

Received ...
24 SEP 2007
Board of Taxation

35 Veterans Parade
Collaroy Plateau
NSW 2097

20 September 2007

Attention – Mr Vernon Joice

The Board of Taxation
c/o Treasury
Langton Crescent
CANBERRA
ACT 2600

Dear Sirs

Off-market share buybacks

Enclosed please find my final submission dated 20th September 2007.

It follows my letter of 6th May 2007, my letter 8th September 2007 and my email of 12th September 2007.

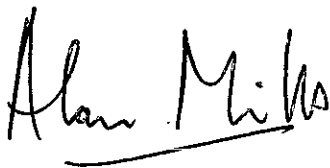
My letter of 8th September 2007 should have the words “there is” deleted before the words “it is nil” in the third sentence of the second paragraph. A corrected copy is attached.

I apologise for being late with my submissions. But please bear in mind my comments on Section 1.10 of the Discussion Paper in my final submission dated 20th September 2007.

I agree that the Board of Taxation may publish my letters, email and final submission as it sees fit.

I look forward with great interest to reading the Board of Taxation’s final recommendations to the Government.

Yours faithfully



Alan W. M. Mills



alanamr@hotmail.com

Printed: Wednesday, 12 September 2007 8:50

From: Alan Mills <alanamr@hotmail.com>
Sent: Wednesday, 12 September 2007 8:48:16 AM
To: vernon.joice@treasury.gov.au
Subject: A question please

Dear Mr. Joice

Many thanks for sending me the Discussion Paper. It arrived Monday afternoon and I have been reading it.

A question I am considering is the capital gains tax implications of off-market share buybacks. I thought the Board was doing to calculate how much capital gains tax has not been paid as a result of the off-market share buybacks providing offsets. Section 4.31 says this is "determined" by Section 4.32 suggests [redacted] it is not because of the alleged double taxation mentioned in Section 3.49. But the example in Section 3.50 is incorrect. The average dividend yield for a listed company is about 4%. Applying that to a dividend of \$70 as in the example a BGE share has a market value of \$1750. Shareholder X might suggest would never sell his share for \$80 if \$1750 was his market value. It is not correct that the capital gain reflects only the retained profits (in BGE - expected future profits) and many other things are what drive market value. There is no double taxation since the tax on the dividend is a tax on past profits. There should require both the shareholder (example in Section 3.50 and Section 4.32) to be considered. Dividends or dollars may have been lost to the general taxation revenue from off-market share buybacks via this capital gains tax offset. This I think is the big issue. Is there another question I should consider?

Many thanks

Best regards
 Alan Mills

Off-Market Share Buybacks

20th September 2007

By Alan W.M. Mills, Collaroy Plateau, NSW 2097

Introduction

- 1) I believe off-market share buybacks for listed companies should be outlawed.
- 2) This document first comments on what appears to be omitted from the Discussion Paper "REVIEW OF THE TAXATION TREATMENT OF OFF-MARKET SHARE BUYBACKS", then, using the Section numbering of the Discussion Paper, it comments on those Sections, and finally there is a brief conclusion.

Apparent Omissions from the Discussion Paper

- 3) There appear to be three important omissions -
 1. The most important omission is a calculation of the capital gains tax lost as a result of the gifted capital losses in off-market share buybacks.

It is this capital gains tax lost that could run to billions of dollars every year. See my comments on Section 2.22 for a solution to calculating this capital gains tax lost. This is BIG ISSUE NUMBER 1. See also my comments on Sections 3.49, 3.50, particularly 4.13, and 4.32 and 5.31.
 2. The second omission is a reference to a specific Section of the Tax Law that prescribes full franking of prescribed dividends within an off-market share buyback. If there is no such Section of the Tax Law (not even ITAA 1997 section 202-40) the dividends in off-market share buybacks should have been unfranked. Any resolution by a Board of Directors would have to be for all shareholders, rather than selective. Please see my comments on Section 3.11. This is BIG ISSUE NUMBER 2. Indeed it could be argued that ITAA 1997 section 202-45(c) may prohibit the franking of prescribed dividends under ITAA 1936 section 159GZZZP.
 3. The third omission is a realistic example of how an off-market share buyback might work. The example given in Section 3.50 is unacceptable and column S of Table 4.1 is also misleading because it does not consider the most beneficial case for a complying superannuation fund (in other words one where the gifted capital losses are highest).

