

# ***CR 2018/3 - Income tax: Bank of Queensland - BOQ Capital Notes***



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## Class Ruling

### Income tax: Bank of Queensland – BOQ Capital Notes

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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.

## Summary – what this ruling is about

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

### Relevant provisions

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 26BB of the ITAA 1936
- subsection 43B(1) of the ITAA 1936
- subsection 44(1) of the ITAA 1936
- section 45 of the ITAA 1936
- section 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 45C of the ITAA 1936
- Division 1A of former Part IIIA of the ITAA 1936

- section 177EA of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-25 of the ITAA 1997
- section 109-10 of the ITAA 1997
- subsection 110-25(2) of the ITAA 1997
- subsection 110-55(2) of the ITAA 1997
- section 130-60 of the ITAA 1997
- section 204-30 of the ITAA 1997
- section 207-20 of the ITAA 1997
- Subdivision 207-D of the ITAA 1997
- Subdivision 207-F of the ITAA 1997
- section 207-145 of the ITAA 1997
- section 207-155 of the ITAA 1997
- Division 230 of the ITAA 1997
- Division 974 of the ITAA 1997
- section 974-75 of the ITAA 1997
- paragraph 974-115(b)(ii) of the ITAA 1997
- section 974-120 of the ITAA 1997
- subsection 995-1(1) of the ITAA 1997
- subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

## Class of entities

3. The class of entities to which this Ruling applies are investors (Holders) who acquired fully paid mandatorily convertible subordinated perpetual debt securities in the form of unsecured notes issued (BOQ Capital Notes) by Bank of Queensland (BOQ) and who:

- are residents of Australia (within the meaning of subsection 6(1) of the ITAA 1936) during the period in which they hold BOQ Capital Notes
- hold their BOQ Capital Notes on capital account, and
- are not subject to the Taxation of Financial Arrangements (TOFA) rules in Division 230 of the ITAA 1997 in relation to financial arrangements under the scheme.

(**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.)

4. The class of entities to which this Ruling applies does not extend to Holders of BOQ Capital Notes who acquired their BOQ Capital Notes otherwise than by initial application under the Prospectus dated 22 November 2017 for issue of BOQ Capital Notes.

5. This Ruling does not address the tax consequences of the Reinvestment Offer to Holders of BOQ Convertible Preference Shares issued on 24 December 2014 nor the issue of the Pro Rata Dividend, as set out in the Prospectus.

6. This ruling does not deal with how the taxation law applies to Holders who hold their Notes as trading stock or revenue assets.

7. This Ruling does not consider how the gross-up and tax offset rules in Division 207 of the ITAA 1997 apply to partnership or trustee Holders, or to indirect distributions to partners in a partnership or beneficiaries or trustees of a trust.

8. This Ruling does not deal with how the taxation law applies to BOQ in relation to the issue of BOQ Capital Notes.

### **Qualifications**

9. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

10. 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 16 to 50 of this Ruling.

11. 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.

12. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*, or
- the relevant provisions are not amended.

13. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the TAA).

14. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun, and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (Item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Date of effect

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16. This Ruling applies from 1 July 2017 to 30 June 2018. The Ruling continues to apply after 30 June 2018 to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

## Scheme

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17. The description of the scheme is set out below and is based upon information provided by BOQ. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Request for Class Ruling from BOQ received on 25 September 2017
- Prospectus dated 22 November 2017 for the issue of BOQ Capital Notes (Prospectus)
- BOQ Capital Notes Deed Poll dated 22 November 2017, including BOQ Capital Notes Terms, and
- correspondence and additional information provided by BOQ.

18. In this Ruling, unless otherwise defined, capitalised terms take their meaning as specified in the Prospectus and Notes Terms.

**Background**

19. BOQ is a publicly listed company that provides retail, business and specialist banking solutions, vendor finance products, premium funding products and insurance products to customers in Australia and, to a lesser extent, in New Zealand. BOQ's main operations include, as a retail bank, taking deposits from customers, and providing loan facilities to borrowers, and the provision of equipment finance and insurance.

20. BOQ is an 'authorised deposit-taking institution' regulated by the Australian Prudential Regulation Authority (APRA) under the *Banking Act 1959* (Cth).

21. BOQ is the head company of the BOQ tax consolidated group (Group) under Part 3-90 of the ITAA 1997.

**The Offer**

22. In the Prospectus, BOQ announced its intention to undertake a capital raising by the issue of the BOQ Capital Notes to raise \$300 million with the ability to raise a higher or lower amount.

23. The proceeds of the BOQ Capital Notes will be used for BOQ's general corporate funding purposes, including the partial refinancing of BOQ's Convertible Preference Shares under the Reinvestment Offer. The issue of the BOQ Capital Notes is being made as part of BOQ's ongoing prudential funding and capital management strategy.

24. APRA confirms in a letter dated 13 November 2017 that the proposed issue of BOQ Capital Notes may be capable of being recognised as Additional Tier 1 Capital of BOQ for the purposes of APRA's prudential standards applying to BOQ, subject to their final terms.

25. BOQ Capital Notes were expected to be issued on 28 December 2017. An application will be made to list BOQ Capital Notes on the Australian Securities Exchange (ASX).

**Main Features of BOQ Capital Notes**

26. BOQ Capital Notes will be issued by BOQ. The obligations of BOQ under BOQ Capital Notes are constituted by, and owing under, the Deed Poll (see clause 2.1 of the Deed Poll).

27. Each BOQ Capital Note is issued fully paid for its face value of AUD \$100 (Face Value) (see clause 1.2 of the Notes Terms).

28. BOQ Capital Notes are perpetual and do not have a definite maturity date.

29. BOQ Capital Notes are subject to Mandatory Conversion on the Mandatory Conversion Date.

30. Some or all of the BOQ Capital Notes may be converted or written off if a Loss Absorption Event occurs. A Loss Absorption Event is a Common Equity Trigger Event or a Non-Viability Trigger Event.

