


# ***CR 2015/20 - Income tax: off market share buy-back - Intrepid Mines Limited***

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## Class Ruling

### Income tax: off market share buy-back – Intrepid Mines Limited

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#### **① 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

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

#### **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)
- section 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 45C of the ITAA 1936
- Division 16K of Part III of the ITAA 1936
- section 70-80 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 70-90 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 855-10 of the ITAA 1997, and
- section 977-55 of the ITAA 1997.

## Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders (other than a corporate limited partnership or venture capital limited partnership) of Intrepid Mines Limited (Intrepid) who:

- (a) disposed of their ordinary shares in Intrepid under the Intrepid share buy-back which was completed on 11 December 2014 and held their shares:
  - (i) on capital account, or
  - (ii) as revenue assets or as trading stock and are a resident of Australia (as defined in subsection 6(1) of the ITAA 1936), 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 Intrepid shares.  
(Note – Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

In this Ruling, these ordinary shareholders are referred to as a 'Participating Intrepid Shareholder'.

## 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 8 to 30 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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7. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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).

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## Scheme

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8. 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:

- Application for class ruling dated 18 December 2014
- Notice of extraordinary general meeting: explanatory memorandum in relation to the Intrepid meeting, dated 16 October 2014
- Intrepid Buy-Back Booklet, October 2014
- Company Announcements in relation to the Intrepid share buy-back dated between 28 August 2014 and 12 December 2014
- Intrepid's financial statements for the half year ended 30 June 2014.

## Background

9. Intrepid is a public company incorporated in Australia and listed on the Australian Securities Exchange (ASX) since 9 November 1993.

10. As at 30 June 2014, the equity of Intrepid comprised of 557,344,000 fully paid ordinary shares (Intrepid Shares), issued share capital of US\$317,655,000 and retained losses of US\$163,584,000.

11. As at 31 October 2014, Intrepid had 557,654,880 Intrepid Shares on issue and a market capitalisation of approximately A\$122.7 million.

12. Intrepid's major asset was its cash reserves of A\$173.3 million, which have been partly realised following the disposal of its Indonesian mining project in 2014, and share capital transactions undertaken in relation to the ownership of that asset (as at 31 October 2014).

13. Intrepid did not hold any interests in real property other than commercial office space leases on market value terms.

14. Intrepid's shareholders are a mix of individuals, companies, trusts, partnerships and superannuation funds, some of whom are foreign residents. Intrepid is widely held with no single shareholder holding more than 13.4% of shares on issue (as at 10 October 2014).

15. Approximately 27.7% of Intrepid shareholders are Australian residents and 72.3% of Intrepid shareholders are foreign residents.

16. Intrepid has not paid a dividend to its shareholders as at the date of this Ruling.

## **Share Buy-back arrangement**

17. On 28 August 2014 (the Announcement Date), Intrepid announced an agreement to merge with Blackthorn Resources Limited by way of a Scheme of Arrangement (the Merger) and its intention to undertake an equal access off-market share buy-back (the Intrepid Buy-Back) of up to a maximum of A\$110 million of Intrepid Shares at A\$0.30 per Intrepid Share (the Buy-Back Consideration) prior to the implementation of the Merger.

18. The closing price of an Intrepid Share on the last trading day before the Announcement Date was A\$0.255 per share. The 5-day volume weighted average price (VWAP) before the Announcement Date was A\$0.260 per share.

19. The Intrepid Buy-Back offer was open to all Intrepid shareholders with the exception of certain ineligible overseas shareholders who hold approximately 0.6% of Intrepid's share capital.

20. Participation in the Intrepid Buy-Back was voluntary. Eligible shareholders who did not want to participate were not required to do anything. Non-Participating shareholders did not receive any property, dividends or distributions as compensation for not participating in the Intrepid Buy-Back.

21. The Intrepid Buy-Back offer period opened on 17 October 2014 and closed on 18 November 2014.

22. Completion of the Intrepid Buy-Back was conditional on:

- Intrepid shareholder approval of the Merger
- Intrepid shareholder approval of the Intrepid Buy-Back, and
- the implementation of the Merger.

23. Intrepid shareholders approved, under separate resolutions, the Merger and Intrepid Buy-Back at an extraordinary general meeting on 18 November 2014.