Comments on the Sections of the Discussion Paper

Foreword. I do not agree that off-market share buybacks have become increasingly popular. It may be true that large superannuation fund shareholders, or charities, like them and even that listed companies themselves like them but non-participating shareholders do not and I believe this latter group may include foreign shareholders.

- 1.1 I presume that the Board of Taxation is relying on the words "... a review of the taxation treatment ..." to avoid looking at issues of fairness. However the last term of reference allows the Board to take into account "any other matters the

- Board considers appropriate” – but see my comments on Section 5.31. So if the Board wishes to it may consider issues of fairness, particularly those pertaining to non-participating shareholders and the application of the Corporations Law.
- 1.2 I believe the greatest value of taxation dollars lost is tied up with the penultimate term of reference – “the capital gains tax implications of off-market share buybacks”.
 - 1.3 None of my comments relate to unlisted companies. I think they should be dealt with separately in the Tax Law.
 - 1.4 A small shareholder representative could perhaps have been seconded to the Working Group.
 - 1.5 I hope the Board has consulted with the Australian Shareholders Association. I understand work is still being done on its position regarding off-market share buybacks.
 - 1.6 Good.
 - 1.7 A good start. My only comment is that I hope is the pro-and-con stakeholders have been equally represented.
 - 1.8 Was the Australian Securities and Investments Commission consulted to ensure the line drawn between supervision of the Tax Law and supervision of the Corporations Law had no cracks in it? If not, I believe this is important too.
 - 1.9 Good.
 - 1.10 The public has waited for the Discussion Paper from 10th October 2006 until 16th July 2007. It is far too short to then hold consultation meetings just ten days later in Sydney and fifteen days later in Melbourne. In my own case I was overseas from 17th July 2007 until 22nd August 2007 and did not hear about the Board’s publication of its Discussion Paper until after my return. This timing may not ensure full and proper consideration of the issues involved.
 - 1.11 The closing date of 24th August 2007 for written submissions is far too early. The Board should also have advertised its contact details far more widely. I had great difficulty finding them.
 - 1.12 Good.
 - 1.13 Good.
 - 1.14 Good.
 - 2.1 It would be most helpful to know the precise Sections of the Corporations Act 2001 to which the Discussion Paper is referring. The legal basis of off-market share buybacks needs to be tested. Whether directors have fulfilled their duties and obligations to all shareholders and passed the requisite Board of Directors’ resolutions while being fair to all shareholders is of crucial importance.
 - 2.2 In the Discussion Paper it needs to be made clear which type of buyback an off-market share buyback is under the Corporations Law. Currently this is not made clear. If an off-market share buyback is a “Selective buyback” for instance under

Section 257D special shareholder resolutions are required. But in many actual off-market share buybacks I believe no such special resolutions have been passed. I think the Board should consider each off-market share buyback in Appendix B and determine which Section of the Corporations Act 2001 it comes under and whether the appropriate Board of Directors' and Shareholders' resolutions have been passed. All this information should be easy to obtain from the companies involved as a simple matter of fact. Also Corporations Act 2001, section 9 should be included in Appendix C.

