



## Class Ruling

# Income tax: Wridgways Australia Limited Scheme of Arrangement and Discretionary Special Dividend

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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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 44(1) of the ITAA 1936;
- former section 160APHN of the ITAA 1936;
- former section 160APHM of the ITAA 1936;
- Division 1A of the former Part IIIA of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 116-20 of the ITAA 1997;

- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- subsection 207-35(1) of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

## **Class of entities**

3. The class of entities to which this Ruling applies are the shareholders of Wridgways Australia Limited (Wridgways), referred to as participating Wridgways Shareholders, who:

- (a) hold their shares on capital account; and
- (b) are residents of Australia within the meaning of subsection 6(1) of the ITAA 1936; and
- (c) receive any of the following:
  - the Wridgways Final Dividend, or
  - the Wridgways Discretionary Special Dividend, or
  - the Wridgways Final Dividend and Discretionary Special Dividend; or
- (d) participate in the following Schemes of Arrangement
  - under which an Australian resident indirect wholly owned subsidiary of Santa Fe Holdings Limited ( Santa Fe) a company resident in Hong Kong would acquire 100% of the shares in Wridgways and who also receive the Wridgways Discretionary Special Dividend; or
  - pursuant to which Santa Fe would acquire 100% of the shares in Wridgways and who also receive the Wridgways Final Dividend and Discretionary Special Dividend; or
  - pursuant to which Santa Fe would acquire 100% of the shares in Wridgways; and
- (e) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their Wridgways shares.  
(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

## **Qualifications**

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 34 of this Ruling.

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

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

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## **Date of effect**

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8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## **Scheme**

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

- application for a Class Ruling, dated 6 September 2010 from PricewaterhouseCoopers;
- the Scheme Implementation Agreement executed 20 September 2010; and
- the Scheme Booklet issued by Wridgways to its shareholders, dated 19 October 2010.

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

## **Wridgways**

10. Wridgways is a resident public company listed on the Australian Securities Exchange (ASX). It provides domestic and international relocation services to a range of clients. The Wridgways Group was founded in 1892 and Wridgways listed on the ASX in 1999.

11. Wridgways is the head company of the Wridgways tax consolidated group and is a resident of Australia under subsection 6(1) of the ITAA 1936.

12. At the date the Scheme Implementation Agreement was executed, Wridgways had 32,000,000 ordinary shares on issue. Each Wridgways share carries the same rights in relation to voting power, rights to dividends and capital distributions.

## **Santa Fe**

13. Santa Fe is a leading international relocation services company providing a comprehensive range of services across Asia and the Middle East. Santa Fe Holdings Limited, the parent of the Santa Fe group, is headquartered in Hong Kong.

14. Santa Fe Holdings Limited intends to incorporate an Australian company, Santa Fe Holdings Australia Pty. Ltd. as a direct or indirect wholly owned subsidiary (Santa Fe Holdings Australia). Santa Fe Holdings Australia intends to incorporate a wholly owned direct subsidiary incorporated in Australia (Bidco) for the purposes of acquiring the Wridgways shares under the Scheme of Arrangement.

15. The Santa Fe group currently has no activities or investments in Australia.

## **Scheme of Arrangement**

16. Wridgways has received a non-binding indicative offer from Santa Fe to acquire 100% of the issued share capital of Wridgways via a Scheme of Arrangement. A Scheme Implementation Agreement (SIA) was executed on 20 September 2010.

17. Under the terms of the SIA, participating Wridgways Shareholders will receive cash consideration of \$2.80 cash per Wridgways share (Scheme Consideration).

18. The Scheme Consideration will be reduced by the Discretionary Special Dividend that Wridgways declared and paid to participating Wridgways Shareholders on 14 December 2010.

19. The Record Date for the Scheme of Arrangement is 15 December 2010 and the Scheme Implementation Date is 16 December 2010.

20. The Scheme Meeting of Wridgways shareholders, as ordered by the Federal Court of Australia, was held on 25 November 2010 at which Wridgways shareholders agreed to the Scheme of Arrangement.

