

Deed

Deed

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Commonwealth Bank of Australia  
ACN 123 123 124

Commissioner of Taxation  
ABN 51 824 753 556

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## The agreement

## Deed

Date ► August 2009

Between the parties	
Party 1	<b>Commonwealth Bank of Australia</b> ACN 123 123 124 of 48 Martin Place, Sydney NSW 2000 (CBA)
Party 2	<b>Commissioner of Taxation</b> of 2 Lang Street, Sydney NSW 2000 (Commissioner)
Definitions and Interpretation	<p><b>Act</b> means the Income Tax Assessment Act 1936 (as amended) and the Income Tax Assessment Act 1997 (as amended) and includes regulations made pursuant to the Act, and any related legislation.</p> <p><b>Assignment Event</b> has the meaning set out in the Note Terms.</p> <p><b>Assignment Event Date</b> has the meaning set out in the Note Terms.</p> <p><b>Assignment Right</b> means CBA's right to elect that an Assignment Event occur under clause 5.1(e) of the Note Terms.</p> <p><b>Base Rate</b> means the base interest rate for a day as defined in section 8AAD(2) of the <i>Taxation Administration Act 1953</i>.</p> <p><b>Business Day</b> means a 'business day' under the ASX Listing Rules on which banks are open for general banking business in Sydney.</p> <p><b>Commissioner</b> means the Commissioner of Taxation of the Commonwealth of Australia and as required, his successors or assigns and any delegate or authorised representative acting on his behalf.</p> <p><b>Court</b> means the Administrative Appeals Tribunal, the Federal Court of Australia, a Full Court of the Federal Court of Australia or the High Court of Australia.</p> <p><b>Determination</b> means a determination pursuant to section 177EA(5)(b) of the ITAA 1936 in respect of frankable distributions that have been paid, are payable or are expected to be payable on the PERLS V to the Nominated Investor.</p> <p><b>Income Year</b> has the meaning set out in the <i>Income Tax Assessment</i></p>

## The agreement

	<p>Act 1997.</p> <p><b>Interest Payment Date</b> has the meaning set out in the Note Terms.</p> <p><b>Investor</b> means an investor in, or holder of, PERLS V, the Notes and/or the Preference Shares.</p> <p><b>ITAA 1936</b> means the <i>Income Tax Assessment Act 1936</i> (as amended) and includes regulations made pursuant to the Act, and any related legislation.</p> <p><b>ITAA 1997</b> means <i>Income Tax Assessment Act 1997</i>.</p> <p><b>Objection</b> means an objection lodged by the Nominated Investor pursuant to section 177EA(9) of the ITAA 1936 against a Determination.</p> <p><b>Objection Decision</b> means a decision by the Commissioner to disallow the Objection pursuant to section 14ZY of the TAA 1953.</p> <p><b>Nominated Investor</b> means an Investor nominated by CBA to the Commissioner.</p> <p><b>Note</b> means a subordinated, unsecured note issued under the Note Deed Poll (including the Note Terms).</p> <p><b>Note Deed Poll</b> has the meaning set out in the Note Terms.</p> <p><b>Note Terms</b> means the terms of issue set out in Appendix B of the Prospectus, substantially in the form attached as Attachment 1.</p> <p><b>Party</b> or <b>parties</b> means CBA and/or the Commissioner.</p> <p><b>PERLS V</b> means:</p> <p>(a) stapled securities comprising a Note and a Preference Share issued pursuant to the Prospectus including, where the context requires, each component part of the stapled securities; and</p> <p>(b) after the Assignment Event Date, the Preference Shares.</p> <p><b>Preference Share</b> means a fully paid preference share in the share capital of CBA issued on the Preference Share Terms.</p> <p><b>Preference Share Terms</b> means the terms of issue set out in Appendix A of the Prospectus, substantially in the form attached as Attachment 2.</p> <p><b>Prospectus</b> means the prospectus to be issued by CBA and lodged with the Australian Securities and Investments Commission on or around 27 August 2009 including any replacement or supplementary prospectus.</p> <p><b>Rate</b> means 70% of the Base Rate.</p> <p><b>TAA 1953</b> means <i>Taxation Administration Act 1953</i>.</p>
Background	<ol style="list-style-type: none"> <li>1 CBA proposes to issue stapled securities comprising a Preference Share stapled to a Note to be called PERLS V.</li> <li>2 CBA proposes to frank distributions, until an Assignment Event Date, on the Notes and, after an Assignment Event Date, on the Preference Shares.</li> <li>3 The Commissioner is of the view that section 177EA(5)(b) of the ITAA 1936 may entitle him to make a determination that no</li> </ol>

