

(As read a first time)

TRUST RECOUPMENT TAX ASSESSMENT BILL 1985

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1985

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

Presented and read a first time, 22 February 1985

(*Treasurer*)

A BILL

FOR

An Act relating to the assessment and collection of a tax in respect of income of certain trusts

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title

5 1. This Act may be cited as the *Trust Recoupment Tax Assessment Act 1985*.

Commencement

 2. This Act shall come into operation on the day on which it receives the Royal Assent.

Interpretation

10 3. (1) In this Act, unless the contrary intention appears—

 “applied penalty tax” means additional tax under Part VII of the Assessment Act in relation to trust recoupment tax;

 “Assessment Act” means the *Income Tax Assessment Act 1936*;

- “associate” has the same meaning in relation to a person as that expression has in relation to a person in section 26AAB of the Assessment Act;
- “company” does not include a company in the capacity of trustee of a trust estate;
- “company taxable amount”, in relation to a person, means an amount that is a company taxable amount in relation to the person under section 7; 5
- “distribution of income” means—
- (a) in relation to a company in relation to a particular time—a distribution of income of the company of the year of income of the company in which that time occurred among the shareholders of the company at that time, being a distribution of income by payment of a dividend; and 10
 - (b) in relation to a trust estate in relation to a particular time—a distribution of income of the trust estate of the year of income of the trustee in which that time occurred among the beneficiaries of the trust estate at that time and the persons who could have become beneficiaries of the trust estate at that time by the exercise of a power of appointment by the trustee of the trust estate or by another person, being a distribution of income that is paid to, or applied for the benefit of, those persons as beneficiaries of the trust estate; 15 20
- “elected taxable amount”, in relation to a person, means an amount that is an elected taxable amount in relation to the person under sub-section 7 (7);
- “eligible beneficiaries class”, in relation to a secondary taxable amount, means the eligible beneficiaries class ascertained under section 6 in relation to that secondary taxable amount; 25
- “late payment tax” means additional tax under section 207 of the Assessment Act in relation to trust recoupment tax, applied penalty tax or penalty tax; 30
- “penalty tax” means additional tax payable under section 12;
- “person” includes a company and a person in the capacity of trustee of a trust estate;
- “prescribed person”, in relation to a taxable amount, means—
- (a) a natural person other than a person in the capacity of trustee of a trust estate; 35
 - (b) a person (other than a person referred to in paragraph (c)) in respect of whom a relevant exempting provision applied in relation to the year of income to which the taxable amount relates; 40
 - (c) a person in the capacity of trustee of a trust estate, being a trust estate that is a provident, benefit, superannuation or retirement fund; or
 - (d) a company that is, by virtue of the application of paragraph 103A (2) (c) or sub-paragraph 103A (2) (d) (i), (iii) or (iv) of 45

the Assessment Act, a public company for the purposes of Division 7 of Part III of that Act in relation to the year of income to which the taxable amount relates;

5 “primary taxable amount”, in relation to a person, means an amount that is a primary taxable amount in relation to the person under section 5;

“primary trust income”, in relation to a primary taxable amount that exists in relation to the trustee of a trust estate, means the income or the part of the income of the trust estate to which the primary taxable amount is attributable;

10 “property” includes—

(a) a chose in action;

(b) any estate, interest, right or power, whether at law or in equity, in or over property; and

(c) any right to receive income;

15 “relevant distribution time”, in relation to a taxable amount that exists in relation to a company or the trustee of a trust estate, means—

20 (a) if the company or trust estate did not exist immediately before the tax avoidance scheme to which the taxable amount relates was entered into—the time when the company or trust estate commenced to exist; or

(b) in any other case—the time immediately before the time when the tax avoidance scheme to which the taxable amount relates was entered into,

25 or, if the Commissioner is of the opinion that that time is inappropriate, such later time as the Commissioner determines;

“relevant exempting provision” has the same meaning as in Division 9C of Part III of the Assessment Act;

30 “right to receive income” means a right of a person to have income that will or may be derived (whether from property or otherwise) paid to, or applied or accumulated for the benefit of, the person;

“scheme” means—

35 (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable, or intended to be enforceable, by legal proceedings; and

(b) any scheme, plan, proposal, action, course of action or course of conduct;

40 “secondary taxable amount”, in relation to a person or persons, means an amount that is a secondary taxable amount under section 6 in relation to an eligible beneficiaries class in which the person is, or the persons are, included;

“taxable amount” means a primary taxable amount, a secondary taxable amount, a company taxable amount or an elected taxable amount;

“trust recoupment tax” means tax assessed under this Act and imposed by the *Trust Recoupment Tax Act 1985*.

(2) The reference in the definition of “scheme” in sub-section (1) to a scheme, plan, proposal, action, course of action or course of conduct shall be read as including a reference to a unilateral scheme, plan, proposal, action, course of action or course of conduct, as the case may be.

(3) In this Act, a reference to the time of entry into a scheme is a reference to—

- (a) if the scheme is a unilateral scheme—the time when the scheme is commenced to be carried out; and
- (b) in any other case—the time when the scheme is entered into.

(4) For the purposes of this Act, a scheme shall be taken to be a tax avoidance scheme if and only if, having regard to—

- (a) the manner in which the scheme was entered into or carried out;
- (b) the form and substance of the scheme;
- (c) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
- (d) the result in relation to the operation of the Assessment Act that, but for section 100A and Part IVA of that Act, would be achieved by the scheme;
- (e) any change in the financial position of any person that has resulted, will result or may reasonably be expected to result from the scheme; and
- (f) any other consequence for any person of the scheme having been entered into or carried out,

it would be concluded that the person, or any of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of securing that a person or persons (whether or not a particular person or particular persons) who, if the scheme had not been entered into or carried out, would have been liable to pay income tax in respect of a year of income would not be liable to pay income tax in respect of that year of income or would be liable to pay less income tax in respect of that year of income than the person or persons would have been liable to pay if the scheme had not been entered into or carried out.

