



Class Ruling

Income tax: Downer EDI Limited 2015, 2016 and 2017 Long Term Incentive Plans

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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.

Summary – what this ruling is about

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

Relevant provisions

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

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Division 83A of the ITAA 1997.

3. All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

4. The class of entities to which this Ruling applies is directors and employees of Downer EDI Limited (Downer) or any Associated Body Corporate of Downer EDI Limited (as defined in the 2015, 2016 and 2017 Plan Rules) (Downer Group) who:

- receive Performance Rights (Rights) under the Downer EDI Limited 2015, 2016 or 2017 Long Term Incentive Plans (the Plans)
- are, at the time they receive Rights under the Plans either:
 - employees of Downer or a subsidiary of Downer, or
 - treated as employees of Downer or a subsidiary of Downer for the purposes of Division 83A by virtue of section 83A-325
- are residents of Australia within the meaning of that expression in subsection 6(1) of the ITAA 1936, and
- are not temporary residents within the meaning of that expression in subsection 995-1(1).

5. In this Ruling a person belonging to this class of entities is referred to as a Participant.

Qualifications

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

7. 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 11 to 41 of this Ruling. If a Participant in the class of entities covered by this Ruling considers that their individual circumstances fall outside that covered in this Ruling, they may seek a private ruling in relation to their specific circumstances.

8. 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.

Date of effect

9. This Ruling applies:

- from 1 July 2014 to 30 June 2018, in respect of the 2015 Long Term Incentive Plan
- from 1 July 2015 to 30 June 2019, in respect of the 2016 Long Term Incentive Plan, and
- from 1 July 2016 to 30 June 2020, in respect of the 2017 Long Term Incentive Plan.

10. This Ruling continues to apply after 30 June 2020 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 Participants 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

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

12. Downer is a public company listed on the Australian Securities Exchange (ASX).

The Plans

13. The Plans are long term incentive schemes for a limited number of senior executives of the Downer Group. The Plans provide for senior executives selected by the Downer Board to receive an offer (Invitation) of certain Rights.

14. The Rights are rights to acquire fully paid ordinary shares in the capital of Downer (Shares) or to be paid an amount of cash consideration (in certain circumstances). The Rights are subject to the relevant Plan Rules and the terms set out in the Invitation. The right to receive Shares or cash consideration is subject to the satisfaction of the vesting conditions described in paragraphs 19 to 24 of this ruling.

15. If the Board decides to make an offer of Rights, it will provide the eligible Participant with an Invitation to participate in the Plans. The Rights will only be granted to Participants upon receipt by Downer of a duly completed and signed application form from the eligible Participant.

16. The Rights were granted to the Participant on the date that Downer's Remuneration Committee approved the Participant's application to participate in the relevant Plan. The grant date was:

- 2 June 2015, for the 2015 Plan
- 30 June 2016, for the 2016 Plan, and
- 21 June 2017, for the 2017 Plan.

17. Participants acquired their Rights under the Plans for no consideration, and at a discount to their market value which is greater than nil.

18. Immediately after acquiring the Rights, none of the Participants held a beneficial interest in more than 5% of Downer nor were they 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 Downer (assuming full vesting of all awards held).

Vesting conditions

19. The Rights were issued in three tranches and will vest subject to the satisfaction of all of the following vesting conditions:

- a Performance Vesting Condition
- the Continued Employment Condition, and
- the Board Approval Condition.

20. Any Rights that fail any of the vesting conditions will lapse and be forfeited. However, there are two circumstances where the Board may make a determination that Rights which would otherwise fail the applicable Vesting Conditions are not forfeited:

- where the Board designates certain Participants as an Eligible Leaver (see paragraphs 28 to 30 of this ruling), or
- when a Change of Control event occurs (see paragraph 31 of this ruling).

Performance Vesting Condition

21. A Performance Vesting Condition applies to each tranche of Rights. For both the 2015, 2016 and 2017 Plans, the performance vesting conditions that must be satisfied are:

- Tranche 1 – Relative total shareholder return
- Tranche 2 – Compound annual earnings per share, and
- Tranche 3 – Net profit after tax and free cash flow.

