


CR 2021/71 - Commonwealth Bank of Australia - off-market share buy-back

 This cover sheet is provided for information only. It does not form part of *CR 2021/71 - Commonwealth Bank of Australia - off-market share buy-back*



Class Ruling

Commonwealth Bank of Australia – off-market share buy-back

📌 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.

| Table of Contents | Paragraph |
|--|------------------|
| What this Ruling is about | 1 |
| Who this Ruling applies to | 4 |
| When this Ruling applies | 6 |
| Ruling | 7 |
| Scheme | 36 |
| Appendix 1 – Explanation | 59 |
| Appendix 2 – Legislative provisions | 101 |

What this Ruling is about

1. This Ruling sets out the income tax consequences for shareholders of the Commonwealth Bank of Australia (CBA) who participated in CBA's off-market share buy-back which was announced on 11 August 2021 (the Buy-Back).
2. Full details of this Buy-Back are set out in paragraphs 36 to 58 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (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 held shares in CBA and sold some or all of those shares under the Buy-Back.
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 36 to 58 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 2021 to 30 June 2022.

Ruling**Off-market share buy-back**

7. The Buy-Back is an off-market purchase for the purposes of section 159GZZZK.

The Dividend Component

8. You are taken to have been paid a dividend of \$66.96 (the Dividend Component) on 4 October 2021 for each CBA share you sold in the Buy-Back (section 159GZZZP).

9. The Dividend Component is a frankable distribution pursuant to section 202-40 and is capable of being franked in accordance with section 202-5.

10. The difference between the buy-back price of \$88.62 (Buy-Back Price) and the Dividend Component (Capital Component) is not taken to be a dividend (subsection 159GZZZP(2)).

Assessability of the Dividend Component and tax offset***Direct distributions***

11. If you are an Australian-resident individual, corporate tax entity or the trustee of a complying superannuation fund who participated in the Buy-Back, your assessable income in the income year in which the Buy-Back occurred includes:

- the Dividend Component of \$66.96 per CBA share, and
- subject to you being a 'qualified person', the amount of the franking credit on the Dividend Component (subsections 44(1) and 207-20(1)).

12. You will be entitled to a tax offset under subsection 207-20(2) equal to the amount of the franking credit on the Dividend Component, subject to you being a qualified person.

Indirect distributions***Partnerships***

13. If you are a partnership, your assessable income in the income year in which the Buy-Back occurred for the purposes of calculating the net income of the partnership includes:

- the Dividend Component of \$66.96 per CBA share (subsection 44(1) and section 90), and
- subject to being a qualified person, the amount of the franking credit on the Dividend Component (subsection 207-35(1) and section 90).

Trusts

14. If you are the trustee of a trust, your assessable income in the income year in which the Buy-Back occurred for the purposes of calculating the net income of the trust includes:

- the Dividend Component of \$66.96 per CBA share (subsections 44(1) and 95(1)), and
- subject to you being a qualified person, the amount of the franking credit on the Dividend Component (subsections 207-35(1) and 95(1)).

Partners and beneficiaries

15. If you are a partner of a partnership or a beneficiary of a trust in which the trustee participated in the Buy-Back and a franked distribution flowed indirectly (within the meaning of Subdivision 207-B) to you, subsections 207-35(3) to (6) set out the circumstances in which you are required to gross up your assessable income for your share of the franking credit on the franked distribution.

16. Where the franked distribution flows indirectly through a trust or partnership to you and you are a resident individual, a corporate tax entity (at the time the distribution flows indirectly to you) or a trustee referred to in paragraphs 207-45(c) or (d), you will (subject to the qualified person rules) be entitled to a tax offset equal to your share of the franking credit on the franked distribution (section 207-45).

Refundable tax offset

17. The franking credit tax offset you are entitled to is subject to the refundable tax offset rules in Division 67. Certain trustees and corporate tax entities are not entitled to the refundable tax offset rules in accordance with subsections 67-25(1A) to (1DA).

Non-resident shareholders

18. If you are a non-resident shareholder, you are not liable to Australian withholding tax in respect of the Dividend Component because it is fully franked (paragraph 128B(3)(ga)).

Sale consideration

19. You are taken to have received \$29.22 (Sale Consideration) for each CBA share you sold in the Buy-Back on 4 October 2021 (section 159GZZZQ), unless you are a corporate tax entity to which subsections 159GZZZQ(8) and (9) apply.

Capital gains tax consequences

20. If you held the CBA shares on capital account, you are taken to have disposed of your CBA shares for capital gains tax (CGT) purposes on 4 October 2021 (CGT event A1 under section 104-10).