(5) In sub-section (4)—

- (a) a reference to the carrying out of a scheme or a part of a scheme by a person shall be read as including a reference to the carrying out of a scheme or a part of a scheme by a person together with another person or other persons; and
- (b) a reference to a scheme or a part of a scheme being entered into or carried out by a person for a particular purpose shall be read as including a reference to a scheme or a part of a scheme being entered into or carried out by the person for 2 or more purposes of which that particular purpose is the dominant purpose.

(6) For the purposes of this Act, trust recoupment tax that has been assessed shall be deemed to be payable notwithstanding that it has not become due and payable.

Application of Assessment Act

5 **4. (1)** Unless the contrary intention appears in this Act, sections 6 and 7A, Part II, section 21, Parts IV and V, Division 1 of Part VI, and Parts VII and VIII of the Assessment Act, and regulations made under that Act, apply for the purposes of the assessment and collection of trust recoupment tax and penalty tax, in like manner, *mutatis mutandis*, as those provisions apply for the purposes of the assessment and collection of income tax under the Assessment Act.

(2) A reference in this Act to a provision of the Assessment Act shall, unless the contrary intention appears, be read as a reference to that provision in its application, in accordance with sub-section (1), for the purposes of this Act.

15 **(3)** For the purposes of section 14 of the Assessment Act, this Act shall be deemed to be part of the Assessment Act.

(4) Nothing in section 16 of the Assessment Act prevents—

20 **(a)** the disclosure, to a person who is, or in the opinion of the Commissioner is likely to become, liable to pay trust recoupment tax, or to pay income tax by virtue of the operation of section 7 of this Act, of information relating to the affairs of another person where that information was, or in the opinion of the Commissioner is likely to be, taken into account in the assessment of the liability of the first-mentioned person to pay trust recoupment tax, or to pay income tax by virtue of the operation of section 7 of this Act, as the case may be; or

25 **(b)** the disclosure, to a person who is, or in the opinion of the Commissioner is likely to become, jointly and severally liable with other persons to pay trust recoupment tax, of the identity of, and particulars of the liability of, any of the other persons liable to pay that trust recoupment tax.

(5) Nothing in section 170 of the Assessment Act prevents the amendment, at any time, of an assessment for the purpose of giving effect to sub-section 6 (2) or section 7 of this Act.

35 **(6)** Proceedings shall not be instituted against a person under section 209 of the Assessment Act for the recovery of any trust recoupment tax, or penalty tax, payable on a secondary taxable amount unless—

(a) the notice of assessment in respect of that tax was served on the person; or

40 **(b)** the Commissioner has served on the person a notice in writing to the effect that it is intended to commence proceedings for recovery of that tax and a period of 30 days has expired after the date of service of the notice.

(7) Unless the contrary intention appears, a reference in section 215 of the Assessment Act to tax shall be deemed to include a reference to—

- (a) trust recoupment tax;
- (b) late payment tax;
- (c) applied penalty tax; and
- (d) penalty tax.

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(8) Where a person dies after an assessment is made of trust recoupment tax, applied penalty tax or penalty tax payable by the person, the Commissioner has the same powers and remedies against the trustee of the deceased person's estate in respect of the collection of that tax, and of late payment tax on that tax, as the Commissioner would have had against the deceased person if the deceased person were alive.

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(9) For the purposes of the application of any of the provisions of the Assessment Act in accordance with sub-section (1), where 2 or more persons are jointly and severally liable to pay trust recoupment tax, or penalty tax, on a secondary taxable amount, service of a notice of assessment or any other notice in respect of that liability on any of those persons shall be deemed to be service of the notice on each of those persons.

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(10) The validity of an assessment of the trust recoupment tax or penalty tax payable on a secondary taxable amount by the persons included in an eligible beneficiaries class in relation to that secondary taxable amount is not affected by reason that the notice of assessment identifies only one or some of the persons included in that eligible beneficiaries class.

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Primary taxable amounts

5. (1) Subject to sub-sections (2) and (3), where—

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- (a) at any time, whether before or after the commencement of this Act, a beneficiary of a trust estate had a vested and indefeasible interest in any of the income of the trust estate of a year of income (in this sub-section referred to as the "relevant year of income");
- (b) the beneficiary was not presently entitled to that income but would, apart from this section and sub-section 100A (1) of the Assessment Act, have been deemed for the purposes of that Act to be presently entitled to that income;
- (c) the vested and indefeasible interest of the beneficiary in the whole or a part of that income (which whole or part is in this sub-section referred to as the "relevant trust income") arose out of a tax avoidance scheme, or by reason of any act, transaction or circumstance that occurred as part of, in connection with or as a result of a tax avoidance scheme, entered into on or after 1 July 1980;
- (d) by reason of, as a result of or as part of the tax avoidance scheme or by reason of any act, transaction or circumstance that has occurred, will occur, or may reasonably be expected to occur, being an act, transaction or circumstance occurring as part of, in connection with or as a result of the tax avoidance scheme, the present value of the

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benefit, or the sum of the present values of each of the benefits, that has or have been, will be, or may reasonably be expected to be, derived by the beneficiary as a consequence of the vested and indefeasible interest of the beneficiary in the relevant trust income is less than 50% of the amount of the relevant trust income; and

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- (e) by reason that the beneficiary would, apart from this section and sub-section 100A (1) of the Assessment Act, have been deemed for the purposes of that Act to be presently entitled to the relevant trust income, the trustee of the trust estate would not have been liable to be assessed and to pay tax under section 99 or 99A of that Act in respect of the net income or a part of the net income (which net income or part is in this sub-section referred to as the “relevant amount”) of the trust estate of the relevant year of income,

the following provisions have effect:

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- (f) the beneficiary shall, for the purposes of the Assessment Act other than sections 99 and 99A, be deemed not to be, and never to have been, presently entitled to the relevant trust income;
- (g) a primary taxable amount equal to the relevant amount shall be taken to exist in relation to the trustee of the trust estate in relation to the relevant year of income.