24. On 20 November 2014, Intrepid announced the acceptances received exceeded the maximum value of Intrepid Shares that could be bought back under the Intrepid Buy-Back and a scale back would proportionately reduce all acceptances to approximately 81.5% of the number of Intrepid Shares for which Intrepid shareholders originally submitted their acceptance.

25. The Merger was implemented and the Intrepid Buy-Back completed on 11 December 2014.

26. The number of Intrepid Shares bought back was 366,666,649 shares which was approximately 65.75% of Intrepid's issued capital. All Intrepid Shares bought back under the Intrepid Buy-Back were cancelled.

27. The Intrepid Buy-Back resulted in a reduction of share capital. The journal entry that gave effect to the Intrepid Buy-Back was as follows:

DR Share Capital	A\$110,000,000
CR Cash	A\$110,000,000

28. The Intrepid Buy-Back was entirely funded from Intrepid's cash reserves. None of the property acquired by Intrepid under the Merger was used to fund any return to shareholders under the Intrepid Buy-Back.

29. No amount has been transferred to Intrepid's share capital account from other accounts such that the share capital would be tainted within the meaning of Division 197 of the ITAA 1997.

30. All parties to the Merger and Intrepid Buy-Back acted on commercial arm's length basis.

## **Ruling**

### **Off-market purchase**

31. For the purposes of Division 16K of Part III of the ITAA 1936, the Intrepid Buy-Back is an off-market purchase within the meaning given by paragraph 159GZZZK(d) of the ITAA 1936.

### **Distribution is not a dividend**

32. No part of the purchase price of a share bought back under the Intrepid Buy-Back is a dividend under subsection 159GZZZP(1) of the ITAA 1936 or under subsection 6(1) of the ITAA 1936.

## **Application of sections 45A, 45B and 45C**

33. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the Buy-Back Consideration received by a Participating Intrepid Shareholder.

34. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the Buy-Back Consideration received by a Participating Intrepid Shareholder.

## **Buy-Back consideration**

35. A Participating Intrepid Shareholder is taken to have received A\$0.30 as consideration in respect of each share bought back under the Intrepid Buy-Back on 11 December 2014 in accordance with section 159GZZZQ of the ITAA 1936.

36. The treatment of the Buy-Back Consideration will depend on whether a Participating Intrepid Shareholder held the sold Intrepid Shares on capital account or on revenue account (as trading stock or revenue assets other than trading stock).

## **Shares held on capital account**

37. CGT event A1 happened when a Participating Intrepid Shareholder disposed of Intrepid Shares under the Intrepid Buy-Back on 11 December 2014 (section 104-10 of the ITAA 1997).

38. The Buy-Back Consideration of A\$0.30 per share is the capital proceeds for CGT purposes pursuant to section 116-20 of the ITAA 1997.

39. A Participating Intrepid Shareholder (other than a partnership) makes a capital gain on a share if the Buy-Back Consideration exceeds the cost base of the share. The capital gain is the amount of the excess. Similarly, a Participating Intrepid Shareholder (other than a partnership) makes a capital loss on a share if the Buy-Back Consideration is less than the reduced cost base of the share (subsection 104-10(4) of the ITAA 1997).

40. Each partner in a partnership has a separate cost base and reduced cost base of the partner's interest in each Intrepid Share sold into the Intrepid Buy-Back by the partnership (subsection 106-5(2) of the ITAA 1997). Each partner is allocated an appropriate share of the Buy-Back Consideration received by the partnership for the disposal of Intrepid Shares under the Intrepid Buy-Back.

**Shares held on revenue account: trading stock**

41. Where Intrepid Shares were held as trading stock and disposed of under the Intrepid Buy-Back in the ordinary course of business, the Buy-Back Consideration of A\$0.30 is included in a Participating Intrepid Shareholder's assessable income under section 6-5 of the ITAA 1997 (subsection 70-80(1) of the ITAA 1997).

42. Where Intrepid Shares were held as trading stock and disposed of outside the ordinary course of business, the market value of the Intrepid Share on the day of disposal is included in a Participating Intrepid Shareholder's assessable income under section 6-5 of the ITAA 1997 (subsection 70-90(1) of the ITAA 1997). The Buy-Back Consideration is not included in assessable income nor is it exempt income (subsection 70-90(2)).

