



CR 2012/98 - Income tax: Whitefield- allotment of convertible resettable preference shares (CRPS)

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Class Ruling

Income tax: Whitefield - allotment of convertible resettable preference shares (CRPS)

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

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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:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 6BA of the ITAA 1936;
 - paragraph 44(1)(a) of the ITAA 1936;
 - section 45 of the ITAA 1936;
 - section 45A of the ITAA 1936;
 - section 45B of the ITAA 1936;

- subsection 177EA(5) of the ITAA 1936;
- subsection 6-5(1) of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 67 of the ITAA 1997;
- Division 104 of the ITAA 1997;
- section 109-10 of the ITAA 1997;
- subsection 110-25(2) of the ITAA 1997;
- subsection 110-55(2) of the ITAA 1997;
- section 115-280 of the ITAA 1997;
- Subdivision 130-A of the ITAA 1997;
- section 202-15 of the ITAA 1997;
- subsection 204-30(3) of the ITAA 1997;
- subsection 205-15(1) of the ITAA 1997; and
- Division 207 of the ITAA 1997.

All legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are subscribers for Convertible Resettable Preference Shares (CRPS) in Whitefield Limited (Whitefield) who hold those CRPS on capital account and are Australian residents (within the meaning of subsection 995-1(1)) during the period in which they hold CRPS (referred to in this Ruling as CRPS Holders).

4. The class of entities to which this Ruling applies does not extend to the CRPS Holders who did not acquire their interest by initial subscription.

5. This Ruling does not apply to CRPS Holders for whom gains and losses from the CRPS are subject to the taxation of financial arrangements rules in Division 230.

(Note – Division 230 will generally not apply to the financial arrangements of individuals, unless they have made an election for those rules to apply to them.)

6. 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 trustee, or to indirect distributions to partners in a partnership, trustees or beneficiaries of a trust.

7. This Ruling does not consider the tax implications of the Redemption of CRPS in accordance with clause 5.17 of the CRPS Terms.

8. This Ruling does not apply to CRPS Holders where Dividends paid in respect of CRPS are either exempt income (within the meaning of section 6-20) or non-assessable non-exempt income (within the meaning of section 6-23) in their hands.

Qualifications

9. 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 12 to 40 of this Ruling.

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

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

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Date of effect

12. This Ruling applies from 9 August 2012 to 30 June 2019. The Ruling continues to apply after 30 June 2019 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

13. The following description of the scheme is based on information provided by DLA Piper (the applicant). The following documents (Transaction documents), or relevant parts of them form part of and are to be read with the description:

- application for Class ruling dated 20 July 2012 lodged by the applicant on behalf of Whitefield;
- Prospectus dated 4 July 2012 (the Prospectus) for the offer of up to 300,000 Convertible Resettable Preference Shares (CRPS) to raise up to \$30,000,000 (Scheme);
- CRPS Terms as contained in Appendix A of the Prospectus (CRPS Terms); and
- correspondence received from the applicant providing further details.

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

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

15. During the term of the transaction, Whitefield will be a resident of Australia under the income tax laws of Australia and of no other jurisdiction.

16. In the Prospectus Whitefield will offer investors who are resident in Australia and New Zealand the opportunity to participate in a capital raising involving the issue of up to 300,000 CRPS in Whitefield.

17. The Scheme and CRPS Terms were approved by Whitefield CRPS Holders at an Annual General meeting on 16 July 2012.

18. The classes of Applicants who can apply for CRPS, and the corresponding process for lodging applications, as described in the Prospectus, are:

- Existing shareholders – being registered Shareholders of Whitefield as at 7:00pm on 14 June 2012 whose registered address is in Australia or New Zealand. Existing shareholders will get a priority in allocation of CRPS up to an aggregate maximum of 150,000 CRPS;
- Broker Firm applicants- Australia or New Zealand resident investors who have received a firm allocation from their broker; and
- General offer applicants – investors in Australia or New Zealand.

19. The capital raised will be used by Whitefield to expand its underlying investment portfolio in order to generate further growth in net investment earnings over time.

Main features of CRPS

20. A CRPS is a perpetual, non-cumulative, convertible, redeemable, resettable preference share in the capital of Whitefield.

