

Transactions

PALADIN ENERGY LTD

Recent Transactions

Mr Ronald Craig Ross X***3476**

FULLY PAID ORDINARY SHARES

Date	Transaction	Movement	Running balance
3/07/2019	CHESS DAILY MOVEMENT UP	+25000	36540
1/02/2018	DOCA TRANSFER TO TRUSTEES	-565460	11540
22/05/2017	CHESS DAILY MOVEMENT UP	+100000	577000
9/02/2017	CHESS DAILY MOVEMENT UP	+100000	477000
30/01/2017	CHESS DAILY MOVEMENT UP	+130000	377000
9/01/2017	CHESS DAILY MOVEMENT UP	+50000	247000
24/11/2016	CHESS DAILY MOVEMENT UP	+150000	197000
12/10/2015	CHESS DAILY MOVEMENT UP	+12500	47000
17/12/2014	2014 NRRI ALLOTMENT	+11500	34500
8/04/2014	CHESS DAILY MOVEMENT UP	+11500	23000
28/12/2011	CHESS DAILY MOVEMENT UP	+6000	11500
17/08/2011	CHESS DAILY MOVEMENT UP	+3500	5500
6/08/2009	CHESS DAILY MOVEMENT UP	+2000	2000

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Compulsory divesting of members' shares under a deed of company arrangement

15 February 2018

In this issue:

- ▲ Discussion of deeds of company arrangement involving the divesting of members' shares for no consideration with consent of members or leave of the court in the absence of consent.
- ▲ The operation of s 444GA, Corporations Act reviewed.
- ▲ Cases where divesting of shares is fundamental to the success of deed proposals.
- ▲ Scope of protection afforded to dissenting shareholders under s 444GA(3).
- ▲ Additional considerations arising where a listed company, or unlisted company with more than 50 members is involved.

Introduction

Recently the deed administrators of uranium miner Paladin Energy Ltd obtained leave of the Court to transfer 98% of shareholders' shares for no consideration to certain parties participating in a debt capital raising undertaken by the company: see *In the matter of Paladin Energy Limited (subject to deed of company arrangement)* (2018) NSWSC, 18/1/2018.

Such compulsory divesting of shares for no consideration with leave of the court reinforces the effectiveness of deeds of company arrangements as a means of extracting value for a company's creditors through restructuring its share capital under a recapitalization plan.

Divesting shares for no consideration under the terms of a DOCA, often opposed by shareholders, appears on its face to be a drastic measure for a deed administrator to adopt. For this reason, it is appropriate to have a closer look at the justification for such decisions, and the operation of Corporations Act provisions that allow compulsory divesting to occur.

Background

Following the introduction of the administration process into the Corporations Act doubt arose as to whether the statutory powers granted to a DOCA administrator allowed for the disposal of existing shares in the company for no consideration against the wishes of the holders of those shares. In early cases, the courts formed the view that a deed administrator could not bind a shareholder to the confiscation of his or her shares if the shareholder did not consent: see *Mulvaney v Wintulich*, unreported, Federal Court of Australia, O'Loughlin J, 29/9/1995.

In light of the early position adopted by the courts s 444GA was introduced into the Corporations Act providing the administrator with power to transfer shares in a company with either the consent of the holders of the shares or with leave of the court in the absence of consent. By way of safeguard ss 444GA(3) further provided that the court may only grant leave if satisfied that "the transfer would not unfairly prejudice the interests of members of the company."

In *Weaver v Noble Resources Ltd* (2010) WASC 182, an early case dealing with the new provision, the Court observed that the purpose of the section was to enable a deed administrator to transfer shares in the company without consent of shareholders where such a transfer was necessary for the success of the DOCA. Moreover, for the purposes of the safeguard extended to members under ss 444GA(3), the Court accepted that a mere transfer of shares without compensation did not constitute "unfair prejudice" if the shares to be transferred had no value.

Cases where s 444GA may be effectively employed by DOCA administrators

The following scenarios are typical of those that may be encountered in court applications under s 444GA.

