# Cover sheet for: TA 2008/1

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The ATO view on the arrangement described in TA 2008/1 is set out in Taxation Determination TD 2009/14.

Australian Government

Australian Taxation Office

# Taxpayer Alert

# TA 2008/1

**FOI status: may be released**

*Taxpayer Alerts are intended to be an "early warning" of significant new and emerging higher risk tax planning issues or arrangements that the Tax Office has under risk assessment.*

*Taxpayer Alerts will provide information that is in the interests of an open tax administration to taxpayers. Taxpayer Alerts are written principally for taxpayers and their advisers and they also serve to inform tax officers of new and emerging higher risk tax planning issues. Not all potential tax planning issues that the Tax Office has under risk assessment will be subject of a Taxpayer Alert, and some arrangements that are the subject of a Taxpayer Alert may on further examination be found not to be of concern to the Tax Office.*

*Taxpayer Alerts will give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and will highlight the features which the Tax Office considers give rise to taxation issues. These issues will generally require more detailed analysis to provide the Tax Office view to taxpayers.*

*Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert can seek a formal determination of the ATO's position through a Private Ruling. (It should be noted that the Taxation Administration Act 1953 sets out circumstances where the Commissioner may decline to issue such a ruling). Such taxpayers might also contact the tax officer named in the Alert and/or obtain their own advice.*

*This Taxpayer Alert is issued under the authority of the Commissioner.*

## TITLE: Certain stapled securities involving notes and preference shares

This Taxpayer Alert describes arrangements where an Australian resident public company issues a Stapled Security consisting of a Note and a Preference Share to resident investors.

The purpose of this Taxpayer Alert is to inform investors in such products that the Tax Office is considering whether or not investors will be entitled to a deduction under section 70B of the *Income Tax Assessment Act 1936* (ITAA 1936) when they sell the Stapled Security on the Australian Securities Exchange (ASX) at a loss, or on the occurrence of a so-called Assignment Event (see below). If investors intend to sell their Stapled Securities on the ASX, they should not assume that they are entitled to a deduction under section 70B.

A profit from the sale of a Stapled Security may be assessable as a capital gain, rather than as statutory income under section 26BB, and if the Stapled Security has been held for more than a year, the taxpayer may be entitled to a CGT discount.

Taxpayers who acquire and sell the Stapled Securities in the ordinary course of business, however, will be entitled to a deduction for a loss under s.8-1 if a loss is incurred, and will be assessable under section 6-5 if a profit is made.

## DESCRIPTION

The alert applies to arrangements that may have some or all of the following features:

1. An Australian resident public entity (the Company) issues Notes from one of its overseas branches or subsidiaries to an Initial Purchaser for a fixed amount. This amount is not repayable.

2. At the same time, the Initial Purchaser enters into an irrevocable agreement with the Company to offer to assign the Notes back to the Company (or one of its subsidiaries) for nil consideration upon certain events occurring, called “Assignment Events”. These may occur in a number of specified circumstances, including at the election of the Company.

3. Also at the same time, the Company issues Preference Shares to the Initial Purchaser at a fully paid face value, said to be in consideration of the offer to assign. (NB that it is thought that this extinguishes any indebtedness if a debt was created on issue of the Note.) The Note and the Preference Share have the same face value and no further money is paid for the Preference Share.

4. In some cases, the steps listed above may differ in that an overseas resident subsidiary of the Company issues the Notes to the Initial Purchaser for a fixed amount. Immediately after the issue of the Notes to the Initial Purchaser, the Initial Purchaser enters into an irrevocable agreement with an Australian resident subsidiary of the Company (Aus Sub) to offer to assign the Notes to Aus Sub for nil consideration upon certain events occurring, the so-called Assignment Events.

5. The Preference Shares are stapled to the Notes one-for-one, and will remain stapled until the occurrence of an Assignment Event.

6. The Initial Purchasers on-sell the Stapled Securities to resident individuals, companies and super funds (the Investors) for an amount equal to the fixed amount paid for the issue of the Notes. For example, the Stapled Security is purchased by the Investor for $500, even though the Stapled Security consists of a Note and Preference Share, each with a face value of $500.

