



CR 2015/79 - Income tax: SKILLED Group Limited Scheme of Arrangement and payment of Final Dividend and Special Dividend

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Class Ruling

Income tax: SKILLED Group Limited Scheme of Arrangement and payment of Final Dividend 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 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 128B of the ITAA 1936
- section 128D of the ITAA 1936
- Division 1A of former Part IIIA of the ITAA 1936
- former section 160APHE of the ITAA 1936
- former section 160APHD of the ITAA 1936
- former section 160APHN of the ITAA 1936

- section 177E of the ITAA 1936
- section 177EA of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997
- Division 115 of the ITAA 1997
- section 116-20 of the ITAA 1997
- Subdivision 124-M of the ITAA 1997
- section 204-30 of the ITAA 1997
- Division 207 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 207-155 of the ITAA 1997, and
- section 855-10 of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies consists of the holders of ordinary shares in SKILLED Group Limited (SKILLED) who:

- (a) are residents or non-residents of Australia (other than non-residents who carry on a business at or through a permanent establishment in Australia) as defined in subsection 6(1) of the ITAA 1936
- (b) hold their shares on capital account
- (c) receive the SKILLED Final Dividend, the SKILLED Special Dividend and participate in the scheme as described in paragraphs 11 to 33 of this Ruling (the Scheme)
- (d) are not significant stakeholders or common stakeholders within the meaning of those expressions in Subdivision 124-M, and
- (e) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their SKILLED 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 Scheme Shareholder.

5. This Ruling does not consider the taxation treatment of the holders of any options or performance rights granted pursuant to the SKILLED's Long Term Incentive and Employee Share Plans.

Qualifications

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

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 11 to 33 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 2015 to 30 June 2016. The Ruling continues to apply after this date 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 the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Request for Class Ruling dated 12 August 2015
- Australian Securities Exchange (ASX) announcement by SKILLED and Programed Maintenance Services Limited (Programmed) dated 24 June 2015
- Scheme Implementation Agreement dated 24 June 2015 (Scheme Implementation Agreement)

- ASX announcement by SKILLED dated 5 August 2015 entitled 'SKILLED dividend payments in conjunction with the proposed acquisition by Programmed'
- Explanatory Memorandum lodged with Australian Securities and Investments Commission (ASIC) on 6 August 2015
- The Constitution of SKILLED, and
- Financial Statements of SKILLED for the financial year ended 30 June 2015 and the annual report of SKILLED for the financial year ended 30 June 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

SKILLED

11. SKILLED is a widely held public company limited by shares and has been listed on the ASX since 1994.
12. SKILLED is a resident of Australia under subsection 6(1) of the ITAA 1936.
13. SKILLED is the head company of the SKILLED tax consolidated group.
14. As at 26 June 2015, SKILLED had a single class capital structure consisting solely of ordinary shares with 235,898,291 ordinary shares on issue. It also had the following:
 - 6,780,001 performance rights and options on issue
 - 538,000 performance rights that may be issued subject to shareholder approval, and
 - 1,112,000 performance rights if certain criteria are met.
15. As at 29 June 2015, approximately 14% of SKILLED shares were held by non-resident entities and approximately 86% of SKILLED shares were held by Australian resident entities.
16. No Scheme Shareholder holds 10% or more of the shares in SKILLED.
17. SKILLED has paid fully franked dividends since the 2011 income year.

Programmed

18. Programmed is a public company limited by shares and is listed on the ASX.
19. Programmed is a resident of Australia under subsection 6(1) of the ITAA 1936.

The Scheme of Arrangement

20. On 24 June 2015, SKILLED and Programmed entered into the Scheme Implementation Agreement under which Programmed proposed to acquire all of the issued shares in SKILLED by way of a court ordered scheme of arrangement pursuant to Part 5.1 of the *Corporations Act 2001* (Corporations Act).

21. As at the date of the Scheme Implementation Agreement, Programmed did not own any shares in SKILLED either directly or indirectly through wholly owned subsidiaries.

22. The Scheme was approved by the requisite majority of SKILLED shareholders at the Scheme Meeting on 25 September 2015.

23. The Scheme was approved by the court at the second hearing held on 1 October 2015. The Scheme became effective on 1 October 2015 when SKILLED lodged the court order with ASIC.

