



Class Ruling

Income tax: Suncorp-Metway Group restructure – employee share scheme – treatment of shares or rights

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① 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.

2. In this Ruling, Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936), as in force at the time occurring just before Schedule 1 to the *Tax Laws Amendment (2009 Budget Measures No.2) Act 2009* commenced is referred to as 'former Division 13A' and the provisions in force at that time are referred to as 'former' provision of the ITAA 1936.

Relevant provision(s)

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

- section 83A-35 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 83A-130 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- Subdivision DA of former Division 13A of the ITAA 1936;

- former subsection 139BA of the ITAA 1936;
- former subsection 139CE of the ITAA 1936; and
- former section 139DQ of the ITAA 1936.

All subsequent legislative references in this Ruling are to be ITAA 1997 unless otherwise indicated.

Class of entities

4. The class of entities to which this Ruling applies is all persons who:

- acquired a beneficial interest in Suncorp-Metway Limited (SML) shares or rights to acquire a beneficial interest in SML shares under the Suncorp Executive Performance Share Plan, the Deferred Employee Share Plan or the Suncorp Exempt Employee Share Plan in respect of their employment by a member of the Suncorp-Metway Limited group; and,
- from the time of acquisition of the shares or rights up to the time of the reorganisation (see paragraphs 12 and 13 below), are residents of Australia within the meaning of subsection 6(1) of the ITAA 1936; and if they
- acquired the shares or rights before 1 July 2009 under either the Suncorp Executive Performance Share Plan or the Deferred Employee Share Plan, those shares or rights are not covered by an election made under former section 139E of the ITAA 1936, nor have those shares or rights had a cessation time as mentioned in former section 139B(3) of the ITAA 1936 happen to them before the reorganisation; and/or
- acquired shares or rights on or after 1 July 2009 under either the Suncorp Executive Performance Share Plan or the Deferred Employee Share Plan, Subdivision 83A-C applies to the shares or rights and those shares or rights had not had an employee share scheme (ESS) deferred taxing point happen to them before the reorganisation; and/or
- acquired shares before 1 July 2009 under the Suncorp Exempt Employee Share Plan, those shares are covered by an election made under the former section 139E of the ITAA 1936 and at the time of the reorganisation, the shares are still under the 3 year disposal restriction under former subsection 139CE(3) of the ITAA 1936.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 23 of this Ruling.
7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

9. 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

10. The following description of the scheme is based on information provided by the applicant.

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

The Suncorp-Metway Limited Group

11. Suncorp-Metway Limited (SML) is a company formerly listed on the Australian Securities Exchange. SML is a diversified financial services group that operates in general insurance, banking, life insurance and wealth management in Australia and New Zealand. It is an authorised deposit-taking institution, that is a licensed bank, under the *Banking Act 1959*.

The reorganisation

12. On 7 January 2011, Suncorp group undertook an internal reorganisation (the reorganisation), which included the following components:

- (a) the interposition of Suncorp Group Limited (SGL) as a non-operating holding company (NOHC), for the Suncorp Group (the interposition), with the effect that SML became a wholly-owned subsidiary of SGL; and
- (b) the separation of the Suncorp group of companies into three principal sub-divisions – banking, general insurance and life insurance – each headed by a NOHC that is a wholly-owned subsidiary of SGL.

13. The interposition of SGL between SML and its ordinary shareholders comprised the following two steps (the reorganisation):

- (a) All of the SML shares owned by the SML shareholders (including SML shares held by a trustee of the relevant Suncorp employee share plans) who participated in the exchange were disposed of to SGL;
- (b) Immediately after the transfer of SML shares to SGL, SGL issued new SGL shares on a one for one basis to the former SML shareholders.

Employee Share Schemes

14. Suncorp group currently has three Australian employee share plans (the plans) in place that are relevant for the purposes of this Class Ruling:

- Suncorp Executive Performance Share Plan;
- Deferred Employee Share Plan; and
- Suncorp Exempt Employee Share Plan.

15. Under each of the plans a plan trustee oversees the acquisition and allocation of the shares for the participants.

Suncorp Executive Performance Share Plan

16. Under the Suncorp Executive Performance Share Plan, a participant acquired a beneficial interest in a right to acquire a SML share. This right was to vest at the end of the performance period provided, amongst other things, that the performance conditions were satisfied.