21. The issue price for each CRPS is \$100, and on issue is fully paid.

22. A CRPS Holder does not have voting rights, except in the limited circumstances described in the CRPS Terms.

Dividend payment

23. Subject to the conditions outlined at paragraph 27 of this Ruling the holder of each CRPS is entitled to receive on the Dividend Payment Date, where the Dividend Period (N) is the period:

- from and including the day after the CRPS Issue Date until (and including) the earliest of 31 May and 30 November after the relevant CRPS Issue Date; or
- Where the CRPS is Converted or Redeemed on a date other than 30 November or 31 May, from and including the first day of the period until the Conversion date or Redemption date as the case may be. (Where Redemption of CRPS is by sale to a third party the CRPS will be deemed not to have been Redeemed for purposes of calculating this period)

a non-cumulative dividend calculated using the formula

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

Where the Dividend Period is the period:

- from but excluding 30 November in each year until (and including) 31 May in the next year; or
- from but excluding 31 May until (and including) 30 November in each year

the holder of each CRPS is entitled to receive on the Dividend Payment Date a non-cumulative dividend calculated using the formula

$$\text{Dividend} = \frac{\text{Dividend Rate} \times \$100}{2}$$

24. The initial Dividend rate from the Issue Date until 30 November 2018 is 7% per annum.

25. On each Reset Date Whitefield can reset the Dividend rate payable on the CRPS, the discount which applies on the Conversion of the CRPS into ordinary shares and determine when resets are to take place in the future. The first reset date is 30 November 2018.

26. Dividends are expected to be fully or substantially franked. However, if any Dividend is not fully franked, no additional cash payment will be made to compensate for the unfranked amount of any Dividend.

27. The Dividend payment dates are on a date determined by the Directors that is:

- not later than 15 December for a Dividend Period ending on 30 November and not later than 15 June for a Dividend Period ending on 31 May until the CRPS are Converted or Redeemed; and
- no later than 14 days after the date on which such CRPS are converted or redeemed as the case may be.

Dividend restrictions

28. A Dividend must not be paid to CRPS Holders if:

- the directors in their absolute discretion have not determined that the Dividend is payable;
- the amount of the Dividend will exceed the amount available to Whitefield for the payment of dividends from time to time in accordance with the *Corporations Act 2001*; and
- the directors form the opinion that making the dividend payment would result in Whitefield becoming , or being, likely to become insolvent for the purposes of the *Corporations Act 2001*.

29. Dividends are non-cumulative. In this regard, if all or any part of a Dividend is not paid because of the restrictions above, or because of any applicable law Whitefield has no liability to pay the Dividend to the CRPS Holder and they have no:

- claim including on the winding-up of Whitefield; or
- right to apply for the winding-up or administration of Whitefield or right to cause a receiver or manager to be appointed in respect of Whitefield.

30. No interest accrues on any unpaid Dividends and the CRPS Holder has no claim or entitlement in respect of interest on any unpaid Dividends.

31. A Dividend is only payable on a Dividend Payment Date to those persons registered as CRPS Holders on the Record Date for that Dividend.

Restrictions in case of non-payment of Dividends

32. If for any reason a Dividend has not been paid in full within 20 business days after the relevant Dividend Payment Date for that dividend, Whitefield must not:

- declare or pay any dividends or distributions on any share in the capital of Whitefield (other than the CRPS) over which the CRPS rank equally or in priority for the payment of dividends; or
- redeem, buy back or reduce capital on any share in the capital of Whitefield,

unless

- all of the CRPS have been Converted or Redeemed;
- a Special Resolution of the CRPS Holders has been passed approving such action; or
- certain other conditions are satisfied by Whitefield as set out in the CRPS Terms.

Conversion

33. Whitefield can Convert CRPS into ordinary shares on any Reset Date and also on the occurrence of certain events.

34. The CRPS Holders can request Whitefield to Convert the CRPS into ordinary shares on any Reset Date and on the occurrence of certain Holder Trigger Events. However, Whitefield can override a Conversion request from a CRPS Holder and instead Redeem the CRPS.

35. On Conversion each CRPS will Convert into one ordinary share (Converted ordinary share) by the variation of the rights and restrictions attaching to the CRPS, such that each CRPS will have the rights attaching to one fully paid ordinary share.

