



CR 2001/18 - Income Tax: Employee Share Scheme: Exemption Conditions: disposal of shares held under the Cable and Wireless Optus Limited Exempt Share Plan within three years of acquisition

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 1998*



Class Ruling

Income Tax: Employee Share Scheme: Exemption Conditions: disposal of shares held under the Cable and Wireless Optus Limited Exempt Share Plan within three years of acquisition

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are sections:
- 139B of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - 139BA of the ITAA 1936;
 - 139CE of the ITAA 1936;
 - 139E of the ITAA 1936;
 - 139GF of the ITAA 1936;
 - 130-80 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of persons

3. The class of persons to whom this Ruling applies is employees of Optus Administration Pty Ltd (Optus) who acquire shares by participating in offers made under the Cable and Wireless Optus Exempt Share Plan (the share plan). They will be persons who may be compelled to dispose of their C&W Optus shares to SingTel Australia Investment Ltd (SingTel Australia) as part of the arrangement outlined below. In this Ruling, this class of persons is referred to as the 'participating employees'.

Qualifications

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

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 14 to 27 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- (b) this Ruling may be withdrawn or modified.

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8. The Commissioner accepts that the shares acquired by the participating employees under the share plan are:

- shares acquired under an employee share scheme for the purposes of Division 13A of Part III of the ITAA 1936; and
- qualifying shares for the purposes of section 139CD of the ITAA 1936.

9. Unless section 139BA applies to the qualifying shares acquired under the share plan, the effect of any elections made under section 139E is that the full value of the discount given in relation to each share is included in the assessable income of the relevant participating employee for the year of income in which the share is acquired. If section 139BA applies, the total amount of discounts assessable to each employee for a year of income is only assessable to the extent that it is greater than \$1,000. Section 139BA applies if the exemption conditions in section 139CE are satisfied in relation to the shares covered by the election. Accordingly, this Ruling only applies to those participating employees who have made or will make an election under section 139E that subsection 139B(2) applies for each year of income to the qualifying shares acquired under the share plan.

10. This Ruling is made on the basis that the share plan is operated in accordance with the arrangement as outlined in paragraphs 14 to 27 of this Ruling.

11. This Ruling is made on the basis that SingTel Australia complies with all the requirements of the Corporations Law in respect of any proposed compulsory acquisition of shares held under the share plan.

Date of effect

12. This Ruling applies to the years of income ended 30 June 1999, 30 June 2000 and 30 June 2001. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20)

Withdrawal

13. This Ruling is withdrawn and ceases to have effect after the last day on which participating employees can have their returns of income lodged for the year of income ended 30 June 2001. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into a specified class who enter into a specified arrangement during the term of the Ruling. Thus the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

14. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. 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 arrangement are:

- submission received from Cable and Wireless Optus Limited (C&W Optus) dated 27 April 2001;
- the share plan 'rules'.

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

15. The share plan commenced on 26 November 1998. It provides an opportunity for eligible employees of Optus to acquire shares in the company.

16. The share plan is administered by Optus Share Plan Pty Ltd (the share plan company) in accordance with the share plan rules. The remuneration committee, appointed by the Board of C&W Optus may from time to time in its absolute discretion offer eligible employees participation in the share plan. On acceptance of the offer, the eligible employee becomes a Participant.

17. The remuneration committee may make recommendations to the share plan company as to the operation of the share plan and the share plan company can follow those recommendations.

18. The share plan company acquires shares in C&W Optus in the ordinary course of trading on the stock market of the ASX or from other purchases, or from new issues, for Participants as directed from time to time by the remuneration committee.

19. Shares acquired under the Share Plan are registered in the name of the Participant, as nominated by the remuneration committee.

20. At no time has the total number of ordinary shares in the capital of C&W Optus acquired by Participants under the share plan exceeded 5% of the total number of ordinary shares of the capital of C&W Optus.

21. The share plan rules provide that during the three year period, after the date of registration of any shares in the name of the Participant:

- (a) the shares are not transferable; and

- (b) a Participant must not grant any security interest in or over or otherwise deal with any shares held under the share plan,

unless the Participant ceases to be an employee of Optus.

22. Where shares under the share plan are held on the Certificated Subregister of C&W Optus all certificates issued in respect of those shares are retained by the share plan company during the period specified in paragraph 21.

23. Where shares under the share plan are not held on the Certificated Subregister of C&W Optus a mechanism has been instituted by the share plan company to ensure that the shares are not disposed of during the period specified in paragraph 21.

24. The Share Plan is governed by the laws of the State of NSW.

Takeover proposal

25. SingTel Australia is currently in the process of launching a takeover offer for C&W Optus.

26. Should C&W Optus lift the disposal restrictions in the share plan rules referred to in paragraphs 21 to 23 above in order to allow participants in the share plan to participate in the takeover offer, it would have the effect of allowing participants to dispose of their shares within three years of acquisition.

