



CR 2008/30 - Income tax: Commonwealth Bank of Australia - Perpetual Exchangeable Resaleable Listed Securities

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 This document has changed over time. This is a consolidated version of the ruling which was published on *23 April 2008*



Class Ruling

Income tax: Commonwealth Bank of Australia – Perpetual Exchangeable Resaleable Listed Securities

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📌 This Ruling provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, 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 provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 44(1) of the ITAA 1936;
- section 45 of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- Division 1A of former Part IIIA of the ITAA 1936;
- section 177EA of the ITAA 1936;
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997);

- Division 104 of the ITAA 1997;
- section 109-5 of the ITAA 1997;
- subsection 110-25(2) of the ITAA 1997;
- subsection 110-55(2) of the ITAA 1997;
- Subdivision 130-A of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997; and
- section 207-145 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies are the Australian resident individuals, companies and complying superannuation entities who acquired a Perpetual Exchangeable Resaleable Listed Security (PERLS IV) issued by the Commonwealth Bank of Australia Limited (CBA) from an Initial Holder (IH) and who hold that PERLS IV on capital account.

4. The class of entities to which this Ruling applies are referred to as the 'Holders'.

5. The class of entities to which this Ruling applies does not include investors who acquire the PERLS IV other than by way of submitting the Application Form attached to the Prospectus for the offer of PERLS IV (that is, this Ruling only applies to investors who have acquired the PERLS IV from an IH under the Prospectus).

Qualifications

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 14 to 39 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

9. This Ruling applies from 1 July 2007 to 30 June 2014. However, the Ruling continues to apply after 30 June 2014 to all entities within the specified class who entered into the specified scheme.

10. 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.

11. 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)).

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

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

13. 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).

Scheme

14. The following description of the scheme that is the subject of this Ruling is based on the following documents provided by Greenwoods & Freehills Pty Limited (the Applicant). These documents, or the relevant part/s of them, as the case may be, form part of and are to be read in conjunction with this description.

15. The relevant documents, or parts of documents, to be read in conjunction with this description are:

- the application for a Class Ruling dated 6 December 2007 incorporating where relevant the letter dated 27 April 2007, from the Applicant on behalf of CBA;
- the PERLS IV Prospectus dated 1 June 2007;
- the PERLS IV Supplementary Prospectus dated 12 June 2007;
- a tax letter from the Applicant to the Directors of CBA dated 29 May 2007 (also included as Section 6 of the above Prospectus headed 'Taxation Information');
- the Offer Management and Subscription Agreement dated 1 June 2007;
- the PERLS IV Note Deed Poll provided on 25 May 2007;
- the Preference Share Terms provided on 5 June 2007;
- the Note Terms provided on 5 June 2007;
- the final KPMG valuation dated 29 May 2007; and
- all further information dated 1 May 2007 up to and including 3 April 2008 provided by the Applicant.

Note: certain information which relates to the affairs of CBA which is not in the public domain has been taken into account in determining the Commissioner's opinion set out in this Ruling (including the application of certain anti-avoidance provisions). This information has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

16. In this Ruling, unless otherwise defined, capitalised terms take their meaning as per the Prospectus.

17. CBA is an authorised deposit-taking institution (ADI) and is required to comply with the capital requirements of the Australian Prudential Regulation Authority (APRA), which includes the maintenance of mandatory levels of Tier 1 Capital.

18. The PERLS IV have been approved by APRA as Non-innovative Residual Tier 1 Capital and assist CBA in meeting its Tier 1 Capital requirement.

19. The Holder acquired a PERLS IV from an IH. PERLS IV is an instrument consisting of a bundle of rights which have the features of a Note and a Preference Share. The Holder acquired a PERLS IV from the IH for a price of \$200 each on 10 July 2007. Pursuant to the terms of the Offer in the PERLS IV Prospectus, the Holder acquired PERLS IV subject to the Note Deed Poll, the Note Terms and the Preference Share Terms. In doing so, the Holder was bound by, and subject to the terms of the offer made by the relevant IH to assign the Note to CBA on the occurrence of a defined Assignment Event. The PERLS IV are listed on the Australian Securities Exchange (ASX) as a stapled security. When an Assignment Event occurs, the PERLS IV will be destapled (that is the Notes will be detached and transferred to CBA) without any further action being required by the Holder. After destapling, the PERLS IV consisting solely of the Preference Shares then outstanding (as applicable) will remain listed on the ASX.

Main features of the PERLS IV

Distributions in respect of the PERLS IV

20. Interest and Dividends payable in respect of the PERLS IV are expected to be fully franked. To the extent that the Interest or Dividend is not franked to 100% under Part 3-6 of the ITAA 1997, the Holder will generally receive a gross-up of the Interest or Dividend payable.

21. Generally, Interest and Dividends are scheduled to be paid quarterly in arrears on the Interest Payment Dates and Dividend Payment Dates. They are non-cumulative.

22. Interest and Dividends will not be paid to Holders of the PERLS IV if the relevant conditions in the terms of the PERLS IV are not satisfied.

23. If Interest or a Dividend is not paid in full because the relevant conditions in the terms of the PERLS IV are not satisfied, CBA has no liability to pay that Interest or Dividend and Holders have no claim in respect of non-payment, notwithstanding the ability for an Optional Dividend to be paid. However, if the unpaid amount is unpaid Interest, an Assignment Event may occur.

