



CR 2004/29 - Income tax: AMP Limited Demerger - AMP Employee and Executive Option Plans

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2003*

Class Ruling

Income tax: AMP Limited Demerger - AMP Employee and Executive Option Plans

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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:
- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 139CB of the ITAA 1936;
 - section 139CC of the ITAA 1936;
 - section 139CD of the ITAA 1936;
 - section 139E of the ITAA 1936;
 - section 139FC of the ITAA 1936;
 - section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 104-25 of the ITAA 1997;
 - section 104-155 of the ITAA 1997;
 - section 116-20 of the ITAA 1997;
 - section 125-55 of the ITAA 1997;

- section 125-65 of the ITAA 1997; and
- section 130-80 of the ITAA 1997.

Class of persons

3. The class of persons to which this Ruling applies consists of Australian resident executives or employees of the following companies in the AMP Group:

- AMP Limited (AMP);
- AMP Services Limited;
- AMP Henderson Global Investors Limited (now known as AMP Capital Investors Limited);
- AMP Bank Limited; and
- Commercial & Industrial Management Pty Ltd;

who, as at the date of the demerger of the AMP Group (the demerger), had been granted options to acquire ordinary shares in AMP under the AMP Executive Option Plan (EXOP) or the AMP Employee Option Plan (EOP); and the options had not been exercised at or before the date of the demerger.

The class of persons is hereafter referred to as ‘Australian option holders’ and any person in the class as an ‘Australian option holder’.

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 actually carried out is carried out in accordance with the arrangement described in paragraphs 10 to 33 of this Ruling.

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

- 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
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to the income year ended 30 June 2004. However, this ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

Withdrawal

9. This Ruling is withdrawn on and ceases to have effect after 30 June 2004. The Ruling continues to apply in respect of the tax law(s) ruled upon to all persons within the 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 the withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

10. 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:

- (a) The application letter from PricewaterhouseCoopers (PwC) dated 11 November 2003 requesting a Class Ruling on behalf of AMP in relation to the EXOP and the EOP. Included as attachments to the application were the EXOP and the EOP Plan Rules;
- (b) Option schedule attached to facsimile dated 20 November 2003 from PwC;
- (c) Correspondence dated 11 December 2003 received from PwC in response to a request for further information from the Australian Taxation Office (ATO). The following documents accompanied the response and form part of it:
 - Achievement Share Program – Explanatory Booklet;
 - AMP Employee Plan Prospectus dated 23 April 1998;
 - Sample letter dated 4 June 2001 sent to employees regarding the exercise of June 1998 options;
 - Achievement Share Program – Exercising your choice, June 2001;
 - Achievement Share Program – Exercising June 1998 Options, June 2001;
 - Achievement Share Program – Exercising June 1998 Options, Tax information, June 2001;
 - Achievement Share Program – Performance Hurdle;
 - Achievement Share Program – Australian and New Zealand Tax Consequences; and
 - Achievement Share Program – United Kingdom Tax Consequences;
- (d) Email dated 7 January 2004 from PwC attaching a copy of the Australian Stock Exchange (ASX) announcement of 6 January 2004 (No.01/04) relating to the adjustment of exercise prices for options granted under the EXOP and the EOP and not exercised at or before the time of the demerger;
- (e) Facsimile dated 19 January 2004 from PwC providing additional information; and

- (f) Email dated 22 January 2004 from PwC attaching copies of ASX announcements of 17 October 2003 and 17 December 2003 (No. 126/03 and 161/03) relating to the AMP Rights Offer.

AMP employee option plans

11. Since June 1998 AMP has operated two employee share option plans - the EXOP and the EOP. The EXOP is an employee share option plan for executives whilst the EOP is an employee share option plan for employees.

12. In the application for class ruling dated 11 November 2003 it was stated that at the time of grant of options under the EXOP and the EOP, each participant under the EXOP and the EOP received 'qualifying rights' that satisfied the conditions outlined in section 139CD of the ITAA 1936.

13. The rules of the EXOP and EOP are respectively detailed in:

- (a) the EXOP Plan Rules adopted by the Board of Directors of AMP (the Board) on 25/3/99 and amended by the Human Resources Committee of the Board of Directors of AMP (HR Committee) on 23/4/98, 6/5/99 and 21/6/99; and
- (b) the EOP Plan Rules adopted by the Board on 25/3/99 and amended by the HR Committee on 23/4/98, 6/5/99 and 21/6/99.

