b) does not breach the closely held test in section 842-240 at
17 that time.

842-235 Start-up and wind-down periods

Start-up period

- 19 *Start-up period*
- 20 (1) Subsection (2) applies if the entity is created at a time in the
21 income year.
- 22 (2) Apply the following rules for the purposes of
23 subsection 842-230(1):
24 (a) treat the period in the income year during which the entity
25 was in existence as the whole income year;
26 (b) treat the requirement in subsection 842-230(2) as being met
27 at all times in the period:
28 (i) starting when the entity was created; and
29 (ii) ending 12 months after the entity was created.

Claw-back rule for start-up period

- 30 *Claw-back rule for start-up period*
- 31 (3) However, paragraph (2)(b) is taken not to have applied if, apart
32 from this subsection:
33 (a) the entity was an IMR foreign fund as a result of
34 paragraph (2)(b) in relation to the income year in which the
35 entity was created (the *start-up year*); and
36 (b) the entity:

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- 1 (i) is *not* in existence at all times during the income year
2 after the start-up year (the *second year*); or
3 (ii) is *not* an *IMR foreign fund in relation to the second
4 year.

5 *Wind-down period*

- 6 (4) Subsection (5) applies if:
7 (a) the entity ceases to exist during the income year; and
8 (b) the entity was an *IMR foreign fund in relation to the
9 previous income year.
- 10 (5) Apply the following rules for the purposes of
11 subsection 842-230(1):
12 (a) treat the period in the income year during which the entity
13 was in existence as the whole income year;
14 (b) treat the requirement in subsection 842-230(2) as being met
15 at all times in the period:
16 (i) starting at the start of the income year; and
17 (ii) ending when the entity ceased to exist.

18 **842-240 Widely held test and closely held test**

- 19 (1) The entity satisfies the widely held test for the purposes of
20 paragraph 842-230(2)(a) if:
21 (a) units or shares in the entity are listed for quotation in the
22 official list of an *approved stock exchange; or
23 (b) the entity has at least 25 *members (as determined in
24 accordance with section 842-242); or
25 (d) the entity is an *IMR foreign widely held entity (see
26 section 842-243); or
27 (e) the entity is an entity of a kind specified in regulations made
28 for the purposes of this paragraph.
- 29 (2) The entity breaches the closely held test for the purposes of
30 paragraph 842-230(2)(b) if:
31 (a) a *member of the entity has a *total participation interest in
32 the entity of 10% or more (as determined in accordance with
33 section 842-242); or
34 (b) the sum of the total participation interests in the entity of 10
35 or fewer members of the entity is 50% or more (as
36 determined in accordance with section 842-242); or
37 (c) the sum of the following is 20% or more:

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- 1 (i) the total participation interest in the entity of a manager
- 2 of the entity;
- 3 (ii) the sum of the total participation interests in the entity
- 4 of the associates (if any) of the manager.

5 Note: Subsections 842-242(3) and (10) do not apply for the purposes of
6 paragraph (c) (see subsection 842-242(2)).

- 7 (3) However, treat the entity as *not* breaching the closely held test for
- 8 the purposes of paragraph 842-230(2)(b) if:
- 9 (a) it is an *IMR foreign widely held entity (see
- 10 section 842-243); or
- 11 (b) the entity is an entity of a kind specified in regulations made
- 12 for the purposes of this paragraph.

13 *Special rule for unpreventable circumstances of short duration*

- 14 (4) Subsection (6) applies if:
- 15 (a) disregarding subsection (6), the requirement in
- 16 subsection 842-230(2) (widely held and closely held tests) is
- 17 not met at a time during the income year because of one or
- 18 more circumstances; and
- 19 (b) none of the following could have prevented the circumstance
- 20 (or circumstances) from arising:
- 21 (i) a trustee of the entity;
- 22 (ii) a manager of the entity;
- 23 (ii) an *associate of the entity, or of a trustee or manager of
- 24 the entity; and
- 25 (c) the number of days covered under subsection (5) in the
- 26 income year does not exceed 30.
- 27 (5) A day is covered by this subsection if, disregarding subsection (6):
- 28 (a) because of the circumstance (or circumstances), there is a
- 29 time during the day when the entity does not meet the
- 30 requirement in subsection 842-230(2); or
- 31 (b) if subsection (4) has a separate operation in respect of the
- 32 income year in relation to another circumstance (or other
- 33 circumstances)—because of the other circumstance (or
- 34 circumstances), there is a time during the day when the entity
- 35 does not meet the requirement in subsection 842-230(2); or
- 36 (c) the requirement in subsection 842-230(2) is treated under
- 37 subsection 842-235(2) as being met at a time in the day.