21. The Sale Consideration of \$29.22 per CBA share (which may be adjusted under subsection 159GZZZQ(8) if you are a corporate tax entity) represents the capital proceeds for CGT purposes (subsection 116-20(1)).

22. If you did not hold your CBA shares through a partnership, you made a capital gain on each CBA share if the Sale Consideration was more than the share's cost base.

Alternatively, you made a capital loss if the Sale Consideration was less than the CBA share's reduced cost base (subsection 104-10(4)).

23. Where you made a capital gain, you can treat the capital gain as a 'discounted capital gain' if you held your CBA share since 4 October 2020 and the other conditions of Subdivision 115-A are met.

24. If you held the CBA shares through a partnership, any capital gain or capital loss will be made by the partners individually (subsection 106-5(2)). Each partner in a partnership has a separate cost base and reduced cost base for the partner's interest in each CBA share sold in the Buy-Back by the partnership. The partnership would allocate to you an appropriate share of the Sale Consideration which the partnership received for the sale of CBA shares in the Buy-Back.

Shares held as trading stock

25. If you held your CBA shares as trading stock (as defined in subsection 995-1(1)) and sold them in the Buy-Back in the ordinary course of your business, the Sale Consideration of \$29.22 per CBA share (which may be adjusted under subsection 159GZZZQ(8) if you are a corporate tax entity) is included in your assessable income under section 6-5 (subsection 70-80(1)).

26. While CGT event A1 also happened when you sold your CBA shares in the Buy-Back, any capital gain or capital loss made as a result of selling the CBA shares you held as trading stock, or if you are a partner in a partnership, the CBA shares that your partnership held as trading stock, will be disregarded (section 118-25).

Shares held on revenue account

27. If you held your CBA shares as revenue assets (as defined in section 977-50), and they were not trading stock, the amount by which the Sale Consideration exceeds the cost of each CBA share is included in your assessable income (section 6-5). Correspondingly, if the cost of each CBA share exceeds the Sale Consideration, the difference is an allowable deduction (section 8-1).

28. CGT event A1 also happened when you sold your CBA shares in the Buy-Back. Where you made a capital gain as a result of selling your CBA shares in the Buy-Back, you reduce the amount of the capital gain by the amount you otherwise include in your assessable income (section 118-20). The capital gain is reduced to zero if it 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 will be reduced by the amount otherwise included in assessable income (subsection 118-20(3)). There is a similar reduction if you are a partner in a partnership (paragraphs 118-20(1)(b) and (2)(b), and subsection 118-20(3)).

Foreign-resident shareholders – capital gains tax consequences

29. If you were a foreign-resident shareholder when you sold your CBA shares under the Buy-Back, you will only have CGT consequences if the CBA shares you sold under the Buy-Back are 'taxable Australian property' (section 855-10).

Qualified persons

30. You will satisfy the qualified person rules in relation to the Dividend Component for the purposes of paragraphs 207-145(1)(a) and 207-150(1)(a) (which refers to Division 1A of former Part IIIAA) if:

- you acquired the CBA shares which you sold in the Buy-Back on or before 16 August 2021
- during the period you held the CBA shares, you had sufficient risks of loss or opportunities for gain in respect of the CBA shares (as defined in former section 160APHM) for a continuous period of at least 45 days, and
- you have not taken any positions in relation to the CBA shares apart from participation in the Buy-Back and were not, or will not, be under an obligation to, or be likely to, make a 'related payment' (as defined in former section 160APHN) in relation to the Dividend Component.

31. Neither the announcement of the Buy-Back, the making of an invitation to shareholders to offer to sell their CBA shares, nor the making of an offer by a CBA shareholder to CBA in respect of a CBA share, will affect whether the CBA shares bought back under the Buy-Back are held 'at risk' for the purposes of Division 1A of former Part IIIAA.

32. The last-in first-out rule in former subsection 160APHI(4) has no effect for the Buy-Back in respect of any additional CBA shares you acquired on or after 17 August 2021, as these CBA shares did not confer an entitlement to participate in the Buy-Back.

The anti-avoidance provisions

33. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the Capital Component of the Buy-Back Price you received from participating in the Buy-Back.

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

35. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits you received in relation to the Dividend Component of the Buy-Back Price from participating in the Buy-Back.

Scheme

36. 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.

Commonwealth Bank of Australia

37. CBA is an Australian-resident public company listed on the Australian Securities Exchange (ASX) and is an Authorised Deposit-taking Institution (ADI) regulated by the Australian Prudential Regulation Authority (APRA) under the authority of the *Banking Act 1959*. CBA is a provider of integrated financial services, including retail, business and institutional banking, funds management, superannuation, insurance, investment and share-broking products and services.