24. No interest accrues on any unpaid Interest or Dividend, and the Holder has no claim or entitlement in respect of interest on any unpaid Interest or Dividend.

25. CBA may choose to pay an Optional Dividend (subject to APRA approval).

26. Subject to certain exceptions, non-payment of Interest or a Dividend will restrict CBA from paying certain distributions in respect of other specific instruments issued by CBA. The Holder of a PERLS IV does not have a right to require redemption of the Notes for cash prior to the winding up of CBA.

27. Dividends on the Preference Shares will only become payable after an Assignment Event (other than Conversion or Repurchase) has occurred, as the PERLS IV will be comprised solely of the Preference Shares then outstanding.

Destapling of the PERLS IV – Assignment Event

28. Immediately after an Assignment Event, the following will broadly occur in relation to all PERLS IV that are not to be Converted or Repurchased if CBA accepts the Holder's offer to assign the relevant Notes to it:

- (a) CBA and each Holder will be deemed to enter into an assignment agreement on the Assignment Event Date;
- (b) all amounts payable in respect of the Note after the occurrence of an Assignment Event will be payable to CBA;
- (c) the relevant Note will be destapled from the Preference Share to which it is Stapled; and
- (d) the Notes and the Holder's right, title and interest in the Notes are assigned to CBA on that date.

29. An Assignment Event is defined in the Note Terms. An Assignment Event means the occurrence of any of the following events after the issue of the Preference Shares comprising part of the PERLS IV:

- (a) a Default Event;
- (b) an APRA Event occurring and APRA requiring that such APRA Event be an Assignment Event;
- (c) APRA requiring that an Assignment Event occur (to the extent required by APRA);
- (d) CBA electing that an Assignment Event occur (to the extent elected by CBA);
- (e) the date the Preference Shares are Repurchased or Converted prior to the Repurchase or Conversion taking effect;
- (f) Interest on the Notes or an Assignment Prevention Optional Dividend on the Preference Shares has not been paid in full to Holders within 20 Business Days of an Interest Payment Date; or
- (g) the Face Value of the Preference Shares has not been paid in full to Holders where the Preference Shares are to be Repurchased.

Mandatory Conversion

30. On the Mandatory Conversion Date, CBA must Convert all Preference Shares on issue at that date into CBA Ordinary Shares. 'Conversion' entails the variation of the rights attaching to a Preference Share under the Preference Share Terms (including the allotment of CBA Ordinary Shares).

31. Each Holder will also be allotted an additional number of fully paid CBA Ordinary Shares for each Preference Share Converted. The number of additional CBA Ordinary Shares is calculated using a formula which incorporates a Conversion Discount of 1%.

32. The Mandatory Conversion Date will be the earlier of 31 October 2012 and each Dividend Payment Date thereafter on which the Mandatory Conversion Conditions are satisfied. The Holders have no right to seek or initiate Conversion or Redemption or Repurchase of the Preference Shares.

33. In addition, CBA may elect to Resell all of the Preference Shares by giving a Resale Notice not less than 21 Business Days prior to the Initial Mandatory Conversion Date.

Exchange

34. CBA may, subject to APRA's prior written approval, give an Exchange Notice to Holders within 6 months after the occurrence of a Regulatory Event, NOHC Event or Tax Event, in respect of all (but not some) of the Preference Shares.

35. If a Change of Control Event occurs, CBA must give an Exchange Notice in respect of all of the Preference Shares within a stipulated time frame.

Resale

36. CBA may require all of the Holders to Resell their Preference Shares (and, if there has not been an Assignment Event, any corresponding Note forming part of the PERLS IV) to a third party Purchaser. Once CBA has negotiated with the Purchaser, it will effect the Resale by issuing a Resale Notice. The Purchaser must acquire the Preference Shares (and any corresponding Note) from the Holders for the Face Value of the Preference Shares on the Exchange Date (which will be the Initial Mandatory Conversion Date).

37. If CBA issues a Resale Notice:

- (a) each Holder is taken irrevocably to offer to sell the Preference Shares (and any corresponding Note forming part of the PERLS IV) which CBA has elected to Resell to the Purchaser on the Exchange Date for a cash amount equal to the Face Value; and

- (b) on the Exchange Date, subject to payment by the Purchaser of the Face Value to the Holders, all right, title and interest in such Preference Shares (and any corresponding Note forming part of the PERLS IV) will be transferred to the Purchaser.

The Offer

38. The Offer to subscribe for the PERLS IV was available to persons within Australia. No action was taken to register the Prospectus, or otherwise permit a public offering of PERLS IV, in any jurisdiction outside Australia.

