


# ***CR 2015/22 - Income tax: Australia and New Zealand Banking Group Limited - ANZ Capital Notes 3***

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## Class Ruling

### Income tax: Australia and New Zealand Banking Group Limited – ANZ Capital Notes 3

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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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 26BB of the ITAA 1936
- subsection 44(1) of the ITAA 1936
- section 45 of the ITAA 1936
- section 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 70B of the ITAA 1936
- section 177EA of the ITAA 1936

- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-25 of the ITAA 1997
- section 104-155 of the ITAA 1997
- section 109-10 of the ITAA 1997
- section 110-25 of the ITAA 1997
- section 110-55 of the ITAA 1997
- section 130-60 of the ITAA 1997
- section 204-30 of the ITAA 1997
- Subdivision 207-D of the ITAA 1997
- section 207-20 of the ITAA 1997
- section 207-145 of the ITAA 1997
- subsection 974-75(1) of the ITAA 1997, and
- section 974-120 of the ITAA 1997.

## Class of entities

3. The class of entities to which this Ruling applies are investors who are allotted non-cumulative, convertible, transferable, redeemable, subordinated, perpetual, unsecured notes issued by Australia and New Zealand Banking Group Limited (ANZ) acting through its New Zealand branch, called ANZ Capital Notes 3 (or Notes) and who:

- are residents of Australia (within the meaning of subsection 6(1) of the ITAA 1936)
- hold their ANZ Capital Notes 3 on capital account, and
- are not subject to the Taxation of Financial Arrangements (TOFA) rules in Division 230 of the ITAA 1997 in relation to financial arrangements under the scheme.

(Note – Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them).

4. The investors described in the above paragraph are referred to in this Ruling as Holders.

5. The class of entities to which this Ruling applies does not extend to Holders of ANZ Capital Notes 3 who acquired their ANZ Capital Notes 3 otherwise than by initial application under the prospectus referred to in paragraph 15 of this Ruling.

**Qualifications**

6. This Ruling does not deal with how the taxation law applies to ANZ in relation to the issue of the ANZ Capital Notes 3.
7. This Ruling does not deal with how the taxation law applies to Resident Holders who hold their Notes as trading stock or revenue assets.
8. This Ruling does not consider the tax implications of the Conversion of ANZ Capital Notes 3 on a Trigger Event.
9. This Ruling does not consider the tax implications of Redemption (other than for the application of sections 45A and 45B of the ITAA 1936) or Resale of ANZ Capital Notes 3.
10. This Ruling does not consider how the gross-up and tax offset rules in Division 207 of the ITAA 1997 apply to partnership or trustee Holders, or to indirect distributions to partners in a partnership, or beneficiaries or trustees of a trust.
11. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
12. 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 15 to 58 of this Ruling.
13. 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.

**Date of effect**

14. This Ruling applies from 1 July 2014 to 30 June 2025. The Ruling continues to apply after 30 June 2025 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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).

## Scheme

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

- application for Class Ruling from ANZ dated 9 January 2015
- prospectus dated 5 February 2015 for the issue of ANZ Capital Notes 3 by ANZ acting through its New Zealand branch (Prospectus)
- Deed Poll dated 4 February 2015 for the issue of ANZ Capital Notes 3 by ANZ acting through its New Zealand branch
- ANZ Capital Notes 3 Terms as contained in Appendix A of the Prospectus (Note Terms), and
- further correspondence and additional information provided by ANZ.

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

16. In this Ruling, unless otherwise indicated, capitalised terms take on the same meaning as in the Prospectus and the Note Terms.

17. During the term of the scheme, ANZ will be a resident of Australia under the income tax laws of Australia and of no other jurisdiction.

18. ANZ is an authorised deposit-taking institution (ADI) regulated by the Australian Prudential Regulation Authority (APRA) and other regulatory bodies.

19. ANZ has applied for ANZ Capital Notes 3 to be quoted on the Australian Securities Exchange (ASX) and the ANZ Capital Notes 3 are expected to trade under ASX code 'ANZPF'.

### The Offer of ANZ Capital Notes 3

20. In the Prospectus, ANZ announced its intention to undertake an offer of 8.5 million of ANZ Capital Notes 3 to raise \$850 million, with the ability to raise more or less (the Offer).

21. The classes of Applicants who can apply for ANZ Capital Notes 3, and the corresponding process for lodging applications, as described in the Prospectus, are:

- ANZ Securityholder Applicant – a holder of Ordinary Shares, ANZ Capital Securities (being CPS2, CPS3, CN1 and CN2) or ANZ Subordinated Notes, with a registered address in Australia at 7:00pm AEDT on 31 December 2014, applying through the ANZ Securityholder Offer
- General Applicant – a member of the general public who is an Australian resident applying through the General Offer
- Broker Firm Applicant – a retail client of a Syndicate Broker invited to participate through the Broker Firm Offer, and
- Institutional Investor – an investor who was invited by ANZ Securities to bid for ANZ Capital Notes 3 in the Bookbuild and who is not a Broker Firm Applicant, ANZ Securityholder Applicant or General Applicant and who is applying through the Institutional Offer.

22. The Prospectus states that no action has been taken to register or qualify ANZ Capital Notes 3 or the Offer or to otherwise permit a public offering of ANZ Capital Notes 3 outside Australia. However, ANZ Capital Notes 3 may be offered in a jurisdiction outside Australia under the Institutional Offer or Broker Firm Offer where such offer is made in accordance with the laws of that jurisdiction.

### **Reasons for issuing ANZ Capital Notes 3**

23. The Offer is part of ANZ's ongoing capital management strategy for the purpose of raising Tier 1 Capital to meet ANZ's regulatory capital adequacy requirements.

24. ANZ will use the proceeds for general corporate purposes. APRA has confirmed that the ANZ Capital Notes 3 will constitute Additional Tier 1 Capital under the Prudential Standard APS 111 implemented under the Basel III capital reforms (commencing from 1 January 2013).

### **Terms of ANZ Capital Notes 3**

25. The ANZ Capital Notes 3 are fully paid, non-cumulative, convertible, transferable, redeemable, subordinated, perpetual, unsecured notes issued by ANZ acting through its New Zealand branch.

26. The issue price of each ANZ Capital Note 3 is \$100 (Face Value), and on issue is fully paid.

27. A Holder will not have voting rights under the ANZ Capital Notes 3, except in the limited circumstances described in the Note Terms.

### ***Distribution calculation***

28. Subject to the conditions outlined in paragraph 31 of this Ruling, the Holder of each ANZ Capital Note 3 is entitled to receive on the relevant Distribution Payment Date a cash distribution (Distribution) calculated using the formula:

$$\text{Distribution} = \frac{\text{Face Value} \times \text{Distribution Rate} \times N}{365}$$

where:

**Distribution Rate** (expressed as a percentage per annum) is calculated using the following formula:

$$\text{Distribution Rate} = [\text{Bank Bill Rate} + \text{Margin}] * [1 - \text{Tax Rate}]$$

where:

**Bank Bill Rate** (expressed as a percentage per annum) means, for a Distribution Period, the average mid-rate for bills of a term of 180 days which average mid-rate is displayed on Reuters page BBSW (or any page which replaces that page) on the first Business Day of the Distribution Period or if there is a manifest error in the calculation of that average mid-rate or that average mid-rate is not displayed by 10.30am (Melbourne time) on that date, the rate specified in good faith by ANZ at or around that time on that date having regard, to the extent possible, to:

- (a) the rates otherwise bid and offered for bills of a term of 180 days or for funds of that tenor displayed on Reuters page BBSW (or any page which replaces that page) at that time on that date; or
- (b) if bid and offer rates for bills of a term of 180 days are not otherwise available, the rates otherwise bid and offered for funds of that tenor at or around that time on that date.

