


# ***CR 2008/84 - Income tax: Wesfarmers Limited - Employee Share Ownership Plan***

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## Class Ruling

### Income tax: Wesfarmers Limited – Employee Share Ownership 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, 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

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

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

2. The relevant provisions dealt with in this Ruling are:

- Division 13A of Part III (Division 13A) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139B of the ITAA 1936;
- section 139BA of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139CE of the ITAA 1936;
- section 139D 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 130-80 of the ITAA 1997;
- section 130-83 of the ITAA 1997; and
- section 207-150 of the ITAA 1997.

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

## Class of entities

3. The class of entities to which this Ruling applies is persons who acquire a share under the Wesfarmers Limited Employee Share Ownership Plan (the plan). They are persons who are:

- residents of Australia within the meaning of subsection 6(1) of the ITAA 1936; and
- not temporary residents of Australia within the meaning of section 995-1(1) of the ITAA 1997.

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

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 29 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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8. This Ruling applies from 1 July 2007. However, 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 Greenwoods & Freehills Pty Limited (the applicant) on behalf of Wesfarmers Limited.

10. 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 request for class ruling from the applicant dated 2 May 2008;
- Wesfarmers Limited Employee Share Ownership Plan Rules;
- Wesfarmers Share Plans Trust (the Trust) Deed executed on 16 September 2005 (trust deed); and
- correspondence from the applicant dated 10 June 2008, 25 July 2008, 21 August 2008 and 27 August 2008.

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

## The plan

11. The plan forms part of a long-standing component of Wesfarmers Limited (Wesfarmers) and its 100% owned subsidiaries' (the group) compensation and benefits packages aimed at aligning employee behaviour with shareholder interests.
12. The plan is operated through the Trust for which CPU Share Plans Limited (the trustee) acts as trustee. The applicant has advised that the trust's activities are limited solely to those necessary for the proper administration of the plan and the Wesfarmers Limited Long Term Incentive Plan (LTIP).
13. Under the plan, eligible employees will be offered up to \$1,000 worth of fully paid ordinary shares in Wesfarmers (shares) for nil consideration (for the purpose of section 139C(3)), and may be offered shares under an effective salary sacrifice arrangement (SSA) (within the meaning of paragraphs 19 to 23 inclusive of Taxation Ruling TR 2001/10).
14. An offer of shares is subject to Wesfarmers achieving performance targets.
15. Eligible employees are Australian full time and part time employees of an employer company within the group (employer company) who are invited to participate in the plan.
16. Where an offer does not involve an SSA, and the offer is not declined by a specified date (intended to be 3 weeks after the offer), acceptance of the offer by an eligible employee is presumed.
17. However, where an offer does involve an SSA, formal acceptance using a prescribed form or on-line facility is required within 3 weeks of the offer.
18. Following acceptance of an offer, an eligible employee then becomes a participant in the plan.
19. The applicant has advised that for the purposes of subsection 139CD(5) and paragraph 139GF(2)(a), at least 75% of the permanent employees of an employer company will be entitled to acquire shares under the plan.
20. The applicant has advised that the following features of the offer under the plan are the same for all eligible employees of an employer company:
  - the consideration (being nil) for the acquisition of shares;
  - the number of shares offered being up to a specified dollar value;
  - the time for acceptance of the offer (intended to be 3 weeks); and
  - the steps taken for the circulation of information about the offer being internal intranet and/or Power Point presentations, posters, invitation letters and plan booklets.

21. Under the plan, Wesfarmers will make contributions to the trust to allow the trustee to either subscribe for shares or acquire shares on-market.

22. Shares acquired by the trustee under the plan will be allocated to a participant and held by the trustee on behalf of the participant until the expiration of a trading lock.

23. All shares acquired under the plan will be listed on the Australian Securities Exchange (ASX).

### **Disposal restrictions**

24. The applicant has advised that the plan will be operated so that disposal restrictions will be imposed through a trading lock by the trustee.

