



Class Ruling

Income tax: Crowe Horwath Australasia Ltd Scheme of Arrangement and Special Dividend

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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 provision(s)

2. The relevant provision(s) 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 128B of the ITAA 1936
- section 128D of the ITAA 1936
- Division 1A of former Part IIIA of the ITAA 1936
- section 177EA of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 83A-35 of the ITAA 1997

- section 104-10 of the ITAA 1997
- Division 115 of the ITAA 1997
- section 116-20 of the ITAA 1997
- section 204-30 of the ITAA 1997
- section 207-20 of the ITAA 1997
- section 207-35 of the ITAA 1997
- section 207-75 of the ITAA 1997
- section 207-145 of the ITAA 1997
- section 208-195 of the ITAA 1997, and
- section 855-10 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders of Crowe Horwath Australasia Ltd (CRH) who:

- (a) held their CRH shares on capital account
- (b) participated in the CRH Scheme of Arrangement (the CRH Scheme) under which Findex Australia Pty Ltd (Findex) acquired all of the shares in CRH and received the Special Dividend, and
- (c) are not subject to the taxation of financial arrangement rules in Division 230 of the ITAA 1997 in relation to gains and losses on their CRH shares.

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

4. In this Ruling, an entity belonging to this class of entities is referred to as a 'CRH shareholder'.

Qualifications

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

6. 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 37 of this Ruling.

7. 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.

Date of effect

8. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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 dated 3 December 2014
- Scheme Implementation Agreement dated 6 October 2014, together with its annexures
- Crowe Horwath Scheme Booklet dated 11 November 2014
- WHK Group Exempt Share Plan Trust Deed dated 25 June 2004 (last amended 22 October 2012), and
- other correspondence provided by the applicant on 11 December 2014, 12 December 2014 and 15 December 2014.

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

Relevant Entities

CRH

10. CRH is a resident of Australia for income tax purposes. Prior to the implementation of the scheme, CRH was listed on the Australian Securities Exchange and was the head entity of the CRH tax consolidated group.

11. CRH is a financial services company that provides business advisory, accounting and financial planning services in Australia and New Zealand.

12. As at 18 September 2014 CRH had 273,005,429 ordinary shares on issue. CRH did not have any other class of shares on issue.

13. The CRH shares were held by Australian resident and non-resident entities, including companies, superannuation funds and other institutional investors.
14. As at 13 October 2014, approximately 89% of CRH shares were held by resident entities.
15. No non-resident shareholders, either alone or together with associates, beneficially held 10% or more of the shares in CRH on 18 December 2014.
16. CRH also had performance rights on issue as at 11 November 2014. These performance rights vested in accordance with their terms under the Performance Share Plan and were converted into ordinary shares in CRH prior to the Special Dividend Record Date.
17. CRH is not and has never been an exempting entity pursuant to Division 208 of the ITAA 1997.
18. The sum of the market values of CRH's assets that are 'taxable Australian real property', as defined in section 855-20 of the ITAA 1997, does not exceed the sum of the market values of its assets that are not taxable Australian real property.

Findex

19. Findex is an Australian resident company and the parent entity of the Findex Group.
20. The Findex Group provides retail financial planning, accounting and wealth management services across the financial advice industry.

The Scheme of Arrangement

21. On 3 October 2014, CRH and Findex entered into a Scheme Implementation Agreement under which Findex proposed to acquire all the issued shares in CRH pursuant to a members' scheme of arrangement under Part 5.1 of the *Corporations Act 2001*.
22. The CRH Scheme was approved by the requisite majority of CRH shareholders at the Scheme Meeting held on 15 December 2014.
23. Under the CRH Scheme, CRH shareholders who held CRH shares at the Scheme Record Date of 30 December 2014 were entitled to receive the Scheme Consideration in consideration for the transfer of their CRH shares to Findex.
24. The CRH Scheme was implemented on 6 January 2015 (Scheme Implementation Date).
25. The Scheme Consideration was a cash payment of \$0.50 per CRH share, less the amount of any Special Dividend.

The Special Dividend

26. On 15 December 2014, subsequent to the Scheme Meeting, the CRH Board of Directors determined to pay a fully franked Special Dividend of \$0.057 per CRH share, subject to the CRH Scheme becoming effective.

27. The determination of the Special Dividend was at the absolute discretion of the CRH Board of Directors. Findex did not have any influence or control over the declaration or payment of the Special Dividend.

