


# ***CR 2009/21 - Income tax: New Hope Corporation Limited - Exempt Employee Share Plan***

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## Class Ruling

### Income tax: New Hope Corporation Limited – Exempt Employee Share 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 provisions 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 provisions dealt with in this Ruling are:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139BA of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 139CE of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FA of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-75 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;

- section 115-30 of the ITAA 1997; and
- section 130-80 of the ITAA 1997.

All subsequent 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 persons who are Australian resident employees of the New Hope Corporation Limited group of companies (the NHC group) who:

- acquire shares in the proposed NHC Exempt Employee Share Plan (the plan); and
- in the same year of income do not acquire any shares or rights in an employee share scheme provided by an employer outside of the NHC group.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

4. The NHC group comprises:

- New Hope Corporation Limited (NHC);
- New Hope Collieries Pty Ltd;
- Tivoli Collieries Pty Ltd;
- Acland Pastoral Co. Pty Ltd;
- Jeebropilly Collieries Pty Ltd;
- Fowlers Engineering Pty Ltd;
- New Oakleigh Coal Pty Ltd;
- New Hope Exploration Pty Ltd;
- Seven Mile Coal Pty Ltd;
- New Acland Coal Pty Ltd;
- Arkdale Pty Ltd;
- New Lenton Coal Pty Ltd;
- New Saraji Coal Pty Ltd;
- New Hope Water Pty Ltd;
- Tivoli Coal (Hawaii) Pty Ltd;
- Andrew Wright Holdings Pty Ltd;
- Tetard Holdings Pty Ltd; and
- Queensland Bulk Handling Pty Ltd.

### Qualifications

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 9 to 13 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 2008. However, this Ruling will 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 issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

### Scheme

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

- the request for a class ruling from the applicant dated 23 September 2008;
- the letter from the applicant dated 13 January 2009;
- the rules for the NHC Exempt Employee Share Plan;
- the information booklet for the NHC Exempt Employee Share Plan; and

- the New Hope Corporation Limited Employee Share Trust (the trust) deed.

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

10. NHC is an Australian company listed on the Australian Securities Exchange (ASX). It has undertaken a review of its employee remuneration strategy with a view to enhancing NHC's ability to retain and attract staff in the competitive mining sector.

11. NHC is either the employer of a participant or the holding company of the employer of a participant.

12. NHC will establish the trust (with an independent trustee) for the purpose of subscribing for or acquiring, delivering, allocating and holding ordinary shares in NHC under the plan (and other plans) for the benefit of the participants.

13. The applicant has advised that the main features of the plan are:

- it will be open to all permanent employees within the meaning of section 139GB, including directors of the NHC group;
- employees who participate in the plan are excluded from participating in the NHC group's Deferred Employee Share Plan in the same financial year;
- eligible employees may complete an application form to participate in the plan;
- participants must contribute towards acquiring NHC shares (shares) by way of an effective salary sacrifice arrangement (SSA) within the meaning of paragraphs 19 to 23 of Taxation Ruling TR 2001/10 up to a maximum amount of \$500 per annum;
- participants will not otherwise be required to contribute any funds to acquire the shares;
- the NHC group will contribute on a dollar for dollar basis up to a further \$500 per annum for each participant who is not also a director;
- the trustee of the trust (the trustee) will use the funds it receives from the NHC group to acquire ordinary shares in NHC, either by buying shares on-market or subscribing for new issues;
- shares will be notionally allocated by the trustee for the benefit of a participant and must be held in the trust for three years from their date of allocation unless the participant ceases to be employed within the meaning of subsection 139CE(5);

- at the conclusion of the three year period, and subject to trading window periods, a participant may submit a notice of withdrawal to NHC in respect of some or all of the shares allocated to them;
- shares allocated to a participant by the trustee under the plan are not subject to any conditions that could result in the participant forfeiting those shares;
- immediately after the allocation of a share under the plan a participant will not hold a legal or beneficial interest in more than 5% of NHC's share capital or be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of NHC; and
- the plan will be operated on a non-discriminatory basis within the meaning of section 139GF.

## **Ruling**

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14. Under the plan, a participant will acquire a qualifying share, for the purposes of section 139C, when the trustee allocates a share for the benefit of the participant.

15. Under the plan, a share acquired by a participant will satisfy the exemption conditions in section 139CE.

16. The discount for a share acquired under the plan for the purposes of section 139B, will be an amount equivalent to the market value of the share at the time it is acquired by a participant. The market value of the share at this time is determined under section 139FA.