**Margin** (expressed as a percentage per annum) means 3.6%, as determined under the Bookbuild; and

**Tax Rate** (expressed as a decimal) means the Australian corporate tax rate applicable to the franking account of ANZ at the relevant Distribution Payment Date; and

**N** means in respect of:

- (a) the first Distribution Payment Date, the number of days from (and including) the Issue Date until (but not including) the first Distribution Payment Date; and
- (b) each subsequent Distribution Payment Date, the number of days from (and including) the preceding Distribution Payment Date until (but not including) the relevant Distribution Payment Date.

29. The Distribution Payment Dates are each 24 March and 24 September, commencing on 24 September 2015 until (but not including) the date on which a Redemption or Conversion of the Note occurs. A Distribution will also be paid on the date on which a Conversion, Redemption or Resale of the Note occurs in accordance with the Note Terms.

30. Distributions are expected to be fully or substantially franked. However, if any Distribution is not franked or only partially franked, the Distribution will be grossed-up to the extent that the franking percentage of the Distribution is less than 100%, as determined by the formula in clause 3.2 of the Note Terms.

### ***Distribution payment conditions***

31. Each Distribution is subject to:

- ANZ's absolute discretion
- such payment of the Distribution not resulting in a breach of ANZ's capital requirements under APRA's prudential standards as they are applied to ANZ or the ANZ Group (as the case may be) at the time of the payment
- the payment of the Distribution not resulting in ANZ becoming, or being likely to become, insolvent for the purposes of the *Corporations Act 2001*, and
- APRA not otherwise objecting to the payment of the Distribution.

32. A Distribution is only payable to those persons registered as the Holders on the Record Date for that Distribution.

33. Distributions are non-cumulative and the Holders of ANZ Capital Notes 3 will have no recourse in the event of non-payment arising because ANZ has determined not to pay a Distribution, a Payment Condition exists at the relevant Distribution Payment Date, or because of any applicable law. Non-payment of all, or part, of a Distribution does not constitute an event of default by ANZ, and the Holders of ANZ Capital Notes 3 have no claim in respect of non-payment.

34. No interest accrues on any unpaid Distribution and the Holders of ANZ Capital Notes 3 have no claim or entitlement in respect of interest on any unpaid Distributions.

### ***Restrictions in the case of non-payment of Distributions***

35. If for any reason a Distribution has not been paid in full on a Distribution Payment Date (the Relevant Distribution Payment Date), ANZ must not without approval of a Special Resolution, until and including the next Distribution Payment Date:

- resolve to pay or pay a dividend on any Ordinary Shares, or



- buy-back, or reduce capital in respect of, any Ordinary Shares,

unless the Distribution is paid in full within 3 Business Days of the Relevant Distribution Payment Date.

## ***Mandatory Conversion***

36. Subject to a Trigger Event, ANZ must Convert all (but not some) ANZ Capital Notes 3 on issue into Ordinary Shares on the Mandatory Conversion Date.

37. The Mandatory Conversion Date is the first to occur of 24 March 2025, which is the Scheduled Mandatory Conversion Date, and the first Distribution Payment Date after 24 March 2025 (each a Relevant Date) on which the Mandatory Conversion Conditions are satisfied.

38. The Mandatory Conversion Conditions for each Relevant Date are:

- the average of the daily volume weighted average sale prices of Ordinary Shares sold on the ASX (VWAP) on the 25th Business Day on which trading in Ordinary Shares took place immediately preceding (but not including) the Relevant Date (the First Test Date) is greater than 56.00% of the Issue Date VWAP (First Mandatory Conversion Condition)
- the VWAP during the period of 20 Business Days on which trading in Ordinary Shares took place immediately preceding (but not including) the Relevant Date (the Second Test Period) is greater than 50.51% of the Issue Date VWAP (Second Mandatory Conversion Condition), and
- no Delisting Event has occurred (Third Mandatory Conversion Condition), being either:
  - the Ordinary Shares remain listed and admitted to trading on the ASX on the Relevant Date
  - trading of Ordinary Shares on the ASX has not been suspended for at least five consecutive Business Days prior to that and including that Relevant Date, or
  - ANZ is not prevented by applicable law, court order, government action or other reason from Converting the ANZ Capital Notes 3 (an Inability Event).

***Trigger Event Conversion***

39. Conversion of the ANZ Capital Notes 3 may occur at a time before a Scheduled Mandatory Conversion Date on the occurrence of:

- a Common Equity Capital Trigger Event, or
- a Non-Viability Trigger Event.

40. A Common Equity Capital Trigger Event occurs when ANZ determines, or APRA has notified ANZ in writing that it believes, that ANZ's or the ANZ Group's (as applicable) Common Equity Capital Ratio is equal to, or less than, 5.125%.

41. A Non-Viability Trigger Event means the earlier of:

- the issuance of a notice in writing by APRA to ANZ that conversion or write off of Relevant Securities (including the ANZ Capital Notes 3) is necessary because, without it, APRA considers that ANZ would become non-viable, or
- a determination by APRA, notified to ANZ in writing, that without a public sector injection of capital, or equivalent support, ANZ would become non-viable.

42. A Conversion following a Trigger Event will occur immediately and is not subject to any conditions. The number of Ordinary Shares that Holders receive on a Conversion will not be greater than the Maximum Conversion Number. If the Notes are not Converted within 5 business days of a Trigger Event for any reason (including an Inability Event) they will be Written Off, which means all rights in relation to those Notes will be terminated, and those Holders will not have their capital repaid or have any right to any Distributions.

***Optional Exchange***

43. ANZ may elect to Exchange at their discretion (Holders of ANZ Capital Notes 3 do not have a right to request an Exchange):

- (a) all, or some, ANZ Capital Notes 3 on an Exchange Date following the occurrence of a Tax Event or a Regulatory Event, or
- (b) all, or some, ANZ Capital Notes 3 on the Optional Exchange Date being 24 March 2023.

44. If ANZ elects to Exchange ANZ Capital Notes 3, it must, subject to APRA's prior written approval, elect which of the following (or which combination of the following) it intends to do in respect of ANZ Capital Notes 3:

- Convert the ANZ Capital Notes 3 into Ordinary Shares in accordance with clause 6 of the Note Terms
- Redeem ANZ Capital Notes 3 in accordance with clause 7 of the Note Terms, or

- Resell ANZ Capital Notes 3 in accordance with clause 8 of the Note Terms.

45. ANZ may not elect Conversion as the method of Exchange if the VWAP two days prior to the date of the election is less than or equal to 22.50% of the Issue Date VWAP or a Delisting Event applies to that date.

