



Class Ruling

Income tax: AWB Limited Scheme of Arrangement and Proposed Special Dividend

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Scheme	9
Ruling	25
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	44
Appendix 2:	e
<i>Detailed contents list</i>	106

① 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provisions

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;
- subparagraph 128B(3)(ga)(i) of the ITAA 1936;
- section 128D of the ITAA 1936;
- Division 1A of former Part IIIA of the ITAA 1936;
- former section 160APHM of the ITAA 1936;
- former section 160APHN of the ITAA 1936;
- paragraph 177EA(5)(b) of the ITAA 1936;

- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 67-25 of the ITAA 1997;
- section 104-10 of the ITAA 1997;
- subsection 116-20(1) of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- paragraph 204-30(3)(c) of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 207-145 of the ITAA 1997;
- subsection 855-10(1) of the ITAA 1997; and
- section 855-15 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders in AWB Limited (AWB) who:

- receive the Special Dividend; and
- hold their AWB shares on capital account; and
- dispose of their shares in AWB to Agrium South Pacific Pty Limited (Agrium Australia) as nominee for Agrium Inc (Agrium) under the Scheme of Arrangement; and
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their AWB shares.

Note: Division 230 will generally not apply to individuals, unless they have made an election for it to apply them.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 9 to 24 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.

7. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Copyright Law Branch
Attorney-General's Department
National Circuit
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

Date of effect

8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

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

- Class Ruling application, including appendices, from KPMG dated 17 September 2010;
- Scheme Implementation Deed dated 20 August 2010;
- Scheme Booklet dated 7 October 2010; and
- correspondence from KPMG dated 8 October 2010, 13 October 2010, 22 October 2010, 26 October 2010 and 27 October 2010.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

AWB

10. AWB is an Australian resident company listed on the Australian Securities Exchange. AWB is a major wheat marketing corporation and the main representative of Australian wheat growers in world markets.

11. AWB's share capital structure consists of B class ordinary shares. At 30 September 2010, AWB had 817,304,356 fully paid B class shares on issue. Its shareholders are a mix of individuals, companies, superannuation funds and other institutional investors, some of which are non-residents.

12. Prior to the implementation of the scheme, AWB's constitution prevented any one shareholder from acquiring or owning more than 10% of AWB's issued share capital. The constitution also provided that dividends may not be paid except out of profits.

Agrium

13. Agrium is a Canadian resident company listed on both the Toronto Stock Exchange and the New York Stock Exchange. It is a leading producer and supplier of agricultural products and services.

14. Agrium Australia is an indirectly wholly owned subsidiary of Agrium. It is incorporated in Australia and registered in Victoria.

The Scheme of Arrangement

15. On 20 August 2010, AWB and Agrium announced that they had signed a Scheme Implementation Deed under which Agrium Australia will acquire all the issued capital in AWB by way of a Scheme of Arrangement under section 411 of the *Corporations Act 2001*. Agrium nominated Agrium Australia as the acquirer of the shares under the Scheme of Arrangement under Clause 4.1(b) of the Scheme Implementation Deed.

16. As at the date of the Scheme Implementation Deed, Agrium did not hold any shares in AWB, either directly or indirectly.

17. A court ordered Scheme Meeting of AWB shareholders was held on 16 November 2010 at which a resolution was put seeking their approval for the Scheme of Arrangement.

18. Immediately following the Scheme Meeting on 16 November 2010, an Extraordinary General Meeting was held at which two resolutions to amend the constitution were put to the shareholders, one removing the 10% limit on any one shareholding and the other to allow the payment of dividends from any available source permitted by law.

19. The Scheme Record Date is 1 December 2010 and the Implementation Date is 3 December 2010.

Scheme consideration

20. Under clause 4.2 of the Scheme Implementation Deed, the Scheme Consideration will be \$1.50 per AWB share minus the amount of any Permitted Dividend declared on each AWB share.

The Proposed Special Dividend

21. AWB will pay a Special Dividend, subject to the necessary declaration by the Board of Directors. The Special Dividend will be fully franked and will be \$0.15 cash per AWB share. The Special Dividend will be sourced entirely from AWB's retained earnings and AWB will not debit the Special Dividend to its share capital account. The Special Dividend will be a Permitted Dividend and will be funded by Agrium in the manner described at paragraph 22 of this Ruling.