31. With the prior written consent of APRA, BOQ may elect to:

- Convert, Redeem or Resell all or some of the BOQ Capital Notes following the occurrence of a Tax Event or Regulatory Event
- Convert all (but not some) of the BOQ Capital Notes following the occurrence of a Potential Acquisition Event, or
- Convert, Redeem or Resell all or some of the BOQ Capital Notes on the date specified in the Terms (see clauses 6, 8 and 10 of the Notes Terms).

32. BOQ Capital Notes cannot be Converted, Redeemed or Resold at the option of a Holder.

33. There is no certainty that BOQ Capital Notes will be Converted, Redeemed or Resold as APRA's written approval for such an action may not be granted, and in any event, BOQ may be unwilling to take such action. BOQ Capital Notes may still be on issue on the Mandatory Conversion Date.

### ***Distribution calculations***

34. Subject to the Notes Terms, each Holder of a BOQ Capital Note on the Record Date is entitled to receive, on the relevant Distribution Payment Date, a cash distribution (Distribution) (see clause 2 of the Terms). The amount of the Distribution is calculated according to the following formula:

$$\text{Distribution} = \frac{\text{Distribution on Rate} \times \text{A\$100} \times \text{N}}{365}$$

where:

**Distribution Payment Date** means, in respect of a BOQ Capital Note:

- each 15 February, 15 May, 15 August and 15 November commencing on 15 February 2018 until (but not including) the date on which the Note is Converted or Redeemed in accordance with these Terms; and
- each date on which a Conversion, Redemption or Resale of that Note occurs in accordance with these Terms.

If a Distribution Payment Date is a day which is not a Business Day, then the Distribution Payment Date is the next Business Day.

**Distribution Rate** (expressed as a percentage per annum) means  $(\text{BBSW Rate} + \text{Margin}) \times (1 - \text{Tax Rate})$

where:

**BBSW Rate** (expressed as a percentage per annum) means, for a Distribution Period, the rate for prime bank eligible securities having a term of 3 months, which is designated as the 'AVG MID' on the Thomson Reuters Screen BBSW Page (or any designation which replaces that designation on that page, or any page that replaces that page) at approximately 10:30am Sydney time (or such other time at which such rate customarily appears on that page) on the relevant day;

**Margin** (expressed as a percentage per annum) means, for a BOQ Capital Note, the margin specified in, or determined in accordance with, the Bookbuild; and

**Tax Rate** means the Australian corporate tax rate applicable to the franking account of BOQ on the relevant Distribution Payment Date (expressed as a decimal);

**N** means the number of days in the Distribution Period.

**Distribution Period** means in respect of:

- the first Distribution Period, the period from (and including) the Issue Date until (but not including) the first Distribution Payment Date after the Issue Date; and
- each subsequent Distribution Period, the period from (and including) the preceding Distribution Payment Date until (but not including) the next Distribution Payment Date.

35. Pursuant to the definition of 'Franking Rate' in the Notes Terms, Distributions are expected to be franked at the same percentage as applies to BOQ's Ordinary Shares ('Ordinary Shares'). The franking percentage of Distributions may vary over time in line with the franking percentage applicable to the franking account of BOQ.

### ***Distribution conditions***

36. The payment of any Distribution is subject to, among other things:

- BOQ's absolute discretion
- the payment of the Distribution not resulting in BOQ or the Group being in breach of APRA's Prudential Capital Requirements at the time of the payment
- the payment of the Distribution not resulting in BOQ becoming, or being likely to become, insolvent for the purposes of the *Corporations Act 2001* (Cth), and



- APRA not objecting to the payment of the Distribution.

37. Distributions are non-cumulative, and interest does not accrue on any unpaid Distributions. BOQ has no liability to pay the unpaid amount of the Distribution, Holders have no claim or entitlement in respect of non-payment, and non-payment does not constitute an event of default.

38. A restriction applies to BOQ if BOQ fails to pay a Distribution in full within 3 Business Days of a Distribution Payment Date. The restriction is that BOQ must not, without the approval of a Special Resolution of the Holders:

- (a) declare, determine to pay or pay any Ordinary Share Dividend, or
- (b) undertake any Buy Back or Capital Reduction.

### ***Mandatory Conversion***

39. BOQ must Convert all (but not some) of BOQ Capital Notes on issue into Ordinary Shares at the Mandatory Conversion Date. The Mandatory Conversion Date is first to occur of the following dates on which the Mandatory Conversion Conditions (discussed below) are satisfied:

- (a) 15 August 2026. As this day is not a Business Day it will be postponed to the next Business Day, expected to be 17 August 2026, or
- (b) the first Distribution Payment Date after that date for which the Mandatory Conversion Conditions are satisfied.

40. The Mandatory Conversion Conditions will be satisfied if, amongst other things, the average price of Ordinary Shares on the relevant dates exceeds the required percentage of the price of Ordinary Shares on the date of issue of the BOQ Capital Notes.

### ***Conversion or Write-Off on Loss Absorption Event***

41. A Loss Absorption Event is a Common Equity Trigger Event or a Non-Viability Trigger Event.

42. A Common Equity Trigger Event occurs when either or both of the Common Equity Tier 1 Capital Ratio in respect of the BOQ Level 1 Group and the BOQ Level 2 Group as determined by BOQ or APRA at any time is equal to or less than 5.125%.

43. A Non-Viability Trigger Event occurs where APRA provides a written determination to BOQ that the Conversion or Write Off of BOQ Capital Notes is necessary because APRA considers that BOQ would become non-viable:

- (a) without the Conversion or Write Off of BOQ Capital Notes, or

(b) without a public injection of capital into BOQ.