### **The Final Dividend**

21. On 20 August 2010, Wridgways declared a fully franked Final Dividend of \$0.11 cash per Wridgways share. The Final Dividend Record Date is 29 September 2010. The Ex-Dividend Date for the Final Dividend is 30 September 2010. The Final Dividend Payment Date is 6 October 2010.

22. In total, the Final Dividend to be paid by Wridgways will be \$3,520,000 with approximately \$1,508,571 franking credits attached. This dividend is consistent with prior year final dividends. As at 30 June 2010, Wridgways has available franking credits of \$8,726,398.

23. The amount of the Final Dividend will not exceed an amount which would cause Wridgways' franking account to have a negative balance.

24. The Final Dividend will be paid out of accounting profits (retained earnings) derived by Wridgways and will be funded by Wridgways from existing cash reserves. Santa Fe will not provide any funds to Wridgways to finance the Final Dividend.

25. The Final Dividend is not contingent on the Scheme being approved, nor will it have any impact on the cash consideration to be paid by Santa Fe to Wridgways shareholders under the Scheme.

26. Santa Fe has had no influence or control over the declaration of the Final Dividend and the Final Dividend will be paid in the ordinary course of trading, irrespective of whether Wridgways shareholders vote in favour of the Scheme.

### **The Discretionary Special Dividend**

27. On 6 December 2010, the Wridgways Board (in its sole and absolute discretion) declared a fully franked additional dividend of \$0.39 per share (Discretionary Special Dividend).

28. For the Discretionary Special Dividend:

- the Record Date is 9 December 2010;
- the Ex-Dividend Date is 10 December 2010; and
- the Dividend Payment Date is 14 December 2010.

29. In total, the fully franked Discretionary Special Dividend of \$0.39 per share to be paid by Wridgways will be \$12,480,000 with, approximately \$5,348,571 franking credits attached. The amount of the Discretionary Special Dividend did not exceed an amount which would have caused Wridgways' franking account to have a negative balance on the Scheme Implementation Date.

30. The Discretionary Special Dividend will be paid out of accounting profits (retained earnings) derived by Wridgways and will be funded by Wridgways from existing cash reserves and/or existing and new banking facilities. Santa Fe will not provide any funds to Wridgways to finance the payment of the Discretionary Special Dividend.

31. If any new bank facilities are required in order to fund the Discretionary Special Dividend, they will be based on the existing financial capacity of Wridgways.

32. The declaration and payment of the Discretionary Special Dividend was contingent on the Scheme being approved by Wridgways shareholders which occurred on 25 November 2010.

33. The Discretionary Special Dividend paid to Wridgways shareholders will reduce the price per share paid by Santa Fe under the Scheme. Wridgways shareholders will still receive the same aggregate cash amount from the two sources (Scheme payment and Discretionary Special Dividend), being \$2.80 per share.

34. Santa Fe had no influence or control over the declaration or payment of the Discretionary Special Dividend by Wridgways.

## Ruling

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### **The Final Dividend**

35. The Wridgways Final Dividend of \$0.11 cash per share paid to participating Wridgways Shareholders will constitute a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

### **The Discretionary Special Dividend**

36. The Wridgways Discretionary Special Dividend of \$0.39 cash per share paid to a participating Wridgways Shareholder will constitute a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

**Assessability of the Wridgways Dividends**

37. Participating Wridgways Shareholders who received the fully franked Final Dividend or Discretionary Special Dividend (the Wridgways Dividends) and who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Wridgways Dividends as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

**Gross up and tax offset**

38. Participating Wridgways Shareholders who received the fully franked Wridgways Dividends directly will:

- include the amount of the franking credit attached to the Wridgways Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit;

under section 207-20 of the ITAA 1997, subject to being a qualified person.

39. Where the fully franked Wridgways Dividends are received by a participating Wridgways Shareholder (not being an entity taxed as a corporate tax entity) who is a trustee of a trust (not being a complying superannuation fund) or a partnership, the trustee of the trust or the partnership will include an amount equal to the franking credit attached to the Wridgways Dividends as assessable income under subsection 207-35(1) of the ITAA 1997.

