


# ***CR 2014/71 - Income tax: Westfield Group Plans - Scentre Group employees***

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## Class Ruling

### Income tax: Westfield Group Plans – Scentre Group employees

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#### **① This publication provides you with the following level of protection:**

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### **Relevant provision(s)**

2. The relevant provisions dealt with in this Ruling are:

- Section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Section 83A-110 of the ITAA 1997
- Section 83A-120 of the ITAA 1997
- Section 130-80 of the ITAA 1997, and
- Subsection 995(1) of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise stated.

## Class of entities

3. The class of entities to which this Ruling applies is individuals who:

- are residents of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*, including by virtue of the operation of any Australian Tax Treaties between Australia and any other country on 30 June 2014 (Implementation Date)
- are not temporary residents as defined in subsection 995-1(1) on the Implementation Date
- hold one or more of Performance Rights, Indeterminate Performance Rights, an Award under the Executive Deferred Award Plan (EDAP) or an Award under the Partnership Incentive Plans (PIPs) (the EDAP and PIPs together are the Cash Awards) on the Implementation Date (collectively, WDC Awards)
- were employees of Westfield Limited (WL) (now Scentre Limited), a wholly owned subsidiary of Westfield Holdings Limited (WHL) (now Scentre Group Limited), at the time the WDC Awards were granted
- continue to be employees of WL following implementation of the Proposal
- have not qualified for a payout in relation to their Cash Awards, and
- are not subject to the taxation of financial arrangements rules in Division 230.

(Note: Division 230 will generally not apply to individuals unless they made an election for it to apply to them.)

In this Ruling, a person belonging to this class of entities is referred to as a Participant.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 33 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

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## Date of effect

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7. This Ruling applies from 1 July 2013 to 30 June 2020. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

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## Scheme

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8. The following description of the scheme is based on information provided by the Applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class ruling application dated 21 May 2014
- Westfield Group Securityholder Booklet dated 14 April 2014 and Westfield Group Supplementary Securityholder Booklet dated 9 May 2014
- Westfield Performance Rights Plan dated 10 December 2010 as amended on 8 April 2014 and Westfield Performance Rights Plan dated March 2011 as amended on 8 April 2014 (collectively referred to as the PRPs)
- Westfield Performance Rights Plan dated 1 June 2008 as amended on 15 May 2012 and 8 April 2014 (Indeterminate PRP)
- Westfield 2011 EDAP – AU & NZ dated March 2010 as amended on 8 April 2014
- Westfield 2010 PIP – AU & NZ dated March 2010 as amended on 8 April 2014 and Westfield 2011 PIP – AU & NZ dated March 2010 as amended on 8 April 2014 (collectively referred to as PIPs), and
- Correspondence from the Applicant dated 26 June 2014 and 13 August 2014.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

9. The Westfield Group was formed in July 2004 by the stapling of the Australian Securities Exchange (ASX) listed securities of WHL, a public company, to Westfield Trust (WT) and Westfield America Trust (WAT), both public unit trusts, and collectively WHL, WT and WAT are referred to as the WDC Group. The stapled securities were quoted and traded together on the ASX under the code 'WDC' (WDC Securities).

10. The Westfield Retail Trust (WRT) was established in December 2010. WRT is an ASX listed stapled property trust. WRT comprises two public unit trusts, WRT1 and WRT2. The securities of WRT1 and WRT2 were quoted and traded together on the ASX under the code 'WRT' (WRT Securities).

11. WHL has issued rights (for nil consideration) to acquire WDC Securities to Participants which are exercisable for nil consideration under the PRPs. These rights were issued before 1 January 2012 and are not cash settleable (Performance Rights). There are no performance hurdles applying to the Performance Rights.

12. WHL has also issued rights on or after 1 January 2012 (for nil consideration) that were able to be settled through the transfer or issue of WDC Securities or the payment of cash under the Indeterminate PRP (Indeterminate Performance Rights).

13. Broadly, the PRPs and Indeterminate PRP provide for the issue of rights with a 3 to 5 year vesting period. During the vesting period, a Participant's entitlement to the rights lapses if the Participant ceases employment with the WDC Group, and additionally for the Indeterminate Performance Rights, if performance hurdles are not met.

14. The EDAP is a cash bonus plan administered by WHL. The quantum of the cash bonus was determined by reference to the market value of WDC Securities on the relevant payment date.

