


***CR 2009/60 - Income tax: Lion Nathan Limited -
proposed acquisition by Kirin Holdings Company,
Limited - Employee Share Acquisition Plan***

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Class Ruling

Income tax: Lion Nathan Limited – proposed acquisition by Kirin Holdings Company, Limited – Employee Share Acquisition Plan

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❶ 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provisions

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 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CE of the ITAA 1936;
- section 139E of the ITAA 1936;
- Division 1A of former Part IIIAA the ITAA 1936 (former Division 1A);

- section 104-85 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 207-35 of the ITAA 1997; and
- section 207-45 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this ruling applies is all persons (participants) who:

- immediately before the date of implementation of the proposed LNL scheme (as described in paragraphs 21 to 29 of this Ruling), are employees of Lion Nathan Limited (LNL) or its wholly owned subsidiaries (including J Boag & Sons Holding Pty Limited and its wholly owned subsidiaries (Boag's group)) (LNL group);
- accepted an offer to participate in the Lion Nathan Limited Employee Share Acquisition Plan (ESAP) and have at least one share in LNL held for their benefit (as described in paragraph 17 of this Ruling) as at 14 October 2009; and

from the time of accepting the offer under the ESAP until the date of implementation of the proposed LNL scheme:

- are residents of Australia as that term is defined in subsection 6(1) of the ITAA 1936;
- are not temporary residents of Australia within the meaning of section 995-1 of the ITAA 1997; and
- are not engaged in foreign service within the meaning of section 139GBA of the ITAA 1936.

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 9 to 35 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

8. This Ruling applies from 1 July 2008 to 30 June 2010. The Ruling continues to apply after 30 June 2010 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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

9. 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:

- application for Class Ruling dated 2 June 2009 with attachments;
- a copy of the Implementation Agreement (the agreement) dated 10 May 2009;
- a copy of the Scheme Booklet dated 6 August 2009;
- a copy of the Lion Nathan Limited Employee Share Acquisition Plan Trust (LNL trust) Deed (as amended) dated 1 May 2003 (trust deed);

- a copy of the draft Trustee Deed Poll (deed poll) as at 23 July 2009; and
- correspondence from LNL dated 23 July 2009, 13 August 2009, 7 September 2009, 21 September 2009, 23 September 2009 and 24 September 2009.

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. LNL is a public company listed on the Australian Securities Exchange and the New Zealand Stock Exchange.

11. LNL is the head company of the LNL tax consolidated group and is a resident of Australia as defined in subsection 6(1).

12. Kirin Holdings Company, Limited (Kirin Japan) is a company resident in Japan. Kirin Holdings (Australia) Pty Ltd (KHAU) is a wholly owned subsidiary of Kirin Japan (together Kirin). Kirin holds approximately 46.13% of the issued capital in LNL.

Employee Share Acquisition Plan

13. The LNL trust was established to assist in the retention and motivation of Australian resident employees of the LNL group through the operation of the ESAP.

14. The applicant has advised that:

- the first offers under the ESAP to which this Ruling applies were made in April 2007;
- fully paid ordinary shares in LNL (LNL shares) held for the benefit of participants (as described in paragraph 17 of this Ruling) under the ESAP are qualifying shares for the purposes of Division 13A of Part III (Division 13A);
- for the purposes of the exemption conditions in section 139CE, the ESAP:
 - has been operated and continues to operate so that since the acquisition of an LNL share, no participant has been permitted to dispose of LNL shares prior to the expiration of 3 years from the time of acquisition, other than in circumstances which involve cessation of employment within the meaning of subsection 139CE(5); and
 - the disposal restrictions applied under the ESAP will not be lifted to allow the disposal of LNL shares to happen for the purposes of implementing the proposed LNL scheme;

- does not have any conditions which could result in a participant forfeiting ownership of the LNL shares acquired under the ESAP; and
- has been operated on a non-discriminatory basis for the purposes of subsection 139CE(4).

15. Permanent employees (either full-time or part-time) of the LNL group (including the Boag's group) may be offered LNL shares under the ESAP, to the value of \$1,000 for nil consideration.

16. Permanent employees who have previously had an opportunity to participate in the ESAP may be offered the opportunity to acquire LNL shares up to the value of \$1,000 by participating in an effective salary sacrifice arrangement (within the meaning of Taxation Ruling TR 2001/10). No further consideration is required to be paid by the participant.