**Qualified person rule*****Final Dividend***

40. The payment of the Wridgways Final Dividend as part of the Scheme of Arrangement will not constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

41. Accordingly, each participating Wridgways Shareholder will need to hold their Wridgways shares at risk for a continuous period of at least 45 days in the primary qualification period in order to be a qualified person.

***Discretionary Special Dividend***

42. Having regard to the relevant circumstances of the Scheme, the participating Wridgways Shareholders are considered to have made, or to be likely to make a related payment in respect of the Discretionary Special Dividend.

43. Accordingly, each participating Wridgways Shareholder will need to hold their Wridgways shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person in respect of the Discretionary Special Dividend.

44. Participating Wridgways Shareholders will no longer be considered to hold their Wridgways shares 'at risk' for the purposes of former Division 1A of the former Part IIIAA of the ITAA 1936 as of 15 December 2010, which is the Scheme record date.

45. Each participating Wridgways Shareholder will be considered to be a qualified person in respect of the secondary qualification period for the purposes of Division 1A of the former Part IIIAA of the ITAA 1936 in relation to the Discretionary Special Dividend if:

- The participating Wridgways Shareholder acquired the Wridgways share or interest in the share on or before 30 October 2010; and
- from 26 October 2010 until 14 December 2010, the participating Wridgways Shareholder continued to hold the Wridgways share and did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of the Wridgways share for a continuous period of at least 45 days.

## **Capital Gains Tax (CGT) consequences**

### ***CGT event A1***

46. CGT event A1 will happen when a participating Wridgways Shareholder disposes of a Wridgways share to Santa Fe pursuant to the Scheme (subsections 104-10(1) and (2) of the ITAA 1997).

47. The time of the CGT event will be when the change of ownership occurs (subsection 104-10(3) of the ITAA 1997). This is when the Wridgways share is transferred to Santa Fe on the Scheme Implementation date, being 16 December 2010.

### ***Capital gain or capital loss***

48. A participating Wridgways Shareholder will make a capital gain when CGT event A1 happens if the capital proceeds in respect of the disposal of a Wridgways share exceed its cost base. A participating Wridgways Shareholder will make a capital loss if the capital proceeds in respect of the disposal of a Wridgways share are less than its reduced cost base (subsection 104-10(4) of the ITAA 1997).

***Capital proceeds***

49. The capital proceeds received by each participating Wridgways Shareholder is the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

50. The capital proceeds will not include the Wridgways Final Dividend or the Wridgways Discretionary Special Dividend as it is considered, having regard to all the circumstances of the arrangement, that the dividends are not paid in respect of the CGT event happening (subsection 116-20(1)).

***Foreign resident shareholders***

51. A foreign resident Wridgways Shareholder who participates in the Scheme disregards any capital gain made when CGT event A1 happens if their share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

***The anti-avoidance provisions – imputation benefits***

52. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in relation to either the Wridgways Final Dividend or the Wridgways Discretionary Special Dividend.

53. 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 benefit received in relation to either the Wridgways Final Dividend or the Wridgways Discretionary Special Dividend.

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**Commissioner of Taxation**22 December 2010

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## Appendix 1 – Explanation

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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.*

### The Final and Discretionary Special Dividends

#### *Dividend as defined in subsection 6(1)*

54. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders. The Wridgways Dividends will be a distribution in money made by Wridgways to its ordinary shareholders.

55. Paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 however excludes from the definition of 'dividend' any:

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company...

56. The Wridgways Dividends will be sourced from Wridgways retained earnings. Wridgways will not debit the Wridgways Dividends to its share capital account. Therefore, the exclusion in paragraph (d) will not apply and the Final Dividend and the Discretionary Special Dividend will constitute dividends for the purposes of subsection 6(1) of the ITAA 1936.

