

# ***CR 2012/102 - Income tax: off-market share buy-back: IMB Limited***

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *7 November 2012*



## Class Ruling

### Income tax: off-market share buy-back: IMB Limited

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#### **ⓘ This publication provides you with the following level of protection:**

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

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

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

## 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. relevant provisions dealt with in this Ruling are:

- subsection 44(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 90 of the ITAA 1936;
- subsection 95(1) of the ITAA 1936;
- paragraph 128B(3)(ga) of the ITAA 1936;
- section 159GZZZP of the ITAA 1936;
- section 159GZZZQ of the ITAA 1936;
- Division 1A of former Part IIIAA of the ITAA 1936;

- section 177EA of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 67 of the ITAA 1997;
- section 104-10 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- section 118-25 of the ITAA 1997;
- section 202-5 of the ITAA 1997;
- section 202-40 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 207-45 of the ITAA 1997;
- section 207-145 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

## **Class of entities**

3. The class of entities to which this Ruling applies is the ordinary shareholders of IMB Limited (IMB), an unlisted company, who:

- (a) disposed of their ordinary shares in IMB under the IMB off-market share buy-back (the Buy-Back) which was announced by IMB on 31 July 2012 and which is described in the Scheme section of this Ruling; and
- (b) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their IMB shares.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

In this Ruling, the ordinary shareholders of IMB are collectively referred to as 'Shareholder Members'.

## **Qualifications**

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

5. 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 9 to 44 of this Ruling.

6. 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

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8. This Ruling applies from 1 July 2012 to 30 June 2013. The Ruling continues to apply after 30 June 2013 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- IMB's Class Ruling application dated 12 March 2012;
- IMB's Off-Market Buyback Booklet dated 31 July 2012;
- Letter of conditional scheme approval from the Australian Prudential Regulation Authority (APRA) dated 20 December 2011;

- Letter from Australian Securities and Investments Commission (ASIC) dated 5 June 2012 granting relief in accordance with ASIC Regulatory Guide 51;
- IMB's responses dated between 12 April 2012 to 10 October 2012 to the Commissioner's requests for further information; and
- IMB's proposal on market value for taxation purposes.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

## **Background of IMB**

10. IMB is a resident unlisted company limited by shares and guarantee. IMB is also a mutual Authorised Deposit-taking Institution (ADI).
11. IMB is the head company of a tax consolidated group.

## **Composition of members**

12. Immediately prior to the share Buy-Back, IMB's share capital comprised 39,911,640 fully paid ordinary shares.
13. The members of IMB comprised members by way of guarantee (Guarantee Members) and Guarantee Members who hold shares in IMB (Shareholder Members). A person or an entity cannot become a member of IMB through shareholding alone.
14. The composition of IMB's members at 31 January 2012 included approximately 180,000 Guarantee Members (including the Shareholder Members) and 4,317 Shareholder Members of which 4,230 were eligible to vote (i.e. Shareholder Members with shareholding of at least 100 shares).
15. The Shareholder Members of IMB are a mix of individuals, companies, nominee companies, trusts and superannuation funds, a minority (1.05% by value as at 31 January 2012) of whom are non-residents.
16. All IMB shares were acquired by their respective Shareholder Members after 20 September 1985.
17. The majority of Shareholders Members by number (92.31%) were individuals with holdings of 73.66% by value as at 31 January 2012.
18. The maximum permissible shareholding of any one Shareholder Member is 5%. Any excess is forfeited to IMB and the Shareholder Member is appropriately compensated.

**History of distributions**

19. IMB limits its annual distributions on shares to less than 50% of its annual net profit after tax in accordance with ASIC Regulatory Guide 147.

20. Since its dividend reinvestment plan ended in August 2004, dividend payments totalling \$68,847,579 have been paid over the last seven calendar years (up to 29 February 2012). All past distributions have been fully franked.

**IMB's share trading mechanism**

21. IMB is not listed on an official stock exchange.

22. IMB operates its own trading facility for shares under both an Australian Market licence and Clearing and Settlement Facility Licence in accordance with the *Corporations Act 2001*. IMB's market involves the manual matching of buyers and sellers at mutually acceptable prices.