22. These are measured over a performance period starting on 1 July 2014 and ending 30 June 2017 (for the 2015 Plan), starting on 1 July 2015 and ending on 30 June 2018 (for the 2016 Plan) and starting on 1 July 2016 and ending on 30 June 2019 (for the 2017 Plan).

Continued Employment Condition

23. If a Participant ceases employment with the Downer Group prior to 30 June 2018 (for the 2015 Plan), 30 June 2019 (for the 2016 Plan) or 30 June 2020 (for the 2017 Plan), any Right granted will be forfeited unless the Participant is designated by the Board as an Eligible Leaver (see paragraphs 28 to 30 of this ruling).

Board Approval Condition

24. As soon as practicable after the date the Continued Employment Condition is satisfied for each Plan, the Board will determine the extent of vesting of any Rights which have satisfied the other vesting conditions. The Board may reduce, in part or in full, the number of Rights that vest in certain circumstances, including where a Participant has acted inappropriately or where the Board considers that the financial results against which the Performance Vesting Condition was tested were incorrect in a material respect or have been reversed or restated.

Vesting of Rights under the Plans

25. Once the Board has made its determination in respect of the Board Approval Condition (after the satisfaction of the applicable Performance Condition and Continued Employment Condition), the Board will give the Participant a notice specifying the number of Rights which will vest, the Vesting Date for those Rights and, in relation to Participants who are Eligible Leavers, whether the Rights will be settled by the issue/transfer of Shares or the payment of cash consideration.

26. Prior to the Vesting Date, Participants will not have any interest in Shares which may be issued or transferred, or any entitlement to cash consideration which may be paid to the Participants, on the Vesting Date.

27. On the Vesting Date, the Board will settle each vested Right by the issue or transfer of one share for nil consideration (except where the Participant is an Eligible Leaver and the Board elects to settle the Rights with cash – see paragraph 30 of this ruling).

Eligible Leavers

28. The Board has the discretion to designate a Participant who ceases employment with the Downer Group before the Continued Employment Condition is satisfied as an Eligible Leaver. This discretion will not be routinely exercised and no Participant will know at the time they acquire their Rights whether or not they will become an Eligible Leaver.

29. Where the Participant is designated an Eligible Leaver, the Continued Employment Condition will cease to apply for some or all of their Rights (as determined by the Board) and those Rights will vest if and to the extent that the Performance Vesting Condition and the Board Approval Condition for the relevant Plan(s) are satisfied. If the Rights vest, they will do so at the original Vesting Date (that is, the time the Rights would have vested had the Continued Employment Condition been satisfied).

30. On the Vesting Date, the Board may, in its absolute discretion, elect to settle each vested Right by the issue or transfer of one Share for nil consideration, or by paying an amount of cash consideration equal to the market value of a Share.

Change of Control

31. If a Change of Control occurs, the Board may determine that different vesting conditions apply to the Performance Rights if the change of control occurs more than 12 months after the first day of the performance period but prior to the end of the performance period. In this instance, the Performance Rights will be eligible to vest on a pro-rata basis having regard to the performance period that has elapsed and applying the relevant Performance Vesting Conditions as if the performance period is shortened to end on the date the Change of Control occurs.

Disposal restrictions

32. The transfer or disposal of vested Shares under each Plan is subject to restrictions under the Plan Rules and Downer's Securities Trading Policy, supported by the Shares being placed in a holding lock within the meaning of the ASX listing rules until the relevant approvals have been obtained.

33. The terms of the Plans provide that once Participants are issued or transferred Shares upon vesting of Rights, they may not transfer any of those Shares without the prior approval of the Remuneration Committee or its delegate. The Remuneration Committee has delegated authority to approve or reject transfer notices to the Company Secretary, Chairman, and Chairman of the Audit & Risk Committee¹ as appropriate, in the manner prescribed by the Securities Trading Policy. A transfer of vested Shares may only be approved if the Remuneration Committee or delegate is satisfied that the transfer is not in breach of Downer's Securities Trading Policy.

