

# Income Tax Assessment

No. 87 of 1970

An Act to amend the Law relating to Income Tax in respect of Convertible Notes.

[Assented to 27 October 1970]

**B**E it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

Short title  
and citation.

1.—(1.) This Act may be cited as the *Income Tax Assessment Act 1970*.

(2.) The *Income Tax Assessment Act 1936–1969\** is in this Act referred to as the Principal Act.

(3.) The Principal Act, as amended by this Act, may be cited as the *Income Tax Assessment Act 1936–1970*.

Commence-  
ment.

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

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\* Act No. 27, 1936, as amended by No. 88, 1936; No. 5, 1937; No. 46, 1938; No. 30, 1939; Nos. 17 and 65, 1940; Nos. 58 and 69, 1941; Nos. 22 and 50, 1942; No. 10, 1943; Nos. 3 and 28, 1944; Nos. 4 and 37, 1945; No. 6, 1946; Nos. 11 and 63, 1947; No. 44, 1948; No. 66, 1949; No. 48, 1950; No. 44, 1951; Nos. 4, 28 and 90, 1952; Nos. 1, 28, 45 and 81, 1953; No. 43, 1954; Nos. 18 and 62, 1955; Nos. 25, 30 and 101, 1956; Nos. 39 and 65, 1957; No. 55, 1958; Nos. 12, 70 and 85, 1959; Nos. 17, 18, 58 and 108, 1960; Nos. 17, 27 and 94, 1961; Nos. 39 and 98, 1962; Nos. 34 and 69, 1963; Nos. 46, 68, 110 and 115, 1964; Nos. 33, 103 and 143, 1965; Nos. 50 and 83, 1966; Nos. 19, 38, 76 and 85, 1967; Nos. 4, 60, 70, 87 and 148, 1968; and Nos. 18, 93 and 101, 1969.

3. Section 5 of the Principal Act is amended by inserting before the words and figures—

“ Division 4.—Leases (Sections 83–89).”

the words and figures—

“ Division 3A.—Convertible Notes (Sections 82L–82T).”

4. Section 44 of the Principal Act is amended by omitting from subparagraph (iii) of paragraph (b) of sub-section (2.) the words “ section fifty-one AB of this Act ” and inserting in their stead the words “ Division 3A of Part III. (not being a convertible note in relation to which sub-section (1.) of section eighty-two s of this Act has effect or has at any time had effect) ”.

5.—(1.) Section 51AB of the Principal Act is repealed.

(2.) Notwithstanding the repeal of section 51AB of the Principal Act effected by the last preceding sub-section—

- (a) sub-section (6.) of that section continues to have effect in relation to outgoings incurred before the commencement of this Act;
- (b) sub-section (9.) of that section continues to have effect in relation to expenditure incurred before the commencement of this Act; and
- (c) sub-section (10.) of that section continues to have effect in relation to interest, or payments in the nature of interest, paid, credited or distributed before the commencement of this Act.

6. After Division 3 of Part III. of the Principal Act the following Division is inserted:—

“ Division 3A.—Convertible Notes.

“ 82L.—(1.) In this Division, unless the contrary intention appears— ‘convertible note’ includes a note issued by a company that provides, whether in pursuance of or by virtue of a trust deed or otherwise—

(a) that the amount of the loan to the company that is evidenced, acknowledged or created by the note or to which the note relates—

- (i) whether with or without interest;
- (ii) whether at par or not;
- (iii) whether at the option of the holder or owner of the note or of some other person or not;
- (iv) whether in whole or in part; or
- (v) whether exclusively or otherwise,

is to be or may be converted into shares in the capital of the company or of another company or is to be or may be redeemed, repaid or satisfied by—

- (vi) the allotment or transfer of shares in the capital of the company or of some other company, whether to the holder or owner of the note or to some other person;

Parts.

Dividends.

Interest on convertible notes.

Interpretation.