#### **Section 208-20**

57. Section 208-20 of the ITAA 1997 states that a corporate tax entity is an exempting entity at a particular time if it is effectively owned by prescribed persons at that time. Subsection 208-25(1) of the ITAA 1997 provides in broad terms that an entity is effectively owned by prescribed persons if not less than 95% of accountable membership interests or accountable partial interests (broadly direct and indirect ownership interests) are held by or on behalf of prescribed persons.

58. Section 208-40 of the ITAA 1997 provides the definition of a prescribed person in relation to another corporate tax entity. The definition includes companies, trustees, partnerships or individuals that are a foreign resident or if they were to receive a distribution by the corporate tax entity, the distribution would be exempt income or non-assessable non-exempt income of the company, trust estate, partnership or individual.

59. As at 30 June 2010, 99.56% of the issued capital of Wridgways was held by resident shareholders. As the percentage of non resident shareholder ownership in Wridgways does not amount to Wridgways being effectively controlled by prescribed persons, Wridgways will not be an exempting entity under Division 208 of the ITAA 1997.

### ***Assessability of the Wridgways Dividends***

60. Subparagraph 44(1)(a)(i) of the ITAA 1936 includes in the assessable income of an Australian resident shareholder in a company:

dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

61. As the Wridgways Final Dividend and Discretionary Special Dividend will be paid to participating Wridgways Shareholders out of profits derived by Wridgways, participating Wridgways Shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the dividends as assessable income.

### ***Gross up and tax offset***

62. Section 207-20 of the ITAA 1997 provides:

- (1) If an entity makes a \*franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the \*franking credit on the distribution. This is in addition to another amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a \*tax offset for the income year in which the distribution is made. The tax offset is equal to the \*franking credit on the distribution.

63. Therefore, subject to satisfying the qualified person rule, where the fully franked Wridgways Final Dividend and/or Discretionary Special Dividend is received directly by a participating Wridgways Shareholder, the participating Wridgways Shareholder will:

- include the amount of the franking credit attached to the Wridgways Final Dividend and/or Discretionary Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit.

64. Where the fully franked Wridgways Final Dividend and/or Discretionary Special Dividend is received by a participating Wridgways Shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) of the ITAA 1997 applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

If:

- (a) a \*franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a \*corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust – the trust is not a \*complying superannuation entity or \*FHSA trust when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the \*franking credit on the distribution.

65. Therefore, subject to satisfying the qualified person rule, the participating Wridgways trustee or partnership Shareholder will be required to include the amount of the franking credit attached to the Wridgways Final Dividend and/or Discretionary Special Dividend in their assessable income under subsection 207-35(1) of the ITAA 1997.

### ***Qualified persons***

66. Pursuant to paragraph 207-145(1)(a) of the ITAA 1997, an entity must be a 'qualified person' in relation to a dividend in order to be entitled to a tax offset in respect of the franking credit allocated to the dividend.

67. Division 1A of former Part IIIAA of the ITAA 1936 (the former Division 1A) contains the measures known as the holding period rule and the related payment rule. In broad terms, the former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

68. The test of what constitutes a 'qualified person' is provided in former section 160APHO of the ITAA 1936 as follows:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a 'qualified person' in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of a taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification in relation to the dividend.

69. Former subsection 160APHO(2) of the ITAA 1936, referred to in paragraph 68 of this Ruling, sets out the holding period requirement. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer makes or is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

### ***Related payment rule***

70. In order to determine which is the relevant qualification period, it is necessary to determine whether, under the present arrangement, the participating Wridgways Shareholders are considered to have made or be likely to make a related payment in respect of the Wridgways Final Dividend and the Discretionary Special Dividend.

71. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of the former Division 1A. Former subsection 160APHN(2) provides:

The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

72. Former subsection 160APHN(3) of the ITAA 1936 states:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other persons:

- (a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or
- (b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or the other persons; or
- (c) causing services to be provided to, or in accordance with the directions of, the other person or other persons; or
- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or
- (e) allowing any property or money to be used by the other person or other persons or by someone nominated by the other person or other persons; or
- (f) causing an amount or amounts to be set off against, or to be otherwise applied in reduction of, a debt or debts owed by the other person or other persons; or
- (g) agreeing to treat an amount or amounts owed to the other person or other persons by the taxpayer or associate as having been increased.