- ▲ A proposal under a DOCA for capital investment on terms, inter alia, that all existing shares be transferred to the investor. Here the investor is unwilling to invest in the company without being granted control of the issued shares. In *Weaver v Noble Resources Ltd* (above) the Court also recognized the free-rider implications of the investment:

“The recapitalisation, in order to be undertaken, would require the provision of a benefit to flow to the investor who takes the risk involved in injecting further capital into a project that has already revealed the risks of such a course. It would be extremely unlikely for an investor to take that risk on the basis that existing shareholders (whose risks of ownership and investment have already materialized and resulted in the loss of all value) could receive some free-carried benefit from further investment in which they take no risk.”

- ▲ Capital restructuring under a DOCA by means of an exchange of debt for equity. For example, a bank creditor may be willing to exchange debt owed to it on acquiring the existing shares in the company.
- ▲ In order to effect a sale transaction under a DOCA a willing buyer of the insolvent company’s business seeks to acquire 100% ownership of the company’s existing shares rather than taking a transfer of its assets.
- ▲ An investor, pursuant to a DOCA proposal, is willing to pay a cash contribution to be distributed among creditors of the company so as to ensure a return to creditors of a specified amount in the dollar. The contribution is subject to the investor acquiring all existing shares in the company.

In each of the above scenarios, DOCA proposals are unlikely to proceed without the divesting of existing shares in favour of the party participating in the proposal. To achieve this, DOCA administrators may exercise the power to transfer existing shares for no consideration with shareholders’ consent. In the absence of consent, the alternative route of an application to the court under s 444GA may be instigated. In that event, the DOCA administrator will seek a court order overriding dissenting shareholders’ objections. In doing so the administrator will bear the onus of satisfying the court that the proposed transfer under the DOCA does not involve unfair prejudice to shareholders.

At this stage, the meaning of the phrase “unfairly prejudice the interests of members of the company” warrants further consideration.

Protection afforded to dissenting shareholders

Following the introduction of s 444GA into the Corporations Act several cases have addressed the operation of ss 444GA(3), and in particular the notion of unfair prejudice to members.

The courts have consistently recognized that where shares, due to the financial position of the company, have no value then to divest them for no consideration does not constitute prejudice to their holders, let alone unfair prejudice. Moreover, the courts have been concerned to ensure that DOCA proposals are not undermined by shareholder “blackmail” with dissenting shareholders refusing to transfer their shares having only tactical value but not economic value.

The notion of unfair prejudice was usefully reviewed by the Court in *Lewis, Re Diverse Barrel Solutions Pty Ltd* (2014) FCA 53 where regard to the following was seen to be relevant:

- ▲ Whether the shares have any residual value which may be lost to the existing shareholders if leave is granted. This enquiry as to residual value will usually consider the position of shareholders in the event of winding up and the likelihood of a return on their shares in those circumstances.
- ▲ Whether there is a prospect of the shares obtaining some value within a reasonable time.
- ▲ The steps or measures necessary before the prospect of the shares attaining value may be realized
- ▲ The attitude of the existing shareholders to providing the capital contributions by which the shares may obtain some value or by which the company may continue in existence.

In the absence of statutory attempts to define “unfairly prejudicial”, it is understandable that the courts have relied on guidelines of the kind arising in the *DBS* decision.

Additional considerations where a listed company, or unlisted company with more than 50 members is involved

With respect to companies to which Chapter 6, Corporations Act applies (a listed company or one with more than 50 shareholders) questions have arisen as to whether compulsory acquisition of shares under s 444GA interacts with the 20% prohibition (takeovers prohibition) that applies to such companies by virtue of s 606, Corporations Act.

Significantly there is no statutory exemption from the 20% takeovers threshold for an acquisition of shares pursuant to a DOCA, even if it is court approved under ss 444GA(3). However, pursuant to s 655A, Corporations Act, ASIC has been granted power to exempt such dealings from the takeover prohibition.

On a number of occasions ASIC has granted exemptions to allow share transfers for which the court gave leave under s 444GA but which would otherwise have contravened the 20% takeover prohibition. Recently ASIC exemption was obtained in *In the matter of Ten Network Holdings Limited (subject to a deed of company arrangement)* (2017) NSWSC 1529. In granting relief to the s 606 takeover

prohibition ASIC recognized that matters relevant to the Court's decision under s 444GA were "potentially overlapping" with criteria relevant to the ASIC exemption decision (para.14).

Concluding comments

As a general proposition, property rights in shares are recognized and protected at law as being inviolable. However, it is also recognised that shareholders are largely excluded from decision-making in the administration process, and the interests of shareholders in their insolvent company deferred in favour of the interests of creditors.