- (vii) the acquisition of such shares, whether by the holder or owner or by some other person, otherwise than as mentioned in the last preceding subparagraph; or
  - (viii) application in or towards paying-up, in whole or in part, the balance unpaid on shares issued or to be issued by the company or by some other company, whether to the holder or owner or to some other person; or
- (b) that the holder or owner of the note is to have, or may have, any right or option to have allotted or transferred to him or to some other person, or for him or some other person otherwise to acquire, shares in the capital of the company or of some other company;
- ‘ foreign loan ’ means a loan to a company raised outside Australia in a currency other than the currency of Australia;
- ‘ instrument ’ includes debenture, bond, certificate, receipt or any other document or writing;
- ‘ issued ’ includes given and executed, and ‘ issue ’ has a corresponding meaning;
- ‘ loan ’, in relation to a company, means—
- (a) a loan, advance or deposit of money to or with the company;
  - (b) money subscribed to the company; or
  - (c) any other form of debt or liability of the company, whether secured or unsecured and whenever redeemable, repayable or to be satisfied;
- ‘ note ’ means a note or other instrument issued by a company that evidences, acknowledges, creates or relates to a loan to the company;
- ‘ qualified person ’, in relation to the valuing of a share in the capital of a company, means a person registered as a company auditor under the law of a State or a Territory of the Commonwealth, but does not include—
- (a) a director, secretary or employee of the company;
  - (b) a partner, employer or employee of a person referred to in the last preceding paragraph; or
  - (c) a partner or employee of an employee of a person so referred to;
- ‘ the date of offer ’, in relation to a loan to a company, means the earliest date on which, by any relevant prospectus, notice, circular,

advertisement or other written invitation, any person was or persons were invited to subscribe to the loan—

(a) in the case of a new loan—by the payment of money to the company; or

(b) in the case of an approved replacement loan—by converting, in whole or in part, an earlier loan, or by converting, in whole or in part, an earlier loan and the payment of money to the company;

‘ the maturity date ’, in relation to a loan to which a convertible note applies, means the date by which the whole of the loan is, under the terms applicable to the note, to be repaid, redeemed or satisfied;

‘ the relevant valuation period ’, in relation to a share, means—

(a) where neither of the next two succeeding paragraphs applies in relation to the share—the period of one month ending on the date that is the valuation date in relation to the share;

(b) where—

(i) the share is included in a class of shares that, during the whole of the period of two months ending on the valuation date, was listed for quotation in the official list of a stock exchange that was a prescribed stock exchange during the whole of that period of two months, or in the official lists of two or more stock exchanges each of which was a prescribed stock exchange during the whole of that period of two months; and

(ii) fully paid shares included in that class of shares were not recorded by that stock exchange or by any of those stock exchanges, as the case may be, as having been sold during the period of one month specified in the last preceding paragraph but were recorded by that stock exchange or by one or more of those stock exchanges, as the case may be, as having been sold during the period of one month immediately preceding the commencement of the period of one month so specified,

that preceding period of one month; or

(c) where—

(i) the share is included in a class of shares that, during the whole of the period of three months ending on the valuation date, was listed for quotation in the official list of a stock exchange that was a prescribed stock exchange during the whole of that period of three months, or in the official lists of two or more stock exchanges each of

which was a prescribed stock exchange during the whole of that period of three months; and

- (ii) fully paid shares included in that class of shares were not recorded by that stock exchange or by any of those stock exchanges, as the case may be, as having been sold during the period of two months ending on the valuation date but were recorded by that stock exchange or by one or more of those stock exchanges, as the case may be, as having been sold during the period of one month immediately preceding the commencement of that period of two months,

that preceding period of one month;

‘ the valuation date ’, in relation to a share, means the date that is earlier by six weeks than the date that is the date of offer in relation to the loan in respect of which the value of the share is to be ascertained.

“ (2.) Where the combined effect or operation of two or more related instruments, whether issued at the same time or not, would have the effect or operation of a convertible note, those instruments shall, for the purposes of this Division, be deemed to be together a convertible note.

“ (3.) Where—

- (a) a company issues a note that provides that the amount of the loan to the company that is evidenced, acknowledged or created by the note or to which the note relates—

- (i) whether with or without interest;
- (ii) whether at par or not;
- (iii) whether at the option of the holder or owner of the note or of some other person or not;
- (iv) whether in whole or in part; or
- (v) whether exclusively or otherwise,

is to be or may be redeemed, repaid or satisfied by the issue, whether by the same company or by another company, of an instrument or a series of instruments; and

- (b) that instrument, or any instrument in that series of instruments, is to provide, whether in pursuance of or by virtue of a trust deed or otherwise, as mentioned in paragraph (a) or (b) of the definition of ‘ convertible note ’ in sub-section (1.) of this section,

that note and the instrument, or that note and each of the instruments in the series of instruments, shall, for the purposes of this Division, be deemed to be a convertible note.