73. Former subsection 160APHN(4) of the ITAA 1936 states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to;

the amount of dividend or distribution.

74. Where a shareholder is not taken to pass the benefit of the dividend to another person in the circumstances set out above, the shareholder will need to satisfy the holding period requirement in respect of the primary qualification period in order to be entitled to a tax offset in respect of the franking credit allocated to the dividend. However, where a shareholder is taken to pass the benefit of the dividend to another person in the circumstances set out above, the shareholder will need to satisfy the holding period requirement in respect of the secondary qualification period in order to be entitled to a tax offset in respect of the franking credit allocated to the dividend.

### ***Holding period requirement***

75. The holding period requirement requires a shareholder to hold the shares, or the interest in the shares, on which a dividend is paid, at risk for a continuous period of at least 45 days during the relevant qualification period.

76. The primary qualification period as provided in the former section 160APHD of the ITAA 1936 begins from the day after the date of acquisition of the share and ends on the 45th day after the day on which the share becomes ex-dividend. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the share are not counted.

77. The secondary qualification period is defined in former section 160APHD of the ITAA 1936 as follows:

In relation to a taxpayer in relation to shares or an interest in shares, means:

- (a) if the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest became ex dividend...

78. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

***The Final Dividend***

79. Having regard to the relevant circumstances of the Scheme, it cannot be said that the Scheme documents indicate that a participating Wridgways Shareholder, or an associate, does anything that has the effect of passing the benefit of the dividend to another person in respect of the Final Dividend. The Final Dividend was paid regardless of whether or not the Scheme proceeded. As the participating Wridgways Shareholders are not taken, for the purposes of the former Division 1A, to have made a related payment in respect of the Final Dividend as a result of the Scheme, and provided no individual circumstances exist which would result in the related payment rule applying, the relevant holding period for the Final Dividend is the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

80. In respect of the Final Dividend, there are 45 clear days between 29 September 2010 (being the Record Date for the Final Dividend) and 14 November 2010 (being the 45th day after the ex-dividend date for the Final Dividend). As such, any participating Wridgways Shareholder, who has not previously satisfied the primary qualification period and who acquired their Wridgways share on or before 29 September 2010 will be capable of being a qualified person in respect of the Final Dividend provided they hold their Wridgways shares at risk for at least 45 continuous days during the period from acquisition until 14 November 2010.

***The Discretionary Special Dividend***

81. In the current circumstances, it is considered that an integral part of the Scheme is the payment of the Discretionary Special Dividend of \$0.39 per share. The payment of the Discretionary Special Dividend was conditional upon Wridgways obtaining approval from the requisite majority of Wridgways shareholders at the Scheme Meeting for the Wridgways Scheme to be entered into. Further, it is clearly contemplated in the current arrangement that the total consideration to be paid by Sante Fe is to be reduced by an amount equal to the amount of any Discretionary Special Dividend paid. Therefore, having regard to the relevant circumstances of the Scheme, it is considered that Wridgways Shareholders will be doing something, be under an obligation to do something, or be likely to do something that has the effect of passing the benefit of the Special Dividend to another person for the purposes of former subsection 160APHN(3) of the ITAA 1936.

82. As the participating Wridgways Shareholders are taken, for the purposes of former Division 1A, to have made or be likely to make a related payment in respect of the Special Dividend, the relevant holding period is thus the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

83. Wridgways will determine eligibility for the Special Dividend on the Special Dividend Record Date of 9 December 2010. This is the last day on which acquisition by a person of a Wridgways share will entitle the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 10 December 2010.

84. The secondary qualification period thus runs from 45 days before the ex-dividend date of 10 December 2010 as determined in paragraph 83 and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 26 October 2010 to 24 January 2011. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Wridgways shares are to be excluded. This would mean that the secondary qualification period would run from 26 October 2010 until the date that participating Wridgways Shareholders are no longer at risk for the purposes of former Division 1A.

