

EXPOSURE DRAFT

EXPOSURE DRAFT

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Inserts for
**Tax and Superannuation Laws
Amendment (2015 Measures No. 2) Bill
2015: Offshore banking units**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule OBU	The day after this Act receives the Royal Assent.	
2.		

EXPOSURE DRAFT

1 Schedule OBU—Offshore banking units

2 Part 1—Trading in subsidiaries

3 *Income Tax Assessment Act 1936*

4 5 Paragraph 121D(1)(c)

5 After “subsection (4)”, insert “(subject to subsection (4A))”.

6 10 After subsection 121D(4)

7 Insert:

8 (4A) However, paragraph (1)(c) does not apply to a trading activity done
9 by an OBU if:

10 (a) the thing traded in affected the OBU’s total participation
11 interest (within the meaning of the *Income Tax Assessment*
12 *Act 1997*) in another entity; and

13 (b) just before the trading activity:

14 (i) the OBU’s total participation interest in the other entity
15 was at least 10%; or

16 (ii) any of the thing traded in was not recorded in the
17 OBU’s accounting records as held for trading in
18 accordance with accounting standards (within the
19 meaning of that Act).

20 (4B) For the purposes of subsection (4A), disregard rights on
21 winding-up.

EXPOSURE DRAFT

1 Part 2—The choice principle

2 *Income Tax Assessment Act 1936*

3 **15 Paragraph 121B(2)(a)**

4 Repeal the paragraph, substitute:

- 5 (a) **OB activity** (sections 121D, 121EA and 121EAA) together
6 with the related definition of *offshore person* (section 121E);
7 and

8 **17 Section 121C**

9 Insert:

10 *non-OB accounting records*, of an OBU, means the OB's
11 accounting records, other than the accounting records maintained
12 in respect of money used in the OBU's OB activities under
13 subsection 262A(1A).

14 **20 Subsection 121D(1)**

15 Omit “, provided that the requirement relating to the OBU in
16 section 121EA is met”, substitute “(subject to sections 121EA and
17 121EAA)”.

18 **25 After section 121EA**

19 Insert:

20 **121EAA Activities recorded in domestic books not OB activities**

- 21 (1) An OBU may, when it does a thing that would otherwise be an OB
22 activity of the OBU, choose to have the thing not be an **OB**
23 *activity*.
- 24 (2) The OBU recording the thing in the OBU's non-OB accounting
25 records is sufficient evidence of the making of the choice.
- 26 (3) The OBU is treated as having chosen under subsection (1) to have
27 a thing (the *transaction*) done by the OBU not be an **OB activity** if:
28 (a) it is reasonable to regard the transaction and one or more
29 other things done by the OBU as constituting a single scheme

EXPOSURE DRAFT

1 (within the meaning of the *Income Tax Assessment Act*
2 *1997*); and
3 (b) the OBU chooses under subsection (1) to have any of those
4 other things done by the OBU not be an OB activity.

5 *Revoking choice*

6 (4) A choice made under this section may be revoked if the OBU
7 recorded the relevant thing as mentioned in subsection (2) by
8 mistake. The OBU revokes the choice by recording the relevant
9 thing in the accounting records maintained under
10 subsection 262(1A).

11 (5) The OBU must revoke a choice the OBU is treated as having
12 made under subsection (3) if the OBU revokes under subsection (4)
13 the choice mentioned in paragraph (3)(b).

14 **30 Subsection 121EB(1)**

15 Omit “121EA”, substitute “121EAA”.

EXPOSURE DRAFT

1 **Part 3—Allocation of expenses**

2 *Income Tax Assessment Act 1936*

3 **35 Subsection 6(1)**

4 Insert:

5 *statutory income* has the meaning given by the *Income Tax*
6 *Assessment Act 1997*.

7 **40 Paragraph 121B(2)(b)**

8 Repeal the paragraph, substitute:

9 (b) special income and allowable deduction definitions relating
10 to OB activities (sections 121EDA to 121EF).

11 **45 Section 121C (definition of assessable OB income)**

12 Repeal the definition, substitute:

13 *assessable OB income* has the meaning given by
14 subsection 121EE(2).

