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Class Ruling

Cuscal Limited – equal access off-market share buy-back and selective off-market share buy-back

Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences of the equal access off-market share buy-back (equal access buy-back) of Cuscal Limited (Cuscal) ordinary shares (shares) and selective off-market buy-back (selective buy-back) of Cuscal shares (and referred to collectively, as the 'buy-backs'), which Cuscal announced on29 September 2021 and implemented on 21 December 2021 (Implementation Date).

2. Full details of the equal access buy-back and selective buy-back are set out in paragraphs 34 to 54 of this Ruling.

3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1936*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to Australian-resident companies (you) which were shareholders of Cuscal on 15 December 2021 and/or 21 December 2021 and disposed of some or all of their shares under:

- the equal access buy-back, and/or
- the selective buy-back.

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5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 of the *Income Tax Assessment Act 1997* (ITAA 1997) in relation to the scheme outlined in paragraphs 34 to 54 of this Ruling.

When this Ruling applies

6. This Ruling applies from 1 July 2021 to 30 June 2022.

Ruling

Off-market purchase

7. Each of the equal access buy-back and selective buy-back is an off-market purchase for the purposes of section 159GZZZK.

Dividend component

8. You are taken to have been paid a dividend of $1.27 (Dividend Component) on the Implementation Date for each Cuscal share you sold in the equal access buy-back and/or selective buy-back (section 159GZZZP).

9. The Dividend Component is a frankable distribution pursuant to section 202-40 of the ITAA 1997 and is capable of being franked in accordance with section 202-5 of the ITAA 1997.

10. The difference between the buy-back price of $1.95 (Buy-Back Price) and the Dividend Component, being 68 cents (Capital Component) for both buy-backs, is not taken to be a dividend (subsection 159GZZZP(2)).

Assessability of the Dividend Component and tax offset

11. As you are a resident corporate tax entity, your assessable income for the income year in which the buy-backs occurred for each share you sold in the equal access buy-back and/or the selective buy-back includes:

- the Dividend Component, and
- subject to the 'qualified person' rules (see paragraphs 24 and 29 of this Ruling), the amount of franking credits attached to the Dividend Component (subsections 44(1) and 207-20(1) of the ITAA 1997).

12. You are entitled to a tax offset equal to the amount of the franking credits attached to the Dividend Component, subject to the qualified person rules (subsection 207-20(2) of the ITAA 1997).

Refundable tax offset

13. The franking credit tax offset you are entitled to is subject to the refundable tax offset rules in Division 67 of the ITAA 1997. Certain trustees and corporate tax entities are not entitled to the refundable tax offset rules in accordance with subsections 67-25(1A) to (1D) of the ITAA 1997.

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Sale consideration

14. You are initially taken to have received 68 cents (Sale Consideration) for each Cuscal share you sold in the equal access buy-back and/or the selective buy-back (section 159GZZZQ).

15. As you are a corporate tax entity, if you made a loss, the Sale Consideration is subject to further adjustments pursuant to subsections 159GZZZQ(8) and (9).

16. The Commissioner accepts that the market value of each Cuscal share bought back was $1.95. As the buy-back price was not at a discount to the market value of a Cuscal share prior to the announcement date, subsection 159GZZZQ(2) does not apply to adjust the Sale Consideration.

Capital gains tax consequences

17. You are taken to have disposed of your Cuscal shares for capital gains tax (CGT) purposes on 30 November 2021 (Notification of Outcome date) for shares you sold in the equal access buy-back, and on 17 December 2021 (Notification of Outcome date) for shares you sold in the selective buy-back (CGT event A1 under section 104-10 of the ITAA 1997).

18. The Sale Consideration of 68 cents per Cuscal share (which may be adjusted under subsection 159GZZZQ(8) if you are a corporate tax entity; see paragraph 15 of this Ruling) represents the capital proceeds for CGT purposes (subsection 116-20(1) of the ITAA 1997). You will make:

- a capital gain on each Cuscal share you sold under the equal access buy-back and/or selective buy-back where the Sale Consideration is more than the share's cost base, and
- a capital loss on each Cuscal share you sold under the equal access buy-back and/or selective buy-back where the Sale Consideration is less than the share's reduced cost base (subsection 104-10(4) of the ITAA 1997).

19. Where you made a capital gain, you are not entitled to treat the capital gain as a 'discount capital gain', as you are a corporate tax entity (sections 115-5 and 115-10 of the ITAA 1997).