23. The rules of these licences impose disclosure obligation on IMB including a requirement to disclose price sensitive information.

24. Trade volumes are relatively low with approximately 5% of IMB shares traded per year.

**The scheme**

25. On 31 July 2012 (the Announcement Date), IMB announced its intention to undertake an off-market buy-back of its own shares. IMB proposed to buy back up to \$14 million worth of its ordinary shares.

26. Under the Buy-Back, IMB acquired a number of shares such that no more than 10% of the voting rights were acquired in a 12 month period, in accordance with a share buy-back under subsections 257B(4) and 257B(5) of the *Corporations Act 2001*.

27. IMB stated that the Buy-Back will support IMB's mutual structure and provides benefits as it:

- simplifies IMB's structure and removes the confusion created by the share/mutual structure;
- resolves differences between the objectives of Shareholder Members and other Members;
- improves IMB's attractiveness as a potential merger partner with other mutual ADIs;
- removes, over time, the relatively high cash cost of servicing Shares compared to other forms of capital available to IMB; and

- does not prevent IMB changing its corporate structure (e.g. by demutualising) in the future should the Board determine that this is an appropriate course of action.

28. The Buy-Back was conducted through a tender process during a specified tender period and was open to all eligible Shareholder Members (Eligible Participants) on 16 August 2012 (the Opening Date) and closed on 19 September 2012 (the Closing Date).

29. Shareholder Members who acquired IMB shares after 3 August 2012 (the Record Date) were not entitled to participate in the Buy-Back.

30. Announcement of the Buy-Back price, the number of shares bought being back, any scale back and entry into Buy-Back contracts took place on 27 September 2012 (the Buy-Back Date).

31. Under the tender process, the Shareholder Members were able to submit offers to sell some or all of their IMB ordinary shares under the Buy-Back.

32. Participation in the Buy-Back was voluntary. Eligible Participants who did not wish to participate were not required to take action. Shareholder Members who did not participate in the Buy-Back did not receive any property, dividends or distributions by way of compensation for not participating in the Buy-Back.

33. IMB has obtained relief from ASIC to conduct the Buy-Back (a tender share buy-back) as an equal access share buy-back in accordance with Division 2 of Part 2J.1 of the *Corporations Act 2001*.

34. The Buy-Back price of \$3.28 comprised two components. The capital component of the Buy-Back price (the Capital Component) was \$1.18 per share. The Capital Component was debited to share capital. The dividend component was the difference between the Buy-Back price and the Capital Component (the Dividend Component). The Dividend Component of \$2.10 per share was debited to retained earnings and treated as a fully franked dividend.

35. IMB undertook not to buy-back its shares at a price higher than the calculated market value (Deemed Market Value) of those shares.

36. Priority Parcel is defined by IMB as the first 300 shares or such lesser number of shares as required to ensure that IMB was able to buy-back only up to \$14 million worth of shares or 10% of the voting rights attached to voting shares it has had on issue over the 12 months preceding the Buy-Back (the Buy-Back Limit).

37. No minimum threshold applied to the Buy-Back (other than in relation to small parcels of shares and residual parcels of shares). The exact number of shares bought back was contingent upon on the level of Shareholder Member participation and the number of participants. However, to the extent that Shareholder Member participation in the Buy-Back would otherwise exceed the Buy-Back Limit, a scale back would be applied on a pro-rata basis.

38. IMB Shareholder Members could tender their shares at a discount (Tender Discount) within the Tender Discount range of 5% to 10% inclusive (at intervals of 1%).

39. Discount for the Buy-Back (Buy-Back Discount) was selected by IMB as 5%, being the largest discount in the Tender Discount range which enabled IMB to buy-back shares which did not exceed the Buy-Back Limit.

40. Tenders received from Shareholder Members fell into three categories:

- Tender Discount greater than Buy-Back Discount: Tender accepted in full with no scale back;
- Tender Discount equal to Buy-Back Discount: Priority Parcel and small and residual parcels of shares were accepted in full. All other tenders were accepted subject to being scaled back on a pro-rata basis; and
- Tender Discount less than Buy-Back Discount: Tender rejected in full.