17. The trustee of the LNL trust (the trustee) acquires and holds LNL shares for the benefit of participants on the terms and conditions set out in the trust deed.

18. Participants are presently entitled to so much of the net income of the LNL trust (as defined in the trust deed) which is attributable to the LNL shares held by the trustee on behalf of the participants. Participants are also entitled to all dividends paid in respect of each LNL share held beneficially.

19. The trustee is indemnified by LNL in respect of all liabilities, costs and expenses incurred in the execution or purported execution of the LNL trust.

20. For the income year ending on 30 June 2010, the LNL trust will derive a positive amount of net income as determined under section 95 referable to:

- the payment of the special dividend (as described in paragraphs 30 to 34 of this Ruling) to the LNL trust;
- the consideration from the disposal of the LNL shares pursuant to the LNL scheme; and
- a nominal amount of interest.

The proposed LNL scheme

21. On 27 April 2009, LNL announced that following discussions between the independent board committee of LNL and Kirin Japan, LNL had agreed to key commercial terms under which Kirin would acquire all non-Kirin LNL shares.

22. On 10 May 2009, LNL and Kirin Japan executed the agreement. The binding terms and conditions of the agreement reflect the key commercial terms relating to Kirin's proposed offer.

23. At the request of Kirin, LNL has proposed the LNL scheme to non-Kirin LNL shareholders whereby, if the LNL scheme is implemented, LNL will become a wholly owned subsidiary of Kirin by means of a scheme of arrangement between LNL and its members in accordance with Part 5.1 of the *Corporations Act 2001*. LNL and Kirin have agreed to implement the proposed LNL scheme on the terms and conditions of the agreement.

24. Kirin Japan has nominated its wholly owned subsidiary KHAU to acquire the LNL shares.

25. Implementation of the proposed LNL scheme was approved by the requisite majority of non-Kirin LNL shareholders at the LNL members' scheme meeting (scheme meeting) on 17 September 2009.

26. LNL shareholders (non-Kirin) who hold LNL shares on 14 October 2009 will be entitled to participate in the LNL scheme and if implemented they will be paid \$11.50 per LNL share (the scheme consideration).

27. No later than two business days before the implementation date of 21 October 2009, Kirin will pay the total scheme consideration into a trust account operated by LNL. On the implementation date, LNL shares will be transferred to Kirin. Within five business days after the implementation date, participating non-Kirin LNL shareholders will be paid the scheme consideration of \$11.50 per LNL share.

28. The trustee proposes to execute the deed poll. Under the deed poll, the trustee will assign to each participant the benefit of any and all of its presently existing rights to receive the scheme consideration, which the trustee is or becomes entitled to in accordance with the LNL scheme in relation to each LNL share allocated to that participant's account as at 7.00pm on the scheme record date in full satisfaction of that participant's interests in the LNL trust. The deed poll will be executed after the time the LNL shares are transferred to Kirin but before the time the scheme consideration is to be paid to all participating non-Kirin LNL shareholders.

29. The deed poll will effect a valid disposal by the trustee of a CGT asset of the LNL trust to each relevant participant in full satisfaction of that participant's interest in the trust.

The proposed special dividend

30. LNL shareholders, including Kirin, who are registered as holding LNL shares on 25 September 2009 will be entitled to receive a special dividend of \$0.50 per LNL share.

31. As the proposed LNL scheme was approved by the requisite majority of non-Kirin LNL shareholders at the scheme meeting, the special dividend will be paid on 6 October 2009.

32. Under the agreement, LNL has undertaken and agreed not to pay the special dividend otherwise than in accordance with the agreement of Kirin.

33. LNL will source the funds for the payment of the special dividend from cash reserves and debt facilities.

34. The special dividend will be fully franked with Australian franking credits.

35. The income tax consequence of the proposed special dividend and LNL scheme for LNL shareholders who hold LNL shares on capital account is the subject of Class Ruling CR 2009/44.

Ruling

The proposed special dividend

36. Where the trustee receives the special dividend and includes as assessable income the amount of the franking credit attached to the special dividend, the participant will be required to include in their assessable income so much of the franking credit amount as is equal to their share of the franking credit attached to the special dividend (subsection 207-35(3) of the ITAA 1997).

37. A participant to whom the fully franked special dividend flows indirectly will be entitled to a tax offset equal to their share of the franking credit attached to the special dividend, subject to being a qualified person (subsection 207-45 of the ITAA 1997).