39. PERLS IV is listed on the ASX and trades under the ASX code 'CBAPB'.

Other matters

40. This Ruling is made on the basis that:
- (a) the documents listed in paragraph 15 of this Ruling provide a complete and accurate description of the scheme;
 - (b) the documents listed in paragraph 15 of this Ruling were intended by parties to have their legal effect and the scheme was implemented according to the terms of these documents;
 - (c) during the term of the scheme, CBA will be a resident of Australia under the income tax laws of Australia and of no other jurisdiction;
 - (d) distributions paid in respect of the PERLS IV are frankable distributions under section 202-40 of the ITAA 1997 and are not unfrankable under section 202-45 of the ITAA 1997;
 - (e) each PERLS IV is an 'equity interest' in CBA under Division 974 of the ITAA 1997;
 - (f) CBA will frank the Distributions in respect of the PERLS IV at the same franking percentage as the benchmark for the franking period in which the payments are made;
 - (g) the Ordinary Shares in CBA are properly characterised as 'equity interests' in CBA under Division 974 of the ITAA 1997;

- (h) a Holder, and their associates, do not have any positions (within the meaning of former section 160APHJ of the ITAA 1936) in relation to the PERLS IV apart from the holding of the PERLS IV themselves;
- (i) a Holder and their associates will not make any related payments (within the meaning of former section 160APHN of the ITAA 1936) in relation to Interest and Dividends payable in respect of the PERLS IV;
- (j) Holders will not dispose of their PERLS IV before a period of at least 90 days (excluding the day of acquisition and the day of disposal) beginning the day after the acquisition of the PERLS IV;
- (k) the residency requirements in section 202-20 of the ITAA 1997 are met;
- (l) CBA will not differentially frank distributions to different Holders in respect of the PERLS IV according to the tax status of the Holders or on any other basis;
- (m) Interest and any gross-up amounts payable in respect of the PERLS IV, and Dividends and any gross-up amounts payable in respect of the PERLS IV following an Assignment Event (other than Mandatory Conversion, Conversion or Repurchase), will not be debited to CBA's share capital account, or its non-share capital account;
- (n) no Interest, Dividends or any gross-up amounts will be sourced, directly or indirectly, from CBA's share capital account; and
- (o) the additional Ordinary Shares issued by CBA on Conversion of the Preference Shares (which form part of the PERLS IV) to Ordinary Shares will not involve an amount being credited to the Holders as shareholders and no amount will be paid from profits.

Ruling

Acquisition time of the PERLS IV

41. Each Holder acquired the PERLS IV from the IH on the date the contract was entered into (section 109-5 of the ITAA 1997).

Cost base and reduced cost base

42. The first element of the cost base and reduced cost base for each PERLS IV is \$200, being the amount paid by the Holder to acquire the PERLS IV from the IH (subsections 110-25(2) and 110-55(2) of the ITAA 1997).

Inclusion of Interest and Dividends in assessable income

43. Interest and Dividends payable in respect of each PERLS IV are non-share dividends and dividends respectively. Holders must include in their assessable income all non-share dividends and dividends received in respect of the PERLS IV (paragraph 44(1)(a) of the ITAA 1936). The Holders must also include in their assessable income an amount equal to the franking credits attached to the non-share dividends and dividends respectively (subsection 207-20(1) of the ITAA 1997).

Entitlement to a tax offset

44. Holders will be entitled to a tax offset equal to the franking credit received on the non-share dividends and dividends paid in respect of the PERLS IV (subsection 207-20(2) of the ITAA 1997).

Franking credit subject to the refundable tax offset rules

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

Gross-up and tax offset denied in certain circumstances

46. For the purposes of Division 1A of former Part IIIA of the ITAA 1936, a Holder will be considered to be a 'qualified person' in relation to the non-share dividends and dividends payable in respect of the PERLS IV provided that the Holder:

- holds the PERLS IV at risk for a continuous period of at least 90 days (excluding the day of acquisition and the day of disposal) pursuant to former sections 160APHO and 160APHM of the ITAA 1936; and
- neither the Holder, nor an associate of the Holder, has made or is under an obligation to make a related payment (within the meaning of former section 160APHN of the ITAA 1936) in respect of the non-share dividends and dividends payable in respect of the PERLS IV.

47. The irrevocable offer by Holders to assign the Notes on an Assignment Event Date or the irrevocable offer by Holders to sell their PERLS IV (which, after an Assignment Event, consists solely of a Preference Share) to a Purchaser if CBA issues a Resale Notice does not affect whether the PERLS IV are held 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

48. Therefore section 207-145 of the ITAA 1997 will not apply to the whole, or any part, of the non-share dividends or dividends received by the Holders. Accordingly, section 207-145 will not adjust the gross-up of the Holders' assessable income to exclude the franking credits, nor will it deny the tax offset to which the Holders would have otherwise been entitled.

Imputation integrity provisions

49. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received in relation to the non-share dividends and dividends received by the Holders in respect of the PERLS IV.

50. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received in relation to the non-share dividends and dividends received by the Holders in respect of the PERLS IV.

Disposal of PERLS IV – Capital Gains Tax (CGT) consequences

51. On a disposal of a PERLS IV on market or as part of a Resale prior to an Assignment Event occurring, the Holder will realise:

- a capital gain under subsection 104-10(4) of the ITAA 1997 to the extent that the capital proceeds from the disposal exceed the cost base of the PERLS IV; or
- a capital loss under subsection 104-10(4) of the ITAA 1997 to the extent that the capital proceeds from the disposal are less than the reduced cost base of the PERLS IV.

