



CR 2006/125 - Income tax: scrip for scrip roll-over: exchange of ordinary shares in The Australian Gas Light Company under the AGL Scheme of Arrangement: buy-back of converting shares

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2006*



Class Ruling

Income tax: scrip for scrip roll-over: exchange of ordinary shares in The Australian Gas Light Company under the AGL Scheme of Arrangement: buy-back of converting shares

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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 we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

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

2. It should be noted that while this Ruling gives certainty to shareholders in respect of the issues addressed in the Ruling section, the Commissioner has not been asked to form a view, and has not formed a view, on other tax issues relating to the overall arrangements to merge The Australian Gas Light Company (AGL) and Alinta Limited (Alinta Ltd) and to 'spin-out' AGL Energy Limited (AGLEN).

Relevant provisions

3. The relevant provisions dealt with in this Ruling are:
- section 45A of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 45B of the ITAA 1936;
 - Division 16K of Part III of the ITAA 1936;
 - section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 109-10 of the ITAA 1997;
 - subsection 115-30(1) of the ITAA 1997;
 - subsection 116-20(1) of the ITAA 1997;
 - Subdivision 124-M of the ITAA 1997; and
 - Subdivision 130-C of the ITAA 1997.

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

Class of entities

4. The class of entities to which this Ruling applies are the shareholders of AGL who:
- owned ordinary shares in AGL and held these on capital account at the time of undertaking the AGL Scheme of Arrangement (the AGL Scheme);
 - transferred their AGL shares to Numar Pty Limited (New Alinta Sub) in exchange for Alinta Mergeco Limited (referred to as New Alinta Ltd) ordinary shares and converting shares under the AGL Scheme;
 - choose to obtain CGT roll-over under Subdivision 124 M;
 - had their New Alinta Ltd converting shares bought back by New Alinta Ltd and were issued with AGL shares as consideration; and
 - were residents of Australia within the meaning of that term in subsection 6(1) of the ITAA 1936 at the time the AGL Scheme was undertaken.

Qualifications

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

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out was carried out in accordance with the scheme described in paragraphs 14 to 31 of this Ruling. This class of entities are referred to as the 'AGL shareholders' throughout this Ruling.

7. If the scheme actually carried out was 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 was not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

9. This Ruling applies to the income year ended 30 June 2007 or substituted accounting period. However, 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.

10. 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 *Taxation Administration Act 1953* (TAA)).

11. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class 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.

12. 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).

Withdrawal

13. This Ruling is withdrawn and ceases to have effect after 30 June 2007. However, the Ruling continues to apply after its withdrawal in respect of the relevant provisions ruled upon 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 involvement in the scheme.

Scheme

14. This description is based on a number of documents provided to the Commissioner. These documents, or relevant parts of them as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement include:

- Class Ruling application dated 6 June 2006 from Greenwoods & Freehills Pty Limited (Greenwoods & Freehills);
- Information received from Greenwoods & Freehills and AGL dated between 20 July 2006 and 17 November 2006 providing further details about the scheme;
- The AGL Share Scheme of Arrangement;
- Scheme Booklet for the AGL Scheme;
- Merger Implementation Agreement;
- The Transaction Implementation Deed;
- The Relationship Deed;
- The Regulatory Deed; and
- Draft Buy Back Agreement.

Note: where certain information received from AGL or Greenwoods & Freehills was provided on a commercial-in-confidence basis, it will not be disclosed or released under the Freedom of Information legislation.

Background

15. The scheme that is the subject of this Ruling involved the exchange of AGL shares for New Alinta Ltd ordinary and converting shares, and the buy-back of the converting shares in exchange for AGL shares (described in this Ruling as the AGL scheme – see paragraphs 22 to 29). This was part of a wider arrangement which involved a merger of AGL's and Alinta Ltd's infrastructure and asset management businesses and the separation of AGL's energy business to create two new listed entities. The exchange of AGL shares and buy-back of New Alinta Ltd shares occurred on 25 October 2006.

AGL

16. AGL is an Australian resident company which was listed on the Australian Stock Exchange (ASX) and was the head company of an existing tax consolidated group. AGL is a major retailer of gas and electricity, and has an extensive portfolio of wholly and partly-owned investments in energy infrastructure, infrastructure management and other energy businesses.

Alinta Ltd

17. Alinta Ltd is an Australian resident company which was listed on the ASX, and was the head company of an existing tax consolidated group. Alinta Ltd provides energy related products and services and manages, operates and owns assets in Australia and New Zealand.

18. Alinta Ltd and its subsidiaries were the registered holders of 90,904,997 AGL shares (amounting to approximately 19.9% of the issued shares of AGL) just before the AGL Scheme was undertaken. Of these shares, approximately 12 million (or 2.6% of AGL's issued shares) were subject to certain option deeds. The terms of the option deeds gave option holders the right to call for the Alinta Group to sell all or some of the AGL shares subject to the options. Alinta Ltd ceased to own the shares which were subject to the option deeds prior to the AGL Scheme being undertaken, either as a result of the options being exercised or by the relevant shares being transferred to a third party. Consequently, Alinta Ltd held approximately 17.3% of the AGL ordinary shares on issue at the time the AGL Scheme was implemented.

The merger transaction

19. AGL and Alinta Ltd merged their respective businesses by creating a separate ownership structure to hold their combined energy and their combined infrastructure assets. This merger was achieved under a series of interdependent steps outlined below.