“ (4.) For the purposes of this Division, a convertible note issued by a company applies to a loan to a company if it evidences, acknowledges or creates the loan.

“(5.) A reference in this Division to the terms, or a term, applicable to a convertible note shall be read as including a reference to terms, or a term, that so apply or applies in pursuance of or by virtue of a trust deed or otherwise.

“ 82M.—(1.) Where—

- (a) a loan to a company is made, and is wholly made, by money being paid to the company at the time when the loan is made; and
- (b) the loan is not part of or related to a transaction, or is not one of a series of related transactions, under which the person making the loan is to receive or has received, for the purpose of enabling him to make, or of assisting him in making, the loan, any money or other property from the company, or from another company or person as a result of arrangements made with that other company or person by the first-mentioned company,

the loan shall, for the purposes of this Division, be treated as a new loan.

“(2.) Where—

- (a) a loan to a company is, under the last preceding sub-section, to be treated as a new loan for the purposes of this Division;
- (b) the loan is not evidenced, acknowledged or created by a convertible note or is not a loan to which a convertible note otherwise applies;
- (c) the loan is for a fixed period;
- (d) the rate of interest payable in respect of the loan is the same in respect of all periods occurring before the date by which the whole of the loan is to be repaid, redeemed or satisfied; and
- (e) the loan is, in whole or in part, converted into another loan to the company or to another company, or the loan is, in whole or in part, converted into a part of another loan to the company or to another company and the remainder of the other loan—
  - (i) is made by money being paid to the company or other company at the time when the loan is made; and
  - (ii) would, if it were a separate loan, be a loan that, under the last preceding sub-section, is to be treated as a new loan for the purposes of this Division,

that other loan shall, for the purposes of this Division, be treated as an approved replacement loan.

“ 82N. For the purposes of this Division, a stock exchange is a prescribed stock exchange during a particular period or at a particular time if, in the regulations as in force during that period or at that time, it is specified as a prescribed stock exchange for the purposes of this Division or if it is declared by the regulations to have been a prescribed stock exchange for the purposes of this Division during that period or a period that includes that period or to have been a prescribed stock exchange for the purposes of this Division during a period that includes that time, as the case may be.

New loans and replacement loans.

Prescribed stock exchanges.

Bonus share allotments.

“ 82P.—(1.) For the purposes of this section, the making of a bonus share allotment by a company is the allotment by the company of shares (in this section referred to as ‘ bonus shares ’) in the capital of the company (being shares all of which are of the same class as each other) to persons who are the holders of other shares (in this section referred to as ‘ qualifying shares ’) in the capital of the company or in the capital of another company (being shares all of which are of the same class as each other but which are not necessarily of the same class as the bonus shares), being an allotment made to the holders of all shares of the same class as the qualifying shares or an allotment made in pursuance of applications for the allotment of the bonus shares by the holders of the qualifying shares in accordance with an invitation to apply for the allotment of shares given to the holders of the qualifying shares and the holders of all other shares of the same class as the qualifying shares.

“ (2.) Where—

- (a) the option to convert that exists under a convertible note is an option to have shares allotted to the holder or owner of the note; and
- (b) the terms applicable to the note are such that, if a bonus share allotment is made by the company that issued the note or by another company in respect of qualifying shares that are of the same class as the shares that are to be allotted to the holder or owner of the note upon the exercise of the option to convert, the holder or owner of the note is to have the right to have allotted to him shares in the capital of the company or of that other company, as the case may be, of the same class as the bonus shares on terms and conditions that are the same as or correspond with, or are no more favourable to him than, the terms and conditions on which bonus shares are allotted to any holder of qualifying shares,

that right shall, for the purposes of sub-paragraph (ii) of paragraph (d) of sub-section (1.) of section eighty-two s of this Act, be deemed to be an approved right relating to the allotting or transfer of bonus shares to the holder or owner of the convertible note.

