


# ***CR 2012/43 - Income tax: proposed return of capital: Murchison Metals Ltd***

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## Class Ruling

### Income tax: proposed return of capital: Murchison Metals Ltd

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#### **ⓘ 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

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

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

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997;
- subdivision 115-A of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

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

## **Class of entities**

3. The class of entities to which this Ruling applies is the ordinary shareholders of Murchison Metals Ltd (Murchison) who:
- (a) are registered on the Murchison share register on the Record Date of the first return of capital or the second return of capital (as applicable);
  - (b) hold their Murchison shares on capital account; and
  - (c) are not subject to the taxation of financial arrangements (TOFA) rules in Division 230 of the ITAA 1997 in relation to gains and losses on their Murchison shares.

(Note: Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them)

## **Qualifications**

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 22 of this Ruling.
6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
  - this Ruling may be withdrawn or modified.
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## Date of effect

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8. This Ruling applies from 1 July 2012 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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).

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## Scheme

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9. The following description of the scheme is based on information provided by the applicant.

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

10. Murchison is an Australian resident public company listed on the Australian Securities Exchange (ASX) as of 1 April 2005.

11. Until recently, Murchison undertook mining and exportation of iron ore to world markets. It was also involved in port and rail infrastructure projects in the mid-west region of Western Australia.

12. Historically, Murchison has never made a distribution of profits or capital to shareholders.

13. On 20 February 2012 Murchison announced the completion of the 'Mitsubishi Transaction' which resulted in the disposal of the majority of its operations, interests and projects to Mitsubishi Development Pty Ltd. This was done in response to concerns that Murchison would be unable to meet its future project funding obligations.

14. The total cash consideration received by Murchison, upon completion of the transaction, amounted to approximately \$325,000,000. The amount of cash remaining after the payment of debts, settlement of litigation, provision for closure costs and contingent liabilities was approximately \$223,000,000.

15. Following the disposal, Murchison announced on 7 March 2012 that if no suitable investments in the natural resources sector were presented to, or identified by Murchison before mid-April 2012, it would move to make a distribution to shareholders. No suitable investments were found.

16. Murchison plans to make two pro-rata returns of capital to its shareholders totalling approximately \$0.49 per ordinary share, or approximately \$223,000,000. Whilst the precise amount of each return of capital is subject to confirmation by Murchison's directors, Murchison expects the first return of capital to account for a significant part of the total amount returned to shareholders. No shares will be cancelled as a result of either distribution.

17. Both of the proposed returns of capital will be debited to Murchison's share capital account.

18. The Record Date for the first return of capital is expected to be late August 2012 and the Payment Date for the first return of capital is expected to be in early September 2012. The Record Date for the second return of capital is expected to be in mid to late January 2013 and the Payment Date for the second return of capital is expected to be in mid to late February 2013.

19. As at 12 March 2012, Murchison had only one class of share on issue comprising 450,093,277 fully paid ordinary shares amounting to \$245,944,000 of share capital.

20. The shareholders of Murchison comprise a mix of both Australian resident shareholders and foreign resident shareholders.

21. Murchison has confirmed that its share capital account is not tainted within the meaning of Division 197 of the ITAA 1997.

22. Murchison has confirmed that, at the time of the payment of the first return of capital and the second return of capital, a Murchison share is not an 'indirect Australian real property interest' (as defined in section 855-25 of the ITAA 1997).

## Ruling

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### **Distributions are not dividends for income tax purposes**

23. Neither the first return of capital nor the second return of capital will be a dividend, as defined in subsection 6(1).

### **The application of sections 45A, 45B and 45C to the proposed returns of capital**

24. The Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) that section 45C applies to either the first return of capital or the second return of capital. Accordingly, no part of either return of capital will be taken to be a dividend for income tax purposes.

**Capital gains tax**

25. CGT event G1 (section 104-135 of the ITAA 1997) will happen when Murchison pays the first return of capital to a Murchison shareholder in respect of a Murchison share that they own at the Record Date for the first return of capital and continue to own at the Payment Date for the first return of capital.

26. CGT event G1 (section 104-135 of the ITAA 1997) will happen when Murchison pays the second return of capital to a Murchison shareholder in respect of a Murchison share that they own at the Record Date for the second return of capital and continue to own at the Payment Date for the second return of capital.

27. CGT event C2 (section 104-25 of ITAA 1997) will happen when Murchison pays the first return of capital to a Murchison shareholder in respect of a Murchison share that they own at the Record Date for the first return of capital but do not own at the Payment Date for the first return of capital.

28. CGT event C2 (section 104-25 of ITAA 1997) will happen when Murchison pays the second return of capital to a Murchison shareholder in respect of a Murchison share that they own at the Record Date for the second return of capital but do not own at the Payment Date for the second return of capital.