Assignment Event – CGT implications

52. CGT event H2, in section 104-155 of the ITAA 1997, will happen when an Assignment Event occurs. However, no Holder will make a capital gain or capital loss, as there are no capital proceeds because of the event, and no incidental costs are incurred in respect of the event. No other CGT event will happen when an Assignment Event occurs.

Conversion of PERLS IV and allotment of additional CBA Ordinary Shares – CGT implications

53. No CGT event in Division 104 of the ITAA 1997 will happen to the Holders because of the Conversion of PERLS IV or the allotment of additional CBA Ordinary Shares to the Holders as part of the Conversion of the PERLS IV.

Allotment of additional CBA Ordinary Shares – assessable income

54. The value of the additional CBA Ordinary Shares on Conversion of the PERLS IV will not be a 'dividend' as defined in subsection 6(1) of the ITAA 1936, and the value of the additional CBA Ordinary Shares will not be included in the Holder's assessable income under subsection 44(1) of the ITAA 1936.

Section 45

55. Section 45 of the ITAA 1936 will not apply to treat the additional CBA Ordinary Shares issued on the occurrence of an Assignment Event which is a Conversion Event, as an unfranked dividend paid by CBA.

Section 45A

56. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that the whole or part of the capital benefit that arises upon an Assignment Event occurring is an unfranked dividend in the hands of the Holders.

Section 45B

57. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that the whole or part of the capital benefit that arises upon an Assignment Event occurring is an unfranked dividend in the hands of the Holders.

Cost base of the CBA Ordinary Shares

58. Subdivision 130-A of the ITAA 1997 will apply to apportion the first element of the cost base and reduced cost base of each PERLS IV over the Converted PERLS IV (that become CBA Ordinary Shares) and the additional CBA Ordinary Shares issued by CBA.

Date of acquisition of the CBA Ordinary Shares

59. The CBA Ordinary Shares are taken to have been acquired by the Holder when the Holder acquired the PERLS IV (section 109-5 of the ITAA 1997). The date of acquisition of the CBA Ordinary Shares that arise from a Conversion of the PERLS IV does not change as a result of the Conversion.

60. The additional CBA Ordinary Shares that are allotted to the Holders as part of the Conversion of the PERLS IV are taken to have been acquired by the Holders at the time the PERLS IV were originally acquired by the Holders (item 1 of the table in subsection 130-20(3) of the ITAA 1997).

Commissioner of Taxation23 April 2008

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.*

Acquisition time of the PERLS IV

61. Where an entity disposes of a CGT asset to you (except where you compulsorily acquire it), you acquire the CGT asset at the time when the disposal contract is entered into or, if no contract is entered into, when the entity stops being the asset's owner (item 1 of the table in subsection 109-5(2) of the ITAA 1997).

62. Each PERLS IV is a single CGT asset, arising from a single contract between CBA and the Holder. By acquiring the PERLS IV from an IH on the terms offered by CBA in its Prospectus for the issue of the PERLS IV, each Holder has agreed to be bound by the Constitution of CBA, the Note Deed Poll, the Note Terms, the Preference Share Terms and the terms and conditions of the Offer as set out in the PERLS IV Prospectus.

63. Each PERLS IV was acquired by the Holder from an IH on the issue date being 10 July 2007.

64. Each PERLS IV is a single CGT asset consisting of a bundle of rights. The Assignment Event does not result in the acquisition of any new CGT asset. Rather the PERLS IV takes on the features of a simple Preference Share. Accordingly, the Preference Share is not a new CGT asset acquired by the Holder upon the assignment of the Note, and the acquisition date of the Preference Share is the acquisition date of the PERLS IV, being 10 July 2007.

Cost base and reduced cost base

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

66. The Holder acquired each PERLS IV from an IH for \$200. Accordingly, the first element of the cost base and reduced cost base of each PERLS IV is \$200.

67. The occurrence of an Assignment Event does not modify the cost base and reduced cost base of each PERLS IV. Accordingly, the first element of the cost base and reduced cost base of each PERLS IV is \$200.

Inclusion of Interest and Dividends in assessable income

68. Paragraph 44(1)(a) of the ITAA 1936 includes in the assessable income of a resident shareholder in a company, all dividends and non-share dividends that are paid to the shareholder by the company.

69. Interest and Dividends payable in respect of the PERLS IV are non-share dividends and dividends respectively. Accordingly, the Holders will include in their assessable income Interest and Dividends payable in respect of the PERLS IV under paragraph 44(1)(a) of the ITAA 1936.

70. Furthermore, as this Ruling is made on the basis that:

- the non-share dividends and dividends payable in respect of the PERLS IV are frankable distributions pursuant to section 202-40 of the ITAA 1997 and are not unfrankable under section 202-45 of the ITAA 1997; and
- where CBA franks a frankable distribution payable in respect of the PERLS IV in accordance with section 202-5 of the ITAA 1997, the distribution will be a franked distribution,

it therefore follows that the franking credits attached respectively to the non-share dividends and dividends must also be included in the Holder's assessable income under subsection 207-20(1) of the ITAA 1997.

Entitlement to a tax offset

71. In accordance with subsection 207-20(2) of the ITAA 1997, the Holders are entitled to receive a tax offset equal to the value of the franking credit which has been included in their assessable income in respect of the non-share dividends and dividends they received.

