


CR 2015/98 - Income tax: AMP Limited - AMP Capital Notes (October 2015 Prospectus offer)

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Class Ruling

Income tax: AMP Limited – AMP Capital Notes (October 2015 Prospectus offer)

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📌 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

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(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 159GP of the ITAA 1936
- section 177EA of the ITAA 1936
- Division 1A of former Part IIIA of the ITAA 1936

- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Division 104 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
- Subdivision 130-C of the ITAA 1997
- section 202-40 of the ITAA 1997
- section 202-45 of the ITAA 1997
- section 204-30 of the ITAA 1997
- Division 207 of the ITAA 1997
- Division 974 of the ITAA 1997
- section 974-75 of the ITAA 1997
- section 974-120 of the ITAA 1997
- section 974-165 of the ITAA 1997, and
- section 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 investors (referred to in this Ruling as Holders) who are issued AMP Capital Notes (Notes) by AMP Limited (AMP) and who:

- are residents of Australia (within the meaning of subsection 6(1) of the ITAA 1936) during the period in which they hold the Notes
- acquire their Notes by initial application under the Prospectus that was lodged with the Australian Securities and Investments Commission on 26 October 2015
- hold their Notes on capital account,¹ and
- are not subject to the taxation of financial arrangements (TOFA) rules in Division 230 in relation to gains and losses on their Notes.

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

¹ That is, they are neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)).

Qualifications

4. This Ruling does not consider how the taxation law applies to a Nominated Purchaser who acquires their Notes under the Resale mechanism described at paragraphs 49 to 51 of this Ruling.

5. This Ruling does not consider how the gross-up and tax offset rules in Division 207 apply to a Holder that is a partnership, or the trustee of a trust, or to indirect distributions to partners in a partnership, or trustees or beneficiaries of a trust.

6. 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 9 to 52 of this Ruling.

7. 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

8. This Ruling applies from 1 July 2015 to 30 June 2024. The Ruling continues to apply after 30 June 2024 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

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

- Prospectus dated 26 October 2015 (Prospectus), and
- AMP Capital Notes Trust Deed dated 26 October 2015 (Trust Deed) incorporating AMP Capital Note Terms (Note Terms).

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

10. In this Ruling, unless otherwise defined, capitalised terms take the meaning that they have in the Note Terms.

Background

11. AMP is the ultimate parent company of the AMP group of companies (AMP Group).
12. AMP is the head company of the AMP tax consolidated group under Part 3-90 of the ITAA 1997. The entities listed in paragraph 15 of this Ruling are subsidiary members of the AMP tax consolidated group. AMP is a resident of Australia under the income taxation laws of Australia and of no other jurisdiction.
13. AMP is an Australian Securities Exchange (ASX) listed company and will remain listed on the official list of the ASX and all of its shares will be quoted on the ASX during the term of the Notes.
14. The AMP Group is a large financial services group operating in Australia and New Zealand. It provides financial advice, superannuation products and services, banking products, insurance products and investment management services to retail and wholesale clients.
15. The following Australian Prudential Regulation Authority (APRA) regulated entities are subsidiaries of AMP and members of the AMP Group:
 - (a) AMP Bank Limited (AMP Bank)
 - (b) AMP Life Limited (AMP Life), and
 - (c) The National Mutual Life Association of Australasia Limited (NMLA).
16. AMP Bank is an 'authorised deposit-taking institution' (ADI) regulated by APRA under the *Banking Act 1959* (Banking Act).
17. AMP is not an authorised 'non-operating holding company' (NOHC) of AMP Bank under section 11AA(2) of the Banking Act.
18. AMP Life and NMLA are life insurance companies regulated by APRA under section 17 of the *Life Insurance Act 1995* (Life Insurance Act).
19. AMP is a registered NOHC of AMP Life and NMLA under section 28A of the Life Insurance Act.

The Offer of AMP Capital Notes

20. In the Prospectus, AMP announced its intention to undertake a capital raising by the issue of the Notes to raise \$200 million with the ability to raise a higher or lower amount (the Offer). The amount raised will be used to fund additional Tier 1 Capital of one or more of the APRA regulated entities within the AMP Group.
21. APRA confirmed that it has no objection to the issue of the Notes.
22. The Notes are expected to be issued on 30 November 2015 and will be listed on the ASX.

23. Applications to acquire the Notes must be for a minimum of 50 Notes (\$5,000) with additional Notes in multiples of 10 Notes (\$1,000). Applications may be made under one of the following offers:

- a Securityholder Offer to Eligible Securityholders
- a Broker Firm Offer to Australian resident retail and high-net-worth clients of Syndicate brokers
- a General Offer to members of the general public who are resident in Australia, and
- an Institutional Offer to certain Institutional Investors invited to bid for Notes under the Bookbuild.