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(2) Subject to sub-section (3), where—

- (a) by reason of the application of sub-section (1) or of this sub-section, a primary taxable amount exists in relation to the trustee of a trust estate (in this sub-section referred to as the “sub-trust”) in relation to a year of income (in this sub-section referred to as the “relevant year of income”) in relation to a tax avoidance scheme (in this sub-section referred to as the “relevant scheme”);

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(b) apart from this section and section 100A of the Assessment Act, the trustee of the sub-trust—

- 30
- (i) was presently entitled to a share of the income of another trust estate (in this sub-section referred to as the “head trust”) of the relevant year of income;

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- (ii) would, by reason that income of another trust estate (in this sub-section also referred to as the “head trust”) of the relevant year of income was paid to, or applied for the benefit of, the trustee of the sub-trust, have been deemed, for the purposes of the Assessment Act, to be presently entitled to income of the head trust; or

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- (iii) would, by reason that the trustee of the sub-trust had a vested and indefeasible interest in any of the income of another trust estate (in this sub-section also referred to as the “head trust”) of the relevant year of income, have been deemed, for the purposes of the Assessment Act, to be presently entitled to that income of the head trust;

- (c) in a case to which sub-paragraph (b) (i) applies—the present entitlement of the trustee of the sub-trust to the share or to a part of the share (which share or part is in this sub-section referred to as the “relevant head trust income”) of the income of the head trust referred to in that sub-paragraph arose out of the relevant scheme or arose by reason of any act, transaction or circumstance that occurred as part of, in connection with or as a result of the relevant scheme; 5
- (d) in a case to which sub-paragraph (b) (ii) applies—the whole or a part (which whole or part is in this sub-section also referred to as the “relevant head trust income”) of the income of the head trust referred to in that sub-paragraph was paid or applied as mentioned in that sub-paragraph as a result of the relevant scheme or as a result of any act, transaction or circumstance that occurred as part of, in connection with or as a result of the relevant scheme; and 10
- (e) in a case to which sub-paragraph (b) (iii) applies—the vested and indefeasible interest of the trustee of the sub-trust in the whole or a part (which whole or part is in this sub-section also referred to as the “relevant head trust income”) of the income of the head trust referred to in that sub-paragraph arose out of the relevant scheme or arose by reason of any act, transaction or circumstance that occurred as part of, in connection with or as a result of the relevant scheme, 15 20

the following provisions have effect:

- (f) the primary taxable amount referred to in paragraph (a) shall be reduced by so much of that amount as is attributable to the relevant head trust income; 25
- (g) a primary taxable amount equal to the amount of the reduction referred to in paragraph (f) shall be taken to exist in relation to the trustee of the head trust in relation to the relevant year of income.

(3) Where, but for this sub-section, 2 or more primary taxable amounts (in this sub-section referred to as the “original taxable amounts”) would be taken to exist in relation to the trustee of a trust estate in relation to a year of income in relation to a tax avoidance scheme by reason of the application of sub-section (1) or (2)— 30

- (a) the original taxable amounts shall not be taken to exist; and
- (b) a primary taxable amount equal to the aggregate of the original taxable amounts shall be taken to exist in relation to the trustee of the trust estate in relation to the year of income. 35

(4) For the purposes of paragraphs (1) (c) and (2) (e), but without limiting the generality of those paragraphs, where—

- (a) a tax avoidance scheme was entered into at or after the time when a person became a beneficiary of a trust estate; and 40
- (b) the amount (in this sub-section referred to as the “increased amount”) of the income of the trust estate in which the beneficiary had a vested and indefeasible interest exceeds the amount (in this sub-section referred to as the “original amount”) of the income of the trust estate 45

in which the beneficiary would have had, or could reasonably be expected to have had, a vested and indefeasible interest if the tax avoidance scheme had not been entered into or if an act, transaction or circumstance that occurred as part of, in connection with or as a result of the tax avoidance scheme had not occurred,

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the vested and indefeasible interest of the beneficiary in so much of the increased amount as exceeds the original amount shall be taken to have arisen out of the tax avoidance scheme.

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(5) In paragraph (1) (d) a reference to the present value of a benefit that has been, will be, or may reasonably be expected to be, derived by a beneficiary of a trust estate as a consequence of a vested and indefeasible interest of the beneficiary in the relevant trust income referred to in that paragraph is a reference to—

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- (a) where the benefit was derived before the end of the year of income in which the relevant trust income was derived—the amount or value of the benefit at the time at which it was derived; or
- (b) in any other case—an amount ascertained in accordance with the

$$\text{formula } \frac{A}{1.1^n}, \text{ where—}$$

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A is the amount or value of the benefit at the time at which it was, will be, or may reasonably be expected to be, derived; and

n is the number of years between the end of the year of income in which the relevant trust income was derived and the time referred to in component A.

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(6) For the purposes of paragraph (2) (c), but without limiting the generality of that paragraph, where—

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- (a) a tax avoidance scheme was entered into at or after the time when a person became a beneficiary of a trust estate; and
- (b) the amount (in this sub-section referred to as the “increased amount”) of the share of the income of the trust estate to which the beneficiary was presently entitled exceeds the amount (in this sub-section referred to as the “original amount”) of the income of the trust estate to which the beneficiary would have been, or could reasonably be expected to have been, presently entitled if the tax avoidance scheme had not been entered into or if an act, transaction or circumstance that occurred as part of, in connection with or as a result of the tax avoidance scheme had not occurred,

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the present entitlement of the beneficiary to so much of the increased amount as exceeds the original amount shall be taken to have arisen out of the tax avoidance scheme.

(7) For the purposes of paragraph (2) (d), but without limiting the generality of that paragraph, where—

(a) a tax avoidance scheme was entered into at or after the time when a person became a beneficiary of a trust estate; and

(b) income of the trust estate was paid to, or applied for the benefit of, the beneficiary and the amount (in this sub-section referred to as the “increased amount”) of that income exceeds the amount (in this sub-section referred to as the “original amount”) that would have been, or could reasonably be expected to have been, paid to, or applied for the benefit of, the beneficiary if the tax avoidance scheme had not been entered into or if an act, transaction or circumstance that occurred as part of, in connection with or as a result of the tax avoidance scheme had not occurred,

so much of the increased amount as exceeds the original amount shall be taken to be income of the trust estate that was paid to, or applied for the benefit of, the beneficiary as a result of the tax avoidance scheme.

