


# ***CR 2011/39 - Income tax: AXA Asia Pacific Holdings Limited - proposed AMP Limited Acquisition - Employee Share Scheme - Tax Deferred Plan***

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## Class Ruling

### Income tax: AXA Asia Pacific Holdings Limited – proposed AMP Limited Acquisition – Employee Share Scheme – Tax Deferred Plan

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#### **❶ This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant 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 Class Ruling are:

- Former Division 13A of Part III (Division 13A) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Subdivision 130-D of the ITAA 1997; and
- Section 83A-5 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997).

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

**Class of entities**

3. The class of entities to which this Ruling applies is all persons who acquired AXA Asia Pacific Holdings Limited (AXA APH) shares (AXA APH shares) under the AXA APH General Tax Deferred Plan (Plan) on or before 30 June 2009, while they were employees of AXA APH or one of its wholly owned subsidiaries (AXA APH group). They are persons who, during the period, hold the relevant shares (Plan Shares) in AXA APH, that is, from the time of acquisition until the time of the proposed AMP Limited (AMP) Acquisition (AMP Acquisition) (described in paragraphs 16 to 25 of this Ruling) and:

- have not previously made an election under former section 139E of the ITAA 1936 in respect of their Plan Shares and have not had a cessation time for the purposes of former subsection 139B(3) of the ITAA 1936 in respect of their Plan Shares immediately before the AMP Acquisition; and
- are residents of Australia for the purposes of the Australian income tax legislation, including by virtue of the operation of any double tax agreement between Australia and any other country;
- are not 'temporary residents' of Australia within the meaning of section 995-1;
- are not engaged in 'foreign service' within the meaning of former section 139GBA of the ITAA 1936;
- immediately before the proposed AMP Acquisition hold a legal or beneficial interest in the relevant shares in AXA APH; and
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their Plan Shares.

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

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

**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 25 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 2010. The Ruling continues to apply to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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9. The scheme that is the subject of this ruling is described below. The following documents, or relevant parts of them form part of and are to be read with the description:

- the request for class ruling from AXA APH dated 3 December 2010;
- sample AXA Asia Pacific Holdings – General Employee Share Plan booklet;
- the National Mutual Group, Australian General Employee Share Plan, Tax Deferred Plan Rules (Plan Rules);
- the Merger Implementation Deed (executed on 29 November 2010) between AXA Asia Pacific Holdings Limited and AMP Limited (Merger Implementation Deed); and

- the Framework Deed (executed on 29 November 2010) between AXA Asia Pacific Holdings Limited, AMP Limited and AXA Société Anonyme (AXA SA).

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

### **AXA APH Deferred Plan**

10. The AXA APH group operates a number of employee share schemes including the Plan.

11. Shares acquired under the Plan are registered and held in a participating employee's name subject to the Plan Rules. There is no trust arrangement involved in the administration or operation of the Plan.

12. Plan Shares acquired by participating employees under the Plan are provided at no cost to the participating employee, being funded via effective salary sacrifice arrangements.

13. AXA APH has advised that:

- the Plan has been implemented in a manner intended to allow participating employees to obtain the benefit of tax deferral available under former Division 13A of the ITAA 1936; and
- the Plan Shares have been provided in a manner to ensure that they are qualifying shares for the purposes of former Division 13A of the ITAA 1936.

14. AXA APH has advised that approximately 279 participating employees have acquired AXA APH shares since 1 December 2000 following ten separate offers made under the Plan.

15. Plan Shares held by participating employees immediately prior to the proposed AMP Acquisition are subject to disposal restrictions and/or forfeiture under the Plan Rules.