27. Additionally, SingTel Australia may acquire 90% of the shares in the bid class, allowing them to invoke provisions of the Corporations Law and compulsorily acquire all remaining shares including the shares that are the subject of the share plan.

Ruling

Compulsory acquisition

28. Provided that the share plan rules are not varied to lift the disposal restrictions referred to in paragraphs 21 to 23 above, it would be concluded that the exemption conditions in section 139CE have been satisfied in relation to the shares acquired by the participating employees, in that:

- the share plan did not contain any conditions which allowed for shares acquired by the participating employees to be forfeited;
- the share plan has been operated so that participating employees would not be permitted to dispose of shares

acquired until three years after their acquisition, or until the participating employees ceased to be employed by Optus – whichever occurs earlier; and

- the share plan has been operated on a non-discriminatory basis in accordance with the terms of section 139GF.

29. Furthermore, the conclusion reached in the previous paragraph is not affected by the fact that shares acquired under the share plan might be disposed of by participating employees due to the operation of the compulsory acquisition provisions of the Corporations Law.

30. Accordingly, as the exemption conditions in section 139CE have been satisfied, section 139BA applies to the participating employees to ensure that the total amount of discounts, assessable to each employee in relation to the qualifying shares acquired under the share plan for each year of income, is only assessable under subsection 139B(2) to the extent that it is greater than \$1,000.

Disposal of shares as a result of an alteration to the Share Plan Rules

31. However, should the shares acquired by the participating employees under the share plan be disposed of within three years of acquisition, as a result of an alteration to the share plan rules made by C&W Optus, the exemption condition in subsection 139CE(3) will not be satisfied.

32. Accordingly, as the exemption condition in subsection 139CE(3) would not be satisfied, section 139BA will not apply to the participating employees for the relevant years of income. Thus employees are required under subsection 139B(2) to include in their assessable income for each year of income the total value of any discounts given. Existing assessments may be required to be amended where a participating employee has excluded an amount of discounts given from their assessable income in a year of income.

Cost base

33. Under subsection 130-80(2) of the ITAA 97, the first element of the cost base or reduced cost base of each share that was acquired by a participating employee under the share plan is the market value of the share (worked out under either section 139FA or section 139FAA of the ITAA 36) when it was acquired.

Explanations

34. A taxpayer who acquires shares under an employee share scheme is required by section 139B to include in his or her assessable income, in an income year, the value of the discount given in relation to each share acquired in that year. Where subsection 139B(2) applies to the discount, it is calculated under subsection 139CC(2) by deducting the amount of consideration paid or given for the share from the market value of the share when it was acquired.

Elections under section 139E

35. A taxpayer who acquires qualifying shares under an employee share scheme is able to make an election under subsection 139E(1) that subsection 139B(2) applies for a year of income to each qualifying share acquired by the taxpayer in that year.

36. Subsection 139E(2) requires that the election be made in writing in a form approved by the Commissioner before the taxpayer lodges his or her return of income for the year of income, or within such further time as the Commissioner requires.

The exemption conditions

37. Section 139CE contains three exemption conditions:

- The first exemption condition is that the scheme did not contain any conditions which could result in recipients forfeiting ownership of the shares that were acquired under the share plan (subsection 139CE(2));
- The second exemption condition is that the scheme is operated so that no recipient would be permitted to dispose of shares acquired under the share plan until three years after the acquisition or until the recipient ceases to be an employee of the employer – whichever event occurs earlier (subsection 139CE(3));
- The third exemption condition is that the employee share scheme and any financial assistance scheme in respect of the acquisition of shares under the employee share scheme is operated on a non discriminatory basis (subsection 139CE(4)).

38. As the reference to ‘the scheme’ in subsections 139CE(2) to (4) is effectively a reference to the mechanism by which participating employees acquire qualifying shares, the exemption conditions initially must be satisfied at the time of the offer of shares to the employees. However, as part of the purpose of section 139CE is to

ensure that qualifying shares are held for the nominated period in order to access the concession in section 139BA, satisfaction of the conditions at the time of offer, of itself, may not be enough. The share plan needs to continue to be operated in a manner that satisfies the exemption conditions.

Forfeiture of ownership

39. The Macquarie Dictionary (1997, Third Edition) defines 'forfeit' as 'something to which the right is lost by the commission of a crime or misdeed, the neglect of a duty, the breach of a contract etc.' The context in which 'forfeiting' is used in subsection 139CE(2) connotes a meaning somewhat broader than the legal definition – taking in a 'relinquishing', or a 'loss', without due recompense.

40. One provision of the share plan rules allows for the amendment of the share plan rules. The provision recognises that a consequence of amending the share plan rules could be a reduction of the rights of participating employees in respect of the shares issued.

41. Shares acquired under the share plan have been acquired in the name of, and are owned by the participants. It would not be possible for any amendment – even a retrospective amendment – to the share plan rules to affect the title of participating employees to those shares. No other provision within the rules of the share plan contemplates the reduction, or removal of any entitlements of participating employees in any circumstances.