28. Implementation of the CRH Scheme was not conditional upon the declaration or payment of the Special Dividend.

29. CRH shareholders registered as holding CRH shares on the Special Dividend Record Date of 22 December 2014 received the fully franked Special Dividend of \$0.057 per share on the Special Dividend Payment Date of 29 December 2014.

30. The Special Dividend was funded from existing debt facilities and available cash reserves and the full amount of the Special Dividend was debited to CRH's retained earnings.

Crowe Horwath Exempt Share Plan

31. Some CRH shares that were on issue prior to the CRH Scheme being implemented were held by employees of CRH under the Crowe Horwath Exempt Share Plan (the Share Plan).

32. Under the Share Plan, eligible CRH employees were given the opportunity to be provided with ordinary shares in CRH up to the value of \$1,000 as part of their remuneration package. CRH employees were eligible to participate in the Share Plan if they were a permanent full time or part time employee of CRH at the time of the offer.

33. CRH shares allocated under the Share Plan were held by the trustee of the Share Plan on the employee's behalf in accordance with the Share Plan trust deed.

34. CRH shares acquired by employees under the Share Plan were subject to disposal restrictions under the rules of the Share Plan that prevented the CRH shares from being disposed of before the earlier of:

- three years after the date of allocation of the shares, or
- the time the employee ceases to be employed by their employer company.

35. The Share Plan was suspended with effect from 3 October 2014 pursuant to the Scheme Implementation Agreement.

36. CRH shareholders who acquired shares under the Share Plan were required to dispose of their CRH shares pursuant to the CRH Scheme in the same manner as other CRH shareholders.

37. Where a CRH share was held by the trustee of the Share Plan, the Scheme Consideration was paid to the trustee of the Share Plan who disbursed those proceeds to the relevant employee.

Ruling

The Special Dividend

38. The Special Dividend of \$0.057 cash per CRH share paid to a CRH shareholder constitutes a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

39. A CRH shareholder who received 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.

40. A CRH shareholder who received 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) is not required to include the Special Dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and is not liable for Australian withholding tax in respect of the Special Dividend (paragraph 128B(3)(ga) of the ITAA 1936).

41. A CRH shareholder who received the fully franked Special Dividend and is a non-resident carrying on business in Australia at or through a permanent establishment in Australia, where the Special Dividend is attributable to the permanent establishment, is not liable for Australian withholding tax in respect of the Special Dividend (subsection 128B(3E) of the ITAA 1936) but is required to include the Special Dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936.

Gross up and tax offset

42. A CRH shareholder who received the fully franked Special Dividend directly and who satisfies the residency requirements in section 207-75 of the ITAA 1997:

- must include the amount of the franking credit on the Special Dividend in their assessable income (gross up), and
- will be entitled to a tax offset equal to the amount of the franking credit (tax offset)

under section 207-20 of the ITAA 1997, subject to being a qualified person in relation to the Special Dividend.

43. A CRH shareholder (not being a corporate tax entity), who received the fully franked Special Dividend as a trustee of a trust (not being a complying superannuation entity or a FHSA trust) or as a partnership, is required to include an amount equal to the franking credit attached to the Special Dividend as assessable income under subsection 207-35(1) of the ITAA 1997, subject to the trustee or the partnership being a qualified person.

Qualified person

44. The payment of the Special Dividend as part of the scheme constitutes a related payment for the purposes of former section 160APHN of the ITAA 1936.

45. Accordingly, each CRH shareholder will need to have held their CRH 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.

46. It is considered that from the Scheme Record Date of 30 December 2014 a CRH shareholder was no longer holding their CRH shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

47. Therefore, a CRH shareholder would be a qualified person in relation to the Special Dividend if, in the period from 8 November 2014 until 29 December 2014 inclusive, they had continued to hold their CRH shares 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 their CRH shares for a continuous period of at least 45 days (not counting the day on which the share was acquired or the day of disposal of the share).

Refundable tax offset

48. The franking credit tax offset that CRH shareholders are entitled to under Division 207 of the ITAA 1997 is subject to the refundable tax offset rules in Division 67 of the ITAA 1997. Certain trustees and corporate tax entities are excluded from the refundable tax offset rules because of section 67-25 of the ITAA 1997.