22. Under clause 4.3 of the Scheme Implementation Deed, Agrium agreed that it will fund the payment of the Permitted Dividend by providing AWB with an unsecured, interest-free loan equal to the aggregate amount of the Permitted Dividend. This loan will not be repayable to Agrium until at least one year from the payment date of the Permitted Dividend.

23. Under Clause 4.3(a) of the Scheme Implementation Deed, the Permitted Dividend is only payable if the Scheme of Arrangement becomes effective.

24. If the Special Dividend is paid, the Special Dividend Record Date will be 25 November 2010 and the Special Dividend Payment Date will be 30 November 2010.

Ruling**The Proposed Special Dividend**

25. The Special Dividend of \$0.15 cash per AWB share will constitute a dividend as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Proposed Special Dividend

26. An AWB shareholder who receives the fully franked Special Dividend and is a resident of Australia as defined in subsection 6(1) of the ITAA 1936 is required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross up and tax offset

27. An AWB shareholder who receives the fully franked Special Dividend directly will:

- include the amount of the franking credit attached to the Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit,

under section 207-20, subject to being a qualified person.

28. An AWB shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1), subject to satisfying the qualified person rule.

Qualified persons

29. The payment of the Special Dividend as part of the Scheme of Arrangement will constitute a related payment within the meaning of former section 160APHN of the ITAA 1936.

30. Accordingly, each AWB shareholder will need to hold their AWB shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person in respect of the Special Dividend.

31. Each AWB shareholder will no longer be considered to hold their AWB shares 'at risk' for the purposes of Division 1A of former Part IIIA of the ITAA 1936 (former Division 1A) as from the Scheme Record Date of 1 December 2010. Therefore, an AWB shareholder will be a qualified person in relation to the Special Dividend if, from 12 October 2010 until 30 November 2010 inclusive, the AWB shareholder continued to hold the AWB share and did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of the AWB share for a continuous period of at least 45 days.

Refundable tax offset

32. The franking credit allocated to the Special Dividend will be subject to the refundable tax offset rules in Division 67, provided the participating AWB shareholder is not excluded by the operation of section 67-25.

Non-resident shareholders

33. An AWB shareholder who receives the fully franked Special Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) will not be required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

Capital gains tax (CGT) consequences***CGT event A1***

34. CGT event A1 will happen when an AWB shareholder disposes of each of their AWB shares to Agrium Australia (subsections 104-10(1) and 104-10(2)).

35. The time of the CGT event A1 will be the Implementation Date of 3 December 2010 (paragraph 104-10(3)(b)).

36. An AWB shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an AWB share exceed its cost base. The capital gain is equal to the amount of the excess. An AWB shareholder will make a capital loss if those capital proceeds are less than the AWB share's reduced cost base (subsection 104-10(4)). The capital loss is equal to the amount of the difference.

Capital proceeds

37. The capital proceeds received by an AWB shareholder will be the money that the shareholder receives or is entitled to receive in respect of the event happening (subsection 116-20(1)).

38. The capital proceeds received by an AWB shareholder who disposes of their AWB shares under the Scheme of Arrangement and who is entitled to the Special Dividend will be \$1.50 for each AWB share.

Anti-overlap provisions

39. Any capital gain made by an AWB shareholder when CGT event A1 happens can be reduced (but not below zero) by the amount of the Special Dividend that is included in the AWB shareholder's assessable income under subsection 44(1) of the ITAA 1936 (section 118-20 of the ITAA 1997). The amount of any capital loss made by an AWB shareholder will not be adjusted by the amount of the Special Dividend.

Foreign resident AWB shareholders

40. An AWB shareholder that is a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens disregards under subsection 855-10(1) any capital gain or capital loss from CGT event A1 happening to the AWB shares if the shares are not taxable Australian property as defined in section 855-15.

The anti-avoidance provisions

41. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

42. Section 207-145 will not apply to the whole, or any part, of the Special Dividend received by AWB shareholders.

43. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend paid in relation to an AWB share.