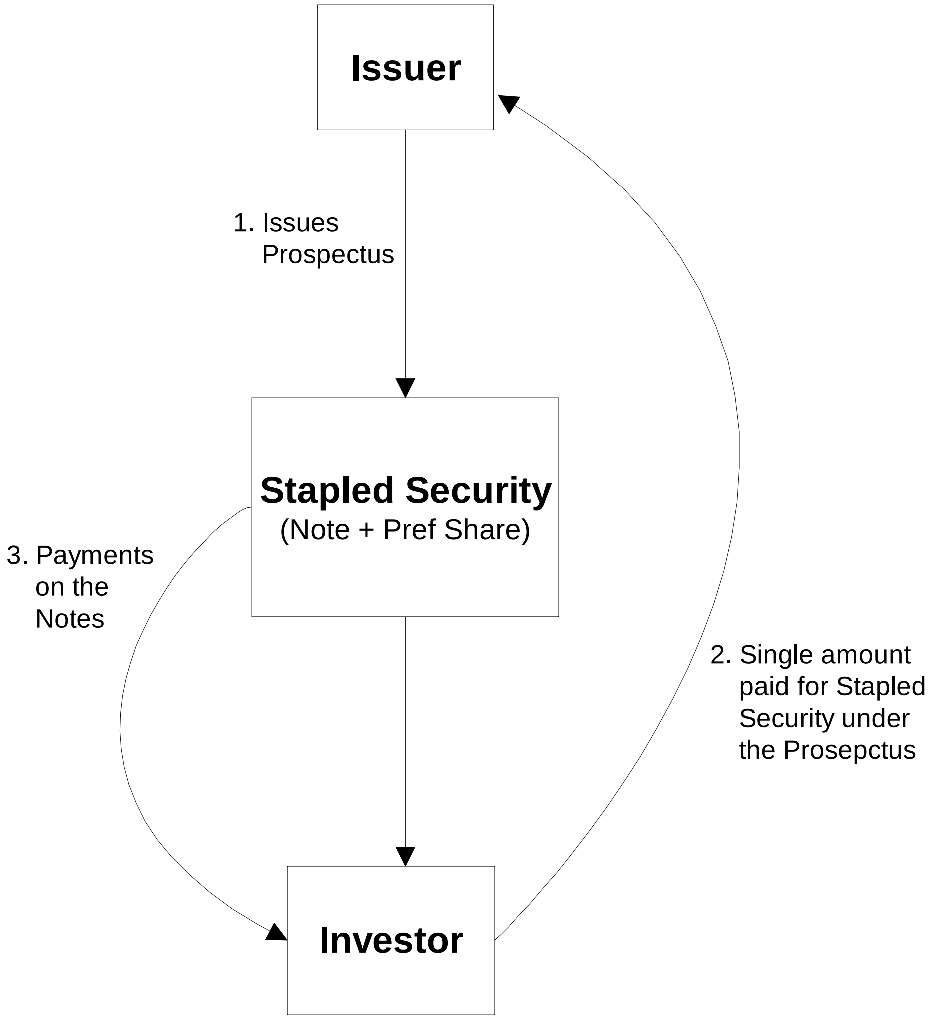
7. The Investors are bound by the same terms as the Initial Purchasers. The irrevocable offer of assignment is embedded in the Note Terms.

8. While the Notes and the Preference Shares remain stapled, an amount is payable on the Notes on the same terms on which dividends would be payable on the Preference Shares, that is, subject to there being distributable profits and subject to certain requirements regarding solvency, at the discretion of the Company and no dividends are payable on the Preference Shares.

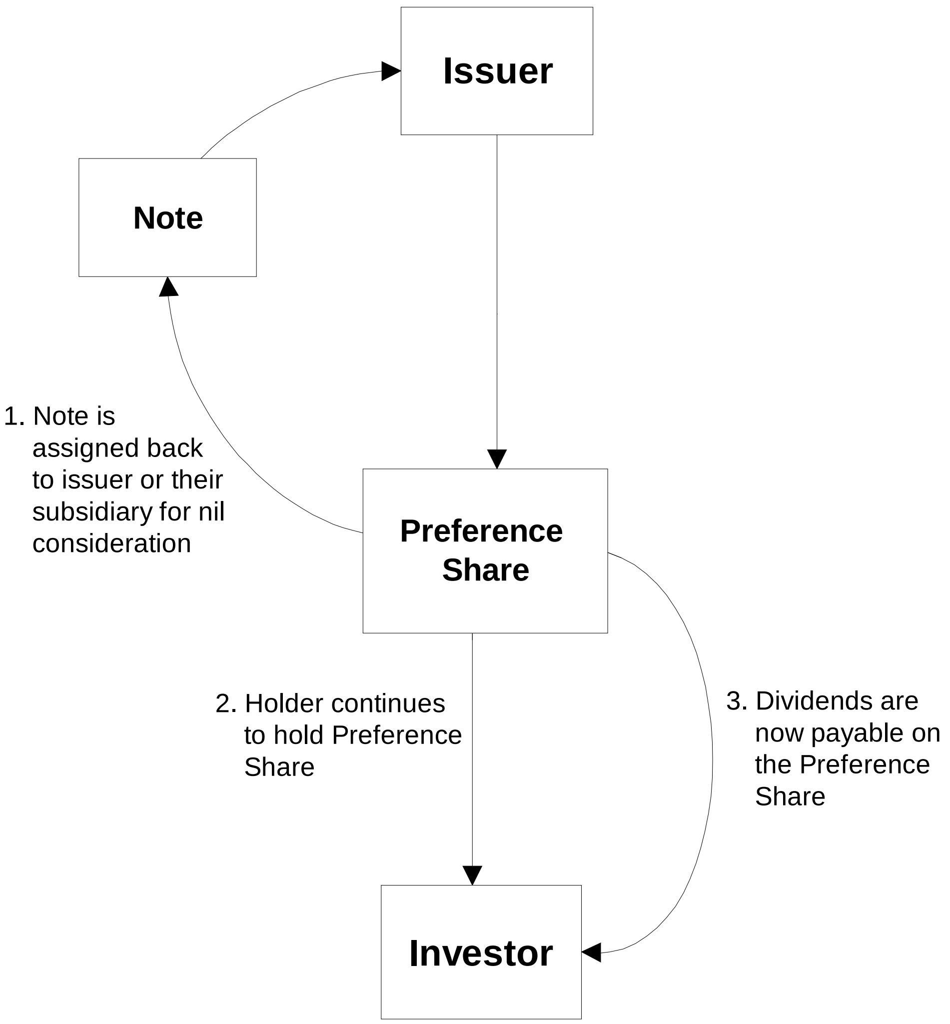
9. When an Assignment Event occurs dividends become payable on the Preference Shares on the same terms as the amounts on the Notes. Alternatively, the Preference Shares are converted into Ordinary Shares in the Company.