Establishment of New Alinta Ltd consolidated group

20. New Alinta Ltd was established with an initial issued share capital of 2 ordinary shares, one held by the Chief Executive Officer of AGL and the other by the Chief Executive Officer of Alinta Ltd. New Alinta Ltd holds all the units in the Alinta Mergeco Trust which in turn holds all the issued shares in New Alinta Sub. Each of New Alinta Ltd, Alinta Mergeco Trust and New Alinta Sub are 'residents of Australia' within the meaning of that expression in subsection 6(1) of the ITAA 1936.

21. New Alinta Ltd made the choice to form a tax consolidated group comprising Alinta Mergeco Trust and New Alinta Sub, with New Alinta Ltd as the head company of that group. New Alinta Ltd ordinary shares are listed on the ASX and commenced trading on a deferred settlement basis on 12 October 2006.

The AGL Scheme

22. Following the formation of the New Alinta Ltd tax consolidated group and the implementation of the Alinta Scheme of Arrangement (the Alinta Scheme), the AGL Scheme was implemented.

Note: under the Alinta Scheme, Alinta Ltd shareholders exchanged their shares in Alinta Ltd for ordinary shares in New Alinta Ltd (the Alinta Scheme is the subject of CR 2006/124).

23. Under the AGL Scheme, the AGL shareholders transferred their shares in AGL to New Alinta Sub. This transfer occurred on the date described in the AGL Scheme as the 'Implementation Date', which was 25 October 2006.

24. In consideration for the transfer of their AGL shares, each AGL shareholder received 0.5775 of a New Alinta Ltd ordinary share and one New Alinta Ltd converting share for each AGL ordinary share transferred to New Alinta Sub under the AGL Scheme. These shares were issued to each AGL shareholder by New Alinta Ltd on the Implementation Date.

25. Alinta Ltd and its subsidiaries that together owned approximately 17.3% of the ordinary shares in AGL at the time of the Implementation Date did not participate in the AGL Scheme. Alinta Ltd and those subsidiaries retained their AGL ordinary shares and did not receive New Alinta Ltd ordinary or converting shares.

The conversion of New Alinta Ltd converting shares via the share buy-back transaction

26. Immediately after the AGL shareholders received their New Alinta Ltd converting shares, these converting shares were bought back by New Alinta Ltd. As consideration for the buy-back of the converting shares, AGL issued ordinary shares to each former converting shareholder. Shareholders received one AGL ordinary share for each New Alinta Ltd converting share bought back.

27. Foreign AGL shareholders participated in the AGL Scheme on the same terms as other AGL shareholders. However certain of those foreign shareholders had their New Alinta Ltd ordinary and converting shares issued to a nominee.

28. The nominee sold the New Alinta Ltd ordinary shares and remitted the proceeds to each foreign shareholder on whose behalf the shares were sold. The nominee participated in the buy-back and conversion transaction for the New Alinta Ltd converting shares. The nominee sold the AGL shares they received upon the conversion and remitted the proceeds to each foreign shareholder on whose behalf the AGL shares were received.

29. Just prior to the issue by AGL of ordinary shares to the holders of New Alinta Ltd converting shares, all of the issued shares of AGL were owned by AGL.

Other matters

30. On the Implementation Date, no AGL shareholder was either a 'significant stakeholder' or 'common stakeholder' within the meaning of those terms in Subdivision 124-M.

31. After the Alinta Scheme was completed New Alinta Ltd changed its name from Alinta Mergesco Limited to Alinta Ltd (note that to avoid confusion, we refer to this company as New Alinta Ltd throughout this Ruling).

Ruling

CGT event A1 happened

32. CGT event A1 happened when AGL shareholders disposed of their AGL shares to New Alinta Sub on the Implementation Date under the AGL Scheme (section 104-10).

33. The AGL shareholders made a capital gain from CGT event A1 happening if the capital proceeds received for the disposal of each AGL share exceeded its cost base. Shareholders made a capital loss if those capital proceeds were less than the share's reduced cost base (subsection 104-10(4)).

34. The capital proceeds received for each AGL share are the sum of the market value of the 0.5775 of a New Alinta Ltd ordinary share and the one New Alinta Ltd converting share the AGL shareholder received under the AGL Scheme (subsection 116-20(1)).

Choosing scrip for scrip roll-over

35. An AGL shareholder can choose scrip for scrip roll-over under Subdivision 124-M provided:

- (a) the shareholder acquired their AGL shares on or after 20 September 1985;
- (b) the shareholder made a capital gain from CGT event A1 happening to their AGL shares; and
- (c) any capital gain that may be made upon a future CGT event happening in relation to the New Alinta Ltd ordinary shares and the New Alinta Ltd converting shares they received under the scheme would not be disregarded (except because of a roll-over).

In this regard, the treatment afforded by Subdivision 130-C on the conversion of the New Alinta Ltd converting shares is considered to be a roll-over.

36. If an AGL shareholder chooses scrip for scrip roll-over, the capital gain arising from the disposal of their AGL share is disregarded (subsection 124-785(1)).