25. Under the trading lock, a participant will not be permitted to dispose of or otherwise deal with a share allocated to them under the plan until the earliest of:

- 3 years from the date of allocation of the share to the participant; or
- when the participant ceases to be employed within the meaning of subsection 139CE(5).

26. The plan provides the Wesfarmers Board (the Board) with the discretion to remove the trading lock prior to the expiration of 3 years from the date of the allocation of shares to a participant. However, the applicant has advised that it is not intended that the Board will exercise this discretion at any time.

27. When shares allocated under the plan are no longer subject to the trading lock, the participant may direct the trustee to transfer the shares into the participant's name, or sell the shares and pay the proceeds to the participant.

28. The plan provides that shares allocated to a participant cannot be forfeited by the participant for any reason.

29. The applicant has also advised that at no time will a participant:

- hold a legal or beneficial interest in more than 5% of the shares in Wesfarmers; 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 Wesfarmers.

## Ruling

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30. A share acquired by a participant under the plan will be a share acquired under an employee share scheme within the meaning of section 139C and will be a qualifying share within the meaning of section 139CD.

31. Section 139D does not apply to a participant in relation to a share acquired by the trustee and allocated to the participant under the plan.

### **Where a participant makes a section 139E election**

32. Where a participant makes an election under section 139E in relation to shares acquired under the plan, the discount given in relation to the shares will only be included in the assessable income of the participant to the extent that it is greater than \$1000, in accordance with section 139BA.

### ***Capital gains tax***

33. Where the disposal restrictions applying to a participant's allocated share are lifted, 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).

34. Where a participant disposes of a share (CGT event A1 in section 104-10 of the ITAA 1997), the 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).

35. 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 (at which time the participant acquired a beneficial interest in the share), pursuant to subsection 130-80(3) of the ITAA 1997.

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

**Where a participant does not make a section 139E election**

37. Where a participant does not make a section 139E election, the discount given in relation to a share acquired by a participant under the plan will be included in the assessable income of the participant in the year of income in which the cessation time occurs, in accordance with subsection 139B(3).

38. Under section 139CA, the cessation time will be the earliest of:

- the time when the participant disposes of the share;
- the time when the trading lock ceases to apply;
- the time when the participant ceases employment within the meaning of subsection 139CA(3); or
- the end of the 10 year period starting when the participant acquired the share.

***Capital gains tax***

39. When the disposal restrictions applying to a participant's allocated share are lifted, 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 a participant makes pursuant to subsection 104-75(5) is disregarded pursuant to subsection 104-75(6).

**Disposal within 30 days**

40. Where a participant subsequently disposes of a share in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time will be the amount or value of any consideration received on the disposal of the share, in accordance with subsection 139CC(3).

***Capital gains tax***

41. Where a participant disposes of a share in an arm's length transaction at or within 30 days after the cessation time of the share, any capital gain or loss made from the disposal is disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

**Disposal after 30 days**

42. Where a share is not disposed of by the participant in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the share (determined under section 139FA) at the cessation time, under subsection 139CC(4).



## ***Capital gains tax***

43. Where a share is not disposed of by the participant in an arm's length transaction within 30 days of the cessation time, the participant makes a capital gain where the capital proceeds from the ultimate 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, pursuant to subsection 104-10(4) of the ITAA 1997.

44. The first element of the cost base and reduced cost base of a share is the market value calculated under section 139FA of the ITAA 1936, of the share at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997.

45. Where a participant disposes of a share more than 12 months after the disposal restrictions are lifted and the participant became absolutely entitled to the share, any capital gain from the disposal will be a discount capital gain, pursuant to Subdivision 115-A of the ITAA 1997.

## **Qualified person with respect to dividends**

46. In the absence of any other long or short positions in respect of the shares that may result in a material diminution in the risk of loss or opportunity for gain, the plan will not prevent a participant from being a qualified person for the purposes of section 207-150 of the ITAA 1997 with respect to dividends received by them on shares acquired under the plan, provided the shares are held for the requisite period of time during the relevant qualification period.