Commissioner of Taxation

17 November 2010

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.*

The Proposed Special Dividend

44. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders.

45. The payment of the Special Dividend is a distribution of money by AWB to its shareholders.

46. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes from the definition of 'dividend' any:

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...

47. The Special Dividend will be sourced entirely from AWB's retained earnings and AWB will not debit the Special Dividend to its share capital account. Therefore, the exclusions in paragraph (d) will not apply and the Special Dividend will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Proposed Special Dividend

48. Subparagraph 44(1)(a)(i) of the ITAA 1936 includes in the assessable income of an Australian resident shareholder in a company:

dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

49. As the Special Dividend will be paid to AWB shareholders out of profits derived by AWB, each AWB shareholder, who is a resident of Australia as defined in subsection 6(1) of the ITAA 1936, is required to include the Special Dividend as assessable income.

Gross up and tax offset

50. Section 207-20 provides:

- (1) If an entity makes a franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the franking credit on the distribution. This is in addition to any other amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a tax offset for the income year in which the distribution is made. The tax offset is equal to the franking credit on the distribution.

51. Therefore, subject to satisfying the qualified person rule, where the fully franked Special Dividend is received directly by an AWB shareholder, the AWB shareholder will:

- include the amount of the franking credit attached to the Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit.

52. Where the fully franked Special Dividend is received by an AWB shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

If:

- (a) a franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust - the trust is not a complying superannuation entity or FHSA trust when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the franking credit on the distribution.

53. Therefore, subject to satisfying the qualified person rule, an AWB shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1).

Refundable tax offset

54. Shareholders who are entitled to a tax offset under subsection 207-20(2), in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

55. Pursuant to section 67-25, there are a range of taxpayers who are specifically excluded from the operation of the refundable tax offset rules. This range of excluded entities includes:

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A));
- a trustee of a trust who is liable to be assessed under section 98 or 99A of the ITAA 1936 (subsection 67-25(1B) of the ITAA 1997);
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the company on behalf of its shareholders (subsections 67-25(1C) and 67-25(1D)); and
- foreign resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

56. Accordingly, a holder of AWB shares will be subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities under section 67-25. Generally, corporate tax entities (including companies, corporate limited partnerships, corporate unit trusts, and public trading trusts) will be excluded from the operation of the refundable tax offset rules.

Non-resident shareholders

57. Subparagraph 44(1)(b)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder in a company:

dividends (other than non-share dividends) paid to the shareholder by the company to the extent to which they are paid out of profits derived by it from sources in Australia.

58. Subsection 128B(1) of the ITAA 1936 imposes Australian withholding tax on income that:

- (a) is derived, on or after 1 January 1968, by a non-resident; and
- (b) consists of a dividend paid by a company that is a resident.

59. However, subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes from subsection 128B(1) of the ITAA 1936 income derived by a non-resident that consists of the franked part of a dividend. As the Special Dividend is fully franked, it will not be subject to Australian withholding tax when derived by non-resident AWB shareholders.

60. Section 128D of the ITAA 1936 states that:

Income other than income to which section 128B applies by virtue of subsection (2A), (2C) or (9C) of that section upon which withholding tax is payable, or upon which withholding tax would, but for paragraph 128B(3)(ga) or (jb), section 128F, section 128FA or section 128GB, be payable, is not assessable income and is not exempt income of a person.

61. As the Special Dividend is income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936, it will not be assessable income and will not be exempt income of non-resident AWB shareholders pursuant to section 128D of the ITAA 1936.

62. Accordingly, an AWB shareholder who receives the fully franked Special Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) will not be required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

Qualified persons

63. Former Division 1A of the ITAA 1936 contains the measures known as the holding period rule and the related payment rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

64. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) of the ITAA 1936 as follows:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a qualified person in relation to the dividend if:

- (a) (where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend - the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend - the taxpayer has satisfied subsection (2) in relation to the secondary qualification in relation to the dividend.

65. Former subsection 160APHO(2) of the ITAA 1936, referred to in paragraph 64 of this Ruling, sets out the holding period requirement. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

66. In order to determine the relevant qualification period, it is necessary to determine whether, under the present arrangement, the AWB shareholders are considered to be under an obligation to make a related payment.

67. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A of the ITAA 1936. Former subsection 160APHN(2) of the ITAA 1936 provides:

The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

68. Former paragraph 160APHN(3)(d) of the ITAA 1936 states:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other person:

...

- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or

...

69. Former subsection 160APHN(4) of the ITAA 1936 states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to;

the amount of dividend or distribution.

70. In the current circumstances, it is considered that an integral part of the Scheme of Arrangement is the payment of the Special Dividend of \$0.15 cash per share. The payment of the Special Dividend is conditional upon the Scheme of Arrangement proceeding, tying the payment of the Special Dividend to the disposal of the AWB shares. The payment of the Special Dividend is a part of the total consideration of \$1.50 per share to be paid to AWB shareholders for the disposal of their AWB shares to Agrium Australia.

71. In these circumstances, in determining whether an AWB shareholder is taken to have made or be likely to make a related payment in respect of the Special Dividend, it is considered that the circumstances surrounding the payment of the Special Dividend would constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936. As such, it can be concluded that an AWB shareholder will be taken to have made a related payment in respect of the Special Dividend.

72. As the AWB shareholders will be taken, for the purposes of former Division 1A of the ITAA 1936, to have made a related payment in respect of the Special Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

73. The secondary qualification period is defined in former section 160APHD of the ITAA 1936 as follows:

In relation to a taxpayer in relation to shares or an interest in shares, means:

- (a) if the shares are not preference shares - the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest becomes ex dividend...

74. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

75. Eligibility for the Special Dividend is determined on the Special Dividend Record Date of 25 November 2010. This is the last day on which acquisition by a person of an AWB share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 26 November 2010.

76. The secondary qualification period thus runs from 45 days before the ex-dividend date of 26 November 2010 as determined in paragraph 75 and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 12 October 2010 to 10 January 2011. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the AWB shares are to be excluded. This would mean that the secondary qualification period would run from 12 October 2010 until the date that AWB shareholders are no longer at risk for the purposes of former Division 1A of the ITAA 1936.

77. Entitlement to participate in the Scheme of Arrangement will be determined on the Scheme Record Date which is 1 December 2010. AWB shareholders who dispose of their shares under the Scheme of Arrangement will no longer be considered to hold their AWB shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 as of 1 December 2010.

78. Accordingly, for an AWB shareholder who disposes of their shares under the Scheme of Arrangement, the secondary qualification period will run from 12 October 2010 to 30 November 2010 (inclusive). An AWB shareholder who receives the Special Dividend will need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A of the ITAA 1936. Further, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, neither the date of acquisition nor the date of disposal is included in the relevant 45 day period.

Capital gains tax consequences

79. The CGT consequences that arise from the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

80. The application of these provisions however raises one issue of interpretation that requires further explanation. It concerns the proper characterisation of the Special Dividend for CGT purposes.

81. The capital proceeds from a CGT event includes, relevantly, the money received or entitled to be received in respect of the event happening (subsection 116-20(1)).

82. The phrase 'in respect of the event happening' in subsection 116-20(1) requires that the relationship between the event and the receipt of the money, or entitlement to receive the money, must be more than coincidental. An amount is not 'capital proceeds' of an event merely because it is received in association with the event.

83. An AWB shareholder who disposes of an AWB share under the Scheme of Arrangement and who is entitled to the Special Dividend will receive \$1.50 cash. This is made up of the Special Dividend of \$0.15 from AWB and the Scheme Consideration of \$1.35 (being \$1.50 reduced by the amount of the Special Dividend) payable by Agrium or Agrium Australia.

84. A dividend declared by a company that is subject to a takeover can form part of the vendor shareholders' capital proceeds from the disposal of the shares. Taxation Ruling TR 2010/4 states in paragraph 9 that:

A dividend declared or paid by the target company to the vendor shareholder will be money or property that the vendor shareholder has received, or is entitled to receive, under the contract or the scheme of arrangement, in respect of the transfer of the shares, if the vendor shareholder has bargained for the receipt of the dividend (whether or not in addition to other consideration) in return for giving up the shares. That is to say, if the dividend forms the whole or part of that sum of money or property in return for which the vendor shareholder is willing, and under the contract has promised or under the scheme of arrangement is bound, to transfer the shares in the target company, it will be capital proceeds in respect of the CGT event A1 happening.

