


CR 2010/73 - Income tax: Macquarie Group Employee Retained Equity Plan

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Class Ruling

Income tax: Macquarie Group Employee Retained Equity 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

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 83A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Subdivision 83A-C of the ITAA 1997;
- section 83A-110 of the ITAA 1997;
- section 83A-115 of the ITAA 1997;
- section 83A-120 of the ITAA 1997;
- section 83A-125 of the ITAA 1997;
- section 83A-310 of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- subsection 104-75(1) of the ITAA 1997;

- subsection 110-25(2) of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-15 of the ITAA 1997;
- section 112-20 of the ITAA 1997;
- section 116-30 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- section 130-85 of the ITAA 1997;
- subsection 130-90(1) of the ITAA 1997; and
- section 134-1 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 employees (including directors) of Macquarie Group Limited or its subsidiaries (as defined in the *Corporations Act 2001*) (Macquarie) who:

- have acquired, under the Macquarie Group Employee Retained Equity Plan (the Plan):
 - restricted share units; and/or
 - performance share units;
- for the whole of the vesting period, are residents of Australia (within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936));
- are not temporary residents (within the meaning of subsection 995-1(1) of the ITAA 1997); and
- have not, at the time of acquisition, notified Macquarie of their intention to retire.

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 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 9 to 48 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 2009. 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 including their request for a class ruling dated 14 April 2010.

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

Remuneration arrangements

10. Macquarie's remuneration structure includes a performance based profit share arrangement.

11. Prior to 1 July 2009 eligible employees received their profit share (retained profit share amount) in a series of cash payments over specified periods with the payments being subject to specified vesting conditions (essentially a deferred potential cash bonus scheme).

12. Effective from the 2010 income year Macquarie has made changes to its remuneration arrangements with the retained profit share amount no longer all being paid in cash. Instead, a portion of the retained profit share will be provided in the form of Macquarie shares (shares) or rights to acquire shares.

13. To implement the changes, Macquarie established the Plan under which employees (eligible employees including directors of Macquarie) are offered shares or rights in the form of:

- restricted share units (RSU) – being beneficial interests in shares held in a trust for the participant;
- deferred share units (DSU) – being rights to receive shares in the future; and
- performance share units (PSU) – being either RSUs or DSUs that are subject to performance hurdles.

14. Where participants are awarded PSUs under the Plan, all PSUs are in the form of DSUs, that is all PSUs are performance rights.

Share trust

15. Macquarie has established a trust (the Trust) for the purposes of subscribing for or acquiring, delivering, allocating and holding shares in Macquarie for participants of the Plan under the terms and conditions set out in the Trust deed.

RSU awards

16. Macquarie will invite employees to acquire RSUs under the Plan with the number of RSUs being determined by an employee's annual retained profit share amount.

17. Eligible employees promoted to director level and new employees joining Macquarie will be invited to acquire a predetermined number of RSU awards under the Plan.

18. Employees will also be invited to move some or all of their pre 2009 retained profit share into the Plan, converting their profit share into RSUs.

19. Once the offers to acquire RSUs are accepted, Macquarie will make loans or contributions to the trustee to fund the acquisition of shares for allocation under the Plan.

20. The RSU is subject to certain conditions including:

- a vesting period;
- a non-disposal period;
- any relevant requirements as set out in the offer; and
- disqualifying events.

Vesting period

21. Different vesting periods apply to the RSU awards depending on the position the participant holds in Macquarie and the reason for allocation of the RSU. Except as mentioned below, the vesting time for the first tranche will generally be on the first day of a staff trading window, two or three years after acquisition of the RSU. Remaining tranches will vest over a set period of time.

22. For those participants who moved their pre 2009 retained profit share amount into the Plan, the first vesting time for the resulting RSUs is the first day of a staff trading window after 1 July 2010.

Non-disposal period

23. Restrictions under Macquarie's personal dealing policy will apply to shares acquired pursuant to RSUs.

Forfeiture***Ceasing employment***

24. Under the Plan, participants who cease employment prior to vesting of their RSUs will forfeit their RSUs.

25. However, the Plan rules contain good leaver provisions that allow Macquarie to exercise its discretion to allow participants to retain their unvested RSUs when they cease employment due to:

- retirement;
- redundancy;
- death;
- total and permanent disability; or
- other limited exceptional circumstances.

26. In all cases where the discretion is exercised in these special circumstances to allow participants to retain their unvested RSUs (accelerating the vesting period), Macquarie may impose further conditions on the RSUs as it determines appropriate. The release of shares will be subject to any such conditions and terms of the Plan rules relating to the withdrawal of shares.

27. Macquarie's general discretion to waive the vesting period, the non-disposal period or any other conditions that may have been imposed will not be exercised on a routine basis to allow participants voluntarily ceasing employment to receive their unvested RSUs.

Retirement

28. The term retirement is not defined in the Plan rules. There is no prescribed retirement age, nor is there any right to withdrawal of shares upon retirement. Where a participant is retiring and they have a record of sustained contribution and commitment to Macquarie over a considerable period of time, Macquarie may, in its absolute discretion in appropriate circumstances and on termination of the employment, accelerate the vesting period such that the RSUs are not forfeited.

29. In considering whether the discretion should be exercised in a particular case, the following factors may be taken into account:

- whether the participant demonstrates that he/she is genuinely retiring from the industries within which Macquarie operates and competes;
- whether the participant is likely to work at any time in the future within the industries within which Macquarie operates and competes;
- whether the participant is likely to work full-time in any capacity, including directorship and consultancy;
- whether the participant has facilitated an appropriate succession strategy; and
- the participant's length of service with the Macquarie group, reflecting a sustained contribution and commitment to Macquarie.

Disqualifying events

30. A participant who was an Executive Director will forfeit their RSUs if the Macquarie Board determines the participant has, whilst employed by Macquarie or since leaving, carried out any of the following disqualifying events:

- committed an act of dishonesty;
- committed a significant and wilful breach of duty that causes material damage to Macquarie;
- joined a competitor of Macquarie;
- taken staff to a competitor or been instrumental in or causing staff to go to a competitor; or
- otherwise acted, or failed to act, in a way that damages Macquarie where the action or inaction leads to material financial restatement, a significant financial loss or any significant reputational harm to Macquarie or its businesses.