## 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.*

47. An employee will acquire a share under an employee share scheme, for the purposes of Division 13A, if the share is:

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

48. Section 139G provides that a person will acquire a share in several circumstances, including by acquiring a beneficial interest in a share.

49. A participant will acquire a share within the meaning of section 139G when the share is allocated to them by the trustee (that is, when the participant acquires a beneficial interest in the share).

50. The plan was established by Wesfarmers as part of the group's compensation and benefits packages for their employees. As such, any share acquired by a participant under the plan is considered to be acquired in respect of their employment, for the purposes of subsection 139C(1).

51. As no consideration is paid or given by a participant for the acquisition of a share, the participant will acquire the share for less than market value pursuant to subsection 139C(3). Consideration for the purposes of subsection 139C(3) does not include an amount sacrificed under an effective SSA as described in paragraphs 19 to 23 inclusive of Taxation Ruling TR 2001/10.

52. Therefore, a share acquired by a participant under the plan will be acquired under an employee share scheme for the purposes of Division 13A.

### Qualifying share

53. In order for a share to be a qualifying share, the conditions set out in section 139CD must be satisfied. These conditions are as follows:

- (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)).

54. For the reasons set out in paragraphs 47 to 52 of this Ruling, it is accepted that a share will be acquired by a participant under an employee share scheme when a share is allotted to the participant by the trustee under the plan. Therefore, the first condition is satisfied.

55. As a share under the plan will only be offered to employees of an employer company, the second condition is satisfied.

56. All of the shares available for acquisition under the plan are ordinary shares. Therefore, the third condition is satisfied.

57. The applicant has advised that at least 75% of permanent employees of each employer company will have the opportunity to participate in the plan. Therefore, the Commissioner accepts that the fourth condition is satisfied.

58. The applicant has also advised that no participant will hold a legal or beneficial interest in more than 5% of the shares in Wesfarmers, 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 Wesfarmers. Therefore, the Commissioner accepts that the conditions in subsections 139CD(6) and 139CD(7) are satisfied.

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

60. 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.

61. Where the share is a qualifying share, the amount of the discount and the year of income in which the discount is included will depend on whether the participant makes a section 139E election.

**Share acquired by trustee**

62. Section 139D provides that where a taxpayer acquires a share in respect of, or for or in relation directly or indirectly to, any employment of, or services rendered by, an associate of the taxpayer, then the associate is assessable in respect of the acquisition of the share by the taxpayer.

63. Section 139G provides that a person will acquire a share in several circumstances, including by acquiring a legal interest in the share, or by having it allotted or transferred to them by another person.

64. Therefore, under section 139D, it could be concluded that where a trustee acquires a legal interest in a share that relates directly or indirectly to any employment or services rendered by an employee, the employee could have an amount included in their assessable income in respect of the share obtained by the trustee.

65. However, subsection 139C(5) provides that a taxpayer does not acquire a share or right under an employee share scheme if the taxpayer is the trustee of a trust whose sole activities are obtaining shares, or rights to acquire shares, and providing those shares or rights to employees of a company or to associates of those employees.

66. The applicant has advised that the trust's activities are limited solely to those necessary for the proper administration of the plan and the LTIP. Therefore, the Commissioner accepts that the trust meets the sole activities test for the purposes of subsection 139CD(5).

67. Consequently, a share acquired by the trustee will not be a share acquired under an employee share scheme pursuant to subsection 139C(5) and section 139D will not apply to a participant in relation to a share acquired by the trustee and allocated to the participant under the plan.

**Where a participant makes a section 139E election**

68. Where a participant makes an election under section 139E in respect of the year of income in which a share is acquired, the discount given in relation to each share is included in the participant's assessable income in the year of income in which the share is acquired, in accordance with section 139B.

69. However, the amount to be included the participant's assessable income may be reduced under section 139BA if the exemption conditions in section 139CE are satisfied in relation to shares covered by the election.