41. On the Buy-Back Date of 27 September 2012, IMB announced that:

- It had successfully completed an off-market share buy-back of 2,909,642 shares, representing approximately 7.3% of the issued capital of IMB;
- The total amount of capital repurchased under the Buy-Back was \$9,543,626; and
- The final Buy-Back price was set at \$3.28.

42. On 9 October 2012, IMB advised the Commissioner that:

- Shares tendered at a discount of 5% or greater or as a Final Price Tender were accepted in full;
- The minimum discount that the shares could be tendered was 5%;
- Subsequently all shares tendered were bought back; and
- A scale-back mechanism was not applied.

43. All shares acquired by IMB under the Buy-Back were cancelled.

44. IMB confirmed that its share capital account was not a tainted capital account.

## Ruling

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### **The Dividend Component**

45. Participating Shareholder Members will be taken to have been paid a dividend of \$2.10 (the Dividend Component) for each share bought back under section 159GZZZP.

46. The Dividend Component is a frankable distribution pursuant to section 202-40 of the ITAA 1997, and is therefore capable of being franked in accordance with section 202-5 of the ITAA 1997.

47. The difference between the Buy-Back price and the Dividend Component is not a dividend for income tax purposes.

### **Assessability of the Dividend Component and tax offset**

#### ***Direct distributions***

48. The Dividend Component of \$2.10 and an amount equal to the franking credit on the Dividend Component (gross-up) is included in the assessable income of resident individual, superannuation fund and company Shareholder Members who participate in the Buy-Back under subsection 44(1) and subsection 207-20(1) of the ITAA 1997 respectively in the income year in which the Buy-Back occurred. These Shareholder Members will be entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the Dividend Component, subject to being a 'qualified person'.

#### ***Indirect distributions***

##### ***Partnerships***

49. The Dividend Component of \$2.10 and an amount equal to the franking credit on the Dividend Component (gross-up) is included in the assessable income of a partnership that participates in the Buy-Back for the purposes of computing the net income of the partnership under section 90.

50. Where an individual partner, corporate partner, or a trustee partner specified by paragraphs 207-45(c) or 207-45(d) of the ITAA 1997 (certain trustees, and certain superannuation funds, approved deposit funds and pooled superannuation trusts) is assessable in respect of a share of the net income of the partnership, or allowed a deduction in respect of a share of the partnership loss, the partner will be entitled to a tax offset equal to the partner's share of the franking credit on the Dividend Component. This would only be the case if the whole or part of that share of the net income or partnership loss of the partnership is attributable to an amount included in the assessable income of the partnership because the Dividend Component is made to the partnership.

*Trusts*

51. The Dividend Component of \$2.10 and an amount equal to the franking credit on the Dividend Component (gross-up) is included in the assessable income of a trustee for the purposes of computing the net income of the trust under subsection 95(1).

52. Where an individual beneficiary, corporate beneficiary, or a trustee beneficiary specified by paragraphs 207-45(c) or 207-45(d) of the ITAA 1997 (certain trustees, and certain superannuation funds, approved deposit funds and pooled superannuation trusts) is assessable in respect of a share of the net income of the trust, the beneficiary both includes an amount in its assessable income (the gross-up), and is entitled to a tax offset equal to the beneficiary's share of the franking credit on the Dividend Component. This would only be the case if the Dividend Component was taken into account in working out the whole or part of that share of the net income of the trust.

**Refundable tax offset**

53. The tax offsets are subject to the refundable tax offset rules in Division 67 of the ITAA 1997. Certain trustees and corporate tax entities are not entitled to the refundable tax offset rules because of subsections 67-25(1A) to 67-25(1D) of the ITAA 1997.

**Non-resident Shareholder Members**

54. As the Dividend Component is fully franked, participating non-resident Shareholder Members are not liable for Australian withholding tax under paragraph 128B(3)(ga).

**Sale Consideration**

55. Participating Shareholder Members are taken to have received \$1.18 as consideration in respect of each share bought back under the Buy-Back (Sale Consideration) on the Buy-Back Date of 27 September 2012 in accordance with section 159GZZZQ, unless the participating Shareholder Member is a corporate tax entity to which subsections 159GZZZQ(8) and (9) apply.