43. A Participating Intrepid Shareholder (other than a partnership) who held Intrepid Shares as trading stock also makes a capital gain or capital loss calculated as discussed at paragraph 39 of this Ruling. However any capital gain or capital loss made is disregarded if at the time of the CGT event the Intrepid Shares were held by a Participating Intrepid Shareholder as trading stock (subsection 118-25(1) of the ITAA 1997). There is a similar exemption for partners in partnerships (paragraph 118-25(1)(b)).

**Shares held on revenue account: revenue assets**

44. Where Intrepid Shares were held as revenue assets but were not held as trading stock, the amount by which the Buy-Back Consideration of A\$0.30 exceeds the cost of the Intrepid Share is included in a Participating Intrepid Shareholder's assessable income under section 6-5 of the ITAA 1997. If the cost of the Intrepid Share exceeds the Buy-Back Consideration of A\$0.30 the difference is an allowable deduction under section 8-1 of the ITAA 1997 (section 977-55 of the ITAA 1997).

45. Where the Buy-Back Consideration per share exceeds the cost of the share, the Participating Intrepid Shareholder (other than a partnership) also makes a capital gain. However any capital gain made is reduced if, because of the disposal, an amount has otherwise been included in assessable income (subsection 118-20 of the ITAA 1997). The capital gain is reduced to zero if the capital gain does not exceed the amount otherwise included in assessable income (subsection 118-20(2)). If the capital gain exceeds the amount otherwise included in assessable income, the capital gain is reduced by the amount otherwise included in assessable income (subsection 118-20(3)). There is a similar reduction for partners in partnerships (paragraph 118-20(1)(b), paragraph 118-20(2)(b) and subsection 118-20(3)).

46. Similarly, the cost base or reduced cost base of the Intrepid Shares is reduced by any allowable deductions for net losses on shares held as revenue assets other than trading stock (subsections 110-45(2) and 110-55(9) of the ITAA 1997).

## **Foreign resident: CGT consequences**

47. A Participating Intrepid Shareholder who was a foreign resident, or the trustee of a foreign trust for CGT purposes just before CGT event A1 happened, disregards any capital gain or capital loss made from CGT event A1, unless the Intrepid Share:

- had been used at any time by the Participating Intrepid Shareholder in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
- is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

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**Commissioner of Taxation**

11 March 2015

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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.*

### Off-market purchase

48. The effect of share buy-backs for income tax purposes is covered in Division 16K of Part III of the ITAA 1936.

49. Section 159GZZZK of the ITAA 1936 provides that where a company buys a share in itself from a shareholder in the company, the purchase is a buy-back. Section 159GZZZK distinguishes between an on-market buy-back and an off-market buy-back.

50. The Intrepid Buy-Back was an off-market share buy-back as defined in paragraph 159GZZZK(d) of the ITAA 1936 because the buy-back was not made in the ordinary course of trading on the ASX.

51. The purchase price in respect of an Intrepid Share for a Participating Intrepid Shareholder was A\$0.30 per share under paragraph 159GZZZM(a) of the ITAA 1936.

52. The purchase price of A\$0.30 per share was debited entirely against Intrepid's share capital account. Therefore, no part of the purchase price is taken to be a dividend for income tax purposes under section 159GZZZP of the ITAA 1936.

### Distribution is not a dividend

53. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends, as defined in subsection 6(1) of the ITAA 1936, paid to the shareholders out of profits derived by the company from any source (if the shareholder is an Australian resident) and from any Australian source (if the shareholder is a foreign resident).

54. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' excludes a distribution from the meaning of dividend if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

55. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account that the company keeps of its share capital or any other account that was created on or after 1 July 1998 and the first amount credited to the account was an amount of share capital. However, if the company's share capital account is tainted, within the meaning given in section 197-50 of the ITAA 1997, that account is taken not to be a share capital account (subsection 975-300(2) of the ITAA 1997).

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56. In this case, Intrepid's share capital account is untainted as no amount has been transferred in to Intrepid's share capital account from its other accounts.

57. The exclusion in paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 is limited by subsection 6(4) of the ITAA 1936 which applies in circumstances where, under an arrangement:

- a person pays or credits any money or gives property to the company and the company credits its share capital account with the amount of the money or the value of the property, and
- the company pays or credits any money or distributes property to another person and debits its share capital account with the amount of the money or the value of the property so paid, credited or distributed.

58. In this case, an arrangement of the type contemplated in subsection 6(4) of the ITAA 1936 is not apparent and therefore subsection 6(4) has no application in respect of the Intrepid Buy-Back.