44. If a Loss Absorption Event occurs, BOQ is required to Convert or Write Off all or some of the BOQ Capital Notes.

45. If the Conversion is unable to be undertaken within the required time period after the Loss Absorption Event, the rights of Holders under BOQ Capital Notes will be immediately and irrevocably Written Off with effect on and from the Loss Absorption Event Conversion Date (Write Off).

### ***Conversion on Acquisition Event***

46. An Acquisition Event occurs if, amongst other things, a person acquires more than 50% of the ordinary shares in BOQ as a result of a takeover bid or scheme of arrangement. If an Acquisition Event occurs, BOQ is required to Convert all (but not some) of the BOQ Capital Notes into Ordinary Shares.

### ***Optional Conversion, Redemption or Resale by BOQ***

47. Subject to APRA's prior written approval, BOQ may elect to:

- (a) Convert, Redeem or Resell all or some of the BOQ Capital Notes following the occurrence of a Tax Event or Regulatory Event
- (b) Convert all (but not some) of the BOQ Capital Notes following the occurrence of a Potential Acquisition Event, or
- (c) Convert, Redeem or Resell all or some of the BOQ Capital Notes on the date specified in the Notes Terms.

48. Certain restrictions on BOQ's elections apply.

### ***Conversion mechanism***

49. A Conversion of BOQ Capital Notes into Ordinary Shares is achieved through:

- (a) the compulsory termination of BOQ Capital Notes in consideration for a payment equal to the Face Value of each BOQ Capital Note, and
- (b) the irrevocable application of that payment to subscribe for the issue of new Ordinary Shares to the Holder.

The Holder has no other rights to the payment, except to have that payment applied to the acquisition of the Ordinary Shares.

## ***Redemption mechanism***

50. A Redemption of BOQ Capital Notes requires the payment of the Face Value to the relevant Holder, upon which all other rights and restrictions imposed by BOQ Capital Notes no longer have effect.

## ***Resale mechanism***

51. A Resale of BOQ Capital Notes requires the Holder to transfer the relevant BOQ Capital Notes to a purchaser nominated by BOQ for a Resale Price equal to the Face Value of the BOQ Capital Notes.

## **Other matters and assumptions**

52. This Ruling is made on the basis that:

- (a) on a Conversion, BOQ will debit the Face Value of the BOQ Capital Notes to its non-share capital account
- (b) the Distributions on the BOQ Capital Notes will not be debited against BOQ's share capital account or non-share capital account, and Distributions will not be sourced, directly or indirectly, from BOQ's share capital account or non-share capital account
- (c) the Distribution paid in respect of the BOQ Capital Notes will be franked. BOQ will frank the Distributions on the BOQ Capital Notes at the same franking percentage as the benchmark franking percentage for the franking period in which the Distributions are made
- (d) the share capital of BOQ will not become tainted by an issue of BOQ Capital Notes or the Ordinary Shares of BOQ on Conversion within the meaning of Subdivision 197-A of the ITAA 1997
- (e) BOQ will not differentially frank Distributions to different Holders in respect of the BOQ Capital Notes according to the tax status of Holders or on any other basis
- (f) on a Redemption, BOQ will make redemption payments out of capital, and not out of profits
- (g) if BOQ declares the unfranked part of a Distribution to be conduit foreign income, Holders who are Australian corporate tax entities will not, after the start of the relevant income year and before the due day for lodging their income tax return for that income year, declare the unfranked part of a frankable distribution made by the Holder to be conduit foreign income
- (h) BOQ has sufficient available frankable profits in relation to any franked Distributions paid

- (i) neither a Holder, nor its associates, will have any 'positions' (within the meaning of former section 160APHJ of the ITAA 1936) in relation to their BOQ Capital Notes that would cause the Holder not to be a 'qualified person' for the purpose of Division 1A of former Part IIIAA of the ITAA 1936
- (j) neither a Holder, nor its associates, will make any related payments, or be under an obligation to make any related payments, or be likely to make any related payments (within the meaning of former section 160APHN of the ITAA 1936) in relation to the Distributions on the BOQ Capital Notes
- (k) Holders in receipt of Distributions on the BOQ Capital Notes will have held their BOQ Capital Notes for a period of at least 90 days (excluding the day of disposal), within the period beginning on the day after the day on which the Holder acquired the BOQ Capital Notes and ending on the 90<sup>th</sup> day after the day on which the BOQ Capital Notes go ex-distribution
- (l) Holders (or their connected entities) will not engage in distribution washing (within the meaning of section 207-157 of the ITAA 1997) in relation to Distributions on the BOQ Capital Notes (unless the exception in subsection 207-157(4) applies)
- (m) the Capital Notes will be issued by BOQ within Australia.

53. This Ruling is made on the basis that the Commissioner considers that BOQ Capital Notes are equity interests in BOQ pursuant to Division 974 of the ITAA 1997 and are non-share equity interests in BOQ as the term is defined in subsection 995-1(1) of the ITAA 1997.

## **Ruling**

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### **BOQ Capital Notes not traditional securities**

54. BOQ Capital Notes will not meet the definition of security under subsection 159GP(1) of the ITAA 1936 and will, therefore, not be traditional securities for the purposes of section 26BB of the ITAA 1936.

### **BOQ Capital Notes not qualifying securities**

55. BOQ Capital Notes will not meet the definition of security under subsection 159GP(1) of the ITAA 1936 and will, therefore, not be qualifying securities under 159GP(1) of the ITAA 1936.

## **Acquisition time**

56. Each Holder who acquired BOQ Capital Notes upon subscription will be taken to have acquired each BOQ Capital Note on the date on which the contract for the allotment of the BOQ Capital Notes was entered into, pursuant to Item 2 of the table in section 109-10 of the ITAA 1997.

## **Cost base and reduced cost base of BOQ Capital Notes**

57. The first element of the cost base and reduced cost base of each BOQ Capital Note is A\$100, being the money paid by the Holder to acquire each BOQ Capital Note from BOQ (in accordance with subsections 110-25(2) and 110-55(2) of the ITAA 1997).