## The agreement

	<p>imputation benefit is to arise to Investors in respect of distributions on PERLS V prior to the Assignment Event Date.</p> <p>4 CBA does not agree with the Commissioner's view that section 177EA(5)(b) of the ITAA 1936 may apply.</p> <p>5 The parties have agreed to resolve the dispute in the manner set out in this Deed.</p> <p>6 In order to achieve an expeditious resolution of the legal issue in dispute and to protect the interests of the Commonwealth, the Commissioner has in the particular circumstances of this case agreed to refrain from exercising his power to deny the benefit of franking credits to all but one of the many thousands of expected investors in PERLS V. This will enable the issues to be properly tested before the courts in a representative case.</p> <p>7 Subject to the terms of this agreement, the Bank has agreed to ensure that the revenue will not be disadvantaged by indemnifying the Commissioner for lost revenue, if the Commissioner's position proves to be the correct view. It is expected that this Agreement will benefit the Commissioner in terms of reduced administrative costs as well as the Bank and Investors. However the Commissioner and Bank have provided that individual Investors may opt out of the arrangement if they wish to.</p>
This deed witnesses	that in consideration of, among other things, the mutual promises contained in this deed, the parties agree as set out in the Operative part of this deed.

## Operative part

### 1 Determination under section 177EA(5)(b) of the ITAA 1936

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- (a) If the Commissioner decides to make a Determination, he shall in any case do so as soon as possible and in relation to the first of any such Determinations, do so no later than 30 days after PERLS V have been quoted for trading on the ASX in respect of frankable distributions on PERLS V that are expected to be payable.
- (b) The Commissioner will not, subject to this Deed, make a determination pursuant to section 177EA(5)(b) of the ITAA 1936 in respect of frankable distributions on PERLS V that are paid, payable or expected to be payable to any Investor, other than the Nominated Investor.
- (c) CBA will procure that any Objection by the Nominated Investor against any Determination will be made within 14 days of receipt of notice of the Determination.
- (d) Within 14 days of receipt of the Objection, the Commissioner must either disallow the Objection, in whole or in part, or allow it.

### 2 Proceedings

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- (a) If the Commissioner disallows the Objection in whole or in part:
  - (1) the Nominated Investor will commence any proceedings under Part IVC of the TAA 1953 in respect of the Objection Decision within 14 days of receipt of notice of the Objection Decision;
  - (2) the parties will do everything in their power to prosecute the litigation expeditiously and will endeavour to limit disputes about the facts in the evidence filed; and
  - (3) CBA will procure that the Nominated Investor will not challenge the Objection Decision on any basis other than that the Commissioner was not entitled to make, or ought not as a matter of discretion to have made, the Determination.
- (b) CBA will elect that an Assignment Event occurs in respect of all Notes under clause 5.1 of the Note Terms on or before the next Interest Payment Date after the first to occur of the following (if any):
  - (1) If a Determination is made but the Nominated Investor does not lodge an Objection – 30 days after the Determination is made;
  - (2) If the Nominated Investor receives notice of the Objection Decision but does not commence proceedings under Part IVC of the TAA 1953 within 14 days of receiving that notice – 14 days after notice of the Objection Decision is received;

- (3) If any Part IVC proceedings have been concluded and there exists a valid Determination that no imputation benefit arises in respect of all or a specified part of a distribution – on the date that Part IVC proceedings are taken to have been concluded under clause 2(h).
- (c) CBA will pay to the Commissioner an amount calculated in accordance with clause 2(d) within 14 days of the date upon which CBA is required to elect that an Assignment Event occurs pursuant to clause 2(b) (whether or not CBA complies with its obligation under clause 2(b) to elect that an Assignment Event occurs).
- (d) The amount to be paid by CBA to the Commissioner will be calculated for each Income Year from the date the PERLS V are issued to the first date to occur as set out in clause 2(b) in accordance with the following formula:
- $$F \times 70\% \times P$$
- where:
- F = the total amount of the franking credits on distributions paid by CBA during the Income Year in respect of the Notes, as stated in the distribution statements for those distributions
- $P = A / B$
- A = the imputation benefit that the Nominated Investor does not receive as a result of a valid Determination
- B = the imputation benefit that the Nominated Investor would have received had no Determination been made.
- (e) Interest is payable by CBA on any amount calculated pursuant to clause (d) in respect of each Income Year at the Rate for each day between:
- (1) the 31 October immediately following the end of the Income year; and
  - (2) the date payment is made by CBA to the Commissioner pursuant to clause 2(c), with the interest compounding daily.
- (f) Any amount paid by CBA to the Commissioner pursuant to clause 2(c) or 2(e) will not be deductible under the Act and will not have any franking consequences.
- (g) Any amount payable by CBA to the Commissioner pursuant to clause 2(e) will be paid at the same time as payment under clause 2(c) is made.
- (h) For the purposes of this Deed, the Part IVC proceedings will have been concluded at the latest of the following:
- (1) 28 days after a decision of the Administrative Appeals Tribunal, if the Nominated Investor does not commence an appeal to the Federal Court of Australia within those 28 days;
  - (2) 28 days after a decision of the Federal Court of Australia, if the Nominated Investor does not commence an appeal to a Full Court of the Federal Court within those 28 days;
  - (3) 28 days after a decision of a Full Court of the Federal Court, if the Nominated Investor does not make an application for Special Leave to Appeal to the High Court within those 28 days;