### **Proposed AMP Acquisition of the AXA APH group**

16. AXA SA, AXA APH and AMP have entered into an arrangement under which:

- (a) AMP (or a wholly-owned subsidiary of AMP) will acquire from AXA SA and its subsidiaries all of the fully paid ordinary shares in AXA APH that are held by and registered in the name of AXA SA and/or its subsidiaries, being 53.9% of the total number of AXA APH ordinary shares on issue (Share Sale Transaction);

- (b) AMP (or a wholly-owned subsidiary of AMP) will acquire the remaining (being 46.1%) AXA APH ordinary shares pursuant to a scheme of arrangement (under section 411 of the *Corporations Act 2001* (Corporations Act)) between AXA APH and the holders of those AXA APH shares (AXA APH Minority Shareholders) hereinafter referred to as the Share Scheme. The Share Scheme is subject to the approval of AXA APH Minority Shareholders and the Supreme Court of Victoria;
- (c) AXA APH will propose a further scheme of arrangement under section 411 of the Corporations Act between AXA APH and the registered holders of AXA APH rights granted under the Executive Performance Plan 2004 (AXA APH Rightsholders) pursuant to which all AXA APH rights on issue at the Scheme Record Date will be cancelled (Rights Scheme). The Rights Scheme is subject to the approval of AXA APH Rightsholders and the Supreme Court of Victoria; and
- (d) by a further transaction, AMP will retain all of the Australian and New Zealand business operations of the AXA APH group, and AXA SA will acquire all of the Asian business operations of the AXA APH group.

17. AXA APH will become a wholly owned subsidiary of AMP after the Share Sale Transaction and the Share Scheme are approved and implemented. AXA APH and its wholly owned subsidiaries will then form part of the AMP consolidated group for income tax purposes.

18. All participating employees of the AXA APH group will continue their employment with AXA APH or the relevant subsidiary following the AMP Acquisition.

19. AXA APH has advised that the proposed AMP Acquisition operates independently of the operation of the Plan.

#### **Plan Shares held under the Share Scheme after the proposed AMP Acquisition**

20. After the proposed Share Scheme is approved, existing Plan Shares held by the participating employees will be acquired by AMP (or a wholly-owned subsidiary of AMP) by operation of the Share Scheme. The participating employees will receive for each of their AXA APH ordinary shares:

- (a) 0.73 fully paid ordinary shares in AMP (Share Component); and
- (b) a variable cash amount described in the Merger Implementation Deed (Cash Component).

21. The Share Component and the Cash Component together form the consideration provided for each AXA APH ordinary share (AMP Consideration).

22. The Cash Component is subject to adjustments to reflect movements in the AMP daily volume weighted average share price for a period of 10 trading days immediately following the effective date of the Share Scheme (AMP VWAP). This mechanism is designed to:

- (a) provide to participating employees an AMP Consideration of \$6.43 in value for each AXA APH ordinary share if the AMP VWAP is between \$4.50 and \$5.60 per share; and
- (b) allow participating employees to benefit from any increase in the AMP share price when the AMP VWAP exceeds \$5.60.

23. If the AMP share price falls below \$4.50 prior to the shareholders' meeting under the Share Scheme, AXA APH is entitled to terminate the proposed AMP Acquisition.

24. The terms of the Share Scheme seek to ensure that all AXA APH Minority Shareholders (including participating employees) will receive the AMP Consideration equivalent to their economic interest in AXA APH prior to the AMP Acquisition.

25. AMP shares received by the participating employees are not subject to restrictions on disposal or forfeiture.

## **Ruling**

26. Where a participating employee:

- has not made an election under former section 139E of the ITAA 1936 covering Plan Shares acquired in a year of income; and
- a cessation time has not happened in relation to the Plan Shares prior to the proposed AMP Acquisition,

Subdivision 83A-C (and the rest of Division 83A to the extent that it relates to that Subdivision) will apply to the participating employee's Plan Shares (ESS interests).

27. Where the proposed AMP Acquisition occurs:

- it will constitute a 100% takeover for the purposes of former Division 13A of the ITAA 1936;
- the AMP shares acquired by participating employees as replacements for their Plan Shares (replacement AMP shares) will be regarded as a continuation of their Plan Shares for the purposes of Division 83A and former Division 13A of the ITAA 1936; and

- a participating employee's employment with AMP, or one of its subsidiaries, after the AMP Acquisition, will be regarded as a continuation of their employment with AXA APH, for the purposes of former Division 13A of the ITAA 1936.

28. The ESS deferred taxing point for the Plan Shares held by participating employees will, subject to paragraph 83A-5(4)(c) of the IT(TP)A 1997, be the cessation time mentioned in former subsection 139B(3) of the ITAA 1936.