Dividend entitlement

31. Participants are entitled to any dividends paid by Macquarie in respect of shares allocated to them but held by the trustee of the Trust.

Withdrawal of shares

32. Participants may submit a notice of withdrawal of shares to Macquarie, or as directed by Macquarie, provided:

- (a) the vesting period has expired;
- (b) the non-disposal period has expired; and
- (c) if applicable, any relevant requirements have expired or been satisfied or waived.

33. Subject to the rules regarding forfeiture, Macquarie must agree to the request in the notice of withdrawal of shares and direct the trustee to act in accordance with the notice, including the transfer or sale of the shares.

PSU awards

34. Certain employees will be invited by Macquarie, under the Plan, to receive PSUs structured as DSUs. The DSUs are zero exercise price options to acquire shares that are subject to performance hurdles.

35. Participants will have no dividend or distribution entitlements in respect of their PSUs.

Vesting period

36. The PSUs will vest in three equal tranches, with the first vesting time on 1 July, two years after the allocation date. Vesting is subject to continued employment and satisfaction of performance hurdles.

Forfeiture***Ceasing employment***

37. Under the Plan, unvested PSUs will be forfeited when a participant ceases employment with Macquarie.

38. However, Macquarie may consider exercising its discretion for PSUs to vest early or for exercise conditions to be waived, and the PSUs not to be forfeited where a participant ceases employment due to:

- retirement;
- redundancy;

- death;
- total and permanent disability; or
- other limited exceptional circumstances.

Performance hurdles

39. The PSUs can only vest and become exercisable upon the achievement of two separate performance hurdles. Each performance hurdle will apply individually to 50 per cent of each tranche of PSUs acquired by a participant.

40. The first performance hurdle is based on a measure of the relative average annual return on ordinary equity over the vesting period, compared to a group of similar companies.

41. The second performance hurdle is based on a measure of compound average annual growth in reported financial year earnings per share over the vesting period.

42. Each performance hurdle is to be examined once only, at the calendar quarter end immediately before the vesting date of the particular tranche. If the hurdle is not met the PSUs will not vest, unless the exercise condition is waived.

43. Vesting of both performance hurdles is on a straight line sliding scale based on the performance measures.

44. Macquarie's general discretion to waive the employment conditions, the performance hurdles, the non-disposal period or any other conditions that may have been imposed will not be exercised on a routine basis to allow participants voluntarily ceasing employment to exercise their unvested PSUs.

Shares and non-disposal period

45. Restrictions under Macquarie's personal dealing policy will apply to shares acquired on exercise of a PSU.

46. Those shares will either be:

- provided directly to the participant by Macquarie; or
- allocated by the trustee for the benefit of the participant.

47. Participants may submit a notice of withdrawal of shares to Macquarie, or as directed by Macquarie, provided:

- (a) the vesting period has expired;
- (b) the non-disposal period has expired; and
- (c) if applicable, any relevant requirements have expired or been satisfied or waived.

48. Subject to the rules regarding forfeiture, Macquarie must agree to the request in the notice of withdrawal of shares and where those shares are held by the trustee, direct the trustee to act in accordance with the notice, including the transfer or sale of the shares.

Ruling

ESS interests acquired under an employee share scheme

49. Where under the Plan a participant is granted an RSU or a PSU, they have acquired an ESS interest under an employee share scheme, for the purposes of Division 83A.

RSUs acquired under the Plan

Subdivision 83A-C: real risk of forfeiture

50. The Commissioner accepts that RSUs acquired by participants under the Plan are at real risk of forfeiture and that Subdivision 83A-C applies to the RSUs.

51. No amount will be included in a participant's assessable income under Division 83A until the ESS deferred taxing point occurs.

ESS deferred taxing point

52. The ESS deferred taxing point will be determined in accordance with section 83A-115.

Amount included in assessable income

53. The market value of the RSU at the ESS deferred taxing point is included in the participant's assessable income in the income year in which the deferred taxing point occurs, in accordance with section 83A-110. The amount will be reduced by the cost base of the RSU.

CGT consequences

Allocation of RSU

54. Where a participant is allocated an RSU via the Trust the participant is taken to be absolutely entitled to the share from the time of acquisition of the ESS interest in accordance with subsection 130-85(2).

55. Where a participant is taken to be absolutely entitled to the share allocated via the Trust, CGT event E5 happens in accordance with subsection 104-75(1).

56. Any capital gain or capital loss made by the participant from CGT event E5 happening on or before the ESS deferred taxing point is disregarded in accordance with subsection 130-80(1).

Where ESS deferred taxing point of RSU happens before disposal of share acquired pursuant to RSU

57. Where the ESS deferred taxing point of an RSU occurs before disposal of the share acquired pursuant to the RSU:

- the time of acquisition of the share is taken to be immediately after the ESS deferred taxing point, in accordance with section 83A-125, and
- the first element of cost base and reduced cost base of the share is its market value immediately after the ESS deferred taxing point, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

Where ESS deferred taxing point of RSU happens at time of disposal of share acquired pursuant to RSU

58. Where the ESS deferred taxing point of an RSU happens at the time of disposal of the share acquired pursuant to the RSU, any capital gain or capital loss made by a participant from that disposal is disregarded in accordance with subsection 130-80(1).

Forfeiture of RSU

59. Where, in relation to an RSU:

- an amount is included in a participant's assessable income under Subdivision 83A-C;
- the participant forfeits the RSU; and
- the forfeiture or loss is not the result of a choice by the participant, other than a choice to cease employment,

then, under section 83A-310, the inclusion of the amount in assessable income is taken never to have happened.

60. Participants will be entitled to interest on overpayments in accordance with the *Taxation (Interest on Overpayments and Early Payments) Act 1983* (T(IOEP)A).

CGT consequences of forfeiture of RSU

Where RSU is forfeited on or before the ESS deferred taxing point

61. Where an RSU is forfeited on or before the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

62. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)). In accordance with subsection 130-80(2), where CGT event C2 happens because you forfeit an RSU on or before the ESS deferred taxing point, subsection 130-80(1) does not apply to disregard any capital gain or capital loss.