Shares held as trading stock

20. If you held your Cuscal shares as trading stock (as defined in subsection 995-1(1) of the ITAA 1997) at the time of the equal access buy-back and/or the selective buy-back:

- you include the Sale Consideration in your assessable income (section 6-5 of the ITAA 1997), and
- you disregard any capital gain or capital loss you made (section 118-25 of the ITAA 1997).

21. However, under section 118-25 of the ITAA 1997, any capital gain or capital loss you make will be disregarded if at the time of the CGT event your shares were held as trading stock.

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Shares held on revenue account

22. If you held your Cuscal shares as revenue assets (as defined in section 977-50 of the ITAA 1997), but not as trading stock, the amount by which:

- the Sale Consideration exceeds the cost of each Cuscal share is included in your assessable income (section 6-5 of the ITAA 1997), or
- the cost of each Cuscal share exceeds the Sale Consideration is an allowable deduction (section 8-1 of the ITAA 1997).

23. If you made a capital gain in respect of the Cuscal shares you held on revenue account but not as trading stock, the capital gain is reduced by the amount that you otherwise include in your assessable income (section 118-20 of the ITAA 1997), but not below nil to make a capital loss. If you made a capital loss in respect of the Cuscal shares you held on revenue account but not as trading stock, you reduce the reduced cost base by the amount of the allowable deduction (subsection 110-55(9) of the ITAA 1997).

Qualified persons – equal access buy-back

24. You will satisfy the qualified person rules in relation to the Dividend Component (for the purposes of paragraph 207-145(1)(a) which refers to Division 1A of former Part IIIAA) if:

- you acquired your Cuscal shares which you sold in the equal access buy-back on or before the start of the trading halt on 17 September 2021 (Trading Halt Date), and
- during the period you held your Cuscal shares, you had sufficient risks of loss or opportunities for gain in respect of the shares (as defined in former section 160APHM) having regard to any positions you have taken in relation to the Cuscal shares for a continuous period of at least 45 days.

25. However, if you were, are, will be or are likely to be under an obligation to make a 'related payment' (as defined in former section 160APHN) in relation to the Dividend Component, the 45 continuous days must be during the period 17 September 2021 to 30 November 2021 inclusive.

26. The announcement of the buy-back, the making of an invitation to you to offer to sell your Cuscal shares, the making of an offer by you to Cuscal to sell your Cuscal shares or your participation in the buy-back do not affect whether the Cuscal shares bought back under the buy-back were held 'at risk' for the purposes of Division 1A of former Part IIIAA.

Qualified persons – selective buy-back

27. You will satisfy the qualified person rules in relation to the Dividend Component (for the purposes of paragraph 207-145(1)(a) which refers to Division 1A of former Part IIIAA) if:

- you acquired your Cuscal shares which you sold in the selective buy-back on or before the start of the trading halt on 17 September 2021, and
- during the period you held your Cuscal shares, you had sufficient risks of loss or opportunities for gain in respect of the Cuscal shares (as defined in former section 160APHM) having regard to any positions you have taken in relation to the Cuscal shares for a continuous period of at least 45 days.

28. However, if you were, are, will be or are likely to be under an obligation to make a related payment (as defined in former section160APHN) in relation to the Dividend Component, the 45 continuous days must be during the period 17 September 2021 to 17 December 2021 inclusive.

29. The announcement of the buy-back, the making of an invitation to you to offer to sell your Cuscal shares, the making of an offer by you to Cuscal to sell your Cuscal shares or your participation in the buy-back do not affect whether the Cuscal shares bought back under the buy-back were held 'at risk' for the purposes of Division 1A of former Part IIIAA.

Value-shifting rules

30. There will be no value-shifting consequences for a Cuscal shareholder under Divisions 725 and 727 of the ITAA 1997 as a result of participating in the equal access buy-back and/or the selective buy-back.

The anti-avoidance provisions

31. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the Capital Component of the equal access buy-back price and/or the selective buy-back price you received.

32. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits you received in relation to the Dividend Component of the buy-back price from participating in the equal access buy-back and/or the selective buy-back.

33. 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 you received in relation to the Dividend Component of the buy-back price from participating in the equal access buy-back and/or the selective buy-back.