49. As CRH is not an exempting entity or former exempting entity at the time of payment of the Special Dividend, section 208-195 of the ITAA 1997 will not apply to deny the gross up of a CRH shareholder's assessable income to exclude the franking credit, nor to deny the tax offset to which a CRH shareholder would otherwise have been entitled under Division 207 of the ITAA 1997 at the time of the Special Dividend Payment.

Capital gains tax (CGT)

CGT event A1

50. CGT event A1 happened when a CRH shareholder disposed of their CRH share to Findex pursuant to the CRH Scheme (subsections 104-10(1) and 104-10(2) of the ITAA 1997).

51. The time of the event was when the change of ownership in the CRH shares occurred. This was when the CRH shares were transferred to Findex on the Scheme Implementation Date of 6 January 2015 (paragraph 104-10(3)(b) of the ITAA 1997).

Capital gain or capital loss

52. A CRH shareholder made a capital gain when CGT event A1 happened if the capital proceeds from the disposal of their CRH share exceeded its cost base (subsection 104-10(4) of the ITAA 1997). The capital gain is the amount of the excess.

53. A CRH shareholder made a capital loss if the capital proceeds were less than the reduced cost base of their CRH share (subsection 104-10(4) of the ITAA 1997). The capital loss is the amount of the difference.

Capital proceeds

54. The capital proceeds received by a CRH shareholder from the CGT event is the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

55. The Special Dividend of \$0.057 does not form part of the capital proceeds as it is considered, having regard to the circumstances of the CRH Scheme, that the Special Dividend was not paid in respect of CGT event A1 happening.

56. The capital proceeds received by a CRH shareholder for each CRH share they disposed of under the CRH Scheme is \$0.443.

Discount capital gain

57. A CRH shareholder who made a capital gain is eligible to treat the gain as a discount capital gain if they acquired their CRH share at least 12 months before the date of disposal (that is, 6 January 2015) and they satisfy the other conditions in Division 115 of the ITAA 1997.

Foreign resident CRH shareholders

58. A CRH shareholder that is a foreign resident, or trustee of a foreign trust for CGT purposes, just before CGT event A1 happened under the CRH Scheme disregards any capital gain or capital loss made from CGT event A1 happening if their CRH shares were not 'taxable Australian property' as defined in section 855-15 of the ITAA 1997 (subsection 855-10(1) of the ITAA 1997).

Crowe Horwath Exempt Share Plan

59. CRH shareholders who acquired their CRH shares under the Share Plan and who were previously entitled to a reduction in the amount to be included in their assessable income pursuant to section 83A-35 of the ITAA 1997 will continue to be entitled to that reduction.

Anti-avoidance provisions

60. 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 respect of the Special Dividend paid in relation to a CRH share.

61. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in respect of the Special Dividend paid in relation to a CRH share.

62. Section 207-145 of the ITAA 1997 will not apply to the whole, or any part, of the Special Dividend received by a CRH shareholder, provided the shareholder is a qualified person.

Commissioner of Taxation**4 February 2015**

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 Special Dividend

63. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders, whether in money or other property.

64. The payment of the Special Dividend is a distribution in money made by CRH to its shareholders.

65. Paragraph 6(1)(d) of the ITAA 1936 excludes from the definition of 'dividend' the following:

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or any 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...

66. The Special Dividend was paid out of CRH's retained earnings account, not the share capital account. Therefore, the exclusion in paragraph 6(1)(d) of the ITAA 1936 does not apply and the Special Dividend constitutes a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

Residents

67. 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.

68. As the Special Dividend was paid to CRH shareholders out of profits derived by CRH, CRH shareholders who are residents of Australia, as defined in subsection 6(1) of the ITAA 1936, are required to include the Special Dividend in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Non-residents (not carrying on business at or through a permanent establishment)

69. 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.

70. However, subsection 44(1) of the ITAA 1936 does not apply to a dividend to the extent to which another provision of the ITAA 1936 that expressly deals with dividends excludes some, or all of the, dividend from assessable income.

71. 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.

72. 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 was fully franked, it is not subject to Australian withholding tax when derived by a non-resident CRH shareholder.

73. In addition, 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.

74. As the payment of the Special Dividend is income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936, it is not assessable income, and is not exempt income of a non-resident CRH shareholder pursuant to section 128D of the ITAA 1936.

75. Accordingly, a CRH shareholder who received 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) is not required to include the Special Dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and is not liable for Australian withholding tax in relation to the Special Dividend (paragraph 128B(3)(ga) of the ITAA 1936).