Main features of the AMP Capital Notes

24. The Notes are fully paid, mandatorily convertible, subordinated, perpetual debt securities issued by AMP. The obligations of AMP under the Notes are constituted by, and owing under, the Trust Deed.

25. Each Note is issued fully paid for its face value of \$100 (Face Value).

26. A Holder does not have voting rights at any meeting of shareholders of AMP.

Distribution calculation

27. Subject to the Note Terms, Distributions are scheduled to be paid quarterly in arrears on each Distribution Date. The amount of a Distribution will be calculated according to the following formula which is set out in clause 3 of the Note Terms:

$$\text{Distribution} = \frac{\text{Distribution Rate} \times \$100 \times N}{365}$$

where:

Distribution Rate means:

(Bank Bill Rate + Margin) × Franking Adjustment Factor

where:

Bank Bill Rate (expressed as a percentage per annum) means, for the Distribution Period ending with the relevant Distribution Date, the rate for prime bank eligible securities having a 3 month tenor which is designated as 'AVG MID' 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 rate or that rate is not displayed by 10:30am (Sydney time) on that date, the rate determined by AMP having regard to comparable indices then available;

Franking Adjustment Factor means:

$$\frac{(1 - T)}{1 - [T \times (1 - F)]}$$

where:

F means the Franking Rate; and

T means the Tax Rate;

Margin means the rate (expressed as a percentage per annum) determined under the Bookbuild;

N means:

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

28. Pursuant to the definition of Franking Rate in Schedule 1 of the Note Terms, Distributions are expected to be franked at the same percentage as applies to a fully paid ordinary share in the capital of AMP (AMP share).

Distribution payment conditions

29. The payment of any Distribution is subject to:

- (a) the absolute discretion of AMP and AMP may elect to pay some or none of a Distribution
- (b) the payment of the Distribution not resulting in AMP breaching APRA's capital adequacy requirements applicable to AMP
- (c) the payment of the Distribution not resulting in AMP becoming, or being likely to become, insolvent for the purposes of the *Corporations Act 2001*, and
- (d) APRA not objecting to the payment of the Distribution.

30. Distributions are non-cumulative and interest does not accrue on any unpaid Distributions. AMP has no liability to pay the unpaid amount of the Distribution. Holders have no claim or entitlement in respect of non-payment and non-payment does not constitute an event of default.

31. A restriction applies to AMP if AMP fails to pay a Distribution in full within 20 Business Days of a Distribution Date. The restriction is that AMP must not, without the approval of a Special Resolution of the Holders:

- (a) declare, determine to pay or pay any dividend in relation to AMP shares, or
- (b) undertake any Buy Back or Capital Reduction.

Mandatory Conversion on Mandatory Conversion Date

32. All Notes on issue (but not some) must Convert into AMP shares on the Mandatory Conversion Date.
33. Subject to all of the Mandatory Conversion Conditions being satisfied, the Mandatory Conversion Date will be the date that is the earlier of 22 December 2023 or the first Distribution Date after 22 December 2023, on which the Mandatory Conversion Conditions are satisfied.
34. The Mandatory Conversion Conditions are as follows:
- (a) the volume weighted average price (VWAP) of AMP shares on the 25th Business Day immediately preceding (but not including) the relevant Distribution Date is greater than 56% of the Issue Date VWAP
 - (b) the VWAP of AMP shares during the period of 20 Business Days on which trading in AMP shares took place immediately preceding (but not including) the relevant Distribution Date is greater than 50.51% of the Issue Date VWAP, and
 - (c) no Delisting Event applies in respect of the relevant Distribution Date.

Mandatory Conversion on Non-Viability Event

35. A Non-Viability Event occurs when APRA provides a written determination to AMP that the conversion or write-off of relevant Perpetual Subordinated Instruments in accordance with their terms or by operation of law is necessary because:
- (a) without the conversion to AMP shares or write-off, APRA considers that AMP would become non-viable, or
 - (b) without a public sector injection of capital into, or equivalent capital support with respect to AMP, APRA considers that AMP would become non-viable.
36. If a Non-Viability Event occurs, AMP must convert to AMP shares or Write- Off all or some relevant Perpetual Subordinated Instruments (which includes the Notes).
37. If the Conversion is unable to be undertaken within the required time period after the Non-Viability Event, the rights of Holders under the Notes will be immediately and irrevocably Written-Off.

Mandatory Conversion on Acquisition Event

38. An Acquisition Event occurs if, amongst other things, a person acquires more than 50% of the AMP shares as a result of a takeover bid or scheme of arrangement. If an Acquisition Event occurs, AMP must convert all (but not some) of the Notes on the Acquisition Conversion Date.