Scheme

34. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Cuscal Limited

35. Cuscal is an unlisted public company.

36. Cuscal is an independent provider of payments solutions for the Australian financial services sector. It partners with mutual banks, credit unions and corporate entities to enable them to provide payment services to their clients.

37. As at 30 June 2021, Cuscal had 186,858,915 shares on issue. Cuscal's shareholders are all Australian-resident companies, comprising 40 mutual banks and credit unions and four other corporate entities.

38. The financial statements of Cuscal, as at 30 June 2021, show that it had issued share capital of approximately $127.1 million and retained earnings of approximately $204.5 million.

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Disposal of 86 400 Holdings Ltd

39. Cuscal was the founding investor in '86 400 Holdings Ltd' (86 400 Holdings), a retail digital banking business. 86 400 Holdings was established as a wholly-owned subsidiary of Cuscal. The sole source of funding for this investment was shareholder funds.

40. In February 2020, Cuscal became the majority shareholder of 86 400 Holdings after equity was raised from third parties. Cuscal remained the majority shareholder until 19 May 2021.

41. On 19 May 2021, Cuscal disposed of its remaining shares in 86 400 Holdings under a scheme of arrangement for approximately $127 million.

Off-market share buy-backs

42. On 29 September 2021 (Announcement Date), Cuscal announced it proposed to distribute a substantial portion of the 86 400 Holdings net sale proceeds to Cuscal shareholders in the form of two buy-backs:

- an equal access buy-back offer to all shareholders (to acquire up to approximately 3.94% of the issued capital) for up to $14.1 million, and
- a selective buy-back offer to 23 shareholders that each held less than 0.4% of Cuscal shares for all their Cuscal shares (to acquire up to approximately 3.4% of the issued capital) for up to $12.1 million.

43. Shareholders approved the selective buy-back at the Annual General Meeting (AGM) held on 28 October 2021. The equal access buy-back did not require shareholder approval but would only proceed if shareholders approved the selective buy-back.

44. Cuscal advised that the commercial rationale for the equal access buy-back was to return to Cuscal shareholders part of the profit and shareholder capital released from the disposal of 86 400 Holdings. The commercial rationale for the selective buy-back was to provide minor Cuscal shareholders with an opportunity to realise their investment in Cuscal.

45. Cuscal offered to purchase the shares under the equal access buy-back and the selective buy-back for a fixed price of $1.95 per share (Offer Price), made up of a Capital Component of 68 cents and Dividend Component of $1.27.

46. Cuscal proposed to fully frank the Dividend Component of the Offer Price. Cuscal does not expect that the buy-backs will affect its ability to pay fully franked dividends in the future.

47. Participation in the equal access buy-back and the selective buy-back was voluntary and therefore Cuscal shareholders who did not wish to participate were not required to do anything.

48. The following table is a summary of the key dates for the equal access buy-back and selective buy-back:

Date	**Buy-back**
17 September 2021	Share trading halt start date
29 September 2021	AGM Notice issued to shareholders (Announcement Date)
28 October 2021	AGM Meeting/share buy-backs approved
15 November 2021	Equal access share buy-back record date

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15 November 2021	Equal access share buy-back offer period opens
29 November 2021	Equal access share buy-back offer period closes
30 November 2021	Notification of outcome to shareholders of equal access buy-back outcome
1 December 2021	Selective share buy-back record date
2 December 2021	Selective share buy-back offer period opens
16 December 2021	Selective share buy-back offer period closes
17 December 2021	Notification of outcome to shareholders of selective buy-back outcome
21 December 2021	Share trading halt end date
21 December 2021	Equal access buy-back implementation date
21 December 2021	Selective share buy-back implementation date

49. On 21 December 2021, Cuscal announced that:

- it had successfully completed the purchase of 7,230,769 Cuscal shares under the equal access buy-back, representing 4% of the issued capital of Cuscal
- the total value of Cuscal shares purchased under the equal access buy-back was $14.1 million
- it had successfully completed the purchase of 4,271,493 Cuscal shares under the selective buy-back, representing 2% of the issued capital of Cuscal
- the total value of Cuscal shares purchased under the selective buy-back was $8.3 million.

50. All Cuscal shares bought back under the equal access buy-back and the selective buy-back were cancelled.

51. The Buy-Back Price was subject to two overriding limits:

- Cuscal would not buy-back its shares at a discount greater than 14% applied to the volume-weighted average price of its shares over the last five trading days up to the respective Notification of Outcome dates for the buy-backs, and
- Cuscal would not buy-back the shares above their market value of $1.95.

