

# ***CR 2021/60 - Macquarie Bank Limited - Macquarie Bank Capital Notes 3***

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## Class Ruling

# Macquarie Bank Limited – Macquarie Bank Capital Notes 3

### **📌 Relying on this Ruling**

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

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

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### **What this Ruling is about**

1. This Ruling sets out how the relevant tax provisions apply to specified entities who subscribed for and acquired Macquarie Bank Capital Notes 3 (BCN3) issued by Macquarie Bank Limited (MBL). MBL is a subsidiary of Macquarie Group Limited (MGL).
2. The scheme is set out in paragraphs 43 to 72 of this Ruling.
3. In this Ruling, unless otherwise defined, capitalised terms have the meaning specified in the Terms of the BCN3 (the Terms), which are contained in Appendix A of the BCN3 Replacement Prospectus dated 11 August 2021 (the Prospectus).
4. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

### **Who this Ruling applies to**

5. This Ruling applies to you if you are an investor (also referred to as a Holder) who:
  - acquired your BCN3 by initial application under the Prospectus
  - is a resident of Australia (as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)) during the period you hold your BCN3

- holds your BCN3 on capital account, that is, you do not hold your BCN3 as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)), and
- is not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on your BCN3.

**What this Ruling does not consider**

6. This Ruling does not consider:
- the tax implications in relation to a non-resident who holds their BCN3 through a permanent establishment (as defined in subsection 6(1) of the ITAA 1936) in Australia
  - the tax implications of the Redemption of your BCN3 (other than for the application of sections 26BB, 45A, 45B and 70B of the ITAA 1936)
  - the tax implications for a Nominated Party who acquires BCN3 under a Resale Notice, and
  - how the gross-up and tax offset rules in Division 207 apply to a partnership or trustee investors (other than a partnership or trustee that is a corporate tax entity, or a trustee of a trust that is a complying superannuation entity), or indirect distributions to partners in a partnership or beneficiaries or trustees of a trust.

**When this Ruling applies**

7. This Ruling applies from 1 July 2021 to 30 June 2032.

**Ruling****Consequences of acquiring Macquarie Bank Capital Notes 3*****Acquisition date***

8. You acquired your BCN3 on 27 August 2021 (Issue Date) under table item 2 of section 109-10.

***Cost base and reduced cost base of Macquarie Bank Capital Notes 3***

9. The first element of the cost base and reduced cost base of each BCN3 is A\$100, being the money you paid to acquire your BCN3 (subsections 110-25(2) and 110-55(2)).

**Consequences of holding your Macquarie Bank Capital Notes 3*****Inclusion of Distributions and franking credits in assessable income and entitlement to a tax offset***

10. A Distribution on a BCN3 is a non-share dividend under section 974-120 and must be included in your assessable income (subparagraph 44(1)(a)(ii) of the ITAA 1936), unless the Distribution is exempt income or non-assessable non-exempt income in the hands of the relevant Holder.

11. If a Distribution is franked, provided you are a qualified person (refer to paragraphs 16 and 17 of this Ruling), your assessable income includes the amount of the franking credit on the Distribution (subsection 207-20(1)) and you are entitled to a tax offset equal to the amount of the franking credit (subsection 207-20(2)), unless the Distribution is exempt income or non-assessable income in the hands of the relevant Holder.

12. A tax offset you are entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25. Entities excluded by section 67-25 include corporate tax entities (such as companies, corporate limited partnerships and public trading trusts), unless they satisfy the requisite conditions in subsections 67-25(1C) or (1D).

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

13. 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 you receive in relation to a Distribution.

#### ***Determination under paragraph 204-30(3)(c)***

14. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits you receive in relation to a Distribution.

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

15. Paragraph 207-145(1)(a) will not apply to cancel the effect of the gross-up and tax offset for a franked Distribution if you are a qualified person in respect of that Distribution.

16. You will be a qualified person in relation to a Distribution if, during the primary qualification period, you held your BCN3 for a continuous period of at least 90 days during which you did not have 'materially diminished risks or loss of opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of your BCN3.

17. The Resale and Exchange features of BCN3 will not affect your risks of loss or opportunities for gain in respect of your BCN3 as neither the Resale nor the Exchange mechanism constitutes a separate position (former sections 160APHM and 160APHJ of the ITAA 1936).

