


CR 2020/1 - ERM Power Limited - Scheme of Arrangement and payment of Ordinary Dividend and Special Dividend

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Class Ruling

ERM Power Limited – Scheme of Arrangement and payment of Ordinary Dividend and Special Dividend

📌 Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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What this Ruling is about

1. This Ruling sets out the tax consequences of the ordinary dividend (Ordinary Dividend) paid on 9 October 2019, the special dividend (Special Dividend) paid on 25 November 2019 and the Scheme of Arrangement (Scheme) implemented by ERM Power Limited (ERM) on 29 November 2019.
2. Full details of this scheme are set out in paragraphs 43 to 62 of this Ruling.
3. All legislative references are to provisions of the *Income Tax Assessment Act 1997* or the *Income Tax Assessment Act 1936* (as detailed in the table in Appendix 2 of this Ruling) unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you were a shareholder of ERM who:
 - is not exempt from Australian income tax
 - acquired your ERM shares on or after 20 September 1985
 - had not acquired your ERM shares pursuant to an employee share, option or rights plan

- held your ERM shares on capital account, that is, your ERM shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
- received the Ordinary Dividend and/or the Special Dividend, and
- disposed of your ERM shares under the Scheme.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 43 to 62 of this Ruling.

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

When this Ruling applies

6. This Ruling applies from 1 July 2019 to 30 June 2020.

Ruling

Ordinary Dividend

7. The Ordinary Dividend is a 'dividend' as defined in subsection 6(1) as it was not debited against ERM's share capital account.

8. The Ordinary Dividend is a frankable distribution¹, and has been franked by ERM.

Resident ERM shareholders

9. If you are an Australian resident ERM shareholder and you received the Ordinary Dividend directly, you will have to include the Ordinary Dividend in your assessable income.² Additionally, you will:

- have to include the amount of the franking credits on the Ordinary Dividend in your assessable income, and
- be entitled to a tax offset equal to the amount of the franking credits on the Ordinary Dividend,

in the income year the Ordinary Dividend was paid, subject to you being a 'qualified person' in relation to the Ordinary Dividend.

10. If you received the Ordinary Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership and you are not a corporate tax entity, you will include an amount equal to the franking credits on the Ordinary Dividend in your assessable income,³ subject to you being a 'qualified person' in relation to the Ordinary Dividend.

11. The relevant members of a partnership or trust to whom a distribution flows indirectly through the partnership or trust, are entitled to a tax offset equal to their share of the franking credits on the Ordinary Dividend included in the assessable income of the partnership or trust.⁴

¹ Section 202-40.

² Subparagraph 44(1)(a)(i).

³ Subsection 207-35(1).

⁴ Section 207-45.

Non-resident ERM shareholders

12. If you are a non-resident ERM shareholder who carries on business in Australia at or through a permanent establishment in Australia, and the Ordinary Dividend is attributable to the permanent establishment, you are required to include the Ordinary Dividend in your assessable income⁵, and will not be liable for withholding tax.⁶

13. If you are a non-resident ERM shareholder other than those carrying on business in Australia at or through a permanent establishment in Australia, you do not include the Ordinary Dividend in your assessable income⁷, and will not be liable for withholding tax.⁸

Qualified persons

14. The payment of the Ordinary Dividend constitutes a 'related payment' for the purposes of former section 160APHN.

15. For the purposes of Division 1A of former Part IIIAA, to be a 'qualified person' in relation to the Ordinary Dividend⁹, you must have held your ERM shares 'at risk' for a continuous period of at least 45 days in the secondary qualification period.¹⁰

16. That is, you will be a qualified person in relation to the Ordinary Dividend if, during the period from 30 July 2019 to 28 October 2019 (inclusive), you held your ERM shares for a continuous period of at least 45 days (not counting the day on which you acquired the ERM share or the day on which you disposed of the ERM share, and not counting the days on which you had 'materially diminished risks of loss or opportunities for gain'¹¹ in respect of your ERM shares).

Refundable tax offset

17. Your entitlement to the franking credit tax offset under Division 207 in relation to the Ordinary Dividend is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25.

18. There are a range of taxpayers specifically excluded from the operation of the refundable tax offset rules under section 67-25. These excluded entities include:

- non-complying superannuation funds or non-complying approved deposit funds¹²
- trustees of a trust who are liable to be assessed under section 98 or 99A¹³
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the company on behalf of its shareholders¹⁴, and

⁵ Subparagraphs 44(1)(b)(i) and 44(1)(c)(i).

⁶ Subsection 128B(3E).