34. Downer's Securities Trading Policy applies generally to any employee, contractor or agent of Downer. The eligible Participants in the Plans are all 'Senior Executives' as defined in clause 1.1 of the Securities Trading Policy. As such, each of the Participants is also a 'Restricted Person' as defined for the purposes of the policy. By virtue of their roles, the eligible Participants are routinely in possession of price sensitive and other confidential information that has not been disclosed to the ASX.

35. Under the Securities Trading Policy, Restricted Persons are:

- prohibited from dealing in Downer's Securities during closed periods (as defined in clause 5.1 of the Securities Trading Policy)
- prohibited from dealing in Downer's Securities if they possess any price sensitive information that has not been disclosed to the ASX (price sensitive information), or confidential information of Downer that may be price sensitive information (confidential information), and
- prohibited from dealing in Downer's Securities outside closed periods without prior approval of the Company Secretary, Chairman of the Board or Chairman of the Audit & Risk Committee as applicable.

Discretion to grant exemption from prohibition on trading within closed periods in 'exceptional circumstances'

36. Under clause 6 of the Securities Trading Policy, the Chairman of the Board has the discretion to grant an exemption to the prohibition on dealing in Downer's Securities during the closed periods or, in the case of the Chairman of the Board wishing to deal in Downer's Securities, the Chairman of the Audit & Risk Committee has that discretion.

¹ The Audit & Risk Committee was previously known as, and is still referred to in the Securities Trading Policy as, the Audit Committee. However, for clarity, the committee will be referred to as the Audit & Risk Committee throughout this Ruling.

37. The discretion is only available in exceptional circumstances, and is generally limited to cases of severe financial hardship only. It will not be exercised if the employee has (or may reasonably be presumed to possess) price sensitive information that has not been disclosed to the ASX. This discretion is not routinely exercised.

Requests for approval to trade outside closed periods

38. Under clause 5.3 of the Securities Trading Policy, a Participant must complete a written request in the appropriate form to seek approval to deal in Downer's Securities outside of a closed period. A response to approval requests will normally be provided within two business days.

39. There are no fixed criteria for the relevant decision-maker to apply in determining whether or not to grant approval to a Participant to deal in Downer's Securities. Approval is given on a case by case basis.

40. In accordance with the Securities Trading Policy, any breaches of the policy are considered serious and will result in disciplinary action against the Participant, including potential termination of employment.

41. The transfer restrictions outlined in paragraphs 32 to 40 of this ruling cease to apply to:

- Eligible Leavers, after their Rights have vested, and
- Participants who cease employment with the Downer Group after their Rights have vested.

Ruling

Where Rights are settled with Shares

42. Rights acquired under the Plans are indeterminate rights for the purposes of section 83A-340. Once the vesting conditions have been met, and the Rights have been settled with Shares, the Rights will be treated as rights to acquire beneficial interests in shares (that is, they will be treated as ESS interests for the purposes of subsection 83A-10(1)) from the time the Rights were acquired by the Participants.

Subdivision 83A-C

43. Rights acquired by Participants under the Plans are at real risk of forfeiture and Subdivision 83A-C applies to the Rights where they are treated as ESS interests under section 83A-340.

44. No amount will be included in the Participant's assessable income in relation to Rights until the ESS deferred taxing point for the Right occurs.

45. The ESS deferred taxing point for the Rights will be determined under section 83A-120.

Deferred taxing point for Participants (other than Eligible Leavers)

46. The ESS deferred taxing point for the Rights of a Participant who is not an Eligible Leaver, which are settled with Shares, will occur at the earliest of the following times:

- if the Participant ceases employment after the Vesting Date, the date they cease employment
- seven years after they acquired the Rights, or fifteen years in the case of Rights acquired on or after 1 July 2015, or
- the first available trading day (outside a closed period) on or after the Vesting Date when the Participant is not (or is no longer) in possession of price sensitive information or confidential information that may be price sensitive information.

Deferred taxing point for Eligible Leavers

47. The ESS deferred taxing point for the Rights of an Eligible Leaver, which are settled with Shares, will be:

- the date they cease employment, if they cease employment within the meaning of the term in section 83A-330, or
- the Vesting Date, if they cease employment otherwise than within the meaning of the term in section 83A-330.