15. The PIPs are cash bonus plans administered by WHL. The quantum of the cash bonus was determined by reference to the market value of WDC Securities on the relevant payment date.

16. The EDAP and PIPs are cash based plans with similar vesting and forfeiture provisions.

## Proposal

17. On 4 December 2013, the WDC Group and WRT jointly announced a proposal to restructure the WDC Group and merge the group's Australian and New Zealand assets with WRT to create two separate ASX listed stapled groups:

- Westfield Corporation (WC), which will own and operate shopping centres in the US, UK and Europe, and
- Scentre Group (SG), which will own and operate shopping centres in Australia and New Zealand.

This restructure is hereinafter referred to as the Proposal.

18. The Proposal was approved by WDC Group Securityholders on 29 May 2014 and WRT Securityholders on 20 June 2014 and involved three main steps:

- Step 1 Restructure
- Step 2 De-stapling, and

- Step 3 Merger.

19. Just after the implementation of the Proposal WDC Securityholders will own 1 stapled security in WC and 1.246 stapled securities in SG for every 1 WDC Group stapled security they owned just before the Implementation Date.

### **Impact of the Proposal on Performance Rights**

20. Participants were given two options in relation to the reconstruction of their Performance Rights. To facilitate the two options, the terms of the PRPs were amended, as permitted by the relevant plan rules (PRP Amendments).

#### ***Option 1***

21. Under Option 1, the terms of the Performance Rights were varied so that on vesting, the Performance Rights are settled with SG Securities. The Applicant has advised that the number of Performance Rights are adjusted to ensure that Participants are not advantaged or disadvantaged as a result of the Proposal in a way that is inconsistent with the impact of the Proposal on WDC Securityholders. The vesting conditions and disposal restrictions continue to apply to the Performance Rights, as varied.

#### ***Option 2***

22. Under Option 2, the terms of the Performance Rights were varied so that on vesting, the Performance Rights are settled with both SG Securities and WC Securities. Where vesting arises as a result of the vesting conditions being satisfied or the Participant ceasing employment, the Performance Rights vest in full. Where vesting arises as a result of a merger or acquisition, winding up, or de-listing from the ASX, of either SG or WC, the Performance Rights may partially vest. As for Option 1, the vesting conditions and disposal restrictions continue to apply to the Performance Rights, as varied.

### **Impact of the Proposal on Indeterminate Performance Rights**

23. Participants were given two options in relation to the reconstruction of their Indeterminate Performance Rights. To facilitate the two options, the terms of the Indeterminate PRP were amended, as permitted by the relevant plan rules (Indeterminate PRP Amendments).

***Option 1***

24. Under Option 1, the terms of the Indeterminate Performance Rights were varied so that on vesting they are settled with SG Securities or a cash payment, the quantum of which is determined by reference to the SG Securities. The Applicant has advised that the number of Indeterminate Performance Rights are adjusted to ensure that Participants are not advantaged or disadvantaged as a result of the Proposal in a way that is inconsistent with the impact of the Proposal on WDC Securityholders. The minimum employment conditions and disposal restrictions continue to apply to the Indeterminate Performance Rights, as varied. Furthermore, performance hurdles on foot have already been tested and therefore have not been replicated or are waived.

***Option 2***

25. Under Option 2, the terms of the Indeterminate Performance Rights were varied so that on vesting, the Indeterminate Performance Rights are settled with SG Securities or a cash payment (the quantum of which is determined by reference to the SG Securities) and a cash payment (the quantum of which is determined by reference to WC Securities). That is, in contrast to the Performance Rights, the part of the reconstructed Indeterminate Performance Rights that relate to WC Securities are settled in cash only. As for Option 1 the minimum employment conditions and disposal restrictions continue to apply to the Indeterminate Performance Rights, as varied. Vesting of the recomposed Indeterminate Performance Rights is not subject to a performance hurdle.

**Impact of the Proposal on Cash Awards**

26. Participants in the EDAP and PIPs were given two options. To facilitate the two options, the terms of the EDAP and PIPs were amended (Cash Award Amendments).