Franking credit subject to the refundable tax offset rules

72. Holders who are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997, in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless they are specifically excluded under section 67-25 of the ITAA 1997. Certain trustees and corporate tax entities are not subject to the refundable tax offset rules because of subsections 67-25(1A) to 67-25(1D) of the ITAA 1997.

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

Imputation integrity provisions

Streaming of imputation benefits

74. Subdivision 204-D of the ITAA 1997 broadly enables the Commissioner to make a determination where distributions with attached imputation benefits are streamed to members of a corporate tax entity.

75. Section 204-30 of the ITAA 1997 prescribes the circumstances that are required to exist before the Commissioner may make such a determination. Section 204-30 applies where an entity 'streams' the payment of distributions in such a way that:

- an 'imputation benefit' is, or apart from section 204-30 would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a) of the ITAA 1997);
- the member (favoured member) would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b) of the ITAA 1997); and
- the other member (disadvantaged member) of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c) of the ITAA 1997).

76. The existence of these conditions enables the Commissioner, under paragraph 204-30(3)(c) of the ITAA 1997, to make a determination that no imputation benefit is to arise in respect of the distributions made to those favoured members.

77. 'Streaming' is not defined for the purposes of Subdivision 204-D of the ITAA 1997. However, it is understood to refer to a company selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits (refer to paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002).

78. CBA have indicated in the PERLS IV Prospectus that the Interest payable and Dividend payable in respect of the PERLS IV to the Holders are expected to be fully franked. Although the PERLS IV rank ahead of Ordinary Shares in respect of the payment of Interest/Dividends, CBA have advised that they have, and will continue, to pay fully franked dividends (to the extent of available franking credits in their franking account) to all of its shareholders and equity holders, including holders of Ordinary Shares. There will be no change in CBA's dividend franking policy or dividend payout ratios on its share capital as a result of the issue of the PERLS IV.

79. As such, there is no evidence that the requisite element of streaming exists in relation to the franked distributions to be paid by CBA to Holders. Accordingly, based on the information provided, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny imputation benefits to Holders.

General anti-avoidance rule – imputation

80. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of the scheme is to obtain an imputation benefit. Where these circumstances arise, subsection 177EA(5) of the ITAA 1936 enables the Commissioner to make a determination with the effect of either:

- imposing franking debits or exempting debits on the distributing entity's franking account generally; or
- denying the imputation benefit on the distribution that flowed directly or indirectly to the relevant taxpayer.

81. Pursuant to subsection 177EA(3) of the ITAA 1936, and in conjunction with subsection 177EA(12) of the ITAA 1936 (which extends the application of section 177EA of the ITAA 1936 to non-share equity interests, equity holders and non-share dividends), section 177EA applies if the following conditions are satisfied:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity;
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be;
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit;
- (d) except for this section, the person (the relevant taxpayer) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and

- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

82. Membership interests include both equity interests and non-share equity interests.

83. It is considered that the conditions in paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied because:

- (a) the issue of PERLS IV constitutes a scheme for the disposition of a membership interest (paragraph 177EA(3)(a) of the ITAA 1936). Pursuant to paragraph 177EA(14)(a) of the ITAA 1936, a 'scheme for a disposition of membership interests or an interest in membership interests' includes a scheme that involves the issuing of membership interests. The issuance of PERLS IV on the terms set out in the PERLS IV Prospectus is a scheme that involves the issuing of membership interests because the Holders of the PERLS IV are equity holders of CBA;
- (b) frankable distributions are expected to be paid to the Holders of the PERLS IV (paragraph 177EA(3)(b) of the ITAA 1936). This Ruling is made on the basis that the distributions payable in respect of the PERLS IV will be frankable distributions under section 202-40 of the ITAA 1997 and not be unfrankable distributions under section 202-45 of the ITAA 1997;
- (c) franked distributions are expected to be paid to the Holders of the PERLS IV (paragraph 177EA(3)(c) of the ITAA 1936). It is expected that the franked distribution payable in respect of the PERLS IV will be made on a quarterly basis. Furthermore, CBA has advised that it will continue its policy of fully franking all frankable distributions made by it, to the extent of the franking credits available in its franking account; and
- (d) it is reasonable to expect that an imputation benefit will be received by the relevant taxpayers as a result of distributions made to the Holders given that CBA expects to frank the distributions on the PERLS IV (paragraph 177EA(3)(d) of ITAA 1936).

84. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that it was entered into or carried out for the purpose (which is not merely an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit under the scheme.

85. Circumstances which are relevant in determining whether any person has the requisite purpose include, but are not limited to, the factors listed in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may or may not be present at any one time in any one scheme.

86. The issue of the PERLS IV is a capital raising transaction which CBA advised was undertaken to assist it to comply with the capital adequacy requirements of APRA. There is nothing in the terms of the PERLS IV which would suggest it was entered into for the purpose (which is not merely an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit under the scheme.

87. Based on the information provided, and having regard to the factors listed in subsection 177EA(17) of the ITAA 1936, the qualifications set out in this Ruling and the relevant circumstances of the scheme, it would not be reasonable to conclude that in entering into the scheme, CBA and/or the Holders of the PERLS IV demonstrate the objective purpose of securing imputation benefits for the Holders of the PERLS IV. To the extent that any imputation benefits are secured, those benefits are considered to be incidental to the more significant objective purposes of the raising of Tier 1 Capital by CBA to meet its capital adequacy requirements.

