

Public advice and guidance compendium – TD 2022/4

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2021/D5 *Income tax: when are you genuinely restricted from immediately disposing of an interest provided under an employee share scheme?* It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	The examples and conclusions in the draft Determination are consistent with our analysis of the legislation. Two additional examples should be included in the final Determination regarding: • a minimum shareholding requirement • disposal restrictions in shareholders deed.	The examples in the Determination have been used to illustrate various principles rather than provide guidance on specific nuanced cases. We note Example 1 in the Determination provides an example of a contractual condition imposed on shares acquired under the employee share scheme (ESS) that would constitute a genuine disposal restriction. That is, the ESS under which Kim acquired her shares prevented her from disposing of those shares until the third anniversary of acquisition.
2	Paragraph 26 of the draft Determination requires an employee to actually show they possessed price-sensitive information which would require them to show any information they actually have. Practically, this is very difficult for an employee to show without also breaching other company policies. Current examples of disposal restrictions on the ATO website indicate, at Example 7: Share trading policy, that there is a genuine disposal restriction so long as the trading policy is strictly enforced. It should be sufficient for a company to strictly enforce its trading policy together with other relevant documented company policies for an employee to show there is a genuine restriction on their ESS interests.	Paragraph 27 has been amended in the final Determination to clarify that specific information does not need to be provided. This paragraph does not, and was not intended to, require an employee to disclose the price-sensitive information they possessed. Rather, it says an employee's position is not sufficient evidence they held price-sensitive information and there must be something more to show their ESS deferred taxing point did not occur due to being in possession of price-sensitive information. In practice, the provision of information by employees, as contemplated by paragraph 27 of the final Determination, will most frequently occur between employees and employers as employers must take reasonable steps to accurately identify when an employee's ESS deferred taxing point occurs. See Example 2 of the final Determination and Example 12: Employer reporting – insider trading policy requires board approval.

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3	Paragraph 57 in Example 4 of the draft Determination seems to imply that both a blackout period and being in possession of price-sensitive information is required for a genuine restriction to exist. Is the example trying to demonstrate the implications for an employee when more than one kind of genuine restriction may apply to ESS shares and that both need to lift before the employee can trade in their ESS shares? If this is the case, Example 4 in the final Determination should be clarified accordingly.	Paragraphs 58 and 59 in Example 4 have been clarified in the final Determination. Paragraph 58 does not imply both circumstances are needed for a genuine disposal restriction to exist. Example 4 explains when an ESS deferred taxing point occurs if an ESS imposed more than one genuine disposal restriction. Paragraph 55 of the final Determination outlines the restrictions on Hamish's ESS interests (shares). Paragraphs 56 to 58 of the final Determination explain those restrictions in more detail. On these facts, Example 4 explains the nominated restriction period and Australian Securities Exchange Holding Lock are genuine disposal restrictions. The restrictions imposed by Beach Co's Securities Dealing Policy are genuine disposal restrictions for the relevant purposes as Beach Co strictly enforces breaches of its Securities Dealing Policy. An ESS deferred taxing point will occur when all the genuine disposal restrictions are lifted (see paragraph 31 of the final Determination).
4	The draft Determination suggests that a discretion allowing early release or waiver of genuine disposal restrictions could result in an ESS interest not being subject to a genuine disposal restriction even if, as a matter of fact, the discretion is not utilised or utilised only in exceptional circumstances. A substance-based approach, as reflected on the ATO website, should continue to be applied with regard to assessing whether discretions allowing early release or waiver of disposal restrictions, such as a board discretion, will be considered to genuinely restrict an employee from disposing of an interest.	No changes have been made to paragraphs 11 to 14 of the final Determination as an ability to exercise a discretion does not determine whether restrictions are genuine. Paragraph 7 of the final Determination (which remains unchanged from the draft) contemplates consideration of the substance of a disposal restriction. This reflects the statutory text which requires a scheme to have 'genuinely' restricted a taxpayer from disposing of their ESS interest. As outlined in the final Determination, and consistent with our web content, if a company routinely approves requests to waive certain disposal restrictions, such disposal restrictions were not genuine disposal restrictions. A disposal restriction will still be considered genuine if a discretion can be exercised to lift the restriction in exceptional and extraordinary circumstances.
5	If the views set out in the draft Determination regarding early release or waiver of disposal restrictions are retained, the final Determination should apply on a prospective basis only.	For the reasons outlined at Issue 4 of this Compendium (that is, there has been no change to our position, including what has been stated on our web content), the final Determination applies before and after its date of issue.