“ (3.) Where—

- (a) the option to convert that exists under a convertible note is an option to have shares transferred to the holder or owner of the note; and
- (b) the terms applicable to the note are such that, if a bonus share allotment is made by the company that issued the note or by another company, being an allotment the qualifying shares relating to which include the shares that are to be transferred to the holder or owner of the note upon the exercise of the option to convert, and bonus shares allotted in respect of the qualifying shares to be so transferred are allotted to the holder of those shares on terms and conditions that are the same as or correspond with, or are no more favourable to him than,

the terms and conditions on which bonus shares are allotted to any other holder of qualifying shares, the holder or owner of the note is to have the right to have the bonus shares allotted to that person transferred to him upon the payment by him, where a consideration was paid or is payable in respect of the allotment of the bonus shares to the other person, of a consideration not less than that consideration,

that right shall, for the purposes of sub-paragraph (ii) of paragraph (d) of sub-section (1.) of section eighty-two s of this Act, be deemed to be an approved right relating to the allotting or transfer of bonus shares to the holder or owner of the convertible note.

“ 82Q.—(1.) Shares in the capital of a company—

Classes of shares.

(a) that have the same nominal value; and

(b) to which there are attached the same rights, including rights in respect of voting, dividends, repayment of share capital in consequence of a reduction of share capital and distribution of the property of the company in the event of the winding up of the company,

constitute a class of shares for the purposes of this Division, and no other shares in the capital of the company constitute a class of shares for such purposes.

“(2.) Notwithstanding anything contained in the last preceding sub-section, a share in the capital of a company to be allotted upon the exercise of the option to convert given under the terms applicable to a convertible note shall not, for the purposes of this Division, be deemed to be a share of a different class from a share in the capital of the company already allotted by reason only that, during the period of one year after the allotment of the first-mentioned share, any dividend payable in respect of the share will or may be less than any dividend payable in respect of the second-mentioned share.

“ 82R.—(1.) Subject to the next succeeding section, this section applies to a convertible note issued by a company, not being—

Interest on certain convertible notes not to be an allowable deduction.

(a) a convertible note issued on or before the fifteenth day of November, One thousand nine hundred and sixty; or

(b) a convertible note—

(i) the terms of the issue of which were announced by the company on or before that date; or

(ii) that the company was, in pursuance of an agreement made on or before that date, bound to issue.

“(2.) Where, in pursuance of the terms upon which any convertible notes were issued by a company, a person was entitled to have a convertible note issued to him by that company, the company shall, for the purposes of the last preceding sub-section, be deemed to have issued the convertible note to that person at the time when the person first became entitled to have the convertible note issued to him.



“(3.) An outgoing consisting of interest, or a payment in the nature of interest, under a convertible note to which this section applies shall be deemed not to be an allowable deduction from the assessable income of the company.

“(4.) Where a payment has been made by a person (whether under a guarantee or otherwise) that represents, in effect, a payment of interest under a convertible note to which this section applies and the company has incurred an outgoing by way of making good the first-mentioned payment to that person, whether by way of indemnification or otherwise, the amount of that outgoing shall, for the purposes of this section, be deemed to be an outgoing consisting of interest under the convertible note.

“(5.) Section sixty-seven of this Act does not apply to the expenditure incurred by the company in borrowing money by means of convertible notes to which this section applies.

“(6.) The interest, or payment in the nature of interest, under a convertible note to which this section applies shall, when paid, credited or distributed, be deemed, for the purpose of calculating the undistributed amount, as defined by section one hundred and three of this Act, in relation to the company, to be a dividend paid by the company.

Interest on certain convertible notes to be an allowable deduction.

