



Class Ruling

Income tax: Transfield Services Limited – TranShare Employee Share Plan

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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, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139BA of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139CE of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FA of the ITAA 1936;
- section 139FB of the ITAA 1936;

- section 139G of the ITAA 1936;
- section 139GA of the ITAA 1936;
- section 139GF of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-5 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- section 130-83 of the ITAA 1997; and
- Subdivision 12-B of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

All subsequent legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is all persons who are Australian resident employees of the Transfield group of companies listed below or the joint ventures listed below, who participate in the Transshare Plan (the Plan) as described in paragraphs 13 to 21 of this Ruling. In this Ruling, a person belonging to this class of entities is referred to as a participating employee.

The Transfield group consists of:

- Transfield Services Limited (Transfield);
- Transfield Services (Australia) Pty Ltd;
- Transfield Metrolink Pty Ltd; and
- Transfield Services (Brisbane Ferries) Pty Ltd.

The joint ventures are:

- Transfield Worley Services;
- Transfield Worley Solutions;
- TGE Energy Services;
- Yarra Trams Partnership;
- Metrolink Queensland Partnership; and
- Sentinar.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme 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 12 to 21 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

8. This Ruling applies from the income year ended 30 June 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the TAA).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

12. The scheme that is the subject of this Ruling is described below. This description is based on the following documents listed below. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- the application for a Class Ruling dated 6 June 2006;
- the TranShare Plan Offer – A Guide to the TranShare Plan Offer for employees of Transfield Services Limited and its wholly owned subsidiaries in Australia;
- the TranShare Plan Offer – A guide to the TranShare Plan Offer for employees of Transfield Services Joint Ventures in Australia;
- Transfield Services Limited – TranShare Plan Rules (the Plan Rules);
- letter from Transfield with additional information received on 4 August 2006; and
- letter from Transfield with additional information received on 30 August 2006.

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

13. Transfield proposes to establish an employee share scheme within the terms of Division 13A of Part III (Division 13A).

14. Participation in the Plan will be open to:

- a) employees of the Transfield group; and
- b) employees of unincorporated joint ventures to which Transfield or a subsidiary of Transfield are a party.

15. The Plan is to be established as part of the employee share strategy of Transfield and will be administered by a Plan Committee that will either be:

- the Transfield Services Board Remuneration Committee;
- any other committee of the Board to which power to administer the Plan is delegated; or
- if there is no such delegation, the Board of Transfield.

16. Under the Plan, eligible employees of the Transfield group and the joint ventures will be invited to acquire shares in Transfield. Upon acceptance of the offer, eligible employees will become participating employees.

17. The employers of participating employees will provide funds to the Plan Committee to facilitate the acquisition of ordinary shares in Transfield which is a company listed on the Australian Stock Exchange (ASX). The funds will include:

- amounts of up to \$900 per participating employee that have been salary sacrificed (in accordance with paragraphs 19 to 23 of Taxation Ruling TR 2001/10) by that employee; and
- contributions by Transfield of up to \$100 per annum for each participating employee.

18. Shares acquired under the Plan will be registered in the name of the participating employee and will be subject to a trading lock which will prevent the participating employee from disposing of the shares before the earlier of:

- three years from the time of acquisition; or
- the time when the participating employee ceases employment within the meaning of subsection 139CE(5).

19. Under the Plan Rules, a participating employee's ownership of shares acquired under the Plan cannot be forfeited.

20. The Plan will be operated such that:

- at no time will a participating employee hold a legal or beneficial interest in more than 5% of the shares of Transfield or be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of Transfield; and
- all offers to acquire shares under the Plan will be made on a non-discriminatory basis within the meaning of section 139GF.

21. The applicant has advised that Transfield or the relevant subsidiary of Transfield, is a party to each of the joint ventures listed in paragraph 3 of this Ruling and such company is jointly and severally liable for the payment of employee entitlements (including salary or wages as defined in section 221A) to employees of those joint ventures.

Ruling

22. When a share is registered in the name of a participating employee under the Plan, the participating employee will acquire a qualifying share for the purposes of Division 13A.

Where an employee makes an election

23. Where the participating employee makes an election under section 139E, the discount given in relation to each share acquired under the Plan will be included in their assessable income in the year of income in which the share is acquired, pursuant to subsection 139B(2).

