



## Class Ruling

### National Australia Bank Limited – NAB Capital Notes 5

#### **📌 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.

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#### **What this Ruling is about**

1. This Ruling sets out the income tax consequences for entities who subscribe for and acquire National Australia Bank Capital Notes 5 (NAB Capital Notes 5) issued by National Australia Bank Limited (NAB).
2. The scheme is set out in paragraphs 50 to 89 of this Ruling.
3. In this Ruling, unless otherwise defined, capitalised terms have the meaning specified in the Terms of NAB Capital Notes 5 (the Terms), which are contained in Appendix A of the Prospectus for the issue of NAB Capital Notes 5 dated 24 November 2020 (the Prospectus).
4. All legislative references are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

#### **Who this Ruling applies to**

5. This Ruling applies to you if you are an investor (also referred to as a Holder) who:
  - acquired your NAB Capital Notes 5 by initial application under the Prospectus
  - is a resident of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) during the period in which you hold your NAB Capital Notes 5
  - holds your NAB Capital Notes 5 on capital account, and

- is not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on your NAB Capital Notes 5.

## What this Ruling does not consider

6. This Ruling does not consider:
- the tax implications in relation to a non-resident who holds their NAB Capital Notes 5 through a permanent establishment (as defined in subsection 6(1) of the ITAA 1936) in Australia
  - the tax implications of Redemption (other than for the application of sections 45A, 45B, 26BB and 70B of the ITAA 1936) of NAB Capital Notes 5
  - the tax implications of Conversion of NAB Capital Notes 5 before the Mandatory Conversion Date on the occurrence of a Loss Absorption Event
  - how the taxation law applies to a Nominated Purchaser who acquires their NAB Capital Notes 5 under the Resale facility
  - the tax implications for holders of NAB Convertible Preference Shares II of reinvesting their NAB Convertible Preference Shares II under a Reinvestment Offer, or of receiving distributions on NAB Convertible Preference Shares II, and
  - how the gross-up and tax offset rules in Division 207 apply to partnership or trustee investors (other than a partnership or trustee that is a corporate tax entity, or a trustee of a trust that is a complying superannuation entity) or to indirect distributions to partners in a partnership or beneficiaries or trustees of a trust.

## When this Ruling applies

7. This Ruling applies from 1 July 2020 to 30 June 2031.

## Ruling

### Consequences of acquiring NAB Capital Notes 5

#### *Acquisition date*

8. You acquired your NAB Capital Notes 5 on 17 December 2020 under table item 2 of section 109-10.

### *Cost base and reduced cost base of each NAB Capital Note 5*

9. The first element of the cost base and reduced cost base of each NAB Capital Note 5 is \$100, being the money you paid to acquire your NAB Capital Notes 5 (subsections 110-25(2) and 110-55(2)).

**Consequences of holding NAB Capital Notes 5*****Distributions on NAB Capital Notes 5 and entitlement to tax offset for franking credits***

10. A Distribution on a NAB Capital Note 5 is a non-share dividend under section 974-120 and is included in your assessable income (subparagraph 44(1)(a)(ii) of the ITAA 1936).

11. In the income year in which the Distribution is made (section 207-20) you also:

- include the amount of the franking credit attached to a Distribution in your assessable income, and
- are entitled to a tax offset equal to the franking credit.

12. To the extent that a Distribution (or a part of it) is either exempt income or non-assessable non-exempt income in your hands (and none of the exceptions in Subdivision 207-E apply), the amount of any franking credit on the Distribution that is exempt income or non-assessable non-exempt income is not included in your assessable income, and you are not entitled to a tax offset under Division 207 (Subdivision 207-D).

13. The franking credit tax offset that you are entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25. Entities excluded by section 67-25 include corporate tax entities (such as companies, corporate limited partnerships and public trading trusts), unless they satisfy the requisite conditions in subsections 67-25(1C) or 67-25(1D).