Optional Exchange

39. Exchange means Conversion, Redemption, Resale of Notes or a combination of these Exchange Methods.

40. Subject to prior written approval from APRA, Notes may be Exchanged by AMP as follows:

- (a) all or some Notes on the Optional Exchange Date which will be on 22 December 2021, or
- (b) all or some of the Notes on an Exchange Date following the occurrence of a Tax Event or a Regulatory Event.

41. If a Potential Acquisition Event occurs, all (but not some) Notes may be Converted on an Exchange Date.

42. A Holder does not have the right to request Exchange of the Notes at any time.

43. There is no certainty that the Notes will be Exchanged as APRA's written approval for Exchange may not be granted, and in any event, AMP may be unwilling to Exchange. Accordingly, the Notes may remain on issue after the Optional Exchange Date, and may still be on issue on the Mandatory Conversion Date (at which time they must be Converted, subject to satisfaction of the Mandatory Conversion Conditions).

Conversion mechanism

44. Conversion of the Notes involves the following:

- (a) each Holder is issued a number of AMP shares for each Note that is being Converted on the Conversion Date equal to the Conversion Number, and
- (b) each Holder's rights in relation to each Note that is being Converted is immediately and irrevocably terminated in full for an amount equal to the Face Value and AMP applies the Face Value by way of payment for the subscription of the Conversion Number of AMP shares to be issued on Conversion.

45. Upon Conversion of a Note, all other rights conferred or restrictions imposed on that Note under the Note Terms no longer have effect (except for accrued rights).

46. Each AMP share allotted upon Conversion ranks equally with all other fully paid AMP shares.

Redemption mechanism

47. If AMP elects Redemption as an optional Exchange Method, it will result in a Note being redeemed by payment on the Exchange Date of the Face Value to the relevant Holder.

48. Upon payment of the Redemption Price, all other rights conferred, or restrictions imposed, by the Note will no longer have effect.

Resale mechanism

49. If AMP elects to Resell the Notes, AMP must appoint one or more Nominated Purchasers for the Resale on such terms as may be agreed between AMP and the Nominated Purchasers.

50. Each Holder on the Exchange Date is taken irrevocably to offer to sell the Notes to the Nominated Purchaser(s) on the Exchange Date for the Resale Price. The Resale Price, for a Note, means a cash amount equal to its Face Value.

51. On the Exchange Date subject to payment by the Nominated Purchaser of the Resale Price to the Holders, all right, title and interest in such Note (excluding the right to any Distribution payable on that date) is transferred to the Nominated Purchaser free from Encumbrances.

Other matters

52. The Ruling is also 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 Notes
- (b) in accordance with Division 203, AMP will frank Distributions in respect of the Notes at the same franking percentage as the AMP benchmark for the franking period in which the frankable distribution is made
- (c) Distributions on the Notes are not sourced, directly or indirectly, from AMP's share capital account or its non-share capital account
- (d) immediately before the payment of a Distribution on the Notes, AMP has available frankable profits (worked out under section 215-20) at least equal to the Distribution
- (e) AMP is not a private company, or a Controlled Foreign Company
- (f) AMP is not a Territory company for the purpose of subsection 24J(2)(a) of the ITAA 1936
- (g) AMP is not a 'NZ franking company' as defined in section 220-30
- (h) AMP expects to continue with its policy of franking all frankable distributions (to the extent that franking credits are available in its franking account)
- (i) AMP will not differentially frank Distributions to different Holders according to their tax status or on any other basis
- (j) the dividend payout ratios and AMP's policies in relation to the franking of its distributions on ordinary share capital and other preference share capital of AMP (to the extent such dividends/distributions are frankable) are not expected to change as a result of the issue of the Notes

- (k) the share capital account of AMP is not tainted (within the meaning of Division 197) and will not become tainted by the issue of the Notes or the allotment of AMP shares on Conversion of the Notes
- (l) on Conversion or Redemption of the Notes, AMP will debit the Face Value of the Notes to its non-share capital account
- (m) AMP shares issued to the Holders on Conversion of the Notes will be equity interests under Division 974
- (n) Holders, and their associates, have not taken and will not take any positions (within the meaning of former section 160APHJ of the ITAA 1936) in relation to their Notes (apart from the holding of the Notes) that would cause a Holder not to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936
- (o) Holders and their associates will not make any related payments (within the meaning of former section 160APHN of the ITAA 1936) in respect of the Distributions
- (p) the Holders in receipt of Distributions will have held their Notes for a period of at least 90 days (excluding the day of acquisition and the day of disposal of their Notes) within the primary qualification period in relation to at least one of the Distributions, which period begins on the day after the day on which the Holder acquired their Notes and ends on the 90th day after the day on which the Notes became ex dividend, and
- (q) the accounts of the AMP Group are prepared in accordance with the applicable accounting standards.