24. The amount of the discount to be included in the participating employee's assessable income will be an amount equivalent to the market value of the share at the time of acquisition. The market value of a share at this time is determined under section 139FA.

25. As the Plan satisfies the exemption conditions contained in Section 139CE, only the amount of the discount in any year of income in excess of \$1000 (if any) will be included in the participating employee's assessable income, pursuant to section 139BA.

Capital gains tax (CGT)

26. Where a share is registered in the name of a participating employee under the Plan, the participating employee will also acquire a share for CGT purposes.

27. Where the share is disposed of, a capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely a capital loss will arise if the reduced cost base of the share exceeds the capital proceeds under subsection 104-10(4) of the ITAA 1997.

28. The first element of the cost base of the share will be the market value of the share at the acquisition time as calculated under section 139FA, pursuant to subsection 130-80(2) of the ITAA 1997.

29. Where the disposal happens 12 months or more after acquisition, any capital gain that results from the disposal will be a discount capital gain for the purposes of Subdivision 115-A of the ITAA 1997.

Where an employee does not make an election

30. Where the participating employee does not make an election under section 139E, the discount given in relation to the share is included in the participating employee's assessable income in the year of income in which the cessation time occurs.

31. The cessation time for the participating employee will be the earliest of:

- the time when the participating employee disposes of the share;
- the time when the trading lock ceases to have effect; and
- the time when the participating employee ceases to be employed by either their employer, a company in the Transfield group or an unincorporated joint venture to which Transfield or a subsidiary of Transfield are a party and have a liability (either jointly or severally) to pay employee entitlements (that is, the time when the participating employee ceases employment within the meaning of subsection 139CA(3)).

Disposal within 30 days

32. Where the participating employee disposes of the share in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time will be the amount of consideration received on the disposal of the share, in accordance with subsection 139CC(3).

33. Any capital gain or capital loss made as a consequence of such a disposal will be disregarded.

Disposal after 30 days

34. Where the share is not disposed of by the participating employee in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the share at the cessation time, in accordance with subsection 139CC(4). The market value of a share at this time is determined under section 139FA.

35. Where the participating employee disposes of a share acquired under the Plan other than in an arm's length transaction within 30 days of the cessation time, a capital gain or loss may arise.

36. The first element of the cost base of the share is the market value of the share at the cessation time, pursuant to subsection 130-80(2) of the ITAA 1997. The market value of a share at this time is determined under section 139FA.

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.*

37. A share will be acquired under an employee share scheme, pursuant to Division 13A if it is:

- acquired within the meaning of section 139G;
- acquired in respect of the employment of an employee, pursuant to subsection 139C(1); and
- acquired for less than market value, pursuant to subsection 139C(3).

38. Section 139G provides that an employee will acquire a share in several circumstances, including by acquiring a legal or beneficial interest in the share, or having it allotted or transferred to them by another person.

39. Under the Plan, a participating employee will acquire a legal interest in a Transfield share when the Plan committee registers the share in their name. Thus the participating employee will acquire a share within the meaning of section 139G at that time.

40. The Plan has been established to enable eligible employees of the Transfield group and joint ventures that include Transfield or subsidiaries of Transfield, to acquire shares in Transfield. As such, any share acquired under the Plan is considered to be acquired by a participating employee in respect of their employment, pursuant to subsection 139C(1).

41. As the Plan does not provide for a participating employee to provide consideration for the acquisition of a share, a participating employee will acquire the share for less than market value, pursuant to subsection 139C(3). Consideration for the purposes of subsection 139C(3) does not include an amount sacrificed under an effective salary sacrifice arrangement for the purpose of acquiring a share.

Qualifying shares

42. In order for a share to be a qualifying share, the conditions set out in section 139CD must be satisfied. These conditions are as follows:

- (1) the share is acquired by a taxpayer under an employee share scheme (subsection 139CD(2));
- (2) the company in which the share is acquired is the employer of the taxpayer or a holding company of the employer of the taxpayer (subsection 139CD(3);

- (3) all the shares available for acquisition under the scheme are ordinary shares and all the rights available for acquisition under the scheme are rights to acquire ordinary shares (subsection 139CD(4));
- (4) at the time the share was acquired, at least 75% of the permanent employees of the employer were, or at some earlier time had been, entitled to acquire:
 - (i) shares or rights under the scheme; or
 - (ii) shares or rights in the employer, or a holding company of the employer, under another employee share scheme (subsection 139CD(5));
- (5) immediately after the acquisition of the share, the taxpayer does not hold a legal or beneficial interest in more than 5% of the shares in the company or is not in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the company (subsections 139CD(6) and 139CD(7)).