Cost base of New Alinta Ltd ordinary shares and New Alinta Ltd converting shares

37. If an AGL shareholder chooses scrip for scrip roll-over, the first element of the cost base and reduced cost base of their New Alinta Ltd ordinary shares and New Alinta Ltd converting shares will be worked out by reasonably attributing to those shares part of the cost base of the AGL share(s) that they disposed of under the AGL scheme and for which roll-over was chosen (subsections 124-785(2) and (4)).

Acquisition date of the New Alinta Ltd ordinary shares

38. The acquisition date of the New Alinta Ltd shares is the date they were issued to each AGL shareholder (section 109-10).

39. For AGL shareholders who choose scrip for scrip roll-over the acquisition date of their New Alinta Ltd ordinary shares for CGT discount purposes is the date they acquired the corresponding AGL shares that they disposed of for the relevant New Alinta Ltd ordinary shares (item 2 of the table in subsection 115-30(1)).

Buy-back and conversion of New Alinta Ltd converting shares***Buy-back consideration is not a dividend***

40. The consideration the New Alinta Ltd converting shareholders received under the buy-back of their converting shares does not constitute a dividend for the purposes of the ITAA 1936 and the ITAA 1997.

CGT event C2 happens on conversion

41. CGT event C2 happened when the New Alinta Ltd converting shares were bought back by New Alinta Ltd in exchange for AGLN shares (paragraph 104-25(1)(f)). CGT event C2 happened in relation to the New Alinta Ltd converting shares on the Implementation Date (paragraph 104-25(2)(b)).

42. The AGL shareholders made a capital gain from CGT event C2 that happened if the capital proceeds received for each New Alinta Ltd converting share under the buy-back exceeded its cost base. Shareholders made a capital loss if those capital proceeds were less than the converting share's reduced cost base (subsection 104-25(3)).

43. The capital proceeds received for each New Alinta Ltd converting share was the market value of the consideration received (that is, the market value of an AGLN share) which was \$15.40.

Capital gain or capital loss disregarded

44. Any capital gain or capital loss made on the conversion of the New Alinta Ltd converting shares to AGLN shares under CGT event C2 is disregarded (subsection 130-60(3)).

Cost base of AGLN shares modified

45. The first element of the cost base and reduced cost base of each AGLN share received as consideration for the buy-back of New Alinta Ltd converting shares is the cost base of the New Alinta Ltd converting shares at the time they were converted (item 1 in the table in subsection 130-60(1)). The cost base of the New Alinta Ltd converting share will generally be the amount of the first element of the cost base of those shares, which is explained in paragraph 37 of this Ruling.

Acquisition date of the AGLN ordinary shares

46. The acquisition date of the AGLN ordinary shares is the date on which the conversion of the New Alinta Ltd converting shares happened (subsection 130-60(2)); this is the Implementation Date (25 October 2006).

Section 45A and section 45B

47. The Commissioner will not make a determination under subsection 45A(2) or paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital benefit provided to AGL shareholders under the buy-back.

Commissioner of Taxation

20 December 2006

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.*

CGT event A1 happens

48. CGT event A1 in section 104-10 happens if there is a change in the ownership of an asset from one entity to another. On the disposal of an AGL share to New Alinta Sub a change of ownership occurred and therefore CGT event A1 happened.

Time of the event

49. The time when CGT event A1 happens determines the income year in which any capital gain or capital loss is made and whether the CGT discount applies to any capital gain.

50. Subsection 104-10(3) provides that the time CGT event A1 happens is when the person enters into a contract for the disposal of the shares, or if there is no contract, when the change of ownership occurs.

51. Under the AGL Scheme, the disposal did not happen under a contract (see paragraph 9 in the addendum to Taxation Determination TD 2002/4). Accordingly, AGL shareholders disposed of their AGL shares when the change of ownership occurs on the Implementation Date.

Capital gain or capital loss

52. A capital gain was made on an AGL share if the capital proceeds from the disposal of that share were more than its cost base. A capital loss was made if the capital proceeds from the disposal were less than the share's reduced cost base (subsection 104-10(4)).

53. Subsection 116-20(1) provides that the capital proceeds from a CGT event are the total of the money and the market value of any property received or entitled to be received (worked out at the time of the event) in respect of the event happening.

54. The capital proceeds AGL shareholders received for the disposal of an AGL share is therefore the market value of:

- 0.5775 New Alinta Ltd ordinary shares; plus
- one New Alinta Ltd converting share.

55. The Commissioner accepts that the market value of a New Alinta Ltd ordinary share may be determined by reference to the ASX volume weighted average price of these shares on the Implementation Date. The Commissioner will accept that the market value of a New Alinta Ltd converting share is the ASX volume weighted average price of an AGL share on the Implementation Date.

56. Any capital gain or capital loss made on an AGL share that was acquired before 20 September 1985 is disregarded (subsection 104-10(5)).

Choosing scrip for scrip roll-over

57. Scrip for scrip roll-over enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange.

58. A capital gain is disregarded completely if the only capital proceeds the shareholder receives is one or more replacement share(s). If the shareholder receives some other form of capital proceeds, the capital gain is disregarded only to the extent of the shares received. The roll-over also provides that the cost base and reduced cost base of the replacement share is based on the cost base and reduced cost base of the original share at the time of the roll-over.