## **CGT Event C2 on Conversion**

58. Each BOQ Capital Note is a convertible interest.

59. CGT event C2 will happen for Holders on Conversion of BOQ Capital Notes into Ordinary Shares in BOQ (section 104-25 of the ITAA 1997).

60. Any capital gain or capital loss made by a Holder from CGT event C2 happening on Conversion of the BOQ Capital Notes will be disregarded (subsection 130-60(3) of the ITAA 1997).

## **Cost base and reduced cost base of Ordinary Shares acquired on Conversion**

61. On Conversion of BOQ Capital Notes, Subdivision 130-C of the ITAA 1997 will apply so that the first element of the cost base and reduced cost base of each Ordinary Share acquired from Conversion of the BOQ Capital Notes will be a pro-rata portion of the cost base of the BOQ Capital Notes at the time of Conversion (item 2 of the table in subsection 130-60(1) of the ITAA 1997).

## **Acquisition time of Ordinary Shares received upon Conversion**

62. Ordinary Shares acquired on Conversion of the BOQ Capital Notes will be taken to have been acquired when the Conversion of the BOQ Capital Notes occurs (subsection 130-60(2) of the ITAA 1997).

## **The Ordinary Shares received upon Conversion**

63. Other than in respect of a Distribution paid on Conversion, Conversion of BOQ Capital Notes will not result in Holders being taken to have received a dividend or a non-share dividend that will be included in the assessable income of the Holders under subsection 44(1) of the ITAA 1936.

**Section 45 of the ITAA 1936**

64. Section 45 of the ITAA 1936 will not apply to treat the Ordinary Shares issued on Conversion as an unfrankable dividend paid by BOQ.

**Section 45A of the ITAA 1936**

65. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole, or part of, a capital benefit that arises on Conversion or Redemption of BOQ Capital Notes as an unfranked dividend in the hands of Holders.

**Section 45B of the ITAA 1936**

66. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole, or part of, a capital benefit that arises on Conversion or Redemption of BOQ Capital Notes as an unfranked dividend in the hands of Holders.

**Inclusion of Distributions and franking credits in assessable income**

67. Distributions paid in respect of each BOQ Capital Note are non-share dividends under section 974-120 of the ITAA 1997 and must be included in the Holder's assessable income (subparagraph 44(1)(a)(ii) of the ITAA 1936).

68. Holders must also include in their assessable income an amount equal to the franking credits attached to the Distribution (subsection 207-20(1) of the ITAA 1997).

**Entitlement to a tax offset**

69. Holders will be entitled to a tax offset equal to the franking credit received on Distributions paid in respect of BOQ Capital Notes (subsection 207-20(2) of the ITAA 1997) unless the Distribution is exempt income or non-assessable non-exempt income in the hands of the Holder (Subdivision 207-D of the ITAA 1997).

## **Franking credit subject to the refundable tax offset rules**

70. Holders who are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997, in respect of the franking credits received in relation to BOQ Capital Notes, will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless they are specifically excluded under section 67-25 of the ITAA 1997.

## **Streaming of imputation benefits**

71. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by a Holder in relation to Distributions paid in respect of BOQ Capital Notes.

## **Determination under paragraph 177EA(5)(b) of the ITAA 1936**

72. 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 benefits received by Holders in relation to Distributions paid in respect of BOQ Capital Notes.

## **Gross-up and tax offset denied in certain circumstances**

73. Section 207-145 of the ITAA 1997 will not apply to the whole, or any part, of the Distributions paid to Holders of BOQ Capital Notes. Accordingly, section 207-145 will not adjust the gross-up of the Holders' assessable income to exclude the franking credit, nor will it deny the tax offset to which the Holders would have otherwise been entitled.

## 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.*

### Characterisation of BOQ Capital Notes

#### ***BOQ Capital Notes not traditional securities***

74. A traditional security is defined in subsection 26BB(1) of the ITAA 1936 as a security held by the taxpayer that was acquired by the taxpayer after 10 May 1989, is not trading stock of the taxpayer, and either does not have an eligible return, or has an eligible return that satisfies the conditions listed in subparagraph (b)(ii) of the definition of traditional security in subsection 26BB(1) of the ITAA 1936.

75. The term 'security' is defined in subsection 26BB(1) of the ITAA 1936 by reference to subsection 159GP(1) of the ITAA 1936. Pursuant to subsection 159GP(1), 'security' means:

- (a) stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security
- (b) a deposit with a bank or other financial institution
- (c) a secured or unsecured loan, or
- (d) any other contract, whether or not in writing, under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

76. BOQ Capital Notes are not stock, a bond, debenture, certificate of entitlement, bill of exchange, or a promissory note.

77. The term 'or other security' in paragraph (a) of the definition of security only encompasses instruments that evidence an obligation on the part of the issuer or drawer to pay an amount to the holder or acceptor, whether during the term of the instrument or at its maturity. The types of securities referred to in paragraph (a) of the definition of security will generally be recognised as debt instruments (Taxation Ruling TR 96/14).

78. Paragraphs (b) and (c) of the definition of security do not apply because a BOQ Capital Note is neither a deposit with a bank or other financial institution, nor a secured or unsecured loan.

79. Only those contracts that have debt like obligations will usually fall under paragraph (d) of the definition of security (TR 96/14).

80. The Notes Terms do not evidence a liability by BOQ to pay an amount or amounts to Holders of BOQ Capital Notes during the term of the instrument or at maturity.

81. BOQ Capital Notes are perpetual and Holders do not have a right to require Conversion, Redemption or Resale.



82. The payment by BOQ of Distributions is subject to certain conditions. Distributions are discretionary and non-cumulative. If a Distribution is not paid, BOQ has no liability to pay the Distribution and Holders have no claim in respect of non-payment.