- 2.3 The two kinds of buybacks under the Tax Law need to be mapped with the five kinds under the Corporations Law. One could then see the whole legal basis for the off-market share buybacks of listed companies in one place. I believe it is most important that the Discussion Paper does this. In so far as it has not done this, but only mapped on-market buybacks, the Discussion Paper is vague and lacking the clarity it should have.
- 2.4 A small step along the path requested in 2.3 above.
- 2.5 Noted.
- 2.6 On-market share buybacks are fine and achieve the objectives mentioned.
- 2.7 Noted.
- 2.8 The role of the 'share capital account' in a buyback may need further clarification. For instance the accounting for a share issued for \$1 but bought back ten years later for say \$3 needs to be defined. The apparent \$2 "loss" by the company needs to be set against the increase in market value of the share, but companies do not book such increases in the market value of their shares (perhaps they should after a buyback, for the bought back shares, with the debit being charged to the current profit & loss account as a realized expense in the interests of maintaining the protective capital of the company). So instead a charge against retained profits has been allowed I presume. Clearly this is an interesting puzzle but not insoluble. I would recommend applying the KISS principle – keep it simple – and hence I am very much in favour of keeping capital transactions and dividend transactions completely separate. They are complicated enough as it is. We do not need to muddy the waters even further.
- 2.9 Which section of Income Tax Assessment Act 1936 prescribes the full franking of prescribed dividends? If there is no such section the dividends in off-market share buybacks should be unfranked. THIS IS BIG ISSUE NUMBER 2 again – see my section 3) 2. In addition ITAA 1997 section 202-45(c) may prohibit the franking of prescribed dividends under ITAA 1936 section 159GZZZP.
- 2.10 I remain unconvinced that the distribution of \$164.6 million franking credits was permissible. It appears to me there are good arguments that need to be answered in Tax Law and in the Corporations Law that the non-participating shareholders may have had some of their franking credits taken away from them unfairly.
- 2.11 None of the objectives listed are unique to off-market share buybacks.

- 2.12 I am not aware that any of these buybacks involve the payment of fully franked dividends.
- 2.13 Noted.
- 2.14 Not sure what is being talked about in this section.
- 2.15 Noted.
- 2.16 Agreed.
- 2.17 Noted.
- 2.18 Noted.
- 2.19 Noted.
- 2.20 Noted.
- 2.21 Noted.
- 2.22 Note 13 says of the list in Appendix B “The list does not include selective buybacks ...” yet Sections 2.2 and 2.3 appear to suggest that selective buybacks are off-market share buybacks, so why are selective buybacks excluded? To have distributed \$7.3 million unfairly via off-market share buybacks is not good - non-participating shareholders have a case that should be answered properly. Also one might ask here which type of participating shareholder has benefited the most? Are they a limited number of large shareholders across all listed companies? It should be easy for the Board of Taxation to find this information; just ask the companies involved to list the fifty biggest payments in their off-market share buybacks and consolidate the information on a spreadsheet. And then look at the capital gains tax savings of those big shareholders too and one has a large percentage of the information one needs for the BIG ISSUE NUMBER 1 – see my Section 3) 1, the most important omission from the Discussion Paper.
- 2.23 Noted.
- 2.24 Noted.
- 2.25 Noted.
- 2.26 Off-market share buybacks that involve fully franked dividends should be banned for listed companies.
- 2.27 A great deal more should be known, and reported on by the Board of Taxation, about the different classes of shareholders that find off-market share buybacks attractive now. Until this knowledge is publicly shared as a matter of fact some commentators may be shooting in the dark. [Late comment – Chapter 5 starts this process.]
- 2.28 Agreed. Good.
- 2.29 Personally I think 30% of the tax paid by companies should not be available for franking credits. The Government should keep that 30% permanently. But that is another issue! And the other 70% should expire after seven years in so far as it is available for franking credits. Another time, another place.