24. On the Scheme Record Date 9 October 2015, any Scheme Shareholder who held a SKILLED share is entitled to participate in the Scheme.

25. On the Implementation Date 16 October 2015, Programmed will pay the Scheme Shareholders for each of their SKILLED shares transferred to Programmed the following:

- (a) the Share Consideration of 0.55 New Programmed Shares, being fully paid ordinary shares in Programmed (Share Consideration); and
- (b) the Cash Consideration of \$0.25 per share (Cash Consideration) less the amount of any SKILLED FY15 Final Dividend and SKILLED Special Dividend, per SKILLED share declared and paid.

Final Dividend

26. On 5 August 2015, the SKILLED Board declared a SKILLED FY15 Final Dividend of \$0.095 cash per SKILLED share (Final Dividend). The Record Date for the Final Dividend is 7 October 2015 and the ex dividend date is 8 October 2015.

27. The Final Dividend will be fully franked and debited against SKILLED's retained earnings account. The Final Dividend will be funded from the existing cash reserves and/or debt facilities. Programmed will not fund the Final Dividend through loans from Programmed, nor through loans from entities with an interest in Programmed.

28. The Final Dividend will be paid on 15 October 2015. Pursuant to paragraph 5.2 of the Scheme Implementation Agreement, the Cash Consideration of \$0.25 per share will be reduced by the Final Dividend.

Special Dividend

29. The Scheme was approved by the Scheme Shareholders at the Scheme meeting on 25 September 2015. After the meeting, the SKILLED Board declared a Special Dividend of \$0.155 cash, per SKILLED share (Special Dividend), which was conditional on the Scheme becoming effective. The Record Date for the Special Dividend is 7 October 2015 and the ex dividend date is 8 October 2015.

30. The Special Dividend will be fully franked and debited against SKILLED's retained profits account. SKILLED will not debit the Special Dividend to its share capital account.

31. The declaration and payment of the Special Dividend was at the discretion of the SKILLED Board. Programmed was not required to consent to the payment of the Special Dividend nor did they provide any funds to SKILLED to finance the payment of the Special Dividend.

32. The Special Dividend will also be paid on 15 October 2015. Pursuant to paragraph 5.2 of the Scheme Implementation Agreement, the Cash Consideration of \$0.25 per SKILLED share will be reduced by the Final Dividend of \$0.095 and the Special Dividend of \$0.155. Consequently, the Cash Consideration will reduce to zero.

Ruling

The Final Dividend and the Special Dividend

33. The Final Dividend and the Special Dividend paid to the Scheme Shareholders are each a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Final Dividend and the Special Dividend

34. Scheme Shareholders who receive the Final Dividend and the Special Dividend and are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Final Dividend and the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

35. Scheme Shareholders who receive the Final Dividend and the Special Dividend and are non-residents (other than those carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

Gross up and tax offset

36. The Final Dividend and the Special Dividend are each a frankable distribution under section 202-40.

37. A Scheme Shareholder who receives the Final Dividend and the Special Dividend directly and satisfies the residency requirements in section 207-75:

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

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

38. A Scheme Shareholder (not being a corporate tax entity), who receives the Final Dividend and the 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 dividend in its assessable income under subsection 207-35(1), subject to the trustee or the partnership being a qualified person.

Qualified persons

39. The payment of the Final Dividend and the Special Dividend will constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

40. Accordingly, to be a qualified person in relation to the Final Dividend and the Special Dividend, each Scheme Shareholder will need to hold their SKILLED shares 'at risk' for a continuous period of at least 45 days in the secondary qualification period. A Scheme Shareholder must exclude any days on which they have materially diminished risks of loss or opportunities for gain in respect of their SKILLED shares.

41. A Scheme Shareholder is considered to no longer hold their SKILLED shares 'at risk' for the purposes of former Division 1A of Part IIIAA of the ITAA 1936 as from the Scheme Record Date of 9 October 2015. Therefore, a Scheme Shareholder will be a qualified person in relation to the Final Dividend and the Special Dividend if, in the period from 24 August 2015 to 8 October 2015 (inclusive), they continued to hold their SKILLED shares and did not have materially diminished risks of loss or opportunities for gain in respect of their SKILLED 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

42. The franking credit tax offset that a Scheme Shareholder is entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, provided the Scheme Shareholder is not excluded by the operation of section 67-25.