59. Accordingly, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies and no part of the purchase price of A\$0.30 per share is a dividend under subsection 6(1).

## **Section 45A – streaming of dividends and capital benefits**

60. Section 45A of the ITAA 1936 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.

61. A shareholder is provided with a capital benefit if the shareholder is provided with shares in the company, receives a distribution of share capital or share premium, or something is done in relation to an ownership interest that has the effect of increasing the value of a share held by that shareholder (subsection 45A(3) of the ITAA 1936).

62. The purchase price of A\$0.30 per share received by a Participating Intrepid Shareholder (Buy-Back Consideration) is a distribution of share capital and accordingly a capital benefit under paragraph 45A(3)(b) of the ITAA 1936.

63. Although a capital benefit has been provided to a Participating Intrepid Shareholder, the circumstances of the Intrepid Buy-Back indicate there is no streaming of capital benefits to some shareholders and dividends to other shareholders. All Intrepid shareholders (other than certain ineligible overseas shareholders) were eligible to participate. This is not a case where some Intrepid Shareholders were eligible to participate in the Intrepid Buy-Back and those Intrepid Shareholders that did not participate received dividends in substitution.

64. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the Buy-Back Consideration.

### **Section 45B – schemes to provide certain benefits**

65. Section 45B of the ITAA 1936 applies where certain capital payments are paid to shareholders. Subsection 45B(2) sets out the conditions under which the Commissioner may make a determination under subsection 45B(3) that section 45C of the ITAA 1936 applies. These conditions are that:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a))
- 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
- 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)).

### ***Scheme***

66. A 'scheme' for the purposes of section 45B of the ITAA 1936 is defined in subsection 995-1(1) of the ITAA 1997 to include:

- any arrangement, or
- any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

67. The arrangement involving the Intrepid Buy-Back is a 'scheme' for the purposes of section 45B of the ITAA 1936.

### ***Capital benefit***

68. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936. A person is provided with a capital benefit if:

- (a) an ownership interest in a company is issued to the person
  - (b) there is a distribution to the person of share capital or share premium, or
  - (c) the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.
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69. The Buy-Back Consideration, which was debited to Intrepid's share capital account, is a distribution of share capital to a Participating Intrepid Shareholder and accordingly is the provision of a capital benefit under paragraph 45B(5)(b) of the ITAA 1936.

## ***Tax benefit***

70. A relevant taxpayer 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, if:

- the amount of tax payable, or
- any other amount payable under the ITAA 1936 or ITAA 1997

would, apart from the operation of section 45B of the ITAA 1936:

- be less than the amount that would have been payable, or
- be payable at a later time than it would have been payable,

if the capital benefit had been an assessable dividend.

71. A Participating Intrepid Shareholder is a relevant taxpayer for the purposes of paragraph 45B(2)(b) of the ITAA 1936.

72. On the basis of information provided, it is likely that some Participating Intrepid Shareholders would obtain a tax benefit from the distribution of share capital. A dividend would generally be included in the assessable income of a resident shareholder.

## ***Relevant circumstances***

73. Under paragraph 45B(2)(c) of the ITAA 1936 the Commissioner has regard to the 'relevant circumstances' of the scheme as set out in subsection 45B(8) of the ITAA 1936 to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit.

74. The test of purpose is an objective one. The question is whether it would be concluded that a person, or one of the persons, who entered into or carried out the scheme did so for a purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit (requisite purpose). This purpose does not have to be the dominant purpose but it must be more than an incidental purpose.

75. In this instance, the offer to participate in the Intrepid Buy-Back was made to all shareholders (except certain ineligible overseas shareholders) regardless of individual shareholder circumstances. As such, paragraphs 45B(8)(c) to 45B(8)(h) of the ITAA 1936 do not incline towards or against a conclusion as to purpose.

76. The factors in paragraphs 45B(8)(i) and 45B(8)(j) of the ITAA 1936 are not relevant to the circumstances of this scheme. Consequently, the relevant circumstances are those covered in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k).

77. Paragraph 45B(8)(a) of the ITAA 1936 refers to the extent to which the capital benefit is attributable to realised or unrealised profits of the company and its associates. A capital distribution out of share capital that is genuinely surplus to the company's needs (for example, release of share capital via a disposal of a significant part of the business structure) is more likely to be attributable to capital rather than being attributable to profits. However, if the disposal also realises a profit the ensuing distribution should, subject to all other relevant circumstances, be considered in terms of its attribution to both share capital and the profit from the disposal.