56. If the Buy-Back price for each share bought back under the Buy-Back was less than what would have been the market value of the share if the Buy-Back did not occur and was never proposed to occur then the market value rule in subsection 159GZZZQ(2) applies to the Buy-Back. The effect of this rule is that the difference between the Buy-Back price and the market value will be included in the consideration received for the disposal of the share for ordinary income or capital gains tax (CGT) purposes.

57. The treatment of the Sale Consideration amount for tax purposes will depend on whether the sale is on capital account (where the shares are held for investment) or on revenue account.

## **Shares held on capital account**

58. The shares are taken to have been disposed off for CGT purposes on the Buy-Back Date of 27 September 2012 pursuant to section 104-10 of the ITAA 1997 (CGT event A1).

59. The Sale Consideration of \$1.18 represents the capital proceeds for CGT purposes pursuant to section 116-20 of the ITAA 1997. A Shareholder Member will make a capital gain on a share if the Sale Consideration per share exceeds the cost base of that share. The capital gain is the amount of the excess. Similarly, a Shareholder Member will make a capital loss on a share if the Sale Consideration per share is less than the reduced cost base of the share (subsection 104-10(4) of the ITAA 1997).

## **Shares held on revenue account**

60. Where the shares are held as trading stock, the Sale Consideration of \$1.18 is included in assessable income under section 6-5 of the ITAA 1997. Participating Shareholder Members will also make a capital gain or capital loss calculated as per paragraph 61 of this Ruling. However, under section 118-25 of the ITAA 1997 any capital gain or capital loss a participating Shareholder Member makes will be disregarded if at the time of the CGT event the shares were held by them as trading stock.

61. Where the shares are held as revenue assets, but are not trading stock, the amount by which the Sale Consideration of \$1.18 per share exceeds the cost of each share is included in the Shareholder Member's assessable income. Correspondingly, if the cost exceeds the Sale Consideration of \$1.18 per share the difference is an allowable deduction. Where the Sale Consideration per share exceeds the cost base of that share these Shareholder Members will also make a capital gain.

62. However, under section 118-20 of the ITAA 1997 any capital gain a participating Shareholder Members makes will be reduced if, because of the event, the capital proceeds have otherwise been included in assessable income. The capital gain is reduced by the amount of the Sale Consideration otherwise included in assessable income or to zero, whichever is the greater. (A corresponding rule applies to a partner of a partnership.)

**Foreign resident Shareholder Members: CGT consequences**

63. Under section 855-10 of the ITAA 1997, foreign resident Shareholder Members who participate in the Buy-Back will only have CGT consequences if their shares bought back under the Buy-Back are 'taxable Australian property'.

**Qualified persons**

64. Paragraph 207-145(1)(a) of the ITAA 1997 states that if a franked distribution is made to an entity that is not a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA, then pursuant to paragraph 207-145(1)(f) of the ITAA 1997, the entity is not entitled to a tax offset under Subdivision 207-F of the ITAA 1997. For the purposes of Division 1A of former Part IIIAA, participating Shareholder Members will be considered to satisfy the holding period rule under former section 160APHO and therefore be qualified persons (as long as the related payments rule is also met) in relation to the Dividend Component received under the Buy-Back if:

- the shares sold into the Buy-Back were acquired on or before the Record Date of 3 August 2012; and
- during the period when the shares or interest in the shares were held the Shareholder Members had sufficient risks of loss or opportunities for gain in respect of the shares or interest in the shares (as defined in former section 160APHM) for a continuous period of at least 45 days. Neither the announcement of the Buy-Back, the making of an invitation to Shareholder Members to offer to sell their IMB shares nor the making of an offer by a Shareholder Member to IMB in respect of a IMB share will affect whether the shares bought back under the Buy-Back are held 'at risk' for the purposes of Division 1A of former Part IIIAA.

65. The 'last-in first-out' rule in former subsection 160APHI(4) has no effect for the purposes of the Buy-Back to IMB shares acquired after 3 August 2012 which do not confer an entitlement to participate in the Buy-Back.