- (4) 7 days after any application by the Nominated Investor for special leave to appeal a decision of a Full Court of the Federal Court upholding the Objection Decision is refused by the High Court of Australia;
  - (5) 7 days after any decision of the High Court of Australia;
  - (6) 7 days after any discontinuance by the Nominated Investor of Administrative Appeals Tribunal proceedings or Federal Court proceedings or of any appeal to a Full Court of the Federal Court or application for leave to appeal or appeal to the High Court of Australia.
- (i) If CBA does not comply with clause 2(b), the Commissioner may make determinations in respect of frankable distributions on PERLS V that are paid, payable or expected to be payable to any Investors in respect of Interest Payment Dates between:
- (1) the date upon which CBA is required to elect that an Assignment Event occurs pursuant to clause 2(b); and
  - (2) the date CBA elects that an Assignment Event occurs in respect of all Notes under clause 5.1 of the Note Terms.

### 3 Investors who opt out

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- (a) If any Investor requests the Commissioner to make a determination pursuant to section 177EA(5)(b) in respect of any frankable distributions on the Notes that are paid, payable or expected to be payable to that Investor:
- (1) the Commissioner may make a determination pursuant to section 177EA(5)(b) in respect of those franked or frankable distributions; and
  - (2) the Commissioner must notify CBA in writing that such a request has been made, without identifying the particular Investor, within 14 days of the date that request is made by the Investor; and
  - (3) the amount payable by CBA to the Commissioner pursuant to clause 2(c) is reduced by an amount calculated for each Income Year in accordance with the following formula:

$$F \times 70\% \times P$$

where:

F = the total amount of franking credits on distributions paid by CBA to the Investor during the Income Year in respect of the Notes, as stated in the distribution statements for those distributions

$$P = A / B$$

A = the imputation benefit that the Nominated Investor does not receive as a result of a valid Determination

B = the imputation benefit that the Nominated Investor would have received had no Determination been made.



## 4 General

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### 4.1 Giving effect to the Deed

The Parties mutually covenant and agree that they will each do all the acts and things and execute all the deeds and documents as shall, from time to time, be reasonably required for the purpose of, and to give effect to, this Deed.

### 4.2 Governing law and jurisdiction

- (a) This deed is governed by the law in force in New South Wales, Australia.
- (b) Each party irrevocably submits to the non-exclusive jurisdiction of courts exercising jurisdiction in New South Wales and courts of appeal from them in respect of any proceedings arising out of or in connection with this deed. Each party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

### 4.3 Invalidity and enforceability

- (a) If any provision of this deed is invalid under the law of any jurisdiction the provision is enforceable in that jurisdiction to the extent that it is not invalid, whether it is in severable terms or not.
- (b) Clause 4.3(a) does not apply where enforcement of the provision of this deed in accordance with clause 4.3(a) would materially affect the nature or effect of the parties' obligations under this deed.

### 4.4 Waiver

No party to this deed may rely on the words or conduct of any other party as a Waiver of any Right unless the Waiver is in writing and signed by the party granting the Waiver.

The meanings of the terms used in this clause 4.4 are set out below.

Term	Meaning
conduct	includes delay in the exercise of a right.
right	any right arising under or in connection with this deed and includes the right to rely on this clause.
waiver	includes an election between rights and remedies, and conduct which might otherwise give rise to an estoppel.

### 4.5 Variation

A variation of any term of this deed must be in writing and signed by the parties.

#### **4.6 Assignment of rights**

- (a) Rights arising out of or under this deed are not assignable by a party without the prior written consent of the other party.
- (b) A breach of clause 4.6(a) by a party entitles the other party to terminate this deed.
- (c) Clause 4.6(b) does not affect the construction of any other part of this deed.

