

CR 2013/99 - Income tax: Village Roadshow Limited - return of capital



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Class Ruling

Income tax: Village Roadshow Limited – return of capital

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	9
Scheme	10
Ruling	31
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	37
Appendix 2:	
Detailed contents list	80

ⓘ 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 provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - subsection 44(1) of the ITAA 1936;
 - section 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; and
 - section 855-10 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of Village Roadshow Limited (VRL) who:

- are registered on the VRL share register on the Record Date for determining entitlements to receive the return of capital; and
- hold ordinary shares in VRL on capital account.

In this Ruling an entity belonging to this class of entities is referred to as a VRL shareholder.

4. This Ruling does not apply to VRL shareholders for whom gains and losses from the return of capital are subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997. Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.

5. This Ruling does not apply to VRL shareholders where the return of capital is exempt income (within the meaning of section 6-20 of the ITAA 1997) or non-assessable non-exempt income (within the meaning of section 6-23 of the ITAA 1997) in their hands.

6. This Ruling does not consider indirect distributions to partners in a partnership, nor trustees or beneficiaries of a trust.

Qualifications

7. 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 29 of this Ruling.

8. 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

9. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

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

- revised application for class ruling dated 15 October 2013;
- VRL Annual Report 2012; and
- resolution to the VRL Annual General Meeting (AGM) on 29 November 2013.

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

Background

11. VRL is an Australian resident listed public company.

12. On 28 March 2011, VRL accepted an offer from Southern Cross Media for its 52.52% stake in Austereo Group Limited (AEO). The AEO disposal generated net cash proceeds of approximately \$376 million. Of this amount, VRL has set aside approximately \$83 million to reinvest in various projects and has paid \$62.1 million in tax in respect of the AEO disposal.

13. The market value of VRL, based on its market capitalisation as at 28 March 2011, when it announced the acceptance of the takeover offer for AEO was approximately \$606 million (151 million shares at \$4.01 per share).

14. The share capital account as at 28 March 2011 was \$249.4 million.

15. On 19 July 2011, a return of capital of approximately \$30 million (\$0.20 per share) was made to VRL shareholders. Class Ruling CR 2011/55 was issued in respect of that distribution.

Capital structure

16. The share capital of VRL at 30 June 2013 was 159,477,712 ordinary shares with a paid up share capital account value of \$234.3 million.

17. As at 30 June 2013 Village Roadshow Corporation Pty Ltd and associates owned 44.63% of VRL's ordinary shares.

18. Approximately 10.1% of the shares in VRL are held by shareholders who are foreign residents.

19. The directors of VRL represent that the share capital account, within the meaning given in section 975-300 of the ITAA 1997, is not tainted for the purposes of Division 197 of the ITAA 1997.

20. VRL's consolidated retained earnings and reserves as at 30 June 2013 totalled \$326.8 million.

21. The application of the slice approach (refer Law Administration Practice Statement PS LA 2008/10 *Application of section 45B of the Income Tax Assessment Act 1936 to share capital reductions*) in determining the extent to which share capital was invested in AEO and is available to be distributed to shareholders, results in a capital invested amount in AEO of \$154.7 million (\$376 million AEO disposal proceeds / \$606 million VRL market capitalisation x \$249.4 million share capital).

22. The amount of share capital available for distribution from the AEO disposal proceeds is calculated as follows:

	\$ million
Share capital invested in AEO	154.7
Less:	
Return of capital on 19 July 2011	30
Capital set aside for reinvestment	<u>83</u>
	<u>113.0</u>
Share capital available for distribution	41.7

Distribution to shareholders

23. At the VRL AGM on 29 November 2013, shareholders approved a distribution that comprises a return of capital of \$0.12 per share and a fully franked dividend of \$0.13 per share to all shareholders on the VRL share register at the Record Date of 12 December 2013.

24. The payment of the distribution is to occur on 31 December 2013 (Payment Date) and will amount to approximately \$39.9 million. The return of capital component of the distribution will amount to approximately \$19.1 million.

25. The return of capital is made to all ordinary shareholders in VRL regardless of individual circumstances.

Other matters

26. All shares in VRL were acquired by VRL shareholders after 19 September 1985 as the company (formerly De Laurentis Entertainments Ltd) was incorporated on 11 November 1986.