Non-residents (carrying on business at or through a permanent establishment)

76. Subparagraph 44(1)(c)(i) of the ITAA 1936 states that a non-resident shareholder of a resident company who is carrying on business in Australia at or through a permanent establishment of the shareholder in Australia must include in their assessable income:

dividends (other than non-share dividends) that are paid to the shareholder by the company and are attributable to the permanent establishment, to the extent to which they are paid out of profits derived by the company from sources outside Australia

77. However, where a dividend is paid from profits and no part of the profit is derived from sources outside of Australia, subparagraph 44(1)(b)(i) of the ITAA 1936 will apply to the non-resident shareholder in relation to the dividend.

78. As the Special Dividend will be paid out of profits derived by CRH from sources in Australia, a non-resident CRH shareholder carrying on a business in Australia at or through a permanent establishment who received the Special Dividend will be required to include the dividend (to the extent to which it is attributable to the permanent establishment) in their assessable income pursuant to subparagraph 44(1)(b)(i) of the ITAA 1936.

79. Subsection 128B(3E) of the ITAA 1936 states that section 128B of the ITAA 1936 does not apply to income that consists of a dividend that:

- (a) is paid to a person who is a non-resident carrying on business in Australia at or through a permanent establishment of the person in Australia; and
- (b) is attributable to the permanent establishment; and
- (c) is not paid to the person in the person's capacity as trustee.

80. Accordingly, a non-resident CRH shareholder carrying on a business in Australia at or through a permanent establishment who received the Special Dividend (to the extent the dividend is attributable to the permanent establishment) will not be liable for Australian withholding tax in relation to the dividend.

Gross up and tax offset

81. Section 207-20 of the ITAA 1997 provides that:

- (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.

82. Therefore, subject to being a qualified person in relation to the Special Dividend, if the fully franked Special Dividend was received directly by a CRH shareholder and the CRH shareholder satisfies the residency requirement in section 207-75 of the ITAA 1997 the CRH shareholder:

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

83. If the fully franked Special Dividend was received by a CRH 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 then subsection 207-35(1) of the ITAA 1997 applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) of the ITAA 1997 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.

84. Therefore, subject to the qualified person rule, a CRH shareholder that is a trustee of a trust or a partnership is required to include the amount of the franking credit on the Special Dividend in the assessable income of that trust or partnership under subsection 207-35(1) of the ITAA 1997.

Qualified person

85. Paragraph 207-145(1)(a) of the ITAA 1997 states that an entity must be a 'qualified person' in relation to a dividend in order to be entitled to a tax offset in respect of the franking credit on a dividend.

86. Former Division 1A of the ITAA 1936 sets out the requirements for a taxpayer to be a 'qualified person' in relation to a franked distribution they have received in order to be entitled to a tax offset for the franking credit on the distribution. Former Division 1A has effect by reference in section 207-145 of the ITAA 1997.

87. 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 a 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 period in relation to the dividend.

88. Former subsection 160APHO(2) of the ITAA 1936 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

89. In order to determine the relevant qualification period, it is necessary to determine whether, under the present arrangement, the CRH shareholders are considered to have made, be under an obligation to make, or be likely to make, a related payment.

90. Former section 160APHN of the ITAA 1936 provides some 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) states:

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.

91. Former subsection 160APHN(3) 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 persons:

- (a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or

- (b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or other persons; or
- (c) causing services to be provided to, or in accordance with the directions of, the other person or other persons; or
- (d) causing property to be transferred to, or in accordance with the directions of, the other person or other persons; or
- (e) allowing any property or money to be used by the other person or other persons or by someone nominated by the other person or other persons; or
- (f) causing an amount or amounts to be set off against, or to be otherwise applied in reduction of, a debt or debts owed by the other person or other persons to the taxpayer or associate; or
- (g) agreeing to treat an amount or amounts owed to the other person or other persons by the taxpayer or associate as having been increased.

92. 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 the dividend or distribution.

93. Former subsection 160APHN(6) of the ITAA 1936 states:

If an amount is taken into account in any way in favour of, or is notionally accredited to, a person in fixing a price or value, or in determining another amount, the first-mentioned amount is taken, for the purposes of this section, to be credited to the other person.