**Foreign resident shareholders**

29. A foreign resident shareholder in Murchison who is paid the first return of capital or the second return of capital disregards any capital gain made from CGT event G1 happening if their Murchison shares are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

30. A foreign resident shareholder in Murchison who is paid the first return of capital or the second return of capital disregards any capital gain or capital loss made from CGT event C2 happening if their right to receive the relevant return of capital is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

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**Commissioner of Taxation**27 June 2012

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## Appendix 1 – Explanation

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

### **Distributions are not dividends**

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

32. The term 'dividend' is defined in subsection 6(1) and includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' excludes a distribution from the meaning of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

33. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

34. Subsection 975-300(3) of the ITAA 1997 states that an account is not a share capital account, except for certain limited purposes, if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies is transferred to the account and the account is not already tainted.

35. The first return of capital and the second return of capital will be recorded as debits to Murchison's share capital account. As the share capital account of Murchison is not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) will apply. Accordingly, neither the first return of capital nor the second return of capital will be a dividend as defined in subsection 6(1).

### **Anti avoidance provisions**

36. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies to treat all or part of the proposed return of capital amounts received by the shareholders as an unfranked dividend paid by the company out of profits to the shareholder.

**Section 45A – streaming of dividends and capital benefits**

37. Section 45A applies where capital benefits are streamed to some shareholders (the Advantaged Shareholders), who would derive a greater benefit from the receipt of capital than other shareholders (the Disadvantaged Shareholders) and these Disadvantaged Shareholders receive, or are likely to receive, dividends.

38. A reference to the 'provision of a capital benefit to a shareholder in a company' is defined in paragraph 45A(3)(b) to include the distribution to the shareholder of share capital. Murchison will provide its shareholders with a 'capital benefit' as defined in paragraph 45A(3)(b) when Murchison pays either the first return of capital or the second return of capital to its shareholders. The capital benefit in each case will be provided to all of its shareholders in the same proportion as their share holdings.

39. Therefore, section 45A will not apply to the first return of capital or the second return of capital. Accordingly, the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the proposed return of capital amounts.

**Section 45B – schemes to provide capital benefits**

40. Section 45B applies where certain capital payments, including a return of capital, are paid to shareholders in substitution for dividends. It allows the Commissioner to make a determination that section 45C applies to a capital benefit. Specifically, the provision applies where:

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

Each of these conditions is considered in paragraphs 41 to 57 of this Ruling.

## ***Scheme***

41. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal.

42. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). It states that a person is provided with a capital benefit if:

- an ownership interest in a company is issued to the person;
- there is a distribution to the person of share capital; or
- the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.

43. As the proposed returns of capital will be debited to Murchison's share capital account, Murchison will provide shareholders with a capital benefit under paragraph 45B(5)(b) in the form of distributions of share capital.

## ***Tax benefit***

44. A relevant taxpayer 'obtains a tax benefit' as defined in subsection 45B(9) if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997;

would, apart from the operation of section 45B, be less than the amount that:

- would have been payable; or
- be payable at a later time than it would have been payable;

if the capital benefit had instead been a dividend.

45. The proposed distributions to Murchison's ordinary shareholders are return of capital payments and therefore constitute capital benefits. In the event that the distributions were dividends rather than capital benefits, it is likely that the amount of tax payable by Murchison shareholders would be greater than is payable in respect of the proposed return of capital payments (those payments being the capital benefits). Consequently, the receipt of the capital benefits will give rise to 'tax benefits'.

46. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or in the case of a foreign resident, be subject to a dividend withholding tax under section 128B. Therefore, Murchison shareholders will obtain a tax benefit from the proposed returns of capital.

### ***Relevant circumstances***

47. Paragraph 45B(2)(c) requires the Commissioner to consider the 'relevant circumstances' of the scheme as set out in subsection 45B(8). A consideration of these circumstances determines whether any part of the scheme will be entered into for a purpose, other than an incidental purpose, of enabling the relevant taxpayer (an ordinary shareholder in Murchison) to obtain a tax benefit.

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

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

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

51. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital and profits (realised or unrealised) of the company or an associate (within the meaning of section 318) of the company.

52. The proposed returns of capital are not considered attributable to the profits of Murchison. The proposed returns of capital are considered attributable to capital only and not to any realised or unrealised profits of Murchison. It is predicted that by the period ended 30 June 2012, Murchison will derive an accounting profit (by way of inter-corporate dividends); however this will cease to exist once offset against prior year losses. In accordance with Taxation Ruling TR 2011/D8, this prevents any distribution of profits from being made.

53. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company.

54. Murchison has never paid dividends. This is consistent with the fact that Murchison has been in an overall loss position since incorporation and therefore no profits have been available for distribution. Accordingly, the absence of payment of dividends does not suggest that the proposed returns of capital will be made in substitution for dividends.

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

56. In this case, the form and substance of Murchison's proposed returns of capital do not lead to a conclusion that the requisite purpose exists that the scheme was carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

57. Accordingly, it cannot be concluded that Murchison or participating Murchison shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a tax benefit. As such, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole or any part of the proposed returns of capital.