***Determination under paragraph 177EA(5)(b) of the ITAA 1936***

14. 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 you receive in relation to a Distribution.

***Determination under paragraph 204-30(3)(c)***

15. 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 receive in relation to a Distribution.

***Gross-up and tax offset cancelled in certain circumstances***

16. Paragraph 207-145(1)(a) will not apply to cancel the effect of the gross-up and tax offset in respect of a franked Distribution if you are a qualified person in respect of that Distribution.

17. You will be a qualified person in relation to a Distribution if, during the primary qualification period, you held your NAB Capital Notes 5 for a continuous period of at least 90 days during which you did not have 'materially diminished risks or loss of opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of your NAB Capital Notes 5.

18. The Resale facility and Conversion mechanism of NAB Capital Notes 5 will not affect your risks of loss or opportunities for gain in respect of your NAB Capital Notes 5. This is because neither the Resale facility nor the Conversion mechanism constitutes a separate position (former sections 160APHM and 160APHJ of the ITAA 1936).

19. Paragraphs 207-145(1)(b) to (1)(db) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution.
20. In respect of paragraphs 207-145(1)(b) and (1)(c), refer to paragraphs 14 and 15 of this Ruling.
21. In respect of paragraph 207-145(1)(d), there is no evidence that the Distributions will be made as part of a dividend stripping operation.
22. In respect of paragraph 207-145(1)(da), the distribution washing provision does not apply (refer to subparagraph 89(v) of this Ruling).
23. In respect of paragraph 207-145(1)(db), the NAB Capital Notes 5 are equity interests which form part of NAB's Additional Tier 1 Capital (refer to subsection 207-158(2) and subparagraph 89(d) of this Ruling).

### **Consequences of disposing of NAB Capital Notes 5**

#### ***NAB Capital Notes 5 not traditional securities***

24. A NAB Capital Note 5 is not a 'traditional security' as defined in subsection 26BB(1) of the ITAA 1936.
25. Section 26BB of the ITAA 1936 will not apply to include any gain on the disposal or Redemption of a NAB Capital Note 5 in your assessable income.
26. Section 70B of the ITAA 1936 will not apply to allow any loss on the disposal or Redemption of a NAB Capital Note 5 as a deduction to you.

### **Conversion of NAB Capital Notes 5 for Ordinary Shares**

27. Each NAB Capital Note 5 is a convertible interest.
28. CGT event C2 happens on Conversion (section 104-25).
29. A capital gain or capital loss you make from CGT event C2 happening on Conversion will be disregarded (subsection 130-60(3)).
30. Ordinary Shares acquired on Conversion will be taken to have been acquired when the Conversion happens on the relevant Conversion Date (subsection 130-60(2)).
31. The first element of the cost base and reduced cost base of Ordinary Shares acquired on Conversion will be equal to the cost base and reduced cost base of the relevant NAB Capital Note 5 at the time of Conversion (table item 2 of subsection 130-60(1)).
32. As you hold your NAB Capital Notes 5 on capital account, no amount will be included in your assessable income on the Conversion of a NAB Capital Note 5 under section 6-5.
33. In addition, you will not incur a deductible loss under section 8-1 as a consequence of Conversion.
34. On the Conversion of NAB Capital Notes 5 for Ordinary Shares in NAB, you will not be taken to have received a dividend or a non-share dividend.

### **Amendment of the Terms to substitute an Approved NOHC**

35. CGT event H2 happens if the Terms are amended to effect the substitution of an Approved NOHC as the issuer of Ordinary Shares to you on Conversion (section 104-155).

36. However, you do not make a capital gain or a capital loss from CGT event H2 happening as there are no capital proceeds or incidental costs incurred because of the amendment of the Terms.

### **Conversion of each NAB Capital Note 5 and the issue of Ordinary Shares in an Approved NOHC – capital gains tax implications**

37. Where an Approved NOHC becomes the ultimate holding company of NAB, the Conversion of NAB Capital Notes 5 and the issue of Approved NOHC Ordinary Shares to you results in CGT event C2 happening as it is the conversion of a convertible interest (section 104-25).

