

CR 2021/8 - Australian Unity Limited - mutual capital instruments

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Class Ruling

Australian Unity Limited – mutual capital instruments

📌 Relying on this Ruling

This publication (excluding appendixes) 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 the way in which specified income tax provisions apply to investors who subscribe for and acquire Mutual Capital Instruments (MCIs) issued by Australian Unity Limited (AU).
2. Full details of the scheme are set out in paragraphs 21 to 54 of this Ruling.
3. In this Ruling, unless otherwise defined, capitalised terms have the meanings set out in the Terms of the AU MCIs (the Terms) contained in Appendix A of the Prospectus for the issue of AU MCIs dated 27 November 2020 (the Prospectus).
4. All legislative references are to provisions of the *Income Tax Assessment Act 1997* or the *Income Tax Assessment Act 1936* (as detailed in the table in Appendix 2 of this Ruling) 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 AU MCIs by initial application under the Prospectus
 - is a resident of Australia within the meaning of subsection 6(1) during the period in which you hold your AU MCIs
 - holds your AU MCIs on capital account, and

- is not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on your AU MCIs.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply.

What this Ruling does not consider

6. This Ruling does not deal with:
- how the taxation law applies to Holders who hold their AU MCIs as trading stock (as defined in subsection 995-1(1)) or as revenue assets (as defined in section 977-50)
 - how the taxation law applies to a Repurchase of AU MCIs by AU, and
 - the consequence of disposing of AU MCIs.

When this Ruling applies

7. This Ruling applies from 1 July 2020 to 30 June 2030.

Ruling

Consequences of acquiring Australian Unity Limited Mutual Capital Instruments

Acquisition date

8. You acquired your AU MCIs on 24 December 2020 (table item 2 of section 109-10).

Cost base and reduced cost base of each Australian Unity Limited Mutual Capital Instrument

9. The first element of the cost base and reduced cost base of each AU MCI is \$100, (subsections 110-25(2) and 110-55(2)).

Consequences of holding Australian Unity Limited Mutual Capital Instruments

Dividends on Australian Unity Limited Mutual Capital Instruments

10. A Dividend on an AU MCI is a 'dividend' as defined in subsection 6(1). Therefore, you include Dividends on your AU MCIs in your assessable income (subparagraph 44(1)(a)(i)).

Entities other than trust or partnership

11. If you are an entity other than a trust or partnership and you are a qualified person in relation to the dividend, in the income year in which the Dividend is made, you also (section 207-20):

- include the amount of franking credit attached to a Dividend in your assessable income, and
- are entitled to a tax offset equal to the franking credit.

Trust or partnership

12. If you received the Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, and you are not a corporate tax entity, you are required to include an amount equal to the franking credit on the Dividend in your assessable income under subsection 207-35(1), subject to the trustee or the partnership being a 'qualified person' in relation to the Dividend.

13. The relevant partners or beneficiaries to whom the Dividend flows indirectly are each entitled to a tax offset under section 207-45 equal to their share of the franking credit on the Dividend included in the assessable income of the partnership or trust under subsection 207-35(1).

Refundable tax offset

14. The franking credit 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, corporate unit trusts and public trading trusts), unless they satisfy the requisite conditions in subsections 67-25(1C) or 67-25(1D)
- the trustees of non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A)), and
- the trustees of trusts who are liable to be assessed under section 98 or 99A (subsection 67-25(1B)).

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

15. 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 Dividend.

Determination under paragraph 177EA(5)(b)

16. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits you receive in relation to a Dividend.

Gross-up and tax offset cancelled in certain circumstances

17. Paragraph 207-145(1)(a) will not apply to cancel the effect of the gross-up and tax offset in respect of a franked Dividend as long as you are a qualified person in respect of that Dividend.

18. You will be a qualified person in relation to a Dividend on your AU MCIs if, during the primary qualification period, you held the AU MCIs for a continuous period of at least 45 days during which you did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM) in respect of the AU MCIs.

19. The Repurchase mechanism of AU MCIs will not affect your risks of loss or opportunities for gain in respect of your AU MCIs (former sections 160APHM and 160APHJ).

20. Paragraphs 207-145(1)(b) to (db) also will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Dividend.

Scheme

21. 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

22. AU is the ultimate holding company of the Australian Unity Group (AU Group) and is resident of Australia.

23. The AU Group is a provider of national health, wealth and living services to more than 700,000 Australians, including its members. AU is a mutual entity, governed by and for the benefit of its members, which comprise eligible customers and employees.

24. AU is limited by shares and guarantee. The liability under the guarantee of the members is limited to \$1 per member for current members and continues for a period of one year following cessation of membership.

25. AU currently has no shares on issue and does not pay dividends. AU reinvested profits to date into the growth of assets and products and services for the benefit of members.