Requirements for scrip for scrip roll-over – Subdivision 124-M

59. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main conditions and exceptions that are relevant to the circumstances of the AGL Scheme are:

- (i) shares are exchanged for shares in another company;
- (ii) the exchange occurs as part of a single arrangement;
- (iii) conditions for roll-over are satisfied;
- (iv) further conditions are not applicable; and
- (v) exceptions to obtaining scrip for scrip roll-over are not applicable.

These conditions are explained below.

Shares are exchanged for shares in another company

60. Subparagraph 124-780(1)(a)(i) requires an entity (an AGL shareholder) to exchange a share in a company for a share in another company.

61. This requirement is satisfied as, under the AGL Scheme, each AGL shareholder received shares in New Alinta Ltd in exchange for the disposal of their AGL shares.

The exchange occurs as part of a single arrangement

62. Paragraph 124-780(1)(b) requires that shares in an entity (AGL, the original entity) be exchanged in consequence of a single arrangement. In the context of the scrip for scrip roll-over provisions, the AGL Scheme constitutes a single arrangement. The single arrangement must also satisfy the following conditions.

(a) 80% ownership

63. Paragraph 124-780(2)(a) requires that shares in an entity (AGL, the original entity) be exchanged as a consequence of a single arrangement that results in another entity (New Alinta Sub, the acquiring entity) becoming the owner of 80% or more of the voting shares in the original entity (AGL).

64. Subparagraph 124-780(2)(a)(ii) provides that this requirement will be satisfied if one or more companies that are members of a wholly-owned group increase the percentage of voting shares they hold in the original entity to 80% or more.

65. Under the AGL Scheme, the acquiring entity (New Alinta Sub) became the owner of more than 80% of the voting shares in AGL. At the time of implementing the AGL Scheme, New Alinta Sub was a member of a wholly-owned group (see paragraph 80 of this Ruling). The ordinary shares in AGL satisfy the definition of 'voting share' in subsection 995-1(1).

66. Therefore, the requirements of subparagraph 124-780(2)(a)(ii) have been met under the AGL Scheme.

(b) All voting share owners participate

67. Paragraph 124-780(2)(b) requires that the exchange of shares must be in consequence of a single arrangement in which at least all owners of voting shares in the original entity (apart from the acquiring entity or members of the acquiring entity's wholly-owned group) could participate.

68. This requirement is satisfied because all the owners of voting shares in AGL were entitled to participate in the AGL Scheme (apart from Alinta Ltd, which is a member of the same wholly-owned group as the acquiring entity).

(c) Participation is on substantially the same terms

69. Paragraph 124-780(2)(c) requires that the exchange is in consequence of an arrangement in which participation is available on substantially the same terms for all of the owners of interests of a particular type in the original entity (AGL).

70. This requirement is satisfied because the AGL Scheme provided that all ordinary shareholders in AGL were entitled to participate in the AGL Scheme on the same terms.

71. The issue of New Alinta Ltd shares to certain foreign AGL shareholders in circumstances where a nominee will dispose of and/or enter into the buy-back of the New Alinta Ltd shares does not prevent the arrangement from being on substantially the same terms for all owners of shares in AGL.

Conditions for roll-over are satisfied

72. Paragraph 124-780(1)(c) requires that the conditions for roll-over outlined in subsection 124-780(3) must be met. These conditions must be met in relation to each AGL share for which scrip for scrip roll-over is chosen.

73. The conditions in subsection 124-780(3) are as follows.

(a) The AGL shares are post-CGT shares

74. Paragraph 124-780(3)(a) requires the original interest holder (an AGL shareholder) to have acquired its original interest (AGL shares) on or after 20 September 1985 (that is, post-CGT).

75. Therefore, roll-over will only be available for those AGL shares that are post-CGT shares – see paragraph 35 of this Ruling.

(b) An AGL Shareholder would otherwise make a capital gain

76. Paragraph 124-780(3)(b) requires that, apart from the roll-over, the original interest holder (an AGL shareholder) would make a capital gain from a CGT event happening in relation to its original interest (an AGL share).

77. As explained at paragraph 52 of this Ruling, a capital gain was made on an AGL share if the capital proceeds from the disposal of that share were more than its cost base. Therefore, whether this condition was met will depend on the individual circumstances of each AGL shareholder.

(c) AGL shareholders receive replacement interests in the acquiring entity or the ultimate holding company

78. Paragraph 124-780(3)(c) requires that the replacement interest is in the acquiring entity (New Alinta Sub), or the ultimate holding company of the wholly owned group which includes the acquiring entity.

79. This requirement is satisfied as the AGL shareholders received shares in New Alinta Ltd which is the ultimate holding company of a wholly owned group that includes the acquiring entity (New Alinta Sub).

80. Paragraph 124-780(3)(c) is satisfied on the basis that New Alinta Ltd and New Alinta Sub are members of the same wholly owned group, as that term is defined in section 995-1. As New Alinta Ltd is not a 100% subsidiary of another company, and as New Alinta Ltd beneficially owns all of the units in Alinta Mergeco Trust, which in turn owns 100% of the shares in New Alinta Sub; New Alinta Ltd is the ultimate holding company of a wholly-owned group of which New Alinta Sub is a member, in accordance with section 975-500.

(d) An AGL shareholder can choose scrip for scrip roll-over

81. Paragraph 124-780(3)(d) requires that the original interest holder (an AGL shareholder) chooses the roll-over, or if section 124-782 applies to it for the AGL Scheme, it and the replacement entity jointly choose to obtain the roll-over.

