


# ***CR 2007/42 - Income tax: renounceable rights to convertible preference shares issued by Hutchison Telecommunications (Australia) Limited***

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## Class Ruling

# Income tax: renounceable rights to convertible preference shares issued by Hutchison Telecommunications (Australia) Limited

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>13</b>
<b>Ruling</b>	<b>22</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<b>Explanation</b>	<b>23</b>
<b>Appendix 2:</b>	
<b>Detailed contents list</b>	<b>33</b>

### **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, 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

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

### **Class of entities**

3. The class of entities to which this Ruling applies are the ordinary shareholders (the Shareholders) in Hutchison Telecommunications (Australia) Limited (HTAL) who are registered as holders of ordinary HTAL shares at 5.00pm (Sydney time) on 14 May 2007.

## 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 14 to 22 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 to the income year ended 30 June 2007. The scheme was completed within that year. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.
9. 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.

10. 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)).

11. 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.

12. 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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13. 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 relevant documents or parts of documents incorporated into this description of the scheme are:

- the Notice of Annual General Meeting held on 4 May 2007 plus Explanatory Memorandum and Independent Expert's Report for the AGM (as announced to the Australian Securities Exchange (ASX) on 19 March 2007 and subsequently circulated to the Shareholders); and
- the Constitution of HTAL as anticipated to be amended by the Annual General Meeting of 4 May 2007.

### **Annual General Meeting**

14. On 19 March 2007, HTAL released a Notice of Annual General Meeting (to be held on 4 May 2007) plus an Explanatory Memorandum and an Independent Expert's Report.

### **Renounceable Rights**

15. The Notice of Annual General Meeting advised the Shareholders that they would be asked to vote on several resolutions at the AGM, some of which would relate to a proposal to raise additional equity funding of up to approximately \$2.85 billion from the issue of up to 13,572,508,580 convertible preference shares (CPS).

16. In regard to the issue of the CPS, HTAL proposed to offer the Shareholders 20 renounceable rights (Rights) for every ordinary share held. Each Right will entitle the Shareholder to subscribe for a CPS. At the time the Rights are granted, the Shareholders will be given a choice whether to exercise them, trade them, or allow them to lapse.

17. The 13,572,508,580 CPS will potentially convert into 11,536,632,293 ordinary shares in HTAL either at the option of the holder after a two year non-conversion period or compulsorily five years after their date of issue.

### **Cost of Rights**

18. The Rights will be issued at no cost to the Shareholder and will be quoted for trading on the ASX.

### **Number of Rights issued**

19. Rights to acquire up to 13,572,508,580 CPS will be issued with the issue price of the CPS being \$0.21 per share.

### **Underwriting of Rights issue**

20. The Rights issue will be underwritten by Hutchison Whampoa Limited (HWL), the ultimate holding company of HTAL.

### **Trading of Rights and issue of CPS**

21. Following the AGM, the following events relevant to this issue will occur:

Lodgement of the Rights Issue Prospectus	4 May 2007
Rights trading will commence	8 May 2007
Record date for Rights issue	14 May 2007
Dispatch of Rights Issue Prospectus and Rights Issue Entitlement and acceptance forms completed	17 May 2007
Rights trading to cease	24 May 2007
Last day to exercise Rights (5.00 pm EST)	31 May 2007
Issue Date and allotment of CPS	8 June 2007
Dispatch of holding statements	12 June 2007
CPS will commence trading	13 June 2007

## **Ruling**

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### **Inclusion of the Rights in assessable income**

22. The Rights are assessable as ordinary income to the Shareholder under section 6-5 of the ITAA 1997 in an amount represented by the market value of the Rights on the date the Rights are issued, being 14 May 2007.

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**Commissioner of Taxation**

23 May 2007

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## Appendix 1 – Explanation

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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.***

23. Subsection 6-5(1) of the ITAA 1997 provides that the assessable income of a taxpayer includes income according to ordinary concepts, which is called ordinary income. Ordinary income includes income from property.

24. The Rights will be granted by HTAL to the Shareholders in proportion to their shareholding in HTAL. Each Shareholder will be entitled to 20 Rights to subscribe for CPS for every ordinary share held.

25. Each Shareholder will be given the Rights by HTAL because they are a Shareholder in HTAL. However, the Rights will not pass from HTAL to the Shareholder as a dividend. They will not be paid by the company to the Shareholder out of profits. Nor will they be a distribution of the share capital of the company. The Rights will nevertheless be a gain to the Shareholder which has its genesis in, and is derived from, the investment in property that is their shareholding which remains intact.

26. Each Shareholder will thereby acquire the Rights as property separate from their shareholding (*Federal Commissioner of Taxation v. Miranda* (1976) 6 ATR 367; 76 ATC 4180).

27. Furthermore, the Rights will be derived by the Shareholder as property that can be turned to pecuniary account and will therefore be a gain to the Shareholder (*Abbott v. Philbin* [1961] AC 352). Indeed, the Rights will be quoted for trading on 8 May 2007 as property independent from the HTAL ordinary shares.

28. In *Commissioner of Taxation v. McNeil* [2007] HCA 5 (22 February 2007) (*McNeil*), the High Court (Gummow ACJ, Hayne, Heydon, and Crennan JJ, with Callinan J dissenting) decided that sell-back rights issued by St George Bank Ltd (SGL) to Mrs McNeil, a shareholder of SGL, were income according to ordinary concepts. The sell-back rights were characterised as something of value which were the product of and severed from Mrs McNeil's shareholding in SGL. As Mrs McNeil's shareholding remained untouched and intact and the sell-back rights did not represent any portion of her rights as a shareholder under the constitution of SGL, the sell-back rights were held to be income from property according to ordinary concepts and usages.

29. In *McNeil*, the Majority emphasised, at paragraph 36, that the 'character of the grant of rights to the shareholders' was decisive. In other words, the character of the rights as income was determined when they were granted to the SGL shareholders; what they did with their rights subsequently did not affect their characterisation as income on receipt.

30. Accordingly, the Rights in this instance will be valuable property which will be derived by the Shareholders as income from property at the point of receipt, regardless of whether they subsequently exercise the Rights, trade them or allow them to lapse.
31. The Rights will be derived as income by the Shareholders when they are granted on 14 May 2007.
32. The amount included in the assessable income of each Shareholder will be the market value of their Rights on that date.

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

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>13</b>
Annual General Meeting	14
Renounceable Rights	15
Cost of Rights	18
Number of Rights issued	19
Underwriting of Rights issue	20
Trading of Rights and Issue of CPS	21
<b>Ruling</b>	<b>22</b>
Inclusion of the Rights in assessable income	22
<b>Appendix 1 – Explanation</b>	<b>23</b>
<b>Appendix 2 – Detailed contents list</b>	<b>33</b>

## References

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*Previous draft:*

Not previously issued as a draft

- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

*Subject references:*

- renounceable rights to shares
- securities underwriting

*Case references:*

- Abbott v. Philbin [1961] AC 352
- Commissioner of Taxation v. McNeil [2007] HCA 5; 2007 ATC 4223; (2007) 64 ATR 431
- FC of T v. Miranda (1976) 6 ATR 367; 76 ATC 4180

*Legislative references:*

- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- TAA 1953

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*ATO references*

NO: 2007/7028

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Assessable income ~~ other payments  
Income Tax ~~ Assessable income ~~ derivation of  
income