26. Under the Prospectus, AU offered to issue MCIs at Face Value for an Issue Price of \$100 each to raise \$100 million (with the ability to raise more or less) (the Offer).

27. AU MCIs were issued on 24 December 2020.

28. AU MCIs are listed on the Australian Securities Exchange under the code AYUPA.

29. AU MCIs were issued by AU in Australia.

Main features of Australian Unity Limited Mutual Capital Instruments

30. In 2019, amendments were made to the *Corporations Act 2001* (Corporations Act) which allow mutual entities to raise share capital through the issue of MCIs in a manner that does not trigger a demutualisation.

31. An MCI is a type of share for the mutual sector and is subject to the Corporations Act regulatory regime that ordinarily applies to the issuance of shares. In order to be issued as an MCI, the share must confer the right to no more than one vote irrespective of the number of MCIs that a Holder owns. In addition, the rights attaching to an MCI can only be varied or cancelled by a special resolution of the company and either a special resolution of all members holding the same class of MCI or obtaining written consent of 75% of the Holders of the class of MCI.

32. Furthermore, in relation to the MCI, a mutual entity's constitution must provide:

- that the share may only be issued as a fully-paid share
- that Dividends in respect of MCIs are non-cumulative, and
- the rights of Holders with respect to participation in surplus assets and profits.

33. The AU constitution (the Constitution) was amended in October 2019, in accordance with the Corporations Act, to authorise AU to issue MCIs.

34. The Terms provide for the securities to be fully-paid MCIs, as required in the Corporations Act, in the capital of AU.

35. AU MCIs are a perpetual instrument in the form of legal shares.

36. AU MCIs confer a single voting right to each Holder (regardless of how many AU MCIs they hold) on a resolution at the annual general meeting or a special general meeting of AU, regardless of whether the Holder is also a Non Shareholder Member.

37. AU MCIs do not entitle its Holder to vote on a demutualisation, a proposal to wind up AU, or on a resolution under Rule 3.4(l) of the Constitution.

Issue Price

38. The Issue Price and Face Value of each AU MCI is \$100. AU MCIs were issued fully-paid on the Issue Date, being 24 December 2020.

Dividends

39. The payment of any Dividend is discretionary and subject to the Directors in their absolute discretion determining that AU pay the Dividend.

40. Dividends are non-cumulative. If all or any part of a Dividend that is determined to be paid is not paid, AU has no liability to pay that Dividend, or any part of that Dividend, and a Holder has no claim or entitlement against AU or any other person in respect of the non-payment.

41. No interest or other amount accrues on any unpaid Dividend, or any unpaid part of a Dividend, and a Holder has no claim or entitlement in respect of interest or any other amount on any unpaid Dividend or any unpaid part of a Dividend.

42. Dividends will be calculated under clause 3.1 of the Terms using the Face Value of each AU MCI and a Dividend Rate set during the Bookbuild described in the Prospectus and carried out between 27 November 2020 and 2 December 2020.

43. To the extent that a Dividend is not fully franked, the cash amount of the Dividend will be a higher amount to compensate for the reduction in franking credits.

Right to Repurchase Australian Unity Limited Mutual Capital Instruments

44. AU may issue a Repurchase Notice. A Repurchase Notice may only be given (clause 4.1(b) of the Terms):

- (1) at any time after a Tax Event or Regulatory Event occurs; or
- (2) at the same time as, or at any time after, the issue by AU of a notice of meeting which contains a resolution seeking member approval of a Demutualisation.

45. A Repurchase Notice issued as a consequence of a Tax Event or a Regulatory Event is irrevocable.

46. On a Repurchase Date, AU will Repurchase each AU MCI for the Repurchase Amount which will be paid to the Holder, the AU MCIs will be cancelled and all rights conferred by the AU MCIs will cease.

Ranking

47. AU MCIs issued under the Prospectus rank equally among themselves in all respects.

48. AU MCIs rank ahead of Non Shareholder Member interests and ordinary shareholders (if any) in AU.

49. AU may issue further MCIs on such terms as the Directors determine, including, but not limited to, different (including in priority to AU MCIs) dividend rights, buy-back and capital reduction rights, provided that those MCIs do not rank in priority to AU MCIs in respect of a return of capital on the winding up of AU.

50. AU must not issue any MCIs which rank in priority to AU MCIs in respect of a return of capital on the winding up of AU, without first obtaining the approval of Holders by a Special Resolution.

Winding up

51. In the event of the winding up of AU, Holders will be entitled to receive out of the assets of AU available for distribution to shareholders, a Winding-Up Amount in respect of each AU MCI equal to (clause 5.3 of the Terms):

- the amount of any Dividend due but unpaid; and
- the Face Value,

before any return of capital or distribution is made to holders of ordinary shares or any other class of securities or shares ranking behind AU MCIs, or to Non Shareholder Members.