Capital Gains Tax (CGT) consequences

CGT event A1

43. CGT event A1 happens when a Scheme Shareholder disposes of each of their SKILLED shares to Programmed pursuant to the Scheme (section 104-10).

44. Under subsection 104-10(3), the time of CGT event A1 is when the change of the ownership occurs (paragraph 104-10(3)(b)). CGT event A1 happens when the SKILLED shares are transferred to Programmed on the Implementation Date of 16 October 2015.

45. A Scheme Shareholder will make a capital gain when CGT event A1 happens if the capital proceeds from the disposal exceed the cost base of that share. A Scheme Shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the share (subsection 104-10(4)).

Capital proceeds

46. The capital proceeds from CGT Event A1 will be the Cash Consideration and the market value (worked out at the time of CGT event A1) of any New Programmed Shares received or entitled to be received by the Scheme Shareholders for each of their SKILLED shares (subsection 116-20(1)).

47. The capital proceeds from CGT event A1 happening in respect of each SKILLED share will not include the Final Dividend or the Special Dividend.

Availability of scrip for scrip roll-over if a capital gain is made

48. Subject to the qualification in paragraph 50 of this Ruling, a Scheme Shareholder who made a capital gain from the disposal of their SKILLED shares and received all or part of their proceeds in the form of New Programmed Shares may choose scrip for scrip roll-over for that part of the capital gain that is referable to the receipt of New Programmed Shares (sections 124-780 and 124-790).

49. However, scrip for scrip roll-over cannot be chosen if any capital gain the Scheme Shareholder might make from the replacement New Programmed Shares would be disregarded, except because of a roll-over (subsection 124-795(2)).

50. If scrip for scrip roll-over is chosen, that part of the capital gain that is referable to the receipt of New Programmed Shares is disregarded (subsections 124-785(1) and 124-790(1)).

Discount capital gain

51. If a Scheme Shareholder makes a capital gain from the disposal and roll-over is not chosen, or cannot be chosen, for all or part of the gain, they will be eligible to treat that part as a 'discount capital gain' provided that:

- the Scheme Shareholder is an individual, complying superannuation entity or, subject to the rules in Subdivision 115-C, a trust (section 115-10);
- the capital gain has been worked out using a cost base that has been calculated without reference to indexation (subsection 115-20(1)); and
- the SKILLED share was acquired at least 12 months prior to CGT event A1 happening (subsection 115-25(1)).

Foreign resident Scheme Shareholders

52. A foreign resident Scheme Shareholder who participates in the Scheme may disregard any capital gain or capital loss made when CGT event A1 happens if their share is not 'taxable Australian property' (section 855-10).

Cost base of New Programmed Shares

53. The cost base and reduced cost base of any New Programmed Shares acquired by a Scheme Shareholder in exchange for all of their SKILLED shares, is affected by whether the Scheme Shareholder chooses scrip for scrip roll-over.

Scrip for scrip roll-over is not chosen

54. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each New Programmed Share is equal to the market value of the SKILLED shares given in exchange for the acquisition of the New Programmed Share (subsections 110-25(2), 110-55(2) and 112-30(1)). The market value is worked out as at the time of the acquisition (subsection 110-25(2)). The market value of the SKILLED shares given by the Scheme Shareholder for the receipt of the cash consideration is not included (subsection 112-30(1)).

Scrip for scrip roll-over is chosen

55. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of a replacement New Programmed Share is worked out by reasonably attributing to it the part(s) of the cost base of the SKILLED shares for which it was exchanged and for which the roll-over was obtained (subsections 124-785(2) and 124-785(4)). Any part(s) of the cost base of the SKILLED shares exchanged by the Scheme Shareholder that relates to the receipt of cash consideration is not included (subsection 124-785(3)).

Acquisition date of New Programmed Shares

56. The acquisition date of the New Programmed Shares will be the date when the shares are issued (Item 2 of the table in section 109-10).

57. For the purpose of determining whether a capital gain made from any later disposal of their New Programmed Shares is a discount capital gain, Scheme Shareholders who choose scrip for scrip roll-over are taken to have acquired their New Programmed Shares when they acquired the corresponding SKILLED shares involved in the roll-over (Item 2 of the table in subsection 115-30(1)).