38. CBA was listed on the ASX in 1991 and all of its ordinary shares on issue are post-CGT assets in the hands of its shareholders, who are a mix of individuals, companies, trusts, partnerships and superannuation funds, some of whom are non-residents.

39. CBA is the head company of an Australian tax consolidated group for the purposes of Part 3-90.

40. The financial statements of CBA on a stand-alone basis at 31 December 2020 show total share capital of \$38.43 billion, reserves of \$2.335 billion and retained profits of \$28.976 billion. CBA had 1,774,096,410 ordinary shares on issue.

41. CBA has generated capital growth through operating performance. Additionally, over the last three years, CBA has announced a number of divestments.

The Off-Market Share Buy-Back

42. On 11 August 2021 (First Announcement Date), CBA announced its intention to undertake an off-market share buy-back of CBA shares of approximately \$6 billion.

43. The Buy-Back was conducted in accordance with a tender process and was open to all shareholders that held CBA shares, other than ineligible CBA shareholders. Ineligible CBA shareholders included:

- any 'Excluded Foreign Person', being any persons holding CBA shares who
 - CBA would otherwise be prohibited, pursuant to any act, rule or regulation in any jurisdiction, from making payments, including any person who is (or who is acting on behalf of or for the account of a person who is) located in the United States, a US Person (as defined by Regulation S under the *United States Securities Act of 1933*, as amended from time to time) including any agent, fiduciary or other intermediary acting on such person's behalf, or a resident of Canada
 - resides, or who is acting on behalf or for the account of a person who resides, in a jurisdiction other than Australia or New Zealand
- persons who hold American Depository Receipts
- persons who hold restricted CBA shares under a CBA employee share plan, and
- directors, Group Executives and certain other management involved in the implementation of the Buy-Back may not participate in the Buy-Back in respect of any CBA shares held legally or beneficially by them.

44. The tender period opened on 30 August 2021 (Opening Date) and closed on 1 October 2021 (Closing Date).

45. Participation in the Buy-Back was voluntary and therefore eligible shareholders who did not wish to participate were not required to do anything. Non-participating eligible shareholders and ineligible shareholders did not receive any property, dividends or distribution by way of compensation.

46. Under the tender process, eligible shareholders could make an offer to sell some or all of their CBA shares to CBA (Tender) at specified discount percentages (Tender Discount) to the volume-weighted average price (VWAP) of all trades on the ASX over the last five trading days up to and including the date the tender closed. The Tender Discount ranged from 10% to 14% inclusive, in 1% intervals. There was also an option to tender shares at the final Buy-Back Price (Final Price Tender) as determined by CBA after the close of the Buy-Back.

47. The Buy-Back Price was subject to two undertakings:
- CBA would not buy back CBA shares at a discount greater than 14%, calculated by reference to the VWAP of CBA shares on the ASX over the five trading days up to and including the Closing Date (Market Price), and
 - CBA will set a maximum price above which it will not buy back any CBA shares, which will be the deemed market value of a CBA share worked out in accordance with Taxation Determination TD 2004/22 *Income tax: for Off-Market Share Buy-Backs of listed shares, whether the buy-back price is set by tender process or not, what is the market value of the share for the purposes of subsection 159GZZZQ(2) of the Income Tax Assessment Act 1936?* and Law Administration Practice Statement PS LA 2007/9 *Share buy-backs*.
48. For shareholders who were concerned with movements in the Market Price after the submission of their Tender, an option was provided for making their Tender conditional on the Buy-Back Price being no less than a specified minimum price (Minimum Price).
49. The target size of the Buy-Back was finalised by the Board prior to the announcement of the terms of the Buy-Back, and the precise number of CBA shares bought back was dependent on the Buy-Back Discount, the Market Price of CBA shares and the volume of demand received from investors during the tender period.
50. Under the terms, CBA reserved the right, in its complete discretion, to:
- buy back any number of CBA shares, or
 - not buy back any CBA shares.
51. If the total number of CBA shares tendered as Final Price Tenders and at Tender Discounts equal to or greater than the Buy-Back Discount was more than the total number of CBA shares that CBA determined to buy back, a scale back procedure would apply.
52. If the Buy-Back Discount was 14%, for those Tenders with a Tender Discount equal to 14% and the Final Price Tenders:
- an initial allocation of up to \$10,000 worth of CBA shares would be accepted (Priority Allocation) or such lesser number of CBA shares determined to be Priority Allocation as was required to ensure that CBA bought back only the number of CBA shares it determined to buy back
 - any remaining CBA shares in successful tenders would be accepted, but would be scaled back on a pro-rata basis (other than Priority Allocation and Small Residual Applications), and
 - where a shareholder would be left with a small holding (of up to approximately \$2,000 worth of CBA shares) created as a result of CBA's acquisition of the Priority Allocation and any scale back (except where the shareholder has become the registered holder of a greater number of CBA shares as at the Closing Date than were held by the holder as at the Buy-Back Record Date) (Small Residual Holding), those CBA shares would be accepted in full (Small Residual Application).
53. The terms of participation were intended to simplify the Buy-Back for shareholders with small holdings and provide them with a greater degree of certainty in respect of their participation, because either all or none of their CBA shares would be bought back.
54. If the Buy-Back Discount was less than 14%, Tenders with a Tender Discount greater than the Buy-Back Discount and Final Price Tenders would generally be accepted