36. Each CRPS Holder will also be issued with an additional number of ordinary shares (Additional Ordinary Shares) calculated by reference to the relevant formula set out in the CRPS Terms.

37. The ordinary shares issued on Conversion of each CRPS and the Additional Ordinary Shares rank equally with all other ordinary shares on issue save with respect to the first dividend after Conversion when the holder will be entitled to a proportionate dividend to reflect the portion of the Dividend Period for which the Converted ordinary share and Additional Ordinary Shares have been held.

38. Conversion does not constitute redemption, cancellation, or the buy back of CRPS or the issue, allotment or creation of a new share (other than any Additional Ordinary Shares)

Redemption

39. Whitefield can Redeem the CRPS on any Reset Date and on the occurrence of certain Trigger events. CRPS Holders cannot seek to have the CRPS redeemed. Redemption can be effected by redemption, buy back (other than an on market buyback), cancellation pursuant to a reduction of capital or can be sold to a third party (or any combination of these), for an amount of cash equal to the Face Value plus any due Unpaid Dividends.

Other matters/assumptions

40. The Ruling is made on the basis that :

- (a) the Transaction documents represent a complete and accurate description of the transaction, are intended by parties to have their legal effect, and will be implemented according to their terms;
- (b) all parties to the transaction are dealing with each other on arm's length terms and fair value consideration will be provided by the CRPS Holders to acquire CRPS;
- (c) CRPS are equity interests in Whitefield pursuant to Division 974;
- (d) Dividends on CRPS will be frankable distributions pursuant to section 202-40;
- (e) Dividends payable in respect of the CRPS will not be debited to Whitefield's share capital account or its non-share capital account;
- (f) Whitefield will frank the Dividends paid on CRPS at the same franking percentage as the benchmark for the franking period in which the payments are made;
- (g) the share capital of Whitefield will not become tainted within the meaning of Subdivision 197-A by the issue of CRPS or the allotment of Additional Ordinary Shares on Conversion of CRPS;
- (h) the additional Ordinary Shares issued in the event of Conversion of CRPS will be equity interests in Whitefield pursuant to Division 974;
- (i) the majority of the CRPS Holders are expected to be residents of Australia for tax purposes, although some may be non-residents;

- (j) Whitefield will not differentially frank distributions payable to different CRPS Holders according to the tax status of the CRPS Holder of those instruments or on any other basis;
- (k) Whitefield will not differentially frank distributions on the CRPS or any other frankable interest in Whitefield according to the tax status of the CRPS Holders of those instruments or on any other basis;
- (l) for the purposes of determining whether a Holder is a 'qualified person' under the former definition of 'qualified person' in subsection 995-1(1), a Holder has taken no positions (apart from the holding of CRPS) in relation to their CRPS and has not made, is not under an obligation to make, or is not likely to make, a related payment in relation to the Dividends;
- (m) the CRPS Holders in receipt of Dividends on CRPS will have held their CRPS 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 CRPS), within the period beginning on the day after the day on which the Holder acquired CRPS and ending on the 90th day after the day on which CRPS become ex-dividend;
- (n) Whitefield expects to have sufficient available profits from which to pay Dividends, where applicable, and have net assets in excess of ordinary share capital, immediately before the payment of any Dividends in respect of the CRPS;
- (o) the dividend payout ratios or the franking credits in relation to the ordinary share capital or other preference share capital of Whitefield are not expected to materially change as a result of the issue of CRPS or any subsequent conversion or redemption;
- (p) on the date of Conversion of CRPS into ordinary Shares, the rights and obligations attached to those ordinary Shares are the same as those contained in the Constitution of Whitefield; and
- (q) Whitefield satisfies the conditions in section 115-290 to qualify as a listed investment company.

Ruling

Acquisition time of CRPS

41. Under item 2 in the table in section 109-10, the CRPS Holders will acquire the CRPS on the date they are issued to CRPS Holders.

CRPS cost base and reduced cost base

42. Under subsections 110-25(2) and 110-55(2), the first element of the cost base and reduced cost base of each CRPS is \$100.