Ruling

Characterisation of the Notes

53. Each Note is:

- an 'equity interest' in AMP under Division 974 and a 'non-share equity interest' in AMP as defined in subsection 995-1(1), and
- a convertible interest under item 4 of the table in subsection 974-75(1).

54. Each Note is not a 'traditional security' as defined in subsection 26BB(1) of the ITAA 1936 nor a 'qualifying security' as defined in subsection 159GP(1) of the ITAA 1936.

55. Holders acquire their Notes on the date on which the contract for the allotment of the Notes will be entered into (item 2 of the table in section 109-10).

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

Distributions

57. The Distributions payable in respect of the Notes will constitute frankable distributions under section 202-40 and not be unfrankable under section 202-45.

58. Holders must include in their assessable income all Distributions received (subparagraph 44(1)(a)(ii) of the ITAA 1936) and the amount of the franking credits attached to the Distributions (subsection 207-20(1)), unless Subdivision 207-D applies.

59. Holders are entitled to a tax offset equal to the franking credit on the Distributions under subsection 207-20(2), unless Subdivision 207-D applies.

60. Holders entitled to a franking credit tax offset under subsection 207-20(2) are subject to the refundable tax offset rules in Division 67. Certain trustees and corporate tax entities are excluded from the refundable tax offset rules under section 67-25.

Conversion of Notes

61. CGT event C2 happens on Conversion of Notes for AMP shares (section 104-25). As each Note is a convertible interest, any capital gain or capital loss made by a Holder from CGT event C2 happening is disregarded (subsection 130-60(3)).

62. On Conversion, the first element of the cost base and reduced cost base of each AMP share acquired on Conversion is the pro-rata portion of the Holder's cost base and reduced cost base of their Notes at the time of Conversion (item 2 of the table in subsection 130-60(1)).

63. AMP shares allotted on Conversion are taken to be acquired at the time of the Conversion of the Notes (subsection 130-60(2)).

64. The issue of AMP shares on Conversion is not a dividend within the meaning of subsection 6(1) of the ITAA 1936, nor is taken to be a non-share dividend within the meaning of section 974-120 and will not be included in the assessable income of the Holder under paragraph 44(1)(a) of the ITAA 1936.

Anti-avoidance

65. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits received by the Holders in respect of the Distributions.

66. 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 the Holders in respect of the Distributions paid.

67. Section 207-145 will not apply to the whole or any part of the Distributions received by the Holders in respect of the Notes. Accordingly, section 207-145 will not adjust the Holders' assessable income to exclude the amount of the franking credit on the Distributions, nor will it deny the tax offset to which the Holders would otherwise be entitled.

68. Section 45 of the ITAA 1936 will not apply to treat the value of the AMP shares issued to the Holders on Conversion as an unfrankable dividend paid by AMP to the Holders.

69. 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 Notes as an unfranked dividend in the hands of Holders.

70. 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 Notes as an unfranked dividend in the hands of Holders.

Commissioner of Taxation

11 November 2015

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.*

Characterisation of the Notes

Each Note is an equity interest

71. Division 974 provides the rules that govern the classification of an interest as a debt interest or an equity interest for income tax purposes.

72. In accordance with subsection 974-70(1) a scheme gives rise to an equity interest in a company if the scheme satisfies the equity test in subsection 974-75(1) and the interest is not characterised as a debt interest under Subdivision 974-B.

73. A scheme satisfies the equity test in relation to a company if it gives rise to an interest set out in the table in subsection 974-75(1). As the Notes are an interest in AMP that will, or may, convert into an equity interest in AMP, being AMP shares, item 4 of the table in subsection 974-75(1) is satisfied. Furthermore, subsection 974-75(2) will not prevent the scheme from giving rise to an equity interest in AMP as the scheme comprising the issue of the Notes will be a financing arrangement under section 974-130.

74. Therefore, the Notes satisfy the test for equity interests and are equity interests provided that the Notes are not also characterised as debt interests under Subdivision 974-B.

75. Having regard to the relevant circumstances of the scheme comprising the issue of the Notes by AMP, the Notes fail to satisfy the debt test in subsection 974-20(1). Therefore, the Notes will not give rise to a debt interest in AMP under subsection 974-15(1).

76. As the Notes issued by AMP satisfy the equity test and the interest is not characterised as a debt interest, the Notes are equity interests under Division 974. The Notes will constitute a 'non-share equity interest', as defined in subsection 995-1(1) as it is an equity interest in AMP that is not solely a share.

Each Note is a convertible interest

77. Subsection 995-1(1) 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). 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.

78. Under section 974-165, 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)), 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)).