in full. The scale back mechanism outlined in paragraph 52 of this Ruling applied for Tenders at the Buy-Back Discount (other than Final Price Tenders).

55. On 4 October 2021, CBA announced that:

- it had successfully completed the Buy-Back of 67.7 million CBA shares, representing 3.8% of the issued capital of CBA
- the total amount of the Buy-Back Price for CBA shares repurchased under the Buy-Back was approximately \$6 billion
- the actual Buy-Back Price was set at \$88.62 per CBA share, representing a discount of 14% to the VWAP of \$103.0483 per CBA share over the five days up to and including 1 October 2021 (Closing Date)
- Tenders at a discount of 14% or as a Final Price Tender were successful, subject to any minimum price condition and scale back
- Tenders at discounts from 10% to 13% were not accepted, and
- due to the significant oversubscription for the Buy-Back, a 79.4% scale-back of Tenders was required.

56. Under the Buy-Back, \$21.66 per CBA share was debited to CBA's untainted share capital account (the Capital Component) and the balance of the Buy-Back Price was debited to CBA's retained profits (the Dividend Component). The Dividend Component of the Buy-Back Price was fully franked.

57. All CBA shares bought back under the Buy-Back were cancelled.

58. The key dates of the Buy-Back were:

| Date | Buy-Back |
|-------------------------------------|--|
| 11 August 2021 | First Announcement Date |
| 16 August 2021 | Last day to acquire CBA shares to be eligible to participate in the Buy-Back and be entitled to franking credits for CBA shares sold into the Buy-Back |
| 17 August 2021 | Buy-Back Ex-entitlement Date (aligned with CBA's ordinary dividend ex-date) |
| 18 August 2021 | Buy-Back Record Date (aligned with CBA's ordinary dividend record date) |
| 30 August 2021 | Opening Date |
| 27 September 2021 to 1 October 2021 | Buy-Back pricing period (the five trading days over which VWAP is calculated) |
| 1 October 2021 | Closing Date |
| 1 October 2021 | Buy-Back Price determined |
| 4 October 2021 | Buy-Back Date |
| 8 October 2021 | Buy-Back payment date |

Appendix 1 – Explanation

① *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.*

| Table of Contents | Paragraph |
|--|------------------|
| Off-market share buy-back | 59 |
| The Dividend Component | 63 |
| Sale Consideration | 67 |
| Foreign-resident shareholders – capital gains tax consequences | 76 |
| Qualified persons | 77 |
| The anti-avoidance provisions | 87 |
| <i>Section 45A</i> | 87 |
| <i>Section 45B</i> | 90 |
| <i>Section 177EA</i> | 93 |
| <i>Section 204-30</i> | 97 |

Off-market share buy-back

59. For the purposes of Division 16K, where a company buys a share in itself from a shareholder, the purchase is a buy-back (paragraph 159GZZZK(a)).

60. Division 16K categorises a buy-back as either an ‘on-market purchase’ or an ‘off-market purchase’.

61. A buy-back is an on-market purchase if the share bought back is listed for quotation in the official list of a stock exchange in Australia or elsewhere, and the buy-back is made in the ordinary course of trading on that stock exchange (paragraph 159GZZZK(c)). A buy-back that is not an on-market purchase is an off-market purchase (paragraph 159GZZZK(d)).

62. Although CBA’s ordinary shares are listed for quotation in the official list of the ASX, the Buy-Back was not made in the ordinary course of trading on the ASX. As a result, for the purposes of Division 16K, the Buy-Back is an off-market purchase within the meaning given by paragraph 159GZZZK(d).

The Dividend Component

63. The difference between the Buy-Back Price and the part of the Buy-Back Price which was debited against amounts standing to the credit of CBA’s share capital account is taken to be a dividend paid by CBA to you.

64. The Buy-Back Price was \$88.62, and \$21.66 was debited against the amounts standing to the credit of CBA’s share capital account. Therefore, the Dividend Component is taken to be \$66.96 per CBA share.