(8) A primary taxable amount may be taken to exist in relation to the trustee of a trust estate notwithstanding that the trust estate has ceased to exist.

Secondary taxable amounts

6. (1) Where—

(a) a primary taxable amount exists in relation to the trustee of a trust estate in relation to a year of income; and

(b) either of the following conditions is satisfied:

(i) the trust estate ceased to exist before the commencement of this Act;

(ii) the trust estate has ceased to exist after the commencement of this Act and an assessment of the trust recoupment tax payable on the primary taxable amount was not made before the trust estate ceased to exist,

a secondary taxable amount of an amount equal to the primary taxable amount shall be taken to exist in relation to the eligible beneficiaries class in relation to the year of income.

(2) Where—

(a) a primary taxable amount exists in relation to the trustee of a trust estate (in this sub-section referred to as the “relevant trust estate”) in relation to a year of income;

(b) during the period (in this sub-section referred to as the “relevant period”) after the time when the tax avoidance scheme to which the primary taxable amount relates was entered into and before the time of service of any notice of assessment in respect of trust recoupment tax payable on the primary taxable amount—

(i) any beneficial interest in the relevant trust estate was sold; or

(ii) any beneficial interest in another trust estate that at any time during the relevant period was a holding trust estate in relation to the relevant trust estate was sold; and

5 (c) the Commissioner is of the opinion that, by reason of a circumstance mentioned in paragraph (b), it would be unreasonable that the trustee of the relevant trust estate be liable to pay trust recoupment tax on the primary taxable amount,

the following provisions have effect:

10 (d) a secondary taxable amount of an amount equal to the primary taxable amount shall be taken to exist in relation to the eligible beneficiaries class in relation to the year of income;

(e) the trustee of the relevant trust estate is not liable, and shall be deemed never to have been liable, to pay trust recoupment tax on the primary taxable amount.

15 (3) Where—

(a) there remains unpaid an amount of trust recoupment tax payable by the trustee of a trust estate on a primary taxable amount that exists in relation to the trustee in relation to a year of income and the Commissioner is of the opinion that the trust recoupment tax, or part of the trust recoupment tax, is unlikely to be paid; or

20 (b) a trust estate ceases to exist at a time when there remains unpaid an amount of trust recoupment tax payable by the trustee on a primary taxable amount that exists in relation to the trustee in relation to a year of income,

25 a secondary taxable amount shall be taken to exist in relation to the eligible beneficiaries class in relation to the year of income of an amount equal to the amount of the unpaid trust recoupment tax multiplied by $\frac{1}{3}$.

30 (4) Subject to sub-section (5), for the purposes of the application of sub-section (1), (2) or (3) in relation to a primary taxable amount, the eligible beneficiaries class includes each person who has derived, or might reasonably be expected to derive, a benefit that would not have been derived, or might reasonably be expected not to have been derived, if the primary trust income in relation to the primary taxable amount had not been derived.

35 (5) In sub-section (4), a reference to a benefit shall be read as not including a reference to—

(a) a benefit referred to in paragraph 5 (1) (d) derived by a beneficiary to whom paragraph 5 (1) (f) applies; and

40 (b) a benefit derived by a person (not being a person who at any time after the time when the tax avoidance scheme to which the primary taxable amount relates was entered into was an associate of the trustee of the trust estate in relation to which the primary taxable amount exists) from a transaction the parties to which were dealing with each other at arm's length in relation to the transaction.

(6) For the purposes of the application of this Act in relation to trust recoupment tax payable or paid on a secondary taxable amount, the eligible beneficiaries class in relation to the secondary taxable amount shall not be taken to include any person who was not included in that class at the time when the notice of assessment in respect of the trust recoupment tax was served. 5

(7) For the purposes of this section, a trust estate is a holding trust estate in relation to another trust estate at a particular time if the trustee of the first-mentioned trust estate has a beneficial interest in the other trust estate at that time.

(8) For the purposes of sub-section (7), where the trustee of a trust estate has a beneficial interest in a second trust estate and the trustee of the second trust estate has a beneficial interest in a third trust estate (including a beneficial interest that the trustee of the second trust estate has in the third trust estate by another application or other applications of this sub-section), the trustee of the first-mentioned trust estate shall be deemed to have a beneficial interest in the third trust estate. 10 15

(9) In this section, unless the contrary intention appears, "trust recoupment tax" includes late payment tax and penalty tax.

Requests to eliminate trust recoupment tax on certain taxable amounts

7. (1) Subject to sub-sections (3) and (5), where— 20

(a) a primary taxable amount exists in relation to the trustee of a trust estate (in this sub-section referred to as the "relevant trust estate"); and

(b) if there had been a distribution (in this sub-section referred to as the "income distribution") at the relevant distribution time of income of the relevant trust estate of an amount equal to the primary taxable amount, an eligible person or eligible persons would have received, or might reasonably be expected to have received, the whole or a part of the income distribution if there had been successive distributions of the relative parts of the income distribution to and by each of any trustees, not being prescribed persons, interposed between the relevant trust estate and the eligible person or eligible persons, 25 30

the eligible person or all the eligible persons, as the case may be, may make a request that this section should apply in relation to the eligible person or all the eligible persons, as the case may be, in relation to the primary taxable amount. 35

(2) Subject to sub-section (5), where—

(a) an elected taxable amount exists in relation to a company (in this sub-section referred to as the "relevant company"); and

(b) if there had been a distribution (in this sub-section referred to as the "income distribution") at the relevant distribution time of income of the relevant company of an amount equal to 48.6% of the elected taxable amount, a prescribed person or prescribed persons would have received, or might reasonably be expected to have received, the whole or a part of the income distribution if there had been successive 40

distributions of the relative parts of that income distribution to and by each of any companies or trustees, not being prescribed persons, interposed between the relevant company and the prescribed person or prescribed persons,

5 the prescribed person or all the prescribed persons, as the case may be, may make a request that this section should apply in relation to the prescribed person or all the prescribed persons, as the case may be, in relation to the elected taxable amount.