29. The cessation time for these purposes will be the time determined by reference to any of the provisions in former Division 13A of the ITAA 1936 that may be necessary to determine the cessation time.

30. To the extent that participating employees receive cash consideration for their Plan Shares the cessation time will occur at the time of the proposed AMP Acquisition in relation to those Plan Shares. This will be the deferred taxing point in respect of those shares.

31. To the extent that participating employees receive replacement AMP shares, the cessation time would be the earliest of:

- the time when participating employees dispose of their replacement AMP shares;
- the time when participating employees are no longer employed by the company which the participating employee is employed by immediately after the AMP Acquisition, or no longer employed by a subsidiary or holding company of that employer company; and
- the end of the 10 year period starting when the participating employee acquired the original Plan Shares.

32. Therefore, to the extent that participating employees receive replacement AMP shares, the ESS deferred taxing point for those shares is the cessation time as detailed in paragraph 31. However the deferred taxing point will, pursuant to paragraph 83A-5(4)(c) of the IT(TP)A 1997, be the time that the participating employee disposes of the replacement AMP shares where the disposal occurs within 30 days after the cessation time.

## **Capital Gains Tax**

### ***CGT event A1***

33. CGT event A1 happens when each Plan Share is disposed of to AMP (subsection 104-10(1)).



***Subsection 130-80(1) on disposal of Plan Share***

34. Any capital gain or capital loss on the disposal to AMP of each Plan Share to which Subdivision 83A-C applies is disregarded (subsection 130-80(1)).

***Cost base of AMP share***

35. If an AMP share is received by a participating employee on the disposal of a Plan Share to which Subdivision 83A-C applies and the participating employee continues to hold the AMP share after its ESS deferred taxing point, the first element of the cost base and reduced cost base of the AMP share is its market value immediately after its ESS deferred taxing point (section 83A-125, section 112-15 and either subsection 110-25(2) or 110-55(2)).

***Disposal of AMP share at the ESS deferred taxing point***

36. If the ESS deferred taxing point happens at the time of the disposal of the AMP share, any capital gain or capital loss is disregarded (subsection 130-80(1)).

***CGT Discount***

37. Where Subdivision 83A-C applies to the Plan Share the participating employee is taken to have acquired the AMP share, for the purposes of the CGT discount in Division 115, on the date on which the participating employee acquired legal title to the Plan Share (subparagraph 83A-5(4)(f)(i) of the IT(TP)A 1997).

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**Commissioner of Taxation****13 April 2011**

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

38. The Commissioner accepts that Plan Shares, which were acquired by participating employees prior to 1 July 2009, are qualifying shares within the meaning of former section 139CD of the ITAA 1936.

### ESS interests and deferred taxing points

39. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009. Division 83A also applies to certain shares, rights and stapled securities acquired before 1 July 2009 (transitional interests), pursuant to Subdivision 83A-A of the IT(TP)A 1997.

40. By reason of subsection 83A-5(2) of the IT(TP)A 1997, Subdivision 83A-C (and the rest of Division 83A to the extent that it relates to that Subdivision) applies in relation to Plan Shares held by participating employees under the Plan because:

- they are ESS interests within the meaning of subsection 83A-10(1) (being a beneficial interest in shares in a company);
- former subsection 139B(3) of the ITAA 1936 applies in relation to the ESS interests (that is, the Plan Shares are qualifying shares within the meaning of former section 139CD of the ITAA 1936 and are not covered by elections made under former section 139E of the ITAA 1936);
- the Plan Shares were acquired (within the meaning of former Division 13A of the ITAA 1936) before 1 July 2009; and
- the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 has not occurred before 1 July 2009.

41. Therefore, Subdivision 83A-C will apply to the Plan Shares held by participating employees immediately prior to the proposed AMP Acquisition.

42. The application of Subdivision 83A-C to transitional interests is, however, modified by subsection 83A-5(4) of the IT(TP)A 1997. Subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997 provides that where former subsection 139B(3) of the ITAA 1936 applied to a transitional interest (at the pre-Division 83A time), when applying Subdivision 83A-C, the ESS deferred taxing point for the transitional interest is treated as being the cessation time mentioned in former subsection 139B(3) of the ITAA 1936. Paragraph 83A-5(4)(c) of the IT(TP)A 1997 further provides that the deferred taxing point is shifted to the time of disposal of a transitional interest where the disposal occurs within 30 days after the cessation time.