Inclusion of Dividends in assessable income

43. Dividends paid to CRPS Holders will meet the definition of 'dividend' in subsection 6(1) of the ITAA 1936. A Dividend paid to a CRPS Holder is a 'frankable distribution' within the meaning of section 202-40 of the ITAA 1997. CRPS Holders must include in their assessable income:

- all Dividends received in respect of their CRPS (subparagraph 44(1)(a)(i) of the ITAA 1936); and
- an amount equal to the franking credit that is attached to Dividends received in respect of their CRPS (subsection 207-20(1) of the ITAA 1997).

Entitlement to a tax offset

44. The CRPS Holders will be entitled to a tax offset equal to the franking credit received on the Dividends under subsection 207-20(2).

Refundable tax offset

45. The CRPS Holders who are entitled to a tax offset under Division 207, in respect of franking credits received, will also be subject to the refundable tax offset rules in Division 67. This is unless the CRPS Holders are specifically excluded from the refundable tax offset rules under section 67-25. Excluded entities include certain trustees and corporate tax entities under subsections 67-25(1A) to 67-25(1D).

Gross-up and tax offset denied in certain circumstances

46. The Gross-up and tax offset will not be denied under paragraph 207-145(1)(a) as a Holder to whom this Ruling applies will be a 'qualified person'.

Credit to franking account for certain corporate tax entities

47. For a Holder that is a 'franking entity' (within the meaning given in section 202-15), satisfies the residency requirement for the income year in which the distribution is made and is entitled to a tax offset under Division 207 in respect of the franking credit on a dividend received, a credit of the franking credit on the Dividend will arise in the Holder's franking account on the day the dividend is made (item 3 of the table in subsection 205-15(1)).

Imputation benefits

48. 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 CRPS Holders in relation to the Dividends payable in respect of CRPS.

Section 177EA

49. 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 in relation to Dividends received by the CRPS Holders in respect of the CRPS.

Deduction for LIC capital gain

50. Where the requirements of Subdivision 115-D are met, CRPS Holders will be entitled to a deduction calculated in accordance with subsections 115-280(2) and 115-280(3).

Conversion of each CRPS and allotment of Additional Ordinary Shares – CGT implications

51. The Conversion of each CRPS into an Ordinary Share (Converted Ordinary Share) and the allotment of Additional Ordinary Shares will not result in a CGT event occurring.

52. CGT event H2 in section 104-155 will not happen on the Conversion of each Converted Ordinary Share involving the allotment of Additional Ordinary Shares as a cost base adjustment will be made to the Converted Ordinary Share because of the allotment of the Additional Ordinary Shares. No other CGT event in Division 104 will happen on the Conversion of CRPS involving the allotment of Additional Ordinary Shares.

Cost base of the Additional Ordinary Shares

53. Either section 6BA of the ITAA 1936 or Subdivision 130-A of the ITAA 1997 will apply to apportion the first element of the cost base and reduced cost base of each CRPS over the Converted Ordinary Share and any Additional Ordinary Shares allotted by Whitefield.

Acquisition time of Additional Ordinary Shares

54. Under subsection 130-20(3), the Additional Ordinary Shares are taken to be acquired at the time CRPS were originally allocated to the CRPS Holders.

Allotment of Additional Ordinary Shares – Dividend

55. The allotment of any Additional Ordinary Shares on Conversion of CRPS will not be assessable as dividend income in the hands of the CRPS Holders.

The value of Additional Ordinary Shares – ordinary income

56. The value of any Additional Ordinary Shares issued on Conversion of CRPS will not be assessable as ordinary income in the hands of the CRPS Holders under subsection 6-5(1).

Section 45

57. Section 45 of the ITAA 1936 will not apply to treat the additional Ordinary Shares acquired on Conversion of CRPS as an unfranked dividend paid by Whitefield.

Section 45A

58. The Commissioner will not make a determination, under subsection 45A(2) of the ITAA 1936, that the Additional Ordinary Shares acquired on Conversion of CRPS will be an unfranked dividend in the hands of the CRPS Holders.

Section 45B

59. The Commissioner will not make a determination, under subsection 45B(3) of the ITAA 1936, that the Additional Ordinary Shares acquired on Conversion of CRPS will be an unfranked dividend in the hands of the CRPS 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 CRPS

60. An equity interest that is issued or allotted by a company is acquired when the contract is entered into or, if no contract exists, when the equity interest is issued or allotted (item 2 in the table in section 109-10).