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- 1 (6) Disregard the circumstance (or circumstances) in determining
2 whether the requirement in subsection 842-230(2) was met at the
3 time mentioned in subsection (4).

4 **842-242 Determining members and total participation interests for**
5 **purposes of widely held test and closely held test**

- 6 (1) Apply the rules in this section in determining:
7 (a) the *members of the entity (the *test entity*), for the purposes
8 of subsections 842-240(1) and (2); and
9 (b) the *total participation interest in the test entity of each of
10 those members, for the purposes of subsection 842-240(2);
11 and
12 (c) the total participation interest in the test entity of a manager
13 of the entity, for the purposes of paragraph 842-240(2)(c).
- 14 (2) However, subsections (3) and (10) do not apply for the purposes of
15 paragraph 842-240(2)(c).
- 16 (3) If an individual holds interests in the test entity indirectly, through
17 one or more interposed entities:
18 (a) treat the individual as a *member of the test entity; and
19 (b) do not treat any of those interposed entities as a member of
20 the test entity.
- 21 (4) For the purposes of subsection (3):
22 (a) if an *IMR widely held entity (other than an entity covered
23 by subsection (5)) has a *total participation interest in the test
24 entity—assume that all the *membership interests in the IMR
25 widely held entity are held by a number of individuals (the
26 *notional members*); and
27 (b) work out the number of those notional members as follows:
28 (i) work out the IMR widely held entity's total
29 participation interest in the test entity;
30 (ii) multiply that *total participation interest by 50 and
31 round the result upwards to the nearest whole number;
32 and
33 (c) treat the *total participation interest in the test entity of each
34 of those notional members as nil.
- 35 (5) An entity is covered by this subsection if:
36 (a) it is either:

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- 1 (i) an entity that is covered by paragraph 12-402(3)(e) in
2 Schedule 1 to the *Taxation Administration Act 1953*
3 (foreign collective investment vehicles with a wide
4 membership); or
5 (ii) an entity that is covered by paragraph 12-402(3)(g) in
6 Schedule 1 to the *Taxation Administration Act 1953*
7 (foreign sovereign wealth funds); and
8 (b) any of these requirements are met:
9 (i) it has a *total participation interest in the test entity of
10 50% or more;
11 (ii) another entity that controls it has a total participation
12 interest in the test entity of 50% or more.
- 13 (6) If the test entity is a trust, do not treat an object of the trust as a
14 member of the trust.
- 15 (7) Treat the following entities as together being one individual:
16 (a) an individual;
17 (b) each of his or her *relatives.
- 18 (8) If two or more individuals are treated as one individual (the
19 ***notional individual***) under subsection (7), treat the notional
20 individual as having a *total participation interest in the test entity
21 equal to the sum of each of the individual's total participation
22 interest in the test entity.
- 23 (9) If an entity (the ***nominee***) has a *total participation interest in the
24 test entity in the capacity of nominee of another entity:
25 (a) treat the nominee as *not* having that total participation
26 interest in the test entity; and
27 (b) instead, treat the other entity as having that total participation
28 interest in the test entity (in addition to the other entity's total
29 participation interest in the test entity (if any) apart from this
30 subsection); and
31 (c) disregard the nominee, in its capacity as nominee of the other
32 entity, for the purposes of subsection (3).
- 33 (10) In determining a *direct participation interest of one entity in
34 another entity, disregard paragraph 350(1)(b) of the *Income Tax*
35 *Assessment Act 1936*.

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1 **842-243 Meaning of *IMR widely held entity*, *IMR domestically widely***
2 ***held entity* and *IMR foreign widely held entity***

3 (1) An entity is an *IMR foreign widely held entity* if:

- 4 (a) it is a *foreign life insurance company; or
5 (b) it is a *foreign superannuation fund, being a fund that has at
6 least 50 *members; or
7 (c) it is an entity that is a fund established by an *exempt foreign
8 government agency for the principal purpose of funding
9 pensions (including disability and similar benefits) for the
10 citizens or other contributors of a foreign country.

11 (2) An entity is an *IMR domestic widely held entity* if:

- 12 (a) it is covered by paragraph 12-402(3)(a), (b), (c), (d) or (h) in
13 Schedule 1 to the *Taxation Administration Act 1953*; and
14 (b) it is not a *foreign superannuation fund.

15 (3) An *IMR widely held entity* is any of the following:

- 16 (a) an *IMR domestic widely held entity;
17 (b) an *IMR foreign widely held entity;
18 (c) an entity that is covered by paragraph 12-402(3)(e) in
19 Schedule 1 to the *Taxation Administration Act 1953* (foreign
20 collective investment vehicles with a wide membership);
21 (d) an entity that is covered by paragraph 12-402(3)(g) in that
22 Schedule (foreign sovereign wealth funds).