**The anti-avoidance provisions**

66. The Commissioner will not make a determination under subsection 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the Capital Component of the Buy-Back price received by participating Shareholder Members.

67. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits received in relation to the Dividend Component of the Buy-Back price by participating Shareholder Members.

68. 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 Dividend Component of the Buy-Back price by participating Shareholder Members.

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**Commissioner of Taxation**

7 November 2012

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## **Appendix 1 – Explanation**

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**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.*

69. The purchase price received by participating Shareholder Members comprises two components:

- Dividend Component; and
- Capital Component.

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

### **The Dividend Component**

70. Section 159GZZZP 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 which is debited against the share capital account, is taken to be a dividend paid by the company to the seller on the day the buy-back occurs. In this case the purchase price was \$3.28 per share and \$1.18 of this was debited to the share capital account (Capital Component). Therefore the Dividend Component is \$2.10 per share.

71. The Dividend Component of \$2.10 per share is frankable but only to the extent that the Buy-Back price does not exceed the market value of the share at the time of the Buy-Back if the Buy-back did not occur and was never proposed to occur (paragraph 202-45(c) of the ITAA 1997).

### **Assessability of the Dividend Component and tax offset**

#### ***Direct distributions***

72. In the case of Australian resident Shareholder Members (other than a partnership or trust) who participate in the Buy-Back and who directly receive the Dividend Component:

- the Dividend Component is included in the assessable income of each Shareholder Member under subsection 44(1); and
- subject to the 'qualified person' rule, an amount equal to the amount of the franking credit on the Dividend Component is included in the assessable income of each Shareholder Member under subsection 207-20(1) of the ITAA 1997 (gross-up).

73. Subject to the 'qualified person' rule, these Shareholder Members are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the Dividend Component.

### ***Indirect distributions***

74. The franked distribution may flow indirectly to a partner in a partnership or a beneficiary of certain trusts.

75. In general terms, pursuant to subsection 207-50(2) of the ITAA 1997, a franked distribution will flow indirectly to a partner in a partnership where the partner:

- has an individual interest in the partnership's net income that is covered by paragraph 92(1)(a) or 92(1)(b), or has an individual interest in a partnership loss of the partnership that is covered by paragraph 92(2)(a) or 92(2)(b); and
- has a share of the franked distribution under section 207-55 of the ITAA 1997 that is a positive amount.

76. In general terms, pursuant to subsection 207-50(3) of the ITAA 1997, a franked distribution will flow indirectly to a beneficiary of a trust where the beneficiary:

- has a share of the trust's net income that is covered by paragraph 97(1)(a) or has an individual interest in the trust's net income that is covered by paragraph 98A(1)(a) or 98A(1)(b) or paragraph 100(1)(a) or 100(1)(b); and
- has a share of the franked distribution under section 207-55 of the ITAA 1997 that is a positive amount.

77. In the case of partnerships and certain trusts that participate in the Buy-Back the following income tax consequences arise.

### ***Partnerships***

78. Pursuant to subsection 44(1), the Dividend Component is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90.

79. Subject to the 'qualified person' rule, pursuant to subsection 207-35(1) of the ITAA 1997, an amount equal to the amount of the franking credit on the Dividend Component is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90 (gross up).

80. Where an individual partner, corporate partner, or a trustee partner specified by paragraph 207-45(c) or 207-45(d) of the ITAA 1997 (that is, trustees liable to be assessed under section 98, 99 or 99A, or certain superannuation funds, approved deposit funds and pooled superannuation trusts) has:

- an individual interest in the partnership's net income that is covered by paragraph 92(1)(a) or 92(1)(b); or
- an individual interest in a partnership loss of the partnership that is covered by paragraph 92(2)(a) or 92(2)(b); and
- the partner has a share of the Dividend Component under section 207-55 of the ITAA 1997 that is a positive amount,

then the partner is, subject to the 'qualified person' rule, entitled to a tax offset equal to the partner's share of the franking credit on the Dividend Component under section 207-57 of the ITAA 1997.