Our discussion reveals that s 444GA was introduced to give deed administrators power to transfer shares in the interests of creditors with either the consent of members or with leave of the court in the absence of consent. The section recognizes that such a power will often be essential to the success of a DOCA where, for example, an investor's contribution under a DOCA proposal is premised on the precondition of acquiring all the existing shares in the company for nil consideration.

The effect of s 444GA is consistent with the statutory objectives of the administration process under Part 5.3A, Corporations Act, and ensures that shareholders are limited in their ability to impede creditor supported DOCA proposals where their shares demonstrably have no economic value.

Download this [Technical Insight \(http://briferrier.com.au/assets/files/News and insights files/Technical insight pdfs/BRI Ferrier - Technical Insights - Compulsory divesting of members shares under a deed of company arrangement.pdf\)](http://briferrier.com.au/assets/files/News and insights files/Technical insight pdfs/BRI Ferrier - Technical Insights - Compulsory divesting of members shares under a deed of company arrangement.pdf).

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Transaction History

Lynas Rare Earths Limited

MR RONALD CRAIG ROSS - As at 23/02/2022



MR RONALD CRAIG ROSS <CRAIG ROSS SUPER FUND A/C> PO BOX 147 AIRLIE BEACH QLD 4802	Security Class Fully Paid Ordinary Shares
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Subregister	Reference	Transaction	Date	No. of Securities	Total Securities
		Closing Balance			1,000
CHESS	0047593476	Consolidation	04-Dec-2017	-10,000	1,000
CHESS	0047593476	Consolidation	04-Dec-2017	1,000	11,000
		Opening Balance	01-Jul-2015		10,000

Another 1 prior transactions
Note: Transactions exist before the cut off date of 01-Jul-2015.



Class Ruling

Healthscope Limited – scheme of arrangement and interim dividend

1 Relying on this Ruling

This publication (excluding appendix) 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 Commissioner's opinion on the tax consequences of the Scheme of Arrangement under which ANZ Hospitals Pty Ltd (Brookfield Bidco) acquired 100% of the shares in Healthscope Limited (Healthscope).
2. Full details of this Scheme of Arrangement are set out in paragraphs 24 to 53 of this Ruling.

Who this Ruling applies to

3. This Ruling applies to you if you:
 - participated in the Scheme of Arrangement (as described in paragraphs 24 to 53 of this Ruling) under which you disposed of your Healthscope shares to Brookfield BidCo under a Scheme of Arrangement entered into under Part 5.1 of the *Corporations Act 2001* (Corporations Act) and received Scheme Consideration (as described in paragraph 46 of this Ruling) for that disposal
 - held your Healthscope shares on 30 May 2019 (the Record Date for the Scheme of Arrangement)

- held your Healthscope shares on capital account (that is, your Healthscope shares were neither held as 'revenue assets' nor as 'trading stock' (as defined in section 977-50 and subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) respectively)
 - were a resident of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) (and not a temporary resident as defined in section 995-1 of the ITAA 1997) on 6 June 2019 (the Scheme Implementation Date), and
 - are not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on your Healthscope shares.
- (**Note:** Division 230 will not apply to individuals, unless they have made an election for it to apply.)

4. A person to whom this Ruling applies to is referred to as a 'Healthscope shareholder'.

When this Ruling applies

5. This Ruling applies to the income year in which the Scheme of Arrangement occurred.

Ruling

Interim dividend

6. The interim dividend of \$0.035 per share paid to Healthscope shareholders is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.
7. The interim dividend is a frankable distribution pursuant to section 202-40 of the ITAA 1997.

Assessability of the interim dividend

8. A Healthscope shareholder includes the interim dividend in their assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).

Gross up and tax offset

9. A Healthscope shareholder who received the interim dividend directly and satisfies the residency requirements in section 207-75 of the ITAA 1997:
- must include the amount of the franking credits on the interim dividend in their assessable income, and
 - is entitled to a tax offset equal to the amount of the franking credits attached to the interim dividend in the income year it is paid (section 207-20 of the ITAA 1997), subject to the Healthscope shareholder being a 'qualified person' in relation to the interim dividend.
10. A Healthscope shareholder (not being a corporate tax entity), who received the interim dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, is required to include an amount equal to the franking credit attached to the interim dividend in their assessable income under subsection 207-35(1) of the ITAA 1997,

subject to the trustee or the partnership being a 'qualified person' in relation to the interim 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 under section 207-45 of the ITAA 1997, equal to their share of the franking credit attached to the distribution included in the assessable income of the partnership or trust under subsection 207-35(1) of the ITAA 1997.