- 2.30 Noted.
- 2.31 It should be noted that high marginal rate taxpayers may seek to reduce their capital gains tax via being gifted with artificial capital losses. In other words they may find off-market share buybacks very attractive.
- 2.32 Noted.
- 2.33 What sort of greater flexibility? Has it made it more confusing for ordinary shareholders?
- 2.34 The relevant Sections of the Laws mentioned in note 18 should be provided in Appendix D.
- 2.35 Noted. If franking credits are not prescribed for off-market share buybacks, neither are their being refunded.
- 2.36 I agree that the primary concern of Tax Law should be the raising of tax revenue for the Government. I also believe it should be very clear (ie without contradiction) and fair.
- 2.37 If a listed company uses an off-market share buyback in order to stream franking credits to large shareholders who happen to be superannuation funds I think that would be wrong. The benefit enjoyed by the large superannuation funds would be mirrored by the loss experienced by the aggrieved non-participating shareholders.
- 2.38 Just use on-market buybacks that have no fully franked dividend component.
- 2.39 Noted.
- 2.40 Noted.
- 2.41 I do not know what the Board means by “equity” here; nor what it means by “progressivity”. Please explain.
- 2.42 Please provide an example of someone, other than a foreign resident shareholder, who cannot use a franking credit. Would a listed company have given them one?
- 2.43 Noted.
- 2.44 I do not know what the Board means by “progressivity” here. Please explain.
- 2.45 Good.
- 2.46 Noted.
- 2.47 Agreed.
- 3.1 Noted.
- 3.2 Noted.
- 3.3 Noted.
- 3.4 I think there needs to be a special column for off-market share buybacks of listed companies in Table 3.1 Does the “Selective buyback” column apply to them or

- not? If “yes” should all off-market share buybacks of listed companies have been preceded by a successful Special Resolution of shareholders?
- 3.5 All off-market share buybacks by listed companies should require a resolution at least by the Board of Directors, who of course would have to declare any dividend for all shareholders.
- 3.6 I would suggest that from a shareholder’s perspective an off-market share buyback (of a listed company) is unlike any other share sale in so far as it involves a fully franked dividend!
- 3.7 Noted. Clearly an accounting standard is needed to prescribe how a company should allocate the buyback price between share capital and other accounts – please see my suggestion in my comment on Section 2.8
- 3.8 I disagree with the Australian Securities & Investments Commission granting the approval mentioned. Non-participating shareholders should have had a vote on a Special Resolution as to whether off-market share buybacks with fully franked dividends by listed companies should proceed. I think such resolutions would comprehensively fail.
- 3.9 Again non-participating shareholders should have had a vote on a Special Resolution as to whether off-market share buybacks with fully franked dividends by listed companies should proceed.
- 3.10 Noted.
- 3.11 Section 159GZZZP of the ITAA 1936 prescribes a dividend for off-market share buybacks. But Section 159GZZZP never mentions the words “fully franked” and as such full franking is not prescribed. Accordingly the dividends in off-market share buybacks should have been unfranked unless there is another Section of the Tax Law that prescribes full franking – such a Section should be specifically identified in the Discussion Paper, but it is not. In particular a prescribed dividend is not an ordinary dividend. Note 35 appended to Section 3.21 refers to ITAA 1997, section 202-40 but on looking it up on the ATO website I have not found a Section that prescribes full franking to prescribed dividends. On the contrary I found section 202-45(c) which may prohibit franking of prescribed dividends. THIS IS BIG ISSUE NUMBER 2 again.
- 3.12 I disagree with this Section. When a company has cancelled some of its shares after paying an amount in excess of the “share capital” of those shares that excess has to be accounted for. In a sense the company has suffered a loss that needs to be set against profits. And there is an issue as to how best this might be done. An accounting standard is needed.
- 3.13 Noted.
- 3.14 Agreed.
- 3.15 Noted.
- 3.16 Noted.
- 3.17 Section 159GZZZP mentions neither “dividend component” nor “capital component”. The Discussion Paper needs to be more precise.