94. The payment of the Special Dividend of \$0.057 per share is an integral part of the CRH Scheme. The payment of the Special Dividend was conditional upon the CRH Scheme being implemented. Additionally, the payment of the Special Dividend reduced the payment that a CRH shareholder would have received from Findex for the disposal of their CRH shares to Findex under the CRH Scheme.

95. In these circumstances, it is considered that the payment of the Special Dividend constitutes an act that has the effect of passing a benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936. Therefore, a CRH shareholder is taken to have made, or be likely to make, a related payment in respect of the Special Dividend.

Holding period

96. As the CRH shareholders are taken, for the purposes of former Division 1A of the ITAA 1936, to have made, or be likely to make, 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.

97. Section 160APHD of the ITAA 1936 defines the secondary qualification period 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 became ex dividend...

98. The concept of 'ex-dividend' is defined in 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.

99. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 22 December 2014. This was the last day on which acquisition by a person of a CRH 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), was 23 December 2014.

100. Therefore, the secondary qualification period runs from 45 days before the ex-dividend date of 23 December 2014 and ends 45 days after that date. This means that the secondary qualification period runs from 8 November 2014 to 6 February 2015.

101. 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 CRH shares are to be excluded. This means that the secondary qualification period runs from 8 November 2014 until the date that CRH shareholders no longer held their shares at risk for the purposes of former Division 1A of the ITAA 1936.

102. Entitlement to participate in the CRH Scheme was determined on the Scheme Record Date of 30 December 2014. It is considered that a CRH shareholder would no longer be considered to be holding their shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 at that time as the CRH shareholder was committed to disposing of their CRH share and receiving the Scheme Consideration.

103. Accordingly, the secondary qualification period would run from 8 November 2014 to 29 December 2014 (inclusive). A CRH shareholder who received the Special Dividend would need to have held 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, the dates of acquisition and disposal are not included in the relevant 45 day period.

104. As such, a CRH shareholder who acquired a CRH share on or before 14 November 2014 is a 'qualified person' for the purposes of former Division 1A of the ITAA 1936 if they continuously held their share at risk until the Scheme Record Date of 30 December 2014.

Capital gains tax

CGT event A1

105. Section 104-10 of the ITAA 1997 provides that CGT event A1 happens if there is a change in the ownership of an asset from one entity to another. The event happens when a contract to dispose of an asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3) of the ITAA 1997).

106. Paragraph 9 of Taxation Determination TD 2002/4 provides that a takeover or merger effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract.

107. CGT event A1 happened when a CRH shareholder disposed of their CRH shares to Findex under the CRH Scheme pursuant to subsections 104-10(1) and 104-10(2) of the ITAA 1997. The disposal occurred on the Scheme Implementation Date of 6 January 2015 when the shares were disposed of by a CRH shareholder pursuant to paragraph 104-10(3)(b).

108. The time when CGT event A1 happens determines the income year in which any capital gain or capital loss is made and whether the CGT discount applies to any capital gain.

109. Under subsection 104-10(4) of the ITAA 1997, a CRH shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of their CRH shares exceeded its cost base. A CRH shareholder made a capital loss if those capital proceeds were less than their CRH share's reduced cost base.

Capital proceeds

110. Subsection 116-20(1) of the ITAA 1997 outlines the general rules about capital proceeds and states:

The capital proceeds from a *CGT event are the total of:

- (a) the money you have received, or are entitled to receive, in respect of the event happening; and
- (b) the *market value of any other property you have received, or are entitled to receive, in respect of the event happening (worked out as at the time of the event).

111. Therefore, the capital proceeds received by a CRH shareholder from CGT event A1 is the total money received or entitled to be received in respect of the event happening.

112. The term 'in respect of the event happening' in subsection 116-20(1) of the ITAA 1997 requires the relationship between the event and the receipt of the money, or the entitlement to receive the money, to be more than coincidental. An amount is not 'capital proceeds' received or entitled to be received in respect of a CGT event merely because it is received in association with the CGT event.

113. Taxation Ruling TR 2010/4 explains when a dividend declared or paid will constitute capital proceeds under section 116-20 of the ITAA 1997. Paragraph 9 of TR 2010/4 states 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.

114. Further, paragraph 11 of TR 2010/4 states:

Similarly, a dividend will be capital proceeds of CGT event A1 happening in respect of a disposal of shares under a scheme of arrangement if the vendor shareholders' acceptance of the scheme of arrangement (by the requisite majority vote) is conditional upon one or more of the following circumstances being present:

- the dividend being declared by the target company; or
- the purchaser or a third party financing or facilitating payment of the dividend; or
- the purchaser or a third party being obliged to bring about the result that the dividend will be received by the vendor shareholders.