83. Furthermore, the Notes Terms provide for the Conversion of BOQ Capital Notes in return for BOQ allotting and issuing the Conversion Number of Ordinary Shares based on the Face Value of the BOQ Capital Notes and a formula set out in the Notes Terms for each BOQ Capital Note held by the Holders. BOQ does not have to Convert the BOQ Capital Notes if it is unable to for any reason. In that case, the BOQ Capital Notes will be Written Off. This does not establish a liability on BOQ to pay an amount.

84. The Redemption or Resale of BOQ Capital Notes is possible. However, it is only at the option of BOQ and requires the prior written approval of APRA. This does not establish a liability on BOQ to pay an amount.

85. BOQ will not become liable to pay an amount in respect of the BOQ Capital Notes upon winding up as it would be expected that, before winding up commences, the BOQ Capital Notes would either be Converted into Ordinary Shares pursuant to a Loss Absorption Event (in which case any payment would be made to the Holders as ordinary shareholders as opposed to under the Notes Terms), or the Holders' rights would be terminated where BOQ is not able to allot and issue Ordinary Shares within the time required by the Notes Terms (referred to as Written Off in the Notes Terms).

86. As BOQ Capital Notes are not a security within the meaning of subsection 159GP(1) of the ITAA 1936, it cannot be a traditional security under subsection 26BB(1) of the ITAA 1936.

### ***BOQ Capital Notes not qualifying securities***

87. A 'qualifying security' is defined in subsection 159GP(1) of the ITAA 1936 as a security issued after 16 December 1984, is not part of an exempt series within the meaning of subsection 159GP(9A) of the ITAA 1936, with a term reasonably likely to exceed 1 year, and has an eligible return that satisfies the requirement in paragraph (e) of the subsection 159GP(1) definition.

88. BOQ Capital Notes are not a 'security' within the meaning of the definition of 'security' in subsection 159GP(1) of the ITAA 1936, for the reasons as explained at paragraphs 74 to 84 of this Ruling.

89. Accordingly, BOQ Capital Notes are not a 'qualifying security' within the meaning of section 159GP(1) of the ITAA 1936.

**CGT Implications*****Acquisition time of BOQ Capital Notes***

90. Item 2 of the table in section 109-10 of the ITAA 1997 provides that in the circumstances where a company issues or allots equity interests or non-equity shares in the company to you, you will acquire the CGT asset when the contract is entered into, or, if there is not a contract, when the interests are issued or allotted.

91. The BOQ Capital Notes are equity interests in BOQ. When a person's application to subscribe for BOQ Capital Notes is accepted by BOQ, this constitutes a contract for the allotment of the BOQ Capital Notes to that person (who will become a Holder once they are entered onto the Register) (see the definition of 'Holder' in the Notes Terms).

92. Consequently, for CGT purposes, a Holder should acquire their BOQ Capital Notes on the date on which the contract for the allotment of BOQ Capital Notes will be entered into.

***Cost base and reduced cost base of BOQ Capital Notes***

93. Under paragraph 110-25(2)(a) of the ITAA 1997 and subsection 110-55(2) of the ITAA 1997 the first element of the cost base and reduced cost base, respectively, of a CGT asset includes the money paid, or required to be paid, in respect of acquiring the CGT asset.

94. The Face Value of each BOQ Capital Note is A\$100, which will be paid by the Holder to BOQ upon subscription for each BOQ Capital Note.

95. Accordingly, for CGT purposes, the first element of the cost base and reduced cost base of each BOQ Capital Note for each Holder who acquires BOQ Capital Notes upon subscription will be A\$100.

***CGT Event C2 on Conversion***

96. Under section 104-25 of the ITAA 1997, CGT Event C2 happens if, among other things, the ownership of an intangible asset that is a convertible interest ends by the conversion of the asset into another asset (paragraph 104-25(1)(f)).

97. Section 995-1(1) of the ITAA 1997 defines a convertible interest in a company by reference to Item 4 of the table in subsection 974-75(1) of the ITAA 1997.

98. Item 4 of the table in subsection 974-75(1), more specifically paragraph (b), refers to an interest that will, or may, convert into an equity interest in the company or a connected entity of the company.

99. The Notes Terms provide that on Conversion each Holder's rights in relation to each BOQ Capital Note that is being Converted will be immediately and irrevocably terminated.

100. BOQ Capital Notes will meet the definition in paragraph (b) in Item 4 of the table in subsection 974-75(1) of the ITAA 1997 and will, therefore, meet the definition of a convertible interest as defined in subsection 995-1(1) of the ITAA 1997.

101. Therefore, CGT Event C2 occurs on the Conversion of BOQ Capital Notes pursuant to section 104-25 of the ITAA 1997.

102. Subsection 130-60(3) of the ITAA 1997 provides that any capital gain or capital loss made from converting a convertible interest is disregarded.

103. Accordingly, upon Conversion, Holders will disregard any capital gain or loss arising from that Conversion pursuant to subsection 130-60(3).

### ***Cost base and reduced cost base of Ordinary Shares acquired on Conversion***

104. Item 2 of the table in subsection 130-60(1) of the ITAA 1997 modifies the first element of the cost base and reduced cost base of shares acquired by converting a convertible interest that is not a traditional security.

105. The subsection provides in these circumstances that the first element of the cost base and reduced cost base of the BOQ Capital Notes will be:

- (a) the cost base of the convertible interest at the time of conversion
- (b) any amount paid to convert the convertible interest, except to the extent that the amount is represented in the paragraph (a) amount, and
- (c) all the amounts to be added under subsection (1A).

106. The Notes Terms state that Conversion will occur at the Face Value of BOQ Capital Notes. Therefore, no additional amount is expected to be paid upon Conversion.