Disposal of Shares within 30 days of the ESS deferred taxing point

48. If a Participant, including an Eligible Leaver, disposes of Shares within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of disposal.

Amount included in assessable income

49. In accordance with section 83A-110, the amount included in the Participant's assessable income, in the income year in which the ESS deferred taxing point occurs, will be the market value of the ESS interest at the ESS deferred taxing point reduced by the Participant's cost base in the ESS interest (if any).

Where Rights are settled in cash

50. Where an Eligible Leaver's Rights are satisfied in cash, Division 83A will not apply and any cash payment will be treated as ordinary income.

Amount included in assessable income

51. The total amount of any cash payment will be included in the Eligible Leaver's assessable income, under section 6-5, in the year in which it is received.

Commissioner of Taxation

4 April 2018

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.*

Where Rights are settled with Shares

ESS interests and indeterminate rights

52. For the purposes of Division 83A, an ESS interest in a company is defined under subsection 83A-10(1) as a beneficial interest in:

- a share in the company, or
- a right to acquire a beneficial interest in a share in the company.

53. Under the Plans, the eligible Participants were granted Rights to acquire fully paid ordinary shares in the company for no consideration. The Rights will vest subject to meeting performance vesting and continued employment conditions and to the extent determined under the Board Approval Condition. The Board Approval Condition gives Downer an overriding discretion to reduce, in full or in part, the number of Rights that will vest in certain circumstances.

54. Accordingly, at the time the Rights are granted under the Plans, they are both conditional and subject to the exercise of the Board's discretion under the Board Approval Condition. In these circumstances the Commissioner does not consider that the Participant has acquired a right to acquire shares on the grant of the Rights.

55. In addition, where a Participant leaves Downer's employment before meeting the employment condition, the Board has the discretion to determine that the Participant is an Eligible Leaver. Upon meeting all other vesting conditions, the Board then has a further discretion to satisfy the Eligible Leaver's Rights with a cash payment in lieu of Shares.

Indeterminate rights

56. Section 83A-340 provides that where you acquire a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A will apply as if the right had always been a right to acquire a beneficial interest in the share.

57. In order for section 83A-340 to apply:

- the right acquired must be capable of becoming a right to acquire a beneficial interest in a share, and
- the right must in fact become a right to acquire a beneficial interest in a share.

58. The Right that the Participant is granted becomes a right to acquire a beneficial interest in a share if:

- the Performance Vesting Condition and Continued Employment Condition are satisfied, and
- the Board does not exercise its discretion under the Board Approval Condition to prevent the Rights from vesting.²

59. Whilst the Rights that the Participant obtains are the subject of a discretion, the Commissioner considers that they are rights to property which are capable of becoming rights to acquire beneficial interests in shares.

60. Therefore, where the Rights granted to a Participant ultimately vest and are settled with Shares on the Vesting Date, section 83A-340 will apply to those Rights. The Rights will be treated as if they had always been rights to acquire a beneficial interest in the share (that is, they will be treated as an ESS interest from the date the Rights were initially granted).

Subdivision 83A-C

61. Subdivision 83A-C provides that where certain conditions are satisfied, the discount in relation to an ESS interest is not included in a Participant's assessable income when they acquire the ESS interest. Instead, under section 83A-110 the assessable income of the Participant will include, at a later time, the market value of the ESS interest at the ESS deferred taxing point reduced by the cost base of the ESS interest.

62. The conditions to be satisfied to be eligible for the deferred inclusion in assessable income are listed in subsection 83A-105(1):

- i) Subdivision 83A-B would, but for section 83A-105, have applied to the interest
- ii) for Rights acquired on or after 1 July 2015, there is still a discount given in relation to the interest after applying section 83A-315
- iii) for Rights acquired on or after 1 July 2015, section 83A-33 does not reduce the amount to be included in the Participant's assessable income in relation to the interest
- iv) the Participant is employed by the company, or a subsidiary of the company, at the time they acquire the ESS interest in the company

² If the Participant leaves Downer's employment before meeting the Continued Employment Condition, the Right becomes a right to acquire a beneficial interest in a share if the Board exercises its discretion to determine that the Participant is an Eligible Leaver and to satisfy the Eligible Leaver's Rights with Shares.