63. Although a participant pays nothing for an RSU, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4).

64. Although a participant receives no capital proceeds from the forfeiture of the RSU the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4).

65. Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting an RSU.

Where RSU is forfeited after ESS deferred taxing point

66. Where an RSU is forfeited after the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

67. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

If section 83A-310 applies

68. If section 83A-310 applies in relation to the forfeiture of an RSU after the ESS deferred taxing point and the participant pays nothing for the RSU, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4). Where a participant receives no capital proceeds from the forfeiture of the RSU, the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4). Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting an RSU after the ESS deferred taxing point if section 83A-310 applies.

If section 83A-310 does not apply

69. If section 83A-310 does not apply in relation to a forfeiture of an RSU after the ESS deferred taxing point, the first element of the reduced cost base of the RSU is its market value immediately after its ESS deferred taxing point, in accordance with section 83A-125, section 112-15 and subsection 110-55(2). Where a participant receives no capital proceeds from the forfeiture of the RSU, the market value substitution rule for capital proceeds in section 116-30 does not apply, in accordance with subsection 130-80(4). Therefore, if a participant receives no capital proceeds, the participant will make a capital loss from forfeiting an RSU after the ESS deferred taxing point if section 83A-310 does not apply.

Dividends

70. Dividends paid in respect of shares to which a participant is beneficially entitled pursuant to an RSU are included in the assessable income of the participant in the year they are paid.

PSUs acquired under the Plan

Subdivision 83A-C: real risk of forfeiture

71. The Commissioner accepts that PSUs acquired by participants under the Plan are at real risk of forfeiture and that Subdivision 83A-C applies to the PSUs.

72. No amount will be included in a participant's assessable income until the ESS deferred taxing point occurs.

ESS deferred taxing point

73. The ESS deferred taxing point will be determined in accordance with section 83A-120.

Amount included in assessable income

74. The market value of the PSU at the ESS deferred taxing point is included in the participant's assessable income in the income year in which the ESS deferred taxing point occurs, in accordance with section 83A-110. The amount will be reduced by the cost base of the PSU.

CGT consequences

Grant of PSU

75. The granting of a PSU to a participant does not result in a CGT event for the participant.

Exercise of PSU on or before ESS deferred taxing point

76. Where a PSU is exercised on or before the application of section 83A-120 any capital gain or capital loss arising from the exercise of the PSU is disregarded in accordance with subsection 130-80(1).

77. Where a PSU is exercised and the participant acquires a beneficial interest in a share held by the trustee, any capital gain or capital loss made by the participant on or before the ESS deferred taxing point is disregarded in accordance with subsection 130-80(1).

78. Where a participant who has acquired a beneficial interest in a share held by the trustee on the exercise of a PSU on or before the ESS deferred taxing point and acquires that share from the trustee:

- the time of acquisition of that share is immediately after the ESS deferred taxing point of the PSU, in accordance with section 83A-125, and
- the first element of cost base and reduced cost base of the share is its market value immediately after the ESS deferred taxing point of the PSU, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

79. Any capital gain or capital loss made by a participant from CGT event E5 happening after the ESS deferred taxing point is disregarded in accordance with subsection 130-90(1).

Exercise of PSU after ESS deferred taxing point

80. Where a PSU is exercised after the ESS deferred taxing point:

- the time of acquisition of the PSU is immediately after the ESS deferred taxing point of the PSU, in accordance with section 83A-125, and
- the first element of cost base and reduced cost base of the PSU is its market value immediately after the ESS deferred taxing point of the PSU, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

81. Where a PSU is exercised after the ESS deferred taxing point, subsection 134-1(4) disregards any capital gain or capital loss that the participant makes from exercising the PSU. Where a PSU is exercised, the participant acquires a beneficial interest in a share held by the trustee of the Trust or issued directly by Macquarie.

82. Where a participant who has acquired a beneficial interest in a share held by the trustee on the exercise of a PSU becomes absolutely entitled as against the trustee to that share, CGT event E5 happens, in accordance with subsection 104-75(1).

83. Any capital gain or capital loss made by a participant from CGT event E5 happening is disregarded in accordance with subsection 130-90(1).

84. Where a participant who has acquired a beneficial interest in a share held by the trustee on the exercise of a PSU after the ESS deferred taxing point and acquires the share from the trustee, the first element of cost base and reduced cost base of the share will be taken to be the cost base of the PSU, which is the market value of the PSU at the deferred taxing point in accordance with section 83A-125, section 112-15 and subsection 134-1(1) item 1.

Where ESS deferred taxing point of PSU happens at time of disposal of share acquired pursuant to PSU

85. Where the ESS deferred taxing point of a PSU happens at the time of disposal of the share acquired pursuant to the PSU, any capital gain or capital loss made by a participant from that disposal is disregarded in accordance with subsection 130-80(1).

Forfeiture of PSU

86. Where, in relation to a PSU:

- an amount is included in a participant's assessable income under Subdivision 83A-C;
- the participant forfeits or loses the PSU, without having exercised it; and
- the forfeiture or loss is not the result of a choice by the participant, other than a choice to cease employment,

then, under section 83A-310, the inclusion of the amount in assessable income is taken never to have happened.

87. Participants will be entitled to interest on overpayments in accordance with the T(IOEP)A.

CGT consequences of forfeiture of PSU

Where PSU is forfeited on or before ESS deferred taxing point

88. Where a PSU is forfeited on or before the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

89. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)). In accordance with subsection 130-80(2), where CGT event C2 happens because you forfeit a PSU on or before the ESS deferred taxing point, subsection 130-80(1) does not apply to disregard any capital gain or capital loss.

90. Although a participant pays nothing for a PSU, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4).

91. Although a participant receives no capital proceeds from the forfeiture of the PSU, the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4).

92. Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting a PSU.