### ***Mandatory Conversion on a Change of Control Event***

46. ANZ must Convert all (but not some only) Notes on the occurrence of a Change of Control Event. Conversion will not occur on a Change of Control Conversion Date if either the Second Mandatory Conversion Condition (as if it referred to 20.21% of the Issue Date VWAP) is not satisfied on, or a Delisting Event applies to, that date.

### ***Conversion***

47. 'Conversion' is defined as the taking effect of the rights specified in clause 6 of the Note Terms.

48. On Conversion:

- each Holder of ANZ Capital Notes 3 will be allotted and issued a number (the Conversion Number) of Ordinary Shares in respect of each ANZ Capital Note 3 held by the Holder, and
- each Holder's rights (including to Distributions other than certain Distributions payable on the Exchange Date) in relation to each ANZ Capital Note 3 that is being Converted will be immediately and irrevocably terminated for an amount equal to the Face Value and ANZ will apply the Face Value of each ANZ Capital Note 3 by way of payment for the subscription for the Ordinary Shares to be allotted and issued on Conversion.

49. The Conversion Number (or Ordinary Shares for each ANZ Capital Note 3) is calculated according to the formula set out in the Note Terms and is always subject to the Conversion Number not being greater than the Maximum Conversion Number.

### ***Redemption***

50. ANZ may (subject to APRA giving its prior written approval and either the ANZ Capital Notes 3 being replaced concurrently or beforehand with Tier 1 Capital of the same or better quality under conditions that are sustainable for ANZ's income capacity or APRA being satisfied that ANZ's capital position is well above its minimum capital requirements) Redeem ANZ Capital Notes 3 in accordance with the Note Terms.

51. ANZ Capital Notes 3 will be Redeemed by payment on the Exchange Date of the Face Value to the Holder.

52. On the Exchange Date the only right the Holders of ANZ Capital Notes 3 will have in respect of ANZ Capital Notes 3 will be to obtain the Face Value payable in accordance with the Note Terms and, upon the payment of the Face Value, all other rights conferred or restrictions imposed by ANZ Capital Notes 3 will no longer have effect.

### ***Resale***

53. ANZ may (subject to APRA giving its prior written approval) elect to Resell ANZ Capital Notes 3 in accordance with the Note Terms.

54. Each Holder is taken irrevocably to offer to sell the relevant number of ANZ Capital Notes 3 to the Purchaser on the Exchange Date for a cash amount equal to the Face Value. Subject to payment by the Purchaser of the Face Value to the Holders, all rights, title and interest in such ANZ Capital Notes 3 will be transferred to the Purchaser on the Exchange Date.

### ***Interposition of Approved NOHC***

55. Clause 11.1 of the Note Terms provides for an Approved NOHC Event, which is a NOHC Event where the NOHC assumes ANZ's Conversion obligations by agreeing to Convert the ANZ Capital Notes 3 into listed Ordinary Shares of the NOHC.

56. A 'NOHC Event' means an event which:

- (a) is initiated by the Directors, acting as a board, and
- (b) would otherwise be a Change of Control Event,

but the result of which would be that the ultimate holding company of ANZ would be a 'non-operating holding company' (NOHC).

57. If an Approved NOHC Event occurs, ANZ may give notice to the Holders of ANZ Capital Notes 3 specifying the amendments to the Note Terms to effect the substitution of the Approved NOHC as the issuer of Ordinary Shares to Holders on Conversion.

### ***Other matters***

58. The Ruling is made on the basis that:

- (a) All parties to the scheme are dealing with each other on arm's length terms and fair value consideration will be provided by the Holders to acquire the ANZ Capital Notes 3.

- (b) ANZ Capital Notes 3 are 'equity interests' in ANZ pursuant to Division 974 of the ITAA 1997 and are 'non-share equity interests' in ANZ as the term is defined in subsection 995-1(1) of the ITAA 1997.
- (c) Distributions on the ANZ Capital Notes 3 will be frankable distributions pursuant to section 202-40 of the ITAA 1997 and are not unfrankable under section 202-45 of the ITAA 1997.
- (d) ANZ will frank the Distributions on the ANZ Capital Notes 3 at the same franking percentage as the benchmark for the franking period in which the payments are made.
- (e) ANZ expects to continue with its policy of franking all frankable distributions (to the extent that franking credits are available in its franking account).
- (f) The share capital account of ANZ will not become tainted by an issue of the ANZ Capital Notes 3 or the Ordinary Shares of ANZ on Conversion of the ANZ Capital Notes 3 within the meaning of Subdivision 197-A of the ITAA 1997.
- (g) The Ordinary Shares issued in the event of Conversion of the ANZ Capital Notes 3 will be equity interests in ANZ pursuant to Division 974 of the ITAA 1997.
- (h) The majority of the Holders of ANZ Capital Notes 3 are expected to be residents of Australia for tax purposes, although some may be non-residents.
- (i) ANZ Capital Notes 3 are expected to be treated as a liability for Australian International Financial Reporting Standard purposes.
- (j) For the purposes of determining whether a Holder is a 'qualified person' under Division 1A of former Part IIIAA of the ITAA 1936 in relation to the Distributions, a Holder has taken no positions (apart from the holding of the ANZ Capital Notes 3) in relation to their ANZ Capital Notes 3 and will not be under an obligation or be likely to make a related payment in relation to the Distributions.
- (k) The Holders, or their associates, will not make any related payments (within the meaning of former section 160APHN of the ITAA 1936) in relation to the Distributions on the ANZ Capital Notes 3.
- (l) Holders in receipt of Distributions on the ANZ Capital Notes 3 will have held their ANZ Capital Notes 3 for a period of at least 90 days (excluding the day of disposal), within the period beginning on the day after the day on which the Holder acquired the ANZ Capital Notes 3 and ending on the 90th day after the day on which the ANZ Capital Notes 3 go ex-distribution.

- (m) Distributions on the ANZ Capital Notes 3 will not be sourced, directly or indirectly, from ANZ's share capital or non-share capital accounts.
- (n) ANZ will not differentially frank Distributions to different Holders in respect of the ANZ Capital Notes 3 according to the tax status of Holders or on any other basis.
- (o) The dividend payout ratios or the franking credits in relation to the ordinary share capital or other preference share capital and non-share capital of ANZ are not expected to change materially as a result of the issue of the ANZ Capital Notes 3.
- (p) Immediately before payment of a Distribution on the ANZ Capital Notes 3, ANZ will have sufficient available profits (worked out under section 215-20 of the ITAA 1997) to pay the Distribution.
- (q) On Conversion, ANZ will debit the Face Value of ANZ Capital Notes 3 to its non-share capital account.
- (r) On the date of Conversion of the ANZ Capital Notes 3 into Ordinary Shares, the rights and obligations attached to the Ordinary Shares are the same as those contained in the Constitution of ANZ.

## **Ruling**

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### **Acquisition time of ANZ Capital Notes 3**

59. Under item 2 of the table in section 109-10 of the ITAA 1997, a Holder will acquire their ANZ Capital Notes 3 on 5 March 2015, being the date the contract for the issue of ANZ Capital Notes 3 is entered into.