18. Paragraphs 207-145(1)(b) to (db) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution on your BCN3.

#### ***Qualifying securities***

19. As your BCN3 is not a 'qualifying security' (as defined in subsection 159GP(1) of the ITAA 1936), Division 16E of Part III of the ITAA 1936 will not apply.

#### ***Consequences of disposing of your Macquarie Bank Capital Notes 3***

##### ***Macquarie Bank Capital Notes 3 are not traditional securities***

20. Your BCN3 are not traditional securities as defined in section 26BB of the ITAA 1936.

21. Section 26BB of the ITAA 1936 will not apply to include any gain on the disposal or Redemption of your BCN3 in your assessable income.

22. Section 70B of the ITAA 1936 will not apply to allow any loss on the disposal or Redemption of your BCN3 as a deduction to you.

### ***Exchange of Macquarie Bank Capital Notes 3 for Macquarie Group Limited Ordinary Shares***

23. Each BCN3 is a 'convertible interest' as defined in subsection 995-1(1) and table item 4 of subsection 974-75(1).

24. CGT event C2 happens on Exchange of each of your BCN3 for MGL Ordinary Shares (paragraph 104-25(1)(f)).

25. A capital gain or capital loss you make from CGT event C2 happening on Exchange will be disregarded (subsection 130-60(3)).

26. MGL Ordinary Shares you acquired on Exchange will be taken to have been acquired when the Exchange happens on the relevant Exchange Date (subsection 130-60(2)).

27. The first element of the cost base and reduced cost base of MGL Ordinary Shares you acquired on Exchange will be equal to the cost base and reduced cost base of your relevant BCN3 at the time of Exchange (table item 2 of subsection 130-60(1)).

28. As you hold your BCN3 on capital account, no amount will be included in your assessable income on the Exchange of a BCN3 under section 6-5.

29. In addition, you will not incur a deductible loss under section 8-1 as a consequence of the Exchange of a BCN3.

30. On the Exchange of a BCN3 for MGL Ordinary Shares you will not be taken to have received a dividend or non-share dividend.

### ***Disposal of Macquarie Group Limited Ordinary Shares by a Sale Agent on Exchange***

31. CGT event A1 happens where the allocation of MGL Ordinary Shares you received on Exchange are disposed of by a Sale Agent and the net proceeds are remitted to you (section 104-10).

32. CGT event A1 happens when the Sale Agent, on your behalf, enters into the contract for the sale of the MGL Ordinary Shares (paragraph 104-10(3)(a)).

33. You will make a capital gain if the net proceeds exceed your cost base (subsection 104-10(4)).

34. You will make a capital loss if the net proceeds are less than your reduced cost base (subsection 104-10(4)).

35. In calculating the capital gain or capital loss the:

- time you are taken to have acquired the MGL Ordinary Shares is worked out according to paragraph 26 of this Ruling, and
- first element of your cost base and your reduced cost base is worked out according to paragraph 27 of this Ruling.

**Resale of Macquarie Bank Capital Notes 3**

36. CGT event A1 happens on the Resale of your BCN3 to the Nominated Party or Nominated Parties (section 104-10).

37. As you receive the Issue Price of the BCN3 on the Resale of your BCN 3, you will not make a capital gain on the Resale as your capital proceeds are not more than the cost base of your BCN3 (subsection 104-10(4)).

38. As you hold your BCN3 on capital account, no amount will be included in your assessable income on the Resale under section 6-5.

39. In addition, you will not incur a deductible loss under section 8-1 as a consequence of the Resale.

**Other integrity provisions****Section 45 of the ITAA 1936**

40. Section 45 of the ITAA 1936 will not apply to treat the value of MGL Ordinary Shares issued to you on Exchange as an unfrankable dividend.

**Section 45A of the ITAA 1936**

41. 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 a part, of the capital benefit provided to you on Exchange or Redemption as an unfranked dividend.

**Section 45B of the ITAA 1936**

42. 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 a part, of the capital benefit provided to you on Exchange or Redemption as an unfranked dividend.

**Scheme**

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

**Background**

44. MGL is the non-operating holding company of the MGL Group and is listed on the Australian Securities Exchange.

45. As the parent company of MBL, MGL is subject to regulatory compliance requirements by the Australian Prudential Regulation Authority (APRA). MBL is an authorised deposit-taking institution for the purposes of the *Banking Act 1959*.