The anti-avoidance provisions

58. The Scheme is not a scheme, or a scheme having substantially the effect of a scheme, by way of, or in the nature of dividend stripping within the meaning of section 177E of the ITAA 1936 and the Commissioner will not make a determination under subsection 177F(1) of the ITAA 1936 to include any amount in the assessable income of the Scheme Shareholders.

59. 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 either the Final Dividend or the Special Dividend.

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

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 Final Dividend and the Special Dividend

61. 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.

62. The payment of the Final Dividend and the Special Dividend are each a distribution in money made by SKILLED to its shareholders.

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

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company.

64. The payment of the Final Dividend and the Special Dividend are sourced from existing cash reserves and loan facilities. The Final Dividend and the Special Dividend will be debited from SKILLED's retained earnings. SKILLED will not debit the Final Dividend or the Special Dividend against its share capital account. Therefore, the exclusion in paragraph (d) will not apply and the Final Dividend and the Special Dividend will each constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Final Dividend and the Special Dividend

65. Paragraph 44(1)(a) 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.

66. As the Final Dividend and the Special Dividend are paid to the Scheme Shareholders out of profits derived by SKILLED, Scheme Shareholders who are residents of Australia are required to include the Final Dividend and the Special Dividend in their assessable income under paragraph 44(1)(a) of the ITAA 1936.

67. 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.

68. 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.

69. 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 Final Dividend and the Special Dividend are fully franked, they will not be subject to Australian withholding tax when derived by non-resident Scheme Shareholders.

70. In addition section 128D of the ITAA 1936 states that:

Income other than income to which section 128B of the ITAA 1936 applies by virtue of subsection (2A), (2C) or 9(C) 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.

71. As the payment of the Final Dividend and the Special Dividend are income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936, they will not be assessable income, and will not be exempt income of non-resident Scheme Shareholders pursuant to section 128D of the ITAA 1936.

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

Gross-up and tax offset

73. Section 207-20 provides:

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

- (2) The receiving entity is entitled to a *tax offset for the income year in which the distribution is made. The tax offset is equal to the *franking credit on the distribution.

74. Therefore, subject to satisfying the qualified person rule, where the fully franked Final Dividend and the fully franked Special Dividend are received directly by a Scheme Shareholder, the Scheme Shareholder will:

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

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

If:

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

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

76. Therefore, subject to satisfying the 'qualified person' rule, a Scheme Shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Final Dividend and the Special Dividend in their assessable income under subsection 207-35(1).

Qualified person

77. Pursuant to subsection 207-145(1), 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.

78. Former section 160APHU of the ITAA 1936 provides that a partner in a partnership or the beneficiary of a trust cannot be a qualified person in relation to a dividend unless the partnership or the trustee of the trust is also a qualified person in relation to the dividend.

79. Former Division 1A of Part IIIAA of the ITAA 1936 provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' in relation to a franked distribution they have received and thus be entitled to a tax offset for the franking credit on the distribution. Former Division 1A has effect via the express terms of section 207-145.

80. 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, or 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.

81. Broadly, if the Scheme Shareholders are not under an obligation to make a related payment in relation to a dividend or distribution, they will have to satisfy the holding period requirement within the primary qualification period. If the Scheme Shareholders are under an obligation to make a related payment in relation to a dividend or distribution, they will have to satisfy the holding period requirement within the secondary qualification period.

Related payment

82. In order to determine what the relevant qualification period is, it is necessary to determine whether, under the present arrangement, a Scheme Shareholder has made, or is under an obligation to make, or is likely to make, a related payment in respect of any of the dividends they receive.

83. Former section 160APHN of the ITAA 1936 gives examples of, but does not limit, what constitutes the making of a related payment, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

84. Former subsection 160APHN(2) of the ITAA 1936 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.

85. 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 the 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 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; 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.

86. 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.

87. In the circumstances of this Scheme, it is considered that the payment of the Final Dividend and the Special Dividend is an integral part of the Scheme. Under the terms of the Scheme Implementation Agreement, the Cash Consideration is reduced by the amount of the Final Dividend and the Special Dividend paid by SKILLED to the Scheme Shareholders. Therefore, the former paragraphs 160APHN(3)(f) and 160APHN(4)(c) of the ITAA 1936 are satisfied.