#### *Trusts*

81. Pursuant to subsection 44(1), the Dividend Component is included in the assessable income of a trustee for the purposes of computing the net income of the trust under subsection 95(1).

82. Subject to the 'qualified person' rule, pursuant to subsection 207-35(1) of the ITAA 1997, an amount equal to the amount of the franking credit on the Dividend Component is included in the assessable income of the trustee for the purposes of computing the net income of the trust under subsection 95(1) (gross-up).

83. Where an individual beneficiary, corporate beneficiary, or a trustee beneficiary specified by paragraph 207-45(c) or 207-45(d) of the ITAA 1997 (that is, trustees liable to be assessed under section 98, 99 or 99A, or certain superannuation funds, approved e 'qualified person' rule, assessed on an amount equal to the beneficiary's share of the franking credit on the Dividend Component as calculated under section 207-57 of the ITAA 1997, and entitled to a tax offset of the same amount.

#### ***Refundable tax offset***

84. The tax offsets are subject to the refundable tax offset rules in Division 67 of the ITAA 1997, provided the participating Shareholder Members are not excluded by subsections 67-25(1A) to 67-25(1D) of the ITAA 1997.

## ***Non-resident Shareholder Members***

85. As the Dividend Component of the consideration received under the Buy-Back is fully franked, a participating non-resident Shareholder Member is not liable to Australian withholding tax on the Dividend Component (paragraph 128B(3)(ga)).

## **The Capital Component**

### ***Calculation of Sale Consideration***

86. For the purposes of determining the amount of a capital gain or capital loss (where the shares are held on capital or revenue account) the consideration in respect of the disposal of a share, the Sale Consideration, under a buy-back is determined in accordance with section 159GZZZQ.

87. Subsection 159GZZZQ(1) provides that a Shareholder Member is taken to have received an amount equal to the purchase price (in this case the \$3.28 received for each share bought back) as consideration in respect of the sale of the share bought back.

88. The Commissioner accepts that the market value of IMB shares was \$3.28 per share which accorded with the Sale Consideration received by participating Shareholder Members.

89. Pursuant to subsection 159GZZZQ(3), the deemed consideration of \$3.28 per share is reduced by a 'Reduction Amount'. The Reduction Amount is an amount calculated under subsection 159GZZZQ(4). In the circumstances of the Buy-Back, the Reduction Amount is equivalent to the Dividend Component, that is, \$2.10 unless the seller is a corporate tax entity to whom subsection 159GZZZQ(8) applies. Therefore, the Sale Consideration for each share disposed of under the Buy-Back is \$1.18 (\$3.28 less \$2.10).

90. However, it should be noted that where a participating Shareholder Member is a corporate tax entity which is entitled to a tax offset under Division 207 of the ITAA 1997 in respect of the Dividend Component, an adjustment may be made to the Sale Consideration. Under subsection 159GZZZQ(8), if that Shareholder Member would otherwise incur either a capital loss or a deductible loss (or any increase in such a loss) in respect of the sale of a share bought back under the Buy-Back, the Sale Consideration is increased by an off-settable amount determined under subsection 159GZZZQ(9). The Reduction Amount is reduced by so much of the off-settable amount that does not exceed the capital loss or the deductible loss.

91. Participating Shareholder Members are taken to have disposed of those shares accepted under the Buy-Back on the Buy-Back Date of 27 September 2012 (CGT event A1). The disposal may have different taxation implications for Shareholder Members depending on how the shares were held, for instance:

- an investor who held their shares on capital account will be subject to the CGT provisions; and
- a share trader who held their shares on revenue account will be subject to the ordinary income provisions and the CGT provisions.

### ***Shares held on capital account***

92. The Sale Consideration of \$1.18 represents the capital proceeds for CGT purposes pursuant to section 116-20 of the ITAA 1997. A Shareholder Member will make a capital gain on a share if the Sale Consideration per share exceeds the cost base of that share. The capital gain is the amount of the excess. Similarly, a Shareholder Member will make a capital loss on a share if the Sale Consideration per share is less than the reduced cost base of the share (subsection 104-10(4) of the ITAA 1997).