***Option 1***

27. Under Option 1, the relevant 'Security' for determining the cash payment is SG Securities. The Applicant has advised that the cash payments are adjusted to ensure that Participants are not advantaged or disadvantaged as a result of the Proposal in a way that is inconsistent with the impact of the Proposal on WDC Securityholders. The minimum employment conditions and disposal restrictions continue to apply to the Cash Awards, as varied. Furthermore, performance hurdles on foot have already been tested and therefore have not been replicated or are waived.

**Option 2**

28. Under Option 2, the relevant 'Security' for determining the cash payment is both SG Securities and WC Securities. As for Option 1 the minimum employment conditions and disposal restrictions continue to apply to the Cash Awards, as varied. Vesting of the recomposed Cash Awards is not subject to a performance hurdle.

**Other**

29. The Applicant has advised that prior to and subsequent to the PRP Amendments and implementation of the Proposal, each Performance Right:

- is an ESS interest for the purposes of Division 83A, and
- is subject to a real risk of forfeiture, such that the ESS deferred taxing points in section 83A-120 apply as all of the other conditions in section 83A-105 are satisfied.

30. The Applicant has advised that prior to and subsequent to the Indeterminate PRP Amendments and implementation of the Proposal each Indeterminate Performance Right:

- is capable of becoming an ESS interest for the purposes of Division 83A, and
- is an indeterminate right for the purposes of section 83A-340 and for which the taxing points are determined under section 83A-120 when satisfied with WDC Securities (prior to) or SG securities (subsequent).

31. The PRP Amendments, Indeterminate PRP Amendments and the Cash Award Amendments became effective on the Implementation Date.

32. In this Ruling a reference to Restructure refers to the implementation of the Proposal and the PRP Amendments, the Indeterminate PRP Amendments, or the Cash Award Amendments as applicable.

33. The Applicant has advised that at the time of the Restructure no Participants held a beneficial interest in more than 5% of the securities in SG/WC and were not in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of SG/WC.

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**Ruling****Performance Rights**

34. The Restructure did not give rise to an ESS deferred taxing point under section 83A-120 for Participants who chose either Option 1 or Option 2 in respect of their Performance Rights.



35. The Restructure did not result in a capital gain or capital loss arising for Participants who chose either Option 1 or Option 2 in respect of their Performance Rights.

36. If a subsequent ESS deferred taxing point occurs to a Performance Right, pursuant to section 83A-110:

- for Participants who chose Option 1, the market value of the Performance Right that relates to SG Securities (less any cost base) will be included in their assessable income, and
- for Participants who chose Option 2, the market value of the Performance Right that relates to both SG Securities and WC Securities (less any cost base) will be included in their assessable income.

## **Indeterminate Performance Rights**

37. If the Indeterminate Performance Rights are satisfied with SG Securities under Option 1 or Option 2, the Restructure does not give rise to an ESS deferred taxing point under section 83A-120 for Participants who chose either Option 1 or Option 2 in respect of their Indeterminate Performance Rights.

38. The Restructure does not result in a capital gain or capital loss arising for Participants who chose either Option 1 or Option 2 in respect of their Indeterminate Performance Rights, including where those Indeterminate Performance Rights are settled with a cash payment on vesting.

39. If a subsequent ESS deferred taxing point occurs to an Indeterminate Performance Right, pursuant to section 83A-110:

- for Participants who chose Option 1, the market value of the Indeterminate Performance Right that relates to SG Securities (less any cost base) will be included in their assessable income, and
- for Participants who chose Option 2, the market value of the Indeterminate Performance Right that relates to SG Securities (less any cost base) will be included in their assessable income.

40. Where Indeterminate Performance Rights are settled in cash, (whether in whole or in part) the cash amount will be included in the Participant's assessable income in the income year in which it is received pursuant to section 6-5. The Restructure did not result in these Participants deriving assessable income pursuant to section 6-5 at the time of the Restructure.

## **Cash Awards**

41. The Restructure did not result in a Participant who chose either Option 1 or Option 2 deriving assessable income pursuant to section 6-5.

42. The Restructure did not result in a capital gain or capital loss arising for Participants who chose either Option 1 or Option 2 in respect of their Cash Awards.

43. The quantum of the cash payment received on vesting of the Cash Awards will be included in the Participant's assessable income in the income year in which it is received pursuant to section 6-5.

#### **Reportable fringe benefits amount**

44. A 'reportable fringe benefits amount' (as defined in subsection 995-1(1)) did not arise for a Participant holding a Performance Right, Indeterminate Performance Right, or a Cash Award, as a result of the Restructure.