Where PSU is forfeited after ESS deferred taxing point

93. Where a PSU is forfeited after the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

94. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

If section 83A-310 applies

95. If section 83A-310 applies in relation to a forfeiture of a PSU after the ESS deferred taxing point and the participant pays nothing for the PSU, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4). Where a participant receives no capital proceeds from the forfeiture of the PSU, the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4). Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting a PSU after the ESS deferred taxing point if section 83A-310 applies.

If section 83A-310 does not apply

96. If section 83A-310 does not apply in relation to a forfeiture of a PSU after the ESS deferred taxing point, the first element of the reduced cost base of the PSU is its market value immediately after its ESS deferred taxing point, in accordance with section 83A-125, section 112-15 and subsection 110-55(2). Where a participant receives no capital proceeds from the forfeiture of the PSU, the market value substitution rule for capital proceeds in section 116-30 does not apply, in accordance with subsection 130-80(4). Therefore, if a participant receives no capital proceeds, the participant will make a capital loss from forfeiting a PSU after the ESS deferred taxing point if section 83A-310 does not apply.

Employee share trust

97. The Trust is an employee share trust for the purposes of subsection 130-85(4).

Commissioner of Taxation

8 December 2010

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.***

ESS interests acquired under an employee share scheme

98. Where an ESS interest is acquired under an employee share scheme at a discount on or after 1 July 2009, the discount in relation to the ESS interest is included in the assessable income of an employee, in accordance with Division 83A.

99. An ESS interest in a company is defined in subsection 83A-10(1) as a beneficial interest in:

- (a) a share in the company; or
- (b) a right to acquire a beneficial interest in a share in the company.

100. An employee share scheme is defined in subsection 83A-10(2) as a scheme under which ESS interests in a company are provided to employees, or associates of employees, of the company, or a subsidiary of the company, in relation to the employee's employment.

101. A company director will, pursuant to section 83A-325, be treated as an employee for the purposes of Division 83A where they receive directors fees in respect of their services as a director.

102. Thus, where under the Plan a participant is issued an RSU or a PSU, they will acquire an ESS interest under an employee share scheme.

103. As participants do not pay for their RSUs or PSUs they will be acquired at a discount and, pursuant to subsection 83A-20(1), Subdivision 83A-B will apply to the RSUs and PSUs acquired by participants under the Plan, unless Subdivision 83A-C applies.

RSUs acquired under the Plan

Subdivision 83A-C

104. Subdivision 83A-C provides that where certain conditions are satisfied the discount in relation to an ESS interest in a company is not included in an employee's assessable income when they acquire the interest. Instead the assessable income of the participant will include at a later time (the deferred taxing point) any gain made in relation to the interest up until the deferred taxing point. The conditions to be satisfied for a share are listed at subsection 83A-105(1).

105. The first condition is that Subdivision 83A-B would, but for subsection 83A-105(1), have applied to the ESS interest.

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106. The second condition is that the ESS interest be an interest in the company that employed the employee, or the holding company of that company (subsection 83A-35(3)).

107. The third condition is that all ESS interests available under the employee share scheme must relate to ordinary shares (subsection 83A-35(4)).

108. The fourth condition is that:

- the predominant business of the company in which ESS interests are acquired is not the acquisition, sale or holding of shares, securities or other investments (directly or indirectly); and
- the employee is not employed by that company and also a subsidiary of that company or a holding company of that company, or a subsidiary of the holding company (subsection 83A-35(5)).

109. The fifth condition is that immediately after the ESS interest is acquired the employee will not hold a beneficial interest in greater than five per cent of the shares, or be in a position to control the casting of greater than five per cent of the votes that might be cast at a general meeting of the company (subsection 83A-35(9)).

110. If the ESS interest is a beneficial interest in a share, the sixth condition is that when the interest is acquired at least 75% of the permanent employees of the employer who have completed at least three years of service with the employer and are Australian residents, are, or have been at an earlier time, entitled to acquire:

- ESS interests under the employee share scheme of the employer; or
- ESS interests in another scheme of the employer or the holding company of the employer (subsection 83A-105(2)).

111. The Commissioner accepts for the purposes of Subdivision 83A-C, in relation to the participants and RSUs allocated under the Plan, that the first six conditions have been satisfied.

112. The seventh condition, for an ESS interest that is a share, is that either:

- the employee share scheme must provide ESS interests through a salary sacrifice arrangement that satisfies the requirements of subsection 83A-105(4); or
- there must, at the time the ESS interest is acquired, be a real risk under the conditions of the scheme, that the ESS interest be forfeited or lost, other than by disposal (subsections 83A-105(3) and 83A-105(4)).

113. As RSUs are not provided through a salary sacrifice arrangement that satisfies the requirements of subsection 83A-105(4), the seventh condition will only be satisfied and Subdivision 83A-C apply to the RSUs to defer the taxing point, if the Plan provides a real risk of forfeiture.

Real risk of forfeiture

114. The Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 (the Explanatory Memorandum), which inserted Division 83A into the ITAA 1997, explains the 'real risk of forfeiture' test at paragraph 1.156 as follows:

The 'real risk of forfeiture' test does not require employers to provide schemes in which their employee share scheme benefits are at a significant or substantial risk of being lost. However, real is regarded as something more than a mere possibility. Something is not a real risk if a reasonable person would disregard the risk as highly unlikely to occur or as nothing more than a rare eventuality or possibility.

115. It is further explained at paragraph 1.158 of the Explanatory Memorandum that the 'real risk of forfeiture' test is intended to provide for deferral of tax when there is a real alignment of interests between the employee and employer, through the employee's benefits being at risk.

116. In order for the 'real risk of forfeiture' test to be satisfied, in relation to an ESS interest acquired by an employee under an employee share scheme, a reasonable person must consider that there is an actual possibility of forfeiture. Furthermore the risk of forfeiture must be 'real', not nominal, artificial or contrived. There must be more than a mere possibility.

117. 'Real' is defined in *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne as 'actually existing as a thing or occurring in fact' and 'genuine; rightly so called; not artificial or merely apparent'.

118. When considering whether a condition in a scheme imposes a real risk of forfeiture, the Commissioner will have regard to whether a reasonable person would consider that there is a genuine connection between the forfeiture condition and aligning the interests of the employee and employer.