107. Subsection 130-60(1A) of the ITAA 1997 provides that an amount is to be added if a capital gain from a convertible interest has been reduced under section 118-20 of the ITAA 1997, which reduces capital gains if the amount is otherwise assessable. No capital gain is assessable to the Holders of BOQ Capital Notes upon Conversion.

108. Accordingly, the first element of the cost base and reduced cost base of each Ordinary Share acquired upon Conversion will be equal to a pro-rata portion of the Holder's cost base and reduced cost base of BOQ Capital Notes at the time of the Conversion.

***Acquisition time of Ordinary Shares received upon Conversion***

109. Subsection 130-60(2) of the ITAA 1997 states:

You are taken to have acquired the shares or units when the conversion of the convertible interest happened.

110. As such, upon Conversion, the Holders of BOQ Capital Notes will be taken to have acquired each Ordinary Share that they receive.

***The Ordinary Shares received upon Conversion***

111. The issue of Ordinary Shares to Holders on Conversion is a distribution of property to holders of a non-share equity interest and a non-share distribution under subparagraph 974-115(b)(ii) of the ITAA 1997. A non-share distribution is a non-share dividend under subsection 974-120(1) of the ITAA 1997, subject to subsection 974-120(2) of the ITAA 1997 applying.

112. However, subsection 974-120(2) of the ITAA 1997 provides that a non-share distribution is not a non-share dividend to the extent to which the company debits the distribution against the company's share capital account or non-share capital account.

113. On Conversion, BOQ will debit the Face Value of BOQ Capital Notes to its non-share capital account. Accordingly, the issue of Ordinary Shares on Conversion is not a non-share dividend and will not be included in a Holder's assessable income under subparagraph 44(1)(a)(ii) of the ITAA 1936.

114. Furthermore, the Ordinary Shares will not be issued to the Holders of BOQ Capital Notes as shareholders of BOQ. Accordingly, the issue of the Ordinary Shares would not satisfy paragraph (a) or (b) of the definition of dividend in subsection 6(1) of the ITAA 1936. This means that it will not be included in the assessable income of the Holders under subparagraph 44(1)(a)(i) of the ITAA 1936.

***Section 45 of the ITAA 1936***

115. Section 45 of the ITAA 1936 applies where a company streams the provision of shares and the payment of minimally franked dividends to its shareholders in such a way that the shares are received by some shareholders and minimally franked dividends are received by other shareholders. Minimally franked dividends are dividends which are franked to less than 10%.

116. The Notes Terms provide that BOQ must endeavour to treat Holders in approximate proportion to their holdings of BOQ Capital Notes when Conversion applies to some, but not all, of the BOQ Capital Notes.

117. Based on the information provided and having regard to the relevant circumstances of the scheme, section 45 of the ITAA 1936 will not apply to treat the value of the Ordinary Shares provided to Holders as an unfrankable dividend in their hands.

## ***Section 45A of the ITAA 1936***

118. Section 45A of the ITAA 1936 applies in circumstances where a company selectively directs the provision of capital benefits to certain shareholders who derive a greater benefit from the receipt of capital (the advantaged shareholders) and it is reasonable to assume that the other shareholders have received or will receive dividends (the disadvantaged shareholders).

119. The Commissioner may make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies. The effect of such a determination is that the capital benefit is taken to be an unfranked dividend.

120. A provision of capital benefits includes the provision to the shareholder of shares in the company pursuant to paragraph 45A(3)(a) of the ITAA 1936. The issue of Ordinary Shares to Holders on Conversion of BOQ Capital Notes will constitute the provision of capital benefits.

121. However, the issue of Ordinary Shares on Conversion of BOQ Capital Notes is in effect a restatement of the Holder's interest in the capital of BOQ. In the absence of any other factors that would contribute to an alternative conclusion, the issue of BOQ Ordinary Shares on Conversion will not be considered a streaming of capital benefits.

122. The Redemption of BOQ Capital Notes will involve the provision of a capital benefit within the meaning of subsection 45A(3) of the ITAA 1936 as it will constitute a non-share capital return (subsection 45A(3A) of the ITAA 1936). The amount paid to Holders on Redemption is limited to the amount of the Face Value of BOQ Capital Notes and any Distribution entitlements on the BOQ Capital Notes will be separately paid as Distributions given that it is at BOQ's absolute discretion to determine whether such Distributions should be made.

123. Accordingly, it cannot be said that Holders would derive a greater benefit from capital benefits than other BOQ shareholders. The issue of Ordinary Shares on Conversion or the Redemption of BOQ Capital Notes will not trigger the application of section 45A of the ITAA 1936.

124. Therefore, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole, or part of, a capital benefit that arises on Conversion or Redemption of the BOQ Capital Notes as an unfranked dividend in the hands of Holders.

**Section 45B of the ITAA 1936**

125. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends and the conditions in subsection 45B(2) of the ITAA 1936 are met.

126. The Commissioner may make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies. The effect of such a determination is that all or part of the capital benefit is taken to be an unfranked dividend.

127. The issue of Ordinary Shares to Holders on Conversion will constitute a scheme under which the Holders are provided with a capital benefit by BOQ (paragraph 45B(5)(a) of the ITAA 1936). Similarly, Redemption of BOQ Capital Notes will also constitute a scheme under which the Holders are provided with a capital benefit by BOQ (paragraph 45B(5)(b) of the ITAA 1936 and subsection 45B(7) of the ITAA 1936).

128. For the provision to apply, among other things, paragraph 45B(2)(c) of the ITAA 1936 requires that, 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 a taxpayer to obtain a tax benefit. A non-exhaustive list of relevant circumstances of the scheme are provided in subsection 45B(8) of the ITAA 1936.