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**Commissioner of Taxation**

3 September 2014

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## Appendix 1 – Explanation

**①** *This Appendix 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.*

### Performance Rights

45. A stapled security is treated in the same way as a share for the purposes of Division 83A under section 83A-335, provided that at least one of the elements in the stapled security is a share in a company. Rights to acquire such stapled securities are treated as rights to acquire shares.

### **No ESS deferred taxing point – Restructure**

46. Under subsection 83A-110(1), an amount will be included in the assessable income of a Participant in respect of their ESS interest in the income year in which the ESS deferred taxing point occurs.

47. The ESS deferred taxing point for a right is worked out under section 83A-120.

48. Section 83A-120 provides that the ESS deferred taxing point for the PRPs will occur at the earliest of the following times:

- when the Performance Rights have not been exercised, there is no real risk of forfeiting the Performance Rights, and the scheme no longer genuinely restricts disposal of the Performance Rights (subsection 83A-120(4))
- when the Participant ceases employment in respect of which they acquired the Performance Rights within the meaning of section 83A-330 (subsection 83A-120(5))
- seven years after the Participant acquired the Performance Rights (subsection 83A-120(6)), and
- when there is no real risk of forfeiting the Performance Rights, or underlying securities and the scheme no longer genuinely restricts exercise of the Performance Rights or disposal of the resulting securities (subsection 83A-120(7)).

49. However, if the Participant disposes of the Performance Rights (or the securities acquired on exercise of the Performance Rights) within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of disposal (subsection 83A-120(3)).

50. But for the application of section 83A-130 a deferred taxing point will occur in relation to a Participant's Performance Rights as a result of the Restructure.

51. Section 83A-130 relevantly provides that where as a result of a restructure (including the structure of the ownership) of a company (the old company):

- an employee stops holding ESS interests in the old company that were acquired under an employee share scheme
- the employee acquires replacement ESS interests in a new company that can reasonably be regarded as matching the old ESS interests
- the replacement ESS interests relate to ordinary shares, and
- the employee at the time they acquire the replacement ESS interests:
  - does not hold a beneficial interest in more than 5% of the shares in the new company, or
  - is not in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of the new company,

the replacement ESS interests will, for the purposes of Division 83A, be treated as a continuation of the employee's ESS interests in the old company.

52. The Commissioner accepts that the Restructure is a restructure for the purposes of section 83A-130 and that as a result of the Restructure a Participant:

- stopped holding ESS interests in an old company that were acquired under an employee share scheme
- irrespective of whether they chose Option 1 or Option 2 in respect of their Performance Rights, is regarded as acquiring replacement ESS interests in a new company:
  - that can reasonably be regarded as matching their old ESS interests, and
  - that relate to ordinary shares.

53. Accordingly, as no Participant will have a beneficial interest in more than 5% of the shares in the new company or be in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of the new company, the Participant's replacement rights are for the purposes of Division 83A treated as a continuation of their rights in WDC Securities and there is no ESS deferred taxing point under section 83A-120 for Participants who chose either Option 1 or Option 2 in respect of their Performance Rights.

## **CGT**

54. Subsection 130-80(1) applies to disregard any capital gain or capital loss arising as a result of the Restructure, as each of the requirements in the provision are satisfied. Specifically:

- only CGT events E4, G1 and K8 are excluded from the operation of section 130-80, but none of these events are relevant for present purposes, and
- any CGT event would happen before an ESS deferred taxing point occurs.

55. Therefore, the Restructure does not result in a capital gain or capital loss arising for Participants who chose either Option 1 or Option 2 in respect of their Performance Rights.

## ***Subsequent ESS deferred taxing point***

56. Where Option 1 was chosen, the Performance Right wholly relates to SG Securities. As such, the market value of the Performance Right as determined by reference to the SG Securities (less any cost base) at the time of the ESS deferred taxing point will be included in the Participant's assessable income under section 83A-110 when an ESS deferred taxing point occurs.

57. Where Option 2 was chosen, the Performance Right relates partly to SG Securities and partly to WC Securities. Pursuant to section 83A-110 the market value of the Performance Right as they relate to both SG Securities and WC Securities (less any cost base) will be included in a Participant's assessable income.