61. CRPS will be acquired at that time they are allotted (item 2 in the table in section 109-10).

CRPS cost base and reduced cost base

62. 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) and subsection 110-55(2)).

63. The Issue Price of each CRPS is \$100. Accordingly, when CRPS are issued, the first element of the cost base and reduced cost base of each CRPS is \$100.

Inclusion of dividends in assessable income

64. Paragraph 44(1)(a) of the ITAA 1936 provides that the assessable income of a resident shareholder in a company includes dividends that are paid to the shareholder by the company out of profits derived by it from any source.

65. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 as a distribution made by a company to shareholders, whether in money or other property. However, moneys paid or property distributed where the amount of the money paid or the value of the property given is debited against the share capital account of the company is not a dividend (paragraph 6(1)(d) of the ITAA 1936). Dividends paid on the CRPS will constitute 'dividends' under subsection 6(1) of the ITAA 1936 being distributions paid by Whitefield not out of the share capital account. Accordingly, the Australian resident CRPS Holders must include the amount of the Dividends paid to them by Whitefield out of profits derived by it from any source in their assessable income.

66. Dividends paid in respect of CRPS are expected to be fully or substantially franked.

67. Under the Australian imputation system, where a franked distribution is paid by an Australian resident company to a shareholder, the assessable income of the shareholder must under Division 207 also include the franking credit attached to the dividend. The inclusion of both the dividend and the associated franking credit in a shareholder's assessable income is termed 'grossing-up' the dividend receipt.

68. In accordance with subsection 207-20(2), and with respect to the 'grossing-up' of the Dividend receipt, the CRPS Holders are entitled to receive a tax offset equal to the value of the franking credit that has been included in their assessable income.

Franking credit subject to the refundable tax offset rules

69. 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.

70. Accordingly, the CRPS Holders will be subject to the refundable tax offset rules unless they are listed as specifically excluded entities under section 67-25.

71. Entities excluded by Division 67 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).

Gross-up and tax offset denied in certain circumstances

72. The Gross-up and tax offset will not be denied under paragraph 207-145(1)(a) as a Holder to whom this Ruling applies will be a 'qualified person'.

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

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

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

76. The CRPS Holders will be qualified persons, provided that:
- the CRPS Holders will have held their CRPS 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 CRPS Holders acquired CRPS and ending on the 90th day after the day on which CRPS become ex-dividend (former subsections 160APHO(2) and 160APHO(3) and former sections 160APHM and 160APHJ of the ITAA 1936); and
 - neither the CRPS Holders, nor associates of the CRPS Holders, have made, are under an obligation to make, or are likely to make a related payment in relation to the Dividends on CRPS (former paragraph 160APHO(1)(a) and former section 160APHN of the ITAA 1936).

77. If either, or both, of the above two considerations are not met, the CRPS Holders will not be a 'qualified person' for the purposes of Division 1A of former Part IIIA of the ITAA 1936. Subdivision 207-F of the ITAA 1997 will create the appropriate adjustment to cancel the effect of the gross-up and tax offset rules for the CRPS Holders.

Credit to franking account for certain corporate tax entities

78. For a Holder that, is a 'franking entity' (within the meaning given in section 202-15), satisfies the residency requirement for the income year in which the distribution is made and is entitled to a tax offset under Division 207 in respect of the franking credit on a Dividend received, a credit of the franking credit on the Dividend will arise in the Holder's franking account on the day the Dividend is made (item 3 of the table in subsection 205-15(1)).

Imputation benefits – streaming of imputation benefits

79. Subdivision 204-D broadly 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.

80. Section 204-30 prescribes the circumstances that are required to exist before the Commissioner may make such a determination. Section 204-30 applies where an entity 'streams' the payment of distributions in such a way that:

- an 'imputation benefit' is, or apart from section 204-30 would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));

- the member (favoured member) would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); 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)).

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

82. Whitefield has indicated that all CRPS Holders will receive fully or substantially franked Dividends regardless of their tax attributes or their individual tax position. The dividend payout ratios or franking credits, in relation to the Ordinary Shares or other preference shares, will not be materially affected by the issue of CRPS.

83. The Additional Ordinary Shares allotted on Conversion of CRPS will not attract the application of section 204-30. This is because the issue of the Additional Ordinary Shares does not constitute a distribution and the allotment of Additional Ordinary Shares will not materially affect Whitefield's fully franked dividend policy.