(3) Where—

- 10 (a) a company (in this sub-section referred to as the “relevant company”) not being a prescribed person would, but for this sub-section, be entitled to make a request under sub-section (1) either alone or together with another person or other persons; and
- 15 (b) if there had been a distribution (in this sub-section referred to as the “relevant income distribution”) at the relevant distribution time of income of the relevant company of an amount equal to 48.6% of the amount that, for the purposes of the application of sub-section (1), is the amount of the income distribution referred to in that sub-section that would have been, or might reasonably be expected to have been,
- 20 received by the relevant company, a prescribed person or prescribed persons would have received, or might reasonably be expected to have received, the whole or a part of the relevant income distribution if there had been successive distributions of the relative parts of the relevant income distribution to and by each of any companies or
- 25 trustees, not being prescribed persons, interposed between the relevant company and the prescribed person or prescribed persons,

the prescribed person or all the prescribed persons, as the case may be, may, with the leave of the Commissioner, make, or be a party to, the request in lieu of the company.

30 (4) Subject to sub-section (5), a request under this section in relation to a taxable amount (in this sub-section referred to as the “relevant taxable amount”) shall—

- (a) be in writing signed by the person or each of the persons, as the case may be, making the request;
- 35 (b) in the case of a request (not being a substitution request) made by a person or persons under sub-section (1)—specify an amount in relation to the person equal to the relevant taxable amount, or amounts in relation to the persons equal in the aggregate to the relevant taxable amount, as the case may be;
- 40 (c) in the case of a substitution request—
- (i) specify—
- (A) an amount (in this paragraph referred to as the “relevant company amount”) in relation to the replacement company, or an amount (in this paragraph

also referred to as the “relevant company amount”) in relation to each of the replacement companies; and

- (B) an amount in relation to the other person or each of the other persons (if any) who would, apart from sub-section (3), be entitled to make the request under sub-section (1),

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such that the sum of—

- (C) the relevant company amount or the relevant company amounts, as the case may be; and

- (D) the amount, or the amounts, as the case may be, specified under sub-sub-paragraph (B),

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equals the relevant taxable amount; and

- (ii) specify in relation to the person, or in relation to each of the persons, entitled by virtue of sub-section (3) to make the request in lieu of a company referred to in sub-paragraph (i) an amount such that the amount, or the aggregate of the amounts, as the case may be, specified in relation to the company equals 48.6% of the relevant company amount in relation to the company;

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- (d) in the case of a request made by a person or persons under sub-section (2)—specify an amount in relation to the person equal to 48.6% of the relevant taxable amount, or amounts in relation to the persons equal in the aggregate to 48.6% of the relevant taxable amount, as the case may be; and

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- (e) be sent to or lodged with the Commissioner—

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- (i) in a case to which sub-paragraph (ii) does not apply—not later than 30 days after the date of service of a notice of assessment (not being an amended assessment) in relation to the trust recoupment tax payable on the relevant taxable amount; or

- (ii) if a notice of assessment (not being an amended assessment) is served in relation to the trust recoupment tax payable on a secondary taxable amount derived by virtue of sub-section 6 (1) or (2) from the relevant taxable amount—not later than 30 days after the date of service of that notice,

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or before such later date as the Commissioner allows.

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(5) Where a request under this section in relation to a taxable amount is not made by the person or persons who, but for this sub-section, would be required to make the request and either or both of the following conditions is or are satisfied:

- (a) where the request was not made by all the persons who, but for this sub-section, would be required to make the request—

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- (i) the request was not so made by reason that—

- (A) any of the persons has died or, being a company that is a prescribed person, has ceased to exist;

(B) if any of the persons was a prescribed person by virtue of being the trustee of a trust estate—the trust estate has ceased to exist; or

(C) the whereabouts of any of the persons, not being a company, is not known; or

(ii) the Commissioner is satisfied that other special circumstances exist by reason of which it would be unreasonable that all the persons who, but for this sub-section, would be required to make the request, should make the request;

(b) where the person or persons making the request was, or included, a person or persons who, but for this sub-section, would not be entitled to make the request—the Commissioner considers it appropriate that the person or persons should be entitled to make the request by reason that an amount that is not included in the assessable income of the person of a year of income would have, or might reasonably be expected to have, been included in the assessable income of the person of the year of income if the tax avoidance scheme to which the taxable amount relates had not been entered into or carried out,

the Commissioner may waive compliance with the provisions of this section in relation to—

(c) the persons who are required to make the request; and

(d) in a case to which paragraph (a) applies—the requirement under sub-section (4) that the amount, or the aggregate of the amounts, specified in the request be equal to a particular amount.

(6) On receipt of a request under this section, the Commissioner, having regard to—

(a) in relation to amounts specified in the request in lieu of which different amounts could have been specified—whether those amounts specified in the request are reasonable having regard to—

(i) in the case of amounts specified in the request in relation to persons who would not have been parties to the request but for sub-section (5)—the amounts that, as mentioned in paragraph (5) (b), would have, or might reasonably be expected to have, been included in the assessable incomes of those persons if the tax avoidance scheme to which the taxable amount to which the request relates had not been entered into or carried out; and

(ii) in the case of amounts specified in the request in relation to other persons—the part of the income distribution referred to in sub-section (1), (2) or (3) in relation to the request that, in the opinion of the Commissioner, would have, or might reasonably be expected to have, been received by each of those persons;

(b) the likelihood that any tax that may become payable by reason of the operation of this section in relation to the request will be paid or that

section 265 of the Assessment Act will apply in relation to any tax that may become so payable; and

(c) any other matters that the Commissioner considers relevant, may grant the request or refuse the request.