⁷ Section 128D.

⁸ Subparagraph 128B(3)(ga)(i).

⁹ Paragraph 207-145(1)(a).

¹⁰ Former paragraph 160APHO(1)(b) and subsection 160APHO(2).

¹¹ As defined in former section 160APHM.

¹² Subsection 67-25(1A).

¹³ Subsection 67-25(1B).

¹⁴ Subsections 67-25(1C) and 67-25(1D).

- non-resident entities carrying on business in Australia at or through a permanent establishment.¹⁵

Exempting entity

19. Section 208-195 will not apply to deny the gross-up of your assessable income by the amount of the franking credits on the Ordinary Dividend you received, or to deny the tax offset to which you are otherwise entitled under Division 207 at the time when the Ordinary Dividend was paid.

Special Dividend

20. The Special Dividend is a 'dividend' as defined in subsection 6(1) as it was not debited against ERM's share capital account.

21. The Special Dividend is a frankable distribution¹⁶, and has been franked by ERM.

Resident ERM shareholders

22. If you are an Australian resident ERM shareholder and you received the Special Dividend directly, you will have to include the Special Dividend in your assessable income.¹⁷ Additionally, you will:

- have to include the amount of the franking credits on the Special Dividend in your assessable income,
- be entitled to a tax offset equal to the amount of the franking credits on the Special Dividend

in the income year the Special Dividend was paid, subject to you being a 'qualified person' in relation to the Special Dividend.

23. If you received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership and you are not a corporate tax entity, you will include an amount equal to the franking credits on the Special Dividend in your assessable income¹⁸, subject to you being a 'qualified person' in relation to the Special Dividend.

24. The relevant members of a partnership or trust to whom a distribution flows indirectly through the partnership or trust, are entitled to a tax offset equal to their share of the franking credits on the Special Dividend included in the assessable income of the partnership or trust.¹⁹

Non-resident ERM shareholders

25. If you are a non-resident ERM shareholder who carries on business in Australia at or through a permanent establishment in Australia, and the Special Dividend is attributable to the permanent establishment, you are required to include the Special Dividend in your assessable income²⁰, and will not be liable for withholding tax.²¹

¹⁵ Subsection 67-25(1DA).

¹⁶ Section 202-40.

¹⁷ Subparagraph 44(1)(a)(i).

¹⁸ Subsection 207-35(1).

¹⁹ Section 207-45.

²⁰ Subparagraphs 44(1)(b)(i) and 44(1)(c)(i).

²¹ Subsection 128B(3E).

26. If you are a non-resident ERM shareholder other than those carrying on business in Australia at or through a permanent establishment in Australia, you do not include the Special Dividend in your assessable income²², and will not be liable for withholding tax.²³

Qualified persons

27. The payment of the Special Dividend constitutes a 'related payment' for the purposes of former section 160APHN.²⁴

28. For the purposes of Division 1A of former Part IIIAA, to be a 'qualified person' in relation to the Special Dividend, you must have held your ERM shares 'at risk' for a continuous period of at least 45 days in the secondary qualification period.²⁵ However, you will cease to hold your ERM shares 'at risk' on the Scheme Record Date (26 November 2019).

29. That is, you will be a qualified person in relation to the Special Dividend if, during the period from 5 October 2019 to 25 November 2019 (inclusive), you held your ERM shares for a continuous period of at least 45 days (not counting the day on which you acquired the ERM share or the day on which you disposed of the ERM share, and not counting the days on which you had 'materially diminished risks of loss or opportunities for gain'²⁶ in respect of your ERM shares).

Refundable tax offset

30. Your entitlement to the franking credit tax offset under Division 207 in relation to the Special Dividend is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25.

31. There are a range of taxpayers specifically excluded from the operation of the refundable tax offset rules under section 67-25. These excluded entities include:

- non-complying superannuation funds or non-complying approved deposit funds²⁷
- trustees of a trust who are liable to be assessed under section 98 or 99A²⁸
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the company on behalf of its shareholders²⁹
- non-resident entities carrying on business in Australia at or through a permanent establishment³⁰

Exempting entity

32. Section 208-195 will not apply to deny the gross-up of your assessable income by the amount of the franking credits on the Special Dividend you received, or to deny the tax

²² Section 128D.

²³ Subparagraph 128B(3)(ga)(i).

²⁴ Paragraph 207-145(1)(a).

²⁵ Former paragraph 160APHO(1)(b) and subsection 160APHO(2).

²⁶ As defined in former section 160APHM.

²⁷ Subsection 67-25(1A).