38. As the Approved NOHC Ordinary Shares are equity interests (within the meaning of Division 974), any capital gain or capital loss that you make from CGT event C2 happening when the NAB Capital Notes 5 are Converted to Ordinary Shares in an Approved NOHC is disregarded (section 130-60(3)).

39. The first element of the cost base and the reduced cost base of each Approved NOHC ordinary share issued to you is calculated as the cost base of your NAB Capital Notes 5 at the time of Conversion divided by the number of Approved NOHC Ordinary Shares you receive (table item 2 of subsection 130-60(1)).

40. You are taken to have acquired your Approved NOHC Ordinary Shares at the time of Conversion (subsection 130-60(2)).

### ***NAB Capital Notes 5 that are Written Off***

41. CGT event C2 happens when a NAB Capital Note 5 is Written Off because the NAB Capital Note 5 is terminated at that time (section 104-25).

42. For the purposes of determining whether you make a capital gain or a capital loss from CGT event C2 happening in respect of your NAB Capital Notes 5, you are taken to have nil capital proceeds from CGT event C2 happening. This is because you receive no capital proceeds in respect of a Write Off happening, and your NAB Capital Notes 5 have a market value of nil at that time.

### ***Resale of NAB Capital Notes 5***

43. CGT event A1 in section 104-10 happens on the Resale of a NAB Capital Note 5. The Resale of a NAB Capital Note 5 to the Nominated Purchaser will be for the Face Value of the NAB Capital Note 5.

44. As the capital proceeds you receive will not be more than the cost base of the NAB Capital Note 5, you will not make a capital gain as a result of the Resale.

45. As you hold your NAB Capital Notes 5 on capital account, no amount will be included in your assessable income on the Resale under section 6-5.

46. In addition, you will not incur a deductible loss under section 8-1 as a consequence of the Resale.

## Other integrity provisions

### **Section 45A of the ITAA 1936**

47. Section 45 of the ITAA 1936 will not apply to treat the value of Ordinary Shares issued to you on Conversion as an unfrankable dividend.

### **Section 45A of the ITAA 1936**

48. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole or a part of the capital benefit provided to you on Conversion or Redemption as an unfranked dividend.

### **Section 45B of the ITAA 1936**

49. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole or a part of the capital benefit provided to you on Conversion or Redemption as an unfranked dividend.

## Scheme

50. 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.

## Background

51. NAB is an Australian-resident company for income tax purposes and is listed on the Australian Securities Exchange.

52. NAB is an authorised deposit-taking institution for the purposes of the *Banking Act 1959* and is subject to regulatory compliance requirements by the Australian Prudential Regulation Authority (APRA), including maintenance of mandatory levels of Tier 1 Capital.

53. Under the Prospectus, NAB announced its intention to undertake a capital raising by the issue of NAB Capital Notes 5 for an issue price of \$100 each to raise \$2 billion (with the ability to raise more or less) (the Offer).

54. The Issue Date for the NAB Capital Notes 5 was 17 December 2020.

55. The NAB Capital Notes 5 are listed on the Australian Securities Exchange under the Australian Securities Exchange code NABPH.

56. The NAB Capital Notes 5 were issued by NAB in Australia. The NAB Capital Notes 5 were not issued at or through an offshore permanent establishment or subsidiary of NAB.

57. The Offer has been made as part of NAB's ongoing capital management strategy within the regulatory capital requirements prescribed by APRA. The issue of the NAB Capital Notes 5 is a new capital-raising. The proceeds from the issue of the NAB Capital Notes 5 are to be used by NAB to replace funding previously provided by the NAB Convertible Preference Shares II (issued on 17 December 2013 and redeemed on 17 December 2020) and for general corporate purposes.