38. A participant who is entitled to the special dividend would need to have held their interest in the LNL shares 'at risk' for a continuous period of not less than 45 days during the period of 12 August 2009 to 13 October 2009 in order to be a qualified person for the purposes of former Division 1A.

Application of Division 13A

Participants who have made a section 139E election

39. Where a participant:

- has made an election under section 139E; or
- is taken to have made an election in accordance with subsection 139E(2B) (in the income year ended 30 June 2009);

for a year of income in which they acquired LNL shares under the ESAP and those LNL shares are compulsorily transferred to Kirin under the LNL scheme:

- the disposal of LNL shares by a participant will not be in breach of the exemption condition in subsection 139CE(3); and

- the discount previously excluded from the participant's assessable income under subsection 139BA(2), in relation to the LNL shares, will continue to be excluded from their assessable income.

Participants who have not made a section 139E election

40. Where a participant:

- did not make an election under section 139E; or
- was not taken to have made an election in accordance with subsection 139E(2B) (in the income year ended 30 June 2009);

for a year of income in which they acquired LNL shares under the ESAP and there has not otherwise been a cessation time for the LNL shares, the participant is required to include in assessable income the discount given in relation to the LNL shares in the year of income in which the cessation time occurs (subsection 139B(3)).

41. If the LNL scheme is implemented as planned, the cessation time in respect of those LNL shares will be when the LNL shares are disposed of to Kirin on 21 October 2009 (section 139CA).

42. The discount that will be included in the assessable income of a participant will be the amount of \$11.50 per LNL share received as the scheme consideration under the proposed LNL scheme, pursuant to section 139CC(3).

43. For the purposes of calculating the discount, the special dividend of \$0.50 per LNL share will not form part of the consideration received for the disposal of the LNL shares.

CGT consequence of ending of interest in the trust

44. CGT event E7 happens when the trustee disposes of its right to receive the scheme consideration from LNL to the participants in satisfaction of the participant's interest, or part of it, in the trust capital (subsection 104-85(1) of the ITAA 1997).

45. A capital gain or capital loss that a participant makes when CGT event E7 happens is disregarded as the participant acquired the CGT asset that is the interest for no expenditure (subsection 104-85(6) 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.*

The proposed special dividend

Gross up and tax offset

46. Subsection 207-35(3) of the ITAA 1997 provides that:

Despite any provisions in Divisions 5 and 6 of Part III of the *Income Tax Assessment Act 1936*, if:

- (a) a *franked distribution is made, or *flows indirectly, to a partnership or the trustee of a trust in an income year; and
- (b) the assessable income of the partnership or trust for that year includes an amount (the **franking credit amount**) that is all or a part of the additional amount of assessable income included under subsection (1) in relation to the distribution; and
- (c) the distribution flows indirectly to an entity that is a partner in the partnership, or a beneficiary or that trustee of the trust; and
- (d) the entity has an amount of assessable income for that year that is attributable to all or a part of the distribution;

then, the entity's assessable income for that year also includes so much of the franking credit amount as is equal to its *share of the franking credit on the distribution.

47. In this case, the fully franked special dividend of \$0.50 per LNL share will be received by the trustee and the assessable income of the LNL trust will include the additional amount of assessable income, being the franking credit attached to the special dividend, under subsection 207-35(1) of the ITAA 1997.

48. Subsection 207-50(3) of the ITAA 1997 provides the circumstances in which a franked distribution is considered to flow indirectly to a beneficiary of a trust in an income year and states:

A *franked distribution **flows indirectly** to a beneficiary of a trust in an income year if, and only if:

- (a) during that income year, the distribution is made to the trustee of the trust, or *flows indirectly to the trustee as a partner or beneficiary because of a previous application of subsection (2) or this subsection; and
- (b) the beneficiary has this amount for that income year (the **share amount**):
 - (i) a share of the trust's *net income for that income year that is covered by paragraph 97(1)(a) of the *Income Tax Assessment Act 1936*; or

- (ii) an individual interest in the trust's net income for that income year that is covered by section 98A or 100 of that Act;

(whether or not the share amount becomes assessable income in the hands of the beneficiary); and
- (c) the beneficiary's *share of the distribution under section 207-55 is a positive amount (whether or not the beneficiary actually receives any of that share).