85. In this context, entitlement to participate in the Wridgways Scheme will be determined on the Scheme Record Date on the basis of being a participating Wridgways Shareholder who is registered in the register as the holder of the relevant Scheme Share on 15 December 2010. It is considered that once a Wridgways Shareholder is identified as a participating Wridgways shareholder, that participating Wridgways Shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A as at that time the participating Wridgways Shareholder is committed to disposing of their Wridgways share and receiving the Scheme Consideration.

86. Accordingly, the secondary qualification period would run from 26 October 2010 until 14 December 2010 (inclusive). Participating Wridgways Shareholders who receive the Special Dividend would need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A. Further, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, the date of acquisition or disposal are not included in the relevant 45 day period. This would have the effect in the present circumstances, for example, that the 45 day qualification period could not include 26 October 2010 if this was the date of acquisition of Wridgways shares.

## **CGT consequences**

### ***CGT event A1***

87. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10 of the ITAA 1997). This event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

88. A takeover or merger effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract (paragraph 9 of Taxation Determination TD 2002/4).

89. CGT event A1 will happen when participating Wridgways Shareholders dispose of their Wridgways shares to Santa Fe pursuant to the Scheme. The disposal will occur on the Scheme Implementation Date of 16 December 2010 (subsections 104-10(1) and (2) of the ITAA 1997) when the shares are disposed of by the participating Wridgways shareholders.

90. The time when CGT event A1 happens determines the income year in which any capital gain or loss is made and whether the CGT discount applies to any capital gain.

91. A participating Wridgways Shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Wridgways share exceed its cost base. A participating Wridgways shareholder will make a capital loss if those capital proceeds are less than the share's reduced cost base (subsection 104-10(4) of the ITAA 1997).

### ***Capital Proceeds***

92. The capital proceeds received by a participating Wridgways Shareholder is the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

93. A participating Wridgways Shareholder will be entitled to receive the Scheme Consideration of \$2.80 cash for each Wridgways share disposed of under the Wridgways Scheme less the cash amount of \$0.39 Discretionary Special Dividend per share declared and paid.

94. The term 'in respect of the event happening' in subsection 116-20(1) of the ITAA 1997 requires the relationship between the event and the receipt of the money, or entitlement to receive the money, must be more than coincidental. An amount is not 'capital proceeds' of an event merely because it is received in association with the event.

### ***The Wridgways Final Dividend***

95. In this case, the payment of the Final Dividend will occur separately to the Wridgways Scheme. The Final Dividend does not form part of the capital proceeds which a participating Wridgways Shareholder will receive in respect of CGT event A1 happening.

***The Discretionary Special Dividend***

96. The Discretionary Special Dividend of \$0.39 cash per Wridgways share was declared on 6 December 2010. The declaration of the Discretionary Special Dividend was at the discretion of the Wridgways Board. Santa Fe had no influence or control over the declaration or payment of the Discretionary Special Dividend.

97. Although payment of the Discretionary Special Dividend was conditional upon Wridgways shareholders approving the Scheme, the Discretionary Special Dividend is not paid as a term of the Scheme. Santa Fe does not influence the decision to pay the Discretionary Special Dividend nor will Santa Fe provide any funds to Wridgways to finance the payment of the Discretionary Special Dividend. It is therefore not received in respect of the disposal of Wridgways shares under the Scheme.

98. Accordingly, the Discretionary Special Dividend does not form part of the capital proceeds which a participating Wridgways Shareholder will receive in respect of CGT event A1 happening.

99. The capital proceeds for a participating Wridgways Shareholder will be \$2.41 cash per Wridgways share as a Discretionary Special Dividend of \$0.39 cash per Wridgways share was paid.

***Foreign resident shareholders***

100. Under subsection 855-10(1), an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

101. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2 or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

102. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happened under the buy-back, can not disregard under subsection 855-10(1) a capital gain or capital loss from CGT event A1 if:

- their share in Wridgways is an indirect Australian real property interest (item 2 of the table in section 855-15); or
- their share in Wridgways has been used at any time by the foreign resident, or the trustee of a foreign trust for CGT purposes, in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15); or
- their share in Wridgways is covered by subsection 104-165(3) (item 5 of the table in section 855-15).