**Main features of NAB Capital Notes 5**

58. The NAB Capital Notes 5 are fully-paid, mandatorily convertible, subordinated, perpetual debt securities issued by NAB in Australia.
59. A Holder of NAB Capital Notes 5 does not have voting rights at a general meeting of NAB.

**Issue Price**

60. The Issue Price and Face Value of each NAB Capital Note 5 is \$100. NAB Capital Notes 5 were fully-paid on the Issue Date.

**Distributions**

61. NAB will pay quarterly floating-rate cash Distributions in respect of each NAB Capital Note 5 on a Distribution Payment Date (each a Relevant Distribution Payment Date) in accordance with the Terms.
62. The Distribution payable is calculated on the Face Value of each NAB Capital Note 5 using a Distribution Rate which is equal to the Bank Bill Rate plus a Margin, adjusted by the corporate tax rate and based on the number of days in the Distribution Period. The Margin was determined in accordance with the Bookbuild.
63. The Distributions are expected to be franked at the same rate as dividends paid on the Ordinary Shares. The extent to which Distributions will be franked will depend on a number of factors, including the Group's capital management plan and the level of profits generated by the Group that will be subject to tax in Australia. If the Distribution is not fully franked, then the Distribution will be adjusted to reflect the applicable franking rate.
64. The payment of a Distribution is subject to the sole discretion of the Directors of NAB and will only be paid if a Payment Condition does not exist on the Distribution Payment Date. Broadly, a Payment Condition exists where NAB is prevented from paying the Distribution by prudential regulatory requirements, applicable law or insolvency.
65. Distributions are non-cumulative and if all or any part of a Distribution is not paid, Holders have no claim or entitlement in respect of such non-payment and such non-payment does not constitute an event of default.
66. No interest accrues on any unpaid Distributions and the Holders have no claim or entitlement in respect of interest on any unpaid Distributions.
67. Subject to certain exceptions, if a Distribution is not paid in full on the Relevant Distribution Payment Date, NAB will be restricted from declaring, paying or determining to pay an Ordinary Share dividend, undertaking any buy-backs or capital reductions (unless Holders approve by Ordinary Resolution) until the next Distribution Payment Date. If the amount of any unpaid Distribution is paid in full within three Business Days of the Distribution Payment Date, this restriction will no longer apply.

**Conversion**

68. Conversion of the NAB Capital Notes 5 involves the following:
- each Holder is issued a number of Ordinary Shares for each NAB Capital Note 5 that is being Converted on the Conversion Date equal to the Conversion Number, and

- each Holder's rights (including to payment of Distributions, other than the Distribution, if any, payable on a Conversion Date that is not a Loss Absorption Event Conversion Date) in relation to each NAB Capital Note 5 that is being Converted is immediately and irrevocably terminated for an amount equal to the Face Value and NAB applies the Face Value by way of payment for the subscription of the Conversion Number of Ordinary Shares to be issued on Conversion.

69. Upon Conversion of the NAB Capital Notes 5, all other rights conferred or restrictions imposed on that NAB Capital Note 5 under the Terms no longer have effect (except for rights relating to a Distribution which has been determined to be payable on a Conversion Date that is not a Loss Absorption Event Conversion Date).

70. Each Ordinary Share issued upon Conversion ranks equally with all other Ordinary Shares.

### ***Mandatory Conversion***

71. All outstanding NAB Capital Notes 5 must Convert into Ordinary Shares on the Mandatory Conversion Date.

72. The Mandatory Conversion Date is the first to occur of the following dates on which the Mandatory Conversion Conditions are satisfied:

- 17 December 2029 (the Scheduled Mandatory Conversion Date), or
- the first Distribution Payment Date after the Scheduled Mandatory Conversion Date on which those conditions are satisfied.

73. If the Mandatory Conversion Conditions are not satisfied on the Scheduled Mandatory Conversion Date, NAB will not proceed with the Conversion on that date. The Conversion will be postponed until the first Distribution Payment Date after the Scheduled Mandatory Conversion Date on which the Mandatory Conversion Conditions are satisfied (if the Mandatory Conversion Conditions are satisfied at all).