17. The plan trustee allocated SML shares to a participant on the vesting date (a participant acquired a beneficial interest in the SML shares on this date). The SML shares were held by the plan trustee and were subject to a further non-disposal period.

Deferred Employee Share Plan

18. Under the Deferred Employee Share Plan a participant could salary sacrifice amounts which were applied by the plan trustee to acquire SML shares on their behalf.

19. The applicant has advised that the Deferred Employee Share Plan and the Suncorp Executive Performance Share Plan are set up to allow participants access to the tax deferral concessions in former subsection 139(B)(3) of the ITAA 1936 and Subdivision 83A-C of the ITAA 1997, as appropriate.

Suncorp Exempt Employee Share Plan

20. Under this plan, the plan trustee acquired SML shares with a market value of up to \$1,000 per participant, and allocated those SML shares for the benefit of each participant. The SML shares must be retained in the plan for at least three years from the date of their allocation to a participant or until the participant ceases employment.

Changes to the plans as part of the reorganisation

21. Each of the plans was amended to ensure that a participant's beneficial interests in, and rights to acquire beneficial interests in, SML shares, are instead beneficial interests in, and rights to acquire beneficial interests in, SGL shares (as appropriate). More specifically, the following changes were made:

- The Suncorp Executive Performance Share Plan Rules were varied so that a participant who held a right to acquire a beneficial interest in SML shares would instead hold a right to acquire a beneficial interest in the same number of SGL shares. The right to SGL shares is subject to the same performance conditions and performance period (and any other terms and conditions contained in the relevant offer).
- The Suncorp Executive Performance Share Plan Rules were varied to provide that the reorganisation was not an accelerated vesting event for the purposes of the plan. In the absence of this variation, rights to shares would have vested when the reorganisation took place.

- The Suncorp Executive Performance Share Plan Rules, the Suncorp Exempt Employee Share Plan Rules and the Deferred Employee Share Plan Rules were amended so that references in those plans to SML were replaced by references to SGL.
- Corresponding changes were also made to relevant trust deeds and employee communications.

No other relevant changes were made to either the documents associated with, or the operation of, the plans in connection with the reorganisation.

Other

22. The applicant has advised that at the time the new shares or rights in SGL were acquired, no participant:

- held a beneficial interest in more than 5% of the shares in SGL, and/or
- was in a position to cast, or to control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of SGL.

23. To the extent that any employment arrangements were affected by the reorganisation, all participants are employed by SGL or a 'subsidiary' of SGL within the meaning of the *Corporations Act 2001*.

Ruling

24. The reorganisation constitutes a restructure for the purposes of Subdivision DA of former Division 13A of the ITAA 1936 and section 83A-130 of the ITAA 1997.

25. Where under the reorganisation, a participant whose shares or rights acquired under the Suncorp Executive Performance Share Plan or the Deferred Employee Share Plan, are replaced with shares or rights in SGL, the replacement shares or rights are treated as a continuation of shares or rights in SML for the purposes of:

- (a) Subdivision DA of former Division 13A of the ITAA 1936, and/or
- (b) section 83A-130.

26. For participants who acquired shares or rights under the Suncorp Executive Performance Share Plan or the Deferred Employee Share Plan, their employment by SGL or a subsidiary of SGL after the reorganisation is treated as a continuation of the employment in respect of which they acquired their shares or rights in SML for the purposes of:

- (a) former section 139DQ of the ITAA 1936, and/or
- (b) section 83A-130.

27. For participants who acquired shares or rights under the Suncorp Executive Performance Share Plan or the Deferred Employee Share Plan, any capital gain or loss arising under the reorganisation is disregarded under subsection 130-80(1).

28. Where under the reorganisation SML shares acquired by participants under the Suncorp Exempt Employee Share Plan, are replaced with SGL shares, the replacement will not breach the three year disposal restriction condition under former subsection 139CE(3) of the ITAA 1936 or subsection 83A-35(8) of the ITAA 1997. Any discount previously excluded from a participant's assessable income under former section 139BA of the ITAA 1936 or section 83A-35 of the ITAA 1997 in respect of those shares will continue to be excluded.