82. Section 124-782 has no application to the AGL Scheme since there were no significant stakeholders or common stakeholders at the time of undertaking the AGL scheme (see paragraph 30 of this Ruling).

83. Subject to their eligibility (see paragraph 35 of this Ruling), whether an AGL shareholder chooses to obtain roll-over in relation to the disposal of an AGL share is a question of fact to be determined in respect of each individual shareholder.

Further conditions are not applicable

84. Subsection 124-780(4) provides that the additional requirements in subsection 124-780(5) must be satisfied if the original interest holder (AGL shareholder) and the acquiring entity (New Alinta Sub) did not deal with each other at arm's length and:

- (a) neither the original entity (AGL) nor the replacement entity (New Alinta Ltd) had at least 300 members just before the arrangement started (paragraph 124-780(4)(a)); or
- (b) the original interest holder (AGL shareholder), the original entity (AGL), and the acquiring entity (New Alinta Sub) were all members of the same linked group just before the arrangement started (paragraph 124-780(4)(b)).

85. Paragraph 124-780(4)(a) has no application in this case because AGL had at least 300 members just before the arrangement started. Paragraph 124-780(4)(b) does not apply as AGL, the AGL shareholders and New Alinta Sub were not members of the same linked group just before the arrangement commenced.

Exceptions to obtaining scrip for scrip roll-over are not applicable

86. Section 124-795 contains a number of exceptions where scrip for scrip roll-over cannot be chosen. The exceptions in subsection 124-795 are as follows:

(a) AGL shareholders are residents of Australia

87. Subsection 124-795(1) provides that a roll-over is not available if, just before the disposal, the original interest holder was a foreign resident, unless just after the acquisition of the replacement interest, the replacement entity is an Australian resident.

88. The class of entities to whom this Ruling applies is limited to AGL shareholders who were residents of Australia at the time of the AGL Scheme. As a consequence, the exception in subsection 124-795(1) does not apply to limit this Ruling in this regard.

(b) A capital gain cannot (apart from a roll-over) be otherwise disregarded

89. Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain you might make from your replacement interest would be disregarded (except because of a roll-over).

90. Whether a capital gain arising from a subsequent disposal of a New Alinta Ltd share (or other CGT event) is disregarded under another provision of the ITAA 1997 (for example, the shareholder will hold those New Alinta Ltd shares as trading stock) is a question of fact to be determined in respect of each AGL shareholder.

91. Paragraph 124-795(2)(b) provides that roll-over is not available if the original interest holder and the acquiring entity are members of the same wholly-owned group just before the original interest holder stops owning their original interest, and the acquiring entity is a foreign resident.

92. This exception does not apply as the AGL shareholders and New Alinta Sub were not members of the same wholly-owned group just before the AGL Scheme was implemented. In addition, New Alinta Sub is not a foreign resident company.

(c) No roll-over available to the AGL shareholders under either Division 122 or Subdivision 124-G

93. Subsection 124-795(3) provides that scrip for scrip roll-over is not available if a roll-over can be chosen under Division 122 or Subdivision 124-G.

94. This exception does not apply as neither of the roll-overs in Division 122 or Subdivision 124-G are available to the AGL shareholders in respect of the disposal of their AGL shares under the AGL Scheme.

(d) AGL is not a foreign resident

95. Subsections 124-795(4) and (5) provide that roll-over is not available for certain original entities that are foreign entities.

96. This exception does not apply as AGL (the original entity) was not a foreign resident.

Consequences of choosing roll-over

Capital gain disregarded

97. Scrip for scrip roll-over enables a shareholder to disregard all or part of a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange.

98. If the only capital proceeds the shareholder receives in respect of the disposal are replacement shares, and the requisite conditions are satisfied, the capital gain is disregarded completely (subsection 124-785(1)).

99. Under the AGL Scheme, AGL shareholders received only New Alinta Ltd ordinary shares and New Alinta Ltd converting shares in respect of the disposal of their AGL shares (that is, no ineligible proceeds for the purposes of subsection 124-790(1) were received). As a consequence, AGL shareholders who are eligible to choose scrip for scrip roll-over and who make that choice will disregard the entire amount of the capital gain made under CGT event A1 which happened on the disposal of their AGL shares.

Cost base of New Alinta Ltd shares

If scrip for scrip roll-over is chosen

100. Subsections 124-785(2) and (4) require that where scrip for scrip roll-over is chosen, the first element of the cost base and the reduced cost base of each share received as a result of an exchange is determined by reasonably attributing to it the cost base of the original interest for which it was exchanged.

101. Therefore, where scrip for scrip roll-over is chosen, the first element of the cost base and the reduced cost base of the replacement New Alinta Ltd ordinary share and New Alinta Ltd converting share will be determined by attributing a reasonable proportion of the cost base of the AGL share(s) which were exchanged for each new interest. AGL will advise its shareholders as to the basis on which this apportionment can be done reasonably.

102. As AGL shareholders did not receive any ineligible proceeds under the AGL Scheme, subsection 124-785(3) does not apply to reduce the amount of cost base of their original AGL share that can be attributed to the replacement New Alinta Ltd ordinary shares and New Alinta Ltd converting shares.

If scrip for scrip roll-over is not, or cannot, be chosen

103. Subsection 110-25(2) provides that the first element of the cost base of an asset is the total of:

- the money you paid or are required to pay in respect of acquiring it; and
- the market value of any other property given or required to be given in respect of acquiring it.