Qualified persons

12. The payment of the interim dividend is not a 'related payment' for the purposes of former section 160APHN of the ITAA 1936.

13. A Healthscope shareholder will be a qualified person in relation to the interim dividend if, in the period from the day after they acquired the shares to 20 April 2019 (inclusive), they continued to hold their Healthscope shares and did not have materially diminished risks of loss or opportunities for gain in respect of their Healthscope shares for a continuous period of at least 45 days (not counting the day on which the shares were acquired or the day of disposal of the shares).

Capital gains tax (CGT) consequences

CGT event A1

14. CGT event A1 happened when a Healthscope shareholder disposed of each of their Healthscope shares to Brookfield BidCo in accordance with the Scheme of Arrangement (subsections 104-10(1) and 104-10(2) of the ITAA 1997).

15. The time of CGT event A1 is 6 June 2019, the Scheme Implementation Date (paragraph 104-10(3)(b) of the ITAA 1997).

Capital proceeds

16. The Scheme Consideration of \$2.465 for each Healthscope share is the capital proceeds from CGT event A1 happening to the share (subsection 116-20(1) of the ITAA 1997).

17. The interim dividend of \$0.035 is not included in the capital proceeds.

Capital gain or capital loss

18. A Healthscope shareholder will make a capital gain if the capital proceeds from the disposal of a Healthscope share exceed its cost base (subsection 104-10(4) of the ITAA 1997). The capital gain is the amount of the excess.

19. A Healthscope shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the Healthscope share (subsection 104-10(4) of the ITAA 1997). The capital loss is the amount of the difference.

Discount capital gain

20. If a Healthscope shareholder makes a capital gain from the disposal of a Healthscope share they will be eligible to treat the capital gain as a 'discount capital gain' provided they satisfy the requirements of Division 115 of the ITAA 1997.

The anti-avoidance provisions

21. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received in relation to the interim dividend.

22. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in relation to the interim dividend.

23. The interim dividend was not made as part of a dividend stripping operation for the purposes of paragraph 207-145(1)(d) of the ITAA 1997.

Scheme

24. 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.

25. Other information referenced is as follows:

- Scheme Implementation Deed dated 1 February 2019, and
- Scheme Booklet dated 16 April 2019.

Relevant entities

Healthscope Limited

26. Healthscope is a company incorporated in Australia and is listed on the Australian Securities Exchange.

27. Healthscope is a private healthcare provider with 43 private hospitals in Australia and pathology operations across New Zealand.

28. Healthscope is the head company of an Australian income tax consolidated group and is a resident of Australia pursuant to subsection 6(1) of the ITAA 1936.

29. As at 30 May 2019, Healthscope had 1,748,628,576 ordinary shares on issue. Healthscope had no other classes of shares on issue.

30. As at 31 January 2019, approximately 65% of the shareholders of Healthscope were Australian resident entities.

ANZ Hospitals Topco Limited (Brookfield HoldCo)

31. Brookfield HoldCo is a 99% owned subsidiary of BCP VIG Holdings LP (Brookfield). Brookfield HoldCo is an unlisted Australian resident company which was incorporated for the purpose of holding, indirectly, 100% of the shares of Brookfield BidCo and issuing Brookfield HoldCo Class B Shares under the Scheme of Arrangement.

ANZ Hospitals Pty Ltd (Brookfield BidCo)

32. Brookfield BidCo is, indirectly, a wholly owned subsidiary of Brookfield HoldCo.

33. Brookfield BidCo is an Australian resident company which was incorporated for the purpose of purchasing 100% of Healthscope shares from Healthscope shareholders under

the Scheme of Arrangement.

Acquisition of Healthscope by Brookfield HoldCo

34. On 1 February 2019, Healthscope announced that it had entered into an Implementation Deed under which, Brookfield, through its 99% owned subsidiary Brookfield Bidco, would acquire 100% of the share capital of Healthscope by way of a scheme of arrangement under Part 5.1 of the Corporations Act.