“82s.—(1.) Subject to the succeeding provisions of this section, the last preceding section does not apply in relation to a convertible note issued by a company where—

- (a) the loan to the company to which the note applies is, under section eighty-two M of this Act, to be treated as a new loan or an approved replacement loan for the purposes of this Division;
- (b) the loan was made—
  - (i) after this section came into operation; and
  - (ii) within the period of six months commencing on the date that is the date of offer in relation to the loan;
- (c) the convertible note was issued before the expiration of two months after the loan was made; and
- (d) the terms applicable to the convertible note are, at the time the note was issued and at all subsequent times, such that—
  - (i) an option is given to the holder or owner of the convertible note (in this Division referred to as ‘the option to convert’) to have allotted or transferred to him shares in the capital of the company or of another company;
  - (ii) no provision is made for the allotting or transferring of shares in the capital of the company or of another company to the holder or owner of the convertible note except in pursuance of the exercise of the option to convert or except in pursuance of a right that, under section eighty-two P of this Act, is an approved right relating to the allotting or transfer of bonus shares to the holder or owner of the note;

- (iii) the convertible note would not, but for the option to convert and any right of the kind referred to in the last preceding sub-paragraph, be a convertible note;
- (iv) the earliest date on which the option to convert may be exercised is a date not later than two years after the date of offer;
- (v) the latest date on which the option to convert may be exercised is—
  - (A) a date not later than the maturity date of the loan or, if the date of offer is more than ten years earlier than the maturity date, a date not later than ten years after the date of offer; and
  - (B) a date not earlier than one year before the maturity date or, if the date of offer is earlier than eleven years before the maturity date, a date not earlier than ten years after the date of offer;
- (vi) the option to convert may be exercised at any time during the period commencing on the earliest date on which the option may be exercised and ending on the latest date on which the option may be exercised, or at times during that period none of which is more than twelve months later than the date on which the option was last previously exercisable;
- (vii) where the loan is not a foreign loan, the loan may not (except under a term applicable to the note the purpose of which is to protect the interests of the holder or owner of the note as a creditor of the company) be repaid, redeemed or satisfied, in whole or in part, before the expiration of seven years after the date of offer except to the extent of an amount that does not exceed the amount, or the aggregate of the amounts, payable in respect of the allotment or transfer of shares in pursuance of the exercise, during that period, of the option to convert;
- (viii) the rate of interest payable in respect of the loan is, subject to sub-section (6.) of this section where the loan is a foreign loan, the same in respect of all periods occurring before the maturity date of the loan;
- (ix) subject to sub-section (7.) of this section, the obligations and rights of the holder or owner of the convertible note (including, but without limiting the generality of the foregoing, obligations and rights with respect to the amount payable on repayment, redemption or satisfaction of the loan and the terms on which shares are to be allotted or transferred in pursuance of the exercise of the option to convert)—
  - (A) where the loan is not a foreign loan—do not vary by reason that he exercises the option, or he or

- the company exercises any other right in relation to the note, at one time rather than at another time after the issue of the note; or
- (B) where the loan is a foreign loan—do not vary in his favour by reason that he exercises the option, or he or the company exercises any other right in relation to the note, at a later rather than at an earlier time after the issue of the note;
- (x) the rights of the holder or owner of the convertible note with respect to the amount payable on repayment, redemption or satisfaction of the loan do not vary according to whether or not he exercises the option to convert;
  - (xi) the shares to be allotted or transferred upon the exercise of the option to convert—
    - (A) are to be allotted or transferred within two months after the exercise of the option;
    - (B) in the case of shares to be allotted, are, upon payment of the amount payable in respect of the allotment, to be fully paid shares or, in the case of shares to be transferred, are, at the time of transfer, to be fully paid shares; and
    - (C) are to be shares of the same class as shares in the capital of the company that, not later than two weeks before the date that is the date of offer in relation to the loan, had been allotted and were fully paid;
  - (xii) the shares to be allotted or transferred upon the exercise of the option to convert are to be shares with respect to which no provision is made (whether by the memorandum, or memorandum and articles, of the company, or other instrument constituting or defining the constitution of the company, or otherwise) for changing or converting them into shares of another class, except for the purpose of enabling, in accordance with any law relating to companies, the consolidation and division of all or any of the share capital of the company or of another company or the subdivision of all or any of the shares in the capital of the company or of another company; and
  - (xiii) the amount payable in respect of the allotment or transfer of a share in pursuance of the exercise of the option to convert is to be paid not later than one month after the allotment or transfer, and is to be not less than the amount that, for the purposes of this sub-section, is the minimum amount applicable to the share, that is to say, whichever

amount is the greater of the nominal value of the share or ninety per centum of the amount that, in accordance with the next succeeding section, is the value as at the valuation date of a fully paid share included in the class of shares in which the share to be allotted or transferred will be, or is, included.