49. In the present circumstances, the receipt of the special dividend will give rise to a positive amount of net income for the LNL trust. Further, the participant's share of that net income that is covered by paragraph 97(1)(a) of the ITAA 1936 will be a positive amount. Thus, a participant will be required to include in their assessable income so much of the franking credit amount as is equal to their share of the franking credit attached to the special dividend that is included in their assessable income (subsection 207-35(3) of the ITAA 1997).

50. Section 207-45 of the ITAA 1997 provides that an entity to whom a franked distribution flows indirectly in an income year is entitled to a tax offset for that income year that is equal to its share of the franking credit on the distribution. Section 207-45 of the ITAA 1997 applies to an entity who is an individual.

51. Therefore, subject to satisfying the qualified person rule, a participant to whom the fully franked special dividend flows indirectly will be entitled to a tax offset equal to their share of the amount of the franking credit on the special dividend.

Qualified persons

52. Former Division 1A contains the measures known as the holding period rule and the related payment rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution that has flowed indirectly to them and thus remain entitled to a tax offset for the franking credit attached to the distribution pursuant to section 207-150 of the ITAA 1997.

53. The interest that a beneficiary of a trust has in shares which are held by the trustee of the trust is worked out under former section 160APHL. However, such a calculation is not required unless the trustee of the trust is a qualified person in relation to the dividend. If the trustee is not a qualified person, no beneficiary of the trust can receive a franking credit through the trust as per former section 160APHU.

54. Pursuant to CR 2009/44, the trustee that receives the special dividend will need to hold the LNL shares at risk for a continuous period of not less than 45 days during the secondary qualification period in order to be a qualified person for the purposes of former Division 1A. The secondary qualification period would run from 12 August 2009 until 13 October 2009 (inclusive). As the trustee is capable of being a qualified person for the purposes of former Division 1A by satisfying the 'at risk' requirement during the relevant holding period, the beneficiaries of the LNL trust are also capable of being qualified persons for the purposes of former Division 1A. This requires consideration of the beneficiaries' interest in the trust pursuant to former section 160APHL.

55. In the present circumstances, it is considered that the determination of a participant's interest in an LNL share pursuant to former section 160APHL would produce the same result as the allocation process undertaken by the trustee of the LNL trust in allocating specific LNL shares to each participant. This is due to the fact that a participant's entitlement to dividends paid on the LNL shares held by the LNL trust is based on the allocation of these shares to a participant. This process is similar to the process in former subsection 160APHL(5), which determines a participant's interest in the relevant LNL shares by way of a participant's proportionate dividend entitlement. Thus, a participant would be considered to have an interest in the LNL shares allocated to them for the purposes of former section 160APHL.

56. Pursuant to former subsection 160APHL(7), a participant's interest in an LNL share is taken to be a long position with a delta of +1 in relation to itself. Further, as the LNL shares held by the trustee of the LNL trust on behalf of each participant would be considered employee share scheme securities under the definition in former section 160APHD, this position is not altered by former subsection 160APHL(10).

57. A participant who held an interest in the LNL shares as determined above will need to satisfy the holding period requirement as set out in former subsection 160APHO(2) in order to be a qualified person for the purposes of former Division 1A. In the present circumstances, pursuant to former paragraph 160APHO(2)(b), a participant will need to have held their interest in the LNL shares 'at risk' for a continuous period of not less than 45 days during the secondary qualification period of 12 August 2009 to 13 October 2009 (inclusive) in order to be a qualified person as outlined in CR 2009/44.

Application of Division 13A

58. A person acquires a share within the meaning of subsection 139G(e) if the person acquires a beneficial interest in the share from another person. Under the ESAP, a participant acquires a share for the purposes of Division 13A when an LNL share is allocated to a participant by the trustee and thus the participant acquires a beneficial interest in that share.

59. Where a participant acquires qualifying LNL shares under the ESAP, the discount in relation to the shares is included in their assessable income in accordance with section 139B.

Participants who have made a section 139E election

60. Where the taxpayer makes an election under section 139E in relation to the shares, the amount of the discount (subject to subsection 139BA) is:

- the market value of the shares (calculated under Subdivision F of Division 13A); less
- any consideration paid or given by the taxpayer as consideration for the acquisition of the shares (subsection 139CC(2)).

61. However, for the purposes of section 139BA:

- where a taxpayer has made an election under section 139E for a year of income; or
- is taken to have made an election in accordance with subsection 139E(2B) (in the income year ended 30 June 2009); and
- the exemption conditions in section 139CE are satisfied in relation to shares covered by the election,

the total amount of discount otherwise included in the taxpayer's assessable income for a year of income in respect of those shares is only included to the extent that it is greater than \$1,000.