- 3.18 I think a more important rationale would be to have consistency with on-market buybacks.
- 3.19 The company's decision also needs to be fair and reasonable!
- 3.20 Noted.
- 3.21 The key question is which ITAA 1997 Section in 202-40 prescribes full franking to a prescribed dividend. If there is none the dividends in off-market share buybacks of listed companies should be unfranked. THIS IS BIG ISSUE NUMBER 2 again.
- 3.22 I think there should be an accounting standard that determines the so called "capital component". It is inappropriate to leave this to the Australian Taxation Office.
- 3.23 Noted, but an example of how the so called "capital component" is adjusted for market value should be given. How is the "market value uplift" entered into the books of account of the company?
- 3.24 Noted.
- 3.25 Noted.
- 3.26 Noted.
- 3.27 Noted.
- 3.28 Noted.
- 3.29 Good.
- 3.30 Some commentary in the Discussion Paper on how companies account for share prices in excess of share capital values would be most useful. Clearly the cash payments on-market to buyback shares may exceed the share capital value of those shares – so what happens to this debit value? Is it a loss? Is it amortized over a number of years? Can there be an off-setting provision for it?
- 3.31 This seems unfair to me.
- 3.32 Noted.
- 3.33 Noted.
- 3.34 Noted.
- 3.35 Noted.
- 3.36 Noted. Perhaps the holding period for off-market share buybacks should be one year, with the 'last in first out' basis specifically not applying.
- 3.37 Noted.
- 3.38 Noted.
- 3.39 As participating shareholders receive greater franking credit benefits than non-participating shareholders should not the Commissioner use his discretion to deny such benefits of streaming?

- 3.40 It seems that the Commissioner has some room to move here to correct any unfairness inflicted on non-participating shareholders.
- 3.41 Clearly the dividends in off-market buybacks should be unfranked.
- 3.42 Clearly off-market buybacks involve streamed dividends.
- 3.43 Clearly some of the benefits of off-market buybacks should be treated as unfranked dividends. The Discussion Paper omits to clarify this – BIG ISSUE NUMBER 2 again.
- 3.44 Noted.
- 3.45 More explanation is required as to what the Commissioner might do here.
- 3.46 More explanation is required as to what the Commissioner might do here.
- 3.47 More explanation is required as to what the Commissioner might do here.
- 3.48 More explanation is required as to what the Commissioner might do here.
- 3.49 The comments by the Review are not correct. It is wrong to think of the payment for shares bought back as a distribution. Such a payment on-market is merely the payment of an acquisition cost for the shares. This muddle further reinforces the argument to keep capital transactions separate from revenue transactions.
- “...allowing the offsetting capital loss to the shareholder.” This I believe is the BIG ISSUE NUMBER 1 for the Discussion Paper. The Board of Taxation needs to calculate how much capital gains tax has been lost. See my comments on Section 2.22 for a possible methodology.
- 3.50 I believe the example given is unrealistic; and that the conclusions drawn are untrue. The average dividend yield for a listed company is about 4%. [In the Australian Financial Review of 14 September 2007 BHP’s dividend yield was quoted as 1.54% while CBA’s was quoted as 4.63%.] Accordingly applying 4% to a dividend of \$70 as in the example a BCo share has a market value of \$1,750. Shareholder X I suggest would never sell her share for \$80 if \$1,750 was its market value. It is not true that a capital gain reflects only the retained profits in a company. Expected future profits, potential takeovers and many other factors, are what drive market value and capital gains. So capital gains tax is not a tax on past profits. So there is no double taxation since the tax on the dividend is if you like a tax on past profits.

In considering the capital gains tax implications of off-market share buybacks I thought the Board was going to calculate how much capital gains tax has not been paid as a result of the gifted capital losses providing offsets. Section 4.31 says this is "difficult to determine". Section 4.32 suggests it is nil because of the alleged double taxation relief mentioned in Section 3.49. But the example in Section 3.50 is incorrect. Thus both the Shareholder X example in Section 3.50 and Section 4.32 need to be reconsidered. Billions of dollars may have been lost to the general taxation revenue from off-market share buybacks via this capital gains tax offset - this is BIG ISSUE NUMBER 1. Please also see my comments

on Section 4.13.

Some 2,350 years ago Aristotle, with his syllogisms, pointed out that if the statement "This apple is green" is true then it does not follow that the statement "All apples are green" is true. In other words generalizing from an example is a very dangerous methodology since others may have different examples that prove the antithesis.

I think the Discussion Paper should contain a great deal more about the capital gains tax lost.