### **Cost base and reduced cost base of ANZ Capital Notes 3**

60. The first element of the cost base and reduced cost base of each ANZ Capital Note 3 is \$100, being the money paid by the Holder to acquire the ANZ Capital Note 3 from ANZ (subsections 110-25(2) and 110-55(2) of the ITAA 1997).

### **Inclusion of Distributions and franking credits in assessable income**

61. Distributions paid in respect of each ANZ Capital Note 3 are non-share dividends under section 974-120 of the ITAA 1997 and must be included in the Holder's assessable income (subparagraph 44(1)(a)(ii) of the ITAA 1936).

62. Holders must also include in their assessable income an amount equal to the franking credits attached to the Distribution (subsection 207-20(1) of the ITAA 1997).

## **Entitlement to a tax offset**

63. Holders will be entitled to a tax offset equal to the franking credit received on Distributions paid in respect of the ANZ Capital Notes 3 (subsection 207-20(2) of the ITAA 1997) unless the Distribution is exempt income or non-assessable non-exempt income in the hands of the Holder.

## **Franking credit subject to the refundable tax offset rules**

64. Holders who are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997, in respect of the franking credits received in relation to the ANZ Capital Notes 3, will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless they are specifically excluded under section 67-25 of the ITAA 1997.

## **Exempt income or non-assessable non-exempt income**

65. If the Distribution (or a part of it) is either exempt income or non-assessable non-exempt income in the hands of the relevant Holder, then the amount of any franking credit on the Distribution is not included in the assessable income of the Holder and the Holder is not entitled to a tax offset under Division 207 of the ITAA 1997 (Subdivision 207-D of the ITAA 1997).

## **Imputation benefits – streaming of imputation benefits**

66. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by a Holder in relation to Distributions paid in respect of the ANZ Capital Notes 3.

## **Section 177EA of the ITAA 1936**

67. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received by Holders in relation to Distributions paid in respect of the ANZ Capital Notes 3.

## **Gross-up and tax offset denied in certain circumstances**

68. Section 207-145 of the ITAA 1997 will not apply to the whole, or any part, of the Distributions paid to Holders. Accordingly, section 207-145 will not adjust the gross-up of the Holders' assessable income to exclude the franking credit, nor will it deny the tax offset to which the Holders would have otherwise been entitled.

**Each ANZ Capital Note 3 will not be a traditional security**

69. Section 26BB of the ITAA 1936 will not apply to include any amount in the assessable income of Holders upon disposal of their ANZ Capital Notes 3.

70. Section 70B of the ITAA 1936 will not apply to allow a deduction to Holders upon disposal of their ANZ Capital Notes 3.

**ANZ Capital Notes 3 are convertible interests**

71. Each ANZ Capital Note 3 is a convertible interest under item 4 of the table in subsection 974-75(1) of the ITAA 1997.

**Conversion of ANZ Capital Notes 3 – CGT implications**

72. CGT event C2 (section 104-25 of the ITAA 1997) will happen for Holders on Conversion of the ANZ Capital Notes 3 for Ordinary Shares. Conversion is constituted by the ANZ Capital Notes 3 (a convertible interest) being converted into Ordinary Shares.

73. Any capital gain or capital loss made by a Holder from CGT event C2 happening on Conversion of the ANZ Capital Notes 3 will be disregarded (subsection 130-60(3) of the ITAA 1997).

**Cost base and reduced cost base of Ordinary Shares acquired on Conversion**

74. On Conversion of the ANZ Capital Notes 3, Subdivision 130-C of the ITAA 1997 will apply so that the first element of the cost base and reduced cost base of each Ordinary Share acquired from Conversion of the ANZ Capital Notes 3 will be a pro-rata portion of the cost base of the ANZ Capital Notes 3 at the time of Conversion (item 2 of the table in subsection 130-60(1) of the ITAA 1997).

**Acquisition time of Ordinary Shares on Conversion**

75. Ordinary Shares acquired on Conversion of the ANZ Capital Notes 3 (being convertible interests) will be taken to be acquired when the Conversion happens on the relevant Conversion Date (subsection 130-60(2) of the ITAA 1997).

**Allotment of Ordinary Shares on Conversion not a Distribution**

76. Other than in respect of a Distribution paid on the Conversion date, Conversion of the ANZ Capital Notes 3 will not result in Holders being taken to have received a dividend within the meaning of subsection 6(1) of the ITAA 1936 or a non-share dividend under section 974-120 of the ITAA 1997.



## **Conversion of each ANZ Capital Note 3 and allotment of ordinary shares in an Approved NOHC – CGT implications**

77. Where a NOHC is interposed as the ultimate holding company of ANZ, the Conversion of each ANZ Capital Note 3 and the allotment of NOHC ordinary shares to Holders will result in CGT event C2 happening. However, no Holder will make a capital gain or capital loss as the capital gain or capital loss is disregarded under subsection 130-60(3) of the ITAA 1997.

## **Approved NOHC Interposition**

78. The amendment to the Note Terms to effect the substitution of an Approved NOHC as the issuer of ordinary shares to Holders on Conversion of ANZ Capital Notes 3 will result in CGT event H2 (section 104-155 of the ITAA 1997) happening. However, no Holder will make a capital gain or capital loss as a result of CGT event H2 happening as there will be no capital proceeds because of the amendments to the Note Terms.

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

79. Section 45 of the ITAA 1936 will not apply to treat the Ordinary Shares issued on Conversion as an unfrankable dividend paid by ANZ.

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

80. 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 part of, a capital benefit that arises on Conversion or Redemption of the ANZ Capital Notes 3 as an unfranked dividend in the hands of Holders.

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

81. 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 part of, a capital benefit that arises on Conversion or Redemption of the ANZ Capital Notes 3 as an unfranked dividend in the hands of Holders.

## **Appendix 1 – Explanation**

**❶** *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.*

### **Acquisition time of ANZ Capital Notes 3**

82. An equity interest that is issued or allotted by a company is acquired when the contract is entered into or, if there is no contract, when the equity interests are issued or allotted (item 2 of the table in section 109-10 of the ITAA 1997).

83. The ANZ Capital Notes 3 are non-share equity interests in ANZ. When an investor's application for ANZ Capital Notes 3 is accepted by ANZ, this leads to the formation of a contract for the issue of ANZ Capital Notes 3 to the investor (who will become a Holder). Under item 2 of the table in section 109-10 of the ITAA 1997, a Holder will acquire their ANZ Capital Notes 3 on 5 March 2015, being the date on which the contract for the issue of the ANZ Capital Notes 3 is entered into.

### **Cost base and reduced cost base of ANZ Capital Notes 3**

84. The first element of the cost base and reduced cost base of a CGT asset includes the money paid, or required to be paid, in respect of acquiring the CGT asset (paragraph 110-25(2)(a) of the ITAA 1997 and subsection 110-55(2) of the ITAA 1997).

85. The issue price of each ANZ Capital Note 3 is \$100. Accordingly, when the ANZ Capital Notes 3 are issued, the first element of the cost base and reduced cost base of each ANZ Capital Note 3 for the Holders will include \$100.