Commissioner of Taxation

9 March 2011

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.*

29. The shares or rights acquired by a participant under each of the plans are ESS interests as defined under subsection 83A-10(1).

30. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009.

31. By reason of Subdivision 83A-A of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997), Division 83A of the ITAA 1997 also applies to certain shares, rights and stapled securities acquired before 1 July 2009.

Reorganisation of the Suncorp-Metway Limited group

32. The employee share scheme rules ensure that employees are not adversely affected by takeovers and restructures, by allowing taxpayers who have deferred tax under an employee share scheme to roll-over an ESS deferred taxing point that would otherwise occur due to a corporate restructure.

33. The term 'restructure' is described in subparagraph 83A-130(1)(a)(ii) as:

ESS interests in a company (the old company) acquired under employee share schemes can reasonably be regarded as having been replaced, wholly or partly, by ESS interests in one or more other companies as a result of a change (the **restructure**) in the ownership (including the structure of the ownership) of the old company.

34. The Commissioner accepts that the reorganisation constitutes a restructure for the purposes of section 83A-130 as the ownership structure of the Suncorp group has undergone a change with shares in SML wholly replaced with shares in SGL.

Executive Performance Share Plan and the Deferred Employee Share Plan

Shares or rights acquired pre 1 July 2009

35. By reason of subsection 83A-5(2) of the IT(TP)A 1997, Subdivision 83A-C of the ITAA 1997 (and the rest of Division 83A of the ITAA 1997 to the extent that it relates to that Subdivision) applies in relation to shares or rights granted to a participant under either Suncorp Executive Performance Share Plan or the Deferred Employee Share Plan because:

- the shares or rights were acquired (within the meaning of former Division 13A of the ITAA 1936) before 1 July 2009;

- former subsection 139B(3) of the ITAA 1936 applied in relation to the shares or rights (the Commissioner accepts that the shares or rights acquired by the participant were qualifying shares or rights within the meaning of former section 139CD of the ITAA 1936 and the participant did not make an election covering those shares or rights under former section 139E of the ITAA 1936); and
- the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 and former section 139CA or former section 139CB for those shares or rights did not occur before 1 July 2009.

ESS deferred taxing point

36. Where Division 83A-C applies to an ESS interest, an amount will be included in the assessable income of a participant under subsection 83A-110(1) in respect of their ESS interest in the income year in which the ESS deferred taxing point occurs.

37. The ESS deferred taxing point for shares or rights is worked out under section 83A-115 of the ITAA 1997 or section 83A-120 of the ITAA 1997. However, because Subdivision 83A-C of the ITAA 1997 applies to shares or rights acquired before 1 July 2009 by virtue of subsection 83A-5(2) of the IT(TP)A 1997, subsection 83A-5(4) of the IT(TP)A 1997 applies.

38. Subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997 provides that the ESS deferred taxing point for a share or right acquired before 1 July 2009 will be the cessation time mentioned in former subsection 139B(3) of the ITAA 1936, subject to subsection 83A-115(3) of the ITAA 1997 or subsection 83A-120(3) of the ITAA 1997 respectively.

39. Therefore, whether an ESS deferred taxing point arises as a consequence of the reorganisation will depend on whether a cessation time as mentioned in former subsection 139B(3) of the ITAA 1936 would result from the reorganisation.

40. The cessation time for a share or right acquired before 1 July 2009 would occur at the time the participant disposes of the share or right as a result of the reorganisation (former paragraph 139CA(2)(a) or paragraph 139CB(1)(a) of the ITAA 1936).

41. However, there would be no disposal where the participant's replacement shares or rights in SGL are, for the purposes of Subdivision DA of former Division 13A of the ITAA 1936, treated as a continuation of shares or rights in SML (provided also that the participant does not cease employment within the meaning of former 139CB(2) of the ITAA 1936). In such circumstances, the reorganisation would not trigger a cessation time and therefore there would be no ESS deferred taxing point.

Conditions for the continuation of shares or rights

42. The Commissioner accepts that the reorganisation constitutes a restructure for the purposes of former section 139GCC of the ITAA 1936.