- 3.51 Noted.
- 3.52 The Tax Office's document PS LA 2007/9 should be withdrawn, especially section 59.
- 3.53 This Section should at least give an indication of what TD 2004/22 says, or be cross referenced to other Sections that provide this information, or TD 2004/22 should be included in Appendix D.
- 3.54 Noted.
- 3.55 More information about these class rulings should be provided.
- 3.56 More information about these class rulings should be provided.
- 3.57 Noted.
- 3.58 Noted.
- 3.59 The Tax Office's document PS LA 2007/9 should be withdrawn, especially section 59.
- 3.60 Noted.
- 3.61 Noted.
- 3.62 Noted.
- 3.63 Noted.
- 3.64 It is quite wrong to think of the purchase price as streaming "capital benefits". It is just the purchase price of a share determined most importantly by the free market price.
- 3.65 Noted.
- 3.66 Noted.
- 3.67 More factual evidence should be obtained about those that buy shares when a buyback is announced and then sell those shares into the buyback.
- 3.68 It seems that the ASX Listing Rules facilitate buying into a buyback! As long as non-participating shareholders are not treated unfairly and there is no general loss of taxation revenue for the Government this may be acceptable, but one may surmise otherwise.

- 3.69 Noted.
- 3.70 What have been the results of the Tax Office's considerations?
- 3.71 What requisite purpose?
- 3.72 Noted.
- 3.73 The first sentence appears to have at least one word missing near "avoiding wastage".
- 3.74 Now "avoided wastage" is used. Please clarify.
- 3.75 I thought non-residents did not benefit at all from franking credits, rather than "did not fully benefit". Please clarify.
- 3.76 I do not agree with the Commissioner's rulings since it appears some shareholders may receive a very considerable tax benefit!
- 3.77 Noted.
- 3.78 OK
- 3.79 OK
- 3.80 OK
- 3.81 Please see my comments re Section 3.68
- 3.82 Noted.
- 3.83 Noted.
- 3.84 Noted.
- 3.85 Noted.
- 3.86 Noted.
- 3.87 Noted.
- 3.88 Noted.
- 3.89 Noted.
- 3.90 I would have thought that denying non-resident shareholders the benefits of franking credits alone was disincentive enough not to invest in Australian listed companies, comparatively speaking.
- 3.91 Noted.
- 3.92 Noted.
- 3.93 Noted.
- 3.94 It would be ridiculous to believe that the taxation arrangements of off-market share buybacks did not drive the levels of participation. Yet the Commissioner appears to dismiss this view viz Section 45B! See Section 3.76 again.
- 3.95 Which Section in Chapter 2 is being referred to?

- 4.1 There should be consequences because a company that buys its shares back for more than their share capital clearly makes a loss, a share buyback loss to be precise. This is a historical cost loss. However compared to the market price of its shares a company that buys back its shares for less than their market price appears to make a profit. This is a current price profit. The historical cost loss and the current price profit should not be confused.
- 4.2 Noted.
- 4.3 Noted.
- 4.4 Agreed.
- 4.5 Noted.
- 4.6 Noted.
- 4.7 47 days facilitates qualified people under the 45 day rule. This seems to be a coincidence of some importance. Those that bought in immediately after the announcement of the buyback can maximise their franking credits. Is not this evidence that taxation arrangements are driving off-market share buybacks? What more does one need?
- 4.8 Special dividends are adequate.
- 4.9 I prefer special dividends over off-market share buybacks.
- 4.10 Agreed, except it is a “prescribed” dividend not a “deemed” dividend.
- 4.11 OK
- 4.12 Clearly “S” that is a complying superannuation fund with a return on investment of 114% is the winner in Table 4.1. The losers are taxpayers generally and non-participating shareholders.
- 4.13 However had the complying superannuation fund bought its shares on-market for \$10 the day after the announcement it would not have held them for a year when it sold them into the buyback for \$9. Apparently it would then have had a larger capital loss of \$7 (rather than \$2) and no discount. So its capital loss after discount would have increased from \$1.33 to \$7! This is BIG ISSUE NUMBER 1 again, and the Discussion Paper has missed it. Please see my comments on Section 3.50 regarding the dangers of generalizing from one example.
- 4.14 Agreed and the process described shows why off-market share buybacks are unfair to non-participating shareholders.
- 4.15 Taxpayers generally are funding shareholders who use the capital losses. This is not the intention of the Tax Law.
- 4.16 Noted.
- 4.17 High tax rate shareholders may particularly enjoy the offset capability of the capital losses.
- 4.18 The model is too simplistic in what it purports to show. The capital losses are always attractive to high rate tax payers.