62. The references to 'the scheme' in section 139CE are considered to be effectively a reference to the mechanism by which an employee acquires a qualifying share. Hence, the exemption conditions must initially be satisfied at least at the time that an offer under an employee share scheme is made to employees.

63. However, the purpose of subsection 139CE(3) is to ensure that qualifying shares are held for the required period, a condition that clearly extends beyond the time of the original offer or acquisition date. Therefore, in this case, the ESAP needs to continue to be operated in a manner that satisfies the exemption conditions to ensure the continued exclusion of the discount (received for LNL shares) from a participant's assessable income.

The exemption conditions

64. The exemption conditions contained in section 139CE that must be satisfied require that the employee share scheme:

- not have any conditions that could result in an employee forfeiting ownership of shares acquired under it;

- be operated so that no employee would be permitted to dispose of a share acquired under it, before the earlier of:
 - the end of the period of three years after the time of the acquisition of the employee share scheme share; or
 - the time when the employee ceases, or first ceases, to be employed by their employer (within the meaning of subsection 139CE(5)); and
- be operated on a non-discriminatory basis (within the meaning of section 139GF).

65. Thus, for the first \$1,000 of a discount to continue to be excluded from an employee's assessable income, the employee share scheme needs to continue to be operated in a manner that satisfies these exemption conditions.

Forfeiture

66. The ESAP rules do not specifically provide for the forfeiture of shares. Further, the compulsory disposal of a participant's shares under the LNL scheme for valuable consideration is not considered to constitute forfeiture.

67. Therefore, as the ESAP rules do not provide for forfeiture and because the compulsory disposal of shares under the LNL scheme will not result in a forfeiture of the LNL shares, the Commissioner accepts that the first condition will continue to be satisfied.

Disposal restrictions

68. The applicant has advised that the ESAP has been operated and continues to operate so that no participant is permitted to dispose of LNL shares prior to the end of the period of 3 years after the time they acquired them, other than in circumstances which have involved a cessation of employment within the meaning of subsection 139CE(5). Therefore, it is accepted that the ESAP will be operated up to the planned implementation date of the LNL scheme on 21 October 2009, in a manner that will continue to satisfy the exemption condition in subsection 139CE(3).

69. Where LNL shares are then disposed of to Kirin pursuant to the implementation of the LNL scheme, the Commissioner accepts that such a disposal is not a breach of subsection 139CE(3), as the compulsory disposal of the shares under the LNL scheme is considered to have no connection with the actual operation of the ESAP.

Non-discriminatory basis

70. As the applicant has advised that the ESAP has operated on a non-discriminatory basis for the purposes of subsection 139CE(4), which primarily relates to the offers made under the ESAP, the Commissioner accepts that the third condition is satisfied.

Continued exclusion of discount from assessable income

71. From the time that LNL shares were acquired under the ESAP up to the time the LNL scheme is implemented, it is accepted that the various exemption conditions in section 139CE were satisfied and will continue to be satisfied, for the purposes of the continued application of section 139BA.

72. Therefore, the discount previously excluded from a participant's assessable income pursuant to section 139BA, in relation to LNL shares acquired under the ESAP will continue to be excluded from their assessable income.

Participants who have not made a section 139E election

73. Where a participant:

- did not make an election under section 139E; or
- was not taken to have made an election in accordance with subsection 139E(2B) (in the income year ended 30 June 2009);

for a year of income in which they acquired LNL shares under the ESAP and there has not otherwise been a cessation time for the LNL shares, the participant is required to include in assessable income the discount given in relation to the LNL shares in the year of income in which the cessation time occurs (subsection 139B(3)).

74. As the LNL shares acquired under the ESAP are subject to disposal restrictions and no forfeiture conditions, the cessation time will be determined pursuant to subsection 139CA(2) and will be the earliest of the following times:

- when the participant disposes of the LNL shares;
- when the disposal restrictions on LNL shares are lifted;
- when the participant ceases to be employed by either their employer (being their employer at the time they acquired the share), a holding company of their employer, or a subsidiary of their employer or of a holding company of their employer; and
- the end of the 10 year period starting when the participant acquired the shares.

75. In accordance with the class of entities:

- a participant will still be employed by the LNL group; and
- will still be holding LNL shares at the time of implementation of the proposed LNL scheme.