115. In this case, at the time when the CRH shareholders voted on the CRH Scheme, there was no certainty that the Special Dividend would be declared and paid.

116. Although payment of the Special Dividend was conditional upon the CRH Scheme becoming effective, the declaration and payment of the Special Dividend was at the discretion of the CRH Board of Directors. Findex did not have any influence or control over the decision to pay the Special Dividend and the implementation of the CRH Scheme was not conditional upon the declaration or payment of the Special Dividend.

117. Therefore, it is considered that the Special Dividend was not received in respect of the disposal of the CRH shares under the CRH Scheme. Accordingly, for the purposes of section 116-20 of the ITAA 1997, the Special Dividend does not form part of the capital proceeds a CRH shareholder received in respect of CGT event A1 happening.

118. The capital proceeds received by a CRH shareholder for each CR share disposed of under the CRH Scheme is \$0.443.

Discount capital gain

119. Division 115 of the ITAA 1997 provides a CGT discount that reduces the amount of CGT otherwise payable by a taxpayer by the relevant discount percentage in accordance with Subdivision 115-B of the ITAA 1997. Only discount capital gains are eligible for the CGT discount.

120. To be eligible to treat a capital gain as a discount capital gain, the capital gain must:

- be made by an individual, a complying superannuation entity, a trust or (in certain circumstances) a life insurance company (section 115-10 of the ITAA 1997)
- result from a CGT event happening after 11.45am legal time in the Australia Capital Territory on 21 September 1999 (section 115-15 of the ITAA 1997)
- have been worked out using a cost base that was not subject to indexation (subsection 115-20(1) of the ITAA 1997), and
- result from a CGT event happening to a CGT asset that was acquired by the entity at least 12 months before the CGT event (subsection 115-25(1) of the ITAA 1997).

121. Accordingly, if a CRH shareholder made a capital gain when they disposed of their CRH share, the capital gain can be treated as a discount capital gain if the shareholder acquired the CRH share at least 12 months before the date of disposal under the CRH Scheme, being the Scheme Implementation Date of 6 January 2015, subject to the other requirements listed in paragraph 120 above of this Ruling being satisfied.

Foreign resident CRH shareholders

122. Subsection 855-10(1) of the ITAA 1997 provides that an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

123. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table in section 855-15 of the ITAA 1997 sets out these five categories of CGT assets:

CGT assets that are taxable Australian property	
Item	Description
1	*Taxable Australian real property (see section 855-20)
2	A *CGT asset that: (a) is an *indirect Australian real property interest (see section 855-25); and (b) is not covered by item 5 of this table
3	A *CGT asset that: (a) you have used at any time in carrying on a *business through: (i) if you are a resident in a country that has entered into an *international tax agreement with Australia containing a *permanent establishment article – a permanent establishment (within the meaning of the relevant international tax agreement) in Australia; or (ii) otherwise – a *permanent establishment in Australia; and (b) is not covered by item 1, 2 or 5 of this table
4	An option or right to *acquire a *CGT asset covered by item 1, 2 or 3 of this table
5	A *CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident)

124. Accordingly, a CRH shareholder who is a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happened under the CRH Scheme, cannot disregard a capital gain or capital loss from CGT event A1 under subsection 855-10(1) of the ITAA 1997 if their share in CRH was:

- an indirect Australian real property interest (item 2 of the table in section 855-15 of the ITAA 1997)

- used at any time by the foreign resident, or the trustee of a foreign trust for CGT purposes, in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
- covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

125. An indirect Australian real property interest under section 855-25 of the ITAA 1997 is a membership interest held by an entity in another entity if the interest passes:

- (a) the non-portfolio interest test (section 960-195 of the ITAA 1997)
- (b) the principal asset test in (section 855-30 of the ITAA 1997).

126. The non-portfolio interest test under section 960-195 of the ITAA 1997 is as follows:

An interest held by an entity (the **holding entity**) in another entity (the **test entity**) passes the non-portfolio interest test at a time if the sum of the *direct participation interests held by the holding entity and its *associates in the test entity at that time is 10% or more.