65. The Dividend Component is a frankable distribution, but only to the extent that the Buy-Back Price does not exceed the market value of a CBA 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)).

66. TD 2004/22 sets out the Commissioner's view as to how to determine what would have been the market value of a CBA share at the time of the Buy-Back if the Buy-Back did not occur and was never proposed to occur. In respect of the Buy-Back, the Buy-Back Price per share did not exceed the market value (determined in accordance with TD 2004/22) of \$96.18. As a result, the entire Dividend Component is frankable.

Sale Consideration

67. For the purposes of determining the amount of a gain or loss you made on the CBA shares you sold in the Buy-Back, the consideration in respect of the disposal of a share (the Sale Consideration) you are taken to have received is determined in accordance with section 159GZZZQ.

68. The effect of section 159GZZZQ is to adjust the Capital Component in order to determine the Sale Consideration for CGT or revenue account treatment.

69. Subsection 159GZZZQ(1) provides that you are taken to have received an amount equal to the purchase price (in this case the Buy-Back Price of \$88.62 received for each CBA share you sold) as consideration in respect of the sale of the share bought back. However, this amount is subject to certain adjustments in order to arrive at the Sale Consideration.

70. Subsection 159GZZZQ(2) is one of the adjusting provisions. It provides that if the purchase price is less than the market value of the share at the time of the buy-back (calculated as if the buy-back did not occur and was never proposed to occur) you are taken to have received an amount equal to the market value of the share as consideration in respect of the sale of the share bought back.

71. For the purposes of determining the application of subsection 159GZZZQ(2), CBA proposed to use the methodology outlined in TD 2004/22 to calculate the market value of the CBA share (which the Commissioner accepted) – the relevant market value of a CBA share is the VWAP of a CBA share over the last five trading days before the first announcement of the Buy-Back (11 August 2021), adjusted for the percentage change in the S&P/ASX 200 Index from the commencement of trading on 11 August 2021 to the close of trading on 1 October 2021.

72. Under this methodology, the market value of a CBA share bought back was calculated by CBA as \$96.18. As a result, you are taken to have instead received consideration of \$96.18 for the sale of each CBA share, rather than the Buy-Back Price.

73. Pursuant to subsection 159GZZZQ(3), the deemed consideration of \$96.18 is reduced by a 'Reduction Amount'. The Reduction Amount is an amount calculated pursuant to subsection 159GZZZQ(4). In the circumstances of the Buy-Back, the Reduction Amount is equivalent to the Dividend Component of \$66.96, unless you are a corporate tax entity to whom subsection 159GZZZQ(8) applies (see paragraph 74 of the Ruling). As a result, the Sale Consideration for each CBA share disposed of under the Buy-Back is \$29.22 (being \$96.18 less the Dividend Component of \$66.96).

74. However, where you are a corporate tax entity that is entitled to a tax offset under Division 207 in respect of the Dividend Component, a further adjustment may be made to the Sale Consideration. Under subsection 159GZZZQ(8), if you also make either a capital loss or a deductible loss (or any increase in such a loss) in respect of the sale of a CBA 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

(being the Dividend Component) is itself reduced by so much of the off-settable amount that does not exceed the capital loss or the deductible loss.

75. You are taken to have disposed of your CBA shares accepted under the Buy-Back on 4 October 2021 (CGT event A1 under section 104-10). The disposal may have different taxation implications depending on how your CBA shares were held, for instance if you are:

- an investor who held your CBA shares on capital account, you will be subject to the CGT provisions (see paragraphs 20 to 24 of this Ruling), or
- a share trader who held your CBA shares on revenue account, you will be subject to the ordinary income provisions and the CGT provisions (see paragraphs 27 to 28 of this Ruling).

Foreign-resident shareholders – capital gains tax consequences

76. If you are a foreign-resident shareholder when you sold your CBA shares under the Buy-Back, you will only have CGT consequences if the CBA shares you sold under the Buy-Back are 'taxable Australian property' (section 855-10). Your CBA share will constitute taxable Australian property if the CBA share:

- is an indirect Australian real property interest (table item 2 of section 855-15)
- was used by you in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- is a CGT asset that is covered by subsection 104-165(3), which is about you choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident (table item 5 of section 855-15).

Qualified persons

77. Paragraph 207-145(1)(a) provides that, in relation to a franked distribution made by an entity, only a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA is required to include the franking credit in its assessable income and is entitled to claim the franking credit as a tax offset. Paragraph 207-150(1)(a) is a similar provision that applies to indirect distributions. Broadly speaking, to be a qualified person in relation to the Dividend Component paid, you must satisfy the 'holding period rule' (former section 160APHO).