46. For Australian tax purposes, MGL is the head company of the MGL income tax consolidated group. MBL is a subsidiary member of that tax consolidated group.

47. MBL carries on business in Australia and outside Australia through foreign branches.

48. Under the Prospectus, MBL offered to undertake a capital raising by the issue of BCN3 for an issue price of A\$100 each to raise A\$655 million (subject to market conditions and capital needs at the time of issue) (the Offer).

49. The BCN3 were issued on 27 August 2021.

50. The BCN3 are issued by MBL in Australia. The BCN3 are not issued at or through an offshore permanent establishment or subsidiary of MBL.

51. The Offer has been made as part of MGL's ongoing capital management strategy within the regulatory capital requirements prescribed by APRA. The issue of BCN3 is a new capital raising and the proceeds from the issue will be used for general corporate funding and capital management purposes.

### **Main features of Macquarie Bank Capital Notes 3**

52. BCN3 are Australian Dollar-denominated, fully-paid, unsecured, subordinated, non-cumulative, mandatorily convertible notes issued by MBL.

53. BCN3 are listed on the Australian Securities Exchange and trade under the code MBLPD.

### **Issue price**

54. The Issue Price of each BCN3 was A\$100. Each BCN3 was fully paid on the Issue Date, being 27 August 2021.

### **Distributions**

55. MBL will pay in arrears quarterly cash floating-rate Distributions in respect of each BCN3 on a Distribution Payment Date (each a Distribution Payment Date) in accordance with the Terms.

56. The Distribution payable is calculated on the Issue Price of each BCN3 using a Distribution Rate, which is equal to the Bank Bill Rate plus a Margin adjusted by the corporate tax rate and based on the number of days held. The Margin was determined under the Bookbuild.

57. Distributions are expected to be partly franked, at the same rate as the dividends on MGL's ordinary shares. The franking percentage of the Distributions may vary over time in line with the franking percentage that applies to MGL Ordinary Shares.

58. The payment of a Distribution is subject to the absolute discretion of MBL and can also only be paid if certain Payment Conditions are met, including that payment will not breach certain APRA conditions or make MBL insolvent.

59. Distributions are non-cumulative. To the extent that all or part of a Distribution is not paid on a scheduled Distribution Payment Date, BCN3 Holders will have no claim or entitlement in respect of the non-payment of the Distribution. A Distribution that is not paid on a Distribution Payment Date for any reason does not accrue interest for the period during which it remains unpaid.

60. Subject to certain exceptions, if any Distribution is not paid in full on the relevant Distribution Payment Date or within 10 Business Days, this will restrict MBL from determining, declaring or paying any MBL Ordinary Share Dividend, or undertaking any Buy-Backs or Capital Reductions in relation to any MBL Ordinary Shares.

***Mandatory Exchange***

61. BCN3 will be Exchanged for MGL Ordinary Shares on the date that is the earlier of (each a Mandatory Exchange Date), unless the BCN3 have been or will be Redeemed or Exchanged before that date:

- 8 September 2031 (Scheduled Mandatory Exchange Date), subject to the satisfaction of the relevant Exchange Conditions, or
- the first Distribution Payment Date after the Scheduled Mandatory Exchange Date on which the relevant Exchange Conditions are satisfied.

***Automatic Exchange***

62. In certain circumstances, some or all of the BCN3 must be Exchanged for MGL Ordinary Shares before a Mandatory Exchange Date if a Common Equity Tier 1 Trigger Event or Non-Viability Event occurs.

***Optional Exchange***

63. Some or all of the BCN3 may be Exchanged for MGL Ordinary Shares before a Mandatory Exchange Date if MBL elects to do so on any Scheduled Optional Exchange Date or following the occurrence of a Tax Event or a Regulatory Event.

***Acquisition Event Exchange***

64. All of the BCN3 must be Exchanged for MGL Ordinary Shares before a Mandatory Exchange Date if an Acquisition Event occurs, unless the Directors make certain determinations.

***Exchange mechanics***

65. Upon Exchange:

- each BCN3 will be automatically transferred to MGL or, only with APRA's written approval obtained prior to the Exchange Date, to another subsidiary of MGL which is a holding company of MBL (an Approved Nominee), and
- MGL will allot and issue the Exchange Number of MGL Ordinary Shares to the Holders for each BCN3 held by the Holder.