127. In respect of the principal asset test, subsection 855-30(2) states:

A *membership interest held by an entity (the **holding entity**) in another entity (the **test entity**) passes the principal asset test if the sum of the *market values of the test entity's assets that are *taxable Australian real property exceeds the sum of the *market values of its assets that are not taxable Australian real property.

128. On the information provided with the scheme description, none of the CRH shares disposed of as a part of the CRH Scheme pass the non-portfolio interest test or the principal asset test. Consequently, the CRH shares held by non-resident shareholders do not constitute indirect Australian real property interest.

129. Where an individual or a company stops being an Australian resident, CGT event I1 happens (subsection 104-160(1) of the ITAA 1997). Subsection 104-165(3) of the ITAA 1997 provides that if an individual chooses to disregard making a capital gain or a capital loss from a CGT asset covered by CGT event I1 under subsection 104-165(2) of the ITAA 1997, that CGT asset is taken to be taxable Australian property until the earlier of:

- (a) a CGT event happening in relation to the asset, if the CGT event involves the individual ceasing to own the asset, and
- (b) the individual again becoming an Australian resident.

130. Consequently, an individual CRH shareholder, who stopped being an Australian resident after they acquired the CRH shares disposed of under the scheme and has chosen to disregard the capital gain or capital loss from CGT event I1, cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain or capital loss from the disposal of CRH shares under the scheme.

Crowe Horwath Exempt Share Plan (the Share Plan)

131. Section 83A-35 of the ITAA 1997 provides that where:

- ESS interests acquired by an individual under an employee share scheme at a discount satisfy the conditions in subsections 83A-35(3) of the ITAA 1997 to 83A-35(9) of the ITAA 1997, and
- the individual's taxable income for the income year plus the other amounts specified in paragraph 83A-35(2)(b) of the ITAA 1997 does not exceed \$180,000,

the total amount otherwise included in the individual's assessable income under subsection 83A-25(1) of the ITAA 1997 in relation to those ESS interests, is only included to the extent that it is greater than \$1,000.

132. Relevantly, one of the conditions that need to be satisfied for the reduction of the total amount to be included in the individual's assessable income under subsection 83A-25(1) is the minimum holding period (subsection 83A-35(8) of the ITAA 1997).

133. Subsection 83A-35(8) of the ITAA 1997 requires the employee share scheme be operated so that participants are not permitted to dispose of an ESS interest acquired under the scheme before:

- three years from the date they were acquired, or
- the time the participating employee ceases employment with the employer.

134. The Commissioner accepts that where CRH shares are disposed of pursuant to the CRH Scheme, such a disposal is not a breach of this condition as the compulsory acquisition of the CRH shares under the CRH Scheme is considered to have no connection with the operation of the Share Plan.

135. Consequently, CRH shareholders who held their CRH shares under the Share Plan and were previously entitled to reduce the amount included in their assessable income in accordance with section 83A-35 of the ITAA 1997 will continue to be entitled to that reduction.

Anti-avoidance provisions**Section 177EA**

136. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes seeking 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.

137. Subsection 177EA(3) of the ITAA 1936 states:

This section 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, the 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.

138. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that:

- a franking debit arises to the company in respect of each distribution made to the relevant taxpayer (paragraph 177EA(5)(a) of the ITAA 1936); or
- that no franking credit benefit arises in respect of a distribution made to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

139. CRH is a corporate tax entity. The disposal of the ordinary shares in CRH pursuant to the CRH Scheme is a scheme for the disposition of membership interests. The fully franked Special Dividend is a frankable distribution that was paid to the CRH shareholders (the relevant taxpayers) as a part of the scheme and who could, therefore, reasonably be expected to receive imputation benefits.

140. In the present case, the conditions in 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 CRH, its shareholders or any other relevant party, there is a purpose, not including an incidental purpose, of enabling a relevant taxpayer to obtain an imputation benefit under the scheme.

141. 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.

142. The relevant circumstances of the scheme include the fact that the disposition of the ordinary shares in CRH was made pursuant to the CRH Scheme under the *Corporations Act 2001* voted upon by CRH's eligible shareholders.

143. The Special Dividend was fully franked and was paid to the existing CRH shareholders in proportion to their shareholding, and irrespective of their ability to utilise the relevant franking credits. The Special Dividend allowed CRH shareholders to share in the accumulated profits of CRH.