78. The holding period rule requires a shareholder to hold the shares on which the dividend is paid 'at risk' for a continuous period of at least 45 days during the relevant qualification period. The relevant qualification period is:

- in the absence of a related payment, the primary qualification period, which commences on the day after you acquired the shares and ends on the 45th day after the day on which the shares became ex-dividend, or
- if a related payment was made (see paragraph 80 of this Ruling), the secondary qualification period, which commences on the 45th day before, and ends on the 45th day after, the day on which the shares became ex-dividend.

79. In determining whether you have satisfied the holding period rule, any days during which you have materially diminished risks of loss or opportunities for gain in respect of the

relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

80. Broadly, a related payment arises under former section 160APHN where you are or were under an obligation to make, or will make, a payment in respect of the dividend, which effectively passes on the economic benefit of the dividend to another person. The rule also applies if an associate of yours is or was under an obligation to, or will, make the payment.

81. Under former subsection 160APHM(2), you are taken to have materially diminished risks of loss opportunities for gain in respect of shares if your 'net position' in respect of the risks and opportunities reduces your exposure to those risks and opportunities to less than 30%.

82. The Commissioner does not regard the announcement of the Buy-Back, the making of an invitation to shareholders to offer to sell their CBA shares or the making of an offer by a shareholder to CBA in respect of a CBA share as affecting whether CBA shares were held at risk or not.

83. There are 45 clear days between the Buy-Back Ex-entitlement Date (17 August 2021) and the Buy-Back Date (4 October 2021). As a result, if you acquired CBA shares on or before 16 August 2021 that were bought back under the Buy-Back, you would satisfy the holding period rule as long as those CBA shares were held at risk for at least 45 continuous days.

84. Generally, under the holding period rule you will be deemed to have disposed of the 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.

85. If you acquired ex entitlement CBA shares and participated in the Buy-Back with cum entitlement shares (which conferred an entitlement to participate in the Buy-Back), you will not be considered, for the purposes of the 45-day rule, to be subject to the last-in first-out rule in former subsection 160APHI(4) and so you will not be considered to have participated in the Buy-Back with the ex entitlement shares. CBA shares commenced trading on an ex entitlement basis on 17 August 2021, and ex entitlement shares do not constitute 'related securities' for the purposes of former subsection 160APHI(2) in relation to any cum entitlement shares. The final ordinary dividend shared a common timetable to the Buy-Back in respect of the Buy-Back Ex entitlement Date and Buy-Back Record Date.

86. Accordingly, for any additional CBA shares that you acquired on or after 17 August 2021 on an ex entitlement basis, the last-in first-out rule in former subsection 160APHI(4) will not apply in relation to those CBA shares, regarding both the final ordinary dividend and the Dividend Component of the Buy-Back.

The anti-avoidance provisions

Section 45A

87. Sections 45A and 45B are two anti-avoidance provisions which, if 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 Capital Component you received under the Buy-Back is treated as an unfranked dividend.

88. 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.

89. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) is provided to participating CBA shareholders under the Buy-Back, the circumstances of the Buy-Back indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. All shareholders who participated in the Buy-Back received both the Capital Component and the Dividend Component in equal proportion based on the number of CBA shares they sold into the Buy-Back. Accordingly, section 45A has no application to the Buy-Back.

Section 45B

90. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends.

91. While the conditions of paragraphs 45B(2)(a) and (b) were met in respect of the Buy-Back, the requisite purpose of enabling a person to obtain a tax benefit as a result of the capital distribution was not present.

92. Having regard to the relevant circumstances (as set out in subsection 45B(8)) of the Buy-Back, it cannot be concluded that a person would have entered into, or carried out, the Buy-Back for a more than incidental purpose of enabling a participating shareholder to obtain a tax benefit. Therefore, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to treat all or part of the distribution of share capital of \$21.66 per CBA share as an unfranked dividend paid by CBA.

Section 177EA

93. 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.

94. It is the Commissioner's view that section 177EA applies to the Buy-Back, having regard to all the relevant circumstances of the scheme as outlined in subsection 177EA(17). Among the circumstances of the Buy-Back reflected in subsection 177EA(17) is the greater attraction of the Buy-Back to resident shareholders (because of the franking credits on the Dividend Component of the Buy-Back Price) than to non-resident shareholders.

95. Where section 177EA applies, the Commissioner may make a determination to debit CBA's franking account pursuant to paragraph 177EA(5)(a), or deny the imputation benefit to each participating CBA shareholder pursuant to paragraph 177EA(5)(b).