14. Unless otherwise indicated, a reference to the option plans should be taken to be a reference to the EXOP and the EOP and a reference to a particular rule is taken to be a reference to such a rule under each option plan.

15. All full time and permanent part time executives and employees of the AMP Group are eligible to participate in the option plans (the terms 'eligible executive' and 'eligible employee' are defined in rule 2.1 of the option plans). However, participation is only permitted in one option plan within the same year (rule 3.2) and excludes persons who hold the office of director of AMP (rule 3.3).

16. The HR Committee, now known as the AMP Board Remuneration Committee, is the administrator of the option plans and, *inter alia*, is responsible for:

- (a) determining any exercise conditions attaching to the options granted (rule 3.1(c)); and
- (b) amending the plan rules from time to time, provided the amendment is not inconsistent with the ASX Listing Rules (LR) (rule 14).

17. The features of the option plans include:
- (a) Each option confers the entitlement to subscribe for and be issued one fully paid ordinary share in AMP at the exercise price (rule 7.1);
 - (b) The exercise price, subject to rule 11, in relation to:
 - (i) initial grants – is the greater of the base price (share price set by AMP after the close of the offer to institutions to buy shares through the Facility described in AMP Prospectus issued in May 1998) and 20 cents; and
 - (ii) all other grants – is the greater of the market value of AMP share on the date of grant, less such discount (if any) as the HR Committee determines, not exceeding 5% of the market value of the share on the date of grant and 20 cents (rule 2.1);
 - (c) The options can only be exercised, subject to rule 11, during the exercise period, which commences on the First Exercise Date (3 years after date of grant or such earlier date as determined by the HR Committee) and ends on the Last Exercise Date (5.00pm Sydney time on a date to be determined by the HR Committee which must not be earlier than the day before the 5th anniversary, and not later than the day before the tenth anniversary of the date of grant) (rule 2.1);
 - (d) Generally the options lapse:
 - (i) when an executive or employee renounces their rights under the option or elects to lose their right to exercise the option (rule 5); or
 - (ii) where there are exercise conditions which have not been met on the termination of employment, retirement or death or total and permanent disablement of the executive or employee provided that no option will be capable of exercise later than the Last Exercise Date (rule 9);
 - (e) The satisfaction of a performance hurdle by AMP, which is based on a specified growth in AMP's Total Shareholder Return (TSR) over a period of between three and five years when ranked against the TSR for the same period of the other members of the Peer Group selected by the HR Committee, may be an exercise condition attaching to the option granted;

Generally, the TSR measures the gross return on investment in a company based on the movement in the company's share price plus dividends reinvested over the applicable performance period whilst the Peer Group consists of top 50 members of the S&P/ASX All Industrials Index (including AMP) on a nominated date;

- (f) The exercise price of options granted is adjusted in accordance with the LR if AMP makes an issue of shares pro rata to existing shareholders (other than an issue in lieu, or in satisfaction, of dividends or by way of dividend reinvestment) (rule 11.3); and
- (g) The number of options to which each executive or employee is entitled and/or the exercise price, will be reconstructed as required by the LR and in a manner which will not result in any benefits being conferred on the executive or employee which are not conferred on shareholders if there is a reconstruction of AMP's issued share capital (rule 11.4).

The demerger & rights issue

18. The demerger involved AMP separating its interests in the United Kingdom businesses from those it holds in its Australian and other businesses. The mechanics of the demerger are described in Class Ruling CR 2003/107 Income tax: AMP Limited: Demerger, Capital Adjustment and Scheme of Arrangement (CR 2003/107) at paragraphs 10 to 33. The end result of the demerger process was the creation of two independent listed companies:

- AMP which continues to own AMP's Australian and New Zealand businesses (the AMP Group); and
- HHG Plc (HHG) which owns AMP's United Kingdom businesses (the HHG Group).

19. The demerger was effected on 23 December 2003 by way of a Capital Adjustment and Scheme of Arrangement. Both the Capital Adjustment and Scheme of Arrangement were conditional upon each other.

20. The Capital Adjustment involved:

- The cancellation of a certain number of AMP shares held by each of the AMP shareholders calculated in accordance with a formula; and

- A share split of the remaining AMP shares held by each AMP shareholder so that each AMP shareholder held the same number of AMP shares they held before the cancellation.