27. VRL has been advised that Village Roadshow Corporation Pty Ltd does not have any carry forward net capital losses. VRL is not aware of the capital losses, if any, available to other shareholders.

28. Since 28 March 2011, VRL shares have not traded lower than \$2.50 and are currently trading in excess of \$6 per share. It is reasonable to conclude that the cost base of VRL shares is likely to be more than the capital component of \$0.12 per share.

29. The shareholders' proportionate interests in the company and rights will be unaffected by the return of capital.

30. The dividend payment history of VRL over the 30 June 2009 to 30 June 2013 income years indicates an average dividend paid of \$0.1655 per ordinary share. VRL is forecasting regular ongoing interim and final dividend payments.

Ruling

Distribution is not a dividend

31. The return of capital to VRL shareholders of \$0.12 per share is not a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Application of sections 45B and 45C of the ITAA 1936

32. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the return of capital.

Capital gains tax (CGT) consequences

33. CGT event G1 (section 104-135 of the ITAA 1997) happens when VRL pays the \$0.12 per share return of capital to a VRL shareholder in respect of a VRL share that they owned at the Record Date and continued to own at the Payment Date.

34. CGT event C2 (section 104-25 of the ITAA 1997) happens when VRL pays the \$0.12 per share return of capital to a VRL shareholder in respect of a VRL share that they owned at the Record Date, but did not own at the Payment Date.

Foreign resident shareholders

35. A foreign resident VRL shareholder who is paid the return of capital disregards any capital gain made when CGT event G1 happens if their VRL share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

36. A foreign resident VRL shareholder who is paid the return of capital disregards any capital gain made when CGT event C2 happens if their right to receive the return of capital is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Class Ruling

CR 2013/99

Page 6 of 16

Page status: **legally binding**

Commissioner of Taxation

18 December 2013

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.*

Distribution is not a dividend

37. A 'slice approach' has been used to determine the amount of capital that is available for distribution to VRL shareholders from the AEO disposal proceeds in accordance with PS LA 2008/10.

38. The Commissioner accepts that the slice approach used to calculate the amount of \$154.7 million is a reasonable basis on which to determine the amount of capital that is attributable to the AEO disposal proceeds.

39. As VRL has set aside approximately \$83 million for further capital reinvestment, this capital is not surplus to needs and therefore is not available for distribution as a return of capital.

40. Further, VRL has returned capital of approximately \$30 million from the AEO disposal proceeds on 19 July 2011. Consequently, the remaining amount of capital available for distribution is \$41.7 million.

41. The shareholders of VRL approved a return of capital of \$19.1 million at the AGM on 29 November 2013. Accordingly, there is sufficient capital attributable to the AEO disposal proceeds to meet the return of capital.

42. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividend (as defined in subsection 6(1) of the ITAA 1936) paid to 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).

43. The definition of 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition excludes a distribution that is debited against an amount standing to the credit of the company's share capital account.

44. VRL will debit the return of capital against its share capital account. In addition, there have been no transfers to VRL's share capital account, within the meaning given in section 975-300 of the ITAA 1997, prior to the return of capital that would have:

- (a) caused the share capital account to become 'tainted' within the meaning of that term in section 197-50 of the ITAA 1997; or
- (b) prevented VRL's share capital account from being a share capital account for the purposes of paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936.

45. Accordingly, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies and the return of capital is not a dividend assessable to VRL shareholders under subsection 44(1) of the ITAA 1936.

Application of sections 45B and 45C of the ITAA 1936

46. Section 45B of the ITAA 1936 is an anti-avoidance provision which allows the Commissioner to make a determination that section 45C of the ITAA 1936 applies to treat all or part of the return of capital amount as an unfranked dividend if certain conditions are satisfied.

47. Section 45B of the ITAA 1936 applies where certain capital payments are made to shareholders in substitution for dividends. 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) of the ITAA 1936);
- 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) of the ITAA 1936); 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) of the ITAA 1936).

Scheme

48. The term 'scheme' is defined in subsection 995-1(1) of the ITAA 1997 to mean any arrangement, scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise. Subsection 45B(10) of the ITAA 1936 provides that a 'scheme' for the purposes of section 45B of the ITAA 1936 has the meaning given in subsection 995-1(1).

49. The arrangement involving VRL's return of capital to VRL shareholders will constitute a 'scheme' for the purposes of section 45B of the ITAA 1936.