²⁸ Subsection 67-25(1B).

²⁹ Subsections 67-25(1C) and 67-25(1D).

³⁰ Subsection 67-25(1DA).

offset to which you are otherwise entitled under Division 207 at the time when the Special Dividend was paid.

The anti-avoidance provisions

33. 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 Ordinary Dividend and the Special Dividend. This is because the purpose requirement in paragraph 177EA(3)(e) is not satisfied.

34. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Ordinary Dividend and the Special Dividend. This is because there was no streaming of franked distributions as required by subsection 204-30(1), as the fully franked Ordinary Dividend and the fully franked Special Dividend were paid equally to all ERM shareholders.

35. Section 207-145 will not apply to the whole or any part of the Ordinary Dividend and the Special Dividend. The Commissioner does not consider that the Ordinary Dividend or the Special Dividend was made as part of a dividend stripping operation (under section 207-155) or a distribution washing arrangement (under section 207-157). Accordingly, section 207-145 will not apply to adjust your assessable income to exclude the amount of the franking credits on the Ordinary Dividend and the Special Dividend, nor will it deny the tax offsets to which you would otherwise be entitled.

CGT consequences

CGT event A1

36. CGT event A1 happened on 29 November 2019 (Implementation Date) when you disposed of your ERM shares to Shell Australia.³¹

Capital proceeds

37. You are taken to have received \$2.335 in money as the capital proceeds for disposing of each of your ERM shares.³²

38. The capital proceeds do not include the Ordinary Dividend or the Special Dividend.

Capital gain or capital loss

39. You will make a capital gain if the capital proceeds from the disposal of an ERM share exceed its cost base.³³ The capital gain is the amount of the excess.

40. If you made a capital gain from the disposal of your ERM share, you are entitled to treat the capital gain as a 'discount capital gain' provided that the conditions of Subdivision 115-A are met. In particular, you must have acquired the ERM shares that were disposed of at least 12 months before the Implementation Date.³⁴

³¹ Section 104-10.

³² Subsection 116-20(1).

³³ Subsection 104-10(4).

³⁴ Subsection 115-25(1).

41. You will make a capital loss if the capital proceeds from the disposal of an ERM share are less than its reduced cost base.³⁵ The capital loss is the amount of the difference.

42. If you were a foreign resident ERM shareholder just before CGT event A1 happened to your ERM shares on 29 November 2019, you disregard any capital gain or capital loss you made as a result of CGT event A1 happening, if your shares were not taxable Australian property.³⁶

Scheme

43. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

ERM

44. ERM is an Australian resident company which is listed on the Australian Securities Exchange. As at 21 August 2019, ERM had 250,288,527 fully paid ordinary shares and 5,333,828 performance rights on issue.

45. As at 31 August 2019, approximately 0.26% of ERM's ordinary shares on issue were held by non-residents.

46. The share capital account of ERM is not tainted for the purposes of Division 197.

Shell Energy Australia Pty Limited

47. Shell Energy Australia Pty Limited (Shell Australia) is a wholly-owned subsidiary of Royal Dutch Shell PLC.

Ordinary Dividend

48. On 22 August 2019, ERM declared a fully franked Ordinary Dividend of \$0.045 per share payable to shareholders who held their ERM shares on 12 September 2019 (Ordinary Dividend Record Date).

49. The Ordinary Dividend was funded by existing cash reserves and borrowings of ERM. Shell Australia did not facilitate or fund the payment of the Ordinary Dividend in any way, nor did it have any influence or control over the decision to pay the Ordinary Dividend. The declaration and payment of the Ordinary Dividend was at the absolute discretion of ERM.

50. The Ordinary Dividend complied with the requirements of the *Corporations Act 2001*, including section 254T of that Act.

51. The Ordinary Dividend was paid on 9 October 2019.

52. ERM was not an 'exempting entity' or a 'former exempting entity' under Division 208 at the time when the Ordinary Dividend was paid.

³⁵ Subsection 104-10(4).

³⁶ Section 855-10.

Special Dividend

53. On 8 November 2019, ERM determined to pay a fully franked Special Dividend of \$0.085 per share to shareholders who held their ERM shares on 18 November 2019 (Special Dividend Record Date), subject to the Scheme becoming unconditional.

54. The Special Dividend was funded by existing cash reserves and borrowings of ERM. Shell Australia did not facilitate or fund the payment of the Special Dividend in any way, nor did it have any influence or control over the decision to pay the Special Dividend.

55. The declaration and payment of the Special Dividend was conditional on the Scheme becoming effective, but was in the absolute discretion of ERM.