- v) all ESS interests available under the employee share scheme must relate to ordinary shares
- vi) the predominant business of the company in which the interests are acquired is not the acquisition, sale or holding of shares, securities or other investments (directly or indirectly) or, if it is, the employee is not employed by that company and also a subsidiary or holding company of that company, or a subsidiary of the holding company
- vii) immediately after the ESS interest is acquired, the Participant will not hold a beneficial interest in greater than 5% of the shares (or 10% for ESS interests acquired on or after 1 July 2015), or be in a position to control the casting of greater than 5% (or 10% for ESS interests acquired on or after 1 July 2015) of the votes that might be cast at a general meeting of the company³
- viii) there must be a real risk, under the conditions of the scheme, that:
 - the Participant will forfeit or lose the ESS interest (other than by disposing of it, exercising the right or letting the right lapse), or
 - if the Participant exercises the right, they will forfeit or lose the beneficial interest in the share (other than by disposing of it).

63. The Commissioner accepts, for the purpose of Subdivision 83A-C, that in relation to Rights acquired by a Participant under the Plans, conditions (i) to (vii) in paragraph 62 of this ruling are satisfied.

64. In relation to condition (viii), that there be a real risk of forfeiture⁴, a reasonable person must consider that there is an actual possibility of forfeiture. The risk of forfeiture must be real, not nominal, artificial or contrived. There must be more than a mere possibility.

65. 'Real risk of forfeiture' may include conditions where retention of the ESS interests is subject to performance hurdles or a minimum term of employment.

³ For ESS interests acquired on or after 1 July 2015, in determining the Participant's effective ownership and voting rights, the Participant must take into account the holdings they could obtain by exercising rights they have over shares in the employer (that is, as if all rights to acquire shares are fully vested) and the holdings of their associates – see subsection 83A-45(7) and 83A-305(2).

⁴ See subsection 83A-105(3).

66. In cases where an ESS interest has both employment and performance conditions to be met and one of these conditions satisfies the 'real risk of forfeiture' test, it is not necessary to consider whether the other condition also satisfies the test. When there is doubt that a condition will satisfy the test, then the other condition will also be examined.

67. The vesting of each tranche of Rights issued is subject to the satisfaction of all of the vesting conditions:

- a Performance Vesting Condition
- the Continued Employment Condition, and
- the Board Approval Condition.

68. Unvested Rights in each tranche will be forfeited if the relevant Performance Vesting Condition for that tranche has not been satisfied. Further, the Continued Employment Condition gives rise to an additional and separate 'real risk of forfeiture'. It is not considered that the existence of the Eligible Leaver and Change of Control modifications result in any reduction in a real risk of forfeiture of Rights for Participants in those circumstances:

- for Eligible Leavers, the Performance Vesting Conditions and Board Approval Condition must still be satisfied for their Rights to vest, or
- if a Change of Control event occurs, the Performance Vesting Conditions (as modified) and Board Approval Condition must still be satisfied for their Rights to vest.

69. Accordingly, the Commissioner accepts that there is a real risk that a Participant will forfeit or lose their Rights under the Plans, other than by disposing them, exercising them or letting them lapse. As such, this final condition is satisfied and Subdivision 83A-C will apply to the Rights. This means that the taxation of Rights received under the Plans will be deferred until the relevant ESS deferred taxing point occurs.

ESS deferred taxing point

70. As Subdivision 83A-C applies to the Rights, section 83A-120 applies in determining the ESS deferred taxing point for the Rights.

71. Subject to subsection 83A-120(3), the ESS deferred taxing point for the Rights is the earliest of the times specified in subsections 83A-120(4) to (7):

- when the Right has not been exercised, there is no real risk of forfeiting the Right, and the scheme no longer genuinely restricts disposal of the Right (subsection 83A-120(4))
- when the Participant's employment in respect of which the Right was acquired ends (subsection 83A-120(5))
- the end of the seven year period starting when the Participant acquired the Right, or fifteen years in the case of a Right acquired on or after 1 July 2015 (subsection 83A-120(6))
- in the case of Rights acquired before 1 July 2015, when there is no real risk of forfeiting the Right or

underlying Share, and the scheme no longer genuinely restricts exercise of the Right or disposal of the resulting Share (former subsection 83A-120(7)), and

- in the case of Rights acquired on or after 1 July 2015, when the Right is exercised and there is no real risk of forfeiting the Share and the scheme no longer genuinely restricts disposal of the Share (subsection 83A-120(7)).