129. Having regard to the relevant circumstances surrounding the issue of Ordinary Shares on Conversion or Redemption of BOQ Capital Notes, it cannot be concluded that BOQ, the Holders or any other person entered into or carried out the Conversion or Redemption of BOQ Capital Notes for a purpose other than an incidental purpose of enabling Holders to obtain a tax benefit.

130. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole, or part of, a capital benefit that arises on Conversion or Redemption of BOQ Capital Notes as an unfranked dividend in the hands of Holders.

**Distributions under BOQ Capital Notes*****Inclusion of Distributions and franking credits in assessable income***

131. Subsection 44(1) of the ITAA 1936 provides that the assessable income of a resident shareholder in a company includes all dividends and non-share dividends paid to the shareholder by the company.

132. BOQ Capital Notes are 'non-share equity interests' as defined in subsection 995-1(1) of the ITAA 1997. Subsection 43B(1) of the ITAA 1936 provides that the legislation governing the taxation of dividends applies to non-share equity interests, equity holders and non-share dividends in the same way as it applies to shares, shareholders and dividends.

133. Distributions will not be debited against BOQ's non-share capital account or share capital account. Therefore, Distributions paid in respect of BOQ Capital Notes are non-share dividends under section 974-120 of the ITAA 1997. Accordingly, Holders must include in their assessable income Distributions paid in respect of BOQ Capital Notes under subparagraph 44(1)(a)(ii) of the ITAA 1936.

134. In accordance with subsection 207-20(1) of the ITAA 1997, any franking credit attached to a Distribution must also be included in the relevant Holder's assessable income for the income year in which the Distribution is made.

#### ***Entitlement to a tax offset***

135. Holders will be entitled to a tax offset equal to the franking credit received on Distributions paid in respect of BOQ Capital Notes (subsection 207-20(2) of the ITAA 1997) unless the Distribution is exempt income or non-assessable non-exempt income in the hands of the Holder (Subdivision 207-D of the ITAA 1997).

#### ***Franking credit subject to the refundable tax offset rules***

136. Holders who are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997, in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless they are specifically excluded under section 67-25 of the ITAA 1997.

137. The refundable tax offset rules ensure that certain taxpayers are entitled to a refund once their available tax offsets have been utilised to reduce any income tax liability to nil.

138. Entities excluded under section 67-25 of the ITAA 1997 include corporate tax entities (such as companies, corporate limited partnerships, corporate unit trusts and public trading trusts), unless they satisfy the requisite conditions as set out in subsections 67-25(1C) or 67-25(1D) of the ITAA 1997.

#### ***Streaming of imputation benefits***

139. Subdivision 204-D of the ITAA 1997 enables the Commissioner to make a determination where distributions with attached imputation benefits are streamed to a member of a corporate tax entity in preference to another member.

140. The term 'streaming' is not defined in the ITAA 1997.

141. At paragraphs 3.28 and 3.29 of the Explanatory Memorandum to the *New Business Tax System (Imputation) Bill 2002* (Cth), which introduced Subdivision 204-D to the ITAA 1997, it is explained that:

3.28 Streaming is selectively directing the flow of franked distributions to those members who can most benefit from imputation credits.

3.29 The law uses an essentially objective test for streaming, although purpose may be relevant where future conduct is a relevant consideration. It will normally be apparent on the face of an arrangement that a strategy for streaming is being implemented. The distinguishing of members on the basis of their ability to use franking benefits is a key element of streaming.

142. As such, 'streaming' involves the distribution of franking credits in a way which provides an enhanced benefit to a certain category of members based upon their respective tax attributes.

143. In the present case, BOQ Capital Notes will be listed on the ASX and hence will be available for investment by different types of investors. All Holders will receive Distributions which are franked to the same percentage regardless of their tax attributes or their individual tax position.

144. The Ordinary Shares allotted on the Conversion of the BOQ Capital Notes will not attract the application of section 204-30 of ITAA 1997. That is because the issue of Ordinary Shares will not constitute a distribution as defined in section 960-120 of the ITAA 1997 and the allotment of Ordinary Shares will not affect BOQ's dividend franking policy.

145. Therefore, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by a Holder in relation to Distributions paid in respect of BOQ Capital Notes.

### ***Determination under paragraph 177EA(5)(b) of the ITAA 1936***

146. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of the scheme is to enable a taxpayer to obtain an imputation benefit.

147. Subsection 177EA(3) of the ITAA 1936 provides the conditions under which the section will apply:

- (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.

148. Paragraph 177EA(12)(a) of the ITAA 1936 extends the operation of section 177EA of the ITAA 1936 to non-share equity interests.

149. The Commissioner considers that the conditions in paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied because:

- (a) the issue of BOQ Capital Notes pursuant to the Prospectus is a scheme for the disposition of membership interests in a corporate tax entity (paragraph 177EA(3)(a) of the ITAA 1936)
- (b) a frankable distribution is expected to be payable to a person in respect of BOQ Capital Notes (paragraph 177EA(3)(b) of the ITAA 1936)
- (c) BOQ will frank the Distributions on BOQ Capital Notes (paragraph 177EA(3)(c) of the ITAA 1936), and
- (d) it is reasonable to expect from the above that, but for the operation of this section, Holders will receive imputation benefits as a result of the Distributions made (paragraph 177EA(3)(d) of the ITAA 1936).

150. Paragraph 177EA(3)(e) of the ITAA 1936 provides that the relevant circumstances of the scheme must be considered to establish whether any person who entered into or carried out the scheme or any part of the scheme did so for a more than incidental purpose of enabling a relevant taxpayer to obtain an imputation benefit.

151. The relevant circumstances of a scheme for consideration are included in subsection 177EA(17) of the ITAA 1936. This is a non-exhaustive list of relevant circumstances and the weight accorded to any of the circumstances will vary according to the extent to which that circumstance is probative of a purpose of the kind referred to in paragraph 177EA(3)(e) of the ITAA 1936.