(7) Subject to sub-section (9), where a request made under sub-section (1) in relation to a primary taxable amount (in this sub-section referred to as the "relevant taxable amount") is granted by the Commissioner, the following provisions have effect:

(a) in relation to each person making the request who is entitled to make the request apart from sub-section (3)—

(i) where the person is a prescribed person, then, for the purposes of the Assessment Act, but subject to section 128D of that Act and to the application of any relevant exempting provision—

(A) an amount equal to the amount specified in the request under paragraph (4) (b) or sub-sub-paragraph (4) (c) (i) (B), as the case may be, in relation to the person shall be included in the assessable income of the person of the year of income to which the relevant taxable amount relates; and

(B) the amount shall be deemed to be included in that assessable income by virtue of sub-section 97 (1) of the Assessment Act and by reason that the person was presently entitled to a share of the primary trust income in relation to the relevant taxable amount; and

(ii) where the person is a company not being a prescribed person—an elected taxable amount shall be taken to exist, in relation to the year of income in relation to which the relevant taxable amount exists, of an amount equal to the amount specified in the request under paragraph (4) (b) in relation to the person;

(b) in relation to each person making the request by virtue of the application of sub-section (3) in relation to a company—

(i) a company taxable amount shall be taken to exist, in relation to the year of income in relation to which the relevant taxable amount exists, of an amount ascertained by dividing the amount specified in the request under sub-paragraph (4) (c) (ii) in relation to the person in relation to the company by 0.486; and

(ii) for the purposes of the Assessment Act other than Division 7 of Part III and Division 4 of Part VI—

(A) the company shall be deemed to have paid to the person, as a shareholder in the company, a dividend of an amount equal to the amount specified in the request under sub-paragraph (4) (c) (ii) in relation to the person in relation to the company;

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(B) the dividend shall be deemed to have been paid by the company, on the last day of the year of income to which the relevant taxable amount relates (whether or not the company existed at that time), out of profits derived by the company from sources in Australia; and

(C) the dividend shall be deemed not to be a dividend to which sub-section 44 (2) of the Assessment Act applies;

(c) the trustee in relation to whom the relevant taxable amount exists is not liable, and shall be deemed never to have been liable, to pay trust recoupment tax on the relevant taxable amount;

(d) any secondary taxable amount derived from the relevant taxable amount shall be deemed not to exist and never to have existed.

(8) Subject to sub-section (9), where a request made under sub-section (2) in relation to an elected taxable amount that exists in relation to a company is granted by the Commissioner, the following provisions have effect:

(a) a company taxable amount shall be taken to exist in relation to the company, in relation to the year of income in relation to which the elected taxable amount exists, of an amount equal to the elected taxable amount;

(b) for the purposes of the application of the Assessment Act, other than Division 7 of Part III and Division 4 of Part VI, in relation to each person making the request—

(i) the company shall be deemed to have paid to the person, as a shareholder in the company, a dividend of an amount equal to the amount specified in the request under paragraph (4) (d) in relation to the person;

(ii) the dividend shall be deemed to have been paid by the company, on the last day of the year of income to which the elected taxable amount relates (whether or not the company existed at that time), out of profits derived by the company from sources in Australia; and

(iii) the dividend shall be deemed not to be a dividend to which sub-section 44 (2) of the Assessment Act applies;

(c) the company is not liable, and shall be deemed never to have been liable, to pay trust recoupment tax on the elected taxable amount.

(9) Where—

(a) a request made under this section in relation to a taxable amount is granted by the Commissioner; and

(b) after the request is granted, the taxable amount is increased or reduced,

sub-sections (7) and (8) have effect in relation to the request as if—

(c) the request had been made in relation to the increased or reduced taxable amount;

- (d) the request had been made by such persons as the Commissioner determines, being some or all of—
 - (i) the persons who, but for sub-sections (3) and (5), would have been required to make the request;
 - (ii) the persons who, by virtue of sub-section (3), could have been permitted to make the request; and
 - (iii) the persons whom the Commissioner considers should have been entitled under paragraph (5) (b) to make the request, if the request had been made in relation to the increased or reduced taxable amount; and
 - (e) the amounts specified in the request in relation to those persons had been such amount or amounts as the Commissioner considers appropriate and, where applicable, those amounts had been specified in relation to the relevant company or relevant companies.
- (10) In this section—
- “eligible person” means a prescribed person or a company not being a prescribed person;
- “replacement company”, in relation to a substitution request, means a company that is not a party to the request but would, but for sub-section (3), be entitled to be a party to the request;
- “substitution request” means a request under sub-section (1) any of the parties to which is a party by virtue only of the application of sub-section (3).

Liability to pay trust recoupment tax

8. (1) Subject to this Act, where a primary taxable amount, an elected taxable amount or a company taxable amount exists in relation to a person, the person is liable to pay the tax imposed on that taxable amount by the *Trust Recoupment Tax Act 1985*.

(2) Subject to this Act, where a secondary taxable amount exists in relation to an eligible beneficiaries class, the persons included in that class are jointly and severally liable to pay the tax imposed on that amount by the *Trust Recoupment Tax Act 1985*.

Reduction of liability where tax paid

9. (1) Where—
- (a) trust recoupment tax is or was payable on a secondary taxable amount and trust recoupment tax is payable on the primary taxable amount by reference to trust recoupment tax on which the secondary taxable amount was ascertained; and
 - (b) an amount of trust recoupment tax on that primary taxable amount is paid,

there shall be deemed to be applied, or to have been applied, in reduction of the trust recoupment tax that is or was payable on the secondary taxable amount, an amount equal to the amount paid as mentioned in paragraph (b).

(2) Where—

(a) trust recoupment tax is or was payable on a primary taxable amount and trust recoupment tax is payable on a secondary taxable amount ascertained by reference to trust recoupment tax on the primary taxable amount; and

(b) an amount of trust recoupment tax on the secondary taxable amount is paid,

an amount equal to the amount paid as mentioned in paragraph (b) shall be deemed to be applied, or to have been applied, in reduction of the trust recoupment tax that is or was payable on the primary taxable amount.

(3) Where under this section an amount is deemed to be applied, or to have been applied, in reduction of the trust recoupment tax that is or was payable on a taxable amount, being trust recoupment tax that includes or included late payment tax, the amount shall, to the extent to which it does not exceed the amount of that late payment tax, be deemed to be applied, or to have been applied, in reduction of that late payment tax and the balance (if any) shall be deemed to be applied, or to have been applied, in reduction of the remaining trust recoupment tax.

(4) In this section, “trust recoupment tax” includes late payment tax and penalty tax.