79. The Notes are convertible interests as they may be converted into another interest because of the allotment of AMP shares upon Conversion.

Each Note is not a traditional security

80. 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.

81. The term 'security' is defined in subsection 26BB(1) of the ITAA 1936 by reference to subsection 159GP(1) of the ITAA 1936. Under 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.

82. The Notes are not stock, a bond, debenture, certificate of entitlement, bill of exchange, or a promissory note.

83. 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' are generally recognised as debt instruments (Taxation Ruling TR 96/14 *Income tax: traditional securities*).

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

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

86. The Note Terms do not evidence a liability of AMP to pay an amount or amounts to Holders during the term of the instrument or at maturity. Notes are perpetual and Holders do not have a right to require redemption. The payment by AMP of Distributions is subject to the distribution payment conditions. Distributions are discretionary and non-cumulative and if a Distribution is not paid, AMP has no liability to pay the Distribution and Holders have no claim in respect of non-payment.

87. Upon Conversion, AMP allots and issues a number of AMP shares based on a formula set out in the Note Terms for each Note held by the Holder. Each Holder's rights in relation to each Note that is being exchanged are immediately and irrevocably terminated for an amount equal to the Face Value and AMP applies that amount by way of payment for the subscription for AMP shares issued to Holders. AMP cannot be said to have a liability to pay an amount under the Note Terms in relation to a Conversion.

88. The Redemption or Resale of Notes is possible. However, it is at the option of AMP, it can only occur upon the occurrence of certain events, and it requires the prior written approval of APRA. This does not establish a liability on AMP to pay an amount.

89. AMP is also not liable to pay an amount under the Notes upon winding up, as it would be expected that before winding up commences, the Notes would either be Converted into AMP shares due to a Non-Viability 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 AMP is not able to issue AMP shares within the time stated in the Note Terms.

90. The Note Terms do not exhibit a debt-like obligation as contemplated by paragraph (d) of the definition of 'security'.

91. As Notes are not a security within the meaning of subsection 159GP(1) of the ITAA 1936, they cannot be a traditional security under subsection 26BB of the ITAA 1936. Accordingly, section 26BB of the ITAA 1936 will not apply to include any gain upon disposal or redemption of the Notes in the assessable income of the Holder. Section 70B of the ITAA 1936 will not apply to allow a deduction to Holders upon disposal or redemption.

Each Note is not a qualifying security

92. Under Division 16E of Part III of the ITAA 1936, the income and deductions from a 'qualifying security' are spread over the term of the security on an accruals basis which reflects the economic gains and losses which have accrued at any point in time (section 159GQ of the ITAA 1936).

93. A 'qualifying security' is defined in subsection 159GP(1) of the ITAA 1936 and must, among other requirements, be a 'security'. A Note is not a 'security' within the meaning of subsection 159GP(1) (see paragraph 83 of this Ruling). Therefore, the Note is not a 'qualifying security' for the purposes of Division 16E of Part III of the ITAA 1936.

Acquisition time of the Notes

94. 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).

95. The Notes are equity interests in AMP. When an investor's application for the Notes is accepted by AMP, this leads to the formation of a contract for the issue of the Notes to the investor (who will become a Holder). Holders will acquire their Notes on the date on which the contract for allotment of the Notes is entered into (item 2 of the table in section 109-10).

Cost base and reduced cost base of the Notes

96. The first element of the cost base and the 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) and subsection 110-55(2)).

97. The Issue Price of each Note is \$100. Accordingly, the first element of a Holder's cost base and reduced cost base of each Note is \$100.

Distributions

98. Subdivision 202-C details the circumstances in which a distribution can be franked. Section 202-40 provides that distributions and non-share dividends are frankable to the extent that they are not unfrankable.

99. As stated in paragraph 53 of this Ruling, each Note issued by AMP is a non-share equity interest. Distributions paid by AMP in respect of each Note therefore constitute a 'non-share distribution' (section 974-115).

100. All non-share distributions will be non-share dividends, except to the extent to which the company debits the distribution against the company's non-share capital account or the company's share capital account (section 974-120). Distributions are not debited against AMP's non-share capital account or share capital account. Accordingly, the Distributions on the Notes will constitute non-share dividends and will be a frankable distribution to the extent that it is not unfrankable under section 202-45.

101. Unfrankable distributions are listed in section 202-45. For example, an unfrankable distribution is a distribution that is sourced, directly or indirectly, from a company's share capital account (paragraph 202-45(e)).

102. As the Distributions payable on the Notes will not be debited against, or sourced directly or indirectly from, AMP's share capital account or its non-share capital account, paragraph 202-45(e) will not apply.