### ***Mandatory Conversion on Loss Absorption Event***

74. A Loss Absorption Event means a Common Equity Trigger Event or a Non-Viability Trigger Event.

75. Such events are triggered by certain circumstances affecting the capital adequacy or viability of NAB.

76. If a Loss Absorption Event occurs, NAB must immediately convert into Ordinary Shares or write off:

- all Relevant Tier 1 Capital Instruments, or
- a proportion of the Relevant Tier 1 Capital Instruments to the extent sufficient to ensure that NAB will not become non-viable as determined by APRA's requirements or to return the Common Equity Tier 1 Ratio to the required percentage (noting, however, that all Relevant Tier 1 Capital Instruments must be converted or written off where the Loss Absorption Event is a Non-Viability Trigger Event involving a determination by APRA that a public sector injection of capital would be required to ensure that NAB does not become non-viable).



**Optional Conversion**

77. Subject to certain conditions, including APRA's prior written approval, NAB may elect to Convert all or some NAB Capital Notes 5 on:

- an Optional Conversion Date following the occurrence of a Tax Event or a Regulatory Event
- an Optional Conversion Date following the occurrence of a Potential Acquisition Event, or
- 17 December 2027.

78. A Holder does not have the right to request a Conversion at any time.

**Optional Redemption**

79. NAB may, with APRA's prior written approval, elect to Redeem all or some NAB Capital Notes 5 on:

- a Redemption Date following the occurrence of a Tax Event or a Regulatory Event, or
- 17 December 2027.

80. The NAB Capital Notes 5 are Redeemed by payment on the Redemption Date of an amount equal to the Face Value to the Holder.

81. A Holder does not have the right to request a Redemption at any time.

**Optional Resale**

82. NAB may, with APRA's prior written approval, elect to Resell all or some NAB Capital Notes 5 on:

- a Resale Date following the occurrence of a Tax Event or a Regulatory Event, or
- 17 December 2027.

83. If NAB elects to Resell NAB Capital Notes 5, NAB must appoint one or more Nominated Purchasers for the Resale on such terms as may be agreed between NAB and the Nominated Purchaser(s).

84. Each Holder on the Resale Date is taken irrevocably to offer to sell NAB Capital Notes 5 to the Nominated Purchaser(s) on the Resale Date for the Resale Price. The Resale Price, for a NAB Capital Note 5, means a cash amount equal to its Issue Price.

85. A Holder does not have the right to request a Resale at any time.

**Substitution of Approved NOHC as issuer of Ordinary Shares**

86. The Terms provide for the possibility of substitution of an Approved NOHC as the issuer of Ordinary Shares on the Conversion of the NAB Capital Notes 5. A NOHC is defined as a non-operating holding company within the meaning of the *Banking Act 1959*.

87. A NOHC Event is an event which would otherwise be an Acquisition Event which is initiated by the Directors and the result of which is that the ultimate holding company of NAB is a NOHC.

88. NAB may give a notice to the Holders before the NOHC Event occurs specifying the amendments to the Terms which will be made to effect the substitution of an Approved NOHC as the issuer of Ordinary Shares of the Approved NOHC to Holders on Conversion of the NAB Capital Notes 5. This means that, on Conversion, each NAB Capital Note 5 that is being Converted is automatically transferred by each Holder to the Approved NOHC (or another entity which meets the stated criteria) and each Holder (or in certain circumstances a nominee) is issued a number of Ordinary Shares in the capital of the Approved NOHC equal to the Conversion Number.