Right of contribution and apportionment of liability

10. (1) Where—

(a) the persons included in an eligible beneficiaries class are jointly and severally liable to pay trust recoupment tax on a secondary taxable amount; and

(b) a person included in that eligible beneficiaries class has paid any of that trust recoupment tax,

the person referred to in paragraph (b) may, in a court of competent jurisdiction, recover by way of contribution and as a debt from any of the other persons included in the class such part of the amount paid as the court considers just and equitable.

(2) Where proceedings against a person under section 209 of the Assessment Act for recovery of any trust recoupment tax payable on a secondary taxable amount are instituted in any court, the court may—

(a) on the application of the person, join, as co-defendant or as co-defendants in the proceedings, a specified person or specified persons who are included in the eligible beneficiaries class in relation to the secondary taxable amount; and

(b) having regard to—

(i) the amount or value of any benefit that each co-defendant has derived, or might reasonably be expected to derive, being a benefit to which sub-section 6 (4) applies in relation to the

person concerned in relation to the secondary taxable amount;
and

(ii) any other relevant circumstances,

determine, on just and equitable grounds, the respective proportions of the amount of the trust recoupment tax that the co-defendants are liable to pay.

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(3) In this section “trust recoupment tax” includes late payment tax and penalty tax.

Application of payments

11. (1) No part of any payment made to the Commissioner shall be applied in discharge or reduction of any trust recoupment tax while any late payment tax in respect of that trust recoupment tax remains unpaid.

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(2) This section has effect in relation to a payment made to the Commissioner notwithstanding any direction of the person making the payment.

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(3) In this section, “trust recoupment tax” includes applied penalty tax and penalty tax.

Penalty tax

12. (1) Where—

(a) for the purpose of making an assessment, the Commissioner has calculated the trust recoupment tax that is assessable to a person or persons in relation to a taxable amount, not being a secondary taxable amount arising under sub-section 6 (3);

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(b) the tax avoidance scheme to which the taxable amount relates was entered into after 28 April 1983 and before the commencement of this Act;

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(c) the assessment is to be made in a quarter (in this sub-section referred to as the “assessment quarter”) commencing after the end of the year of income that immediately succeeded the year of income to which the taxable amount relates; and

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(d) the index number in relation to the quarter immediately preceding the assessment quarter exceeds the index number in relation to the March quarter of the year of income that immediately succeeded the year of income to which the taxable amount relates,

the person is liable or, in the case of persons included in an eligible beneficiaries class, the persons are jointly and severally liable, to pay, by way of penalty, additional tax equal to an amount ascertained in accordance with the

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formula $\frac{A B}{C} - A$, where—

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A is the amount of the trust recoupment tax referred to in paragraph (a);

B is the index number in relation to the quarter immediately preceding the assessment quarter; and

C is the index number in relation to the March quarter referred to in paragraph (d).

(2) Where—

(a) for the purpose of making an assessment, the Commissioner has calculated the income tax that is assessable to a person in relation to a year of income (in this sub-section referred to as the “relevant year of income”);

(b) in the calculation of that income tax an amount was, or amounts were, included in the assessable income of the person by virtue of the application of section 7 in relation to a tax avoidance scheme or tax avoidance schemes entered into after 28 April 1983 and before the commencement of this Act;

(c) if the amount or amounts had not been included in the assessable income of the person—

(i) no income tax would have been assessable to the person in relation to the relevant year of income; or

(ii) there would have been assessable to the person in relation to the relevant year of income an amount of income tax (in this sub-section referred to as the “amount of claimed tax”) that is less than the amount of the income tax referred to in paragraph (a);

(d) the assessment is to be made in a quarter (in this sub-section referred to as the “assessment quarter”) commencing after the end of the year of income that immediately succeeded the relevant year of income; and

(e) the index number in relation to the quarter immediately preceding the assessment quarter exceeds the index number in relation to the March quarter of the year of income that immediately succeeded the relevant year of income,

the person is liable to pay, by way of penalty, additional tax equal to an amount ascertained in accordance with the formula $\frac{A B}{C} - A$, where—

A is—

(f) in a case to which sub-paragraph (c) (i) applies—the amount of the income tax referred to in paragraph (a); or

(g) in a case to which sub-paragraph (c) (ii) applies—the amount by which the amount of the income tax referred to in paragraph (a) exceeds the amount of claimed tax;

B is the index number in relation to the quarter immediately preceding the assessment quarter; and

C is the index number in relation to the March quarter referred to in paragraph (e).

(3) Where—

(a) for the purpose of making an assessment, the Commissioner has calculated the trust recoupment tax that is assessable to a person or

persons in relation to a taxable amount, not being a secondary taxable amount arising under sub-section 6 (3); and

- (b) the tax avoidance scheme to which the taxable amount relates was entered into after the commencement of this Act,

the person is liable or, in the case of persons included in an eligible beneficiaries class, the persons are jointly and severally liable, to pay, by way of penalty, additional tax equal to double the amount of the trust recoupment tax referred to in paragraph (a). 5

(4) Where—

- (a) for the purpose of making an assessment, the Commissioner has calculated the income tax that is assessable to a person in relation to a year of income (in this sub-section referred to as the “relevant year of income”); 10

- (b) in the calculation of that income tax an amount was, or amounts were, included in the assessable income of the person by virtue of the application of section 7 in relation to a tax avoidance scheme or tax avoidance schemes entered into after the commencement of this Act; and 15

- (c) if the amount or amounts had not been included in the assessable income of the person— 20

(i) no income tax would have been assessable to the person in relation to the relevant year of income; or

- (ii) there would have been assessable to the person in relation to the relevant year of income an amount of income tax (in this sub-section referred to as the “amount of claimed tax”) that is less than the amount of the income tax referred to in paragraph (a), 25

the person is liable to pay, by way of penalty, additional tax equal to—

- (d) in a case to which sub-paragraph (c) (i) applies—double the amount of the income tax referred to in paragraph (a); or 30

- (e) in a case to which sub-paragraph (c) (ii) applies—double the amount by which the amount of the income tax referred to in paragraph (a) exceeds the amount of claimed tax.