Other matters

52. Cuscal shares were subject to a trading halt during the period starting 17 September 2021 until 21 December 2021.

53. Cuscal's share capital account (as defined in section 975-300 of the ITAA 1997), was not tainted within the meaning of Division 197 of the ITAA 1997.

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54. No Cuscal shareholder alone or together with associates held 40% or more of Cuscal shares or had rights to 40% or more of dividends or returns of capital paid by Cuscal, nor in fact controlled Cuscal.

Commissioner of Taxation
19 January 2022

Appendix – Explanation

This Explanation 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.

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Sale Consideration

55. You are taken to have received the initial Sale Consideration of 68 cents per share as consideration in respect of each share bought back under the equal access buy-back and/or selective buy-back on the Implementation Date in accordance with section 159GZZZQ.

56. However, as you are a corporate tax entity, if you made a loss as a result of participating in the equal access buy-back and/or the selective buy-back, you reduce the amount of the loss by the amount of the Dividend Component. However, where the Dividend Component is greater than the amount of the loss, you reduce the loss to nil (subsections 159GZZZQ(8) and (9)).

Qualified persons

57. Paragraph 207-145(1)(a) provides that, in relation to a franked distribution made by an entity, only a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA is required to include the franking credit in its assessable income and is entitled to claim the franking credit as a tax offset. Paragraph 207-150(1)(a) is a similar provision that applies to indirect distributions. Broadly speaking, to be a qualified person in relation to the Dividend Component paid, you must satisfy the holding period rule (former section 160APHO).

58. The holding period rule requires a shareholder to hold the shares on which the dividend is paid 'at risk' for a continuous period of at least 45 days during the relevant qualification period. The relevant qualification period is:

- in the absence of a related payment, the primary qualification period, which commences on the day after you acquired the shares and ends on the 45th day after the day on which the shares became ex dividend, or

- if a related payment was made (see paragraphs 25 and 28 of this Ruling), the secondary qualification period, which commences on the 45th day before, and ends on the 45th day after, the day on which the shares became ex dividend.

59. In determining whether you have satisfied the holding period rule, any days during which you have materially diminished risks of loss or opportunities for gain in respect of the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

60. Broadly, a related payment arises under former section 160APHN where you are or were under an obligation to make, or will make, a payment in respect of the dividend, which effectively passes on the economic benefit of the dividend to another person. The rule also applies if an associate of yours is or was under an obligation to, or will, make the payment.

61. Under former subsection 160APHM(2), you are taken to have materially diminished risks of loss opportunities for gain in respect of shares if your 'net position' in respect of the risks and opportunities reduces your exposure to those risks and opportunities to less than 30%.

62. The Commissioner does not regard the announcement of the equal access buy-back and/or selective buy-back, the making of an invitation to you to offer to sell Cuscal shares and the making of an offer by you to Cuscal in respect of a Cuscal share as affecting whether Cuscal shares or an interest in the Cuscal shares were held at risk or not.

Equal access buy-back

63. Under the terms of the equal access buy-back, you could only participate with shares you acquired before the trading halt commenced on 17 September 2021.

64. If you acquired your Cuscal shares on or before 17 September 2021, you satisfied the holding period rule as long as you held those shares at risk for at least 45 continuous days during the relevant qualification period as outlined in paragraphs 24 to 26 of this Ruling.

65. As a result of the trading halt, there is no requirement to consider the application of the last-in first-out rule in former subsection 160APHI(4) for the purposes of the equal access buy-back.

Selective buy-back

66. Under the terms of the selective buy-back, you could only participate with shares you acquired before the trading halt commenced on 17 September 2021.

67. If you acquired your Cuscal shares on or before 17 September 2021, you satisfied the holding period rule as long as you held those shares at risk for at least 45 continuous days during the relevant qualification period as outlined in paragraphs 27 to 29 of this Ruling.

68. As a result of the trading halt, there is no requirement to consider the application of the last-in first-out rule in former subsection 160APHI(4) for the purposes of the selective buy-back.

Value-shifting rules

69. Division 725 of the ITAA 1997 may apply where there is a direct value shift under a scheme involving equity interests in an entity. For Division 725 of the ITAA 1997 to have consequences, paragraph 725-50(b) of the ITAA 1997 requires, among other things, that the 'controlling entity test' is satisfied.