85. In this case, the payment of the Special Dividend will not occur independently of the Scheme of Arrangement. This is primarily reflected in the following scheme attributes:

- the Scheme Consideration offered of \$1.50 per AWB share is reduced by the amount of the Special Dividend;
- the Special Dividend may only be paid if the Scheme becomes effective; and
- Agrium has consented to the payment of the Special Dividend and notably agreed to lend to AWB, by way of an interest-free loan, the funds to enable AWB to pay the Special Dividend.

86. In light of these factors, it is considered that the Special Dividend is part of the sum of money in return for which the AWB shareholders will have, by approving the Scheme of Arrangement, demonstrated their willingness to transfer the shares. Accordingly, the Special Dividend will form part of the capital proceeds which an AWB shareholder will receive in respect of CGT event A1 happening.

The anti-avoidance provisions

Section 204-30

87. Section 204-30 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a)); and
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and

- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

88. Relevantly, if section 204-30 applies, the Commissioner is vested with discretion under subsection 204-30(3) to make a determination in writing either:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); or
- (b) that no imputation benefit is to arise in respect of a distribution that is made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

89. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

90. Pursuant to the payment of the Special Dividend, all AWB shareholders will receive an imputation benefit as a result of the dividend; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a)) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders (subsection 204-30(8)).

91. However, the Special Dividend will be paid to all AWB Shareholders and will be fully franked with Australian franking credits.

92. Accordingly, it cannot be argued that AWB will direct the flow of distributions in such a manner as to stream the imputation benefits such that one class of members derive a greater benefit from the franking credits attached to the Special Dividend, while the other members receive lesser or no imputation benefits.

93. As the conditions in subsection 204-30(1) for the provision to apply will not be met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

Section 207-145

94. Section 207-145 applies where, inter alia, a franked distribution is made as part of a dividend stripping operation. Section 207-155 defines a dividend stripping operation as being:

- (a) by way of or in the nature of dividend stripping; or
- (b) having substantially the effect of a scheme by way of or in the nature of a dividend stripping.

95. Having regard to the purpose of the scheme under which the shareholders will dispose of their AWB shares to Agrium Australia, the scheme will not be a scheme by way of or in the nature of dividend stripping, or a scheme having substantially the effect of a scheme by way of or in the nature of dividend stripping to which subsection 207-145(1) is applicable.

Section 177EA

96. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares.

97. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, a person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

98. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a) of the ITAA 1936) or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

99. AWB is a corporate tax entity. The disposal of the ordinary shares in AWB pursuant to the Scheme of Arrangement is a scheme for the disposition of membership interests. The fully franked Special Dividend is a frankable distribution that will be paid to AWB shareholders as a part of this scheme and who could, therefore, reasonably be expected to receive imputation benefits.

100. In the present case, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(17) of the ITAA 1936), it would be concluded that, on the part of AWB, its shareholders or any other relevant party, there is a purpose of more than merely an incidental purpose of conferring an imputation benefit under the scheme.

101. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may not be present at any one time in any one scheme.

102. The relevant circumstances include the fact that the disposition of the ordinary shares in AWB is to be made pursuant to a takeover by Agrium by way of a Scheme of Arrangement under the *Corporations Act 2001* voted upon by AWB's existing shareholders.

103. The Special Dividend will be fully franked and will be paid to the existing shareholders of AWB in proportion to their shareholding, and irrespective of their ability to utilise the relevant franking credits. The Special Dividend will allow AWB shareholders to share in the accumulated profits of AWB.

104. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by AWB or the AWB shareholders for more than an incidental purpose of enabling participating shareholders to obtain imputation benefits. The goal of providing imputation benefits to AWB shareholders remains incidental, in the sense of being subservient to, to the purpose of transferring their shares to Agrium Australia.