Capital benefit

50. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936 and includes a distribution by a company to a person of share capital.

51. As VRL's return of capital will be recorded by means of a debit to VRL's share capital account, VRL shareholders will be taken to have been provided with a capital benefit.

Tax benefit

52. A taxpayer 'obtains a tax benefit' as defined in subsection 45B(9) of the ITAA 1936 if an amount of tax or other amount payable under the ITAA 1936 or the ITAA 1997 would, apart from section 45B of the ITAA 1936, be less than the amount that would have been payable or payable at a later time if the capital benefit had instead been an assessable dividend.

53. Ordinarily, a return of capital would be subject to the CGT provisions of the ITAA 1936 or the ITAA 1997. 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. A capital gain may not arise at all for certain foreign resident shareholders. 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 dividend withholding tax under section 128B of the ITAA 1936. Therefore, VRL shareholders will obtain a tax benefit from the return of capital.

Relevant circumstances

54. Paragraph 45B(2)(c) of the ITAA 1936 sets out an objective purpose test for the Commissioner to consider having regard to the 'relevant circumstances' of the scheme as set out in subsection 45B(8) of the ITAA 1936.

55. Subsection 45B(8) of the ITAA 1936 lists a number of factors in paragraphs 45B(8)(a) to 45B(8)(k) that are the relevant circumstances in determining whether a person, or one of the persons, who entered into or carried out a scheme for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit.

56. In this scheme the return of capital will be made to all VRL shareholders regardless of individual circumstances. Therefore, the factors within paragraphs 45B(8)(c) to 45B(8)(h) of the ITAA 1936 do not incline for or against a conclusion as to purpose.

57. The factors in paragraphs 45B(8)(i) and 45B(8)(j) of the ITAA 1936 are not relevant to the circumstances of this scheme. Consequently, the relevant factors are those covered in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k) of the ITAA 1936.

58. Paragraph 45B(8)(a) of the ITAA 1936 refers to the extent to which a capital benefit is attributable to realised and unrealised profits of the company and its associates (which includes subsidiaries of VRL). VRL shareholders will receive a return of capital that is referable to the capital component of the proceeds received by VRL from the disposal of AEO. Accordingly, the return of capital is attributable to capital and not to profits, realised or unrealised, of VRL and its associates.

59. Paragraph 45B(8)(b) of the ITAA 1936 refers to the pattern of distribution of dividends, bonus shares and returns of paid up capital of VRL or its associates. VRL has a history of making regular dividend distributions to its shareholders and expects this dividend distribution policy to continue. Accordingly, VRL's pattern of distributions does not suggest that the return of capital will be made in substitution for a dividend.

60. Paragraph 45B(8)(k) of the ITAA 1936 refers to the matters in subsection 177D(2) of the ITAA 1936. 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. These matters include, among other things, the form and substance of the scheme and its financial implications for the parties involved.

61. The practical implications of the scheme by VRL to return an amount of capital arising from the disposal of part of its business to VRL shareholders will be consistent with it being, in form and substance, a return of capital. The scheme would not lead to the conclusion that a requisite purpose exists and that the scheme is to be carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

62. It cannot be concluded that VRL, or the VRL shareholders, entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a tax benefit.

63. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the return of capital.

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

CGT consequences

CGT event G1

65. CGT event G1 will happen when VRL pays the \$0.12 per share return of capital amount to a VRL shareholder in respect of a share that they own at the Record Date and continues to own at the Payment Date (section 104-135 of the ITAA 1997).

66. If the return of capital is equal to or less than the cost base of the VRL share at the Payment Date, the cost base and reduced cost base of the share will be reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

67. A VRL shareholder will make a capital gain if the \$0.12 per share return of capital is more than the cost base of their VRL share (subsection 104-135(3) of the ITAA 1997). The amount of the capital gain is equal to the excess.

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

69. 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 VRL share was acquired at least 12 months before the payment of the return of capital (subsection 115-25(1) of the ITAA 1997), and the other conditions of Subdivision 115-A of the ITAA 1997 are satisfied.

CGT event C2

70. The right to receive the return of capital is one of the rights inherent in a VRL share at the Record Date. If, after the Record Date but before the Payment Date, a VRL shareholder ceases to own a VRL share in respect of which the return of capital is payable, the right to receive the return of capital in respect of that share will be retained by the shareholder and is a separate CGT asset.