## Section 45C

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

**Capital gains tax*****CGT event G1 – section 104-135 of the ITAA 1997***

59. CGT event G1 (section 104-135 of the ITAA 1997) will happen when Murchison pays the first return of capital to a Murchison shareholder in respect of a share that they own in Murchison at the Record Date for the first return of capital and continue to own at the Payment Date for the first return of capital.

60. CGT event G1 (section 104-35 of the ITAA 1997) will happen when Murchison pays the second return of capital to a Murchison shareholder in respect of a share that they own in Murchison at the Record Date for the second return of capital and continue to own at the Payment Date for the second return of capital.

61. In either case, if the proposed return of capital is equal to or less than the cost base of the Murchison share at the time of payment, the cost base and reduced cost base of the share will be reduced (but not below nil) by the amount of the payment (subsection 104-135(4) of the ITAA 1997).

62. A Murchison shareholder will make a capital gain if the proposed return of capital in either case is more than the cost base of the Murchison share (subsection 104-135(3) of the ITAA 1997). The amount of the capital gain is equal to the excess.

63. If a Murchison shareholder makes a capital gain when CGT event G1 happens, the cost base and reduced cost base of the Murchison share is reduced to nil. A Murchison shareholder cannot make a capital loss when CGT event G1 happens (subsection 104-135(3) of the ITAA 1997).

64. A capital gain made when CGT event G1 happens will be eligible to be treated as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided that the Murchison share was acquired at least 12 months before the payment of the relevant return of capital (subsection 115-25(1) of the ITAA 1997) and the other conditions of that subdivision are satisfied.

***CGT event C2 – section 104-25 of the ITAA 1997***

65. The right to receive the first return of capital is one of the rights inherent in a Murchison share at the Record Date for the first return of capital. If, after the Record Date but before the Payment Date for the first return of capital, a Murchison shareholder ceases to own a Murchison share, the right to receive the first return of capital in respect of that share will be retained by the shareholder and is a separate CGT asset. This will also apply in respect of the right to receive the second return of capital.

66. CGT event C2 (section 104-25 of the ITAA 1997) will happen when each return of capital is paid and the right to receive the relevant payment (being an intangible CGT asset) ends.

67. A Murchison shareholder will make a capital gain if the capital proceeds from the ending of the right are more than its cost base. The capital gain is equal to the amount of the excess. A Murchison shareholder will make a capital loss if the capital proceeds from the ending of the right are less than its reduced cost base (subsection 104-25(3) of the ITAA 1997). The capital loss is equal to the amount of the difference.

68. In working out the capital gain or capital loss made when CGT event C2 happens, the capital proceeds will be the amount of the relevant return of capital at that time (subsection 116-20(1) of the ITAA 1997).

69. The cost base of a Murchison shareholder's right to receive either return of capital is worked out under Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). The cost base of the right does not include the cost base or reduced cost base of the share previously owned by the Murchison shareholder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the share – for example, when the Murchison shareholder disposed of the share after the Record Date for either return of capital.

70. Therefore, if the full cost base or reduced cost base of a Murchison share has been previously applied in working out a capital gain or capital loss made when a CGT event happened to that share, the right to receive either return of capital will have a nil cost base.

71. As the rights to receive the first return of capital and the second return of capital were inherent in the Murchison share during the time it was owned, the rights are considered to have been acquired at the time when the corresponding share was acquired (section 109-5 of the ITAA 1997). Accordingly, if the Murchison share was acquired at least 12 months before the relevant return of capital, a capital gain made from the ending of the corresponding right will satisfy the requirements of section 115-25 of the ITAA 1997. Such a capital gain will be eligible to be treated as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided the other conditions of that Subdivision are satisfied.

## **Foreign resident shareholders**

72. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made 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'.

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

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2, or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 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).

74. Murchison has advised that at the time CGT event G1 happens for any foreign resident Murchison shareholder who is entitled to either return of capital, a Murchison share will not be an indirect Australian real property interest (as defined in section 855-25 of the ITAA 1997) as the interest will not pass the principal asset test in section 855-30 of the ITAA 1997 at that time.

75. However, a foreign resident Murchison shareholder, just before CGT event G1 happens, cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain made if:

- (a) the Murchison share has been used at any time by the foreign resident Murchison shareholder 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
- (b) the Murchison share is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

76. A Murchison foreign resident shareholder who has a right to the payment of either return of capital, disregards any capital gain or capital loss made when CGT event C2 happens to that right because the right is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

## Appendix 2 – Detailed contents list

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

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## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10; TR 2011/D8

### *Subject references:*

- capital benefit
- capital gains tax
- capital reductions
- CGT event C1-C3 – end of a CGT asset
- CGT event G1-G3 – end of a CGT asset
- return of capital on shares
- share capital
- shareholder payments

### *Legislative references:*

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(a)
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- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 995-1
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- Corporations Act 2001 256C

### ATO references

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