### ***Shares held on revenue account***

93. Where the shares are held as trading stock, the Sale Consideration of \$1.18 is included in assessable income under section 6-5 of the ITAA 1997. These Shareholder Members will also make a capital gain or capital loss. However, as the shares are held as trading stock, the capital gain or loss is disregarded under section 118-25 of the ITAA 1997.

94. Where the shares are held as revenue assets, but are not trading stock, the amount by which the Sale Consideration of \$1.18 per share exceeds the cost of each share is included in the Shareholder Member's assessable income. Correspondingly, if the cost exceeds the Sale Consideration of \$1.18 per share the difference is an allowable deduction. Where the Sale Consideration per share exceeds the cost base of the share these Shareholder Members will also make a capital gain. However, Shareholder Members who hold their shares as revenue assets will have the amount of the capital gain reduced under the anti-overlap provisions contained in section 118-20 of the ITAA 1997.

### **Foreign resident Shareholder Members: CGT consequences**

95. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

96. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2, or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident).

97. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happened under the Buy-Back, cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain or capital loss from CGT event A1 if:

- their share in IMB is an indirect Australian real property interest (item 2 of the table in section 855-15 of the ITAA 1997);
- their share in IMB has been used at any time by the foreign resident in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15); or
- their share in IMB is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15).

### Qualified persons

98. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked dividend made by an entity only a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA is entitled to a franking credit or tax offset. Broadly speaking, to be a 'qualified person' in relation to the Dividend Component paid under the Buy-Back, a participating Shareholder Member must satisfy both the holding period rule and the related payments rule.

99. Broadly, a Shareholder Member will not satisfy the related payments rule if the Shareholder Member, or associate of the Shareholder Member, is under an obligation to make, or makes, a payment in respect of the dividend which effectively passes the benefit of the dividend to another person.

100. The holding period rule requires a Shareholder Member to hold the shares, or the interest in the shares, on which the dividend is paid at risk for a continuous period of at least 45 days. In determining whether a Shareholder Member has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

101. Under former subsection 160APHM(2), a Shareholder Member is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the 'net position' of the Shareholder Member results in the Shareholder Member having less than 30% of the risks and opportunities relating to the shares or interest in shares.

102. In this case the Commissioner does not regard the announcement of the Buy-Back offer as affecting whether the shares or an interest in shares was held at risk or not.

103. IMB has adopted a Record Date of 3 August 2012 in relation to the Buy-Back. Shares acquired after 3 August 2012 did not confer an entitlement to participate in the Buy-Back. There are at least 45 clear days between 3 August 2012 and the Buy-Back Date of 27 September 2012, that is, the date the tender offer was accepted. Therefore, a Shareholder Member who acquired shares on or before 3 August 2012 satisfies the holding period rule as long as those shares were held at risk for at least 45 continuous days.

104. Generally, under the holding period rule a Shareholder Member will be deemed to have disposed of his or her most recently acquired shares first: former subsection 160APHI(4). The 45 day rule operates on a 'last-in first-out' basis, so that shareholders will be deemed to have disposed of their most recently acquired shares first for the purposes of applying the 45 day rule.

105. IMB shares acquired by Shareholder Members which did not confer an entitlement to participate in the Buy-Back (ex-entitlement shares) which were purchased after IMB shares that did confer an entitlement to participate in the Buy-Back (cum-entitlement shares) will not be considered to take the place of tendered cum-entitlement shares under an application of the 'last-in first-out' rule in former subsection 160APHI(4). Ex-entitlement shares do not constitute 'related securities' for the purposes of former subsection 160APHI(2) to any cum-entitlement shares. Accordingly, for any additional IMB shares that a participating Shareholder Member acquired after 3 August 2012 that did not confer an entitlement to participate in the Buy-Back, the 'last-in first out' rule in former subsection 160APHI(4) will not apply in relation to those shares.

## The anti-avoidance provisions

### **Sections 45A and 45B**

106. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies. The effect of such a determination is that all or part of the distribution of capital received by a participating Shareholder Member under the Buy-Back is treated as an unfranked dividend. Accordingly, the application of these two provisions to the Buy-Back must be considered.