96. The Commissioner will not make a determination that the whole, or any part, of the imputation benefits you obtained by participating in the Buy-Back will be denied under paragraph 177EA(5)(b).

Section 204-30

97. Subsection 204-30(1) empowers the Commissioner to make a determination under paragraph 204-30(3)(c) if an entity streams distributions in a certain way.

98. The requirements of subsection 204-30(1) are satisfied in respect of the Buy-Back because:

- participating CBA shareholders received an imputation benefit (within the meaning given by subsection 204-30(6)) as a result of receiving the fully franked Dividend Component of the Buy-Back Price
- some participating CBA shareholders would have derived a greater benefit from franking credits than other CBA shareholders (for example, non-resident CBA shareholders – see subsections 204-30(7) and (8)), and
- it is reasonable to conclude that the features of the Buy-Back influenced some non-resident CBA shareholders not to participate in the Buy-Back, and as a result not receive any imputation benefits in respect of the Buy-Back.

99. Accordingly, the conditions in subsection 204-30(1) are met and the Commissioner can make a determination under subsection 204-30(3), including a determination under paragraph 204-30(3)(c) to deny the imputation benefit to each participating CBA shareholder.

100. However, the Commissioner will not make a determination under subsection 204-30(3), including a determination under paragraph 204-30(3)(c).

Appendix 2 – Legislative provisions

101. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

| | |
|---------------------------------------|-------------------------------|
| <i>Income Tax Assessment Act 1936</i> | subsection 44(1) |
| <i>Income Tax Assessment Act 1936</i> | section 45A |
| <i>Income Tax Assessment Act 1936</i> | subsection 45A(2) |
| <i>Income Tax Assessment Act 1936</i> | paragraph 45A(3)(b) |
| <i>Income Tax Assessment Act 1936</i> | section 45B |
| <i>Income Tax Assessment Act 1936</i> | paragraph 45B(2)(a) |
| <i>Income Tax Assessment Act 1936</i> | paragraph 45B(2)(b) |
| <i>Income Tax Assessment Act 1936</i> | subsection 45B(3) |
| <i>Income Tax Assessment Act 1936</i> | subsection 45B(8) |
| <i>Income Tax Assessment Act 1936</i> | section 45C |
| <i>Income Tax Assessment Act 1936</i> | section 90 |
| <i>Income Tax Assessment Act 1936</i> | subsection 95(1) |
| <i>Income Tax Assessment Act 1936</i> | paragraph 128B(3)(ga) |
| <i>Income Tax Assessment Act 1936</i> | Division 16K |
| <i>Income Tax Assessment Act 1936</i> | section 159GZZZK |
| <i>Income Tax Assessment Act 1936</i> | paragraph 159GZZZK(a) |
| <i>Income Tax Assessment Act 1936</i> | paragraph 159GZZZK(c) |
| <i>Income Tax Assessment Act 1936</i> | paragraph 159GZZZK(d) |
| <i>Income Tax Assessment Act 1936</i> | section 159GZZZP |
| <i>Income Tax Assessment Act 1936</i> | subsection 159GZZZP(2) |
| <i>Income Tax Assessment Act 1936</i> | section 159GZZZQ |
| <i>Income Tax Assessment Act 1936</i> | subsection 159GZZZQ(1) |
| <i>Income Tax Assessment Act 1936</i> | subsection 159GZZZQ(2) |
| <i>Income Tax Assessment Act 1936</i> | subsection 159GZZZQ(3) |
| <i>Income Tax Assessment Act 1936</i> | subsection 159GZZZQ(4) |
| <i>Income Tax Assessment Act 1936</i> | subsection 159GZZZQ(8) |
| <i>Income Tax Assessment Act 1936</i> | subsection 159GZZZQ(9) |
| <i>Income Tax Assessment Act 1936</i> | former Part IIIAA Division 1A |
| <i>Income Tax Assessment Act 1936</i> | former subsection 160APHI(2) |
| <i>Income Tax Assessment Act 1936</i> | former subsection 160APHI(4) |
| <i>Income Tax Assessment Act 1936</i> | former section 160APHM |
| <i>Income Tax Assessment Act 1936</i> | former subsection 160APHM(2) |
| <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> | section 177EA |
| <i>Income Tax Assessment Act 1936</i> | paragraph 177EA(5)(a) |
| <i>Income Tax Assessment Act 1936</i> | paragraph 177EA(5)(b) |
| <i>Income Tax Assessment Act 1936</i> | subsection 177EA(17) |
| <i>Income Tax Assessment Act 1997</i> | section 6-5 |
| <i>Income Tax Assessment Act 1997</i> | section 8-1 |
| <i>Income Tax Assessment Act 1997</i> | Division 67 |
| <i>Income Tax Assessment Act 1997</i> | subsection 67-25(1A) |
| <i>Income Tax Assessment Act 1997</i> | subsection 67-25(1B) |
| <i>Income Tax Assessment Act 1997</i> | subsection 67-25(1C) |
| <i>Income Tax Assessment Act 1997</i> | subsection 67-25(1D) |
| <i>Income Tax Assessment Act 1997</i> | subsection 67-25(1DA) |
| <i>Income Tax Assessment Act 1997</i> | subsection 70-80(1) |
| <i>Income Tax Assessment Act 1997</i> | section 104-10 |
| <i>Income Tax Assessment Act 1997</i> | subsection 104-10(4) |
| <i>Income Tax Assessment Act 1997</i> | subsection 104-165(3) |
| <i>Income Tax Assessment Act 1997</i> | subsection 106-5(2) |
| <i>Income Tax Assessment Act 1997</i> | Subdivision 115-A |
| <i>Income Tax Assessment Act 1997</i> | subsection 116-20(1) |
| <i>Income Tax Assessment Act 1997</i> | section 118-20 |
| <i>Income Tax Assessment Act 1997</i> | paragraph 118-20(1)(b) |
| <i>Income Tax Assessment Act 1997</i> | subsection 118-20(2) |
| <i>Income Tax Assessment Act 1997</i> | paragraph 118-20(2)(b) |
| <i>Income Tax Assessment Act 1997</i> | subsection 118-20(3) |
| <i>Income Tax Assessment Act 1997</i> | section 118-25 |
| <i>Income Tax Assessment Act 1997</i> | section 202-5 |
| <i>Income Tax Assessment Act 1997</i> | section 202-40 |
| <i>Income Tax Assessment Act 1997</i> | paragraph 202-45(c) |
| <i>Income Tax Assessment Act 1997</i> | section 204-30 |
| <i>Income Tax Assessment Act 1997</i> | subsection 204-30(1) |
| <i>Income Tax Assessment Act 1997</i> | subsection 204-30(3) |
| <i>Income Tax Assessment Act 1997</i> | paragraph 204-30(3)(c) |
| <i>Income Tax Assessment Act 1997</i> | subsection 204-30(6) |
| <i>Income Tax Assessment Act 1997</i> | subsection 204-30(7) |
| <i>Income Tax Assessment Act 1997</i> | subsection 204-30(8) |
| <i>Income Tax Assessment Act 1997</i> | Division 207 |
| <i>Income Tax Assessment Act 1997</i> | Subdivision 207-B |