***Disposal of Macquarie Group Limited Ordinary Shares by a Sale Agent on Exchange***

66. In certain circumstances, including by the request of a Holder, the MGL Ordinary Shares may be issued to a Sale Agent instead of the Holder. The Sale Agent will, subject to the Terms, arrange for the sale of those shares and pay the relevant Holder a cash amount equal to the net proceeds of the sale.

***Redemption***

67. MBL may elect to Redeem all or some of the BCN3:

- on a Scheduled Optional Exchange Date, or
- following the occurrence of a Tax Event or Regulatory Event.

68. Each BCN3 will be Redeemed by payment of the Issue Price (Redemption Price) to the relevant Holder. Distributions for the period since the last Distribution Payment Date to (but excluding) the Redemption Date will be paid subject to the conditions for payment of a Distribution being met.

### **Resale**

69. MBL may elect that all or some of the Holder's holding of the BCN3 will be transferred to one or more Nominated Parties (Resale).

70. The Nominated Party or Nominated Parties will be one or more third parties selected by MBL and cannot be MBL itself or a Related Entity.

71. Under a Resale, each Holder on the Resale Date is taken to irrevocably offer to sell the BCN3 that are subject to the Resale Notice to the Nominated Party or Nominated Parties on the Resale Date for a purchase price equal to the Issue Price of that BCN3. Each BCN3 which is to be Resold will be transferred to the Nominated Party free from any encumbrance.

### **Other matters**

72. This Ruling is made on the basis that:

- (a) During the term of the scheme, MGL and MBL are residents of Australia under the income tax laws of Australia and of no other jurisdiction.
- (b) The BCN3 are equity interests in MBL under Division 974 and are non-share equity interests as defined in subsection 995-1(1).
- (c) The BCN3 form part of MBL's Additional Tier 1 Capital for the purposes of the prudential standards determined by APRA and in force under section 11AF of the *Banking Act 1959*.
- (d) The Distributions are frankable distributions under section 202-40.
- (e) MGL expects to frank each Distribution in accordance with the franking policy that applies to ordinary shares in MGL (as such time as Distributions are made), and in a manner that satisfies the benchmark rule in Division 203 for the franking period in which a Distribution is made. The policy of MGL in relation to the franking of dividends on the ordinary shares of MGL is not expected to change as a result of the issuance of the BCN3.
- (f) MGL will not differentially frank Distributions to different Holders according to their tax status or on any other basis.
- (g) Immediately before payment of a Distribution on the BCN3, MBL will have available frankable profits (worked out under section 215-20) at least equal to the Distribution.
- (h) Distributions on the BCN3 will not be sourced directly or indirectly from MBL's non-share capital account or share capital account.
- (i) Distributions on the BCN3 will not be debited to any extent against MBL's non-share capital account or share capital account.
- (j) The share capital account of MBL will not become tainted (within the meaning of Division 197) by the issue of the BCN3 or the issue of MGL Ordinary Shares on Exchange of the BCN3.

- (k) On Exchange or Redemption, MBL will debit the Issue Price of the BCN3 to its non-share capital account (within the meaning of section 164-10).
- (l) Any MGL Ordinary Shares issued on Exchange will be equity interests in MGL as defined in Subdivision 974-C.
- (m) The accounts of the MGL group will be prepared in accordance with the applicable accounting standards.
- (n) You (or an associate) will not make, be under an obligation to make, or be likely to make, a 'related payment' (as defined under former section 160APHN of the ITAA 1936) in relation to a Distribution.
- (o) You will hold your BCN3 for a continuous period of at least 90 days (excluding the day of acquisition and disposal (if relevant)) during the 'primary qualification period' (as defined in former section 160APHD of the ITAA 1936) in relation to a Distribution.
- (p) You will not take any 'positions' as defined in former section 160APHJ of the ITAA 1936) at any time in relation to your BCN3 apart from holding the BCN3.
- (q) You (or your connected entities) will not engage in distribution washing (as outlined in section 207-157) in relation to a Distribution (unless entitled to the exception under subsection 207-157(4)).

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**Commissioner of Taxation**15 September 2021

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**Appendix – Explanation**

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

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**Section 177EA of the ITAA 1936**

73. 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 a particular scheme is to enable a taxpayer to obtain an imputation benefit.

