



## Class Ruling

### Income tax: Babcock & Brown Communities Limited (previously Primelife Corporation Limited) – proposed return of capital to shareholders

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#### **❶ This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### **Relevant provision(s)**

2. The relevant provisions dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - subsection 44(1) of the ITAA 1936;
  - section 45A of the ITAA 1936;
  - section 45B of the ITAA 1936; and
  - section 45C of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

## Class of entities

3. The class of entities to which this Ruling applies is the owners of ordinary shares in Babcock & Brown Communities Limited (BBCL), who are registered on the BBCL share register on the Record Date (anticipated to be 6 August 2007), being the date for determining entitlements to the proposed return of capital and who:

- hold their BBCL shares on capital account; and
- are residents of Australia within the meaning of that term in subsection 6(1).

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 13 to 26 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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8. This Ruling applies from 1 July 2007 to 30 June 2008. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

9. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Scheme

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13. The following description of the scheme is based on information provided by Ernst & Young (the applicant). The following documents, or relevant parts of them, form part of and are to be read with the description:

- the application for a Class Ruling from the applicant dated 30 January 2007;
- a revised application of the Class Ruling from the applicant dated 14 May 2007;
- Explanatory Booklet dated 15 June 2007 in relation to a proposal to form the Babcock & Brown Communities Group;
- the Babcock & Brown Communities Group Implementation Agreement between Primelife Corporation Limited (Primelife), Babcock & Brown Australia Pty Limited and MFS Limited dated 30 May 2007;
- the Notice of General Meeting of Primelife shareholders dated 15 June 2007 relating to the General Meeting to be held on 19 July 2007;

- the Stapling Deed between Primelife and MTM Funds Management Limited; and
- Additional information provided by the applicant on 1 March 2007, 2 April 2007, 2 May 2007, 14 May 2007, 18 June 2007 and 19 June 2007.

14. Primelife is a publicly listed entity on the Australian Stock Exchange.

15. Primelife, to be re-branded as BBCL, proposes to make a return of capital of \$100 million, equating to \$0.43 per share to its ordinary shareholders.

16. The return of capital is part of a wider restructuring which is proposed to be undertaken to form a stapled security structure, Babcock & Brown Communities Group (BBCG).

17. The restructure proposal is to comprise of, amongst other things, the following elements:

- BBCL to consolidate its interests in its aged care and retirement village assets;
- BBCL to make a return of capital to facilitate the stapled security structure; and
- BBCL's shares to be stapled to units in a unit trust.

18. BBCL is to consolidate its interest in its aged care and retirement village assets by:

- Prime Living Trust (PLT), partly owned by BBCL, to dispose of its interest in Aevum Limited for market consideration;
- BBCL to acquire PLT's shareholding in a number of entities for market value consideration;
- BBCL to acquire the balance of units in PLT and shares in the trustee of PLT, PLT Management Limited, it does not own for shares in BBCL; and
- BBCL to acquire all shares in Babcock & Brown Retirement Villages Pty Limited for shares in BBCL.

19. The proposed return of capital is subject to BBCL shareholders' approval at a shareholders' meeting to be held on 19 July 2007. The proposed return of capital will be applied equally to each holder of fully paid ordinary shares on the register on the Record Date (anticipated to be 6 August 2007). The main conditions for the proposed return of capital are:

- that BBCL shareholders approve a scheme of arrangement to allow for the return of capital to be reinvested in units in the Babcock & Brown Communities Trust (BBCT), a trust settled on 27 April 2007 for nominal value; and
- for each unit in BBCT to be stapled to one BBCL share.

20. BBCL is to make to all shareholders a return of capital of \$100 million. The proposed return of capital is to be made on the Payment Date (anticipated to be on 10 August 2007).
21. The proposed return of capital is to be debited to the share capital account of BBCL.
22. Immediately before the proposed return of capital BBCL will have share capital of 232,425,155 ordinary shares on issue with total contributed equity of \$302,349,499.
23. The effect of the stapling is the formation of BBCG as one single economic group.
24. The applicant has advised that the share capital account is not tainted for the purposes of Subdivision 197 of the *Income Tax Assessment Act 1997* (ITAA 1997).
25. BBCL non-resident shareholders hold less than 1% of the total shareholding and none of the major shareholders have non-resident beneficiaries.
26. Because of accumulated losses BBCL has not declared any dividends for the income years ended 30 June 2004, 30 June 2005 and 30 June 2006.

## **Ruling**

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### **Dividends**

27. The payment of the proposed return of capital will not be a dividend, as defined in subsection 6(1).

### **Anti-avoidance provisions**

28. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the proposed return of capital to be received by BBCL shareholders.

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**Commissioner of Taxation**

4 July 2007

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### Dividends

29. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholder out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

30. 'Dividend' is defined in subsection 6(1) to include any distribution made by a company to any of its shareholders. However, this broad definition is confined by later paragraphs in the definition which expressly exclude certain items from being a dividend for income tax purposes.