## Exemption conditions

70. Section 139CE contains exemption conditions that must be satisfied by an employee share scheme before an employee participating in such a scheme can access the \$1,000 reduction provided for in subsection 139BA(2).

71. The exemption conditions that must be satisfied are:

- the scheme does not have any conditions that could result in any employee forfeiting ownership of any 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 is operated on a non-discriminatory basis in accordance with section 139GF.

72. As to the first exemption condition, the plan does not contain any forfeiture conditions that could result in any employee forfeiting ownership of any share that was acquired under the plan. Therefore, the first condition is satisfied.

73. The applicant has advised that the plan will be operated so that there is a trading lock on all shares acquired under the plan that prevent a participant from disposing of, or otherwise dealing with, a share acquired under the plan until the earliest of:

- 3 years from the date of allocation of the share to the participant; or
- when the participant ceases employment within the meaning of subsection 139CE(5).

74. As set out in paragraph 26 of this Ruling, the applicant has advised that the Board does not at any time intend exercising the discretion provided in the plan to remove the trading lock prior to the expiration of 3 years from the date of allocation of a share to a participant. Therefore, it is accepted that the second exemption condition will be satisfied.

75. As to the third exemption condition, section 139GF sets out the conditions that must be satisfied for an employee share scheme and any scheme for the provision of financial assistance under the scheme to be operated on a non-discriminatory basis. As the applicant has advised that there is no provision of financial assistance under the plan, the relevant conditions in section 139GF are as follows:

- participation in the scheme is open to at least 75% of permanent employees of the employer;
- the time for the acceptance of each offer is reasonable; and
- the essential features of each offer are the same for at least 75% of permanent employees of the employer, namely:
  - the consideration for the acquisition of the share concerned (whether that consideration is determined by reference to the value of the share or otherwise);
  - the number of shares, the minimum number of shares or the maximum number of shares offered to each employee, as the case may be;
  - the time for acceptance of the offer; and
  - the steps taken for the circulation of information about the offer.

76. As to the first condition, the applicant has advised that participation in the plan will be open to at least 75% of the permanent employees of each employer company. Therefore, the first condition is satisfied.

77. As to the second condition, the applicant has advised that the time for acceptance of each offer is intended to be three weeks. The Commissioner accepts this is a reasonable time for acceptance of an offer and, therefore, the second condition is satisfied.

78. As to the third condition, the applicant has advised that the essential features of each offer made under the plan will be the same for all eligible employees of an employer company. Therefore, the Commissioner accepts that the third condition is satisfied.

79. Therefore, an offer made under the plan to employees of an employer company will satisfy all of the conditions in section 139GF, and will be an employee share scheme operated on non-discriminatory basis for the purposes of the third exemption condition in section 139CE.

80. As all of the exemption conditions in section 139CE will be satisfied in relation to a share acquired by a participant under the plan, section 139BA will apply so that only the total discount on the shares greater than \$1,000 (if any) will be included in the participant's assessable income in the year of income in which the shares are acquired.

## ***Capital gains tax***

81. Where the disposal restrictions applying to a participant's allocated share are lifted, 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).

82. Where a participant disposes of a share (CGT event A1 in section 104-10 of the ITAA 1997), the 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).

83. 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 (at which time the participant acquired a beneficial interest in the share), pursuant to subsection 130-80(3) of the ITAA 1997.

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

## **Where a participant does not make a section 139E election**

85. Where a participant acquires a qualifying share and does not make a section 139E election, the discount given in relation to the share is included in the participant's assessable income in the year of income in which the cessation time occurs, under subsection 139B(3).

86. Under these circumstances the \$1,000 reduction amount provided for in subsection 139BA(2) is not available to the participant.

87. As the plan contains restrictions that prevent a participant from dealing with a share acquired under the plan before a particular time, the cessation time will be determined in accordance with subsection 139CA(2) and will be the earlier of:

- the time when the participant disposes of the share;
- the time when the trading lock on the share ceases to have effect; or
- the time the participant ceases to be employed by their employer or a group company, under subsection 139CA(3).