### Other matters

89. The Ruling is made on the basis that:

- (a) During the term of the scheme, NAB is a resident of Australia under the income taxation laws of Australia and of no other jurisdiction.
- (b) The majority of the Holders who acquire the NAB Capital Notes 5 under the Offer are expected to be residents of Australia for tax purposes, although some may be non-residents.
- (c) The NAB Capital Notes 5 are equity interests in NAB under Division 974 and are non-share equity interests as defined in subsection 995-1(1).
- (d) The NAB Capital Notes 5 form part of NAB's Additional Tier 1 Capital for the purposes of the prudential standards determined by APRA and in force under section 11AF of the *Banking Act 1959*.
- (e) The Distributions are frankable distributions under section 202-40.
- (f) In accordance with Division 203, NAB will frank Distributions in respect of the NAB Capital Notes 5 at the same franking percentage as the NAB benchmark for the franking period in which the frankable distribution is made.
- (g) Distributions on the NAB Capital Notes 5 are not sourced, directly or indirectly, from NAB's share capital account or its non-share capital account.
- (h) Distributions paid on the NAB Capital Notes 5 will not be debited to NAB's share capital account or its non-share capital account.
- (i) Immediately before the payment of a Distribution on the NAB Capital Notes 5, NAB has available frankable profits (worked out under section 215-20) at least equal to the Distribution.
- (j) NAB expects to continue with its policy of franking all frankable distributions (to the extent that franking credits are available in its franking account).
- (k) NAB does not differentially frank Distributions to different Holders according to their tax status or on any other basis.
- (l) The dividend payout ratios and NAB's policies in relation to the franking of its distributions on ordinary share capital and other preference share capital of NAB (to the extent such dividends/distributions are frankable) are not expected to change as a result of the issue of the NAB Capital Notes 5.
- (m) The share capital account of NAB does not become tainted (within the meaning of Division 197) by the issue of the NAB Capital Notes 5 or the allotment of Ordinary Shares on Conversion of the NAB Capital Notes 5.
- (n) On Conversion or Redemption of the NAB Capital Notes 5, NAB debits the Face Value of the NAB Capital Notes 5 to its non-share capital account.

- (o) Ordinary Shares issued to the Holders on Conversion of the NAB Capital Notes 5 are equity interests under Division 974.
- (p) If an Approved NOHC is the ultimate holding company of NAB, the Approved NOHC Ordinary Shares issued to the Holders on Conversion of the NAB Capital Notes 5 are equity interests under Division 974.
- (q) The accounts of the NAB group are prepared in accordance with the applicable accounting standards.
- (r) All parties to the scheme are dealing with each other at arm's length.
- (s) You will not take any 'positions' (as defined in former section 160APHJ of the ITAA 1936) at any time in relation to your NAB Capital Notes 5 apart from holding your NAB Capital Notes 5.
- (t) You (or an associate) will not make, be under an obligation to make, or be likely to make, a 'related payment' (as defined under former section 160APHN of the ITAA 1936) in relation to a Distribution.
- (u) You will hold your NAB Capital Notes 5 for a continuous period of at least 90 days (excluding the day of acquisition and disposal (if relevant)), during the 'primary qualification period' (as defined in former section 160APHD of the ITAA 1936) in relation to a Distribution.
- (v) You (or your connected entities) will not engage in distribution washing (as outlined in section 207-157) in relation to a Distribution (unless entitled to the exception under subsection 207-157(4)).
- (w) You will not receive capital proceeds in respect of a Write-Off of a NAB Capital Note 5 and the market value of a NAB Capital Note 5 at that time will be nil.

**Appendix – 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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**Determination under paragraph 177EA(5)(b) of the ITAA 1936**

90. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of a particular scheme is to enable a taxpayer to obtain an imputation benefit.

91. The conditions in paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied, therefore the relevant circumstances of the scheme must be considered to establish whether any person who entered into or carried out the scheme, or any part of the scheme, did so for a more than incidental purpose of enabling a Holder to obtain an imputation benefit; paragraph 177EA(3)(e) of the ITAA 1936.