72. Under subsection 83A-120(3), if the Participant disposes of the Share within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of the disposal.

ESS deferred taxing point for Participants (other than Eligible Leavers)

73. In considering the appropriate ESS deferred taxing point for Participants (other than Eligible Leavers), it must be determined at what point the scheme no longer 'genuinely restricts' disposal of the Share.

74. The phrase 'genuinely restricts' is not defined in the legislation. However the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 (the EM), which introduced Division 83A, outlines a number of key principles:

- If disposal of an ESS interest would be a criminal offence, for example under a law regulating insider trading, then the employee would be considered genuinely restricted from disposing of the share.
- A company's internal share trading policy is only considered to be a restriction preventing disposal for the purposes of deferring the taxing point if the penalty for breaking the policy constitutes an effective sanction.
- A restriction that otherwise meets the conditions for a genuine restriction, but is able to be lifted in cases of severe financial hardship, is nonetheless considered to be a genuine restriction.
- Restrictions preventing disposal are considered to be lifted once an opportunity arises in which a taxpayer can realise the share.
- In the case of a trading window, or restrictions that may lift and then re-engage, if the employee does not avail themselves of the opportunity to dispose of the share and the window subsequently closes, there is no further delay in the taxing point. The taxing point would still be at the commencement of the first trading window.

- A genuine restriction should not be open to manipulation, for example requiring the employee to apply for approval before trading (giving the employee a choice regarding whether and when to apply for approval).

75. The Commissioner considers that a scheme does not genuinely restrict disposal of an ESS interest if the employee can take action to enable disposal of the ESS interest.

76. Whether the Participant is able to take action to deal with the Shares is a question of fact.

77. Given the way the transfer restrictions under the Plan Rules and the supporting ASX holding lock operate in this case, they are not considered to genuinely restrict the disposal of the shares in themselves – the stated purpose is to support the Securities Trading Policy. It is expected that if the Remuneration Committee or delegate is satisfied that disposal would be in accordance with that policy, the approval would be given and the ASX holding lock lifted.

78. As outlined in paragraphs 34 and 35 of this ruling, under the Securities Trading Policy, the Participants are:

- prohibited from dealing in Downer's Securities during closed periods (as defined in clause 5.1 of the Securities Trading Policy)
- prohibited from dealing in Downer's Securities if they possess any price sensitive information or confidential information, and
- prohibited from dealing in Downer's Securities outside closed periods without prior approval of the Company Secretary, Chairman of the Board or Chairman of the Audit & Risk Committee as applicable.

79. The Participant initiates the approval process through a written request. There are no fixed detailed criteria applied in determining whether approval is granted. It is determined on a case by case basis.

80. The Commissioner accepts that the prohibition on disposal during closed periods is a genuine restriction preventing disposal of the Shares. During those periods, the Participant is unable to dispose of the Shares. The existence of the discretion, in clause 6 of the Securities Trading Policy, to grant an exemption from the prohibition (outlined in paragraphs 36 and 37) does not prevent the prohibition during closed periods being a genuine restriction in this case. This is because the discretion can only be exercised in exceptional circumstances (generally in cases of severe financial hardship only) and is not routinely exercised.

81. In relation to disposal during a non-closed period, it is a question of fact at that time whether a Participant is in possession of price sensitive information or confidential information.

82. If, when a Participant receives the Shares in satisfaction of the Rights, they have possession of price sensitive information or confidential information, the Commissioner accepts that the Participant is genuinely restricted from disposing of their Shares, on the basis that they would be unable to obtain the necessary approvals to trade. Participants and Downer must either have contemporaneous evidence, or be able to obtain evidence, to support a contention that the Participant has possession of price sensitive information or confidential information. That evidence must support that the Participant had possession of particular price sensitive information or confidential information every trading day for the period contended.