35. Under the terms of the Implementation Deed, a Healthscope shareholder who held ordinary shares on the Scheme Record Date of 30 May 2019 could choose to receive Scheme Consideration in exchange for each Healthscope share of either:

- \$2.465 per Healthscope share (the cash consideration), or
- Class B ordinary shares (Class B shares) in Brookfield HoldCo with a total value of \$2.465 for each Healthscope share (the scrip consideration).

36. If a Healthscope shareholder did not make an election to receive either the cash consideration or the scrip consideration, they were treated as choosing to receive the cash consideration.

37. The Scheme of Arrangement was subject to certain conditions precedent set out in the Implementation Deed including, but not limited to:

- shareholder approval at the scheme meeting by the requisite majorities under the Corporations Act, and
- Court approval by the Supreme Court of Victoria.

38. The scrip consideration was subject to a scale back mechanism if scrip consideration elections exceeded 45% of Brookfield HoldCo Class B shares, equal to approximately 284 million Healthscope shares. Any scale back would be on a pro rata basis and cash consideration would be paid in place of Brookfield HoldCo Class B shares that were not issued due to the scale back.

39. If the scale back mechanism did not apply, for each Healthscope share held as at the Scheme Record Date, the scrip consideration would be 2.465 Brookfield HoldCo Class B Shares.

40. The scrip consideration was also subject to a minimum number of elections for scrip consideration. If scrip consideration was elected for less than 10% of Healthscope shares, only cash consideration was payable.

41. The scheme resolution was approved by the requisite majority of Healthscope shareholders at the scheme meeting held on 22 May 2019.

42. On 22 May 2019, Healthscope announced that it had received scrip consideration elections in respect of less than 0.01% of Healthscope shares. As a result, no scrip consideration was issued and all Healthscope shareholders received cash consideration of \$2.465 per Healthscope share.

43. The Scheme of Arrangement was approved by the Supreme Court of Victoria at a hearing held on 24 May 2019. The Scheme of Arrangement became effective on 24 May 2019 when Healthscope lodged the court order with the Australian Securities and Investment Commission. Healthscope shares were suspended from trading at the close of trading on 24 May 2019.

44. On the Scheme Record Date of 30 May 2019, a Healthscope shareholder was entitled to participate in the Scheme of Arrangement.

45. On the Scheme Implementation Date of 6 June 2019, Healthscope shareholders disposed of each share they held in Healthscope to Brookfield BidCo.

46. Healthscope shareholders received a total of \$2.50 per share comprising a fully franked interim dividend of \$0.035 which was paid on 26 March 2019 and Scheme Consideration of \$2.465 per Healthscope share which was paid on 6 June 2019.

Interim dividend

47. On 14 February 2019, Healthscope declared a fully franked interim dividend of \$0.035 per Healthscope share. The ex-dividend date was 4 March 2019.

48. The interim dividend Record Date was 5 March 2019 and the payment date was 26 March 2019.

49. The interim dividend was not conditional on the Scheme of Arrangement proceeding. The determination of the interim dividend was wholly at Healthscope's discretion. The interim dividend did not form part of the Scheme Consideration, and the Scheme Consideration was not reduced by the amount of the interim dividend.

50. Brookfield had no control over the determination or payment of the interim dividend. The quantum and timing of the interim dividend was consistent with previous dividends paid by Healthscope following release of its financial results for the 6 month period to 31 December 2018.

51. The interim dividend was paid out of accounting profits (current and prior year earnings) derived by Healthscope, and was funded from existing cash reserves and working capital.

52. The interim dividend was not debited against Healthscope's share capital account.

53. The interim dividend complied with the requirements of the Corporations Act, including section 254T of that Act.

Appendix – Explanation

❶ *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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Interim dividend

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, whether in money or other property. However, paragraph (d) of the definition of 'dividend' excludes a distribution debited against an amount standing to the credit of the share capital account of the company.

55. The payment of the interim dividend was a distribution of money made by Healthscope to its shareholders. Healthscope did not debit the interim dividend against its share capital account.

56. Therefore, the exclusion in paragraph (d) of the definition does not apply and the interim dividend constitutes a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

57. A distribution is a frankable distribution to the extent it is not unfrankable (section 202-40 of the ITAA 1997). Section 202-45 of the ITAA 1997 sets out the circumstances under which an amount or distribution is taken to be unfrankable.