119. Real risk of forfeiture in a scheme may include conditions where retention of the ESS interests is subject to performance hurdles or a minimum term of employment.

120. If a participant ceases employment with Macquarie before the vesting of their RSUs, under the Plan rules the RSUs will be forfeited unless the Board determines otherwise in its absolute discretion.

121. The vesting periods that apply under the Plan differ depending on the position held by the participant in Macquarie, and the circumstances under which the RSUs are acquired. The RSUs vest in a series of tranches over a set period of time.

122. The first possible vesting time is two or three years after acquisition other than for those participants who moved their pre 2009 retained profit share amount into the Plan. The first vesting time for those amounts is the first staff trading day after 1 July 2010. This is less than 12 months after acquisition.

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123. The Commissioner accepts that a condition of an employee share scheme that imposes a minimum term of employment of at least 12 months provides more than a 'mere' or 'rare' possibility of forfeiture. Such a condition does not prevent a scheme from having a purpose of retaining employees and aligning their interests with the interests of the company.

124. Where a minimum employment period is less than 12 months, the Commissioner accepts that the 'real risk of forfeiture' test is met if the risk is genuine, having regard to the circumstances and the deferral period under the scheme.

125. The non-disposal period that applies to RSUs acquired in relation to a participant's pre 2009 retained profit share amount is not different to that which applies to other RSUs. No additional disposal restrictions apply to these RSUs enabling further deferral of the taxing time.

126. Subject to the discussion below regarding Macquarie's discretion, it is accepted that the 'real risk of forfeiture' test is met for all RSUs granted under the Plan.

'Special circumstances' – good leaver conditions

127. The Plan rules provide that Macquarie has a discretion to allow participants to retain their unvested RSUs when they cease employment due to:

- retirement;
- redundancy;
- death;
- total and permanent disability; or
- other limited exceptional circumstances.

128. If an employee share scheme has good leaver conditions that allow ESS interests to be retained in the event of death, invalidity or bona fide redundancy the Commissioner accepts those conditions do not prevent the interests being at a real risk of forfeiture provided that the scheme is operated in accordance with the conditions.

Furthermore, employees must not routinely receive the interests regardless of their reason for ceasing employment.

129. These exceptions are outside the control of a participant and will not prevent the risk of forfeiture for the participant from being real if they cease employment with Macquarie in normal circumstances.

130. Under the Plan there is no prescribed retirement age, or automatic vesting on retirement. No participant will know at the time they acquire their RSUs whether they will receive their unvested RSUs if they retire during the vesting period as no participant can predict with confidence whether Macquarie will exercise its discretion favourably at the time of their retirement.

131. Macquarie will have regard to a range of factors when determining whether the discretion should be exercised for a participant who is retiring, and these factors may vary for different participants. Factors which may be considered are listed at paragraph 29 of this Ruling.

132. The applicant has advised that the discretion will not be exercised on a routine basis to allow participants voluntarily ceasing employment to receive their unvested RSUs.

133. As Macquarie's discretion is not routinely exercised, the Commissioner accepts that the availability of the discretion does not prevent the RSUs from being at a real risk of forfeiture.

134. Therefore, under the Plan rules there is a real risk that a participant will forfeit or lose their RSUs, other than by disposing of them. The seventh condition at paragraph 112 of this Ruling is satisfied. Subsection 83A-105(3) will apply to the RSUs acquired by a participant under the Plan.

135. As a result, Subdivision 83A-C applies to the RSUs, and Subdivision 83A-B does not apply. The taxation of discounts received under the Plan will be deferred until a deferred taxing point.

ESS deferred taxing point

136. When Subdivision 83A-C applies to an ESS interest, an amount will be included in the assessable income of an employee in accordance with section 83A-110 at the ESS deferred taxing point.

137. Section 83A-115 will apply in determining the ESS deferred taxing point, as the RSUs are ESS interests that are shares.

138. The ESS deferred taxing point for a participant will be at the earliest of the following times:

- seven years after the participant was granted the RSU;
- when the participant ceases the employment in respect of which they acquired their RSU, within the meaning of section 83A-330; or
- when there is no real risk of forfeiture and the Plan no longer genuinely restricts the disposal of the RSU.

139. If the RSU is disposed of within 30 days of the ESS deferred taxing point calculated above, the taxing point will instead be the date of disposal.

140. There will no longer be a real risk of forfeiture under the Plan when the vesting period has expired, or been removed by exercise of Macquarie's discretion.

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141. A genuine disposal restriction must exist in the conditions of an employee share scheme at the time that the employee acquires the ESS interest. The restriction can be a condition of a scheme that prohibits disposal or it can be provided for in an employee's employment contract. The restriction should be enforced (for example, by a holding lock or by the shares being held in a trust) or there should be serious and enforced consequences for breaching the condition.

142. A scheme does not genuinely restrict disposal of an ESS interest if an employee can take action to dispose of the interest. However, a restriction that can be lifted in special circumstances or in cases of financial hardship can be a genuine disposal restriction.

143. A genuine disposal restriction is taken to be lifted on the first date on which an employee has an opportunity to dispose of their ESS interest. It does not matter whether or not they choose to do so.

144. Where genuine trading restrictions are lifted during trading windows allowing shares to be traded, and at the end of each trading window the disposal restrictions again apply, the restrictions are taken to be lifted at the start of each window. This is the time when an employee first has an opportunity to dispose of their shares.

145. The applicant has advised that Macquarie's Personal Dealing Policy and insider trading laws may apply to restrict disposal of the shares, for example where a participant is in possession of price sensitive information which is not publicly available. These restrictions are enforced and there are sanctions for breaches. There are also designated staff trading windows, and participants may only dispose of their shares during those windows.

146. The Plan will no longer restrict disposal of the shares at the first time during a staff trading window when these trading restrictions no longer apply and a participant is able to dispose of their shares.

Amount included in assessable income

147. The amount to be included in assessable income will be the market value of the interest at the ESS deferred taxing point, reduced by the cost base of the interest, in accordance with section 83A-110.

148. The ordinary meaning of market value is used for determining the value of ESS interests.

149. Where the RSUs have been disposed of, the Commissioner accepts that the market value can be the amount received where the disposal was at arm's length.