70. The controlling entity test is satisfied if an entity (the controller) controls for value-shifting purposes the 'target entity' at some time during the period starting when the scheme is entered into and ending when the scheme has been carried out (section 725-55 of the ITAA 1997). The target entity in this case is Cuscal.

71. Subdivision 727-E of the ITAA 1997 sets out the circumstances in which an entity will be regarded as controlling another entity for value-shifting purposes.

72. No entity, either alone or together with its associates, controlled Cuscal for value-shifting purposes under the tests in section 727-355 of the ITAA 1997 during the period starting when the scheme was entered into and ending when it had been carried out.

73. As the threshold requirement in paragraph 725-50(b) of the ITAA 1997 is not satisfied, Division 725 of the ITAA 1997 does not result in any value-shifting consequences for you in respect of the scheme.

74. Division 727 of the ITAA 1997 also does not result in any value-shifting consequences for you in respect of the scheme.

The anti-avoidance provisions

Sections 45A and 45B

75. If section 45A or section 45B applies then, in turn, section 45C will apply to treat some or all of the return of capital payment as an unfranked dividend.

76. Section 45A generally applies when a company streams capital benefits to some shareholders (such as the distribution of share capital by way of the return of capital payment) and it is reasonable to assume that the other shareholders have received, or will receive, dividends.

77. Although you were provided a capital benefit (as defined in paragraph 45A(3)(b)), the circumstances of the buy-back indicate that there was no streaming of capital benefits to shareholders of Cuscal who sold their shares in the equal access buy-back and/or selective buy-back.

78. Section 45B generally applies where certain capital benefits are paid to shareholders in substitution for dividends.

79. While the conditions of paragraphs 45B(2)(a) and (b) were met in respect of the buy-backs, the requisite purpose of enabling a person to obtain a tax benefit, by way of capital distribution, was not present.

80. Having regard to the relevant circumstances (as set out in subsection 45B(8)) of the buy-back, it cannot be concluded that a person would have entered into or carried out the buy-backs for a more than incidental purpose of enabling a participating shareholder to obtain a tax benefit. Therefore, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to treat all or part of the distribution of share capital as an unfranked dividend paid by Cuscal.

Section 177EA

81. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. For section 177EA to apply, the conditions of paragraphs 177EA(3)(a) to (e) must be satisfied. Cuscal is a corporate tax entity. The equal access buy-back and selective buy-back are a scheme for the disposition of membership interests. The Dividend Component of the Offer Price is a frankable distribution paid to the shareholders of Cuscal who could reasonably be expected to receive imputation benefits. Therefore, the conditions of paragraphs 177EA(3)(a) to (d) are satisfied.

82. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided by subsection 177EA(17)), it would be concluded that (on the part of Cuscal, you or any other relevant party) there is a more than merely incidental purpose of conferring an imputation benefit under the scheme (paragraph 177EA(3)(e)).

83. Considering the circumstances of the equal access buy-back and selective buy-back, it cannot be concluded that you or Cuscal entered into or carried out the scheme for the purpose of enabling you to obtain an imputation benefit. Therefore, the Commissioner considers that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefit you received in relation to the buy-backs.

Section 204-30 of the ITAA 1997

84. Subsection 204-30(1) of the ITAA 1997 empowers the Commissioner to make a determination under paragraph 204-30(3)(c) if an entity streams the payment of dividends to its members in such a way that certain members (referred to as favoured members) obtain imputation benefits, and other members (referred to as disadvantaged members) obtain lesser or no imputation benefits, whether or not they receive other benefits. The favoured members are those that derive a greater benefit from imputation benefits than disadvantaged members.

85. 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 another member entity. The term 'derive a greater benefit from franking credits' is defined in subsection 204-30(8) of the ITAA 1997 by reference to the ability of the members to fully use imputation benefits.

86. Under the scheme, you received imputation benefits in relation to the Dividend Component of the Sale Consideration.

87. The Commissioner accepts that in this matter, it cannot be said that Cuscal selectively directed the flow of franked dividends to those members who obtained the most benefit from the franking credits.

88. As the conditions in subsection 204-30(1) of the ITAA 1997 were not met, 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 you received in relation to the buy-backs.

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Not previously issued as a draft

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TD 2004/22

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