The market value of the property is worked out at the time of the acquisition.

104. For AGL shareholders who do not, or cannot, choose roll-over, the first element of the cost base and reduced cost base of their New Alinta Ltd ordinary and New Alinta Ltd converting shares is determined by the market value of the AGL shares they disposed of under the AGL Scheme.

105. The Commissioner accepts that the market value of the AGL shares disposed of under the AGL Scheme will be determined by reference to the market value of the New Alinta Ltd ordinary shares received in exchange for the AGL shares and the market value of the AGLLEN shares received when the New Alinta Ltd converting shares were exchanged. These market values will be based on the ASX volume weighted average price of the New Alinta Ltd ordinary shares and AGLLEN shares on the Implementation Date.

Apportionment of cost base

106. Subsection 112-30(1) provides that where an asset is acquired as part of a transaction in which not all of the expenditure you incur relates to the asset, the first element of that asset's cost base and reduced cost base must reflect the amount of expenditure that is reasonably attributable to the acquisition of that asset. A shareholder must apportion the cost base according to the amount they paid for the asset.

107. Therefore, for AGL shareholders who do not, or cannot, choose roll-over, the first element of cost base for their New Alinta Ltd ordinary shares and New Alinta Ltd converting shares will be a proportion of the market value of the corresponding AGL ordinary shares they disposed of that is reasonably attributable to each new interest. AGL will advise its shareholders the basis on which this apportionment can be done reasonably.

Acquisition date of New Alinta Ltd ordinary shares

108. The acquisition date of New Alinta Ltd ordinary shares is the date they are issued to each AGL shareholder (this is the same date as the Implementation Date) (section 109-10).

109. For AGL shareholders who choose scrip for scrip roll-over, the acquisition date of their New Alinta Ltd ordinary shares for CGT discount purposes is the date they acquired their original AGL shares which were disposed of in exchange for the relevant New Alinta Ltd ordinary shares (item 2 of the table in subsection 115-30(1)).

Buy-back and conversion of New Alinta Ltd converting shares***The purchase price in respect of the buy-back***

110. The income tax consequences of an off-market share buy-back are worked out under Subdivision C of Division 16K of Part III of the ITAA 1936. Those consequences are based on the 'purchase price' of the share worked out under section 159GZZZM of the ITAA 1936.

111. Paragraph 159GZZZM(b) of the ITAA 1936 provides that, if the seller of the share has received or is entitled to receive property other than money as a result of, or in respect of, the buy-back, the purchase price is the market value of that property in respect of the buy-back. In this case an AGL share was received for each New Alinta Ltd converting share bought back. The market value of each AGL share worked out at the time of the buy-back was \$15.40.

112. The purchase price may comprise two components:

- a dividend component; and
- a capital component.

The amount of each component is determined in accordance with sections 159GZZZP and 159GZZZQ of the ITAA 1936, having regard to how the company accounts for the off-market share buy-back.

The dividend component

113. Section 159GZZZP of the ITAA 1936 provides that, where the buy-back of a share is an off-market purchase, the difference between the purchase price and the part (if any) of the purchase price in respect of the buy-back of the share which is debited against amounts standing to the credit of the company's share capital account, is taken to be a dividend paid by the company to the seller on the day the buy-back occurs.

114. In this case, the entire purchase price of \$15.40 per share was debited to the share capital account. Consequently, there is no dividend amount to be included in a shareholder's assessable income under section 44 of the ITAA 1936.

The capital component (or sale consideration)

115. For the purposes of computing the amount of a gain or loss (on capital or revenue account), the consideration in respect of the disposal of a share under a buy-back is determined in accordance with section 159GZZZQ of the ITAA 1936.

116. Subsection 159GZZZQ(1) of the ITAA 1936 provides that the seller is taken to have received an amount equal to the purchase price in respect of the buy-back. However, this amount may be:

- increased under subsection 159GZZZQ(2) of the ITAA 1936 if the purchase price is less than the market value of the share at the time of the buy-back worked out as if the buy-back did not occur and was never proposed to occur; and/or
- reduced under subsection 159GZZZQ(3) of the ITAA 1936 to the extent that it is a dividend and included in the seller's assessable income of any income year.

117. In this case, the purchase price for each New Alinta Ltd converting share that was subject to the buy-back (\$15.40) is taken to equal the market value of an AGLN share. Therefore, subsection 159GZZZQ(2) of the ITAA 1936 does not apply. Also as there was no dividend component, no other provision in section 159GZZZQ modifies the consideration in respect of the buy-back.

118. Therefore, the consideration determined under section 159GZZZQ of the ITAA 1936 is the buy-back price of \$15.40 per share.

CGT event C2 happens on conversion

119. Paragraph 104-25(1)(f) provides that CGT event C2 happens when a convertible interest is converted.

120. The buy-back of the New Alinta Ltd converting shares by New Alinta Ltd in exchange for AGLN shares constituted a conversion of these convertible interests and CGT event C2 happened.

121. Subsection 104-25(2) provides that the time of CGT event C2 happening is either when the contract that results in the ending of the asset is entered into, or if there is no contract, when the asset ends.