144. In considering the manner, form and substance of the scheme, it is considered that the scheme was not entered into or carried out by CRH or the CRH shareholders for a more than incidental purpose of enabling CRH shareholders to obtain imputation benefits. The provision of imputation benefits to CRH shareholders was incidental, in the sense of being subservient to, the purpose of transferring the CRH shares to Findex.

145. 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 received in relation to the Special Dividend.

Section 204-30

146. Section 204-30 of the ITAA 1997 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) of the ITAA 1997)
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b) of the ITAA 1997), 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) of the ITAA 1997).

147. If all the conditions in subsection 204-30 of the ITAA 1997 are satisfied, the Commissioner may make one or more of the following determinations listed under subsection 204-30(3) of the ITAA 1997 that:

- (a) 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) of the ITAA 1997), or
- (b) no imputation benefit is to arise in respect of any distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c) of the ITAA 1997).

148. For section 204-30 of the ITAA 1997 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.

149. Pursuant to the scheme, all CRH shareholders who were eligible to receive the Special Dividend received an imputation benefit as a result of the Special Dividend. Subject to being 'qualified persons', Australian resident CRH shareholders who received the Special Dividend received an imputation benefit in the form of a tax offset (paragraph 204-30(6)(a) of the ITAA 1997). Non-resident CRH shareholders who received the Special Dividend received an imputation benefit in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e) of the ITAA 1997). Resident CRH shareholders derived a greater benefit from franking credits than non-resident CRH shareholders (subsection 204-30(8) of the ITAA 1997).

150. However, the Special Dividend was paid to all CRH shareholders identified at the Dividend Record Date of 22 December 2014 and was fully franked. Therefore, it cannot be concluded that CRH intended to direct the flow of distributions in such a manner as to stream the imputation benefits to members that derive a greater benefit from the franking credits attached to the Special Dividend, while other members receive lesser or no imputation benefits.

151. Accordingly, as the conditions in subsection 204-30(1) of the ITAA 1997 are not met in respect of the Special Dividend, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by CRH shareholders in relation to the Special Dividend.

Section 207-145

152. Pursuant to subsection 207-145(1) of the ITAA 1997, gross-up and tax offset treatment under sections 207-20, 207-35 and 207-45 of the ITAA 1997 does not apply if an entity makes a franked distribution to another entity in one or more of the following circumstances:

- the entity is not a qualified person in relation to the distribution for the purposes of former Division 1A of the ITAA 1936 (paragraph 207-145(1)(a) of the ITAA 1997)
- the Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(b) of the ITAA 1997)
- the Commissioner has made a determination under paragraph 204-30(3)(c) of the ITAA 1997 that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(c) of the ITAA 1997), or
- the distribution is made as part of a dividend stripping operation (paragraph 207-145(1)(d) of the ITAA 1997).

153. For an explanation of whether a CRH shareholder is a qualified person for the purposes of former Division 1A of the ITAA 1936 see paragraphs 85 to 88 of this Ruling.

154. The Commissioner has confirmed that no determination will be made under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit in relation to the Special Dividend.

155. Paragraph 207-145(1)(d) of the ITAA 1997 applies if a franked distribution is made as part of a dividend stripping operation. A distribution will be taken to be made as part of a dividend stripping operation, pursuant to section 207-155 of the ITAA 1997, if the making of the distribution arose out of, or was made in the course of, a scheme that:

- (a) was by way of, or in the nature of, dividend stripping, or
- (b) had substantially the effect of a scheme by way of, or in the nature of, dividend stripping.

156. Having regard to the circumstances of the scheme, under which the CRH shareholders disposed of their CRH shares to Findex, it is not considered that the payment of the Special Dividend to the CRH shareholders was made as part of a dividend stripping operation. Therefore, paragraph 207-145(1)(d) of the ITAA 1997 will not apply.

157. Consequently, section 207-145 of the ITAA 1997 will not apply to the Special Dividend received by the CRH shareholders.

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2010/4;
TD 2002/4

Subject references:

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- CGT event A1 – disposal of a CGT asset
- distributions
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- dividend stripping
- employee share schemes
- frankable distributions
- franked dividends
- franking credits
- holding period rule
- ordinary shares
- qualified person
- related payment rule
- schemes of arrangement
- takeovers and mergers

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Income tax ~~ Capital management ~~ Franking credits / tax offsets
Tax offsets, credits and benefits ~~ Other offsets and credits ~~ Franking tax offset

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