- 4.19 OK
- 4.20 Of course non-participating shareholders do not want to lose their franking credits!
- 4.21 This sounds like a red herring.
- 4.22 Noted.
- 4.23 OK
- 4.24 OK
- 4.25 OK
- 4.26 OK
- 4.27 OK
- 4.28 I agree that listed and unlisted companies should have different arrangements for all share buybacks.
- 4.29 It is quite wrong that anyone facilitates “the distribution of franking credits to those shareholders who are able to make the greatest use of them”. This deprives other shareholders of a lesser use that may still be of great value to them, compared to nothing! That some \$500 million a year of tax expenditure is lost in this way is a disgrace.
- 4.30 Noted.
- 4.31 This Section needs to be expanded considerably to explain why the Board of Taxation appears to accept the view that “The precise impact of off-market share buybacks on taxation revenue is difficult to determine”. I disagree. Please follow the methodology I suggest in my comments on Section 2.22.
- 4.32 Shareholders “enjoy” the capital loss as it is a gift. In the first sentence what does “... as it is consistent with the benchmark treatment mean”? Section 3.49 cannot be relied on and there is no double taxation. Top marginal rate tax payers who have just bought shares clearly may find off-market share buybacks very attractive since they are compensated twice for the capital losses they enjoy, once via a fully franked dividend and again when they offset their discounted capital gains!
- 4.33 OK
- 4.34 So the non-participating shareholders are paying for off-market share buybacks again if and when they have higher than normal capital gains later on! Not fair.
- 4.35 OK
- 4.36 “Yes” there is an unfair transfer of wealth between participating and non-participating shareholders in an off-market share buyback. “Not necessarily” appears to me to admit this. This is BIG ISSUE NUMBER 2 again.
- 5.1 Noted.
- 5.2 Noted.

- 5.3 Noted.
- 5.4 If non-participating shareholders start abandoning investment in listed companies because of their unfair treatment in off-market share buybacks I think that would be very sad and very inefficient for the economy.
- 5.5 There may be winners, but there are also losers. The views expressed in this Section are too one-sided.
- 5.6 Noted.
- 5.7 One does not need off-market share buybacks to do this.
- 5.8 This appears to be irrelevant to me.
- 5.9 This appears overly simplistic to me.
- 5.10 The other ways are better than off-market share buybacks.
- 5.11 How has the view “that on average, investors think that (off-market) buybacks are beneficial” been obtained? I have heard that 96% of non-participating shareholders disapprove of off-market share buybacks. Looking at the share price movement the day after the announcement is irrelevant. The price of copper may have jumped 5% overnight!
- 5.12 Not necessarily.
- 5.13 The company cancels the shares it buys back. It is hardly an investment.
- 5.14 The other mechanisms are fair and do not bring the market into disrepute.
- 5.15 Noted.
- 5.16 Optimising the use of franking credits is unfair. They vest in all shareholders, not a select few.
- 5.17 Noted.
- 5.18 Maybe.
- 5.19 Agreed.
- 5.20 Noted.
- 5.21 Noted.
- 5.22 A share buyback is a capital transaction. No dividends should be involved. And franking credits even less so.
- 5.23 Market value, for listed companies, is determined by the price of a share on the stock exchange. I am sure shareholders take franking credits into account when comparing what they will receive in an off-market share buyback with market value.
- 5.24 I agree that such dividends, if we have to have them at all, should be unfranked.
- 5.25 Noted.
- 5.26 No way should a grossed up dividend be given the CGT discount!