17. Where the total discount for a participant for a year of income is \$1,000 or less for shares acquired under the plan:

- the participant is treated as though they have made a section 139E election, pursuant to subsection 139E(2B); and
- no amount is included in the participant's assessable income, pursuant to section 139BA.

### **Capital gains tax**

18. Where the disposal restrictions applying to a participant's allocated share cease to have effect, the participant becomes absolutely entitled to the share and CGT event E5 in section 104-75 of the ITAA 1997 happens. Any capital gain or capital loss the participant makes pursuant to subsection 104-75(5) is disregarded pursuant to subsection 104-75(6).

19. Where a participant disposes of a share, CGT event A1 happens, pursuant to subsection 104-10(1) of the ITAA 1997.

20. A participant makes a capital gain where the capital proceeds from the disposal are more than the cost base of the share, or a capital loss where the capital proceeds are less than the reduced cost base of the share, pursuant to subsection 104-10(4) of the ITAA 1997.

21. The first element of the cost base and reduced cost base of a share is the market value of the share, calculated under section 139FA of the ITAA 1936 at the time it was allocated to the participant by the trustee, pursuant to subsection 130-80(3) of the ITAA 1997.

22. For the purposes of Subdivision 115-A of the ITAA 1997, a participant will acquire a share at the time at which the trustee allocated the share for the benefit of the participant, pursuant to subsection 115-30(1), item 8, of the ITAA 1997.

23. Where a participant disposes of a share more than 12 months after the time when the trustee allocated the share for the benefit of the participant, any capital gain from the disposal will be a discount capital gain, pursuant to Subdivision 115-A of the ITAA 1997.

## Appendix 1 – Explanation

**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.*

24. A share will be acquired under an employee share scheme, for the purposes of Division 13A of Part III (Division 13A), if it is:

- acquired within the meaning of section 139G;
- acquired in respect of the employment of the employee, in accordance with subsection 139C(1); and
- acquired for less than market value in accordance with subsection 139C(3).

25. Section 139G provides that an employee will acquire a share in several circumstances, including by acquiring a beneficial interest in the share.

26. A participant will acquire a beneficial interest in a share and therefore will acquire a share within the meaning of section 139G when a share is allocated by the trustee for the benefit of a participant, in accordance with the plan.

27. Participation in the plan is open to all permanent employees and directors of the NHC group as part of its employee remuneration strategy. Consequently, a share acquired under the plan will be considered to be acquired by a participant in respect of their employment, in accordance with subsection 139C(1).

28. Shares will be acquired by the trustee with funds contributed by the NHC group. The applicant has advised that the contributions will be funded by way of an effective SSA within the meaning of paragraphs 19 to 23 of TR 2001/10 and by NHC on a matching basis.

29. Consideration for the purposes of subsection 139C(3) does not include an amount sacrificed under an effective SSA. Participants will not otherwise pay or give consideration for the acquisition of shares.

30. As no consideration will be paid or given, participants will acquire a share for less than market value, for the purposes of subsection 139C(3).

31. Therefore, a participant will acquire a share under an employee share scheme for the purposes of Division 13A.

32. Where a participant acquires a share under an employee share scheme, the discount given in relation to the share is included in the participant's assessable income in accordance with Subdivision B of Division 13A.



33. Where the share is a qualifying share, the amount of the discount included in a participant's assessable income and the year of income in which the discount is included will depend on whether the participant:

- makes a section 139E election; or
- is treated as having made an election under subsection 139E(2B); and
- whether the exemption conditions in section 139CE are satisfied in relation to the share.

## Qualifying shares

34. For a share to be a qualifying share, the conditions set out in section 139CD must be satisfied. These conditions are:

- (1) the share is acquired by a taxpayer under an employee share scheme (subsection 139CD(2));
- (2) the company in which the share is acquired is the employer of the taxpayer or a holding company of the employer of the taxpayer (subsection 139CD(3));
- (3) all the shares available for acquisition under the scheme are ordinary shares (subsection 139CD(4));
- (4) at the time the share was acquired, at least 75% of the permanent employees of the employer were, or at some earlier time had been, entitled to acquire:
  - (i) shares or rights under the scheme; or
  - (ii) shares or rights in the employer, or a holding company of the employer, under another employee share scheme (subsection 139CD(5)); and
- (5) immediately after the acquisition of the share, the taxpayer does not hold a legal or beneficial interest in more than 5% of the shares in the company or is not in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the company (subsections 139CD(6) and 139CD(7)).