58. None of the circumstances in section 202-45 of the ITAA 1997 applies to the interim dividend. Accordingly, the interim dividend is a frankable distribution under section 202-40 of the ITAA 1997.

Assessability of the interim dividend

59. The assessable income of a resident shareholder in a company includes dividends that are paid to the shareholder by the company out of profits derived by it from any source (subparagraph 44(1)(a)(i) of the ITAA 1936).

60. As the interim dividend is paid to Healthscope shareholders out of profits derived by Healthscope, the assessable income of Healthscope shareholders includes the interim dividend (subparagraph 44(1)(a)(i) of the ITAA 1936).

Gross up and tax offset

61. Where a shareholder receives a franked distribution directly, satisfies the residency requirement in section 207-75 of the ITAA 1997 and is a 'qualified person' in relation to the franked distribution, the assessable income of the shareholder includes the amount of the franking credit (subsection 207-20(1) of the ITAA 1997). The shareholder will also be entitled to a tax offset equal to the franking credit on the distribution (subsection 207-20(2) of the ITAA 1997).

62. Subject to satisfying the 'qualified person' rule, the assessable income of a Healthscope shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, includes the amounts of the franking credits attached to the interim dividend (subsection 207-35(1) of the ITAA 1997).

63. A Healthscope shareholder that is not a qualified person in relation to the interim dividend:

- does not include the franking credit attached to the dividend in their assessable income (paragraph 207-145(1)(e) of the ITAA 1997), and
- is not entitled to a tax offset equal to the amount of the franking credit attached to the dividend (paragraph 207-145(1)(f) of the ITAA 1997).

Qualified person

64. The impact of the qualified person rules in relation to inclusion of franking credits in assessable income and entitlement to tax offsets or otherwise are described in paragraph 61 this Ruling.

65. Former section 160APHU of the ITAA 1936 provides that a partner in a partnership or the beneficiary of a trust cannot be a qualified person in relation to a dividend unless the partnership or the trustee of the trust is also a qualified person in relation to the dividend.

66. Paragraph 207-145(1)(a) which refers to former Division 1A of Part IIIAA of the ITAA 1936 provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' in relation to a franked distribution they have received and thus be entitled to a tax offset for the franking credit on the distribution.

67. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) of the ITAA 1936. Broadly, if the Healthscope shareholder is not under an obligation to make a related payment in relation to the interim dividend, as is the case, they are required to satisfy the holding period requirement within the primary qualification period.

Related payment rule

68. In order to determine the relevant qualification period, it is necessary to determine whether, under the Scheme of Arrangement, a Healthscope shareholder has made, or is under an obligation to make, or is likely to make, a related payment in respect of the interim dividend they receive (former subsection 160APHN(2) of the ITAA 1936).

69. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 are provided in former section 160APHN of the ITAA 1936. Broadly, a related payment is where a Healthscope shareholder has done, or is obliged to do, anything having the effect of passing the benefit of the interim dividend to one or more other persons.

70. Former subsection 160APHN(3) of the ITAA 1936 lists examples of what may have the effect of passing that benefit to one or more other persons, for example, causing an amount or amounts to be set off against, or to be otherwise applied in reduction of, a debt or debts owed by the other person or other persons (former paragraph 160APHN(3)(f) of the ITAA 1936).

71. Former subsection 160APHN(4) of the ITAA 1936 lists the circumstances of making a related payment referred to in former paragraph 160APHN(3)(f) of the ITAA 1936 being broadly that the amount of the benefit passed on reflects the amount of the interim dividend.

72. Under the terms of the Implementation Deed, the Scheme Consideration was not reduced by the amount of the interim dividend, and the interim dividend was not contingent upon the Scheme of Arrangement being implemented. Therefore, it is considered that the payment of the interim dividend is not an integral part of the Scheme of Arrangement.

Holding period requirement

73. The holding period rule requires shareholders to hold their ordinary shares at-risk for a continuous period of not less than 45 days during the relevant qualification period (former paragraph 160APHO(2)(a) of the ITAA 1936).

74. The primary qualification period (as defined in former section 160APHD of the ITAA 1936) begins from the day after the date of acquisition of the share and ends on the 45th day after the day on which the share becomes ex dividend. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the share are not counted.

75. Healthscope shareholders are not taken, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to be under an obligation to make a related payment in respect of the interim dividend as a result of the Scheme of Arrangement. Therefore, the relevant holding period for the interim dividend is the primary qualification period pursuant to former paragraph 160APHO(1) of the ITAA 1936.