122. In the present case, the ending of the New Alinta Ltd converting shares did not happen under a contract. Rather, the converting shares end in accordance with subsection 257H(3) of the *Corporations Act 2001*, which provides that immediately after the registration of the transfer of the converting shares to New Alinta Ltd, the converting shares were cancelled.

123. A capital gain was made on conversion of a New Alinta Ltd converting share if the capital proceeds from the conversion of that share was more than its cost base. A capital loss was made if the capital proceeds from the conversion was less than the share's reduced cost base (subsection 104-10(4)).

124. The capital proceeds for the purposes of CGT event C2 happening in respect of the New Alinta Ltd converting shares is determined in accordance with section 159GZZZQ of the ITAA 1936 since the ending of those shares happened under an off-market share buy-back.

125. As explained in paragraphs 115 to 118 of this Ruling, the capital proceeds are \$15.40 per share.

Convertible interests – Subdivision 130-C

126. Subdivision 130-C applies to the acquisition of shares by the conversion of a convertible interest. In order for this subdivision to have applied to the New Alinta Ltd converting shares, the requirements listed below must be satisfied. Where those requirements are met, any capital gain or capital loss made under CGT event C2 happening in respect to the New Alinta Ltd converting shares is disregarded (see paragraph 132 of this Ruling).

A New Alinta Ltd converting share was a convertible interest

127. A convertible interest in a company is defined in section 995-1 as an interest of the kind referred to in item 4 of the table in subsection 974-75(1). Paragraph (b) of that item describes an interest that will or may convert into an equity interest in the company or a connected entity of the company.

AGLEN was a connected entity of New Alinta Ltd

128. In the present circumstances, the New Alinta Ltd converting shares converted to AGLEN ordinary shares. Therefore, AGLEN must satisfy the definition of a connected entity.

129. The term connected entity is defined in section 995-1. That definition includes, as a connected entity, another member of the same wholly owned group. AGLEN satisfied this definition as all of its issued shares were owned by AGL just before it issued shares to the holders of the New Alinta Ltd converting shares, and was therefore a member of the same wholly-owned group as New Alinta Ltd at the relevant time.

New Alinta Ltd converting shares converted into AGLEN shares

130. The term ‘an interest that will or may convert into another interest’ is defined in section 974-165. It includes the circumstances where a first interest must be, or may be, satisfied by the issue of the second interest (subparagraph 974-165(b)(i)).

131. The New Alinta Ltd converting shares satisfied this requirement on the basis that, under the terms of the Buy Back Agreement, the first interest (the New Alinta Ltd converting share) was exchanged and the second interest (an AGLLEN ordinary share) was received as consideration.

Capital gain or capital loss disregarded

132. Subsection 130-60(3) provides that a holder disregards any capital gain or capital loss arising from CGT event C2 happening as a consequence of the conversion of a converting interest. Therefore, New Alinta Ltd converting shareholders disregard any capital gain or loss arising from the conversion of their New Alinta Ltd converting shares into AGLLEN ordinary shares.

Cost base of AGLLEN ordinary shares

133. The first element of the cost base and reduced cost base of an AGLLEN ordinary share acquired upon conversion of a New Alinta Ltd converting share is worked out under item 2 in the table in subsection 130-60(1). Paragraph (a) of item 2 relevantly provides that the first element of the cost base and reduced cost base of shares acquired under a conversion will be the cost base of the convertible interest at the time of conversion.

134. Therefore, the first element of the cost base and reduced cost base of each AGLLEN share received as consideration for the buy-back of New Alinta Ltd converting shares is the cost base of the New Alinta Ltd converting share at the time it was bought back.

Acquisition date of the AGLLEN ordinary shares

135. The acquisition date of the AGLLEN ordinary shares is the time at which the conversion of the New Alinta Ltd converting shares happened (subsection 130-60(2)). This is the Implementation Date.

Section 45A

136. The Commissioner may make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in circumstances where capital benefits are streamed 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 (the disadvantaged shareholders) have received or will receive dividends.

137. New Alinta Ltd provided the holders of its converting shares with a capital benefit when it debited its share capital account and the owners of the New Alinta Ltd converting shares received shares in AGLLEN under the buy-back arrangement. Subsection 45A(3) of the ITAA 1936 explains the meaning of being provided with a capital benefit, and relevantly includes the provision of shares in the company and a distribution of share capital or share premium.

138. However since it is likely that future dividends paid by New Alinta Ltd on ordinary shares will be fully franked dividends, subsection 45A(5) of the ITAA 1936 will prevent section 45A of the ITAA 1936 having application to the present case.

139. Therefore the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the relevant scheme.

Section 45B

140. Where section 45B of the ITAA 1936 applies the Commissioner may make a determination under paragraph 45B(3)(b) that section 45C of the ITAA 1936 applies to the whole, or a part, of a capital benefit that the whole of the capital benefit, or that part of it, is taken, for the purposes of the ITAA 1936, to be an unfranked dividend paid to the shareholder at the time they receive the capital benefit.