### **Inclusion of Distributions and franking credits in assessable income**

86. Subsection 44(1) of the ITAA 1936 provides that the assessable income of a resident shareholder in a company includes all dividends and non-share dividends paid to the shareholder by the company.

87. The ANZ Capital Notes 3 are 'non-share equity interests' as defined in subsection 995-1(1) of the ITAA 1997. Paragraph 43B(1)(a) of the ITAA 1936 provides that Subdivision D of Division 2 of Part III of the ITAA 1936 (which governs dividends) applies to a non-share equity interest in the same way that it applies to a share. The Holders are 'equity holders' as defined in subsection 995-1(1) of the ITAA 1997. Paragraph 43B(1)(b) of the ITAA 1936 provides that Subdivision D of Division 2 of Part III of the ITAA 1936 applies to an equity holder in the same way as it applies to a shareholder.

88. Distributions paid in respect of the ANZ Capital Notes 3 are non-share dividends under section 974-120 of the ITAA 1997. Accordingly, Holders must include in their assessable income Distributions paid in respect of the ANZ Capital Notes 3 under subparagraph 44(1)(a)(ii) of the ITAA 1936.

89. Distributions are expected to be franked. If a company makes a franked distribution to another entity, subsection 207-20(1) of the ITAA 1997 requires that the assessable income of the receiving entity include the amount of the franking credit on the distribution in addition to the amount of the franked distribution. Subsection 207-20(2) of the ITAA 1997 provides that the receiving entity is entitled to a tax offset equal to the franking credit on the distribution.

90. In accordance with subsection 207-20(1) of the ITAA 1997, any franking credit attached to a Distribution must also be included in the relevant Holder's assessable income for the income year in which the Distribution is made.

## **Entitlement to a tax offset**

91. In accordance with subsection 207-20(2) of the ITAA 1997, Holders are entitled to receive a tax offset equal to the franking credit which has been included in their assessable income in respect of Distributions they receive.

## **Franking credit subject to the refundable tax offset rules**

92. Holders who are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997, in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless they are specifically excluded under section 67-25 of the ITAA 1997.

93. The refundable tax offset rules ensure that certain taxpayers are entitled to a refund once their available tax offsets have been utilised to reduce any income tax liability to nil.

94. Entities excluded under section 67-25 of the ITAA 1997 include corporate tax entities (such as companies, corporate limited partnerships, corporate unit trusts and public trading trusts), unless they satisfy the requisite conditions as set out in subsections 67-25(1C) or 67-25(1D) of the ITAA 1997.

**Exempt income or non-assessable non-exempt income**

95. If the Distribution is exempt income or non-assessable non-exempt income in the hands of the Holder and none of the exceptions in Subdivision 207-E of the ITAA 1997 apply, then the amount of any franking credit on the Distribution is not included in the assessable income of the Holder and the Holder is not entitled to a tax offset under Division 207 of the ITAA 1997 (Subdivision 207-D of the ITAA 1997).

**Imputation benefits – streaming of imputation benefits**

96. Subdivision 204-D of the ITAA 1997 enables the Commissioner to make a determination where distributions with attached imputation benefits are streamed to a member of a corporate tax entity in preference to another member.

97. Section 204-30 of the ITAA 1997 prescribes the circumstances that are required to exist before the Commissioner may make such a determination. Section 204-30 of the ITAA 1997 applies where an entity 'streams' the payment of distributions, or the payment of distributions and the giving of other benefits, in such a way that:

- an 'imputation benefit' is, or apart from section 204-30 of the ITAA 1997 would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a) of the ITAA 1997)
- the member (favoured member) would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b) of the ITAA 1997), and
- the other member (disadvantaged member) of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c) of the ITAA 1997).

98. Streaming is not defined for the purposes of Subdivision 204-D of the ITAA 1997. However, the Commissioner understands it to refer to a company 'selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits' (paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002).

99. ANZ has indicated that all Holders will receive franked Distributions regardless of their tax attributes or their individual tax position. ANZ's policy in relation to the franking of its frankable distributions is not expected to change as a result of the issue of the ANZ Capital Notes 3.

100. The Ordinary Shares allotted on Conversion of the ANZ Capital Notes 3 will not attract the application of section 204-30 of the ITAA 1997. The reason is that the issue of Ordinary Shares does not constitute a distribution, and the allotment of Ordinary Shares will not affect ANZ's dividend franking policy.

101. Based on the information provided, the Commissioner has concluded that the requisite element of streaming does not exist in relation to the franked distributions to be paid by ANZ to Holders. Accordingly, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by a Holder in relation to Distributions paid on the ANZ Capital Notes 3.

### **Section 177EA of the ITAA 1936**

102. 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 the scheme is to obtain an imputation benefit. In these circumstances, subsection 177EA(5) of the ITAA 1936 enables the Commissioner to make a determination with the effect of either:

- imposing franking debits or exempting debits on the distributing entity's franking account, or
- denying the imputation benefit on the distribution that flowed directly or indirectly to the relevant taxpayer.

103. Pursuant to subsection 177EA(3) of the ITAA 1936, the provision applies if the following conditions are satisfied:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
  - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
  - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the relevant taxpayer) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

104. Subsection 177EA(12) of the ITAA 1936 extends the operation of section 177EA to non-share equity interests. Subsection 177EA(12) provides that section 177EA:

- (a) applies to a non-share equity interest in the same way as it applies to a membership interest; and
- (b) applies to an equity holder in the same way as it applies to a member; and
- (c) applies to a non-share dividend in the same way as it applies to a distribution.

105. The Commissioner considers that the conditions in paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied because:

- (a) the issue of the ANZ Capital Notes 3 constitutes a scheme for the disposition of a membership interest (paragraph 177EA(3)(a) of the ITAA 1936). Pursuant to paragraph 177EA(14)(a) of the ITAA 1936, a 'scheme for a disposition of membership interests or an interest in membership interests' includes a scheme that involves the issuing of membership interests. Pursuant to paragraph 177EA(12)(a) of the ITAA 1936, section 177EA applies to a non-share equity interest in the same way as it applies to a membership interest. Therefore, as the ANZ Capital Notes 3 are non-share equity interests paragraph 177EA(3)(a) of the ITAA 1936 is satisfied
- (b) frankable distributions are expected to be payable to the Holders (paragraph 177EA(3)(b) of the ITAA 1936). The Commissioner accepts that Distributions payable on the ANZ Capital Notes 3 will be frankable distributions to the extent that the Distributions on the ANZ Capital Notes 3 do not fall within the list of relevant factors in section 202-45 of the ITAA 1997
- (c) franked distributions are expected to be paid to the Holders (paragraph 177EA(3)(c) of the ITAA 1936). It is expected that these distributions will be made on 24 March and 24 September of each year. Furthermore, ANZ has advised that it will continue its policy of fully franking all frankable distributions made by it, to the extent that franking credits are available in its franking account, and
- (d) it is reasonable to expect that an imputation benefit will be received by the relevant taxpayers as a result of Distributions made to Holders, given that ANZ expects to frank the Distributions on the ANZ Capital Notes 3 (paragraph 177EA(3)(d) of ITAA 1936).