74. The conditions in paragraphs 177EA(3)(a) to (d) of the ITAA 1936 will be satisfied. Therefore, 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 an incidental purpose of enabling a Holder to obtain an imputation benefit (paragraph 177EA(3)(e) of the ITAA 1936).

75. The Commissioner considers that the relevant circumstances of the scheme do not, on balance, lead to a conclusion that the purpose of enabling Holders to obtain imputation benefits is more than incidental to MBL's primary purpose of raising additional Tier 1 capital for general corporate funding and capital management purposes.

**Section 204-30**

76. Subsection 204-30(1) empowers the Commissioner to make a determination under paragraph 204-30(3)(c) if an entity streams distributions in such a certain way that imputation benefits are received by a member who would derive a greater benefit from franking credits than another member of the entity who will receive lesser or no imputation benefits.

77. There is no evidence of streaming as Distributions will be received by all Holders by reason of their proportionate holding of BCN3 and not by reference to their tax profiles or individual tax positions. There is nothing in the Terms that allows MBL to treat Holders differently in respect of their entitlement to a franked Distribution.

#### **Gross up and tax offset cancelled in certain circumstances**

78. Subdivision 207-F may 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.

79. Under subsection 207-145(1), 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))
- 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))
- the Commissioner has made a determination under paragraph 204-30(3)(c) that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(c))
- the distribution is made as part of a dividend stripping operation (paragraph 207-145(1)(d))
- the distribution is one to which section 207-157 (which is about distribution washing) applies (paragraph 207-145(1)(da)), or
- the distribution is one to which section 207-158 (which is about distributions entitled to a foreign income tax deductions) applies (paragraph 207-145(1)(db)).

80. Paragraphs 207-145(1)(a) to (db) will not apply to franked Distributions paid to Holders as explained in paragraphs 81 to 90 of this Ruling.

#### **Paragraph 207-145(1)(a)**

81. Paragraph 207-145(1)(a) will not apply to cancel the effect of the gross-up and tax offset rules for a franked Distribution provided you are a qualified person.

82. As this Ruling is made on the basis that you have not made a related payment in respect of a Distribution, the relevant qualification period for working out if you are a qualified person is the 'primary qualification period' (as defined in former section 160APHD of the ITAA 1936). The primary qualification period begins on the day after you acquire your BCN3 and ends on the 90th day after the day BCN3 becomes ex-distribution.

83. You generally need to have held BCN3 'at risk' for a continuous period of 90 days (excluding the days of acquisition and disposal, if relevant) during the primary qualification period in order to be a qualified person. Any days you had materially diminished risks of loss or opportunities for gain in respect of your holding are also excluded (former subsection 160APHO(3) of the ITAA 1936).

84. Under former subsection 160APHM(2) of the ITAA 1936, you are taken to have materially diminished the risks of loss and opportunities for gain on a particular day with

respect to your BCN3 if your net position on that day does not retain 30% or more of the risks and opportunities associated with holding BCN3.

85. Embedded options such as the Resale and Exchange mechanisms do not represent separate positions in relation to BCN3 (see also Taxation Determination TD 2007/29 *Income tax: holding period rule: is an embedded share option a position in relation to the share if it is exercisable by or against a party other than the issuer of the share?*). Under the Resale mechanism, you will only be taken to have made an offer to sell BCN3 if MBL issues a Resale Notice. As MBL is the only party entitled to make an election to exercise the Resale option, it is not a separate position that you have taken in relation to your BCN3. Similarly, under the Exchange mechanism you do not have the right to elect Exchange of your BCN3.

86. Therefore, the Resale and Exchange mechanisms will not, of themselves, affect your risks of loss or opportunities for gain in respect of your BCN3.

#### **Paragraphs 207-145(1)(b) and (c)**

87. Paragraphs 207-145(1)(b) and (c) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution as the Commissioner will not make determinations under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) (refer to paragraphs 13 and 14 of this Ruling).

#### **Paragraph 207-145(1)(d)**

88. Paragraph 207-145(1)(d) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution as there is no evidence that the Distributions will be made as part of a dividend stripping operation.

#### **Paragraph 207-145(1)(da)**

89. Paragraph 207-145(1)(da) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution as this Ruling is made on the basis the distribution washing provision does not apply (refer to paragraph 72(q) of this Ruling).