“(2.) Where—

- (a) the loan to which a convertible note applies is not a foreign loan; and
- (b) the loan is, otherwise than in accordance with the terms applicable to the note and otherwise than by reason of a compromise or arrangement approved by a court, repaid, redeemed or otherwise satisfied, in whole or in part,

the last preceding sub-section ceases to have effect in relation to the note.

“(3.) Where sub-section (1.) of this section ceases to have effect in relation to a convertible note by reason of a change in the terms applicable to the note (not being a change resulting from a compromise or arrangement approved by a court) or by reason of the last preceding sub-section, sub-section (1.) of this section shall be deemed never to have had effect in relation to the note.

“(4.) Where a note is a convertible note in relation to which sub-section (1.) of this section has effect and the right to exercise the option to convert relating to the note becomes exercisable by a person other than the holder or owner of the note by reason of an assignment of that right, the assignment shall, for the purposes of this section, be disregarded.

“(5.) Where, in relation to a convertible note issued by a company, the company or a director of the company does any act or thing for the purpose of, or purposes that include the purpose of, and having the effect of, causing the amount that, for the purposes of sub-section (1.) of this section, is the minimum amount applicable to a share to be allotted or transferred in pursuance of the exercise of the option to convert relating to the note, to be less than it would otherwise have been, sub-section (1.) of this section does not have effect in relation to the note.

“(6.) Where, under the terms applicable to a convertible note that applies to a foreign loan, the rate of interest payable in respect of the loan is to be, or may be, varied from time to time (otherwise than with retrospective effect) by reference to the rate of interest prevailing from time to time at a specified place outside Australia in respect of a specified class of transactions, the term shall, for the purposes of sub-paragraph (viii) of paragraph (d) of sub-section (1.) of this section, be deemed not to be a term providing for a variation in the rate of interest payable in respect of the loan.

“(7.) For the purposes of sub-paragraph (ix) of paragraph (d) of sub-section (1.) of this section, the obligations and rights of the holder or owner of a convertible note shall not be deemed to vary in a manner referred to in that sub-paragraph by reason only that any dividend payable in respect of a share in the capital of a company to be allotted upon the exercise of the option to convert relating to the note, being a dividend payable during the period of one year after the allotment of the share, will or may vary according to the time when, in relation to the period to which the dividend relates, the option to convert is exercised.

Value of shares. “82T.—(1.) For the purposes of the last preceding section, the value of a fully paid share as at the valuation date is—

(a) where—

- (i) the share is included in a class of shares that, during the whole of the relevant valuation period, was listed for quotation in the official list of a stock exchange that was a prescribed stock exchange during the whole of that period, or in the official lists of two or more stock exchanges each of which was a prescribed stock exchange during the whole of that period; and
- (ii) fully paid shares included in that class of shares were recorded by that stock exchange, or by one or more of those stock exchanges, as the case may be, as having been sold during that period,

an amount ascertained by dividing the total consideration paid or payable in respect of those sales by the total number of shares so recorded as having been sold; and

- (b) in any other case—the amount that a person who is a qualified person in relation to the valuing of the share certifies that, on a true and fair view of the state of the company’s affairs, would, in respect of a sale at the end of the relevant valuation period between a willing but not anxious seller and a willing but not anxious buyer, be expected to be the consideration paid for the share, on the assumption, in a case where the class of shares in which that share is included was not, at the end of the relevant valuation period, listed for quotation in the official list of a stock exchange that, at that time, was a prescribed stock exchange, that the memorandum, or memorandum and articles, of the company, or other instrument constituting or defining the constitution of the company, satisfied, at that time, such of the requirements of a stock exchange that, at that time, was a

prescribed stock exchange as it would have been necessary to satisfy to enable that class of shares to be listed for quotation in the official list of that stock exchange.

“(2.) A person shall not, in a certificate for the purposes of this section, wilfully make a statement false in a material particular knowing it to be false.

Penalty: One thousand dollars.”.

7. Section 170 of the Principal Act is amended by inserting in sub-section (10.), after the words “ section seventy-seven D,”, the words “ sub-section (3.) of section eighty-two s,”.

Amendment of  
assessments.

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