**Diagrams**

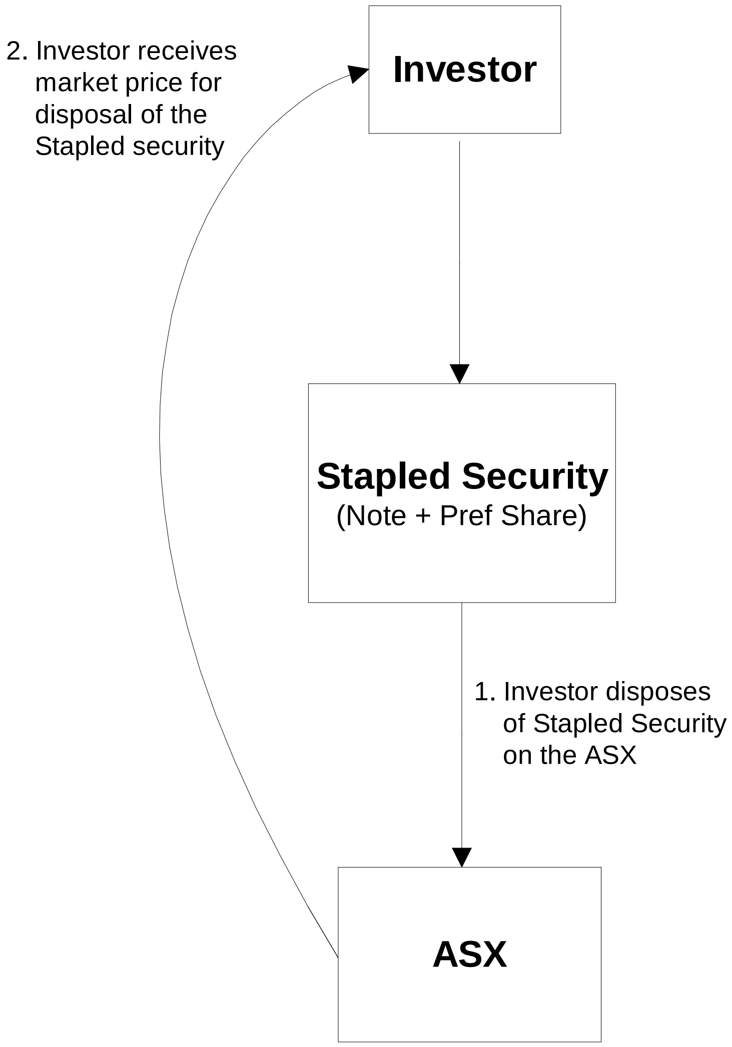
a) Investor purchases the Stapled Security via the Prospectus. The Investor is entitled to interest payments on the Notes.



b) In an Assignment Event, the Note is assigned back to the Issuer. Preference Share becomes dividend paying.



c) Investor disposes of the Stapled Security on the ASX for the market price.




## FEATURES WHICH THE TAX OFFICE CONSIDERS GIVE RISE TO TAXATION ISSUES

The Tax Office considers that an arrangement of this type gives rise to taxation issues including:

(a) whether the Stapled Security constitutes one or two assets for CGT purposes;
(b) whether the 'traditional security' provisions (sections 26BB and 70B of the ITAA 1936) apply to gains/losses on disposal of the Stapled Security on market and when the Note is assigned back to the Company;
(c) if the Note is a traditional security, whether the assignment of the Note constitutes a disposal for the purposes of section 70B; and
(d) whether Part IVA applies to cancel a section 70B deduction.

*The Australian Taxation Office is examining these arrangements.*

**Subject references:**
traditional security
stapled security
losses

**Legislative references:**
*Income Tax Assessment Act 1936*
section 70B
section 26BB
Part IVA
*Income Tax Assessment Act 1997*
section 8-1
section 6-5

**Related Practice Statements:**
PS LA 2005/13 – Taxpayer Alerts

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| Date issued: | |
| Authorised by: | Stephanie Martin<br>Deputy Commissioner |
| Contact Officer: | **Usha Narain** |
| Business Line: | **Law & Practice** |
| Section: | **Tax Counsel Network** |
| Phone: | **(02) 6216 2355** |