#### **4.7 Severability**

- (a) Subject to clause 4.7(b) the application of any clause of this deed which is prohibited in any jurisdiction is, in that jurisdiction, ineffective only to the extent of that prohibition.
- (b) Clause 4.7(a) does not apply where the prohibition of the application of any clause of this deed in any jurisdiction would substantially change the nature of the parties' obligations under the deed.

#### **4.8 Entire agreement**

This deed states all the express terms of the agreement between the parties in respect of its subject matter. It supersedes all prior discussions, negotiations, understandings and agreements in respect of its subject matter.

#### **4.9 No reliance**

Neither party has relied on any statement by the other party not expressly included in this deed.

#### **4.10 Counterparts**

This deed may be executed in any number of counterparts.

### **5 Notices**

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#### **5.1 Form of Notice**

A notice or other communication to a party under this deed (**Notice**) must be:

- (a) in writing and in English; and
- (b) addressed to that party in accordance with the details nominated in Schedule 1 (or any alternative details nominated to the sending party by Notice).

#### **5.2 How Notice must be given and when Notice is received**

- (a) A Notice must be given by one of the methods set out in the table below.

- (b) A Notice is regarded as given and received at the time set out in the table below.

However, if this means the Notice would be regarded as given and received outside the period between 9.00am and 5.00pm (addressee's time) on a Business Day (**business hours period**), then the Notice will instead be regarded as given and received at the start of the following business hours period.

Method of giving Notice	When Notice is regarded as given and received
By hand to the nominated address	When delivered to the nominated address
By pre-paid post to the nominated address	At 9.00am (addressee's time) on the second Business Day after the date of posting
By fax to the nominated fax number	At the time indicated by the sending party's transmission equipment as the time that the fax was sent in its entirety.  However, if the recipient party informs the sending party within 4 hours after that time that the fax transmission was illegible or incomplete, then the Notice will not be regarded as given or received. When calculating this 4 hour period, only time within a business hours period is to be included.

### 5.3 Notice must not be given by email or other electronic communication

A Notice must not be given by email or other electronic means of communication (other than fax as permitted in clause 5.2).

## 6 Interpretation

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### 6.1 Agreement components

This agreement includes any schedule.

### 6.2 Interpretation

In this deed:

- (a) Headings and bold type are for convenience only and do not affect the interpretation of this deed.
- (b) The singular includes the plural and the plural includes the singular.
- (c) Words of any gender include all genders.

- (d) Other parts of speech and grammatical forms of a word or phrase defined in this deed have a corresponding meaning.
- (e) An expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any Government Agency as well as an individual.
- (f) A reference to a clause, party, schedule, attachment or exhibit is a reference to a clause of, and a party, schedule, attachment or exhibit to, this deed and a reference to this deed includes any schedule, attachment and exhibit.
- (g) A reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them.
- (h) A reference to a document includes all amendments or supplements to, or replacements or novations of, that document.
- (i) A reference to a party to a document includes that party's successors and permitted assignees.
- (j) A reference to an agreement other than this deed includes a deed and any legally enforceable undertaking, agreement, arrangement or understanding, whether or not in writing.
- (k) A reference to liquidation or insolvency includes appointment of an administrator, compromise, arrangement, merger, amalgamation, reconstruction, winding-up, dissolution, deregistration, assignment for the benefit of creditors, scheme, composition or arrangement with creditors, insolvency, bankruptcy, or any similar procedure or, where applicable, changes in the constitution of any partnership or person, or death.
- (l) No provision of this deed will be construed adversely to a party because that party was responsible for the preparation of this deed or that provision.
- (m) A reference to a body, other than a party to this deed (including an institute, association or authority), whether statutory or not:
  - (1) which ceases to exist; or
  - (2) whose powers or functions are transferred to another body,is a reference to the body which replaces it or which substantially succeeds to its powers or functions.

### **6.3 Interpretation of inclusive expressions**

Specifying anything in this deed after the words 'include' or 'for example' or similar expressions does not limit what else is included.

### **6.4 Business Day**

Where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day.

Executed as a deed

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Signed sealed and delivered by  
**Commonwealth Bank of Australia**  
By

*sign here ►* \_\_\_\_\_

*print name* \_\_\_\_\_

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Signed sealed and delivered by  
**Commissioner of Taxation of the Commonwealth of Australia**

*sign here ►* \_\_\_\_\_

*print name* \_\_\_\_\_

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## Schedule 1

### Notice details

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#### **Clause 5**

##### **CBA**

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##### **Commissioner of Taxation of the Commonwealth of Australia**

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