76. Former subsection 160APHO(3) of the ITAA 1936 stipulates that any days on which a taxpayer has materially diminished risks of loss or opportunities for gain are to be excluded in determining whether the shares are held 'at risk'.

77. As of 30 May 2019, the Scheme Record Date, Healthscope shareholders ceased to hold their shares 'at risk' as they were committed to dispose of their shares in exchange for the Scheme Consideration.

78. Accordingly, in the context of the Scheme of Arrangement (and assuming Healthscope shareholders have not already satisfied the primary qualification period in respect of an earlier dividend), the primary qualification period begins on the day after the day on which the shareholder acquired the shares and ends 45 days after the ex-dividend

day (6 March 2019). This means that the primary qualification period ended on 20 April 2019.

CGT consequences

CGT event A1

79. CGT event A1 happens if there is a change in the ownership of an asset (section 104-10 of the ITAA 1997). The event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3) of the ITAA 1997).

80. The acquisition of shares under a court approved scheme of arrangement does not involve a disposal of shares under a contract.

81. Therefore, CGT event A1 happened when there was a change of ownership in a Healthscope share from a Healthscope shareholder to Brookfield BidCo pursuant to the Implementation Deed (subsections 104-10(1) and 104-10(2) of the ITAA 1997). The change of ownership occurred on the Scheme Implementation Date of 6 June 2019 (paragraph 104-10(3)(b) of the ITAA 1997).

Capital proceeds

82. The capital proceeds received by a Healthscope shareholder from a CGT event is the money and the market value of any property received or entitled to be received (worked out at the time of the event happening) in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

83. The term 'in respect of the event happening' in subsection 116-20(1) of the ITAA 1997 requires the relationship between the event and the receipt of the money, or the entitlement to receive the money, to be more than coincidental. An amount is not capital proceeds received or entitled to be received in respect of a CGT event merely because it is received in association with the CGT event.

84. In this case, the interim dividend was not paid in respect of the disposal of Healthscope shares under the Scheme of Arrangement. The determination to pay the interim dividend was at the discretion of the Healthscope Board. Brookfield had no control over Healthscope's decision to pay the interim dividend or the amount.

85. The payment of the interim dividend was funded entirely by Healthscope's cash reserves and working capital with no actual or contingent funding support from Brookfield.

86. The Commissioner considers that the interim dividend was not received in respect of the disposal of Healthscope shares under the Scheme of Arrangement. Accordingly, the interim dividend does not form part of the capital proceeds in respect of CGT event A1 happening.

87. Therefore, the capital proceeds that a Healthscope shareholder received for the disposal of a Healthscope share is the Scheme Consideration of \$2.465 per Healthscope share.

Capital gain or capital loss

88. The time when CGT event A1 happens determines the income year in which any capital gain or capital loss is made and whether the CGT discount applies to any capital gain.

89. A Healthscope shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Healthscope share are more than the cost base of the share. A Healthscope shareholder makes a capital loss if the capital proceeds are less than the reduced cost base of the Healthscope share (subsection 104-10(4) of the ITAA 1997).

Discount capital gain

90. If a Healthscope shareholder made a capital gain from the disposal of their Healthscope share, the Healthscope shareholder may be eligible to treat the capital gain as a discount capital gain provided that all the relevant requirements of Division 115 of the ITAA 1997 are met.

91. One of these requirements is that the capital gain must result from a CGT event happening to a CGT asset that was acquired by the entity making the capital gain at least 12 months before the CGT event (subsection 115-25(1) of the ITAA 1997).

92. This means that a capital gain made by a Healthscope shareholder is a discount capital gain if they acquired the share at least 12 months before the date of disposal under the Scheme of Arrangement, being the Scheme Implementation Date of 6 June 2019, and the other requirements in Division 115 of the ITAA 1997 are satisfied.

The anti-avoidance provisions

Section 177EA

93. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that operates to prevent franking credit trading. For section 177EA to apply, the conditions of paragraphs 177EA(3)(a) to (e) must be satisfied.

94. The conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied as Healthscope is a corporate tax entity, the Scheme of Arrangement is a scheme involving the disposal of Healthscope shares in which there is a franked distribution and franking credits were received by Healthscope shareholders (the relevant taxpayers) that participated in the scheme and who could, therefore, reasonably be expected to receive imputation benefits.