78. When the distribution of share capital under the Intrepid Buy-Back was made, Intrepid had a significant accumulated loss position and had no realised or unrealised profits. The distribution of share capital was sourced from Intrepid's cash reserves. The absence of realised or unrealised profits suggests this circumstance does not incline towards the conclusion that the requisite purpose exists.

79. Paragraph 45B(8)(b) of the ITAA 1936 refers to the pattern of distribution of dividends, bonus shares and returns of capital or share premium by Intrepid or its associates. Intrepid has no history of paying dividends or other distributions. This circumstance does not incline towards the conclusion that the requisite purpose exists.

80. Paragraph 45B(8)(k) of the ITAA 1936 refers to the matters in paragraphs 177D(2)(a) to (h) of the ITAA 1936. These are matters which require examination of a scheme from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, the timing of the scheme, its form and substance, and the financial and other implications for the parties involved.

81. The manner in which the distribution of share capital under the Intrepid Buy-Back was undertaken is consistent with ordinary returns of capital and reflects normal commercial activities where capital has been released following a disposal of an asset and is excess to the company's requirements. The substance of the scheme is consistent with its form. The timing of the scheme relates to the disposal of Intrepid's Indonesian mining project.

82. Any changes to the financial positions of a Participating Intrepid Shareholder are wholly commercial. There are no other consequences under paragraph 177D(2)(g) of the ITAA 1936 for Participating Intrepid Shareholders to be considered in relation to the distribution of share capital. Intrepid is a widely held public company and has not considered the personal circumstances of the Intrepid shareholders or any tax benefits that may result.

83. Considering all the relevant circumstances it cannot be reasonably concluded that the scheme was entered into or carried out for more than an incidental purpose of enabling any relevant taxpayer to obtain a tax benefit in relation to the distribution of share capital under the Intrepid Buy-Back. It is accepted that the purpose of the distribution of share capital was to enable Intrepid to return to its shareholders capital that was excess to its requirements.

84. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat all or part of the Buy-Back Consideration as an unfranked dividend paid by Intrepid.

## **Buy-Back Consideration**

85. For the purposes of determining the amount of a gain or loss on the sale of Intrepid Shares under the Intrepid Buy-Back, the consideration in respect of the disposal of an Intrepid Share under an off-market share buy-back is determined in accordance with section 159GZZZQ of the ITAA 1936.

86. Pursuant to subsection 159GZZZQ(1) of the ITAA 1936 a Participating Intrepid Shareholder is taken to have received as consideration in respect of the sale of Intrepid Shares, an amount equal to the purchase price of A\$0.30 per share in respect of the Intrepid Buy-Back (Buy-Back Consideration).

## **Shares held on capital account**

87. Under the Intrepid Buy-Back, a Participating Intrepid Shareholder disposed of Intrepid Shares, which are CGT assets as defined in section 108-5 of the ITAA 1997.

88. CGT event A1 happened when a Participating Intrepid Shareholder disposed of Intrepid Shares under the Intrepid Buy-Back (section 104-10 of the ITAA 1997).

89. The time of the CGT event A1 was the date on which the Intrepid Buy-Back was completed. This occurred on 11 December 2014.

90. The Buy-Back Consideration of A\$0.30 is the capital proceeds from the CGT event (section 116-20 of the ITAA 1997).

91. Accordingly, a Participating Intrepid Shareholder (other than a partnership) makes a capital gain (or capital loss) if the capital proceeds from the disposal of Intrepid Shares is more than (or less than) the cost base (or reduced cost base) of those shares (subsection 104-10(4) of the ITAA 1997).

92. Each partner in a partnership has a separate cost base and reduced cost base for the partner's interest in each Intrepid Share sold into the Intrepid Buy-Back by the partnership (subsection 106-5(2) of the ITAA 1997). Each partner is allocated an appropriate share of the Buy-Back Consideration received by the partnership for the disposal of Intrepid Shares into the Intrepid Buy-Back.

**Shares held on revenue account: trading stock**

93. A Participating Intrepid Shareholder who held Intrepid Shares as trading stock disposed of the Intrepid Shares when the Intrepid Buy-Back was completed on 11 December 2014.