84. 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 Whitefield to the CRPS Holders. Accordingly, based on the information provided, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny imputation benefits to the CRPS Holders.

Section 177EA

Determination under paragraph 177EA(5)(b)

85. 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.

86. 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.

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

- (a) the issue of the CRPS 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. The issuance of CRPS on the terms set out in the Prospectus is a scheme that involves the issuing of membership interests because, once CRPS are issued, the CRPS Holders are members of Whitefield and CRPS are not debt interests (sections 960-130 and 960-135 of the ITAA 1997);
- (b) frankable distributions are expected to be payable to the CRPS Holders (paragraph 177EA(3)(b) of the ITAA 1936). The Commissioner accepts that Dividends payable on CRPS will be frankable distributions to the extent that the Dividends on CRPS do not fall within the list in section 202-45 of the ITAA 1997;

- (c) franked distributions are expected to be paid to the CRPS Holders (paragraph 177EA(3)(c) of the ITAA 1936). It is expected that these distributions will be made on a semi-annual basis. Furthermore, Whitefield has advised that it intends to fully frank all frankable distributions made by it to the extent that franking credits are available in the 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 the CRPS Holders, given that Whitefield expects to frank the distributions on the CRPS (paragraph 177EA(3)(d) of ITAA 1936).

88. 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 to obtain an imputation benefit.

89. Circumstances which are relevant in determining whether any person has the requisite purpose include, but are not limited to, the factors listed in subsection 177EA(17) of the ITAA 1936.

90. 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.

91. Whitefield has advised that it will issue the CRPS to raise new capital to expand and diversify its investment portfolio in accordance with established investment strategy. There is nothing in the transaction documents which would suggest the scheme was entered into for the purpose (which is not merely an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit under the scheme.

92. Based on the information provided, and having regard to the factors listed in subsection 177EA(17) of the ITAA 1936, the qualifications set out in this Ruling and the relevant circumstances of the scheme, it would not be reasonable to conclude that in entering into the scheme, Whitefield and/or the CRPS Holders demonstrate the objective purpose of securing imputation benefits for the CRPS Holders. To the extent that any imputation benefits are secured, those benefits are considered to be incidental to the more significant objective purpose of raising new capital to expand and diversify Whitefield's investment portfolio.

93. Accordingly, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 that would deny the imputation benefits to the CRPS Holders.

Deduction for LIC capital gain

94. Subdivision 115-D allows CRPS Holders covered by subsection 115-280(1) (certain individuals, trusts and complying superannuation funds) to claim a deduction for dividends paid to such investors where all or some part of the dividend paid is reasonably attributable to a 'LIC capital gain' made by a 'listed investment company'. The amount of the deduction is determined in accordance with subsections 115-280(2) and 115-280(3) and broadly is meant to reflect the CGT discount the investor would have secured if they had made the capital gain directly.

95. An LIC capital gain is a capital gain:

- (a) from a CGT event that happens on or after 1 July 2001;
- (b) that is made by a company that is a listed investment company from a CGT asset that is an investment to which paragraph 115-290(1)(c) applies;
- (c) that meets the requirements of sections 115-20 (discount capital gain must not have indexed cost base) and 115-25 (discount capital gain must be on asset acquired at least 12 months before);
- (d) that is not a capital gain that could not be a discount capital gain had it been made by an individual because of section 115-40 (special rule about time of acquisition for certain replacement asset roll-overs) or 115-45 (capital gain from equity with newly acquired assets);
- (e) that is included in the net capital gain of the company; and
- (f) that is reflected in the taxable income of the company for the income year in which the company had the net capital gain.

96. On the basis that Whitefield meets the requirements of a listed investment company, CRPS Holders will be entitled to a deduction under paragraph 115-280(2) where the other requirements of subsection 115-280(1) are met.

Conversion of each CRPS and allotment of Additional Ordinary Shares – CGT implications

97. Under the transaction, each CRPS will convert into one Ordinary Share through a variation of the rights attaching to each CRPS. The CRPS Holders will also receive an allotment of Additional Ordinary Shares in Whitefield.