31. A specific exclusion is paragraph (d) of the definition which provides:

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company.

32. As BBCL has confirmed that the proposed return of capital will be debited to their untainted share capital account, paragraph (d) of the definition of 'dividend' applies to exclude the distribution from falling within the definition of 'dividend'. Accordingly, the proposed return of capital would not be regarded as a dividend.

### Anti-avoidance provisions

#### **Sections 45A and 45B**

33. Sections 45A and 45B are two anti avoidance provisions which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfranked dividend that is paid by the company out of profits to the shareholder.

**Streaming of dividends and capital benefit: section 45A**

34. Section 45A applies in circumstances where capital benefits are streamed to shareholders (the advantaged shareholders) who would, in the year of income in which the capital benefits are provided, derive a greater capital benefit than the other shareholders (the disadvantaged shareholders) who would receive dividends.

35. BBCL is providing its shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b)), and the capital benefit is to be provided to all shareholders in direct proportion to their individual shareholding. As all shareholders benefit equally from the proposed return of capital, there is no 'streaming' of capital benefits to some shareholders and not to others. Accordingly, section 45A does not apply to the proposed return of capital, and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the proposed return of capital.

**Schemes to provide capital benefits in substitution for dividends: section 45B**

36. Section 45B applies where certain amounts of a capital nature are provided to shareholders in substitution for dividends.

37. Subsection 45B(2) sets out the conditions under which the Commissioner will make a determination under subsection 45B(3) that section 45C applies. These conditions are that:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- under the scheme a taxpayer (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

Each of these conditions is considered below.

38. The proposed return of capital will be a 'scheme' within the broad meaning of that term.

39. The phrase 'provided with a capital benefit' is defined at subsection 45B(5). It includes a distribution to a person of share capital. As BBCL proposes to debit the return of capital against its share capital account, shareholders will be provided with a capital benefit.

40. A shareholder 'obtains a tax benefit', as defined in subsection 45B(9), where the amount of tax payable or any other amount payable under the ITAA 1936 or the ITAA 1997 by the shareholder would, apart from the operation of section 45B:

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend.

### **Relevant circumstances**

41. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

42. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. The requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

43. The purpose which causes section 45B to apply may be the purpose of any party to the scheme. In this case, however, the Commissioner is concerned only with the purpose of BBCL. The Commissioner cannot at this stage apprehend the purposes of BBCL's shareholders, all of whom are eligible to vote on the proposed return of capital under section 256C of the *Corporations Act 2001* and all of whom will participate in the proposed return of capital. Nevertheless, in a case such as this, an objective conclusion as to the purpose of the company should, generally speaking, not be inconsistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who will vote on the proposal.

44. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance, as the proposed return of capital is made to all shareholders of BBCL regardless of individual shareholder circumstances, paragraphs 45B(8)(c) to (h) do not incline for or against a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and (j) pertaining to the provision of ownership interests and demerger, respectively, are not relevant. In this case, the relevant matters are those covered by circumstances described in paragraphs 45(8)(a), (b) and (k).

45. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital or profits (realised and unrealised) of the company or an associate (within the meaning of section 318) of the company. In this case, the proposed return of capital is attributable to the creation of BBCG as a stapled security structure and neither BBCL nor PLT are in a position on their own to make a distribution of profits.

46. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company. Neither BBCL nor its associate's pattern of distributions suggests that the proposed return of capital will be made in substitution for a dividend.

47. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to (viii). These matters are by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, the timing of the scheme, its form and substance, and the financial and other implications for the parties involved.

48. BBCL is proposing to return an equal amount of share capital to all ordinary shareholders on the condition that it be applied to acquire units in BBCT. In this case, the practical implications of the scheme are consistent with it being, in form and substance, a genuine return of capital.

49. Therefore, having regard to the relevant circumstances of the scheme to return capital to BBCL's shareholders, it is concluded that BBCL will enter into or carry out the scheme for an incidental purpose of enabling the shareholders to obtain a tax benefit.

50. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C is to apply to the whole, or any part, of the proposed return of capital.

#### **Section 45C – deeming dividends to be paid where determinations under section 45A or 45B are made**

51. As the Commissioner will not make a determination under subsections 45A(2) or 45B(3) in relation to the scheme as described, section 45C will not deem any part of the proposed return of capital to be a dividend for the purposes of the ITAA 1936 or ITAA 1997.

## **Appendix 2 – Detailed contents list**

52. The following is a detailed contents list for this Ruling:

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## References

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### *Previous draft:*

Not previously issued as a draft

### *Subject references:*

- return of capital on shares

### *Legislative references:*

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  - ITAA 1936 45B(8)(e)
  - ITAA 1936 45B(8)(f)
  - ITAA 1936 45B(8)(h)
  - ITAA 1936 45B(8)(i)
  - ITAA 1936 45B(8)(j)
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  - ITAA 1936 45B(9)
  - ITAA 1936 45C
  - ITAA 1936 177D(b)(i)
  - ITAA 1936 177D(b)(ii)
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