92. The Commissioner considers that the relevant circumstances of the scheme do not, on balance, lead to a conclusion that the purpose of enabling Holders to obtain imputation benefits is more than incidental to NAB's primary purpose of raising Additional Tier 1 capital for regulatory capital requirements and otherwise to maintain the diversity of its sources and types of funding.

**Determination under paragraph 204-30(3)(c)**

93. 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.

94. Based on the scheme, there is no evidence of streaming. Distributions will be received by all Holders by reason of their proportionate holding of NAB Capital Notes 5 and not by reference to their tax profiles or individual tax positions. There is nothing in the Terms that allows NAB to treat Holders differently in respect of their entitlement to a franked Distribution.

**Gross up and tax offset cancelled in certain circumstances**

95. If you are not a qualified person in relation to a Distribution, you:
- do not include the franking credit attached to the dividend in your assessable income (paragraph 207-145(1)(e)), and
  - are not entitled to a tax offset equal to the amount of the franking credit attached to the dividend (paragraph 207-145(1)(f)).
96. As this Ruling is made on the basis that you have not made a related payment in respect of a Distribution, the relevant qualification period is the primary qualification period (as defined in former section 160APHD of the ITAA 1936). The primary qualification period begins on the day after you acquire your NAB Capital Notes 5 and ends on the 90th day after the day NAB Capital Notes 5 becomes ex-distribution.
97. You need to have held NAB Capital Notes 5 'at risk' for a continuous period of 90 days (excluding the days of acquisition and disposal, if relevant) during the primary qualification period. Any days you had materially diminished risks of loss or opportunities for gain in respect of your holding are also excluded (former subsection 160APHO(3) of the ITAA 1936).
98. Under former subsection 160APHM(2) of the ITAA 1936, you are taken to have materially diminished the risks of loss and opportunities for gain on a particular day with respect to your NAB Capital Notes 5 if your net position on that day does not retain 30% or more of the risks and opportunities associated with holding NAB Capital Notes 5.
99. Embedded options such as the Resale and Conversion mechanisms do not represent separate positions in relation to NAB Capital Notes 5 (see also Taxation Determination TD 2007/29 *Income tax: holding period rule: is an embedded share option a position in relation to the share if it is exercisable by or against a party other than the issuer of the share?*). Under the Resale mechanism, you will only be taken to have made an offer to sell NAB Capital Notes 5 if NAB issues a Resale Notice. As NAB is the only party entitled to make an election to exercise the Resale option, it is not a separate position that you have taken in relation to your NAB Capital Notes 5. Similarly, under the Conversion mechanism you do not have the right to elect Conversion of your NAB Capital Notes 5 and neither does NAB have an obligation to Convert.
100. Therefore, the Resale and Conversion mechanisms will not, of themselves, affect your risks of loss or opportunities for gain in respect of your NAB Capital Notes 5.
101. However, if you do enter into any risk management strategies in respect of your NAB Capital Notes 5 that have the effect of reducing your risks of loss and opportunities for gain below 30% (for example, by the use of limited recourse loans, options or other derivatives), then you will not be considered a qualified person in respect of a Distribution.

**Ordinary Shares received on Conversion not a dividend or a non-share dividend**

102. You are not a shareholder of NAB in respect of your NAB Capital Notes 5 holding. Accordingly, you will not receive a 'dividend' as defined in subsection 6(1) of the ITAA 1936.
103. The application of the Face Value to subscribe for Ordinary Shares on Conversion of NAB Capital Notes 5 is a crediting of that amount to you and, therefore, a non-share distribution under section 974-115.

104. All non-share distributions are non-share dividends unless they are debited against the distributing company's non-share capital account or its share capital account (section 974-120).

105. The allocation and issue of Ordinary Shares to you on Conversion of NAB Capital Notes 5 will not be a non-share dividend as defined in section 974-120, as the Face Value of NAB Capital Notes 5 will be debited against NAB's non-share capital account.