35. For the reasons set out in paragraphs 24 to 31 of this Ruling, the first condition will be satisfied.

36. As NHC is either the employer of a participant or is the holding company of the employer of a participant, the second condition will be satisfied.

37. All of the shares available for acquisition under the plan are ordinary shares. Therefore, the third condition will be satisfied.

38. As all permanent employees of the NHC group will have the opportunity to participate in the plan, the Commissioner accepts that the fourth condition will be satisfied.

39. The applicant has also advised that immediately after the acquisition of a share under the plan, no participant will hold a legal or beneficial interest in more than 5% of the shares in NHC or be in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at an annual general meeting of NHC. Therefore, the Commissioner accepts that the conditions in subsections 139CD(6) and 139CD(7) will be satisfied.

40. As all of the conditions in section 139CD will be satisfied, a share acquired by a participant under the plan will be a qualifying share for the purposes of Division 13A.

### **Exemption conditions**

41. Section 139CE contains exemption conditions that must be satisfied in relation to shares acquired under an employee share scheme before a taxpayer can benefit from the \$1,000 reduction provided for in subsection 139BA(2).

42. The exemption conditions are:

- the scheme does not have any conditions that could result in any employee forfeiting ownership of a share that was acquired under the scheme;
- the scheme must be operated so that no employee is permitted to dispose of a share acquired under the scheme before the earlier of the following times:
  - the end of the period of 3 years after the time of the acquisition of the share;
  - the time when the taxpayer ceased, or first ceased to be employed by the employer (within the meaning of subsection 139CE(5));
- the employee share scheme and any scheme for the provision of financial assistance under the scheme are operated on a non-discriminatory basis within the meaning of section 139GF.

43. As to the first condition, the plan does not contain any forfeiture conditions that could result in any employee forfeiting the legal or beneficial ownership of a share acquired under the plan. Therefore, the first condition will be satisfied.

44. The applicant has advised that shares must be held in the trust and not disposed of within three years of their date of allocation to a participant unless the participant ceases to be employed within the meaning of subsection 139CE(5). That is, they are no longer employed by the employer, a holding company of the employer or a subsidiary of the employer or of a holding company of the employer. Therefore, the second condition will be satisfied.

45. The applicant has advised that the scheme will be operated on a non-discriminatory basis within the meaning of section 139GF.

46. Therefore, the Commissioner accepts that the exemption conditions in section 139CE will be satisfied in relation to shares acquired under the plan.

## Section 139E election

47. A taxpayer can elect under subsection 139E(1) that subsection 139B(2) applies in respect of all qualifying shares or qualifying rights acquired by the taxpayer in a year of income. Subsection 139B(2) provides that the discount in relation to a share or right is included in the taxpayer's assessable income in the year of income in which the share is acquired.

48. Under section 139BA, only the total amount of the discount that exceeds \$1,000 will be included in a taxpayer's assessable income if the exemption conditions in section 139CE are satisfied in relation to the shares or rights covered by the section 139E election.

49. The *Tax Laws Amendment (Budget Measures) Act 2008* amended section 139E to require a taxpayer to make an election in their income tax return for the year of income in which the shares or rights were acquired. The amendment applies in relation to the 2008-09 and subsequent income years. Previously a taxpayer was required to make the election in writing in an approved form (refer to Taxation Determination TD 97/23).

50. Alternatively, in accordance with subsection 139E(2B), (inserted by the amending Act), a taxpayer is treated as having made a section 139E election where:

- the total discount for the taxpayer for the year of income is \$1,000 or less; and
- the exemption conditions in section 139CE are satisfied in relation to the relevant shares or rights.

51. Where the taxpayer is treated as having made an election under subsection 139E(2B), section 139BA will operate so that no amount is included in the taxpayer's assessable income.

52. The total discount for a taxpayer for the purposes of subsection 139E(2B) is the sum of the discounts given in relation to all of the shares or rights acquired by a taxpayer under an employee share scheme in that year.

***Calculation of discount***

53. Where subsection 139B(2) applies to the discount, the amount of the discount is calculated in accordance with subsection 139CC(2) and is the market value of the share at the time it is acquired by the employee less any consideration paid or given by the employee for the acquisition of the share.

54. In accordance with paragraphs 28 and 29 of this Ruling, a participant does not provide any consideration for the acquisition of a share under the plan. Therefore, the discount is the market value of the share at the time it was acquired by the participant.