43. Thus, whether a deferred taxing point arises when a participating employee's Plan Shares are replaced with AMP shares will depend on whether a cessation time as mentioned in former subsection 139B(3) of the ITAA 1936 happens.

44. The cessation time in relation to a participating employee's Plan Shares is determined by former subsection 139CA(2) of the ITAA 1936 which provides that the cessation time will occur at the earlier of a number of times, including:

- when the share is disposed of;
- when the share is no longer subject to disposal restrictions and forfeiture; or
- when the participating employee ceases employment within the meaning of subsection 139CA(3) of the ITAA 1936.

However, where:

- the AMP replacement share is, because of former section 139DQ of the ITAA 1936, treated as if it were a continuation of the Plan Share it replaced; and
- the participating employee's employment with the new AMP group is treated as a continuation of existing employment,

the cessation time will not happen at the AMP Acquisition time.

45. Former subsection 139DQ(1) of the ITAA 1936 provides that where, as a result of a 100% takeover:

- an employee acquires matching shares in a new company to replace shares in an old company that were acquired under an employee share scheme; and
- the conditions specified in former section 139DR of the ITAA 1936 are met,

the matching shares will be treated for the purposes of former Division 13A of the ITAA 1936 as if they were a continuation of the shares the employee held in the old company.

**100% takeover**

46. The Commissioner accepts that the proposed AMP Acquisition would constitute a 100% takeover for the purposes of former Division 13A of the ITAA 1936.

**Matching shares**

47. The Commissioner accepts that the AMP shares will be matching shares, within the meaning of former section 139DQ of the ITAA 1936.

**Former section 139DR conditions**

48. The conditions in former section 139DR of the ITAA 1936 that must be met are:

- immediately before the AMP Acquisition the participating employee must hold shares in AXA APH under the Plan;
- the participating employee must at, or about, the time they acquire the replacement AMP shares be an employee of AMP; or a holding company of AMP; or a subsidiary of AMP or of a subsidiary of a holding company of AMP;
- the replacement AMP shares must be ordinary shares; and
- at the time the participating employee acquires the replacement AMP shares:
  - they do not hold a legal or beneficial interest in more than 5% of the shares of AMP; and
  - they are not in a position to cast, or control the casting of more than 5% of the maximum number of votes that may be cast at a general meeting of AMP.

49. As the Commissioner accepts that:

- the AMP Acquisition will be a 100% takeover as defined;
- the replacement AMP shares will be matching shares; and
- the conditions specified in former section 139DR of the ITAA 1936 will be met,

former subsection 139DQ(1) of the ITAA 1936 will apply to the replacement AMP shares. Thus, for the purposes of former Division 13A of the ITAA 1936, the AMP replacement shares will be treated as if they were a continuation of participating employees' Plan Shares. Each AMP share will also be treated as a continuation of the corresponding Plan Shares, pursuant to section 83A-130.

**Continuing employment**

50. Former subsection 139DQ(3) of the ITAA 1936 relevantly provides that for the purposes of former Division 13A of the ITAA 1936 where a participating employee is employed by AMP or a subsidiary of AMP after the AMP Acquisition that employment will be treated as a continuation of the employment in respect of which they acquired their Plan Shares.

51. Therefore, as participating employees will be employed by the AMP consolidated group after the proposed AMP Acquisition their employment will be regarded as a continuation of their employment with AXA APH and they will not have ceased employment for the purposes of former paragraph 139CA(2)(c) of the ITAA 1936 and accordingly will not have a cessation time happen to them as a result of the proposed AMP Acquisition.

52. Thus, where under the AMP Acquisition a participating employee's Plan Shares are replaced with AMP shares, the AMP Acquisition will not of itself give rise to an ESS deferred taxing point.

**Deferred taxing point**

53. The AMP Acquisition will give rise to a deferred taxing point where it results in the cessation time occurring. The cessation time is determined in accordance with former section 139CA of the ITAA 1936.