## Section 45 of the ITAA 1936

106. Section 45 of the ITAA 1936 applies where a company streams the provision of shares and the payment of minimally franked dividends to its shareholders in such a way that:

- the shares are received by some shareholders but not all shareholders, and
- some or all of the shareholders who do not receive the shares receive or will receive minimally franked dividends.

107. NAB's distribution/dividend payout ratios in relation to its Ordinary Shares and other equity interests are not expected to change as a result of issuing NAB Capital Notes 5. The extent to which NAB's distributions/dividends will be franked (including Distributions on NAB Capital Notes 5) will depend on a number of factors, including the Group's capital management plan and the level of profits generated by the Group that will be subject to tax in Australia.

108. Under the Terms, NAB is unable to issue Ordinary Shares to all or some Holders in satisfaction of their Distribution entitlement under NAB Capital Notes 5. The issue of Ordinary Share on Conversion merely reflects a change in the type of equity interests held by Holders in NAB.

109. Based on the information provided and having regard to the circumstances of the scheme, section 45 of the ITAA 1936 will not apply to treat the value of Ordinary Shares issued to you on Conversion as an unfrankable dividend.

## Section 45A of the ITAA 1936

110. Section 45A of the ITAA 1936 applies where a company streams capital benefits and the payment of dividends to shareholders who would derive a greater benefit from receiving the capital benefits (the advantaged shareholders), and it is reasonable to assume that other shareholders (the disadvantaged shareholders) have received, or will receive, dividends.

111. Both the issue of Ordinary Shares on Conversion and the Redemption of NAB Capital Notes 5 will constitute the provision of a capital benefit to Holders (paragraph 45A(3)(a) of the ITAA 1936 for an Conversion, and paragraph 45A(3)(b) of the ITAA 1936 as affected by subsection 45A(3A) of the ITAA 1936 for a Redemption).

112. However, the issue of Ordinary Shares on Conversion and the Redemption of NAB Capital Notes 5 will not constitute the streaming of capital benefits because under a Conversion or Redemption, NAB will not selectively direct the flow of capital benefits to Holders who could most benefit from the receipt of capital. Accordingly, as this requirement does not apply to the Conversion or Redemption of NAB Capital Notes 5, the Commissioner will not make a determination to treat the whole or a part of the capital benefit received by Holders as an unfranked dividend.

**Section 45B of the ITAA 1936**

113. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends. Where the conditions are met, the Commissioner may make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or a part, of the capital benefit such that it will be treated as an unfranked dividend.

114. The issue of Ordinary Shares to Holders on Conversion and the Redemption of NAB Capital Notes 5 will each constitute a scheme under which Holders are provided with a capital benefit by NAB (paragraphs 45B(5)(a), (5)(b) and subsection 45B(7) of the ITAA 1936). As a result, paragraph 45B(2)(a) of the ITAA 1936 will be satisfied.

115. At least some Holders will obtain a tax benefit as defined in subsection 45B(9) of the ITAA 1936 as a result of a Conversion or Redemption. As a result, paragraph 45B(2)(b) of the ITAA 1936 will be satisfied.

116. Therefore, whether section 45B of the ITAA 1936 will apply to a Conversion or Redemption turns on whether paragraph 45B(2)(c) of the ITAA 1936 will be satisfied. This involves considering the relevant circumstances, including but not limited to those listed in subsection 45B(8) of the ITAA 1936, of the Conversion and Redemption schemes to establish whether one of the persons who will enter into or carry out the schemes will do so for a more than incidental purpose of enabling a relevant taxpayer (the Holder) to obtain a tax benefit.

117. Having regard to the relevant circumstances, it could not be concluded that the Conversion or Redemption of NAB Capital Notes 5 will be entered into for a more than incidental purpose of enabling Holders to obtain a tax benefit. Accordingly, paragraph 45B(2)(c) of the ITAA 1936 would not be satisfied and the Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or a part of the capital benefit provided to Holders on Conversion or Redemption.

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