

# ***CR 2015/46 - Income tax: AusNet Services Employee Exempt Security Plan***

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## Class Ruling

### Income tax: AusNet Services Employee Exempt Security Plan

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#### **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, 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 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 provisions dealt with in this Ruling are:

- subsection 83A-10(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 83A-35 of the ITAA 1997
- subsection 83A-35(8) of the ITAA 1997
- section 83A-130 of the ITAA 1997
- subsection 83A-130(2) of the ITAA 1997, and
- subsection 83A-130(6) of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

## Class of entities

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

- are residents of Australia within the meaning of that expressions in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- are not 'temporary residents' within the meaning of that expression in subsection 995-1(1)
- acquired Stapled Securities under the SP AusNet General Employee Exempt Security Plan (GEESP) in 2012, 2013, 2014 and 2015, and those Stapled Securities had not had an employee share scheme (ESS) deferred taxing point happen to them before the Restructure
- had their Stapled Securities under the Restructure replaced with ordinary shares in AusNet Services Ltd (NewCo) issued on 18 June 2015
- continue to be employees of NewCo or the subsidiaries of NewCo following implementation of the Restructure
- do not hold more than 5% of the shares in NewCo and are not in a position to control more than 5% of the vote at a general meeting of NewCo, and
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their securities.

(Note: Division 230 will generally not apply to individuals, unless they make an election for it to apply to them).

## Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 8 to 31 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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7. This Ruling applies from 1 July 2011 to 30 June 2018. The Ruling continues to apply after 30 June 2018 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).

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## Scheme

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8. 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 able to be read with the description:

- Application for class ruling dated 7 November 2014
- 2012 Offer Guide for the SP AusNet General Employee Exempt Security Plan
- SP AusNet General Employee Exempt Security Plan rules dated 16 April 2012 (Plan Rules)
- 2013 Offer Guide for the SP AusNet General Employee Exempt Security Plan
- SP AusNet General Employee Exempt Security Plan rules dated 10 May 2013 (Plan Rules)
- 2014 Offer Guide for SP AusNet General Employee Exempt Security Plan
- Stapling deed in relation to the SP AusNet Group dated 19 October 2005
- SP AusNet Guidelines for dealing in securities dated 19 September 2011
- AusNet Services Guidelines for dealing in securities dated 9 September 2014, and
- 2015 Offer Guide for SP AusNet General Employee Exempt Security Plan.

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

## **AusNet Services**

9. AusNet Services is an energy delivery service provider in Australia.
10. AusNet Services (formerly SP AusNet) consists of the following entities:
  - AusNet Services (Transmission) Limited (Transmission) and its wholly owned subsidiaries
  - AusNet Services (Distribution) Limited (Distribution) and its wholly owned subsidiaries
  - AusNet Services Finance Trust (Finance Trust).
11. For the purposes of the GEESP the administrator of the GEESP can declare any other member to be a member of the AusNet Group.
12. AusNet Services has a primary listing on the Australian Securities Exchange (ASX) and a secondary listing on the Singapore Exchange (SGX-ST) and trades as an ordinary stapled security, comprising one share in Transmission, one share in Distribution and one unit in Finance Trust (stapled security).

## **The Restructure of AusNet Services**

13. AusNet Services moved from its triple stapled security to AusNet Services Ltd (NewCo), a single listed company (Restructure). The Restructure took place on 18 June 2015.
14. The following Steps 1 to 7 are collectively referred to as the Restructure.
15. Step 1 – NewCo was incorporated as a dormant entity with nominal share capital, comprising four ordinary shares held by a member of AusNet Services.
16. Step 2 – The AusNet Services triple stapled securities were de-stapled and the stapling arrangements between Transmission, Finance Trust and Distribution were cancelled.
17. Step 3 – Each component of the AusNet Services triple stapled securities (being a share in Transmission, a unit in Finance Trust and a share in Distribution) held by certain overseas investors (Ineligible Foreign Security Holders) were transferred to a sale nominee (NomineeCo) prior to participating in the Restructure.
18. Step 4 – By way of a members' scheme of arrangement under Part 5.1 of the *Corporations Act 2001* (Corporations Act), approved by an order of a court, NewCo acquired 100% of the shares in Transmission from the Security Holders (including NomineeCo) in exchange for issuing a whole number of ordinary shares in NewCo to Security Holders in proportion to the percentage of the shares in Transmission originally held by the Security Holder. Each Security Holder received one share in NewCo for each share held in Transmission prior to the Restructure.

19. At the same time, under a pre-arranged selective share reduction, the two to four original ordinary shares in NewCo were cancelled, with the result that 100% of the shares in NewCo were owned by the Security Holders.