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

Gross-up and tax offset denied in certain circumstances

89. Subdivision 207-F of the ITAA 1997 creates the appropriate adjustment to cancel the effect of the gross-up and tax offset rules where the entity concerned has manipulated the imputation system in a manner that is not permitted under the income tax law.

90. Section 207-145 of the ITAA 1997 provides the circumstances that must exist before this adjustment can occur. Pursuant to subsection 207-145(1) of the ITAA 1997 a 'manipulation of the imputation system' may occur where:

- the entity is not a 'qualified person' in relation to the distribution (paragraph 207-145(1)(a) of the ITAA 1997);
- the Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in relation to the dividend (paragraph 207-145(1)(b) of the ITAA 1997);

- the Commissioner has made a determination under paragraph 204-30(3)(c) of the ITAA 1997 that no imputation benefit is to arise in relation to the distribution (paragraph 207-145(1)(c) of the ITAA 1997); or
- the dividend is made as part of a dividend stripping operation (paragraph 207-145(1)(d) of the ITAA 1997).

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

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

93. The holding period rule applies where no related payment has been, or will be made, in respect of the non-share dividend or dividend, and requires the non-share equity interest or share to have been continuously held at risk throughout the primary qualification period (former paragraph 160APHO(1)(a) of the ITAA 1936).

94. The related payments rule applies where the taxpayer or an associate has made or will make a related payment in respect of the non-share dividend or dividend and requires the non-share equity interest or share to have been continuously held at risk throughout the secondary qualification period (former subsection 160APHO(1) of the ITAA 1936 and former section 160APHN of the ITAA 1936).

95. The Holders are qualified persons, as:

- the Holders in receipt of non-share dividends and dividends in respect of the PERLS IV will have held their PERLS IV at risk for at least 90 days (excluding the day of acquisition and the day of disposal), in the period beginning on the day after the day on which the Holder acquired the PERLS IV and ending on the 90th day after the day on which the PERLS IV became ex-dividend (former subsections 160APHO(2) and 160APHO(3) of the ITAA 1936 and former sections 160APHM and 160APHJ of the ITAA 1936); and
- neither the Holders, nor associates of the Holders, are under an obligation to make, or are likely to make a related payment in relation to the non-share dividends or dividends (former paragraph 160APHO(1)(a) of the ITAA 1936 and former section 160APHN of the ITAA 1936).

96. However, if either or both of the above 2 considerations are not met, the Holder will not be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Subdivision 207-F of the ITAA 1997 will create the appropriate adjustment to cancel the effect of the gross-up and tax offset rules for the Holder.

97. The Commissioner has confirmed that he will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) of the ITAA 1997 to deny the imputation benefits attached to non-share dividends or dividends paid to the Holders in respect of their PERLS IV.

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

99. The PERLS IV Prospectus provides no indication that the offering of PERLS IV and the associated payment of franked distributions to the Holders in any way constitute a dividend stripping arrangement. As such, the dividend stripping provision will have no application to the Holders.

100. Therefore, section 207-145 of the ITAA 1997 will not apply to deny imputation benefits to Holders unless the conditions outlined in paragraph 95 of this Ruling are not met.

101. In addition, based on the facts and additional matters stated by the Applicant, the Commissioner has concluded that the irrevocable offer by Holders to assign the Notes on an Assignment Event Date or the irrevocable offer by Holders to sell their PERLS IV (which, after an Assignment Event, consists solely of a Preference Share) to a Purchaser if CBA issues a Resale Notice does not affect whether the PERLS IV are held 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

Characterisation of PERLS IV for CGT purposes

102. Each PERLS IV is a single CGT asset, arising from a single contract, the terms of which are to be found in the Constitution of CBA, the Note Deed Poll, the Note Terms, the Preference Share Terms and the terms and conditions of the Offer as set out in the PERLS IV Prospectus.

Disposal of PERLS IV

103. CGT event A1 happens if you dispose of a CGT asset (subsection 104-10(1) of the ITAA 1997). Under subsection 104-10(2) of the ITAA 1997, you dispose of a CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law.

104. CGT event A1 will happen if a PERLS IV is disposed of on market, or as part of a Resale prior to an Assignment Event occurring, as there will be a change of ownership of the PERLS IV.

105. A capital gain will be made under subsection 104-10(4) of the ITAA 1997 on the disposal of the PERLS IV if the capital proceeds from the disposal are more than the cost base of the PERLS IV. A capital loss will be made under subsection 104-10(4) of the ITAA 1997 on the disposal of the PERLS IV if the capital proceeds from the disposal are less than the reduced cost base of the PERLS IV.

Assignment Event

106. Each PERLS IV is a single CGT asset, arising from a single contract between CBA and the Holder. The assignment of the Notes on an Assignment Event Date will not affect the continued existence of this CGT asset, although the PERLS IV will then take on the features of a simple Preference Share.

107. Subsection 104-155(1) of the ITAA 1997 provides that CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset that you own and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base.

108. CGT event H2 will happen when an Assignment Event occurs. This is an act, transaction or event in relation to the PERLS IV that does not result in an adjustment being made to the cost base or reduced cost base of the PERLS IV.