152. The present circumstances have many similarities to, although not identical to, the circumstances considered in *Mills v.*

*Commissioner of Taxation* [2012] HCA 51; 2012 ATC 20-360; 83 ATR 514. The High Court in that case found that the holders of stapled securities obtained franking credits for a purpose that was incidental to the Bank's purpose of raising Tier 1 capital.

153. Based on the information provided and the qualifications set out in this Ruling, and having regard to the relevant circumstances in section 177EA(17), the Commissioner considers the principal purpose of the issue of BOQ Capital Notes is to raise Additional Tier 1 Capital for BOQ to meet its capital adequacy requirements and the purpose of enabling the Holders to obtain imputation benefits is no more than incidental to that purpose.

154. Accordingly, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 that would deny imputation benefits to the Holders.

#### ***Gross-up and tax offset denied in certain circumstances***

155. Subdivision 207-F of the ITAA 1997 creates the appropriate adjustment to cancel the effect of the gross-up and tax offset rules where the entity concerned has manipulated the imputation system in a manner that is not permitted under the income tax law. Section 207-145 is relevant to the Holders that are subject to this Ruling.

156. Pursuant to subsection 207-145(1) of the ITAA 1997, this adjustment will occur where a franked distribution is made to an entity in one or more of the following circumstances:

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

- the distribution is one to which section 207-157 (which is about distribution washing) applies (paragraph 207-145(1)(da) of the ITAA 1997).

157. This Ruling is made on the assumption that the distribution washing provisions do not apply.

158. A person is a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 if, generally speaking, they satisfy the holding period rule and the related payments rule (see former section 160APHO of the ITAA 1936).

159. By virtue of former section 160AOA of the ITAA 1936, the holding period rule and the related payments rule apply to non-share equity interests, equity holders and non-share dividends in the same way as they apply to shares, shareholders and dividends respectively.

160. The holding period rule applies where neither the holder nor an associate of the holder has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend (or non-share dividend), and requires the shares (or non-share equity interests) to have been continuously held at risk throughout the primary qualification period (former paragraph 160APHO(1)(a) of the ITAA 1936).

161. The related payments rule applies where the holder or an associate of the holder has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend (or non-share dividend) and requires the shares (or non-share equity interests) to have been continuously held at risk throughout the secondary qualification period (former paragraph 160APHO(1)(b) and former section 160APHN of the ITAA 1936).

162. A Holder will be a 'qualified person' in relation to a Distribution received in respect of their BOQ Capital Notes, provided that:

- the Holder held their BOQ Capital Notes at risk for a period of at least 90 days (excluding the day of acquisition and the day of disposal, and any days on which the Holder has materially diminished risks of loss or opportunities for gain in respect of the shares or interest), in the period beginning on the day after the day on which the Holder acquired BOQ Capital Notes and ending on the 90th day after the day on which BOQ Capital Notes became ex-dividend (former subsections 160APHO(2) and 160APHO(3) of the ITAA 1936 and former sections 160APHM and 160APHJ of the ITAA 1936), and
- neither the Holder, nor an associate of the Holder, has made, is under an obligation to make, or are likely to make a related payment in relation to Distributions on their BOQ Capital Notes (former paragraph 160APHO(1)(a) of the ITAA 1936 and former section 160APHN of the ITAA 1936).

163. If either, or both, of the above two considerations are not met, the Holders will not be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

164. In determining whether a shareholder is a 'qualified person' in relation to dividends paid on their shares, all 'positions' in respect of the shares are taken into account in identifying a 'net position' to ensure that there is no material diminution in the risks of loss or opportunities for gain.

165. In accordance with former subsection 160APHJ(2) of the ITAA 1936, a position in relation to a share is anything that has a 'delta' in relation to that share. Although 'delta' is not a defined term, paragraph 4.56 of the *Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 2) 1999* states that it 'is a well-recognised financial concept that measures the relative change in the price of an option or other derivative for a given small change in the price of an underlying asset. An option with a positive delta indicates that its price is expected to rise and fall with the underlying asset, while a negative delta indicates an inverse price relationship.'

166. Under the Resale mechanism, BOQ can elect to require some or all Holders to sell their BOQ Capital Notes. The Nominated Purchaser, until appointed by BOQ, has no right or ability to trigger Resale for BOQ Capital Notes from the Holders.

167. BOQ is not required to exercise the Resale mechanism. It follows that the Resale mechanism is an option that is held by BOQ, as the issuer, and not by a third party. The Resale mechanism therefore does not represent a separate position in relation to BOQ Capital Notes for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

168. Similarly, although the Conversion mechanism will effect the conversion of BOQ Capital Notes for Ordinary Shares, the Conversion will not represent a separate position for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. This is because the Holders do not have the right to elect Conversion.

169. Therefore, the Commissioner has concluded that the Resale or Conversion mechanisms will not of themselves affect a Holder's risks of loss or opportunities for gain in respect of BOQ Capital Notes.

170. The Commissioner has confirmed that no determination will be made under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) of the ITAA 1997 to deny the imputation benefits attached to Distributions paid to Holders in respect of BOQ Capital Notes.

171. A distribution will be taken to be made as part of a dividend stripping operation, pursuant to section 207-155 of the ITAA 1997, where the distribution arose out of, or was made in the course of, a scheme or substantially similar arrangement that was in the nature of dividend stripping.

172. Based on the information provided by BOQ there is no indication that the offering of BOQ Capital Notes and the associated payment of franked Distributions to Holders in any way constitutes a dividend stripping arrangement.

173. Therefore, section 207-145 of the ITAA 1997 will not apply to the Distributions received by the Holders in respect of their BOQ Capital Notes. Accordingly, section 207-145 will not adjust the Holder's assessable income to exclude the amount of the franking credit on the Distributions, nor will it deny the tax offset to which the Holder would otherwise be entitled.

## **Appendix 2 – Detailed contents list**

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