83. If a Participant does not have possession of price sensitive information or confidential information on the first available trading day (outside a closed period) from when they receive the Shares in satisfaction of the Rights, the Commissioner does not consider the Participant to be genuinely restricted from disposing of their Shares. They can take action at that time to realise the benefit by requesting approval to trade.

84. The Commissioner does not accept that the mere requirement under the Securities Trading Policy to obtain approval to dispose of the Shares constitutes a genuine disposal restriction in this case. The approval process is considered to be subjective; the relevant decision-maker has a broad discretion, with no clear, fixed, objectively measured criteria to be applied. Further, the Participant has a choice regarding whether or when to apply for approval. As noted in paragraph 74 of this ruling, the EM supports the conclusion that this does not constitute a genuine disposal restriction.

85. However, if a Participant, within 10 business days from receiving the Shares in satisfaction of the Rights (or, if they receive the Shares during a closed period, 10 business days from the first available trading day outside that closed period), applies for approval to trade and the request is refused on the basis that the Participant has possession of particular price sensitive information or confidential information, the Commissioner will consider the Participant to have always been restricted from disposing of the Shares. They will be considered not to be genuinely restricted from disposing of their Shares on the first available trading day (outside a closed period) when that information is no longer price sensitive or confidential and they do not possess other specific price sensitive or confidential information (which must also be evidenced in accordance with paragraph 82 of this ruling).

86. Accordingly, the ESS deferred taxing point for the Rights of a Participant (other than an Eligible Leaver) which are settled with Shares will occur at the earliest of the following times:

- if a Participant ceases employment (within the meaning of section 83A-330) after the Vesting Date, the date they cease employment

- seven years after they acquire the Rights, or fifteen years in the case of a Right acquired on or after 1 July 2015, or
- the first available trading day (outside a closed period) on or after the Vesting Date when the Participant is not (or is no longer) in possession of price sensitive information or confidential information.

87. However, if a Participant disposes of the Shares within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of disposal.

ESS deferred taxing point for Eligible Leavers

88. Where an Eligible Leaver's Rights are settled with Shares, and they ceased employment within the meaning of the term in section 83A-330, the earliest of the times mentioned in paragraph 71 of this ruling will be when their employment in respect of which the Right was acquired ends. This will therefore be their deferred taxing point.

89. Where an Eligible Leaver's Rights are settled with Shares, and they ceased employment otherwise than within the meaning of the term in section 83A-330, the ESS deferred taxing point will be the Vesting Date, as this will be when there is no real risk of forfeiting the Right or the Share and there is no genuine restriction on the disposal of the Share (as the transfer restrictions under the Plans do not apply to Eligible Leavers once their Rights have vested).

90. However, if an Eligible Leaver disposes of the Shares within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of disposal.

Amount included in assessable income

91. Under section 83A-110, the amount to be included as assessable income, in the income year in which the ESS deferred taxing point occurs, is the market value of the ESS interest at the ESS deferred taxing point, reduced by the cost base of the ESS interest (if any).

92. As the Rights and Shares were issued for nil consideration, the cost base will usually be nil. In that case, the amount to be included in the Participant's assessable income, in the income year in which the ESS deferred taxing point occurs, is the market value of the ESS interest at the deferred taxing point.

Where Rights are settled in cash

93. Where an Eligible Leaver's Rights are satisfied in cash instead of shares, section 83A-340 will not apply to the Rights. The Rights will not be considered ESS interests under subsection 83A-10(1) and Division 83A will not apply to the Rights.

94. In these circumstances, the granting of the Rights:

- will be viewed as one of a series of steps in the payment of salary or wages, and
- will not be viewed as a separate benefit to the payment of salary or wages which are excluded from the definition of fringe benefit by paragraph 136(1)(f) of the *Fringe Benefits Tax Assessment Act 1986*.

Amount included in assessable income

95. Subsection 6-5(2) provides that the assessable income of an Australian resident taxpayer includes ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during an income year. Ordinary income includes salary and wages.

96. Therefore, the Eligible Leaver would need to include the full amount of any cash payment in their assessable income for the year in which the cash is received.

Appendix 2 – Detailed contents list

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

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