141. Section 45B of the ITAA 1936 is an integrity measure that applies to company shareholders. Relevantly, the section applies if:

- there is a scheme under which a shareholder is provided with a capital benefit (paragraph 45B(2)(a) of the ITAA 1936);
- under the scheme the shareholder obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- having regard to the relevant circumstances of the scheme, it would be concluded that one of the parties who entered into or carried out the scheme did so for a more than incidental purpose of enabling the shareholder to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

142. For the purposes of section 45B of the ITAA 1936, the arrangement described in paragraphs 14 to 31 of this Ruling is a scheme (subsection 45B(10) of the ITAA 1936) and the issue of shares in AGLLEN to the AGL shareholders is the provision of a capital benefit (paragraph 45B(5)(a) of the ITAA 1936) on which the tax payable would be less than if it were a dividend; the provision of the capital benefit therefore constitutes the shareholders' obtaining a tax benefit (subsection 45B(9) of the ITAA 1936).

143. However, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 are met, the requisite purpose of enabling the shareholders to obtain a tax benefit by way of a capital benefit is not present. In other words, having regard to the relevant circumstances of the scheme, set out in subsection 45B(8) of the ITAA 1936, it would not be concluded that any of the parties to the scheme entered into or carried out the scheme for a more than incidental purpose of enabling the AGL shareholders to obtain a tax benefit.

144. The relevant circumstances listed in subsection 45B(8) of the ITAA 1936 include the tax and non-tax (that is, business and other financial) implications of the scheme, the latter covered in the main by the matters in paragraph 177D(b) of the ITAA 1936 which are included in subsection 45B(8) by paragraph (k). All of the circumstances listed in the paragraphs of subsection 45B(8) of the ITAA 1936 must be considered to determine whether or not, individually or collectively, they reveal the existence of the requisite purpose. Paragraphs (a) and (b) concern respectively the extent to which the capital benefit is attributable to capital and profit and the distribution culture of the company. Paragraphs (c) to (g) refer to the tax characteristics of the shareholders. Paragraph (h) deals specifically with the change to a share interest by a distribution of share capital or share premium. Paragraph (i) concerns schemes which involve a distribution of shares and their later disposal and paragraph (j) is directed at demergers as defined in Division 125.

145. In this case, the nature of the scheme, the fact that it represents an exceptional event in the business life of AGL and the fact that it involves all of the AGL shareholders regardless of their individual tax characteristics indicate that the more pertinent circumstances are those covered by paragraphs (a) and (k) of subsection 45B(8) of the ITAA 1936. In regard to paragraph (a), it is apparent that the capital benefit represented by the shares in AGLEN has an indirect but nonetheless sufficient connection with the profit and capital of AGL to be regarded as being attributable thereto. However, the wider circumstances of the scheme, revealed at paragraph (k) by reference to the matters in paragraph 177D(b) of the ITAA 1936, demonstrate that enabling the AGL shareholders to obtain a tax benefit from the provision of the capital benefit does not constitute a more than incidental purpose of the scheme.

146. The matters in paragraph 177D(b) include the manner in which the scheme is entered into, its form and substance, the timing and duration of the scheme, the results that it would achieve but for section 45B, the financial and other changes the scheme will bring about and the connections between the parties.

147. In this instance, the scheme has come about after prolonged negotiation between AGL and Alinta whereby it was resolved to achieve a structure which would concentrate their infrastructure and energy interests into two separate businesses, one owned by both sets of shareholders and the other owned by the AGL shareholders. The Scheme booklet demonstrates the improved profitability expected from undertaking the restructure, which will flow to the AGL and Alinta shareholders through increased dividends.

The improvement in profitability arises from the synergies and cost savings achieved by combining the two infrastructure businesses and the enhanced business focus resulting from the separation of the energy business. It is apparent that the manner in which the scheme was carried out is characterised by a series of negotiations undertaken to improve the energy and infrastructure businesses for the ultimate benefit of the wider shareholder group.

148. It is also apparent that in this case the form of the scheme has been determined by and is consistent with its substance, which is to merge AGL and Alinta and then separate their infrastructure and energy businesses in a way which preserves the value of individual shareholder interests. Hence the scheme, which takes the form of an exchange of scrip for scrip and a buyback of the convertible shares in exchange for the AGL shares, ultimately maintains the essential character of shareholder investment in a rearranged structure of underlying assets. The form was chosen as the best way to achieve the desired restructure and differentiation of the infrastructure and energy businesses within the existing ownership without disturbing the value of individual shareholder interests.

149. The timing of the scheme represents a confluence of the business aims of AGL and Alinta; the former to demerge its infrastructure and energy businesses and the latter to merge its infrastructure business with that of AGL.

150. The scheme maintains existing shareholder value and any manifest financial changes it brings about occur within the corporate group structures and not at the shareholder level. The scheme also brings about significant changes in the management of the infrastructure and energy assets. It is apparent that senior management of the infrastructure assets will now be mainly in the hands of the personnel currently managing Alinta's infrastructure assets. The energy businesses will remain largely under the existing AGL management team. As noted above, these non-tax changes are documented in the Scheme booklet and have been the subject of wide discussion in the financial press leading up to this transaction. The materiality of the business and financial changes brought about by the scheme at the corporate level are such as to render the shareholders' 'obtaining a tax benefit' pursuant to subsection 45B(9) of the ITAA 1936 an incidental aspect of the scheme.

151. Lastly, the connection between the parties is and will remain one of company and shareholder.

152. It is concluded, therefore, that the results achieved by the scheme, unaffected by section 45B of the ITAA 1936, are not tax driven results and the requisite purpose of enabling the shareholders to 'obtain a tax benefit' is not present.

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Previous draft:

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Related Rulings/Determinations:

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