21. Under the Scheme of Arrangement each AMP shareholder was issued with a Cancellation Entitlement (a receivable) equal to the capital distribution made to AMP shareholders in consideration for the cancellation of their shares in AMP. By order of the Court the receivable was applied to subscribe for the issue of HHG shares equal in number to the number of AMP shares originally held.

22. As stated in CR 2003/107, the demerger arrangement did not qualify as a 'demerger' for the purposes of Division 125 of the ITAA 1997. AMP was not a 'head entity' for the purposes of the demerger rules as another member of the AMP Group owned shares in AMP (subsection 125-65(3) of the ITAA 1997). Accordingly, the roll-over relief provided for in section 125-55 of the ITAA 1997 was not available.

23. AMP also undertook a rights issue pursuant to the AMP Rights Offer which was conditional on the demerger occurring. The AMP Rights Offer resulted in approximately 306 million AMP shares (post demerger) being issued. The shares were allotted on 23 December 2003.

Adjustments to exercise price and performance hurdle

24. Options under the option plans, which have not been exercised at or before the time of the demerger, are detailed in the schedule attached to the ASX announcement of 6 January 2004 (the unexercised options).

25. The unexercised options comprise:

- (a) options held by employees and executives who have their registered addresses in, or are citizens or residents of, a jurisdiction outside Australia, New Zealand, the United Kingdom, the United States of America and India; and options held by employees and executives who have agreed to forgo the full exercise price reduction (ineligible participants); and
- (b) options that are held by employees and executives who are not ineligible participants (eligible participants).

26. Relevant details of the unexercised options, inclusive of those granted to the Australian option holders, are detailed in the table below.

Grant Date	Options granted under the EXOP or the EOP	Outstanding Performance Hurdle attaching to options granted under the EXOP
26/06/1999	EXOP & EOP	No
28/08/1999	EXOP & EOP	No
30/10/1999	EXOP	No
18/12/1999	EXOP	No
1/01/2000	EXOP & EOP	No
22/01/2000	EXOP	No
19/02/2000	EXOP	No
30/06/2000	EXOP & EOP*	Yes
26/08/2000	EXOP	Yes
28/10/2000	EXOP & EOP*	Yes
9/12/2000	EXOP & EOP*	Yes
21/03/2001	EXOP	Yes
21/07/2001	EXOP & EOP*	Yes
15/12/2001	EXOP & EOP*	Yes
23/03/2002	EXOP	Yes

* Performance hurdles are not attached to options granted under the EOP.

27. A consequence of the demerger is the reduction in the value of each AMP share due to the loss of that portion of the share's value which was attributable to the value of the business of the HHG Group. This, in turn, results in the reduction in the value of the unexercised options which were granted prior to the demerger.

28. Pursuant to rules 11.3, 11.4 and 14 of the option plans AMP is permitted to adjust the exercise price of the unexercised options provided the adjustment complies with certain LR in relation to the reduction in the exercise price of the options if there is any reconstruction of the issued share capital of the company or an issue of shares pro rata to existing shareholders.

29. AMP has obtained waivers to LR 6.23.3 and LR 6.23.4 (which prohibits a reduction in the exercise price of options) and LR 7.22.6 (which would otherwise apply to reduce the exercise price upon the demerger) in relation to the unexercised options held by eligible participants. However, LR 6.22.2, which provides for an adjustment

of the exercise price where there is a pro-rata issue of the underlying shares (rights issue), continues to apply.

30. The exercise price of the unexercised options held by ineligible participants has been reduced only by the amount required as a result of the effect of rules 11.3 and 11.4 of the option plans and of LR 6.22.2 and LR 7.22.6. LR 7.22.6 refers to the adjustment of the exercise price so that holders of options do not receive a benefit not received by shareholders as a result of a reorganisation.

31. AMP has reduced the exercise price of the unexercised options with effect from 13 January 2004. Details of the original exercise price and the adjusted exercise price are outlined in the schedule attached to the ASX Announcement of 6 January 2004.

32. In addition, AMP proposes to adjust, pursuant to rules 3 and 14 of the option plans, the outstanding performance hurdle attaching to some of the unexercised options, as indicated in the table in paragraph 26. The proposed adjustment is the reduction in the required percentage growth in AMP's TSR for the performance hurdle to be satisfied in order to reflect the reduction in the value of AMP shares as a result of the demerger. The proposed adjustment is hereafter referred to as the proposed OPH adjustment.