71. CGT event C2 will happen when the return of capital is paid (section 104-25 of the ITAA 1997). The right to receive the payment (being an intangible CGT asset) will end by the right being discharged or satisfied when the payment is made.

72. A VRL 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 VRL 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.

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

74. The cost base of the VRL shareholder's right to receive the 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 a VRL 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 VRL shareholder disposed of the share after the Record Date.

75. Therefore, if the full cost base or reduced cost base of the VRL share has been previously applied in working out a capital gain or capital loss when a CGT event happened to that share, then the right to receive the return of capital is likely to have a nil cost base. As a result, the VRL shareholder will generally make a capital gain equal to the amount of the return of capital.

Foreign resident shareholders

76. 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'.

77. Section 855-15 of the ITAA 1997 sets out when a CGT asset is 'taxable Australian property':

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) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident).

78. Neither a VRL share nor the right to payment is 'taxable Australian real property'.

79. However, a foreign resident, or the trustee of a foreign trust, for CGT purposes, cannot disregard, under subsection 855-10(1) of the ITAA 1997, a capital gain from CGT event G1 or CGT event C2 if just before the CGT event happens:

- their VRL share or right to payment was an 'indirect Australian real property interest' not covered by item 5 (item 2 of the table in section 855-15 of the ITAA 1997);
- their VRL share or right to payment had been used at any time by the foreign resident 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
- their VRL share or right to payment was covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	7
Date of effect	9
Scheme	10
Background	11
Capital structure	16
Distribution to shareholders	23
Other matters	26
Ruling	31
Distribution is not a dividend	31
Application of sections 45B and 45C of the ITAA 1936	32
Capital gains tax (CGT) consequences	33
Foreign resident shareholders	35
Appendix 1 – Explanation	37
Distribution is not a dividend	37
Application of sections 45B and 45C of the ITAA 1936	46
<i>Scheme</i>	48
<i>Capital benefit</i>	50
<i>Tax benefit</i>	52
<i>Relevant circumstances</i>	54
CGT consequences	65
<i>CGT event G1</i>	65
<i>CGT event C2</i>	70
<i>Foreign resident shareholders</i>	76
Appendix 2 – Detailed contents list	80

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2011/55; TR 2006/10

Subject references:

- arrangement
 - capital benefit
 - capital gains tax
 - CGT capital proceeds
 - CGT cost base
 - CGT discount
 - CGT events C1-C3 - end of a CGT asset
 - CGT events G1-G3 – shares
 - distributions
 - ordinary shares
 - return of capital on shares
 - share capital
- ITAA 1936 45B(8)(g)
 - ITAA 1936 45B(8)(h)
 - ITAA 1936 45B(8)(i)
 - ITAA 1936 45B(8)(j)
 - ITAA 1936 45B(8)(k)
 - ITAA 1936 45B(9)
 - ITAA 1936 45B(10)
 - ITAA 1936 45C
 - ITAA 1936 128B
 - ITAA 1936 177D(2)
 - ITAA 1997 6-20
 - ITAA 1997 6-23
 - ITAA 1997 104-25
 - ITAA 1997 104-25(3)
 - ITAA 1997 104-135
 - ITAA 1997 104-135(3)
 - ITAA 1997 104-135(4)
 - ITAA 1997 104-165(3)
 - ITAA 1997 Div 110
 - ITAA 1997 Div 112
 - ITAA 1997 Div 115
 - ITAA 1997 Subdiv 115-A
 - ITAA 1997 115-25(1)
 - ITAA 1997 116-20(1)
 - ITAA 1997 Div 197
 - ITAA 1997 197-50
 - ITAA 1997 Div 230
 - ITAA 1997 855-10
 - ITAA 1997 855-10(1)
 - ITAA 1997 855-15
 - ITAA 1997 975-300
 - ITAA 1997 995-1(1)
 - TAA 1953
 - Copyright Act 1968

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)
- ITAA 1936 45B(5)(b)
- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(a)
- ITAA 1936 45B(8)(b)
- ITAA 1936 45B(8)(c)
- ITAA 1936 45B(8)(d)
- ITAA 1936 45B(8)(e)
- ITAA 1936 45B(8)(f)

Other references:

- PS LA 2008/10

ATO references

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