

# ***CR 2007/104 - Income tax: Sims Group Limited - Employee Long Term Incentive Plan***



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## Class Ruling

### Income tax: Sims Group Limited – Employee Long Term Incentive Plan

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#### **ⓘ 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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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

#### **Relevant provision(s)**

2. The relevant provision dealt with in this Ruling is:

- Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936).

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

#### **Class of entities**

3. The class of entities to which this Ruling applies is all persons who are Australian resident employees of Sims Group Limited (Sims) and related companies who receive an award under the Sims Group Limited Long Term Incentive Plan (the Plan). In this Ruling, a person belonging to this class of entities is referred to as a participant.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
5. 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 12 to 23 of this Ruling.
6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
  - this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
  - this Ruling may be withdrawn or modified.
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## Date of effect

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8. This Ruling applies from 1 July 2007. However, the 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. Furthermore, the Ruling only applies to the extent that:
  - it is not later withdrawn by notice in the *Gazette*; or
  - the relevant provisions are not amended.
9. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).
10. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:
  - the income year or other period to which the rulings relate has not begun; and

- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## **Scheme**

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12. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- the Application for Class Ruling dated 28 June 2007 received from Ernst & Young;
- the Sims Group Limited Long Term Incentive Plan Rules (Plan rules);
- a pro-forma invitation letter (letter of offer) to employees to participate in the Sims Group Limited Long Term Incentive Plan; and
- an email from the applicant dated 25 September 2007.

### **Long Term Incentive Plan**

13. Sims is a company listed on the Australian Securities Exchange. As part of its executive remuneration practice, it has established the Plan, which is aimed at creating a stronger link between performance and reward.

14. Under the Plan, eligible employees will be offered awards. The Plan rules specify that awards consist of either performance rights or cash rights. The applicant has advised that it is intended that cash rights that are cash based phantom awards will only be made available in overseas jurisdictions.

### **Performance rights**

15. An award offered to an Australian resident eligible employee (employee) under the Plan will comprise a performance right (right). An employee who receives such an offer is not required to notify their acceptance, but must notify their refusal within one month of receiving a letter of offer.

16. A right granted to a participant will only vest on the satisfaction of specified performance conditions. On vesting of a right, a participant will be entitled to receive a Sims share or an equivalent cash payment, as previously determined at the discretion of the Sims board.

17. The applicant has advised that the Sims board will exercise its discretion to determine how the rights granted to a participant will be satisfied, prior to the testing of the performance conditions.

18. A right is granted to a participant for nil consideration and no amount is required to be paid by a participant on exercise of the right.

## **Vesting conditions**

19. The vesting conditions will be satisfied if certain performance criteria typically measured over a 3 year period, and based on the total shareholder return and earnings per share of Sims, are met.

20. If all the rights granted to a participant have not vested after the initial measurement period, testing in relation to the unvested portion of rights can extend for a further period of 2 years. If the performance criteria are still not met after the extended period, any unvested rights will lapse.

21. Rights granted to a participant that have not vested may also lapse on the cessation of employment of a participant unless the reason for ceasing employment is a qualifying cessation as described in the letter of offer.

## **Vesting and exercise of rights**

22. Where the performance conditions are met, a right granted to a participant will vest and will automatically trigger the exercise of the right (subject to paragraph 23 of this Ruling). As a consequence, a Sims share will be issued or transferred to the participant. The participant will have no beneficial or other proprietary interest in that Sims share until the right is both vested and exercised.

## **Cash payments**

23. Under the Plan, Sims may at the discretion of its board, satisfy a participant's rights by a cash payment instead of the issue of Sims shares. The amount of cash payable will be the market price of the shares that would have been issued to the participant had the board not exercised its discretion.

## **Ruling**

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24. A participant will not acquire a right under an employee share scheme for the purposes of Division 13A of Part III (Division 13A) on the grant of a right to a participant under the Plan.

25. A participant will, however, acquire a right under an employee share scheme for the purposes of Division 13A at the time the Sims board exercises its discretion to determine that a right granted under the Plan will be satisfied by the issue or transfer of a Sims share.

26. A participant will not acquire a share under an employee share scheme for the purposes of Division 13A upon the issue or transfer of a Sims share to a participant following the vesting and exercise of a right acquired under the Plan.

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**Commissioner of Taxation**

14 November 2007

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## Appendix 1 – Explanation

**①** *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.*

### Acquiring a right under Division 13A

27. An employee will acquire a right under an employee share scheme for the purposes of Division 13A where that right is:

- a right for the purposes of Division 13A;
- acquired within the meaning of section 139G;
- acquired in respect of employment (subsection 139C(1); and
- acquired for less than market value (subsection 139C(3).

28. The expression 'right' as used in Division 13A is not defined, but as 'right' and 'right to acquire a share' are used interchangeably throughout Division 13A, the Commissioner considers that a right should be taken to mean a 'right to acquire a share'.

29. Where at the time a right is granted to an employee:

- the employee has a right to acquire a share on the exercise or operation of the right; and
- for the purposes of subsection 139B(2), the amount of the discount in respect of such a right can reasonably be determined,

the Commissioner considers the right to be a right for the purposes of Division 13A.

30. However, where an employee is granted a right under a scheme that purports to be a right to acquire a share, and the scheme is operated so that the employer makes the ultimate decision as to whether an employee actually receives a share or cash in lieu of a share, the right will not be considered to be a right to acquire a share for the purposes of Division 13A at the time it is granted.

31. Under the Plan, the Sims board may determine that a participant's rights are satisfied by the payment of an equivalent amount of cash instead of the issue of Sims shares. The Sims board will exercise its discretion shortly before the performance conditions have been tested and therefore before the rights have vested.

32. Thus, the Commissioner considers that a participant will not acquire a right for the purposes of Division 13A at the time that a right is granted to a participant.

33. However, the Commissioner considers that, where the Sims board exercises its discretion to determine that a right will be satisfied by the issue or transfer of a share, a participant will acquire a right under an employee share scheme for the purposes of Division 13A at the time that the Sims board exercises its discretion.

### **Acquiring a share on the exercise of a right**

34. Subsection 139C(4) provides that an employee will not acquire a share under an employee share scheme for the purposes of Division 13A where the share is acquired as a result of exercising a right that the employee acquired under an employee share scheme (within the meaning of section 139C).

35. As explained in paragraph 33 of this Ruling, a participant will have acquired a right under an employee share scheme at the time that the Sims board exercises its discretion to determine that a right will be satisfied by the issue or transfer of a Sims share.

36. Accordingly, a participant will not acquire a share under an employee share scheme for the purposes of Division 13A upon the issue or transfer of a Sims share to a participant following the vesting and exercise of a right acquired under the Plan.



## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Subject references:*

- employee share scheme
- rights

*Legislative references:*

- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B(2)

- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139C(4)
- ITAA 1936 139G
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

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*ATO references*

NO: 2007/19205

ISSN: 1445-2014

ATOLaw topic: Income Tax ~~ Assessable income ~~ employee share schemes