56. The Special Dividend complied with the requirements of the *Corporations Act 2001*, including section 254T of that Act

57. The Special Dividend was paid on 25 November 2019.

58. ERM was not an 'exempting entity' or a 'former exempting entity' under Division 208 at the time when the Special Dividend was paid.

Scheme of Arrangement

59. On 22 August 2019, ERM announced that it had entered into a Scheme Implementation Deed with Shell Australia to implement the Scheme. Under the Scheme, Shell Australia would acquire all the shares in ERM, by way of a Scheme of Arrangement under Part 5.1 of the *Corporations Act 2001*, for a cash price of \$2.465 per share, reduced by the Ordinary Dividend and the Special Dividend (Scheme Consideration).

60. A resolution in favour of the Scheme was passed by ERM shareholders at a meeting on 8 November 2019. This was followed by the approval of the Scheme by the Federal Court. The Scheme was implemented on 29 November 2019.

61. The implementation of the Scheme resulted in Shell Australia acquiring all the shares in ERM from ERM shareholders who held their ERM shares as at 26 November 2019 (Scheme Record Date).

62. Each ERM shareholder received \$2.335 for each ERM share.

Appendix 1 – Explanation

ⓘ *This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

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Qualified person

63. Paragraph 207-145(1)(a), which refers to Division 1A of former Part IIIAA, provides the statutory tests that you must satisfy to be a 'qualified person' in relation to a franked distribution you have received, in order for you to be entitled to a tax offset for the franking credit on the distribution.

64. A partner in a partnership or a beneficiary of a trust cannot be a qualified person in relation to the dividend unless the partnership or the trustee of the trust is also a qualified person in relation to the dividend.³⁷

65. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1). Broadly, if you were not under an obligation to make a related payment in respect of the dividend, you will have to satisfy the holding period rule in relation to the primary qualification period. If you were under an obligation to make a related payment in respect of the dividend, you will have to satisfy the holding period rule in relation to the secondary qualification period.

Ordinary Dividend and Special Dividend are a related payment

66. In order to determine the relevant qualification period, it is necessary to determine whether, under the Scheme, you or an associate have made, are under an obligation to make, or are likely to make, a related payment in respect of the Ordinary Dividend or the Special Dividend you have received.³⁸

67. Former section 160APHN defines the making of a related payment, and gives examples of, but does not limit, what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA.

68. Under the terms of the Scheme, the Scheme Consideration (paid by Shell Australia) is defined as \$2.465 less the amount of the Ordinary Dividend and the Special Dividend paid by ERM to the ERM shareholders. The reduction of the Scheme Consideration payable by Shell Australia has the effect of passing the benefit of the Ordinary Dividend and the Special Dividend from an ERM shareholder to Shell Australia.³⁹ Therefore, you (or a partner in a partnership or a beneficiary of a trust that has an interest in ERM shares⁴⁰) are taken to have made a related payment in respect of the Ordinary Dividend and the Special Dividend.

³⁷ Former section 160APHU.

³⁸ Former subsection 160APHO(1).

³⁹ Former subsection 160APHN(2), paragraph 160APHN(3)(f) and paragraphs 160APHN(4)(c) and (d).

⁴⁰ Former subsection 160APHG.

Holding period rule

69. The holding period rule requires you to hold your ERM shares on which the Ordinary Dividend and the Special Dividend were paid 'at risk' for a continuous period of at least 45 days during the relevant qualification period.⁴¹ The relevant qualification period is the secondary qualification period, which begins on the 45th day before, and ends on the 45th day after, the day on which the shares became 'ex dividend'.⁴² A share becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.⁴³

70. In respect of the Ordinary Dividend, eligibility to receive the Ordinary Dividend was determined on the Ordinary Dividend Record Date (12 September 2019), being the last day on which the acquisition by a person of an ERM share entitled the person to receive the Ordinary Dividend. Accordingly, the day on which ERM shares became ex dividend for the Ordinary Dividend was 13 September 2019. This means that the secondary qualification period for the Ordinary Dividend was the period from 30 July 2019 to 28 October 2019 (inclusive).