106. Accordingly, the issue is whether having regard to the relevant circumstances of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme, did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer (Holder of ANZ Capital Notes 3) to obtain an imputation benefit (paragraph 177EA(3)(e) of the ITAA 1936).

107. In arriving at a conclusion, the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the factors listed in subsection 177EA(17) of the ITAA 1936.

108. The relevant circumstances listed encompass a range of circumstances, which taken individually or collectively, could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may or may not be present at any one time in relation to a particular scheme.

109. Based on the information provided and the qualifications set out in this Ruling, and having regard to all of the relevant circumstances of the scheme, the Commissioner has concluded that the purpose of enabling the Holders to obtain imputation benefits is not more than incidental to ANZ's purpose of raising Tier 1 Capital to meet its capital adequacy requirements.

110. Accordingly, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received by Holders in relation to Distributions paid in respect of the ANZ Capital Notes 3.

### **Gross-up and tax offset denied in certain circumstances**

111. Subdivision 207-F of the ITAA 1997 creates the appropriate adjustment to cancel the effect of the gross-up and tax offset rules where the entity concerned has manipulated the imputation system in a manner that is not permitted under the income tax law. Section 207-145 is relevant to the Holders that are subject to this Ruling.

112. Pursuant to subsection 207-145(1) of the ITAA 1997, this adjustment will occur where a franked distribution is made to an entity in one or more of the following circumstances:

- the entity is not a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 (paragraph 207-145(1)(a) of the ITAA 1997)
- the Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(b) of the ITAA 1997)

- the Commissioner has made a determination under paragraph 204-30(3)(c) of the ITAA 1997 that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(c) of the ITAA 1997), or
- the distribution is made as part of a dividend stripping operation (paragraph 207-145(1)(d) of the ITAA 1997).

113. A person is a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 if, generally speaking, they satisfy the holding period rule and the related payments rule (see former section 160APHO of the ITAA 1936).

114. By virtue of former section 160AOA of the ITAA 1936, the holding period rule and the related payments rule apply to non-share equity interests, equity holders and non-share dividends in the same way as they apply to shares, shareholders and dividends respectively.

115. The holding period rule applies where neither the holder nor an associate of the holder has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend (or non-share dividend), and requires the shares (or non-share equity interests) to have been continuously held at risk throughout the primary qualification period (former paragraph 160APHO(1)(a) of the ITAA 1936).

116. The related payments rule applies where the holder or an associate of the holder has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend (or non-share dividend) and requires the shares (or non-share equity interests) to have been continuously held at risk throughout the secondary qualification period (former paragraph 160APHO(1)(b) and former section 160APHN of the ITAA 1936).

117. A Holder will be a 'qualified person' in relation to a Distribution received in respect of their ANZ Capital Notes 3, provided that:

- the Holder held their ANZ Capital Notes 3 at risk for a period of at least 90 days (excluding the day of acquisition and the day of disposal, and any days on which the Holder has materially diminished risks of loss or opportunities for gain in respect of the shares or interest), in the period beginning on the day after the day on which the Holder acquired the ANZ Capital Notes 3 and ending on the 90th day after the day on which the ANZ Capital Notes 3 became ex-dividend (former subsections 160APHO(2) and 160APHO(3) of the ITAA 1936 and former sections 160APHM and 160APHJ of the ITAA 1936), and
- neither the Holder, nor an associate of the Holder, has made, is under an obligation to make, or are likely to make a related payment in relation to Distributions on their ANZ Capital Notes 3 (former paragraph 160APHO(1)(a) of the ITAA 1936 and former section 160APHN of the ITAA 1936).



118. If either, or both, of the above two considerations are not met, the Holders will not be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

119. In determining whether a shareholder is a 'qualified person' in relation to dividends paid on their shares, all 'positions' in respect of the shares are taken into account in identifying a 'net position' to ensure that there is no material diminution in the risks of loss or opportunities for gain.

120. In accordance with former subsection 160APHJ(2) of the ITAA 1936, a position in relation to a share is anything that has a 'delta' in relation to that share. Although 'delta' is not a defined term, paragraph 4.56 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 2) 1999 states that it 'is a well-recognised financial concept that measures the relative change in the price of an option or other derivative for a given small change in the price of an underlying asset. An option with a positive delta indicates that its price is expected to rise and fall with the underlying asset, while a negative delta indicates an inverse price relationship.'

121. An embedded share option is a position in relation to a share if it is exercisable by or against a party other than the issuer of the share (Taxation Determination TD 2007/29).

122. Under the Resale mechanism, ANZ can elect to require some or all Holders to sell their ANZ Capital Notes 3 to the Purchaser. The Purchaser, until selected by ANZ, has no right or ability to trigger Resale for ANZ Capital Notes 3 from the Holders.

123. ANZ is not required to exercise the Resale mechanism. It follows that the Resale mechanism is an option that is held by ANZ, as the issuer, and not by a third party. The Resale mechanism therefore does not represent a separate position in relation to ANZ Capital Notes 3 for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

124. Similarly, although the Conversion mechanism will affect the conversion of ANZ Capital Notes 3 for Ordinary Shares, the Conversion will not represent a separate position for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. This is because the Holders do not have the right to elect Conversion.

125. Therefore, the Commissioner has concluded that the Resale and Conversion mechanism will not of themselves affect a Holder's risks of loss or opportunities for gain in respect of ANZ Capital Notes 3.

126. The Commissioner has confirmed that no determination will be made under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) of the ITAA 1997 to deny the imputation benefits attached to Distributions paid to Holders in respect of the ANZ Capital Notes 3.

127. A distribution will be taken to be made as part of a dividend stripping operation, pursuant to section 207-145 of the ITAA 1997, where the distribution arose out of, or was made in the course of, a scheme or substantially similar arrangement that was in the nature of dividend stripping.

128. Based on the information provided by ANZ there is no indication that the offering of the ANZ Capital Notes 3 and the associated payment of franked Distributions to Holders in any way constitutes a dividend stripping arrangement.

129. Therefore, section 207-145 of the ITAA 1997 will not apply to the Distributions received by the Holders in respect of the ANZ Capital Notes 3. Accordingly, section 207-145 will not adjust the Holder's assessable income to exclude the amount of the franking credit on the Distributions, nor will it deny the tax offset to which the Holder would otherwise be entitled.

### **Each ANZ Capital Note 3 will not be a traditional security**

130. A 'traditional security' is defined in subsection 26BB(1) of the ITAA 1936 as a security held by the taxpayer that was acquired by the taxpayer after 10 May 1989, is not a prescribed security within the meaning of section 26C of the ITAA 1936, is not trading stock of the taxpayer, and either does not have an eligible return, or has an eligible return that satisfies the conditions listed in subparagraph (b)(ii) of the definition of 'traditional security' in subsection 26BB(1) of the ITAA 1936.

131. The term 'security' is defined in subsection 26BB(1) of the ITAA 1936 by reference to subsection 159GP(1) of the ITAA 1936. Pursuant to subsection 159GP(1), 'security' means:

- (a) stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security;
- (b) a deposit with a bank or other financial institution;
- (c) a secured or unsecured loan; or
- (d) any other contract, whether or not in writing, under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

132. The ANZ Capital Notes 3 is not stock, a bond, debenture, certificate of entitlement, bill of exchange, or a promissory note.