109. A capital gain is made if the capital proceeds from CGT event H2 are more than the incidental costs incurred in relation to the event. A capital loss is made if the capital proceeds are less than the incidental costs (subsection 104-155(3) of the ITAA 1997).

110. Subsection 116-20(2) of the ITAA 1997 provides that the capital proceeds from CGT event H2 happening is the money or other consideration received, or entitled to be received, because of the act, transaction or event.

111. Holders will make no capital gain or capital loss from the happening of CGT event H2 as there are no capital proceeds because of the event and no incidental costs are incurred by the Holders that relate to the event. No other CGT event will happen when an Assignment Event occurs.

Conversion of PERLS IV and allotment of additional CBA Ordinary Shares

112. Pursuant to the PERLS IV Prospectus, upon a Conversion Event, each PERLS IV will Convert into CBA Ordinary Shares through a variation of the rights attaching to each PERLS IV. Holders of the PERLS IV will also receive an allotment of additional CBA Ordinary Shares.

113. The PERLS IV will Convert into CBA Ordinary Shares on 31 October 2012, subject to the satisfaction of the Mandatory Conversion Conditions. If the Mandatory Conversion Conditions are not satisfied on that date, the Mandatory Conversion Date moves to the next Dividend Payment Date on which the conditions are satisfied.

114. The PERLS IV may Convert into CBA Ordinary Shares before the Mandatory Conversion Date at CBA's discretion where certain defined events have occurred.

115. CGT events A1, C2, G1 or H2 will not happen to the Holders on either the Conversion of the PERLS IV or the allotment of additional Ordinary Shares to the Holders.

116. The Conversion of the PERLS IV does not constitute a disposal of an asset or part of an asset as required for CGT event A1 to happen.

117. PERLS IV are comprised of a bundle of rights; however those rights are not separate pieces of property capable of being divided out and held separately (refer to Taxation Ruling TR 94/30).

118. Under section 104-25 of the ITAA 1997, CGT event C2 happens if, among other things, the ownership of an intangible CGT asset (the PERLS IV) ends:

- by being redeemed or cancelled (paragraph 104-25(1)(a) of the ITAA 1997); or
- if the PERLS IV is a convertible interest – by being converted (paragraph 104-25(1)(f) of the ITAA 1997).

119. The mere variation of rights attaching to the PERLS IV is not a 'redemption' or 'cancellation' of the PERLS IV for the purposes of paragraph 104-25(1)(a) of the ITAA 1997, and does not involve the conversion of the PERLS IV for the purposes of paragraph 104-25(1)(f) of the ITAA 1997.

120. Furthermore, the relinquishment by the Holders of some of the rights attaching to the PERLS IV is not a CGT event that happens to part of the CGT asset comprised by each PERLS IV under section 112-30 of the ITAA 1997 (see paragraph 40 of Taxation Ruling TR 94/30).

121. Under section 104-135 of the ITAA 1997, CGT event G1 happens if a company makes a payment (which can include giving property) to an entity in respect of a share they own in the company (the PERLS IV), and some or all of the payment is not a dividend. The variation of rights attaching to the PERLS IV, so that they become CBA Ordinary Shares, does not amount to CBA making a payment. Therefore, CGT event G1 will not happen.

122. Although CGT event C2 or G1 does not happen as a result of the variation of the rights attaching to the PERLS IV, the receipt of money or other consideration in respect of such a variation may attract the operation of CGT event H2 (see paragraphs 10 and 46 to 48 of Taxation Ruling TR 94/30).

123. Subsection 104-155(1) of the ITAA 1997 provides that CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset that you own and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base.

124. The Conversion of PERLS IV to CBA Ordinary Shares and the allotment of additional CBA Ordinary Shares will result in an adjustment to the cost base and reduced cost base of the PERLS IV under Subdivision 130-A of the ITAA 1997 (refer to paragraphs 149 to 151 of this Ruling).

125. Accordingly, the act, transaction or event that occurs in relation to the PERLS IV results in an adjustment to the cost base or reduced cost base of the PERLS IV. Therefore, CGT event H2 does not happen because of the Conversion of the PERLS IV and the allotment of additional CBA Ordinary Shares.

126. No other CGT event in Division 104 of the ITAA 1997 will happen because of the Conversion of the PERLS IV and the allotment of the additional CBA Ordinary Shares.

Allotment of additional CBA Ordinary Shares – dividend

127. Subsection 6(1) of the ITAA 1936 defines a 'dividend' to include any distribution made by a company to any of its shareholders, whether in money or other property, and any amount credited by a company to any of its shareholders as shareholders.

128. Although the additional CBA Ordinary Shares issued on Conversion of the PERLS IV (which, after an Assignment Event, consists solely of Preference Shares) will constitute 'property' in the hands of the Holders, the allotment is not a disposition of property in the ordinary meaning of that expression (refer *Ord Forrest Pty Ltd v. FC of T* (1974) 130 CLR 124; 74 ATC 4034; (1974) 4 ATR 230). As there is no disposition, there cannot be a distribution of property by CBA.

129. Furthermore, no amount is credited to the Holders, nor is an amount paid out of profits.

130. Accordingly, the allotment of additional CBA Ordinary Shares does not constitute a 'dividend' within the meaning of subsection 6(1) of the ITAA 1936.