52. If, upon a winding up of AU, there are insufficient funds to pay the Winding-Up Amount, Holders and holders of any other shares that rank equally as to distribution with the AU MCIs will share in any distribution of assets of AU in proportion to the amounts to which they respectively are entitled.

53. AU MCIs do not confer on Holders any further right to participate in the surplus assets of AU on the winding up of AU beyond payment of the Winding-Up Amount.

Other matters

54. This Ruling is made on the basis that:

- (a) AU is a resident of Australia under the income tax laws of Australia and of no other jurisdiction.
- (b) AU MCIs are equity interests in AU for the purposes of Division 974.
- (c) AU is a franking entity under section 202-15.
- (d) Dividends paid on AU MCIs are frankable pursuant to section 202-40.
- (e) The only frankable instruments AU will have on issue will be the AU MCIs issued on 24 December 2020, and AU will frank the Dividends paid in respect of all AU MCIs at the same franking percentage as the AU benchmark for the franking period in which the Dividend payments are made.

- (f) Dividends on the AU MCIs will not be sourced, directly or indirectly, from AU's share capital account or its non-share capital account, nor debited against AU's share capital account or its non-share capital account.
- (g) Immediately before the payment of a franked Dividend on the AU MCIs, AU has available frankable profits (worked out under section 215-20) at least equal to the proposed Dividend.
- (h) AU does not and will not differentially frank Dividends to different Holders according to their tax status or on any other basis.
- (i) The AU Group does not and will not have any foreign branches, permanent establishments, or operations of any kind and any Dividend will not give rise to a foreign income tax deduction (as defined in section 832-120).
- (j) All parties to the scheme will deal with each other on arm's length terms.
- (k) You do not take any 'positions' (as defined in former section 160APHJ) at any time in relation to your AU MCIs apart from holding AU MCIs.
- (l) You (or an associate) did not make, are not under an obligation to make, and will not be likely to make, a 'related payment' (as defined under former section 160APHN) in relation to a Dividend on AU MCIs.
- (m) You (or your connected entities) will not engage in distribution washing (as outlined in section 207-157) in relation to a Dividend paid in respect of AU MCIs (unless entitled to the exception under subsection 207-157(4)).
- (n) No part of any Dividend will be exempt income or non-assessable non-exempt income in your hands.

Appendix 1 – Explanation

ⓘ *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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Dividends

55. As each Dividend that AU will pay on AU MCIs will be a distribution of money that was not debited against AU's share capital account, each Dividend will constitute a dividend as defined in subsection 6(1).

Cost base and reduced cost base of each Australian Unity Limited Mutual Capital Instrument

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

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

57. Subsection 204-30(1) empowers the Commissioner to make a determination under paragraph 204-30(3)(c) if an entity streams distributions in a certain way.

58. Based on the scheme, AU will not stream dividends. Dividends will be received by all Holders in proportion to and by reason of their holding of AU MCIs and not by reference to their tax profile or individual tax positions. There is nothing in the Terms that allows AU to treat Holders differently in respect of their entitlement to a franked Dividend.

Determination under paragraph 177EA(5)(b)

59. Section 177EA 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.

60. The conditions in paragraphs 177EA(3)(a) to (d) are considered to 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 incidental purpose of enabling a Holder to obtain an imputation benefit (paragraph 177EA(3)(e)).

61. 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 AU's primary purpose of raising capital to advance its social infrastructure and complex human services business objectives and otherwise to improve its balance sheet and financial risk profile.

Gross up and tax offset cancelled – qualified persons and certain other circumstances

Qualified persons

62. If you are not a qualified person in relation to a Dividend, you:

- do not include the franking credit attached to the Dividend in your assessable income (paragraph 207-145(1)(e)), and
- are not entitled to a tax offset equal to the amount of the franking credit attached to the dividend (paragraph 207-145(1)(f)).

63. As this Ruling is made on the basis that you have not made and are not required to make a related payment in respect of a Dividend, you will be a qualified person in relation to a Dividend if you hold your AU MCIs at risk for a required number of days during the relevant qualification period. The relevant qualification period is the 'primary qualification period' (as defined in former section 160APHD).

64. The Commissioner accepts, having reviewed the Constitution, Prospectus and Terms of the AU MCIs, that the AU MCIs are not 'preference shares' within the meaning of that expression in former section 160APHD for the purposes of former Division 1A of Part IIIAA, and therefore the primary qualification period is the period beginning on the day after you acquire your AU MCIs and ends on the 45th day after the day the AU MCIs became ex dividend.

65. You are required to hold your AU MCIs at risk for a continuous period of 45 days (excluding the days of acquisition and disposal, if relevant) during the primary qualification period. 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)).