150. The cost base of the RSUs is determined under Division 110. As the RSUs are acquired for no consideration, the cost base will be nil, unless incidental costs have been incurred.

CGT consequences*Allocation of RSU*

151. Where a participant is allocated an RSU via the Trust the participant is taken to be absolutely entitled to the share from the time of acquisition of the ESS interest in accordance with subsection 130-85(2).

152. Where a participant is taken to be absolutely entitled to the share allocated via the Trust, CGT event E5 happens in accordance with subsection 104-75(1).

153. Any capital gain or capital loss made by the participant from CGT event E5 happening on or before the ESS deferred taxing point is disregarded in accordance with subsection 130-80(1).

Where ESS deferred taxing point of RSU happens before disposal of share acquired pursuant to RSU

154. Where the ESS deferred taxing point of an RSU occurs before disposal of the share acquired pursuant to the RSU:

- the time of acquisition of the share is taken to be immediately after the ESS deferred taxing point, in accordance with section 83A-125, and
- the first element of cost base and reduced cost base of the share is its market value immediately after the ESS deferred taxing point, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

Where ESS deferred taxing point of RSU happens at time of disposal of share acquired pursuant to RSU

155. Where the ESS deferred taxing point of an RSU happens at the time of disposal of the share acquired pursuant to the RSU, any capital gain or capital loss made by a participant from that disposal is disregarded in accordance with subsection 130-80(1).

Forfeiture of RSU

156. Where an amount of discount is included in assessable income in respect of ESS interests granted under an employee share scheme, and the interests are subsequently forfeited, section 83A-310 may apply to ensure Division 83A is taken never to have applied.

157. Section 83A-310 will apply if:

- the conditions of the scheme do not have the direct effect of protecting employees from a fall in the market value of the ESS interest; or
- there was no choice but to forfeit the ESS interest, except when the choice is to cease employment.

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158. Where under the Plan a participant forfeits their RSU because they ceased employment, and Macquarie's discretion was not exercised, section 83A-310 will apply.

159. No amount will be included in a participant's assessable income in respect of a forfeited RSU. Where an amount has been included in an earlier year, then the participant can request an amendment to exclude that amount. There is no time limit for amending an assessment to exclude an amount in these circumstances, pursuant to subsection 170(10AA) of the ITAA 1936.

160. Part III of the T(IOEP)A will apply to determine interest which may be payable in respect of any refund of tax paid.

CGT consequences of forfeiture of RSU

Where RSU is forfeited on or before ESS deferred taxing point

161. Where an RSU is forfeited on or before the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

162. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)). In accordance with subsection 130-80(2), where CGT event C2 happens because you forfeit an RSU on or before the ESS deferred taxing point, subsection 130-80(1) does not apply to disregard any capital gain or capital loss.

163. Although a participant pays nothing for an RSU, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4).

164. Although a participant receives no capital proceeds from the forfeiture of the RSU, the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4).

165. Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting an RSU.

Where RSU is forfeited after ESS deferred taxing point

166. Where an RSU is forfeited after the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

167. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

If section 83A-310 applies

168. If section 83A-310 applies in relation to a forfeiture of an RSU after the ESS deferred taxing point and the participant pays nothing for the RSU, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4). Where a participant receives no capital proceeds from the forfeiture of the RSU, the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4). Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting an RSU after the ESS deferred taxing point if section 83A-310 applies.

If section 83A-310 does not apply

169. If section 83A-310 does not apply in relation to a forfeiture of an RSU after the ESS deferred taxing point, the first element of the reduced cost base of the RSU is its market value immediately after its ESS deferred taxing point, in accordance with section 83A-125, section 112-15 and subsection 110-55(2). Where a participant receives no capital proceeds from the forfeiture of the RSU, the market value substitution rule for capital proceeds in section 116-30 does not apply, in accordance with subsection 130-80(4). Therefore, if a participant receives no capital proceeds, the participant will make a capital loss from forfeiting an RSU after the ESS deferred taxing point if section 83A-310 does not apply.

Dividends

170. In accord with subsection 207-35(3) a participant will include any franking credit and dividend in their assessable income and, if they satisfy the qualified person rules, will be entitled to a tax offset as set out in section 207-45, Tax offset – distribution flows indirectly to an entity.

Qualified person

171. Paragraph 207-145(1)(a) provides that in relation to a franked dividend made to an entity, only a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIA of the ITAA 1936 is entitled to a franking credit or tax offset. A taxpayer is generally considered a qualified person and entitled to the franking credits attached to the shares if the shares, or an interest in the shares held satisfy both the holding period rule and the related payments rule.

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Holding period rules

172. The holding period rule under the former subsection 160APHO(2) of the ITAA 1936 requires shareholders to hold the shares or the interests in the shares, on which the dividend is paid at risk for a continuous period of at least 45 days during the qualification period. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

173. Under former subsection 160APHM(2) of the ITAA 1936, 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.

174. Essentially, the risks and opportunities in relation to shares will be diminished if an entity enters into a position, for example, a hedge that would change the net position on those shares. However, based on the Plan conditions under which participants are granted ESS interests, there is no position entered into over the shares as part of the transaction. As such, the Trust and the participant (indirectly) will have held the shares or ESS interests at risk for the qualification period.

Related payments rule

175. Former section 160APHO of the ITAA 1936 further provided that an entity would not be a qualified person where a related payment of the dividend was paid in respect of a share. 'Related payment' was defined in former subsection 160APHN(2) of the ITAA 1936 as having an obligation to pass the benefit of the dividend or distribution to one or more others.

176. Based on the information provided, none of the payments in the scheme have the effect of passing on Macquarie's benefit of the dividends on the shares to another party. Accordingly, the participant is entitled to the franking tax offset under section 207-20 in respect of franked dividends received on the Macquarie shares.

PSUs acquired under the Plan

Subdivision 83A-C

177. The conditions to be satisfied for deferral of tax in respect of the discount in relation to an ESS interest which is a right to acquire a share are listed at subsection 83A-105(1).

178. The first five conditions are the same that apply to an ESS interest which is a share. See paragraphs 105 to 109 of this Ruling.