## **Anti-avoidance provisions**

### ***Section 204-30***

103. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- (c) the other 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)).

104. Relevantly, if section 204-30 of the ITAA 1997 applies, the Commissioner is vested with a discretion under subsection 204-30(3) to make a determination in writing either:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); or
- (b) that no imputation benefit is to arise in respect of any distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

105. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

106. Under the current Scheme, all participating Wridgways Shareholders will receive an imputation benefit as a result of the Wridgways Dividends; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a) of the ITAA 1997) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e) of the ITAA 1997). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders (subsection 204-30(8) of the ITAA 1997).

107. However, the Wridgways Dividends will be paid to all participating Wridgways Shareholders at the respective Payment Dates and will be fully franked with Australian franking credits. Accordingly, it cannot be argued that Wridgways will direct the flow of distributions in such a manner as to stream the imputation benefits such that one class of members will derive a greater benefit from the franking credits attached to the dividends, while the other members will receive lesser or no imputation benefits.

108. As the conditions in subsection 204-30(1) of the ITAA 1997 for the provision to apply will not be met, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in relation to either of the dividends.

### **Section 177EA**

109. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes seeking to obtain a tax advantage in relation to imputation benefits. Subsection 177EA(3) provides that section 177EA applies if:

- (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 membership interests, as the case may be;
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit;

- (d) except for this section, a 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.

110. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a)) or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b)).

111. Wridgways is a corporate tax entity. The disposal of the ordinary shares in Wridgways pursuant to the Scheme is a scheme for the disposition of membership interests. Both the fully franked Final Dividend and the Discretionary Special Dividend are frankable distributions that will be paid to participating Wridgways Shareholders as a part of this Scheme who could, therefore, reasonably be expected to receive imputation benefits.

112. In the present case, the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether having regard to the relevant circumstances of the Scheme, it would be concluded that, on the part of Wridgways or its shareholders, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the Scheme.

113. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the Scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there 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 not be present at any one time in any one scheme.

114. The relevant circumstances of the Scheme indicate that there is no requisite purpose of conferring an imputation benefit under the Scheme. The Wridgways Dividends will be fully franked, which is a continuation of Wridgways dividend policy to pay fully franked dividends. Wridgways has only ordinary shares on issue and the Wridgways Dividends will be paid to all participating Wridgways Shareholders on a pro-rata basis in proportion to the number of shares that each participating Wridgways Shareholder holds on the relevant Record Dates. The amount of the Final Dividend is largely consistent with dividends previously paid out by Wridgways and allowed participating Wridgways Shareholders to share in the current profits of Wridgways for the income year ended 30 June 2010. The amount of the Final Dividend and Discretionary Special Dividend allows participating Wridgways Shareholders to share in the accumulated profits of Wridgways.

115. In considering the manner, form and substance of the Scheme, it is considered that the Scheme is not being entered into for the purpose of enabling participating members to obtain an imputation benefit. Having regard to the relevant circumstances of the Scheme, the Commissioner has come to the view that the requisite purpose is not present and 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 benefit received in relation to the dividend.

**Appendix 2 – Detailed contents list**

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<i>Previous draft:</i>	- ITAA 1936 177EA(3)(a)
Not previously issued as a draft	- ITAA 1936 177EA(3)(b)
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<i>Subject references:</i>	- ITAA 1936 177EA(5)(b)
- arrangement	- ITAA 1936 177EA(17)
- CGT capital proceeds	- ITAA 1997 104-10
- dividend streaming arrangement	- ITAA 1997 104-10(1)
- dividend stripping	- ITAA 1997 104-10(2)
- frankable dividends	- ITAA 1997 104-10(3)
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- imputation system	- ITAA 1997 116-20
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- ITAA 1936 6(1)	- ITAA 1997 204-30(3)(a)
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- ITAA 1936 160APHO(2)(a)	- Corporations Act 2001 411
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