43. Former subsection 139DQ(1) of the ITAA 1936 relevantly provides that where, as a result of a restructure:

- an employee acquires matching shares or rights in a new company to replace rights to shares in an old company that were acquired under an employee share scheme; and
- the conditions specified in former section 139DR of the ITAA 1936 are met,

the matching shares or rights are treated, for the purposes of former Division 13A of the ITAA 1936, as if they are a continuation of the shares or rights the employee held in the old company.

44. The Commissioner accepts that, for the purposes of former Division 13A of the ITAA 1936, when a participant ceased to hold shares or rights in SML (old company) acquired under the Suncorp Executive Performance Share Plan or the Deferred Employee Share Plan and instead held shares or rights in SGL (new company), the participant is regarded as having acquired matching rights to shares in SGL that replace shares or rights in SML that were acquired under these plans.

45. Former section 139DR of the ITAA 1936 sets out the following conditions that must be met before replacement shares or rights are treated as a continuation of existing shares or rights under former section 139DQ of the ITAA 1936:

- immediately before the restructure the participant held shares or rights in the old company under an employee share scheme;
- where the participant has not made an election under section 139E in relation to their shares or rights in the old company, the participant must at or about the time they acquire their replacement shares or rights in the new company be an employee of the group;
- the shares or rights in the new company must be ordinary shares, or rights to acquire ordinary shares, in the new company; and
- at the time, the participant acquires their shares or rights in the new company:
 - they do not hold a legal or beneficial interest in more than 5% of the shares in the new company; and
 - they are not in a position to cast, or control the casting of more than 5% of the maximum number of votes that may be cast at a general meeting of the new company.

46. As the Commissioner accepts that:

- the reorganisation is a restructure for the purposes of former section 139GCC of the ITAA 1936;
- the participant acquired matching shares or rights in SGL that replaced shares or rights in SML that were acquired under an employee share scheme; and
- the conditions specified in former section 139DR of the ITAA 1936 are met,

the former subsection 139DQ(1) of the ITAA 1936 applies to the participant's replacement shares or rights in SGL. Thus, for the purposes of Subdivision DA of former Division 13A of the ITAA 1936, the replacement shares or rights in SGL are treated as if they are a continuation of the participant's shares or rights in SML.

47. Thus the reorganisation does not trigger a cessation time under former Division 13A of the ITAA 1936 and therefore there is no ESS deferred taxing point for the purposes of Subdivision 83A-C of the ITAA 1997 for the shares or rights that were acquired before 1 July 2009.

Shares or rights acquired on or after 1 July 2009

48. Under the reorganisation, when a participant ceased to hold shares or rights in SML and instead held shares or rights in SGL, the participant is, for the purposes of Division 83A, taken to have disposed of their shares or rights. Under subsection 83A-120(3), the disposal may give rise to a deferred taxing point triggered by the reorganisation.

49. However, there would be no disposal where the participant's replacement shares or rights in SGL are, for the purposes of section 83A-130, treated as a continuation of shares or rights in SML. In such circumstances, the reorganisation alone would not trigger a cessation time and therefore there would be no ESS deferred taxing point.

50. Section 83A-130 relevantly provides that where as a result of a restructure (including the structure of the ownership) of a company (the old company):

- an employee stops holding ESS interests in the old company that were acquired under an employee share scheme;
- the employee acquires replacement ESS interests in a new company that can reasonably be regarded as matching the old ESS interests;
- the replacement ESS interests relate to ordinary shares;

- the employee is employed by the new company, or a subsidiary of the new company, or a holding company of the new company, or a subsidiary of a holding company of the new company at or about the time of the restructure; and
- the employee at the time they acquire the replacement ESS interests:
 - does not hold a beneficial interest in more than 5% of the shares in the new 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 new company,

the replacement ESS interests will, for the purposes of Division 83A, be treated as a continuation of the employee's ESS interests in the old company.

51. The Commissioner accepts that the reorganisation is a restructure for the purposes of Division 83A and that as a result a participant:

- stopped holding ESS interests in an old company (SML) that were acquired under an employee share scheme;
- is regarded as acquiring replacement ESS interests in a new company (SGL):
 - that can reasonably be regarded as matching their ESS interests in SML; and
 - that relate to ordinary shares;
- is employed by SGL, or a subsidiary of SGL, at or about the time of the reorganisation; and
- at the time they acquired their replacement ESS interests:
 - did not hold a beneficial interest in more than 5% of the shares in SGL, or
 - was 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 SGL.