33. AMP's reduction in the exercise price and proposed OPH adjustment in relation to the unexercised options is intended to ensure that holders of the unexercised options are not unfairly disadvantaged as a result of the reduction in the value of AMP shares following changes in AMP's capital structure, financial position and businesses that occur in connection with the demerger.

Ruling

Where an election to be taxed in the year the option was granted has been made

34. The reduction in the exercise price of the unexercised options and the proposed OPH adjustment for some of the unexercised options (the relevant adjustments) have no impact on the discount calculated under subsection 139CC(2) of the ITAA 1936.

35. As the relevant adjustments do not result in a change of ownership of the unexercised options to acquire a share in AMP, CGT event A1 does not happen as a result of the adjustments (section 104-10 of the ITAA 1997).

36. As the relevant adjustments have not brought the Australian option holder's unexercised option to acquire a share in AMP to an end, CGT event C2 will not happen as a result of the adjustments (section 104-25 of the ITAA 1997).

37. The relevant adjustments will result in CGT event H2 happening as they are acts, transactions or events in relation to an unexercised option that does not result in an adjustment being made to the cost base of the unexercised option. However, this event will not affect the tax position of an Australian option holder. There will be no capital gain or capital loss as there are no capital proceeds because of the event and no incidental costs are incurred by the Australian option holder in respect of the event (section 104-155 of the ITAA 1997).

Where no election to be taxed in the year the option was granted has been made

38. The relevant adjustments do not result in the happening of a cessation time under paragraph 139CB(1)(a) of the ITAA 1936 as there has not been a disposal of the option.

Explanation

Adjustments to exercise price and performance hurdle

39. The relevant adjustments constitute variations of the initial option contract and do not result in a new option contract.

40. The High Court in *Tallerman & Co. Pty Ltd v. Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93 (*Tallerman's Case*) considered this issue. Justice Taylor stated at page 144 that:

It is firmly established by a long line of cases ... that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement. Variation, of course, may involve partial rescission as is pointed out in *Salmond and Williams on Contracts* 2nd ed. (1945) pp. 488, 489, but 'Partial rescission ... does not completely destroy the contractual relation between the parties. It merely modifies that relation by cutting out part of the rights and obligations involved therein, with or without the substitution of new rights and obligations in their place. Partial rescission is not the extinction of the contract but the variation of it'...

41. Based on *Tallerman's Case*, it is considered that the relevant adjustments are variations of the initial option contract as the terms of the initial option contract, such as the exercise price and outstanding performance hurdle, are not rescinded but only varied by the adjustments.

Where an election to be taxed in the year the option was granted has been made

42. Where an Australian option holder has made an election under section 139E of the ITAA 1936, the discount given on the unexercised option is included in the option holder's assessable income under subsection 139B(2) of the ITAA 1936 in the income year the option was granted. The discount given on the option is calculated under subsection 139CC(2) of the ITAA 1936 as its market value on acquisition less consideration paid or given for the option. The market value of the option on acquisition is calculated under section 139FC of the ITAA 1936 by reference to the market value of the AMP share, the exercise price and the exercise period.

43. The discount calculated under subsection 139CC(2) of the ITAA 1936 will not change because of the relevant adjustments. The market value of the option calculated under section 139FC of the ITAA 1936 is determined at the date the option was acquired and is based on the exercise price of the option at that time.

CGT

44. Where an Australian option holder makes an election under section 139E of the ITAA 1936, the first element of the cost base and reduced cost base of the unexercised option is determined in accordance with subsection 130-80(2) of the ITAA 1997. This is its market value (as determined under section 139FC of the ITAA 1936) at the date of acquisition of the unexercised option. The cost base of the unexercised option is not adjusted as a result of the relevant adjustments.

CGT event A1

45. CGT Event A1 happens when there has been a change of ownership in the unexercised option from the Australian option holder to another entity (section 104-10 of the ITAA 1997).

46. The relevant adjustments do not result in a change of ownership of the unexercised option to acquire a share in AMP. The Australian option holder continues to hold the unexercised option granted under the initial option contract. The initial option contract is only varied by the relevant adjustments.

47. Accordingly, where an Australian option holder has made an election under section 139E of the ITAA 1936, the relevant adjustments do not result in CGT event A1 happening.