55. Subdivision F of Division 13A contains special provisions to determine the market value of a share on a particular day. As the ordinary shares of NHC are listed on the ASX, section 139FA provides that their market value is:

- if there was at least one transaction on the ASX in those shares in the week up to and including the date of acquisition – the weighted average of the prices at which shares were traded on the ASX during that week; or
- if there were no such transactions in the week up to and including the date of acquisition – the last price at which an offer was made on the ASX in that period to buy such a share, or if no offer was made, the value as determined under section 139FB.

***Discount is \$1,000 or less***

56. In accordance with paragraphs 41 to 46 of this Ruling, the Commissioner accepts that shares acquired under the plan will satisfy the exemption conditions. Therefore, where the total discount for a participant is \$1,000 or less no amount will be included in the participant's assessable income pursuant to subsection 139BA(2).

***Capital gains tax***

57. Where CGT event E5 happens, pursuant to subsection 104-75(1) of the ITAA 1997, for similar reasons to those outlined in paragraph 29 of this Ruling, a share is acquired for no expenditure for the purposes of subsection 104-75(6) and therefore any capital gain or capital loss the participant makes is disregarded.

58. CGT event A1 in section 104-10 of the ITAA 1997 is the relevant CGT event for the disposal of a share to another entity. The calculation for a capital gain or a capital loss is described in subsection 104-10(4).

59. The market value calculation in section 139FA of the ITAA 1936 applies because the share will be listed on the ASX. Subsection 130-80(3) of the ITAA 1997 then uses that market value as the first element of the cost base and the reduced cost base of the share. The concepts of cost base and reduced cost base are described in Subdivisions 110-A and 110-B of the ITAA 1997.

60. Under subsection 130-80(3) of the ITAA 1997, the market value calculation pertains to the time the share was allocated for the benefit of the participant because that was the point in time that the participant first acquired a beneficial interest in the share.

61. Where an election under section 139E of the ITAA 1936 is taken to have been made pursuant to subsection 139E(2B), the acquisition time for the purposes of Subdivision 115-A of the ITAA 1997 is determined under subsection 115-30(1), item 8, of the ITAA 1997.

62. For the purposes of the discount capital gains tax provisions, the acquisition time under subsection 115-30(1), item 8, of the ITAA 1997 is the time when the acquirer first acquired a beneficial interest in the share which is, in the circumstances of this Ruling, when the trustee allocated the share for the benefit of the participant. Where a participant disposes of a share more than 12 months after the time when the trustee allocated the share to the participant, any capital gain from the disposal will be a discount capital gain.

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

63. 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

*Related Rulings/Determinations:*

TR 2001/10; TR 2006/10;  
TD 97/23

*Subject references:*

- acquisition of shares
- capital gains tax
- CGT discount
- CGT cost base
- CGT events
- disposal of shares
- employee share ownership
- employee share schemes & options
- employees
- share discounts on employee share schemes
- salary sacrifice
- shares

*Legislative references:*

- ITAA 1936
- ITAA 1936 Pt III Div 13A
- ITAA 1936 Pt III Div 13A Subdiv B
- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139BA
- ITAA 1936 139BA(2)
- ITAA 1936 139C
- ITAA 1936 139C(1)
- ITAA 1936 139C(3)
- ITAA 1936 139CC(2)
- ITAA 1936 139CD
- ITAA 1936 139CD(2)
- ITAA 1936 139CD(3)
- ITAA 1936 139CD(4)
- ITAA 1936 139CD(5)
- ITAA 1936 139CD(6)
- ITAA 1936 139CD(7)
- ITAA 1936 139CE
- ITAA 1936 139CE(5)
- ITAA 1936 139E
- ITAA 1936 139E(1)
- ITAA 1936 139E(2B)
- ITAA 1936 Pt III Div 13A Subdiv F
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1936 139G
- ITAA 1936 139GB
- ITAA 1936 139 GF
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(4)
- ITAA 1997 104-75
- ITAA 1997 104-75(1)
- ITAA 1997 104-75(5)
- ITAA 1997 104-75(6)
- ITAA 1997 Subdiv 110-A
- ITAA 1997 Subdiv 110-B
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-30
- ITAA 1997 115-30(1)
- ITAA 1997 130-80
- ITAA 1997 130-80(3)
- TAA 1953
- Copyright Act 1968
- Tax Laws Amendment (Budget Measures) Act 2008

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ATO references

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