| | |
|---------------------------------------|-------------------------|
| <i>Income Tax Assessment Act 1997</i> | subsection 207-20(1) |
| <i>Income Tax Assessment Act 1997</i> | subsection 207-20(2) |
| <i>Income Tax Assessment Act 1997</i> | section 207-35 |
| <i>Income Tax Assessment Act 1997</i> | subsection 207-35(1) |
| <i>Income Tax Assessment Act 1997</i> | subsection 207-35(3) |
| <i>Income Tax Assessment Act 1997</i> | subsection 207-35(4) |
| <i>Income Tax Assessment Act 1997</i> | subsection 207-35(5) |
| <i>Income Tax Assessment Act 1997</i> | subsection 207-35(6) |
| <i>Income Tax Assessment Act 1997</i> | section 207-45 |
| <i>Income Tax Assessment Act 1997</i> | paragraph 207-45(c) |
| <i>Income Tax Assessment Act 1997</i> | paragraph 207-45(d) |
| <i>Income Tax Assessment Act 1997</i> | paragraph 207-145(1)(a) |
| <i>Income Tax Assessment Act 1997</i> | paragraph 207-150(1)(a) |
| <i>Income Tax Assessment Act 1997</i> | Division 230 |
| <i>Income Tax Assessment Act 1997</i> | Part 3-90 |
| <i>Income Tax Assessment Act 1997</i> | section 855-10 |
| <i>Income Tax Assessment Act 1997</i> | section 855-15 |
| <i>Income Tax Assessment Act 1997</i> | section 977-50 |
| <i>Income Tax Assessment Act 1997</i> | subsection 995-1(1) |

References*Previous draft:*

Not previously issued as a draft

- Banking Act 1959

- United States Securities Act of 1933

Related Rulings/Determinations:

TD 2004/22

Other references:

- PS LA 2007/9

Legislative references:

- TAA 1953

ATO references

NO: 1-QE2HU9S

ISSN: 2205-5517

BSL: PGI

ATOlaw topic: Income tax ~~ Capital management ~~ Return of capital ~~ Share buy back

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).