## **Indeterminate Performance Rights**

### ***No ESS deferred taxing point for Indeterminate Performance Rights settled with SG Securities***

58. For similar reasons as outlined in paragraphs 46 to 53, if the Indeterminate Performance Rights are subsequently satisfied with SG Securities under Option 1 or Option 2, the Restructure does not give rise to an ESS deferred taxing point under section 83A-120 for Participants who chose either Option 1 or Option 2 in respect of their Indeterminate Performance Rights.

## ***Assessable Income***

59. The Restructure does not result in a Participant whose Indeterminate Performance Rights are settled wholly or partially with cash deriving assessable income pursuant to section 6-5 at the time of the Restructure.

**CGT**

60. For similar reasons as outlined in paragraphs 54 to 55, no capital gain or capital loss arises for a Participant as a result of the Restructure for Indeterminate Performance Rights to the extent that they are settled with SG Securities.

***Subsequent ESS deferred taxing point***

61. For similar reasons as outlined in paragraphs 56 to 57, where Option 1 or Option 2 was chosen, the market value of the Indeterminate Performance Right as determined by reference to the SG Securities will be included in a Participant's assessable income under section 83A-110.

***Indeterminate Performance Rights settled wholly or partially with cash***

62. Where a Participant's Indeterminate Performance Rights are satisfied wholly or partially by a cash payment with no SG Securities provided, Division 83A will have no application (section 83A-340) and the payment will be included in a Participant's assessable income under section 6-5 (see paragraph 64).

**CGT**

63. To the extent that an Indeterminate Performance Right is settled by a cash payment, it was merely a right to future payment of remuneration. Any cash payment will be included in assessable income in the income year in which it is received in accordance with section 6-5. Accordingly, no capital gain or capital loss arises for a Participant as a result of the Restructure for Indeterminate Performance Rights to the extent they are settled with cash.

64. The cash payments paid to a Participant on vesting of their Indeterminate Performance Rights will be included in the Participant's assessable income in the income year in which it is received pursuant to section 6-5. This is the case regardless of whether Option 1 or Option 2 was chosen.

**Cash Awards*****Assessable Income***

65. The Restructure does not result in a Participant who chose either Option 1 or Option 2 deriving assessable income pursuant to section 6-5.

## **CGT**

66. For similar reasons as outlined in paragraph 63, no capital gain or capital loss arises for a Participant as a result of the Restructure for Cash Awards.

## ***Vesting of Cash Awards***

67. The quantum of the cash payment received on vesting of the Cash Awards will be included in the Participant's assessable income in the income year in which it is received pursuant to section 6-5. This is the case regardless of whether Option 1 or Option 2 was chosen.

## **Reportable fringe benefits amount**

68. For Performance Rights and Indeterminate Performance Rights that are settled with SG Securities or WC Securities no reportable fringe benefit amount arises for Participants as paragraph (h) of the definition of 'fringe benefit' in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986) provides that an ESS interest to which Subdivision 83A-C applies is not a fringe benefit.

69. Paragraph (f) of the definition of 'fringe benefit' in subsection 136(1) of the FBTAA 1986 excludes a payment of salary and wages. Accordingly, for Indeterminate Performance Rights that are wholly or partly settled in cash and the Cash Awards, the payment of cash is exempt from fringe benefits tax as it is a payment of salary or wages.

70. Accordingly, a 'reportable fringe benefits amount' (as defined in subsection 995-1(1)) did not arise for a Participant holding a Performance Right, Indeterminate Performance Right or a Cash Award as a result of the Restructure.

## **Appendix 2 – Detailed contents list**

71. The following is a detailed contents list for this Ruling:

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## References

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- capital gains tax
- employee share schemes
- ESS interest
- ESS deferred taxing point
- fringe benefits tax
- income

*Legislative references:*

- FBTAA 1986 136(1)
- ITAA 1936 6(1)
- ITAA 1997 6-5

- ITAA 1997 Div 83A
- ITAA 1997 83A-110
- ITAA 1997 83A-110(1)
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(5)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-130
- ITAA 1997 83A-330
- ITAA 1997 83A-335
- ITAA 1997 83A-340
- ITAA 1997 130-80
- ITAA 1997 130-80(1)
- ITAA 1997 Div 230
- ITAA 1997 995-1(1)
- TAA 1953

ATO references

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