98. Shares are comprised of a bundle of rights; however, those rights are not separate pieces of property capable of being divided out and held separately. Accordingly, the rights attaching to shares do not constitute individual assets as defined by section 108-5, but rather combine to make up the relevant CGT asset, being the share (Taxation Ruling TR 94/30).

99. Under section 104-25, CGT event C2 happens if, among other things, the ownership of an intangible asset, such as a preference share, ends by the share:

- being redeemed or cancelled (paragraph 104-25(1)(a)); or
- if the share is a convertible interest – being converted (paragraph 104-25(1)(f)).

100. The mere variation of rights attaching to CRPS and allotment of an additional number of Ordinary Shares for no consideration is not a 'redemption' or 'cancellation' of the share under paragraph 104-25(1)(a).

101. Further, the Conversion of CRPS to Ordinary Shares by the variation of the rights attaching to CRPS does not involve CRPS being converted into equity interests under paragraph 104-25(1)(f).

102. The relinquishment by the CRPS Holders of some of the rights attaching to CRPS is not a CGT event that happens to part of the CGT asset comprised by each CRPS under section 112-30 (paragraph 40 of TR 94/30).

103. As CGT event C2 will not occur on Conversion of CRPS into Ordinary Shares, Subdivision 130-C will have no application.

104. Although CGT event C2 does not happen because of the variation of the rights attaching to CRPS, the receipt of money or other consideration in respect of such a variation may attract the operation of CGT event H2 (paragraphs 9 and 46 to 48 of TR 94/30).

105. Subsection 104-155(1) provides that CGT event H2 happens if:

- (a) an act, transaction or event occurs in relation to a CGT asset that you own; and
- (b) the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base.

106. The Conversion of CRPS involving the allotment of Additional Ordinary Shares will result in an adjustment to the cost base and reduced cost base of the Converted CRPS under Subdivision 130-A of the ITAA 1997 or section 6BA of the ITAA 1936.

107. Accordingly, CGT event H2 does not happen on the Conversion of CRPS involving the allotment of Additional Ordinary Shares.

Cost base of the Additional Ordinary Shares

108. Either section 6BA of the ITAA 1936 or Subdivision 130-A of the ITAA 1997 will apply to apportion the first element of the cost base and reduced cost base of the CRPS over the Converted CRPS and any Additional Ordinary Shares issued by Whitefield.

109. Section 6BA of the ITAA 1936 applies if a shareholder holds shares in a company (the original shares) and the company issues other shares (the bonus shares) in respect of the original shares.

110. Pursuant to subsection 6BA(3) of the ITAA 1936, as the Additional Ordinary Shares are issued to CRPS Holders for no consideration and are not a dividend or taken to be a dividend, the Issue Price of the CRPS will be apportioned over the Converted CRPS and any Additional Ordinary Shares allotted.

111. Subdivision 130-A applies in a similar manner. It provides special rules relating to the time of acquisition and the cost base of bonus equities for CGT purposes.

112. Section 130-20 sets out what happens if an entity owns shares in a company (the original equities) and the company issues other shares (the bonus equities) in relation to the original equities.

113. Under item 1 of the table in subsection 130-20(3), as the Additional Ordinary Shares are not a dividend nor taken to be a dividend, the first element of the cost base and reduced cost base of each CRPS are apportioned over both the Converted CRPS and any Additional Ordinary Shares issued to the CRPS Holders by Whitefield.

Acquisition time of Additional Ordinary Shares

114. The CRPS Holders are taken to have acquired the Additional Ordinary Shares at the time when the CRPS were originally allotted to the CRPS Holders (subsection 130-20(3)).

Allotment of Additional Ordinary Shares – Dividend

115. Subsection 6(1) of the ITAA 1936 defines a 'dividend' to include any distribution made by a company to any of its shareholders, whether in money or other property, and any amount credited by a company to any of its shareholders as shareholders.

116. Although the Additional Ordinary Shares issued on Conversion of CRPS will constitute 'property' in the hands of the CRPS Holders, the allotment is not a disposition of property in the ordinary meaning of that expression (*Ord Forrest Pty Ltd v. FC of T* (1974) 130 CLR 124; 74 ATC 4034; (1974) 4 ATR 230, per Barwick CJ and McTiernan J). As there is no disposition there cannot be a distribution of property by Whitefield.