179. The Commissioner accepts for the purposes of Subdivision 83A-C, in relation to the participants and PSUs allocated under the Plan, that the first five conditions have been satisfied.

180. The sixth condition is that there must be a real risk, under the scheme rules, when the ESS interest is acquired,

- of forfeiting or losing the ESS interest, other than by disposing it, exercising the right or letting the right lapse; or
- of forfeiting or losing the beneficial interest in the share that was acquired on exercise of the right, other than by disposing of it (paragraph 83A-105(3)(b)).

181. If the Plan provides a real risk of forfeiture that satisfies the sixth condition, then the discount in relation to the PSU is not included in a participant's income when they acquire it. Instead the assessable income of the participant at the deferred taxing point will include any gain made in relation to the interest up until that point.

Real risk of forfeiture

182. See paragraphs 114 to 119 of this Ruling for factors the Commissioner considers when deciding if an employee share scheme provides a real risk of forfeiture on grant of an ESS interest. In cases where an employee share scheme has both employment and performance conditions to be met, and one of these conditions satisfies the 'real risk of forfeiture' test, it is not necessary to consider whether the other condition also satisfies the test.

183. Where there is some doubt whether a condition will satisfy the 'real risk of forfeiture' test then the other condition will also be examined.

184. PSUs granted to participants under the Plan vest over three years, with the first possible vesting time two years after grant. Unvested PSUs may be forfeited if the participant ceases employment with Macquarie. PSUs can only vest and be exercised if specified performance hurdles have been achieved before the vesting time. The PSUs will lapse to the extent that the performance hurdles are not achieved

185. As the minimum employment period before vesting is greater than 12 months, then subject to the discussion below regarding the discretion of the Board, it is accepted that the 'real risk of forfeiture' test is met for PSUs granted under the Plan.

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'Special circumstances' – good leaver conditions

186. See paragraphs 37 and 38 of this Ruling for more information about the participants in 'special circumstances', and the discretion available to the Board.

187. A discretion is available to the Board to consider any relevant matter when determining the treatment of a participant's PSUs in circumstances such as death or termination of employment. The Board may reduce the vesting period, extend the exercise period or waive the performance hurdles.

188. The applicant has advised that the discretion will not be exercised on a routine basis to allow participants voluntarily ceasing employment to receive their unvested PSUs.

189. As Macquarie's discretion is not routinely exercised to allow a participant to retain their PSUs, the Commissioner does not consider that the availability of a discretion in the 'special circumstances' as described will prevent the PSUs from being at real risk of forfeiture. This discretion is consistent with the purpose of the scheme to align the interests of employees with the interests of shareholders.

190. Therefore, as there is a real risk that a participant will forfeit or lose their PSUs, other than by disposing of them, the sixth condition at paragraph 180 of this Ruling is satisfied. Subsection 83A-105(3) will apply to the PSUs acquired by a participant under the Plan.

191. As a result, Subdivision 83A-C applies to the PSUs, and Subdivision 83A-B does not apply. The taxation of discounts received under the Plan will be deferred until a deferred taxing point.

ESS deferred taxing point

192. Section 83A-120 will apply in determining the ESS deferred taxing point, as the PSUs are ESS interests that are rights.

193. The ESS deferred taxing point for a participant with a PSU will be at the earliest of the following times:

- seven years after the participant was granted the PSU;
- when the participant ceases the employment in respect of which they acquired their PSU, within the meaning of section 83A-330;
- when there is no real risk of forfeiting the PSU; and
- when there is no real risk of forfeiting the PSU or the resulting share, and the Plan no longer genuinely restricts exercise of the PSU or disposal of the resulting share.

194. If the PSU is exercised and the resulting share is disposed of within 30 days of the ESS deferred taxing point calculated above, the taxing point will instead be the date of disposal.

195. There will no longer be a real risk of forfeiture under the Plan when the vesting period has expired, and the performance hurdles have been met, or at the time these conditions are removed at the discretion of the Board in 'special circumstances'.

196. The Plan will no longer restrict disposal of shares acquired from the exercise of a PSU at the first time during a staff trading window when trading restrictions no longer apply and a participant is able to dispose of their shares.

Amount included in assessable income

197. The amount to be included in assessable income will be the market value of the interest at the ESS deferred taxing point, reduced by the cost base of the interest, in accordance with section 83A-110.

198. The ordinary meaning of market value is used for determining the value of ESS interests.

199. However, subsection 83A-315(1) provides that an amount specified as market value in the regulations is to be used, if the regulations specify such an amount.

200. Regulation 83A-315.01 of the Income Tax Assessment Regulations 1997 applies to unlisted rights that must be exercised within ten years of acquisition.

201. Under this regulation a participant can choose to value a PSU at either:

- the market value according to its ordinary meaning; or
- the amount determined by application of the regulations.

202. However, a participant must determine the market value of the PSU according to its ordinary meaning where the deferred taxing point for the PSU occurs on the day the participant disposes of the share acquired on exercise of the PSU.

203. Where there has been a disposal of the shares acquired on exercise of the PSU and the disposal was at arm's length, the Commissioner will accept the amount received as being the market value.

204. The cost base of the PSUs is determined under Division 110. As the PSUs are acquired for no consideration, the cost base will be nil, unless incidental costs have been incurred.

CGT consequences

Grant of PSU

205. The granting of a PSU to a participant does not result in a CGT event for the participant.

Exercise of PSU on or before ESS deferred taxing point

206. Where a PSU is exercised on or before the application of section 83A-120 any capital gain or capital loss arising from the exercise of the PSU is disregarded in accordance with subsection 130-80(1) (subsection 134-1(1) Note 4).

207. Where a PSU is exercised and the participant acquires a beneficial interest in a share held by the trustee, any capital gain or capital loss made by the participant on or before the ESS deferred taxing point is disregarded in accordance with subsection 130-80(1).

208. Where a participant who has acquired a beneficial interest in a share held by the trustee on the exercise of a PSU on or before the ESS deferred taxing point and acquires that share from the trustee:

- the time of acquisition of that share is immediately after the ESS deferred taxing point of the PSU, in accordance with section 83A-125, and
- the first element of cost base and reduced cost base of the share is its market value immediately after the ESS deferred taxing point of the PSU, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

209. Any capital gain or capital loss made by a participant from CGT event E5 happening after the ESS deferred taxing point is disregarded in accordance with subsection 130-90(1).