133. The term 'or other security' in paragraph (a) of the definition of 'security' only encompasses instruments that evidence an obligation on the part of the issuer or drawer to pay an amount to the holder or acceptor, whether during the term of the instrument or at its maturity. The types of securities referred to in paragraph (a) of the definition of 'security' will generally be recognised as debt instruments (Taxation Ruling TR 96/14).

134. Paragraphs (b) and (c) of the definition of 'security' do not apply because the ANZ Capital Notes 3 is neither a deposit with a bank or other financial institution, nor a secured or unsecured loan.

135. Only those contracts that have debt like obligations will usually fall under paragraph (d) of the definition of 'security' (TR 96/14).

136. The Note Terms do not evidence a liability by ANZ to pay an amount or amounts to Holders of the ANZ Capital Notes 3 during the term of the instrument or at maturity.

137. The ANZ Capital Notes 3 are perpetual and Holders do not have a right to require Redemption.

138. The payment by ANZ of Distributions is subject to the Distribution Payment Conditions. Distributions are discretionary and non-cumulative. If a Distribution is not paid, ANZ has no liability to pay the Distribution and Holders have no claim in respect of non-payment.

139. Upon Conversion, ANZ will allot and issue a number of Ordinary Shares based on a formula set out in the Note Terms for each ANZ Capital Note 3 held by the Holder. Each Holder's rights in relation to each ANZ Capital Note 3 that is being converted are immediately and irrevocably terminated for an amount equal to the Face Value and ANZ will apply that amount by way of payment for the subscription for Ordinary Shares issued to Holders. ANZ cannot be said to have a liability to pay an amount under the Note Terms of the ANZ Capital Notes 3 pursuant to the Conversion.

140. Early Redemption of the ANZ Capital Notes 3 is possible. However, it is at the option of ANZ or will only occur upon the happening of certain events and requires the prior written approval of APRA. This does not establish a liability on ANZ to pay an amount.

141. ANZ will not become liable to pay an amount under the ANZ Capital Notes 3 upon a wind-up as it would be expected that the ANZ Capital Notes 3 would either be converted into Ordinary Shares pursuant to a Trigger Event (in which case any distribution would be made to the Holders as ordinary shareholders as opposed to under the Note Terms), or Holders' rights would be terminated where ANZ is not able to issue Ordinary Shares within the time stated in the Note Terms.

142. As the ANZ Capital Notes 3 are not a security within the meaning of subsection 159GP(1) of the ITAA 1936, it cannot be a traditional security under subsection 26BB(1) of the ITAA 1936.

143. Section 26BB of the ITAA 1936 will not apply to include any amount in the assessable income of the Holder upon disposal of the ANZ Capital Notes 3.

144. Section 70B of the ITAA 1936 will not apply to allow a deduction to Holders upon disposal of their ANZ Capital Notes 3.

**ANZ Capital Notes 3 are convertible interests**

145. Subsection 995-1(1) of the ITAA 1997 defines a 'convertible interest' in a company as an interest of the kind referred to in item 4 of the table in subsection 974-75(1) of the ITAA 1997. Paragraph (b) of item 4 of the table in subsection 974-75(1) provides that an interest is an equity interest if it is an interest issued by the company that is an interest that will, or may, convert into an equity interest in the company.

146. Under section 974-165 of the ITAA 1997, an interest is an interest that will or may convert into another interest if:

- the interest must be or may be converted into another interest (paragraph 974-165(a) of the ITAA 1997), or
- the interest must be or may be redeemed, repaid or satisfied by the issue or transfer of the other interest (subparagraph 974-165(b)(i) of the ITAA 1997).

147. Each ANZ Capital Note 3 is a convertible interest because it will or may be redeemed, repaid or satisfied by the issue of Ordinary Shares upon Conversion.

**Conversion of ANZ Capital Notes 3 – CGT implications**

148. CGT event C2 will happen to Holders on Conversion of the ANZ Capital Notes 3. Under paragraph 104-25(1)(f) of the ITAA 1997, CGT event C2 happens if an entity's ownership of an intangible CGT asset ends by the asset (if it is a convertible interest) being converted.

149. The ANZ Capital Notes 3 are convertible interests. Conversion of the ANZ Capital Notes 3 for Ordinary Shares constitutes the conversion of a convertible interest.

150. Conversion of the ANZ Capital Notes 3 happens as part of a conversion to which Subdivision 130-C of the ITAA 1997 applies. Under subsection 130-60(3) of the ITAA 1997, a capital gain or capital loss made from converting a convertible interest is disregarded. Any capital gain or capital loss made by a Holder from CGT event C2 happening on Conversion of the ANZ Capital Notes 3 will be disregarded.

**Cost base and reduced cost base of Ordinary Shares acquired on Conversion**

151. On Conversion, Subdivision 130-C of the ITAA 1997 will apply so that the first element of the cost base and reduced cost base of each Ordinary Share acquired from Conversion of the ANZ Capital Notes 3 will be a pro-rata portion of the cost base of their ANZ Capital Notes 3 at the time of Conversion (item 2 of the table in subsection 130-60(1) of the ITAA 1997).

## **Acquisition time of Ordinary Shares acquired on Conversion**

152. Ordinary Shares acquired on Conversion of the ANZ Capital Notes 3 (being convertible interests) will be taken to be acquired when the Conversion happens on the relevant Conversion Date (subsection 130-60(2) of the ITAA 1997).

## **Allotment of Ordinary Shares on Conversion not a Distribution**

153. The issue of Ordinary Shares to Holders on Conversion is a distribution of property to holders of a non-share equity interest and a non-share distribution under subparagraph 974-115(b)(ii) of the ITAA 1997. A non-share distribution is a non-share dividend under subsection 974-120(1) of the ITAA 1997, subject to subsection 974-120(2) of the ITAA 1997 applying.

154. Subsection 974-120(2) of the ITAA 1997 provides that a non-share distribution is not a non-share dividend to the extent to which the company debits the distribution against the company's share capital account or non-share capital account.

155. On Conversion, ANZ will debit the Face Value of the ANZ Capital Notes 3 to its non-share capital account. Accordingly, the issue of Ordinary Shares on Conversion is not a non-share dividend and will not be included in a Holder's assessable income under subparagraph 44(1)(a)(ii) of the ITAA 1936.

156. Furthermore, the Ordinary Shares will not be issued to the Holders of ANZ Capital Notes 3 as shareholders of ANZ. Accordingly, the issue of the Ordinary Shares would not satisfy paragraphs (a) or (b) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936. This means that it will not be included in the assessable income of the Holders under subparagraph 44(1)(a)(i) of the ITAA 1936.

## **Conversion of each ANZ Capital Note 3 and allotment of ordinary shares in an Approved NOHC – CGT implications**

157. Under section 104-25 of the ITAA 1997, CGT event C2 happens if, among other things, the ownership of an intangible asset that is a convertible interest ends by the conversion of the asset into another asset (paragraph 104-25(1)(f)).