76. Further:

- the disposal restrictions applied under the ESAP will not be lifted to allow the disposal of LNL shares to happen; and
- 10 years will not have elapsed as the first offers under the ESAP were made in April 2007.

77. Accordingly, a cessation time can only arise at the time of implementation of the LNL scheme, if the participant disposes of their LNL shares.

78. Where a share is compulsorily acquired under a scheme of arrangement and the shares are held on trust on behalf of participants, both the trustee (in respect of the legal interest) and the participant (in respect of the beneficial interest) would be taken to have disposed of their interests in a share.

79. Therefore, the cessation time for the LNL shares held by the participant will be when the participant disposes of their beneficial interest in the LNL share to Kirin on the proposed implementation date of 21 October 2009.

Calculation of discount

80. When a cessation time occurs, the amount of the discount to be included in a participant's assessable income is determined under section 139CC and will depend on whether the share is disposed of in an arm's length transaction at or within 30 days of the cessation time.

81. For the purposes of subsection 139CC(3), the Commissioner accepts that the disposal of LNL shares by participants to Kirin under the proposed LNL scheme, which includes a court sanctioned scheme of arrangement, is an arm's length transaction.

Disposal at or within 30 days of cessation time

82. Where a participant disposes of a share in an arm's length transaction at or within 30 days of the cessation time, the amount of the discount to be included in the participant's assessable income is calculated in accordance with subsection 139CC(3). The discount is the amount or value of any consideration received by the participant for the disposal reduced by the amount or value of any consideration paid or given by the participant as consideration for the acquisition of the share.

83. The participant will have either:

- made no direct payments to acquire LNL shares under the ESAP; or
- acquired the shares under an effective salary sacrifice arrangement within the meaning of TR 2001/10.

84. Entering into a salary sacrifice arrangement does not constitute the giving of consideration by the participant. Therefore, the participant will not have paid or given any consideration in respect of the acquisition of LNL shares under the ESAP.

85. As no consideration has been paid or given by a participant for the acquisition of the LNL shares, the discount to be included pursuant to subsection 139CC(3) is the amount or value of any consideration received by the participant for the disposal.

86. If the LNL scheme is implemented:

- a participant will be entitled to receive the scheme consideration of \$11.50 for each LNL share disposed of to Kirin; and
- a participant may also be entitled to the special dividend of \$0.50 per LNL share.

87. Whilst the payment of the special dividend will not occur independently of the LNL scheme due to its payment being conditional on LNL obtaining approval for the LNL scheme by the requisite majority of non-Kirin LNL shareholders, the special dividend will be an amount that is paid by LNL from its own funds.

88. It is considered that the special dividend will only be received by a participant as a consequence of holding an LNL share and does not form part of the consideration for disposal of an LNL share, paid by Kirin and received as such by the participant.

89. Therefore, for the purposes of calculating the discount given in relation to an LNL share pursuant to section 139CC, the consideration received for the disposal, and thus the discount will be the amount of the scheme consideration of \$11.50 per LNL share.

CGT consequences of ending of interest in the trust

90. CGT event E7 happens when a trustee disposes of a CGT asset of the trust to a beneficiary in satisfaction of the beneficiary's interest, or part of it, in the trust capital (subsection 104-85(1) of the ITAA 1997).

91. On the proposed implementation date of the LNL scheme, the ownership of the LNL shares will be transferred from the trustee to Kirin and as a consequence the trustee will acquire a right against LNL to receive the scheme consideration. Under the deed poll, the trustee will dispose of its rights against LNL to receive the scheme consideration to each participant in satisfaction of the participant's interest in the trust.

92. The disposal of the right to receive the scheme consideration from LNL to the participants is a disposal by the trustee, of a CGT asset of the LNL trust in satisfaction of the participant's interest in the trust capital. CGT event E7 therefore happens.

93. A capital gain or capital loss the beneficiary makes from CGT event E7 is disregarded if the beneficiary acquired the CGT asset that is the interest for no expenditure (subsection 104-85(6) of the ITAA 1997).

94. Accordingly, a capital gain or capital loss that a participant makes when CGT event E7 happens will be disregarded as the participant acquired the CGT asset that is the interest for no expenditure.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

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Related Rulings/Determinations:

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Subject references:

- CGT assets
- CGT events E1-E9 - trusts
- CGT events
- dividend income
- frankable dividends
- franking credits
- imputation system
- qualified person
- share discounts on employee share schemes

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