(5) Subject to sub-section (6), if at any time, whether before or after the commencement of this section, the Australian Statistician has published or publishes an index number in respect of a quarter in substitution for an index number previously published by him in respect of that quarter, the publication of the later index number shall be disregarded for the purposes of this section. 35

(6) If at any time, whether before or after the commencement of this section, the Australian Statistician has changed or changes the reference base for the Consumer Price Index, then, for the purposes of the application of this section after the change took place or takes place, regard shall be had only to the index numbers published in terms of the new reference base. 40

(7) The Commissioner shall make an assessment of the additional tax payable by a person or persons under a provision of this section.

5 (8) Notice of an assessment made in respect of a person or persons under sub-section (7) may be incorporated in notice of any other assessment made in respect of the person or persons under this Act or the Assessment Act.

10 (9) The Commissioner may, in the Commissioner's discretion, remit the whole or any part of the additional tax payable by a person or persons under a provision of this section, but, for the purposes of the application of sub-section 33 (1) of the *Acts Interpretation Act 1901* to the power of remission conferred by this sub-section, nothing in this Act shall be taken to preclude the exercise of the power at a time before an assessment is made under sub-section (7) of the additional tax.

15 (10) In this section, "index number", in relation to a quarter, means the All Groups Consumer Price Index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of the quarter.

Arrangements, &c., to avoid operation of Act

13. (1) Where—

20 (a) a scheme entered into or carried out by a person after 28 April 1983 would, but for this section, have the effect of in any way, directly or indirectly, defeating, evading or avoiding any liability of the person to pay trust recoupment tax; and

25 (b) it would be reasonable to conclude or infer that the person entered into or carried out the scheme for the purpose of in any way, directly or indirectly, defeating, evading or avoiding any liability of the person to pay trust recoupment tax or future trust recoupment tax,

then, in any prescribed recovery proceedings, the scheme shall be treated as being void in so far as it would, but for this section, have the effect mentioned in paragraph (a) but without prejudice to such validity as the scheme may have for any other purpose.

30 (2) Without limiting the generality of sub-section (1), where—

(a) a person (in this sub-section referred to as the "taxpayer") is liable to pay an amount of trust recoupment tax to the Commissioner;

(b) after 28 April 1983, the taxpayer has transferred or transfers property to another person;

35 (c) the transfer would, but for this section, have the effect of rendering the taxpayer unable to pay the trust recoupment tax, or any part of the trust recoupment tax;

(d) having regard to—

40 (i) the manner and circumstances in which the transfer was made;

(ii) the nature of any connection (whether of a business, family or other nature) between the taxpayer and the other person referred to in paragraph (b); and

(iii) any other relevant circumstances,

it would be reasonable to conclude or infer that the transfer was made by the taxpayer for the purpose of rendering the taxpayer unable to pay the trust recoupment tax, a part of the trust recoupment tax or any future trust recoupment tax; and

(e) either of the following conditions is satisfied:

(i) the transfer was made by way of gift; or

(ii) having regard to the circumstances referred to in paragraph (d), it would be reasonable to conclude or infer that the person to whom the property was transferred believed or suspected that the transfer was made by the taxpayer for the purpose referred to in paragraph (d),

then, in any prescribed recovery proceedings, the transfer shall be treated as being void in so far as it would, but for this section, have the effect mentioned in paragraph (c) but without prejudice to such validity as the transfer may have for any other purpose.

(3) A reference in this section to a scheme being entered into or carried out or a transfer of property being made by a person for a particular purpose shall be read as including a reference to the scheme being entered into or carried out or the transfer being made, as the case may be, by the person for 2 or more purposes of which that particular purpose is the dominant purpose.

(4) In this section—

(a) a reference to a transfer of property by a person includes a reference to—

(i) the execution by the person of a charge on property of the person in favour of another person;

(ii) the incurring by the person of an obligation in favour of another person; and

(iii) any scheme that has the effect, directly or indirectly, of diminishing the value of any property of the person and increasing the value of the property of another person or persons; and

(b) a reference, in relation to a transfer of property to which paragraph (a) applies, to the person to whom the property was transferred is a reference to—

(i) in a case to which sub-paragraph (a) (i) applies—the person in whose favour the charge referred to in that sub-paragraph was executed;

(ii) in a case to which sub-paragraph (a) (ii) applies—the person in whose favour the obligation referred to in that sub-paragraph was incurred; and

(iii) in a case to which sub-paragraph (a) (iii) applies—the person, or any of the persons, referred to in that paragraph the value of whose property was increased by reason of the transfer.

(5) A reference in sub-section (4) to a scheme that has the effect, directly or indirectly, of increasing the value of the property of a person includes a reference to a scheme that has the effect, directly or indirectly, that the person becomes the owner of property of which the person would not have been the owner but for the scheme, whether or not the property would have existed but for the scheme.

(6) A reference in this section to trust recoupment tax shall be read as including a reference to income tax payable by virtue of the operation of section 7 and a reference to future trust recoupment tax shall be read as including a reference to income tax that could reasonably have been expected by the person at the time when the scheme was entered into or carried out to become payable by the person after that time by virtue of the operation of section 7.

(7) In this section—

“future trust recoupment tax”, in relation to a person in relation to a scheme, means trust recoupment tax that could reasonably have been expected by the person at the time when the scheme was entered into or carried out to become payable by the person after that time;

“prescribed recovery proceedings”, in relation to trust recoupment tax, means—

(a) proceedings by the Commissioner or a Deputy Commissioner for recovery of the trust recoupment tax or part of the trust recoupment tax or of an amount that includes the trust recoupment tax or part of the trust recoupment tax;

(b) proceedings for enforcement of a judgment given in proceedings referred to in paragraph (a); or

(c) proceedings by a trustee within the meaning of the *Bankruptcy Act 1966* or by a liquidator, being proceedings for the benefit of the Crown, the Commissioner or a Deputy Commissioner or for the benefit of persons including the Crown, the Commissioner or a Deputy Commissioner;

“trust recoupment tax” includes applied penalty tax, late payment tax and penalty tax.

Regulations

14. The Governor-General may make regulations, not inconsistent with this Act, prescribing matters—

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act,

and, in particular, may make regulations prescribing penalties not exceeding a fine of \$500 for offences against the regulations.