88. The reduction of the Cash Consideration has the effect of passing the benefit of the dividends from a Scheme Shareholder to Programmed. A Scheme Shareholder, or a partner in a partnership or a beneficiary of a trust that has an interest in SKILLED shares, is taken to have made, or to be under an obligation to make, a related payment in respect of the Final Dividend and the Special Dividend.

Holding period requirement

89. As the Scheme Shareholders are taken, for the purposes of former Division 1A, to have made or be likely to make a related payment in respect of the Final Dividend and the Special Dividend, the relevant qualification period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

90. Former paragraph 160APHO(2)(a) of the ITAA 1936 provides that:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid satisfies this subsection in relation to a qualification period in relation to the shares or interest if, during the period:

- (a) where the taxpayer held the shares – the taxpayer held the shares for a continuous period (not counting the day on which the taxpayer acquired the shares or, if the taxpayer has disposed of the share, the day on which the disposal occurred) of not less than:
 - (i) if the shares are not preference shares – 45 days; or
 - (ii) if the shares are preference shares – 90 days.

91. As the SKILLED shares are not preference shares, Scheme Shareholders are required to hold their shares for at least 45 days during the secondary qualification period.

92. The former 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*...

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

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

94. The eligibility for both dividends is determined on 7 October 2015. This is the last day on which acquisition by a person of a SKILLED share entitled the person to receive the Final Dividend and 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) of the ITAA 1936 is 8 October 2015.

95. As per the definition in former section 160APHD of the ITAA 1936, the secondary qualification period will begin 45 days before the ex dividend date of 8 October 2015 and end 45 days after that day. This means that the secondary qualification period would ordinarily run from 24 August 2015 to 22 November 2015 (45 days before and 45 days after 8 October 2015).

96. Pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which an entity had materially diminished risks of loss or opportunities for gain in respect of their SKILLED shares, or interest in SKILLED shares, are excluded from counting towards the 45 day holding period requirement. Subsection 160APHO(3) provides:

In calculating the number of days for which the taxpayer continuously held the shares or interest, any days on which the taxpayer has materially diminished risks of loss or opportunities for gain in respect of the shares or interest are to be excluded, but the exclusion of those days is not taken to break the continuity of the period for which the taxpayer held the shares or interest.

97. This would mean that for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, the secondary qualification period would run from 24 August 2015 until 16 October 2015, the date that the Scheme Shareholders disposed of their shares.

98. Entitlement to participate in the Scheme will be determined on the Scheme Record Date on the basis of being a SKILLED shareholder who is registered in the share register as the holder of the relevant ordinary share at 7.00pm on 9 October 2015. It is considered that once a SKILLED shareholder is identified as a Scheme Shareholder on the Scheme Record Date, that Scheme Shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A of former Part IIIAA of the ITAA 1936 as, at that time the Scheme Shareholder is committed to disposing of their SKILLED shares and receiving the scheme consideration. This means that as from 9 October 2015, Scheme Shareholders no longer held their SKILLED shares 'at risk'.

99. Accordingly, while the secondary qualification period would relevantly run from 24 August 2015 to 16 October 2015, the period 9 October 2015 to 16 October 2015 would be excluded in determining the period during which the shares were held at risk, as it represents a period of materially diminished risk. As such, a Scheme Shareholder who received the Final Dividend and the Special Dividend would need to have held their shares at risk for a continuous period of not less than 45 days during the period 24 August 2015 and 8 October 2015 in order to be a 'qualified person' for the purposes of former Division 1A of former Part IIIAA of the ITAA 1936. 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.

Refundable tax offset

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

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

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

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

Capital Gains Tax (CGT) consequences**CGT event A1**

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

104. The acquisition of shares in SKILLED under a court approved scheme of arrangement does not involve a disposal of shares under a contract (paragraph 9 of the Taxation Determination TD 2002/4).

105. CGT event A1 happens when a Scheme Shareholder disposed of a SKILLED share to Programmed pursuant to the Scheme (subsections 104-10(1) and 104-10(2)). The disposal occurred on the Implementation Date of 16 October 2015 when the share was disposed of by a Scheme Shareholder (paragraph 104-10(3)(b)).