71. As you received the Ordinary Dividend because you held shares in ERM, you will only be a qualified person in relation to the Ordinary Dividend if, during the period from 30 July 2019 to 28 October 2019 (inclusive), you held your ERM shares for a continuous period of at least 45 days (not counting the day on which you acquired the ERM share or the day on which you disposed of the ERM share, and not counting the days on which you had 'materially diminished risks of loss or opportunities for gain').⁴⁴

72. In respect of the Special Dividend, eligibility to receive the Special Dividend was determined on the Special Dividend Record Date (18 November 2019), being the last day on which the acquisition by a person of an ERM share entitled the person to receive the Special Dividend. Accordingly, the day on which ERM shares became ex dividend for the Special Dividend was 19 November 2019. This means that the secondary qualification period for the Special Dividend began on 5 October 2019.

73. You ceased to hold your ERM shares 'at risk' on the Scheme Record Date (26 November 2019) because on that day you became committed to dispose of your ERM shares in exchange for the Scheme Consideration.

74. As you received the Special Dividend because you held shares in ERM, you will only be a qualified person in relation to the Special Dividend if, during the period from 5 October 2019 to 25 November 2019 (inclusive), you held your ERM shares for a continuous period of at least 45 days (not counting the day on which you acquired the ERM share or the day on which you disposed of the ERM share, and not counting the days on which you had 'materially diminished risks of loss or opportunities for gain').⁴⁵

⁴¹ Former paragraph 160APHO(2)(a).

⁴² Former section 160APHD.

⁴³ Former section 160APHE.

⁴⁴ Former paragraph 160APHO(2)(a).

⁴⁵ Former paragraph 160APHO(2)(a).

Appendix 2 – Legislative provisions

75. This paragraph sets out the details of the provisions ruled upon in this Ruling.

| | |
|---------------------------------------|-----------------------------|
| <i>Income Tax Assessment Act 1936</i> | subsection 6(1) |
| <i>Income Tax Assessment Act 1936</i> | section 44 |
| <i>Income Tax Assessment Act 1936</i> | section 98 |
| <i>Income Tax Assessment Act 1936</i> | section 99A |
| <i>Income Tax Assessment Act 1936</i> | section 128B |
| <i>Income Tax Assessment Act 1936</i> | section 128D |
| <i>Income Tax Assessment Act 1936</i> | former Pt IIIAA Division 1A |
| <i>Income Tax Assessment Act 1936</i> | former section 160APHD |
| <i>Income Tax Assessment Act 1936</i> | former section 160APHE |
| <i>Income Tax Assessment Act 1936</i> | former section 160APHG |
| <i>Income Tax Assessment Act 1936</i> | former section 160APHM |
| <i>Income Tax Assessment Act 1936</i> | former section 160APHN |
| <i>Income Tax Assessment Act 1936</i> | former section 160APHO |
| <i>Income Tax Assessment Act 1936</i> | former section 160APHU |
| <i>Income Tax Assessment Act 1936</i> | section 177EA |
| <i>Income Tax Assessment Act 1997</i> | Division 67 |
| <i>Income Tax Assessment Act 1997</i> | section 67-25 |
| <i>Income Tax Assessment Act 1997</i> | section 104-10 |
| <i>Income Tax Assessment Act 1997</i> | section 115-20 |
| <i>Income Tax Assessment Act 1997</i> | section 116-20 |
| <i>Income Tax Assessment Act 1997</i> | Division 197 |
| <i>Income Tax Assessment Act 1997</i> | section 202-40 |
| <i>Income Tax Assessment Act 1997</i> | section 204-30 |
| <i>Income Tax Assessment Act 1997</i> | Division 207 |
| <i>Income Tax Assessment Act 1997</i> | section 207-35 |
| <i>Income Tax Assessment Act 1997</i> | section 207-45 |
| <i>Income Tax Assessment Act 1997</i> | section 207-145 |
| <i>Income Tax Assessment Act 1997</i> | section 207-155 |
| <i>Income Tax Assessment Act 1997</i> | section 207-157 |
| <i>Income Tax Assessment Act 1997</i> | Division 208 |
| <i>Income Tax Assessment Act 1997</i> | section 208-195 |
| <i>Income Tax Assessment Act 1997</i> | Division 230 |
| <i>Income Tax Assessment Act 1997</i> | section 855-10 |
| <i>Income Tax Assessment Act 1997</i> | section 977-50 |
| <i>Income Tax Assessment Act 1997</i> | subsection 995-1(1) |
| <i>Corporations Act 2001</i> | Pt 5.1 |
| <i>Corporations Act 2001</i> | 254T |

References

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ATO references

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Income tax ~~ Capital gains tax ~~ Capital proceeds
Income tax ~~ Capital management ~~ Anti avoidance rules ~~
Section 177EA
Income tax ~~ Capital management ~~ Qualified person rule
Income tax ~~ Capital management ~~ Franking credits / tax offsets

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