15 **47 Section 121C**

16 Insert:

17 *OB income* has the meaning given by section 121EDA.

18 **50 Section 121E**

19 Omit “For the purposes of section 121D, a reference in that section”,
20 substitute “A reference”.

21 **55 After section 121ED**

22 Insert:

23 **121EDA Meaning of *OB income***

24 *OB income*

25 (1) Subject to subsections (2) to (5), the *OB income* of an OBU of a
26 year of income is so much of the OBU’s ordinary income and
27 statutory income of the year of income as is:

EXPOSURE DRAFT

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- 1 (a) derived from OB activities of the OBU or the part of the
2 OBU to which paragraph 121EB(1)(c) applies; or
3 (b) included in the statutory income because of such activities.
- 4 (2) Subsection (1) does not apply to amounts included under Part 3-1
5 of the *Income Tax Assessment Act 1997* (about capital gains).
- 6 (3) Subsection (1) does not apply to the extent that the money lent,
7 invested or otherwise used in carrying on the OB activities is
8 non-OB money of the OBU.
- 9 (4) A typical example of an amount covered by the exception in
10 subsection (3) is interest derived from the OB activity of lending
11 money to an offshore person, where the money lent is non-OB
12 money.

Reduction of OB income because of certain investment activities

- 13
- 14 (5) Ordinary or statutory income that:
- 15 (a) would otherwise be taken into account under subsection (1);
16 and
17 (b) is derived from an investment activity (within the meaning of
18 subsection 121D(6A) or (6B)) included in OB activities of
19 the OBU or the part of the OBU to which
20 paragraph 121EB(1)(c) applies;
21 is reduced by the average Australian asset percentage (within the
22 meaning of subsection 121DA(2)) of the portfolio investment
23 concerned.

60 Subsections 121EE(2) to (3A)

24 Repeal the subsections, substitute:

Assessable OB income

- 25
- 26
- 27 (2) The **assessable OB income** of an OBU is so much of the OBU's
28 OB income of the year of income as is assessable income.

65 Subsection 121EF(4)

29 Repeal the subsection, substitute:

General OB deduction

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- 32 (4) A deduction that:

EXPOSURE DRAFT

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- 1 (a) is none of the following:
2 (i) a loss deduction;
3 (ii) an apportionable deduction;
4 (iii) an exclusive OB deduction;
5 (iv) an exclusive non-OB deduction; and
6 (b) is allowable from the OBU's assessable income of the year of
7 income;
8 is a *general OB deduction* to the extent that:
9 (c) it is incurred in gaining or producing the OB income of the
10 OBU; or
11 (d) it is necessarily incurred in carrying on a business for the
12 purpose of gaining or producing the OB income of the OBU.

13 **70 Paragraph 121EH(a)**

14 Omit "subsection 121EE(2)", substitute "subsection 121EDA(3)".

EXPOSURE DRAFT

1 **Part 4—Eligible OB activities**

2 *Income Tax Assessment Act 1936*

3 **75 Section 121C (definition of *eligible contract*)**

4 Omit “or a loan contract”, substitute “, a loan contract, a securities
5 lending or repurchase arrangement or a non-deliverable forward foreign
6 currency contract”.

7 **80 Section 121C**

8 Insert:

9 *OB advisory activity* has the meaning given by section 121DC.

10 *OB eligible contract activity* has the meaning given by
11 section 121DB.

12 *OB leasing activity* has the meaning given by section 121DD.

13 *offshore property* means property that:

14 (a) cannot be in Australia; or

15 Example: Land outside Australia.

16 (b) is used, or will be used:

17 (i) wholly outside Australia; or

18 (ii) in Australia to an extent that is not material.

19 **85 Paragraph 121D(1)(d)**

20 Repeal the paragraph, substitute:

21 (d) an OB eligible contract activity (see section 121DB); or

22 **90 Paragraph 121D(1)(f)**

23 Repeal the paragraph, substitute:

24 (f) an OB advisory activity (see section 121DC); or

25 **95 After paragraph 121D(1)(g)**

26 Insert:

27 (ga) an OB leasing activity (see section 121DD); or

EXPOSURE DRAFT

100 Paragraph 121D(2)(b)

After “lending money”, insert “, or making unfunded commitments to lend money,”.