43. As a share acquired by a participating employee is acquired at a discount and in respect of employment, the first condition is satisfied.

44. To satisfy the second condition, the share acquired by the participating employee must be a share in their employer or the holding company of their employer, that is, Transfield or a subsidiary of Transfield must be the employer of the participating employee. Employer is relevantly defined in subsection 139GA(3) to have the same meaning as in section 221A which defines an employer to mean a person who pays, or is liable to pay 'work and income support related withholding payments and benefits'. These payments are in turn defined to include payments from which an amount must be withheld under a provision of Subdivision 12-B in Schedule 1 to the TAA. Subdivision 12-B in Schedule 1 provides that an entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee.

45. As Transfield or a subsidiary of Transfield will be liable to pay 'work and income support related withholding payments and benefits' as defined (including being jointly and severally liable for the payment of employee entitlements to employees of unincorporated joint ventures to which they are a party), they will be the employer of participating employees for the purposes of subsection 139CD(3). Therefore, the Commissioner accepts that as Transfield or a subsidiary of Transfield will be the employer of the participating employee, the second condition will be satisfied.

46. The shares available for acquisition under the Plan are ordinary shares, thus the third condition will be satisfied.

47. The applicant has advised that all offers to acquire shares under the Plan will be made on a non-discriminatory basis within the meaning of section 139GF, thus the Commissioner accepts that the fourth condition will be satisfied.

48. As the applicant has advised that the Plan will be operated such that at no time will a participating employee:

- hold a legal or beneficial interest in more than 5% of the shares of Transfield; or
- be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of Transfield,

the Commissioner accepts that the last of the conditions will be satisfied.

49. As the Commissioner accepts that all the conditions in section 139CD are satisfied, a share acquired by a participating employee under the Plan will be a qualifying share for the purposes of Division 13A.

50. Where an employee acquires a share under an employee share scheme, the discount given in relation to the share is included in their assessable income in accordance with Subdivision B of Division 13A. Where the share is a qualifying share, the amount of the discount, and the year of income in which the discount is included is dependent on whether the employee makes a section 139E election.

Where an employee makes an election

51. Where an employee makes an election under section 139E in respect of the year of income in which a share is acquired, the discount given in relation to the share is included in their assessable income in the year of income in which the share is acquired in accordance with section 139B. However, the amount may be reduced pursuant to section 139BA.

52. The amount of the discount is calculated in accordance with subsection 139CC(2) and is the market value of the share at the time it is acquired by the employee less any consideration paid or given by the employee for the acquisition of the share.

53. In accordance with paragraph 41 of this Ruling, a participating employee does not provide any consideration for the acquisition of a share under the Plan. Thus, the amount of the discount is the market value of the share at the acquisition time.

54. Subdivision F of Division 13A contains special provisions to determine the market value of a share on a particular day. If the share is quoted on an approved stock exchange on the particular day, section 139FA provides that its market value is:

- if there is at least one transaction on the approved stock market in shares of that class during the week up to and including that day – the weighted average of the prices at which those shares were traded on that stock market during that week;
- if there was no such transaction in that one week period up to and including the acquisition day – the last price at which an offer was made on that stock market during that week to buy a share;
- if there was no transaction in, or offer made to buy shares on that stock market in the specified period – the value is determined under section 139FB.

If the share is not quoted on an approved stock exchange on that day, the market value of the share is determined under section 139FB.

\$1,000 reduction in discount

55. Section 139CE contains exemption conditions that must be satisfied by a scheme before employees have access to the \$1,000 reduction provided for in subsection 139BA(2).

56. The exemption conditions that must be satisfied are:

- the scheme does not have any conditions that could result in any employee forfeiting ownership of any share that was acquired under the scheme;
- the scheme must be operated so that no employee is permitted to dispose of shares acquired under the scheme until the earlier of:
 - (i) three years after their acquisition; and
 - (ii) the time when the employee is no longer employed within a corporate group or by the same employer as at the time the shares were acquired; and
- the scheme is operated on a non-discriminatory basis, pursuant to section 139GF.