20. Step 5 – By way of a trust scheme, in respect of which the responsible entity of Finance Trust obtained judicial advice (court approval), NewCo acquired 100% of the units in Finance Trust from the Security Holders (including NomineeCo), in exchange for issuing a whole number of additional ordinary shares in NewCo in proportion to the percentage of units in Finance Trust originally owned by the Security Holder. Each Security Holder received one share in NewCo for each unit held in Finance Trust prior to the Restructure.

21. Step 6 – By way of a members' scheme of arrangement under Part 5.1 of the Corporations Act, approved by an order of a court, NewCo acquired 100% of the shares in Distribution from the Security Holders (including NomineeCo), in exchange for issuing a whole number of ordinary shares in NewCo in proportion to the percentage of shares in Distribution originally owned by the Security Holder. Each Security Holder received one share in NewCo for each share previously held in Distribution.

22. Step 7 – NewCo undertook a share consolidation in accordance with section 254H of the Corporations Act, such that each Security Holder holds one ordinary share in NewCo for each triple stapled security held by them prior to the Restructure.

### **Employee Share Schemes**

23. In 2012, SP AusNet offered employees the opportunity to purchase stapled securities in the company (ASX code: SPN) under an employee elected salary sacrifice plan, the SP AusNet GEESP. The SP AusNet board of directors approved further invitations to employees to participate in a 2013 GEESP, a 2014 GEESP, and a 2015 GEESP.

24. All current full time and permanent part-time SP AusNet employees, as at the date of the offer, who have not given notice of resignation or are under a notice of termination, were eligible to participate. For the 2014 GEESP offer this included full time and permanent part-time employees of Select Solutions, and Geomatic Technologies Pty Ltd, both wholly owned subsidiaries of SP AusNet.

25. Eligible employees must elect to enter into the salary sacrifice agreement to participate in the GEESP offer.

26. Participating employees agree to pre-tax deductions from pre-tax salary by salary sacrifice for a specified period (via fortnightly payroll deductions). Participants receive approximately \$1,000 worth of SP AusNet stapled securities.

27. Participants have the stapled securities registered in their name and hold legal title to the stapled securities from the allocation date. They receive voting rights and entitlement to any distributions. SP AusNet will pay the brokerage and other costs associated with allocating the stapled securities to Participants. Stapled securities cannot be forfeited.

28. Following allocation, stapled securities are subject to a disposal restriction that lifts on the earlier of the end of three years after the date of allocation or the time when the Participants ceases to be an employee. Stapled securities that are subject to a disposal restriction are restricted securities (Restricted Securities).

29. Participants are subject to SP AusNet's Guidelines for Dealing in Securities, which restricts when Participants can deal with stapled securities. A Participant must not trade any stapled securities acquired under the Plan while they are Restricted Securities. Administrators of the Plan Rules may implement any procedure they consider appropriate to restrict a Participant from trading any stapled securities acquired by a Participant for as long as those stapled securities are Restricted Securities.

## **Changes to the Employee Share Schemes as part of the Restructure**

30. Under the Restructure of AusNet Services, Restricted Securities held by Participants will be exchanged for ordinary shares in NewCo in the same proportion to the percentage of shares/units they held in Transmission, Distribution and Finance Trust immediately before the Restructure.

31. These ordinary shares in NewCo held by Participants will continue to be subject to the GEESP Plan Rules and subject to the same restrictions on disposal and forfeiture as the stapled securities were under the Plan Rules immediately before the Restructure i.e. they will be Restricted Securities until such time as the disposal restrictions are lifted in accordance with the Plan Rules.

## **Ruling**

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32. The Restructure constitutes a restructure for the purposes of section 83A-130.

33. The stapled securities acquired by Participants under the 2012, 2013, 2014 and 2015 SP AusNet GEESP are ESS interests as defined under subsection 83A-10(1).

34. Where under the Restructure, a Participant whose stapled securities acquired under the SP AusNet GEESP are replaced with shares in AusNet Services Ltd (NewCo), the new interest (NewCo share) is treated as a continuation of the old interest (stapled security) for the purposes of subsection 83A-130(2).

35. For Participants who acquired stapled securities under the SP AusNet GEESP, their employment by NewCo, or a subsidiary of NewCo after the Restructure is treated as a continuation of the employment in respect of which they acquired their stapled securities in SP AusNet for the purposes of subsection 83A-130(6).

36. Where under the Restructure, stapled securities acquired by Participants under the 2012, 2013, 2014 and 2015 SP AusNet GEESP are replaced with NewCo shares, the replacement will not breach the three year disposal restriction condition under subsection 83A-35(8). Any discount previously excluded from a Participant's assessable income under section 83A-35 in respect of those ESS interests will continue to be excluded.

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**Commissioner of Taxation**

1 July 2015

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## 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.*

### Stapled Security is an ESS interest

37. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009.

38. A stapled security is treated in the same way as a share for the purposes of Division 83A under section 83A-335, provided that at least one of the elements in the stapled security is a share in a company. A beneficial interest in such a stapled security is treated as a beneficial interest in a share.