CGT event C2

48. CGT event C2 happens if ownership of an intangible CGT asset ends in certain ways (subsection 104-25(1) of the ITAA 1997).

49. The relevant adjustments do not bring the Australian option holder's ownership of the unexercised option to acquire a share in AMP to an end. The Australian option holder continues to hold the unexercised option granted under the initial option contract.

50. The lapse or exercise of the unexercised option are the only situations contemplated by the option plans that result in the unexercised option ending in terms of CGT event C2. Neither of these situations occurs because of the relevant adjustments.

51. Therefore, where an Australian option holder has made an election under section 139E of the ITAA 1936, the relevant adjustments do not result in the unexercised option ending and CGT event C2 will not happen.

CGT event H2

52. CGT event H2 happens if 'an act, transaction or event' occurs in relation to a CGT asset and the act, transaction or event does not result in an adjustment being made to the asset's cost base (subsection 104-155(1) of the ITAA 1997).

53. CGT event H2 will happen on the making of the relevant adjustments as these are acts, transactions or events in relation to the unexercised option that do not result in an adjustment being made to the cost base of the unexercised option.

54. A capital gain is made if the capital proceeds from CGT event H2 are more than the incidental costs incurred in relation to the event. A capital loss is made if the capital proceeds from the event are less than the incidental costs.

55. Under subsection 116-20(2) of the ITAA 1997, the capital proceeds from CGT event H2 is the money or other consideration received or entitled to be received because of the act, transaction or event. Taxation Ruling TR 95/3 (paragraphs 106 to 112) states that 'consideration' is to be interpreted widely to include, for example, the benefit of mutual promises flowing to the parties, even if those promises are not in themselves property.

56. In this case the Commissioner does not consider that the reduction in the exercise price and the proposed OPH adjustment constitutes capital proceeds because of the H2 event happening.

57. It is only when a subsequent CGT event happens to the unexercised option that any capital proceeds may be received. When that CGT event happens any capital proceeds would relate to the subsequent CGT event and not to the CGT event H2 that happened when the unexercised option was varied. A different approach might give rise to double counting.

58. Accordingly, the Australian option holder will make no capital gain or capital loss from the happening of CGT event H2 as there are no capital proceeds because of the event and no incidental costs are incurred by the Australian option holder in respect of the event.

Where no election to be taxed in the year the option was granted has been made

59. Where an Australian option holder has not made an election under section 139E of the ITAA 1936, the discount given on the unexercised option is not included in their assessable income under subsection 139B(3) of the ITAA 1936 as a result of the relevant adjustments. The relevant adjustments do not result in the happening of a cessation time under paragraph 139CB(1)(a) of the ITAA 1936 as there has not been a disposal of the option (other than by exercise).

60. The Australian option holder will include in assessable income, in the year of income in which the cessation time occurs, the discount given on the option as calculated under subsection 139CC(3) or 139CC(4) of the ITAA 1936. If the cessation time under subsection 139CB(1) of the ITAA 1936 happens when the Australian option holder exercises the option to acquire the share in AMP the exercise price paid or given for the exercise of the option will be the reduced exercise price for the purpose of these provisions.

Detailed contents list

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Commissioner of Taxation

24 March 2004

Previous draft:

Not previously issued as a draft

*Related Rulings/Determinations:*CR 2001/1; CR 2003/107; TR 92/1;
TR 92/20; TR 95/3; TR 97/16*Subject references:*

- employee share scheme
- options
- election
- no election
- capital gains tax
- cost base
- demerger

Legislative references:

- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139CB
- ITAA 1936 139CB(1)
- ITAA 1936 139CB(1)(a)
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)
- ITAA 1936 139CD
- ITAA 1936 139E
- ITAA 1936 139FC
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
- ITAA 1997 104-155
- ITAA 1997 104-155(1)

- ITAA 1997 116-20
- ITAA 1997 116-20(2)
- ITAA 1997 Div 125
- ITAA 1997 125-55
- ITAA 1997 125-65
- ITAA 1997 125-65(3)
- ITAA 1997 130-80
- ITAA 1997 130-80(2)
- Copyright Act 1968

- TAA 1953 Part IVA

Case references:

- *Tallerman & Co. Pty Ltd v. Nathan's
Merchandise (Vic) Pty Ltd* (1957) 98
CLR 93

ATO references

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