- 5.27 It is more likely that non-participating shareholders will get fed up with being ripped off and seek investments other than shares.
- 5.28 I agree that breaches appear to have been made.
- 5.29 The Tax Law and the Corporations Law should have one definition of a dividend and there should be no contradiction; otherwise a serious problem exists, akin to anarchy. The present situation is illogical to say the least. THIS IS A VERY IMPORTANT POINT.
- 5.30 ASIC should have intervened and banned off-market share buybacks for listed companies.
- 5.31 The Board of Taxation should express a view. Otherwise ASIC and the ATO will never resolve the matter. And it needs to be resolved to improve the credibility of the law generally.
- 5.32 Non-participating shareholders I would suggest want their fair share of their company's franking credits and to keep their shares. How is this view accommodated?
- 5.33 Noted.
- 5.34 The broader tax paying community is losing out significantly and I think the Board of Taxation should attempt to quantify this loss. BIG ISSUE NUMBER 1 again.
- 5.35 Noted.
- 5.36 Noted.
- 5.37 Usually there are no benefits to "the remaining shareholders" if the stolen franking credits are taken into account. Appendix J appears to confirm this in its third last paragraph.
- 5.38 Noted.
- 5.39 Noted.
- 5.40 Franking credits should not be involved in off-market share buybacks at all; they are not prescribed.
- 5.41 Non-participating shareholders suffering again!
- 5.42 Noted.
- 5.43 Special dividends would be good.
- 5.44 Noted.
- 5.45 I disagree because many investors, especially self-funded retirees, just want a fully franked dividend. So the franking credit has full value for them.
- 5.46 This may be just coincidental.
- 5.47 Noted.

- 5.48 It is wrong to conclude that a share price rise is a positive reaction. I believe 96% of non-participating shareholders disagree with the view expressed in this Section.
- 5.49 Noted.
- 5.50 St George Bank's approach is commendable but I would still prefer off-market share buybacks to be banned.
- 5.51 Noted.
- 5.52 Noted.
- 5.53 Perhaps some buy shares ten days before the formal announcement in order to sell them back in the three days after the announcement. Could be very profitable trading.
- 5.54 Noted.
- 5.55 Noted.
- 5.56 Noted.
- 5.57 See my comments at Section 5.53 – I agree.
- 5.58 Agreed.
- 5.59 The suggestion made is an improvement.
- 5.60 Noted.
- 5.61 Noted.
- 5.62 Noted.
- 5.63 I disagree with the first sentence here. Non-participating shareholders do not receive any benefits!
- 5.64 Noted.
- 5.65 The impact should be reported by the company as soon as it is known.
- 5.66 Noted.
- 5.67 Further information should be made available to the Board of Taxation.
- 5.68 A methodology should be established.
- 5.69 There is no prescription to frank the dividend at all.
- 5.70 Noted.
- 5.71 There should be an accounting standard.
- 5.72 I disagree with the double taxation issue. And whether one makes a capital loss or gain depends on how much one bought the share for.
- 5.73 Had the third party paid twice the market price the first sentence would be untrue.
- 5.74 "Resource-intensive" suggests inefficiency – so get rid of off-market share buybacks.
- 5.75 Noted.

- 5.76 So do not give a ruling.
- 5.77 Sounds very inefficient to me.
- 5.78 More inefficiency.
- 5.79 Very true.
- 5.80 Good point.

4) Conclusion

First please recommend banning off-market share buybacks for listed companies.

Second in order to avoid contradiction in our law, please recommend our having only one definition in law for a dividend of a listed company. One definition that both ASIC and the ATO can successfully and easily apply.

Third please accurately calculate the capital gains tax lost each year in the off-market share buybacks of listed companies.

Fourth please recommend pressing ahead with an accounting standard for all share buybacks, a standard in which capital transactions are always be distinct from revenue transactions.

Fifth it is important that ordinary shareholders do not become disenchanted with a listed company regime where they regularly lose their franking credits, or they will find other investments.

End