23 **7 Subsection 842-245(1)**

24 Omit “(2).”.

25 **8 Subsection 842-245(2)**

26 Repeal the subsection.

27 **9 Paragraph 842-245(3)(a)**

28 Omit “is a *derivative financial arrangement that relates to a *CGT
29 asset”, substitute “is or relates to a *CGT asset”.

30 **10 Subsection 842-250(1)**

31 Repeal the subsection, substitute:

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1

IMR income

2

(1) The *IMR income* for an income year of an *IMR foreign fund in relation to the income year is the sum of the fund's assessable income for the income year to the extent that:

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4

5

(a) the assessable income is attributable to a return or gain from a *financial arrangement covered by section 842-245; and

6

7

(b) if the interest of the *IMR foreign fund in the issuer of the financial arrangement passes the *non-portfolio interest test (see section 960-195):

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10

(i) the assessable income is attributable to a permanent establishment of the fund in Australia that arises solely as a result of the fund engaging an entity that is a resident of Australia to habitually exercise a general authority to negotiate and conclude contracts on its behalf; and

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(ii) the assessable income has an *Australian source as a result of the engagement of that entity; and

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(iii) the assessable income would *not* have an *Australian source if the fund had negotiated and concluded all contracts actually negotiated and concluded on behalf of the fund by that entity.

22

11 Paragraph 842-255(1)(a)

23

Omit "a resident of Australia", substitute "an Australian resident".

24

12 Paragraph 842-255(2)(a)

25

Omit "a resident of Australia", substitute "an Australian resident".

26

13 Paragraph 842-255(1)(b)

27

Repeal the paragraph, substitute:

28

(b) each such capital gain is made in respect of a *CGT asset that is a *financial arrangement that is covered by section 842-245 and by subsection (3) of this section.

29

30

31

14 Paragraph 842-255(2)(a)

32

Omit "a resident of Australia", substitute "an Australian resident".

33

15 Paragraph 842-255(2)(b)

34

Repeal the paragraph, substitute:

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1 (b) each such capital loss is made in respect of a *CGT asset that
2 is a *financial arrangement that is covered by section 842-245
3 and by subsection (3) of this section.

4 **16 Subsection 842-255(3)**

5 Omit “A *CGT asset of an *IMR foreign fund is covered by this
6 subsection if”, substitute “A *financial arrangement of an *IMR foreign
7 fund is covered by this subsection if it is a *CGT asset that”.

8 **17 Paragraph 842-255(3)(a)**

9 Omit “it is covered”, substitute “is covered”.

10 **18 Paragraph 842-255(3)(b)**

11 Omit “it is covered”, substitute “is covered”.

12 **19 After subsection 842-270**

13 Insert:

14 (2A) For the purposes of subsection (1), in determining whether a
15 *financial arrangement is covered by section 842-245, disregard the
16 repeal of subsection (2) of that section by the *Tax Laws*
17 *Amendment (2013 Measures No. 2) Bill 2013*.

18 **20 At the end of Division 842**

19 Add:

20 **842-275 Amendment of assessments**

21 Section 170 of the *Income Tax Assessment Act 1936* does not
22 prevent the amendment of an assessment of an entity for the
23 purpose of giving effect to this Subdivision for an income year if:

24 (a) the amendment is necessary to give effect to the operation of
25 subsection 842-235(3); and

26 (b) the amendment is made within 7 years after the day on which
27 the Commissioner gives notice of the assessment to the
28 entity.

29 **21 Subsection 995-1(1)**

30 Insert:

31 *IMR domestic widely held entity* has the meaning given by
32 section 842-243.

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1 **22 Subsection 995-1(1)**

2 Insert:

3 *IMR foreign widely held entity* has the meaning given by
4 section 842-243.

5 **23 Subsection 995-1(1)**

6 Insert:

7 *IMR widely held entity* has the meaning given by section 842-243.

8 ***Taxation Administration Act 1953***

9 **24 After subsection 286-75(2BA) in Schedule 1**

10 Insert:

11 (2BB) You are also liable to an administrative penalty if:

12 (a) you have an obligation under section 395-10 (IMR foreign
13 fund reporting) to give a written notice to an entity; and

14 (b) you do not comply with that obligation.