103. Furthermore, having regard to all of the relevant circumstances, there is no indication that the Distributions payable on the Notes will reflect the circumstances of any of the other distributions that are taken to be unfrankable under section 202-45.

104. Accordingly, Distributions payable in respect of the Notes constitute frankable distributions under section 202-40 and are not unfrankable under section 202-45.

Inclusion of Distributions and franking credits in assessable income

105. The assessable income of a resident shareholder includes all non-share dividends that are paid to the shareholder by the company (subparagraph 44(1)(a)(ii) of the ITAA 1936).

106. The Notes are 'non-share equity interests' as defined in subsection 995-1(1) and the Holders are 'equity holders' as defined in subsection 995-1(1). 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 as it applies to a share. 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.

107. Distributions in respect of the Notes are non-share distributions under section 974-115.

108. As the Distributions are not debited against AMP's non-share capital account or share capital account the Distributions are non-share dividends under section 974-120. Accordingly, Holders must include Distributions received in their assessable income under subparagraph 44(1)(a)(ii) of the ITAA 1936.

109. Where an Australian resident company makes a franked distribution directly to a shareholder, the assessable income of the shareholder must also include the amount of the franking credit on the distribution (subsection 207-20(1)), unless Subdivision 207-D applies. The inclusion of both the dividend and the attached franking credit in a shareholder's assessable income is known as 'grossing-up' the dividend.

110. If AMP franks the Distributions in respect of the Notes, Holders must include in their assessable income the amount of any franking credits attached to the Distribution in the income year in which the Distribution is made.

Conduit foreign income

111. A frankable distribution that has an unfranked part declared to be conduit foreign income between Australian corporate tax entities may be treated as non-assessable non-exempt income (Subdivision 802-A).

112. If AMP declares the unfranked part of the Distribution to be conduit foreign income the amount that is treated as non-assessable non-exempt income is determined under subsection 802-20(2) provided the conditions in subsection 802-20(1) and all other conditions in Subdivision 802-A are met.

Entitlement to a tax offset

113. Holders are entitled to a tax offset equal to the franking credit on the Distributions under subsection 207-20(2), unless Subdivision 207-D applies.

114. Holders who are entitled to a franking credit tax offset under subsection 207-20(2) are subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25. 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.

115. Accordingly, the Holders are subject to the refundable tax offset rules unless they are a type of entity that is specifically excluded under section 67-25.

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

Conversion of Notes

117. The Notes must convert upon the satisfaction of the Mandatory Conversion Conditions, or may convert should AMP elect to do so following the occurrence of certain defined events and subject to the satisfaction of any relevant conditions.

118. CGT event C2 happens to Holders on Conversion under paragraph 104-25(1)(f), which provides that 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.

119. As the Notes are convertible interests, the Conversion of Notes for AMP shares is the conversion of a convertible interest.

120. A capital gain or capital loss made from converting a convertible interest is disregarded (subsection 130-60(3)). Therefore, any capital gain or capital loss made by the Holders from CGT event C2 happening on Conversion is disregarded.

Cost base and reduced cost base of AMP shares acquired on Conversion

121. On Conversion, Subdivision 130-C applies so that the first element of the cost base and reduced cost base of each AMP share acquired on Conversion is the pro-rata portion of the Holder's cost base and reduced cost base of their Notes at the time of Conversion (item 2 of the table in subsection 130-60(1)).

Acquisition time of AMP shares on Conversion

122. AMP shares allotted on Conversion are taken to be acquired at the time of the Conversion of the Notes (subsection 130-60(2)).

Issue of AMP shares on Conversion not a dividend or a non-share dividend

123. The issue of AMP shares 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). A non-share distribution is a non-share dividend, but not to the extent the company debits the distribution against its share capital account or non-share capital account.

124. On Conversion, AMP debits the Face Value of the Notes to its non-share capital account. Accordingly, the issue of AMP shares on Conversion will not constitute a non-share dividend and will not be included in the Holders assessable income (subparagraph 44(1)(a)(ii) of the ITAA 1936).

125. Furthermore, on Conversion, AMP shares will not be issued to the Holders as shareholders of AMP. Therefore, it would not satisfy paragraphs (a) or (b) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936. Accordingly, the issue of AMP shares on Conversion will not be included in the Holders' assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).

Anti-avoidance***Imputation benefits – streaming***

126. The Commissioner has a discretion 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 (Subdivision 204-D).

127. Section 204-30 applies where a corporate tax entity 'streams' the payment of distributions to its members in such a way that an imputation benefit is or would be received by a member of the entity that derives a greater benefit from franking credits, while other members receive lesser or no imputation benefits regardless of whether or not they receive other benefits (paragraphs 204-30(1)(a), (b) and (c)).