52. Accordingly, the participant's replacement shares or rights in SGL are, for the purposes of Division 83A, treated as a continuation of their shares or rights in SML.

Continuation of employment

53. For participants who continued to be employed by SGL or a subsidiary of the SGL after the reorganisation, their employment is treated as a continuation of the employment in respect of which they acquired their shares or rights in SML for the purposes of former Division 13A of the ITAA 1936, and/or section 83A-130 of the ITAA 1997. Accordingly they have not ceased their employment within the meaning of the former sections 139CA and 139CB of the ITAA 1936, and/or section 83A-330 of the ITAA 1997.

Capital gains tax

54. For participants who acquired shares or rights to which this ruling applies under the Suncorp Executive Performance Share Plan or the Deferred Employee Share Plan, subsection 130-80(1) applies to disregard any capital gain or loss arising under the reorganisation because paragraphs (a) and (b), and subparagraph (d)(ii) of that provision are satisfied and subsection 130-80(2) does not apply.

Suncorp Exempt Employee Share Plan***Shares acquired pre 1 July 2009***

55. Where shares were acquired under the Suncorp Exempt Employee Share Plan before 1 July 2009 former Division 13A of the ITAA 1936 will continue to apply (in spite of its repeal) to the shares by reason of subsection 83A-10 of the IT(TP)A 1997 because:

- the shares were covered by an election made under former section 139E of the ITAA 1936;
- former section 139BA of the ITAA 1936 applied to the shares;
- at the time of the reorganisation, the shares were still under the 3 year disposal restriction under former subsection 139CE(3) of the ITAA 1936; and
- Division 83A of the ITAA 1997 did not apply to the shares under subsection 83A-5 (2) of the IT(TP)A 1997.

56. Former section 139BA of the ITAA 1936 provides that, where a taxpayer has made an election under former section 139E of the ITAA 1936 in relation to shares or rights, and the exemption conditions in former 139CE of the ITAA 1936 are satisfied, the total amount of discount otherwise included in the taxpayer's assessable income for a year of income in respect of those shares is only included to the extent that it is greater than \$1000.

57. The exemption condition in former subsection 139CE(3) of the ITAA 1936, provides that the scheme, under which the employee acquired their shares or rights, must be operated such that no employee is permitted to dispose of those shares or rights before a period of three years after the time of acquisition, or the time at which the employee ceases to be employed by the employer (whichever occurs earlier).

58. However, former subsection 139CE(3A) of the ITAA 1936 provides that the above condition does not apply where a replacement share or a right is treated, for the purposes of former section 139DQ of the ITAA 1936, as a continuation of a share or right acquired under an employee share scheme.

59. The Commissioner accepts that the replacement shares in SGL resulting from the reorganisation are treated as a continuation of the participant's shares in SML. Therefore, the replacement of SML shares with SGL shares does not breach the three year disposal restriction condition under former subsection 139CE(3) of the ITAA 1936. Any discount previously excluded from a participant's assessable income in respect of those shares will continue to be excluded.

Shares acquired on or after 1 July 2009

60. Where shares are acquired under the Suncorp Exempt Employee Share Plan on or after 1 July 2009 and the replacement SGL shares are treated as continuation of the SML shares under section 83A-130 following the reorganisation, subsection 83A-130(3) provides that the three year minimum holding period condition in subsection 83A-35(8) is taken to be satisfied. Any discount previously excluded from a participant's assessable income under section 83A-35 in respect of those shares will continue to be excluded.

Appendix 2 – Detailed contents list

61. The following is a detailed contents list for this Ruling:

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References

Related Rulings/Determinations:

TR 2006/10

Subject references:

- Employee share schemes & options
- Employee share ownership
- Company restructuring

Legislative references:

- | | |
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| - ITAA 1936 Pt III Div 13A | - ITAA 1997 83A-35 |
| - ITAA 1936 139B(3) | - ITAA 1997 83A-35(8) |
| - ITAA 1936 139BA | - ITAA 1997 Subdiv 83A-C |
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| | - Copyright Act 1968 |
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ATO references

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