158. However, Subdivision 130-C of the ITAA 1997 applies to the acquisition of shares by the conversion of a convertible interest. In order for this Subdivision to apply to the Conversion of the ANZ Capital Notes 3, the ANZ Capital Notes 3 must be a convertible interest. If the ANZ Capital Notes 3 is a convertible interest any capital gain or capital loss made under CGT event C2 happening in respect to the Conversion of the ANZ Capital Notes 3 is disregarded.

159. A 'convertible interest' in a company is defined in subsection 995-1(1) of the ITAA 1997 as an interest of the kind referred to in item 4 of the table in subsection 974-75(1) of the ITAA 1997. Paragraph (b) of that item describes an interest that will or may convert into an equity interest in the company or a connected entity of the company.

160. The term 'interest that will or may convert into another interest' is defined in section 974-165 of the ITAA 1997. It includes the circumstances where a first interest must be, or may be, satisfied by the issue of the second interest (subparagraph 974-165(b)(i) of the ITAA 1997).

161. The Note Terms provide for the possibility of an Approved NOHC to be interposed as the ultimate owner of ANZ. If this occurs, ANZ may amend the Note Terms and provide notice to Holders that upon Conversion, shares in the Approved NOHC may be allotted to the Holders instead of ANZ Ordinary Shares.

162. The term 'connected entity' is defined in subsection 995-1(1) of the ITAA 1997 and includes an 'associate' of the entity being tested. 'Associate' is widely defined in section 318 of the ITAA 1936. As the Approved NOHC will be the parent company of ANZ at the time of the Conversion the Approved NOHC will be an associate, and thus a connected entity of ANZ.

163. Accordingly, upon Conversion, Holders will disregard any capital gain or loss arising from that Conversion pursuant to subsection 130-60(3).

### **Approved NOHC Interposition**

164. The interposition of a NOHC between ANZ and its shareholders will not result in a CGT event for Holders for CGT purposes.

165. Subsection 104-155(1) of the ITAA 1997 provides that CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset that you own and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base.

166. The Note Terms provide that ANZ may amend the Note Terms where necessary and appropriate to effect the substitution of an Approved NOHC as the issuer of ordinary shares on Conversion.

167. The amendment to the Note Terms to effect the substitution of an Approved NOHC as the issuer of ordinary shares on Conversion results in a CGT event H2 happening for Holders. The amendment to the Note Terms is an act, transaction or event in relation to the ANZ Capital Notes 3 that does not result in an adjustment being made to the cost base or reduced cost base of the ANZ Capital Notes 3.

168. A capital gain is made if the capital proceeds from the CGT event H2 are more than the incidental costs incurred in relation to the event. A capital loss is made if the capital proceeds are less than the incidental costs (subsection 104-155(3) of the ITAA 1997).

169. Subsection 116-20(2) of the ITAA 1997 provides that the capital proceeds from CGT event H2 happening is the money or other consideration received, or entitled to be received, because of the act, transaction or event.

170. Holders make no capital gain or capital loss from the happening of CGT event H2 as there are no capital proceeds because of the amendments to the Note Terms and no incidental costs are incurred by the Holders that relate to these amendments. No other CGT event will happen because of the amendments to the Note Terms.

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

171. 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 and minimally franked dividends are received by other shareholders. Minimally franked dividends are dividends which are franked to less than 10%.

172. ANZ has consistently paid and will continue to pay fully franked dividends/distributions to all its shareholders (including the Holders) to the extent of the franking credits in its franking account.

173. 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 issue of Ordinary Shares on Conversion as an unfrankable dividend in the hands of Holders.

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

174. Section 45A of the ITAA 1936 applies in circumstances where a company streams the provision of capital benefits to certain shareholders who derive a greater benefit from the receipt of capital (the advantaged shareholders) and it is reasonable to assume that the other shareholders have received or will receive dividends (the disadvantaged shareholders).

175. The Commissioner may make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies. The effect of such a determination is that the capital benefit is taken to be an unfranked dividend.

176. A provision of capital benefits includes the provision to the shareholder of shares in the company pursuant to paragraph 45A(3)(a) of the ITAA 1936. The issue of Ordinary Shares to Holders on Conversion of the ANZ Capital Notes 3 will constitute the provision of capital benefits.

177. The issue of Ordinary Shares on Conversion of the ANZ Capital Notes 3 is in effect a restatement of the Holder's interest in the capital of ANZ. In the absence of any other factors that would contribute to an alternative conclusion, there will not be any streaming of capital benefits.

178. The Redemption of the ANZ Capital Notes 3 will involve the provision of a capital benefit within the meaning of subsection 45A(3) of the ITAA 1936 as it will constitute a non-share capital return (subsection 45A(3A) of the ITAA 1936). The amount paid to Holders on Redemption is limited to the amount of the Face Value of the ANZ Capital Notes 3 and any Distribution entitlements on the ANZ Capital Notes 3 will be separately paid as Distributions given that the Redemption Date will also be a Distribution Payment Date under the Note Terms.

179. Accordingly, it cannot be said that Holders would derive a greater benefit from capital benefits than other ANZ shareholders. Therefore, the issue of Ordinary Shares on Conversion or the Redemption of the ANZ Capital Notes 3 will not trigger the application of section 45A of the ITAA 1936.

180. Therefore, 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 part of, a capital benefit that arises on Conversion or Redemption of the ANZ Capital Notes 3 as an unfranked dividend in the hands of Holders.

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

181. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends and the conditions in subsection 45B(2) of the ITAA 1936 are met.

182. The Commissioner may make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies. The effect of such a determination is that the capital benefit is taken to be an unfranked dividend.

183. The issue of Ordinary Shares to Holders on Conversion will constitute a scheme under which the Holders are provided with a capital benefit by ANZ (paragraph 45B(5)(a) of the ITAA 1936). Similarly, Redemption of the ANZ Capital Notes 3 will also constitute a scheme under which the Holders are provided with a capital benefit by ANZ (paragraph 45B(5)(b) of the ITAA 1936 and subsection 45B(7) of the ITAA 1936).



184. For the provision to apply, among other things, paragraph 45B(2)(c) of the ITAA 1936 requires that, having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit. A non-exhaustive list of relevant circumstances of the scheme are provided in subsection 45B(8) of the ITAA 1936.

185. Having regard to the relevant circumstances surrounding the issue of Ordinary Shares on Conversion and Redemption of the ANZ Capital Notes 3, it cannot be concluded that ANZ, the Holders or any other person entered into or carried out the Conversion or Redemption of ANZ Capital Notes 3 for the purpose of enabling Holders to obtain a capital benefit.

186. Accordingly, 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 part of, a capital benefit that arises on Conversion or Redemption of the ANZ Capital Notes 3 as an unfranked dividend in the hands of Holders.

## Appendix 2 – Detailed contents list

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 96/14; TR 2006/10; TD 2007/29

### *Subject references:*

- acquisition dates
- anti-avoidance measures
- capital gains tax
- CGT cost base
- convertible interests
- dividend imputation
- franking tax offset
- imputation benefits
- ordinary income
- qualified person
- securities
- traditional securities

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