107. Section 45A is an anti-avoidance provision that applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of share capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

108. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) is provided to participating Shareholder Members under the Buy-Back, the circumstances of the Buy-Back indicate that there is no streaming of capital benefits to some Shareholder Members and dividends to other Shareholder Members. Accordingly, section 45A has no application to the Buy-Back.

109. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends. In broad terms, section 45B applies where:

- (a) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- (b) under the scheme, a taxpayer (the 'relevant taxpayer'), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- (c) 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 a tax benefit (paragraph 45B(2)(c)).

110. In the case of the Buy-Back, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) have been met, the requisite purpose of enabling a Shareholder Member to obtain a tax benefit by way of capital distribution was not present.

111. Having regard to the 'relevant circumstances' (as set out in subsection 45B(8)) of the Buy-Back, it is apparent that:

- the Capital Component of the Buy-Back was determined in accordance with the Average Capital Per Share (ACPS) method outlined in PS LA 2007/9 Share Buy-Backs;
- the Capital Component cannot be said to be attributable to the profits of the company;
- the pattern of distributions does not indicate that the Capital Component is being paid in substitution for a dividend;
- the Buy-Back is not expected to impact upon the company's dividend distribution policy; and
- as a consequence of the Buy-Back, the distribution of share capital will result in a reduction in the participants' ownership interests in the company.

112. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to treat all or part of the Capital Component of the Buy-back price as an unfranked dividend paid by the company.

### **Section 177EA**

113. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares. This would include a buy-back with a franked dividend component.

114. Specifically, subsection 177EA(3) provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
  - (1) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
  - (2) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and

- (d) except for this section, the person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

115. In the present case, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of IMB, its Shareholder Members or any other relevant party, there is a purpose more than merely an incidental purpose of conferring an imputation benefit under the scheme. Under this arrangement the relevant taxpayer is the participating Shareholder Member and the scheme comprises the circumstances surrounding the Buy-Back.

116. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17). The relevant circumstances listed there 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 not be present at any one time in any one scheme.

117. The Commissioner has come to the view that section 177EA applies to the Buy-Back. In coming to this conclusion the Commissioner had regard to all the relevant circumstances of the arrangement, as outlined in subsection 177EA(17). Among the circumstances of the Buy-Back reflected in those paragraphs are:

- the delivery of franking credits in excess of what would have otherwise been distributed in the ordinary course of dividend declaration;
- the greater attraction of the Buy-Back to resident shareholders who could fully utilise the franking credits than to non-resident shareholders who could not; and
- the greater attraction of the Buy-Back to some resident shareholders with a low marginal tax rate than other resident shareholders (for example, whereas superannuation funds are taxed at 15% and corporations at 30% individuals can be taxed at a marginal tax rate up to 45%).

118. Where section 177EA applies the Commissioner has a discretion pursuant to subsection 177EA(5) to make a determination to debit the company's franking account pursuant to paragraph 177EA(5)(a), or deny the imputation benefit to each Shareholder Member pursuant to paragraph 177EA(5)(b).

119. The Commissioner will exercise his discretion in such a way that he does not make a determination that the imputation benefit obtained by the participating Shareholder Members be denied under paragraph 177EA(5)(b).

### **Section 204-30**

120. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- (c) the other 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)).

121. Relevantly, if section 204-30 of the ITAA 1997 applies, the Commissioner is vested with a discretion under subsection 204-30(3) to make a determination in writing either:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); or
- (b) that no imputation benefit is to arise in respect of any streamed distribution made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

122. For section 204-30 of the ITAA 1997 to apply, Shareholder Members to whom distributions are streamed must derive a greater benefit from imputation benefits than the Shareholder Members who do not participate in the Buy-Back. The words 'derive a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

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123. A portion of IMB's shareholding was held by non-resident Shareholder Members who do not fully benefit from franking, a feature of the Buy-Back, to the same extent as resident Shareholder Members. Therefore, the conditions in subsection 204-30(1) of the ITAA 1997 for the provision to apply are met. However, the Commissioner will not make a determination under section 204-30.

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

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