117. The allotment of Additional Ordinary Shares does not constitute a dividend under subsection 6BA(5) of the ITAA 1936 as the CRPS Terms do not provide CRPS Holders with a choice of being paid a dividend or being issued shares.

118. Furthermore, no amount is credited to the CRPS Holders, nor is an amount paid out of profits.

119. Accordingly, the allotment of Additional Ordinary Shares does not constitute a dividend within the meaning of subsection 6(1) of the ITAA 1936.

The value of Additional Ordinary Shares – ordinary income

120. The allotment of Additional Ordinary Shares will be a bonus issue within the meaning of paragraph 254A(1)(a) of the *Corporations Act 2001* that is, an issue of shares for which consideration is not payable to Whitefield. The issue of Additional Ordinary Shares will result in a re-expression of the Holder's interest in the share capital of Whitefield. Accordingly, the value of any Additional Ordinary Shares issued on Conversion of CRPS will not be assessable as ordinary income under subsection 6-5(1) of the ITAA 1997 (*Commissioner of Taxation v. McNeil* (2007) 229 CLR 656; 2007 ATC 4223; (2007) 64 ATR 431).

Section 45

121. 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 not franked or are franked to less than 10%.

122. Whitefield has consistently paid fully franked dividends and has stated it will pay fully or substantially franked dividends to all its shareholders, including the CRPS Holders, to the extent of the franking credits available in its franking account. Furthermore, the CRPS Terms do not allow Whitefield to issue Ordinary Shares to the CRPS Holders in satisfaction of their Dividend entitlements in relation to CRPS.

123. Therefore, section 45 of the ITAA 1936 will not apply to the Additional Ordinary Shares acquired by the CRPS Holders on Conversion of CRPS.

Section 45A

124. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed 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).

125. The allotment of Additional Ordinary Shares to the CRPS Holders is a provision of capital benefits pursuant to paragraph 45A(3)(a) of the ITAA 1936.

126. The allotment of Additional Ordinary Shares is in effect a restatement of the CRPS Holders' interest in the capital of Whitefield. In the absence of any other additional factors that would contribute to an alternative conclusion, the allotment of Additional Ordinary Shares does not constitute the streaming of capital benefits.

127. Accordingly, it cannot be said that the CRPS Holders derive a greater benefit from capital benefits than other Whitefield shareholders. Therefore, the allotment of Additional Ordinary Shares does not trigger the application of section 45A of the ITAA 1936, and the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that the Additional Ordinary Shares acquired on Conversion of the CRPS will be an unfranked dividend in the hands of the CRPS Holders.

Section 45B

128. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends.

129. The allotment of Additional Ordinary Shares on Conversion of CRPS is a scheme under which a capital benefit is provided to the CRPS Holders (paragraph 45B(5)(a) of the ITAA 1936).

130. For the provision to apply, 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. The relevant circumstances of the scheme are listed in subsection 45B(8) of the ITAA 1936.

131. The allotment of Additional Ordinary Shares is not in satisfaction of the CRPS Holders' entitlement to Dividends, but rather a product of the Conversion of the CRPS held by the CRPS Holders according to the CRPS Terms. Consequently, each Holder's interest in the share capital of Whitefield will not change when the capital benefit is provided. Furthermore, Whitefield has paid, and has stated it will continue to pay, franked dividends to all its shareholders to the extent of the franking credits available.

132. Having regard to these relevant circumstances of the scheme, as required by subsection 45B(8) of the ITAA 1936, it would not be concluded that any of the parties to the scheme entered into or carried out the scheme for a more than incidental purpose of enabling the CRPS Holders to obtain a tax benefit. Therefore, section 45B of the ITAA 1936 will not apply to treat the Additional Ordinary Shares acquired on Conversion as an unfranked dividend in the hands of the CRPS Holders.

133. Accordingly the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 94/30

Subject references:

- acquisition dates
- capital gains tax
- CGT cost base
- conversion of securities
- dividend imputation
- dividend income
- dividend streaming arrangements
- franking tax offset
- preference shares

Legislative references:

- ITAA 1936 6(1)
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- ITAA 1936 6BA(3)
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- ITAA 1936 44(1)
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- Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002

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ATOlaw topic: Income Tax ~~ Assessable income ~~ dividend, interest and royalty income
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Income Tax ~~ Entity specific matters ~~ franking of dividends – company matters