Exercise of PSU after ESS deferred taxing point

210. Where a PSU is exercised after the ESS deferred taxing point:

- the time of acquisition of the PSU is immediately after the ESS deferred taxing point of the PSU, in accordance with section 83A-125, and
- the first element of cost base and reduced cost base of the PSU is its market value immediately after the ESS deferred taxing point of the PSU, in accordance with section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2).

211. Where a PSU is exercised after the ESS deferred taxing point, subsection 134-1(4) disregards any capital gain or capital loss that the participant makes from exercising the PSU. Where a PSU is exercised, the participant acquires a beneficial interest in a share held by the trustee of the Trust or issued directly by Macquarie.

212. Where a participant who has acquired a beneficial interest in a share held by the trustee on the exercise of a PSU becomes absolutely entitled as against the trustee to that share, CGT event E5 happens, in accordance with subsection 104-75(1).

213. Any capital gain or capital loss made by a participant from CGT event E5 happening is disregarded in accordance with subsection 130-90(1).

214. Where a participant who has acquired a beneficial interest in a share held by the trustee on the exercise of a PSU after the ESS deferred taxing point and acquires the share from the trustee, the first element of cost base and reduced cost base of the share will be taken to be the cost base of the PSU, which is the market value of the PSU at the deferred taxing point in accordance with section 83A-125, section 112-15 and subsection 134-1(1) item 1.

Where ESS deferred taxing point of PSU happens at time of disposal of share acquired pursuant to PSU

215. Where the ESS deferred taxing point of a PSU happens at the time of disposal of the share acquired pursuant to the PSU, any capital gain or capital loss made by a participant from that disposal is disregarded in accordance with subsection 130-80(1).

Forfeiture of PSU

216. Where an amount of discount is included in assessable income in respect of ESS interests granted under an employee share scheme, and the interests are subsequently forfeited, section 83A-310 may apply to ensure Division 83A is taken never to have applied.

217. Section 83A-310 will apply if:

- the conditions of the scheme do not have the direct effect of protecting employees from a fall in the market value of the ESS interest; or
- there was no choice but to forfeit the ESS interest, except when the choice is to cease employment.

218. Where under the Plan:

- a participant forfeits or loses a PSU because they ceased employment;
- Macquarie's discretion was not exercised to enable them to retain the PSU; and
- the participant had not at any time been in a position where they could have chosen to exercise the PSU,

then section 83A-310 will apply and Division 83A will be taken never to have applied to that PSU.

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219. No amount will be included in a participant's assessable income in respect of a forfeited PSU. Where an amount has been included in an earlier year, then the participant can request an amendment to exclude that amount. There is no time limit for amending an assessment to exclude an amount in these circumstances, pursuant to subsection 170(10AA) of the ITAA 1936.

220. Part III of the T(IOEP)A will apply to determine interest which may be payable in respect of any refund of tax paid.

CGT consequences of forfeiture of PSU

Where PSU is forfeited on or before ESS deferred taxing point

221. Where a PSU is forfeited on or before the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

222. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)). In accordance with subsection 130-80(2), where CGT event C2 happens because you forfeit a PSU on or before the ESS deferred taxing point, subsection 130-80(1) does not apply to disregard any capital gain or capital loss.

223. Although a participant pays nothing for a PSU, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4).

224. Although a participant receives no capital proceeds from the forfeiture of the PSU, the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4).

225. Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting a PSU.

Where PSU is forfeited after ESS deferred taxing point

226. Where a PSU is forfeited after the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

227. Where CGT event C2 happens, you make a capital gain if the capital proceeds from the event are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)).

If section 83A-310 applies

228. If section 83A-310 applies in relation to a forfeiture of a PSU after the ESS deferred taxing point and the participant pays nothing for the PSU, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4). Where a participant receives no capital proceeds from the forfeiture of the PSU, the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4). Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting a PSU after the ESS deferred taxing point if section 83A-310 applies.

If section 83A-310 does not apply

229. If section 83A-310 does not apply in relation to a forfeiture of a PSU after the ESS deferred taxing point, the first element of the reduced cost base of the PSU is its market value immediately after its ESS deferred taxing point, in accordance with section 83A-125, section 112-15 and subsection 110-55(2). Where a participant receives no capital proceeds from the forfeiture of the PSU, the market value substitution rule for capital proceeds in section 116-30 does not apply, in accordance with subsection 130-80(4). Therefore, if a participant receives no capital proceeds, the participant will make a capital loss from forfeiting a PSU after the ESS deferred taxing point if section 83A-310 does not apply.

Employee share trust

230. An employee share trust is defined in subsection 995-1(1) as having the meaning given by subsection 130-85(4).

231. Subsection 130-85(4) provides that:

an **employee share trust**, for an *employee share scheme, is a trust whose sole activities are:

- (a) obtaining *shares or rights in a company; and
- (b) ensuring that *ESS interests in the company that are beneficial interests in those shares or rights are provided under the employee share scheme to employees, or to *associates of employees, of:
 - (i) the company; or
 - (ii) a *subsidiary of the company; and
- (c) other activities that are merely incidental to the activities mentioned in paragraphs (a) and (b).

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232. The Trust deed for the Plan provides that the trustee will purchase or subscribe for shares in Macquarie (being ESS interests), to satisfy obligations to participants under the Plan (an employee share scheme).

233. The Trust deed also provides that the trustee will distribute dividends and other benefits to participants, send notices of general meetings and organise voting rights for participants, manage investments, determine annual distributable income and administer the Plan in accordance with the Trust deed.

234. These activities, which are a necessary part of managing the Plan and administering the Trust, are considered to be incidental activities covered by paragraph 130-85(4)(c).

235. The Trust deed does not provide for any additional benefits to be available for employees.

236. Accordingly, the Trust is an employee share trust for the purposes of subsection 130-85(4).

Appendix 2 – Detailed contents list

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