106. 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.

107. A Scheme Shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a SKILLED share are more than the cost base of the share. A Scheme Shareholder makes a capital loss if those capital proceeds are less than the reduced cost base of the SKILLED share (subsection 104-10(4)).

Capital proceeds

108. The capital proceeds received by a Scheme Shareholder from a CGT event is the money and the market value of any property received or entitled to be received (worked out at the time of the event happening) in respect of the event happening (subsection 116-20(1)).

109. The capital proceeds the Scheme Shareholders receive for the disposal of a SKILLED share is the market value of 0.55 New Programmed Shares and the amount of Cash Consideration received.

110. The term 'in respect of the event happening' in subsection 116-20(1) 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.

111. In this case, neither dividend was paid in respect of the disposal of SKILLED shares under the Scheme. The determination to pay the Final Dividend and the Special Dividend was at the discretion of the SKILLED Board. Programmed had no control over SKILLED's decision to pay it, or its quantum (subject to the \$0.25 ceiling in the Scheme Implementation Agreement).

112. The payment of the Final Dividend and the Special Dividend will be funded entirely by SKILLED's cash reserves and debt facilities with no actual or contingent funding support from Programmed.

113. In these circumstances, it is considered that the Final Dividend and the Special Dividend do not form part of the capital proceeds which a Scheme Shareholder receives in respect of CGT event A1 happening.

Availability of scrip for scrip roll-over if a capital gain is made

Scrip for scrip roll-over – Subdivision 124-M

114. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. It enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

115. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the scheme that is the subject of this Ruling are:

- shares are exchanged for shares in another company
- the exchange is in consequence of a single arrangement
- conditions for the roll-over are satisfied
- further conditions, if applicable, are satisfied, and
- exceptions to obtaining scrip for scrip roll-over are not applicable.

Discount capital gain

116. If a Scheme Shareholder made a capital gain from the disposal of their SKILLED share, the Scheme Shareholder may be eligible to treat the capital gain as a discount capital gain provided that all relevant requirements of Division 115 are met.

117. One of those requirements is that the capital gain must result from a CGT event happening to a CGT asset that was acquired by the entity making the capital gain at least 12 months before the CGT event (subsection 115-25(1)).

118. This means that a capital gain made by a Scheme Shareholder when they dispose of their SKILLED share is a discount capital gain if the shareholder acquired the SKILLED share at least 12 months before the date of disposal under the Scheme, being the Implementation Date of 16 October 2015, and the other requirements in Division 115 are satisfied.

Foreign resident Scheme Shareholders

119. Under subsection 855-10(1), 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'.

120. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these 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).

121. Item 2 of the table in section 855-15 defines taxable Australian property to include an indirect Australian real property interest. An indirect Australian real property interest under section 855-25 is an interest held by an entity in another entity if it passes:

- the non-portfolio interest test under section 960-195; and
- the principal asset test in section 855-30.

122. The non-portfolio interest test under section 960-195 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.

123. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens under the Scheme, cannot disregard under subsection 855-10(1) a capital gain or capital loss from CGT event A1 happening if their shares in SKILLED are indirect Australian real property interests (item 2 of the table in section 855-15).

124. On the basis that there were no foreign residents, either alone or together with any associates, who beneficially hold more than 10% of the shares in SKILLED, none of the SKILLED shares disposed of as part of the Scheme passes the non-portfolio interest test. Consequently, SKILLED shares held by non-residents do not constitute indirect Australian real property interests.

125. Since the first condition of an indirect Australian real property interest under section 855-25 is not satisfied, it is not necessary to consider the application of the principal asset test. The SKILLED shares do not constitute 'taxable Australian property' of foreign resident shareholders.

The anti-avoidance provisions

Section 177E

126. Section 177E of the ITAA 1936 is an anti-avoidance provision that is designed to prevent tax benefits being obtained as part of a dividend stripping scheme or a scheme with substantially the same effect as a dividend stripping scheme.

127. The term 'dividend stripping' has no precise legal meaning. In its traditional form, a dividend stripping operation occurs when shares in a company with substantial retained profits are acquired by shareholders who pay the existing shareholders a capital sum reflecting the value of the retained profits. The new shareholders then liberate those profits through the payment of a dividend post acquisition. Generally, the new shareholders who derive dividend income from the company would not be liable to tax upon those dividends.