39. Under Division 83A, an ESS interest in a company is defined under subsection 83A-10(1) as either a beneficial interest in a share in the company or a beneficial interest in a right to acquire a beneficial interest in a share in the company.

40. The Commissioner accepts that the stapled securities which were acquired by Participants under the 2012, 2013, 2014 and 2015 SP AusNet GEESP are ESS interests as defined under subsection 83A-10(1).

### Restructure of AusNet

41. Section 83A-130 in Division 83A ensures that employees are not adversely affected by takeovers and restructures, by allowing taxpayers who have deferred tax under an employee share scheme to roll-over an ESS deferred taxing point that would otherwise occur due to a corporate restructure.

42. The term 'restructure' is described in subparagraph 83A-130(1)(a)(ii) as:

ESS interests in a company (the old company) acquired under employee share schemes can reasonably be regarded as having been replaced, wholly or partly, by ESS interests in one or more other companies as a result of a change (the **restructure**) in the ownership (including the structure of the ownership) of the old company.

43. As the ownership structure of AusNet Services will undergo a change with an ordinary stapled security, comprising one share in Transmission, one share in Distribution and one unit in Finance Trust being wholly replaced by a single ordinary share in NewCo, the Commissioner accepts that the Restructure constitutes a restructure for the purposes of section 83A-130.

**Continuation of ESS interests**

44. Section 83A-130 relevantly provides that where as a result of a change in the ownership (including the structure of the ownership) of a company (the old company):

- an employee stops holding ESS interests in the old company that were acquired under an employee share scheme
- the employee acquires replacement ESS interests in a new company that can reasonably be regarded as matching the old ESS interests
- the replacement ESS interests relate to ordinary shares
- the employee is employed by the new company, or a subsidiary of the new company, or a holding company of the new company, or a subsidiary of a holding company of the new company
- the employee at the time they acquire the replacement ESS interests:
  - does not hold a beneficial interest in more than 5% of the shares in the new company, and
  - 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 new company.

the replacement ESS interests will, for the purposes of Division 83A, be treated as a continuation of the employee's ESS interests in the old company.

45. The Restructure is a restructure for the purposes of Division 83A and a Participant:

- stops holding an ESS interest in the old company (SP AusNet) that was acquired under an employee share scheme, the GEESP
- is regarded as acquiring a replacement ESS interest in a new company, AusNet Services Ltd (NewCo) that:
  - retains the respective market value of the stapled securities
  - is held as Restricted Securities under the GEESP that is, subject to a disposal restriction that lifts on the earlier of the end of three years after the date of allocation of the old interests or the time when the Participant ceases to be an employee, and
  - can reasonably be regarded as matching

- starts holding an ordinary share/s
- is employed by NewCo or a subsidiary of NewCo
- at the time Participant acquires the new interests:
  - they will not hold a beneficial interest in more than 5% of the shares in NewCo, and
  - will not 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 a general meeting of NewCo.

46. As the Commissioner accepts that:

- the Restructure is a restructure for the purposes of Division 83A
- the Participant acquired a matching ESS interest in NewCo that replaced the ESS interest in SP AusNet acquired under the GEESP, and
- the conditions specified in section 83A-130 are met,

subsection 83A-130(2) applies to the Participant's replacement ESS interest in NewCo. Thus, for the purposes of subsection 83A-130(2), the replacement shares in NewCo are treated as if they are a continuation of the Participant's stapled securities in AusNet.

## **Minimum holding period**

47. As the stapled securities were acquired under the GEESP on or after 1 July 2009 and the replacement NewCo shares are treated as continuation of the ESS interest under section 83A-130 following the Restructure, subsection 83A-130(3) provides that the three year minimum holding period condition in subsection 83A-35(8) is taken to be satisfied. Any discount previously excluded from a Participant's assessable income under section 83A-35 in respect of those stapled securities will continue to be excluded.

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

48. 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 2006/10

*Subject references:*

- employee share ownership
  - employee share schemes
  - ESS deferred taxing point
  - ESS interest
  - exchange of shares
  - exchange of unit trust units
  - company restructuring
- ITAA 1997
  - ITAA 1997 Div 83A
  - ITAA 1997 83A-10(1)
  - ITAA 1997 83A-35
  - ITAA 1997 83A-35(8)
  - ITAA 1997 83A-130
  - ITAA 1997 83A-130(1)(a)(ii)
  - ITAA 1997 83A-130(2)
  - ITAA 1997 83A-130(3)
  - ITAA 1997 83A-130(6)
  - ITAA 1997 83A-335
  - ITAA 1997 Div 230
  - ITAA 1997 995-1(1)
  - Corporations Act 2001
  - Corporations Act 2001 Pt 5.1
  - TAA 1953

*Legislative references:*

- ITAA 1936
  - ITAA 1936 6(1)
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ATO references

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