15 **25 After paragraph 286-80(2)(a) in Schedule 1**

16 Insert:

17 (b) for non-compliance with an obligation to give a written
18 notice to an entity as mentioned in
19 subsection 286-75(2BB)—1 penalty unit for each period of
20 28 days or part of a period of 28 days starting on the day
21 when you first fail to comply with the obligation and ending
22 when you give the notice (up to a maximum of 5 penalty
23 units); or

24 **26 Paragraph 286-80(2)(a) in Schedule 1**

25 After “(2BA)”, insert “, (2BB)”.

26 **27 After Division 394 in Schedule 1**

27 Insert:

28 **Division 395—IMR foreign fund reporting**

29 **Table of Subdivisions**

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1 **Guide to Division 395**

2 **395-1 What this Division is about**

3 Entities responsible for IMR foreign funds must give the
4 Commissioner an annual information statement about the fund.

5 Entities responsible for IMR foreign funds are also required to
6 notify foreign resident beneficiaries and foreign resident partners
7 of the lodgment of the annual information statement.

8 **Table of sections**

9 **395-5 Annual information statement**

10 (1) If an entity is covered by subsection (2) in relation to an *IMR
11 foreign fund in relation to an income year, the entity must give the
12 Commissioner a statement for that year in relation to the fund.

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

15 (2) An entity is covered by this subsection in relation to the fund in
16 relation to the income year if the entity is:

- 17 (a) in the case of a fund that is a body corporate—the body
18 corporate; or
19 (b) in the case of a fund that is a trust—a trustee of the trust; or
20 (c) in the case of a fund that is a partnership—a partner in the
21 partnership; or
22 (d) in any other case—an entity with responsibility for the
23 day-to-day management of the fund.

24 (3) A statement under subsection (1) must be in the *approved form.

25 (4) The statement must be given to the Commissioner no later than 3
26 months after the end of the income year.

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

29 (5) The *approved form may require the statement to contain the
30 following information:

- 31 (a) the name and address of the fund;
32 (b) either:

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- 1 (i) the country of which the fund is a resident throughout
2 the income year; or
3 (ii) if subparagraph (i) does not apply—each country of
4 which the fund is a resident at any time in the income
5 year; and
6 (c) other information that is relevant to:
7 (i) the fund’s status as an *IMR foreign fund in relation to
8 that income year; and
9 (ii) the application of Subdivision 842-I of the *Income Tax*
10 *Assessment Act 1997* to the fund.
- 11 (6) Subsection (5) does not limit the information that the *approved
12 form may require the statement to contain.

13 **395-10 Notification to foreign resident beneficiaries and foreign** 14 **resident partners**

- 15 (1) This section applies if:
16 (a) an *IMR foreign fund in relation to an income year is a trust
17 or partnership; and
18 (b) an entity is covered by subsection (2) in relation to the fund.
- 19 (2) An entity is covered by this subsection in relation to the fund in
20 relation to the income year if the entity is:
21 (a) in the case of a fund that is a trust—a trustee of the trust; or
22 (b) in the case of a fund that is a partnership—a partner in the
23 partnership.
- 24 (3) If an entity is covered by subsection (5), the entity covered by
25 subsection (2) in relation to the fund must give the entity covered
26 by subsection (5) a written notice stating that:
27 (a) if the fund is a trust—all the trustees of the fund consider that
28 the fund is an *IMR foreign fund in relation to the income
29 year; or
30 (b) if the fund is a partnership—all partners of the fund consider
31 that the fund is an IMR foreign fund in relation to the income
32 year.
- 33 (4) Treat the entity covered by subsection (2) as having given that
34 written notice to the entity covered by subsection (5) if it makes
35 that information available on a website in a way that it is readily
36 accessible to the entity covered by subsection (5) until the end of
37 the last day on which the Commissioner could amend an

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1 assessment of an entity because of the operation of section 842-275
2 of the *Income Tax Assessment Act 1997*.

3 (5) An entity is covered by this subsection if it is:

4 (a) if the fund is a trust—a beneficiary of the fund to which
5 section 842-215 of the *Income Tax Assessment Act 1997*
6 applies; or

7 (b) if the fund is a partnership—a partner of the fund to which
8 section 842-220 of the *Income Tax Assessment Act 1997*
9 applies.

10 (6) The fund must comply with subsection (3) no later than the time at
11 which it must give a statement under section 395-5 to the
12 Commissioner for the income year.

13 Note: Failure to give the notice or make the details available as required by
14 this section incurs an administrative penalty: see section 286-75(2BB).

15 **395-15 Non-complying entity taken to be IMR foreign fund for the** 16 **purposes of this Division**

17 For the purposes of this Division, in determining whether an entity
18 is an *IMR foreign fund in relation to an income year, disregard
19 paragraph 842-230(1)(d) of the *Income Tax Assessment Act 1997*
20 (requirement to give annual information statement in accordance
21 with section 395-5).