128. 'Streaming' is not defined for the purposes of Subdivision 204-D however paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002 provides that it is 'selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits'.

129. The Notes will be listed on the ASX and as such are available for investment by different types of investors. AMP will not differentially frank distributions payable to different Holders according to the tax status of the Holder or on any other basis. AMP expects to continue with its policy of franking all frankable distributions (to the extent of the franking credits in its franking account). The dividend payout ratios and AMP's policies in relation to the franking of dividends/distributions on AMP shares and other preference share capital of AMP (to the extent such dividends/distributions are frankable) are not expected to change as a result of the issue of the Notes. Accordingly, it cannot be said that AMP will selectively direct the flow of franked distributions to those members who could most benefit from the franking credits.

130. Further, the AMP shares issued on Conversion of the Notes do not attract the application of section 204-30 because the issue of the AMP shares does not constitute a 'distribution' (as defined in section 960-120).

131. Having regard to all of the relevant circumstances, the Commissioner has concluded that the requisite element of streaming does not exist in relation to the franked distributions to be paid by AMP to the Holders. Accordingly, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits that are to be received by the Holders in respect of the Distributions paid.

Section 177EA

132. Section 177EA of the ITAA 1936 is a general anti-avoidance rule that is intended to prevent abuse of the imputation system through schemes which circumvent the basic rules for the franking of dividends.

133. In broad terms, there needs to be a scheme in which, 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 to obtain an imputation benefit.

134. The Holders could reasonably be expected to receive an imputation benefit as AMP expects to frank the Distributions.

135. Having regard to all of the relevant circumstances of the scheme, set out in subsection 177EA(17) of the ITAA 1936, it cannot be concluded that the purpose of enabling the Holders to obtain imputation benefits is not more than incidental to AMP's purpose of raising Additional Tier 1 Capital to meet its capital adequacy requirements.

136. 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 that are to be received by the Holders in respect of the distributions paid on the Notes.

Gross up and tax offset denied in certain circumstances

137. The application of the gross-up rules and the availability of tax offsets referable to the franking credit on the Notes are also subject to the rules in Division 207. In particular, Subdivision 207-F can apply to cancel the ordinary operation of the gross-up and tax effect rules if the imputation system has been manipulated in an impermissible manner. Section 207-145 specifically operates to cancel these consequences if a franked distribution is made to an entity in one or more of the circumstances specified in paragraphs 207-145(1)(a) to 207-145(1)(d).

138. Paragraph 207-145(1)(a) provides that in relation to a franked dividend made by an entity only a 'qualified person in relation to the distribution for the purposes of Division 1A or former Part IIIAA of the ITAA 1936' is entitled to a franking credit or tax offset. Broadly speaking, to be a 'qualified person' in relation to the Distribution, the Holder must satisfy both the holding period rule and the related payments rule.

139. A Holder is a qualified person in relation to a Distribution received in respect of their Notes, provided that:

- the Holder held their Note 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 their Note and ending on the 90th day after the day on which the Note become ex-dividend (former subsections 160APHO(2) and 160APHO(3) and former sections 160APHM and 160APHJ of the ITAA 1936), and
- neither the Holder, nor associates of the Holder, have made, are under an obligation to make, or are likely to make a related payment in relation to Distributions on their Notes (former paragraph 160APHO(1)(a) and former section 160APHN of the ITAA 1936).

140. If either, or both, of the above two conditions are not met, the Holder is not a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Subdivision 207-F creates the appropriate adjustment to cancel the effect of the gross-up and tax offset rules for the Holder.

141. As stated above at paragraphs 131 and 136 of this Ruling, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) to deny the imputation benefit that arises in respect of a Distribution that is made. Thus the circumstances specified in paragraphs 207-145(1)(b) and 207-145(1)(c) are not present.

142. In respect of paragraph 207-145(1)(d), a distribution will be taken to be made as part of a dividend stripping operation, 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 (section 207-155). Having regard to all of the relevant circumstances, there is no indication that the offering of the Notes and the associated payment of franked distributions to the Holders in any way constitutes a dividend stripping arrangement. As such, the dividend stripping provisions do not apply.

143. Accordingly, section 207-145 will not apply to adjust the Holders' assessable income to exclude the franking credit on the Distributions, nor will it deny the tax offset to which the Holders would otherwise be entitled.

Qualified person – the Resale and the Conversion mechanisms

144. In determining whether a shareholder is a 'qualified person' in relation to a distribution paid on their shares, every 'position' (defined in former subsection 160APHJ(2) of the ITAA 1936) in relation to the shares is taken into account in calculating the 'net position' (defined in former subsection 160APHJ(5) of the ITAA 1936) in relation to the shares. The 'net position' determines whether a shareholder has materially diminished risks of loss or opportunities for gain on a particular day in respect of shares held by the shareholder (former section 160APHM of the ITAA 1936). Under former subsection 160APHJ(2) of the ITAA 1936, a 'position' in relation to shares is anything that has a delta in relation to the shares.