#### **Paragraph 207-145(1)(db)**

90. Paragraph 207-145(1)(db) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution as the BCN3 are equity interests which form part of MBL's Additional Tier 1 Capital under APRA prudential standards (refer to paragraph 72(c) of this Ruling).

#### **Macquarie Group Limited Ordinary Shares received on Exchange not a dividend or non-share dividend**

91. On Exchange, each BCN3 will be transferred from a Holder to MGL (or an Approved Nominee) and MGL will allocate and issue MGL Ordinary Shares as consideration for the transfer.

92. The allocation and issue of MGL Ordinary Shares to a Holder is not a Distribution made on the BCN3. Therefore, the MGL Ordinary Shares will not be a dividend as defined in subsection 6(1) of the ITAA 1936 or a non-share dividend as defined in subsection 974-120.

93. Accordingly, the MGL Ordinary Shares received on Exchange will not be included in a Holder's assessable income under paragraph 44(1)(a) of the ITAA 1936.

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

94. 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 but not all shareholders, and
- some or all of the shareholders who do not receive the shares receive or will receive minimally franked dividends.

95. The Terms do not provide for the issue of shares to all or some Holders in satisfaction of their Distribution entitlement. The issue of MGL Ordinary Shares on Exchange merely reflects a change in the type of equity interests held by Holders.

96. Based on the information provided and having regard to the circumstances of the scheme, section 45 of the ITAA 1936 will not apply to treat the issue of MGL Ordinary Shares on Exchange as an unfrankable dividend in the hands of Holders.

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

97. Section 45A of the ITAA 1936 applies where a company streams capital benefits and the payment of dividends to shareholders who would derive a greater benefit from receiving the capital benefits (the advantaged shareholders), and it is reasonable to assume that other shareholders (the disadvantaged shareholders) have received, or will receive, dividends.

98. Both the issue of MGL Ordinary Shares on Exchange and the Redemption of BCN3 will constitute the provision of a capital benefit to Holders (paragraph 45A(3)(a) of the ITAA 1936 for an Exchange and paragraph 45A(3)(b) of the ITAA 1936, as affected by subsection 45A(3A) of the ITAA 1936, for a Redemption).

99. However, the issue of MGL Ordinary Shares on Exchange and the Redemption of BCN3 will not constitute the streaming of capital benefits because, under an Exchange or Redemption, MBL will not selectively direct the flow of capital benefits to Holders who could most benefit from capital. Accordingly, as this requirement does not apply to the Exchange or Redemption of BCN3, the Commissioner will not make a determination to treat the whole, or a part, of the capital benefit received by Holders as an unfranked dividend.

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

100. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends. Where the conditions are met, the Commissioner may make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or a part, of the capital benefit such that it will be treated as an unfranked dividend.

101. The issue of MGL Ordinary Shares to Holders on Exchange and the Redemption of BCN3 (a Redemption being a non-share capital return) will each constitute a scheme under which Holders are provided with a capital benefit by MGL or MBL (paragraphs 45B(5)(a), 45B(5)(b) and subsection 45B(7) of the ITAA 1936). As a result, paragraph 45B(2)(a) of the ITAA 1936 will be satisfied.

102. At least some Holders will obtain a tax benefit as defined in subsection 45B(9) of the ITAA 1936 as a result of an Exchange or Redemption. As a result, paragraph 45B(2)(b) of the ITAA 1936 will be satisfied.

103. Therefore, whether section 45B of the ITAA 1936 will apply to an Exchange or Redemption turns on whether paragraph 45B(2)(c) of the ITAA 1936 will be satisfied. This involves considering the relevant circumstances, including but not limited to those listed in subsection 45B(8) of the ITAA 1936, of the Exchange and Redemption schemes to establish whether one of the persons who will enter into or carry out the schemes will do so for a more than incidental purpose of enabling a relevant taxpayer (the Holder) to obtain a tax benefit.

104. Having regard to the relevant circumstances, it could not be concluded that the Exchange or Redemption of BCN3 will be entered into for a more than incidental purpose of enabling Holders to obtain a tax benefit. Accordingly, paragraph 45B(2)(c) of the ITAA 1936 would not be satisfied and 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 the whole, or a part, of the capital benefit provided to Holders on Exchange or Redemption.

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Not previously issued as a draft

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