66. Under former subsection 160APHM(2), you are taken to have materially diminished the risks of loss and opportunities for gain on a particular day with respect to your AU MCIs if your net position on that day does not retain 30% or more of the risks and opportunities associated with holding AU MCIs.

67. Under the Repurchase mechanism, you will only be taken to have made an offer to sell AU MCIs if AU issues a Repurchase Notice. As AU is the only party which can choose to exercise the Repurchase option, it is not a separate position that you have taken in relation to your AU MCIs (former sections 160APHM and 160APHJ).

68. Therefore, the Repurchase mechanism will not, of itself, affect your risks of loss or opportunities for gain in respect of your AU MCIs.

69. However, if you do enter into any risk management strategies in respect of your AU MCIs that have the effect of reducing your risks of loss or opportunities for gain below 30% (for example, by the use of limited recourse loans, options or other derivatives), then you will not be considered a qualified person in respect of a Dividend and you will not receive the benefit of the franking credit and tax offset rules set out in paragraph 62 of this Ruling.

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70. You may also be a qualified person in relation to a Dividend if you:
- have made a valid election under former section 160APHR to have franking credit ceilings and franking rebate ceilings apply, which continues to apply to you for the year of income, or
 - hold your AU MCIs as an individual and satisfy the small shareholder exemption rule in former section 160APHT.

If you are a qualified person only because you made a valid election under former section 160APHR, the offsets that you are entitled to may be limited pursuant to former Subdivision A of Part IIIAA Division 7B.

Certain other circumstances

71. 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 Dividend.
72. In respect of paragraphs 207-145(1)(b) and (c), refer to paragraphs 15 and 16 of this Ruling.
73. In respect to paragraph 207-145(1)(d), based on the facts of the scheme there is no evidence that the Dividends will be made as part of a dividend stripping operation.
74. In respect to paragraph 207-145(1)(da), this Ruling is made on the basis that the distribution washing provision does not apply (refer to paragraph 54(m) of this Ruling).
75. In respect to paragraph 207-145(1)(db), this Ruling is made on the basis that the payment of franked Dividends on the AU MCIs will not give rise to any foreign income tax deductions (refer to paragraph 54(i) of this Ruling).

Appendix 2 – Legislative references

76. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

<i>Income Tax Assessment Act 1936</i>	subsection 6(1)
<i>Income Tax Assessment Act 1936</i>	former Part IIIAA Division 1A
<i>Income Tax Assessment Act 1936</i>	former Part IIIAA Division 7B Subdivision A
<i>Income Tax Assessment Act 1936</i>	section 44(1)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(a)(i)
<i>Income Tax Assessment Act 1936</i>	former section 160APHD
<i>Income Tax Assessment Act 1936</i>	former section 160APHJ
<i>Income Tax Assessment Act 1936</i>	former section 160APHM
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHM(2)
<i>Income Tax Assessment Act 1936</i>	former section 160APHN
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHO(3)
<i>Income Tax Assessment Act 1936</i>	former section 160APHR
<i>Income Tax Assessment Act 1936</i>	former section 160APHT
<i>Income Tax Assessment Act 1936</i>	section 177EA
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(b)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(c)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(d)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(e)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(b)
<i>Income Tax Assessment Act 1997</i>	Division 67
<i>Income Tax Assessment Act 1997</i>	section 67-25
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1A)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1B)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1C)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	section 109-10
<i>Income Tax Assessment Act 1997</i>	section 110-25
<i>Income Tax Assessment Act 1997</i>	subsection 110-25(2)
<i>Income Tax Assessment Act 1997</i>	section 110-55
<i>Income Tax Assessment Act 1997</i>	subsection 110-55(2)
<i>Income Tax Assessment Act 1997</i>	section 202-15

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<i>Income Tax Assessment Act 1997</i>	section 202-40
<i>Income Tax Assessment Act 1997</i>	section 204-30
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(1)(c)
<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(3)(c)
<i>Income Tax Assessment Act 1997</i>	Division 207
<i>Income Tax Assessment Act 1997</i>	section 207-20
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(1)
<i>Income Tax Assessment Act 1997</i>	section 207-45
<i>Income Tax Assessment Act 1997</i>	section 207-145
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(a)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(b)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(c)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(d)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(e)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(f)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(da)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(db)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(e)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(f)
<i>Income Tax Assessment Act 1997</i>	section 207-157
<i>Income Tax Assessment Act 1997</i>	section 207-157(4)
<i>Income Tax Assessment Act 1997</i>	section 215-20
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	section 832-120
<i>Income Tax Assessment Act 1997</i>	Division 974
<i>Income Tax Assessment Act 1997</i>	subsection 995-(1)
<i>Income Tax Assessment Act 1997</i>	section 977-50

References*Previous draft:*

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- Corporations Act 2001
- TAA 1953

ATO references

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