57. As the Plan provides for the trading lock not to be released until the earlier of:

- three years from the time of acquisition; or
- the time when the participating employee ceases employment within the meaning of subsection 139CE(5),

and because the Plan contains no forfeiture provisions and will be operated on a non-discriminatory basis within the meaning of section 139GF, the exemption conditions in section 139CE will be satisfied. Section 139BA will apply so that only the total discount greater than \$1,000 (if any) will be included in a participating employee's assessable income.

Capital gains tax

58. Where an employee becomes the owner of a CGT asset, they will acquire the CGT asset, pursuant to subsection 109-5(1) of the ITAA 1997. Therefore where a share is registered in the name of a participating employee and they become the legal owner, the participating employee will acquire the share for CGT purposes.

59. Where the share is subsequently disposed of, a capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely, a capital loss is made if the reduced cost base exceeds the capital proceeds, pursuant to subsection 104-10(4) of the ITAA 1997.

60. Where the share is a qualifying share and a participating employee makes a section 139E election in respect of the share, the first element of the cost base of the share will be its market value (determined under section 139FA) at the acquisition time, pursuant to subsection 130-80(2) of the ITAA 1997.

61. Where the disposal happens 12 months or more after the acquisition, any capital gain that results from the disposal will be a discount capital gain for the purposes of Subdivision 115-A of the ITAA 1997.

Where an employee does not make an election

62. Where an employee acquires a qualifying share and does not make an election under section 139E in respect of the year of income in which the share is acquired, the discount given in relation to the share is included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

63. As a share acquired by a participating employee under the Plan will be subject to disposal restrictions, the cessation time is determined in accordance with subsection 139CA(2) and will be the earliest of:

- the time when the participating employee disposes of the share;
- the time when the trading lock ceases to have effect and any restriction preventing the participating employee from disposing of the share ceases to have effect;
- the time when the participating employee ceases employment within the meaning of subsection 139CA(3), that is, when they are no longer employed by either their employer at the time they acquired the share or a company in the Transfield group or an unincorporated joint venture to which Transfield or a subsidiary of Transfield are a party and have a liability (either jointly or severally) to pay employee entitlements; and
- the end of the 10 year period starting when the participating employee acquired the shares.

64. The amount of the discount to be included in an employee's assessable income is determined under section 139CC and will depend on whether the share is disposed of in an arm's length transaction within 30 days of the cessation time.

Disposal within 30 days

65. Subsection 139CC(3) provides that where an employee disposes of a share in an arm's length transaction at or within 30 days of the cessation time, the discount to be included in assessable income is the amount or value of any consideration received by the employee for the disposal less the amount or value of any consideration paid or given by the employee for the acquisition of the share.

66. In accordance with paragraph 41 of this Ruling, a participating employee does not provide any consideration for the acquisition of a share under the Plan. Thus, the amount of the discount is the amount or value of any consideration received by the participating employee for the disposal of the share.

67. Subsection 130-83(2) of the ITAA 1997 provides that if the share is a qualifying share, an election is not made under section 139E and CGT event A1, C2, E1, E2, E5 or I1 happens in relation to the share in an arm's length transaction at, or within 30 days of, the cessation time, any capital gain or capital loss the employee makes on the disposal is disregarded.

68. Therefore, if the share is disposed of in an arm's length transaction at or within 30 days of the cessation time, no capital gain or capital loss will arise in relation to the disposal of the share.

Disposal after 30 days

69. Subsection 139CC(4) provides that where the employee does not dispose of a share in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the share at the cessation time less the amount or value of any consideration paid or given by the employee for the acquisition of the share.

70. In accordance with paragraph 41 of this Ruling, a participating employee does not provide any consideration for the acquisition of a share under the Plan. Thus, the amount of the discount is the market value of the share at the cessation time.

71. Where an employee does not make an election under section 139E and does not dispose of the share in an arm's length transaction within 30 days of the cessation time, the first element of the cost base or reduced cost base of the share is the share's market value (worked out under section 139FA) at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2001/10

Subject references:

- employee share schemes

Legislative references:

- ITAA 1936 Pt III Div 13A
- ITAA 1936 Pt III Div 13A Subdiv B
- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139BA
- ITAA 1936 139BA(2)
- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139CA
- ITAA 1936 139CA(2)
- ITAA 1936 139CA(3)
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CD
- ITAA 1936 139CD(2)
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- ITAA 1936 139CD(4)
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- ITAA 1997 115-100
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- ITAA 1997 130-80(2)
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ATO references

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