94. The treatment of the Buy-Back Consideration received by a Participating Intrepid Shareholder for Intrepid Shares disposed of into the Intrepid Buy-Back as an item of trading stock depends on whether the disposal occurred in the ordinary course of business.

95. Where Intrepid Shares were disposed of as an item of trading stock in the ordinary course of business, a Participating Intrepid Shareholder includes the Buy-Back Consideration in assessable income under section 6-5 of the ITAA 1997 (pursuant to section 70-80 of the ITAA 1997).

96. Where Intrepid Shares were disposed of as an item of trading stock outside the ordinary course of business, a Participating Intrepid Shareholder includes the market value of the Intrepid Shares on the day of the disposal in assessable income under section 6-5 of the ITAA 1997 (pursuant to subsection 70-90(1) of the ITAA 1997). The Buy-Back Consideration received by the Participating Intrepid Shareholder is not included in assessable income, nor is it exempt income (subsection 70-90(2)).

97. A Participating Intrepid Shareholder (other than a partnership) who held Intrepid Shares as trading stock also makes a capital gain or capital loss on their disposal. However, as the shares were held as trading stock, the capital gain or capital loss is disregarded under subsection 118-25(1) of the ITAA 1997. There is a similar exemption for partners in partnerships (paragraph 118-25(1)(b)).

**Shares held on revenue account: revenue assets**

98. A Participating Intrepid Shareholder who held Intrepid Shares as revenue assets, but not as trading stock, disposed of Intrepid Shares on 11 December 2014, being the date the Intrepid Buy-Back was completed.

99. The disposal of Intrepid Shares into the Intrepid Buy-Back that were held by a Participating Intrepid Shareholder as revenue assets, but were not trading stock, is a realisation event under section 977-55 of the ITAA 1997 in determining a loss or a gain realised for income tax purposes.

100. Where Intrepid Shares were held as revenue assets but were not trading stock, a Participating Intrepid Shareholder includes the amount by which the Buy-Back Consideration exceeds the cost of each share in assessable income under section 6-5 of the ITAA 1997. If the cost exceeds the Buy-Back Consideration the difference is an allowable deduction under section 8-1 of the ITAA 1997.

101. Where the Buy-Back Consideration exceeds the cost base of the share, a Participating Intrepid Shareholder (other than a partnership) who held Intrepid Shares as revenue assets other than trading stock also makes a capital gain. However, the amount of the capital gain is reduced under the anti-overlap provisions in section 118-20 of the ITAA 1997. The capital gain is reduced by the amount otherwise included in assessable income (subsection 118-20(3)). If the capital gain exceeds the amount otherwise included in assessable income, the capital gain is reduced to zero (subsection 118-20(2)).

102. Similarly, the cost base or reduced cost base of the Intrepid Shares is reduced by any allowable deductions for net losses on shares held as revenue assets other than trading stock (subsections 110-45(2) and 110-55(9) of the ITAA 1997).

### **Foreign resident: CGT consequences**

103. Under subsection 855-10(1) of the ITAA 1997, a Participating Intrepid Shareholder who was a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens disregards a capital gain or capital loss from a CGT event if the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

104. CGT assets that are 'taxable Australian property' are set out in the table in section 855-15 of the ITAA 1997. The five categories of CGT assets are:

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
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).

105. Items 1 and 4 of the table in section 855-15 of the ITAA 1997 do not apply to Intrepid Shares.

106. Intrepid Shares held by a Participating Intrepid Shareholder who was a foreign resident are not an indirect Australian real property interest under section 855-25 of the ITAA 1997 at the time of CGT event A1 as the Intrepid Shares do not pass the principal asset test (section 855-30 of the ITAA 1997).

107. Accordingly, a Participating Intrepid Shareholder who was a foreign resident, or the trustee of a foreign trust, disregards a capital gain or capital loss made from CGT event A1 unless the Intrepid Share disposed of is taxable Australian property because:

- it had been used at any time by the foreign resident or the trustee of a foreign trust in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
  - it is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).
-

## Appendix 2 – Detailed contents list

108. The following is a detailed contents list for this Ruling:

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Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10; TD 2004/22

### *Subject references:*

- CGT event A1 – disposal of a CGT asset
- CGT exemptions
- CGT taxable Australian property
- deemed dividends
- dividend streaming arrangements
- dividend substitution
- revenue assets
- share buy-backs
- trading stock

### *Legislative references:*

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Income tax ~~ Capital management ~~ Share buy back

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