145. 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 *Income tax: holding period rule: is an embedded share option a position in relation to the share if it is exercisable by or against a party other than the issuer of the share?*).

146. Under the Resale mechanism, AMP may (subject to certain conditions) elect to require the Holders to sell all or some of their Notes to one or more Nominated Purchasers. Until AMP appoints an entity as a Nominated Purchaser, that entity has no right or ability to call for the Notes from the Holders.

147. AMP is also not required to elect to exercise the Resale mechanism. It follows that the Resale mechanism is an option that is held by AMP, the issuer of the Notes, and not by a third party. Therefore, the Resale mechanism does not constitute a separate 'position' in relation to the Notes under former subsection 160APHJ(2) of the ITAA 1936.

148. Similarly, although the Conversion mechanism effects the exchange of Notes for AMP shares, the Conversion mechanism does not constitute a separate 'position' for the purposes of former Division 1A of Part IIIAA of the ITAA 1936 as the Holders have no right to elect for Conversion.

149. For the purpose of determining whether a Holder is a 'qualified person' in relation to the Distributions under Division 1A of former Part IIIAA of the ITAA 1936, neither the Resale mechanism nor the Conversion mechanism affects a Holder's risks of loss or opportunities for gain in respect of the Notes.

Sections 45, 45A and 45B

150. Subdivision D of Division 2 of Part III of the ITAA 1936 (which includes sections 45, 45A and 45B of the ITAA 1936) applies as the Notes are non-share equity interests and the Holders are equity holders (subsection 43B(1) of the ITAA 1936).

Section 45

151. 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 (but not all) shareholders and minimally franked dividends are received by other shareholders. Minimally franked dividends are dividends which are not franked or are franked to less than 10%.

152. AMP has consistently paid franked dividends on its ordinary shares (to the extent such dividends are frankable). Distributions on the Notes are expected to be franked at the same benchmark franking percentage as the dividends on AMP shares.

153. Furthermore, on Conversion the Note Terms do not allow AMP to issue AMP shares to some or all of the Holders as an alternative to the payment of Distributions.

154. Accordingly, section 45 of the ITAA 1936 will not apply to treat an amount equal to the value of the AMP shares issued on Conversion as a dividend that is unfrankable.

Section 45A

155. Section 45A of the ITAA 1936 may apply where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the capital benefits than other shareholders, and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

156. The issue of AMP shares to the Holders on the Conversion of the Notes is a 'provision of a capital benefit' to the Holders (as defined in paragraph 45A(3)(a) of the ITAA 1936).

157. Upon Conversion, all Holders receive identical benefits, being the issue of AMP shares. Consequently, it cannot be concluded that capital benefits are streamed to advantaged Holders while dividends are paid to disadvantaged Holders.

158. Redemption involves the provision of capital benefits within the meaning of subsection 45A(3) of the ITAA 1936 which includes the distribution of share capital. By virtue of subsection 45A(3A) of the ITAA 1936, a non-share capital return will be taken to be a distribution of share capital to the Holder. The amount paid to the Holders on Redemption is limited to the amount of the Face Value of each Note, and Redemption may occur even if AMP, in its absolute discretion, refuses to pay a Distribution for the final Distribution Period.

159. Accordingly, it cannot be said that capital benefits are streamed in such a manner as to enable advantaged Holders to derive a greater benefit from the capital benefits provided than disadvantaged Holders. Therefore, the Redemption or the issue of AMP shares on Conversion of the Notes will not trigger the application of section 45A of the ITAA 1936. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 in respect of the Conversion or Redemption of Notes.

Section 45B

160. Section 45B of the ITAA 1936 may apply where certain payments, allocations and distributions are made to shareholders in substitution for dividends.

161. In broad terms, there needs to be a scheme in which, having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into the scheme or carried out the scheme or any part of the scheme did so for a purpose, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit.

162. As the Conversion or Redemption will generally result in a lesser amount of tax payable to Holders than what would be payable if it had instead been an assessable dividend, Holders will obtain a tax benefit within the meaning of subsection 45B(9) of the ITAA 1936.

163. Having regard to the relevant circumstances of the scheme, set out in subsection 45B(8) of the ITAA 1936, it cannot be concluded that the scheme is to be entered into or carried out for a more than incidental purpose of enabling the Holders to obtain a tax benefit. In a Conversion, the Notes terminate and the Holders receive AMP shares. In a Redemption, the Notes terminate and the Holders receive cash. In both cases, the amount is limited to the Face Value of the Notes.

164. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936.

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