128. Therefore, a scheme by way of, or in the nature of, dividend stripping, or one that has substantially the effect of a scheme by way of, or in the nature of, dividend stripping, would be one that has the effect of delivering a shareholder's entitlement to a dividend in a tax advantaged manner.

129. The retained profits of SKILLED that are to be distributed to its existing shareholders as the Final Dividend and the Special Dividend prior to the implementation of the Scheme are not provided in a tax advantaged manner. Consequently section 177E will not apply.

Section 207-145

130. As there is no dividend stripping scheme or a scheme in the nature of a dividend stripping or a scheme that has that effect for the purposes of section 207-155, paragraph 207-145(1)(d) will not be satisfied.

Section 177EA

131. 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.

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

133. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA of the ITAA 1936 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.

134. SKILLED is a corporate tax entity. The sale of the ordinary shares in SKILLED pursuant to a Scheme of Arrangement is a scheme for the disposition of membership interests. The fully franked Final Dividend and the Special Dividend are each a frankable distribution that was paid to the Scheme Shareholders (the relevant taxpayers) as a part of this scheme and who could, therefore, reasonably be expected to receive imputation benefits.

135. In the present case, it is considered that the conditions of paragraphs 177EA(3)(a) to (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)), it would be concluded that, on the part of SKILLED, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the scheme.

136. In arriving at a conclusion, one 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 diverse matters which, taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the imputation benefit is more than an incidental purpose of the scheme.

137. The relevant circumstances are that the disposition of the ordinary shares in SKILLED was made pursuant to a takeover by Programmed by way of Scheme of Arrangement under the Corporations Act voted upon by SKILLED's shareholders entitled to vote.

138. The SKILLED Scheme of Arrangement is a normal commercial transaction under which SKILLED is being acquired.

139. SKILLED's shareholders are a mix of residents and non-residents. The fully franked Special Dividend was paid to all the existing shareholders of SKILLED in proportion to the number of shares that each shareholder held on the relevant Record Dates and irrespective of their ability to utilise the relevant franking credits. The Final Dividend and the Special Dividend allowed the Scheme Shareholders to share in the accumulated profits of SKILLED.

140. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by SKILLED or the Scheme Shareholders for more than an incidental purpose of enabling the Scheme Shareholders to obtain imputation benefits. The provision of imputation benefits to the Scheme Shareholders remains incidental, in the sense of being subservient to, the purpose of transferring their shares to Programmed.

141. Having regard to the relevant circumstances of the scheme, it cannot be concluded that SKILLED or the Scheme Shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain an imputation benefit.

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

Section 204-30

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

- (a) an *imputation benefit is, or apart from this section would be, received by a *member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a))
- (b) the member would *derive a *greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)), and
- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

144. Relevantly, if section 204-30 applies, the Commissioner has the discretionary powers under subsection 204-30(3) to make a written determination.

145. Subsection 204-30(3) provides:

The Commissioner may make one or more of these determinations:

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

A determination must be in writing.

146. 'Streaming' is not defined for the purposes of section 204-30. However, the Commissioner has understood it to refer to a company 'selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits' (paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002).

147. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than another member of the entity. The words 'derive a greater benefit from franking credits' are defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

148. Under the current arrangement, all Scheme Shareholders will receive an imputation benefit when the Final Dividend and the Special Dividend are paid. The imputation benefit for resident shareholders is in the form of a tax offset (paragraph 204-30(6)(a)), and for non-resident shareholders is in the form of not being liable to pay dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders may derive a greater benefit from franking credits than the non-resident shareholders.

149. However, the Final Dividend and the Special Dividend were paid equally to all Scheme Shareholders and were fully franked regardless of their tax profiles. Accordingly, it cannot be said that SKILLED selectively directed the flow of franked distributions to those members who could most benefit from the franking credits.

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

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NO: 1-74S353S

ISSN: 2205-5517

ATOlaw topic: Income tax ~~ Assessable income ~~ Dividend, interest and royalties ~~ Dividend income
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 - disposal of a CGT asset
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