105 At the end of subsection 121D(2)

Add:

; or (e) acting as an arranger in a syndicated lending arrangement that includes a borrowing or lending activity to which paragraph (a), (b), (c) or (d) applies.

115 Paragraph 121D(3)(a) and (b)

Repeal the paragraphs, substitute:

(a) providing a guarantee or letter of credit to an offshore person in relation to activities that are, or will be, conducted:

(i) wholly outside Australia; or

(ii) in Australia to an extent that is not material; or

(b) underwriting a risk for an offshore person in respect of:

(i) offshore property; or

(ii) an event, if the likelihood of the event happening in Australia is not material; or

120 Paragraph 121D(3)(d)

Repeal the paragraph, substitute:

(d) issuing a performance bond to an offshore person in relation to activities that are, or will be, conducted:

(i) wholly outside Australia; or

(ii) in Australia to an extent that is not material.

125 After paragraph 121D(4)(a)

Insert:

(aa) trading with any person in non-deliverable forward foreign currency contracts; or

130 At the end of subsection 121D(4)

Add:

; or (i) trading with an offshore person in commodities, if:

(i) the commodities are not mentioned in another paragraph of this subsection; and

(ii) the trading is incidental to an eligible contract activity.

EXPOSURE DRAFT

135 Subsection 121D(5)

Repeal the subsection.

140 Paragraph 121D(6A)(e)

Omit “subsection 121DA(5); and”, substitute “subsection 121DA(5)).”.

145 Paragraph 121D(6A)(f)

Repeal the paragraph.

150 Subsection 121D(7)

Repeal the subsection.

155 After section 121DA

Insert:

121DB Meaning of *OB eligible contract activity*

An *OB eligible contract activity* is entering into an eligible contract (other than a loan contract that is not a securities lending or repurchase arrangement) with:

- (a) an offshore person; or
- (b) if the eligible contract is a non-deliverable forward foreign currency contract—any person.

121DC Meaning of *OB advisory activity*

- (1) An *OB advisory activity* is giving investment or other financial advice to an offshore person, including advice about disposing of an investment.
- (2) Giving advice about the making of a particular investment is not an *OB advisory activity* unless the investment is of a kind mentioned in subsection 121D(6) (Investment activity).
- (3) Subsection (2) does not exclude giving advice about a particular investment of a different kind if doing so is incidental to advising on an investment of a kind mentioned in that subsection (for example for the purpose of comparison or because the investments are commercially related).

EXPOSURE DRAFT

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- 1 (4) To avoid doubt, for the purposes of this section, advice about
2 disposing of an investment is not advice about the making of the
3 investment.

4 **121DD Meaning of *OB leasing activity***

- 5 (1) An *OB leasing activity* is leasing activity with an offshore person
6 involving offshore property.
- 7 (2) Without limiting subsection (1), *OB leasing activity* includes
8 entering into:
- 9 (a) any arrangement (within the meaning of section 51AD) under
10 which a right to use offshore property is granted by the owner
11 to another person; or
- 12 (b) any arrangement (within the meaning of that section) under
13 which a right to use offshore property, being a right derived
14 directly or indirectly from a right mentioned in paragraph (a)
15 in relation to the property, is granted by a person to another
16 person;
17 with an offshore person.

EXPOSURE DRAFT

1 **Part 5—Internal financial dealings**

2 *Income Tax Assessment Act 1936*

3 **157 At the end of section 121EB**

4 Add:

5 *Arm's length pricing*

6 (4) For the purposes of this Division, treat an amount that, because of
7 subsections (1) to (3):

8 (a) is included in the OBU's OB income; or

9 (b) is an allowable OB deduction of the OBU;

10 as being the amount that would be so included, or that would be the
11 amount of the allowable OB deduction, were the OBU and the
12 permanent establishments mentioned in paragraph (1)(d) dealing
13 with each other at arm's length.

EXPOSURE DRAFT

1 **Part 6—Application of amendments**

2 **160 Application of amendments**

3 The amendments made by this Schedule apply in relation to years of
4 income starting on or after 1 July 2015.

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