105. Having regard to the relevant circumstances of the scheme, the Commissioner has come to the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit to be received in relation to the dividends.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provisions	2
Class of entities	3
Qualifications	4
Date of effect	8
Scheme	9
AWB	10
Agrium	13
The Scheme of Arrangement	15
Scheme consideration	20
The Proposed Special Dividend	21
Ruling	25
The Proposed Special Dividend	25
Assessability of the Proposed Special Dividend	26
Gross up and tax offset	27
Qualified persons	29
Refundable tax offset	32
Non-resident shareholders	33
Capital gains tax consequences	34
<i>CGT event A1</i>	34
<i>Capital proceeds</i>	37
<i>Anti-overlap provisions</i>	39
<i>Foreign resident AWB shareholders</i>	40
The anti-avoidance provisions	41
Appendix 1 – Explanation	44
The Proposed Special Dividend	44
Assessability of the Proposed Special Dividend	48
Gross up and tax offset	50
Refundable tax offset	54
Non-resident shareholders	57
Qualified persons	63

Related payment rule	66
Capital gains tax consequences	79
The anti-avoidance provisions	87
<i>Section 204-30</i>	87
<i>Section 207-145</i>	94
<i>Section 177EA</i>	96
Appendix 2 – Detailed contents list	106

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2010/4

Subject references:

- arrangement
- CGT capital proceeds
- CGT event A1 – disposal of a CGT asset
- distributions
- franking credits
- ordinary shares
- qualified person
- related payment rule
- takeovers & mergers

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 44(1)(a)(i)
- ITAA 1936 44(1)(b)(i)
- ITAA 1936 44(1)(b)(ii)
- ITAA 1936 98
- ITAA 1936 99A
- ITAA 1936 128B(1)
- ITAA 1936 128B(3)(ga)
- ITAA 1936 128B(3)(ga)(i)
- ITAA 1936 128D
- ITAA 1936 Pt IIIA Div1A
- ITAA 1936 160APHD
- ITAA 1936 160APHE
- ITAA 1936 160APHE(1)
- ITAA 1936 160APHM
- ITAA 1936 160APHN
- ITAA 1936 160APHN(2)
- ITAA 1936 160APHN(3)
- ITAA 1936 160APHN(3)(d)
- ITAA 1936 160APHN(4)
- ITAA 1936 160APHO(1)
- ITAA 1936 160APHO(1)(b)
- ITAA 1936 160APHO(2)
- ITAA 1936 160APHO(2)(a)
- ITAA 1936 160APHO(3)
- ITAA 1936 177EA
- ITAA 1936 177EA(3)
- ITAA 1936 177EA(3)(a)
- ITAA 1936 177EA(3)(b)
- ITAA 1936 177EA(3)(c)
- ITAA 1936 177EA(3)(d)
- ITAA 1936 177EA(5)
- ITAA 1936 177EA(5)(a)
- ITAA 1936 177EA(5)(b)
- ITAA 1936 177EA(17)
- ITAA 1997
- ITAA 1997 Div 67
- ITAA 1997 67-25
- ITAA 1997 67-25(1A)
- ITAA 1997 67-25(1B)
- ITAA 1997 67-25(1C)
- ITAA 1997 67-25(1D)
- ITAA 1997 67-25(1DA)
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(2)
- ITAA 1997 104-10(3)(b)
- ITAA 1997 104-10(4)
- ITAA 1997 116-20(1)
- ITAA 1997 118-20
- ITAA 1997 204-30
- ITAA 1997 204-30(1)
- ITAA 1997 204-30(1)(a)
- ITAA 1997 204-30(1)(b)
- ITAA 1997 204-30(1)(c)
- ITAA 1997 204-30(3)
- ITAA 1997 204-30(3)(a)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 204-30(6)(a)
- ITAA 1997 204-30(6)(e)
- ITAA 1997 204-30(8)
- ITAA 1997 207-20
- ITAA 1997 207-20(2)
- ITAA 1997 207-35(1)
- ITAA 1997 207-145
- ITAA 1997 207-145(1)
- ITAA 1997 207-155
- ITAA 1997 Div 230
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001
- Corporations Act 2001 411

ATO references

NO: 1-2BZ5TT9

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Assessable Income ~~ dividend, interest
and royalty income
Income Tax ~~ Capital Gains Tax ~~ CGT event A1 –
disposal of a CGT asset