Sections 45, 45A and 45B

131. Sections 45, 45A and 45B of the ITAA 1936 are anti-avoidance provisions which, if they apply, either deem the value of shares or other capital benefits received by a shareholder to be an unfranked dividend paid by the company out of profits of that company, to the shareholder or allow the Commissioner to make a determination to that effect.

Section 45

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

133. CBA has consistently paid fully franked dividends and intends to continue paying fully franked dividends to all its shareholders into the foreseeable future. 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 allotment of additional CBA Ordinary Shares as an unfranked dividend in the hands of the Holders.

Section 45A

134. Section 45A 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 have received or will receive dividends (the disadvantaged shareholders).

135. The 'provision of capital benefits' is defined in subsection 45A(3) of the ITAA 1936 and includes, in this case, the allotment of additional CBA Ordinary Shares upon an Assignment Event which is a Conversion Event and any increase in the value of the PERLS IV (which after an Assignment Event consist solely of Preference Shares) if an Assignment Event occurs.

136. The allotment of additional CBA Ordinary Shares to Holders upon an Assignment Event which is a Conversion Event is a 'provision of capital benefits' pursuant to paragraph 45A(3)(a) of the ITAA 1936.

137. The allotment of additional CBA Ordinary Shares is in effect a restatement of the Holder's interest in the capital of CBA. Without more, it does not constitute the streaming of capital benefits.

138. Accordingly, it cannot be said that Holders derive a greater benefit from capital benefits than other CBA shareholders. Therefore, the allotment of additional CBA Ordinary Shares does not trigger the application of section 45A of the ITAA 1936.

139. Therefore the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that the whole or part of the capital benefit that arises upon an Assignment Event occurring is an unfranked dividend in the hands of the Holders.

140. Any increase in the value of the PERLS IV (which after an Assignment Event consists solely of Preference Shares) after an Assignment Event is a 'provision of capital benefits' pursuant to paragraph 45A(3)(c) of the ITAA 1936.

141. This circumstance on its own does not constitute the streaming of capital benefits.

142. Accordingly, it cannot be said that Holders derive a greater benefit from capital benefits than other CBA shareholders. Therefore, any such increase in the value of the PERLS IV does not trigger the application of section 45A of the ITAA 1936.

143. Therefore, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that the whole or part of the capital benefit that arises upon an Assignment Event occurring is an unfranked dividend in the hands of the Holders.

Section 45B

144. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends.

145. The allotment of additional CBA Ordinary Shares to Holders upon a Conversion and any increase in the value of the PERLS IV (which after an Assignment Event consists solely of Preference Shares) after an Assignment Event fall within the definition of a 'provision of capital benefits' within the meaning of subsection 45B(5) of the ITAA 1936.

146. For the provision to apply, among other things, paragraph 45B(2)(c) of the ITAA 1936 requires that, having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit. A non-exhaustive list of relevant circumstances of the scheme are provided in subsection 45B(8) of the ITAA 1936.

147. Having regard to the relevant circumstances surrounding the issue of the PERLS IV, it cannot be concluded that CBA, the Holders or any other person entered into or carried out the issue of the PERLS IV for the purpose of enabling the Holders to obtain a tax benefit. The terms of the arrangement do not disclose that the additional CBA Ordinary Shares allotted upon a Conversion and any increase in the value of the PERLS IV after an Assignment Event, will be provided in substitution for any dividend payment in respect of the PERLS IV. Further, the allotment of additional Ordinary Shares cannot be said to be attributable to the profits of the company.

148. Accordingly the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that the whole or part of the capital benefit that arises upon an Assignment Event occurring is an unfranked dividend in the hands of the Holders.

Cost base of the CBA Ordinary Shares

149. Subdivision 130-A of the ITAA 1997 provides special rules relating to the time of acquisition and the cost base of bonus equities for CGT purposes.

150. Subdivision 130-A of the ITAA 1997 will apply to apportion the first element of the cost base and reduced cost base of the PERLS IV over the Converted PERLS IV (that become CBA Ordinary Shares) and the additional CBA Ordinary Shares issued by CBA.

151. As the value of the additional Ordinary Shares is not a dividend nor taken to be a dividend, the first element of the cost base and reduced cost base of each PERLS IV is to be apportioned in a reasonable way over both the CBA Ordinary Shares and the additional CBA Ordinary Shares issued to the Holders by CBA (item 1 of the table in subsection 130-20(3) of the ITAA 1997).

Date of acquisition of the CBA Ordinary Shares

152. The CBA Ordinary Shares are taken to have been acquired by the Holder when the Holder acquired the PERLS IV, being 10 July 2007 (section 109-5 of the ITAA 1997).

153. The additional CBA Ordinary Shares that are allotted to the Holders as part of the Conversion of the PERLS IV are taken to have been acquired by the Holders at the time the PERLS IV were originally acquired by the Holders, being 10 July 2007 (item 1 of the table in subsection 130-20(3) of the ITAA 1997).

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 94/30

Subject references:

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- anti-avoidance measures
- capital gains tax
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- dividend imputation
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Legislative references:

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ATO references

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Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to C3 - end of a CGT asset
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