95. Paragraph 177EA(3)(e) of the ITAA 1936, in broad terms, requires that in considering the relevant circumstances of the scheme, 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 (whether or not the dominant purpose but not including an incidental purpose) of enabling the taxpayer to obtain an imputation benefit.

96. In arriving at a conclusion, the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of diverse matters which, taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the imputation benefit is more than an incidental purpose of the scheme.

97. The relevant circumstances are that the disposition of the ordinary shares in Healthscope was made pursuant to an acquisition by Brookfield BidCo by way of the Scheme of Arrangement under the Corporations Act voted upon by Healthscope shareholders entitled to vote. The Scheme of Arrangement is a normal commercial transaction under which Healthscope was acquired by Brookfield BidCo.

98. Healthscope shareholders have different tax and residency profiles. The fully franked interim dividend was paid to all existing shareholders of Healthscope in proportion

to the number of shares that each shareholder held on the interim dividend Record Date irrespective of their ability to utilise the relevant franking credits. The interim dividend allowed Healthscope shareholders to share in the accumulated profits of Healthscope.

99. In considering the manner, form and substance of the Scheme of Arrangement, it is considered that the scheme was not entered into by Healthscope shareholders for more than an incidental purpose of enabling Healthscope shareholders to obtain imputation benefits. The provision of imputation benefits to Healthscope shareholders remains incidental, in the sense of being subservient to, the purpose of transferring their shares in Healthscope to Brookfield BidCo in exchange for the Scheme Consideration.

100. Having regard to the relevant circumstances of the shareholders, it cannot be concluded that Healthscope or the Healthscope shareholders entered into or carried out the scheme for the purpose of enabling the Healthscope shareholders to obtain an imputation benefit.

101. As the requisite purpose is not present, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit which Healthscope shareholders received in relation to the interim dividend.

Section 204-30

102. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of dividends to its members in such a way that certain shareholders, referred to as favoured members, obtain imputation benefits, and other shareholders, referred to as disadvantaged members, obtain lesser or no imputation benefits, whether or not they receive other benefits. The favoured members are those that derive a greater benefit from imputation benefits than disadvantaged members.

103. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than another member entity. The term 'derive a greater benefit from franking credits' is defined in subsection 204-30(8) ITAA 1997 by reference to the ability of the members to fully use imputation benefits.

104. Under the Scheme of Arrangement, Healthscope shareholders received imputation benefits when the interim dividend was paid. The interim dividend was paid equally to all Healthscope shareholders, and was fully franked regardless of their tax profiles. Accordingly, it cannot be said that Healthscope selectively directed the flow of franked dividends to those members who obtained the most benefit from the franking credits.

105. As the conditions in subsection 204-30(1) of the ITAA 1997 have not been met, the Commissioner will not make a determination under paragraph 204-30(3)(c) ITAA 1997 to deny the whole, or any part, of the imputation benefits received by a Healthscope shareholder in relation to the interim dividend.

Paragraph 207-145(1)(d)

106. Paragraph 207-145(1)(d) of the ITAA 1997 applies if a franked distribution is made as part of a dividend stripping operation. A distribution will be taken to be made as part of a dividend stripping operation if the making of the distribution arose out of, or was made in the course of, a scheme that was by way of, or in the nature of, dividend stripping; or had substantially the effect of a scheme by way of, or in the nature of, dividend stripping (section 207-155 of the ITAA 1997).

107. The Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002 states at paragraph 5.57:

Schemes by way of, or in the nature of, dividend stripping schemes include those where a person purchases for a capital sum the shares in a target company that has accumulated profits, and then draws off the profits by effecting the payment of a dividend by the target company.

108. Having regard to the circumstances of the scheme under which Healthscope shareholders disposed of their shares to Brookfield BidCo, the Commissioner considers that the payment of the interim dividend to Healthscope shareholders was not made as part of a dividend stripping operation.

109. Therefore, paragraph 207-145(1)(d) of the ITAA 1997 will not apply to the interim dividend received by the Healthscope shareholders.

References*Previous draft:*

Not previously issued as a draft

Related Rulings/Determinations:

TD 2002/4; TR 2006/10; TR 2010/4

Legislative references:

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 Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 – disposal
 of a CGT asset
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 Franking tax offset

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