88. 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 within 30 days of the cessation time.

### ***Capital gains tax***

89. When the disposal restrictions applying to a participant's allocated share are lifted, 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 a participant makes pursuant to subsection 104-75(5) is disregarded pursuant to subsection 104-75(6).

### **Disposal within 30 days**

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

### ***Capital gains tax***

91. Where a participant disposes of a share in an arm's length transaction at or within 30 days after the cessation time of the share, any capital gain or loss made from the disposal is disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

### **Disposal after 30 days**

92. Where a participant does not dispose of a share in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the share (determined under section 139FA) at the cessation time less the amount or value of any consideration paid or given by the employee for the acquisition of the share, pursuant to subsection 139CC(4).



## ***Capital gains tax***

93. Where a share is not disposed of by the participant in an arm's length transaction within 30 days of the cessation time, the participant makes a capital gain where the capital proceeds from the ultimate 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, pursuant to subsection 104-10(4) of the ITAA 1997.

94. The first element of the cost base and reduced cost base of a share is the market value calculated under section 139FA, of the share at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997.

95. Where a participant disposes of a share more than 12 months after the disposal restrictions are lifted and the participant became absolutely entitled to the share, any capital gain from the disposal will be a discount capital gain, pursuant to Subdivision 115-A of the ITAA 1997.

## **Qualified person with respect to dividends**

96. Where a franked dividend is paid indirectly to an entity on the shares, paragraph 207-150(1)(a) of the ITAA 1997 denies a gross-up and tax offset where the entity is not a qualified person for the purposes of the former Division 1A of Part IIIA of the ITAA 1936.

97. A participant will be a qualified person in relation to all dividends paid during a year of income on all shares that the participant held or held an interest in, if the total imputation credits in relation to the dividends do not exceed \$5,000. If the total imputation credits for a year of income exceed \$5,000 then, broadly speaking, the participant must satisfy both the holding period rule and the related payments rule in order to be a qualified person in respect of the dividend.

98. A participant will be taken to be a qualified person in respect of a dividend if the relevant shares are held at risk for a period of 45 days during the primary qualification period where no related payments are made, or the secondary qualification period where related payments are made.

99. Under former subsection 160APHM(2), a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the net position of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares.

100. The net position of a shareholder with respect to shares is determined in accordance with the former subsection 160APHJ(5). However, former subsection 160APHJ(2), in defining the meaning of position provides:

....if a share, or an interest in a share, is an employee share scheme security, a condition attached to the share or interest, or a term of the document that created the interest, that prevents the holder of the share or interest from disposing of it or could result in the share or interest being forfeited is not a position in relation to the share or interest.

101. Shares acquired by a participant will be employee share scheme securities, as defined in former section 160APHD, as they will be qualifying shares for the purposes of Division 13A.

102. The conditions attaching to those shares which prevent their disposal (that is, the trading lock) will by virtue of the definition referred to above, not constitute a position in relation to those shares for the purposes of the former Division 1A of Part IIIA.

103. As the terms of the plan do not give rise to a position that may affect the calculation of the net position with respect to the shares, they will not consequently result in a material diminution of risks and opportunities with respect to the shares.

104. Therefore, in the absence of any other long or short positions in respect of the shares that may result in a material diminution in the risk of loss or opportunity for gain, the plan will not prevent a participant from being a qualified person for the purposes of section 207-150 of the ITAA 1997 with respect to dividends received by them on shares acquired under the plan, provided the shares are held for the requisite period of time during the relevant qualification period.

## Appendix 2 – Detailed contents list

105. 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

### *Subject references:*

- acquisition of shares
- capital gains tax
- CGT cost base
- CGT discount
- CGT event E5
- employee share ownership
- employee share schemes & options
- qualifying shares
- share discounts on employee share

### *Legislative references:*

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