42. If SingTel Australia acquires 90% of the shares in the bid class and decides to complete the compulsory acquisition of C&W Optus' shares, the current shareholders of C&W Optus will be entitled to receive the consideration offered in SingTel Australia's 'Bidder Statement'. The value of that consideration will not differ between the participating employees and other shareholders. An entitlement to that consideration precludes a finding that the compulsorily acquired shares had been 'forfeited'. Thus the share plan rules do not contain any conditions which could result in shares acquired by participants being forfeited.

43. As the share plan rules do not contemplate 'forfeiture' of the shares acquired by the participating employees, the exemption condition in subsection 139CE(2) is satisfied.

Restrictions on disposal

44. The share plan rules prohibit the share plan company from allowing the sale or transfer of shares allocated to an employee under the share plan before the earlier of:

- the period ending three years after the time of acquisition of the shares; and
- the time at which the employee ceased to be employed by Optus.

45. These restrictions on disposal are enforced by the share plan company holding all certificates issued in respect of the shares, or by instituting a mechanism preventing disposal where no share certificates have been issued.

46. Compulsory acquisition of shares following a takeover bid is regulated by the provisions contained within Division 1 of Part 6A.1 of the Corporations Law. Section 661A of the Corporations Law allows a bidder acquiring 90% of any class of shares to compulsorily acquire the remaining shares in that class.

47. The participants in the share plan, along with the share plan company have operated the share plan to prevent disposal of the shares within the requisite three year period.

48. Any decision by SingTel Australia to pursue compulsory acquisition of the shares acquired by the participating employees is out of the control of both the employees and the share plan company. There is no connection between any forced disposal of the shares and the operation of the share plan. Any forced disposal of the shares is outside the operation of the share plan. As those responsible for the operation of the share plan would not be involved in the compulsory acquisition decision, it would be concluded that the share plan has been operated so that no participating employee could dispose of the shares acquired under the share plan before the time set out in subsection 139CE(3). Accordingly, the exemption condition set out in that subsection would be satisfied.

49. However, the position is different if the shares acquired by the participating employees under the share plan are disposed of within three years of acquisition, as a result of an alteration to the share plan rules made by C&W Optus.

50. Alteration of the share plan rules is within the direct control of C&W Optus. By altering the share plan rules to allow disposal of shares within three years of acquisition, it could not be concluded that the share plan is being operated in a manner that complies with the exemption condition in subsection 139CE(3).

51. Failure to meet the exemption condition in subsection 139CE(3) means that a participating employee who has made an election under section 139E for a particular year of income will not be able to avail themselves of the \$1,000 concession in section 139BA.

52. In these circumstances, employees that only included in their assessable income, for a particular year of income, that part of the

total amount of discounts given that exceeded \$1,000, may be required to amend their income tax return for that year.

Non-discriminatory operation

53. Subsection 139CE(4) requires that the employee share scheme and any financial assistance in respect of the acquisition of the shares must be operated on a non discriminatory basis.

54. In order for an employee share scheme to have been operated on a non discriminatory basis, the conditions listed in subsection 139GF(2) must be satisfied in relation to all offers to acquire shares under the scheme. These conditions are that:

- participation in the scheme is open to at least 75% of permanent employees;
- the time for acceptance of offers made is reasonable; and
- the essential features of each offer are the same for at least 75% of permanent employees.

55. The share plan has been operated on a non discriminatory basis. The share plan rules provide that the share plan ‘...shall be operated on a non discriminatory basis within the meaning of that expression in sections 139CE and 139GF’.

Cost base

56. The first element of the cost base and reduced cost base of a qualifying share that is covered by an election under section 139E is its market value (worked out under sections 139FA to 139FF) when it was acquired (subsection 130-80(2) of the ITAA 97).

57. As the qualifying shares acquired by the participating employees under the share plan are listed shares, their market value is determined under either section 139FA or section 139FAA.

Detailed contents list

58. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

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Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 97/16;
TR 92/20

Subject references:

- employee share scheme
- cost base
- reduced cost base

Legislative references:

- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139BA
- ITAA 1936 139CC(2)
- ITAA 1936 139CD

- ITAA 1936 139CE
- ITAA 1936 139CE(2)
- ITAA 1936 139CE(3)
- ITAA 1936 139CE(4)
- ITAA 1936 139E
- ITAA 1936 139E(1)
- ITAA 1936 139E(2)
- ITAA 1936 139FA
- ITAA 1936 139FAA
- ITAA 1936 139FB
- ITAA 1936 139FC
- ITAA 1936 139FD
- ITAA 1936 139FE
- ITAA 1936 139FF
- ITAA 1936 139GF
- ITAA 1936 139GF(2)
- ITAA 1936 Div 13A of Part III
- ITAA 1997 130-80
- ITAA 1997 130-80(2)

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- Corporations Law 661A
 - Corporations Law Div 1 of Part 6A.1
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ATO References

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