**Participating employees receive cash and replacement AMP shares for Plan Shares**

54. To the extent that a participating employee receives cash for their Plan Shares it would constitute a disposal of their Plan Shares for the purposes of former paragraph 139CA(2)(a) of the ITAA 1936.

55. As none of the other paragraphs in former subsection 139CA(2) of the ITAA 1936 would apply at an earlier time, the disposal time would constitute a cessation time.

56. By virtue of the operation of subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997 the deferred taxing point will be at the cessation time.

57. To the extent that a participating employee receives replacement AMP shares for their Plan Shares, the disposal of the participating employee's Plan Shares at the time of the AMP Acquisition would not constitute a cessation time under former subsection 139CA(2) of the ITAA 1936 as the replacement AMP shares are treated as continuing shares for the purposes of former Division 13A of the ITAA 1936.

58. As a consequence of former paragraph 139CA(2)(b) of the ITAA 1936 not applying, a cessation time will only arise under former subsection 139CA(2) of the ITAA 1936 at the earliest of the following times:

- the time when the participating employee disposes of the replacement AMP share (this is because the replacement AMP share is treated by former subsection 139DQ(1) of the ITAA 1936 as a continuation of the AXA APH share originally acquired under the Plan);
- the time when the participating employee is no longer employed by the AMP group (this is because the participating employee's employment with the AMP group is treated by former subsection 139DQ(3) of the ITAA 1936 as being a continuation of the employment in respect of which the participating employee acquired their Plan Shares); and
- the end of the 10 year period starting when the participating employee acquired their Plan Shares.

59. By virtue of the operation of subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997 the deferred taxing point will be at the cessation time.

60. However, where the replacement AMP share is disposed of within 30 days of the cessation time, paragraph 83A-5(4)(c) of the IT(TP)A 1997 operates to treat the deferred taxing point as the cessation time.

### ***Capital Gains Tax***

#### ***CGT event A1***

61. CGT event A1 happens when each Plan Share is disposed of to AMP (subsection 104-10(1)).

#### ***Subsection 130-80(1) on disposal of Plan Share***

62. Subsection 130-80(1) applies to disregard any capital gain or capital loss from a CGT event if the conditions in that subsection are satisfied and subsection 130-80(2) does not apply.

63. Subdivision 83A-C applies to the Plan Shares (subsection 83A-5(2) of the IT(TP)A 1997) and, because:

- there is no forfeiture or loss of the ESS interest;
- CGT event A1 happens when each Plan Share is disposed of to AMP;
- the CGT event is not CGT event E4, G1 or K8; and

- the CGT event happens on or before the ESS deferred taxing point for the ESS interest,

any capital gain or capital loss on the disposal of each Plan Share by participating employees to AMP is disregarded under subsection 130-80(1).

#### *Cost base of AMP share*

64. Each AMP share is a continuation of the corresponding Plan Shares (section 83A-130) so that Subdivision 83A-C, including section 83A-125, applies to the AMP share as it would have applied to each Plan Share. The modification of the cost base (section 110-25) and reduced cost base (section 110-55) is facilitated by section 112-15.

#### *Disposal of AMP share at the ESS deferred taxing point*

65. Subsection 130-80(1) applies because paragraphs (a) and (b), and subparagraph (d)(ii), of that provision are satisfied. The disposal of the AMP share is subsequent to the disposal of the Plan Shares. Any capital gain or capital loss on the disposal of each Plan share has already been disregarded (subsection 130-80(1)); the AMP share is taken to have been a continuation of the corresponding Plan Shares (section 83A-130); Subdivision 83A-C continues to apply to the AMP share; and Subdivision 130-D continues to be relevant if the AMP share is disposed of on or before the time of its ESS deferred taxing point.

#### *CGT Discount*

66. Where Subdivision 83A-C applies to the Plan Share the participating employee is taken to have acquired the AMP share, for the purposes of the CGT discount in Division 115, on the date on which the participating employee acquired legal title to the Plan Share (subparagraph 83A-5(4)(f)(i) of the IT(TP)A 1997).

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

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

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## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Subject references:*

- capital gains tax
- cessation time
- CGT event
- cost base
- employee share scheme
- election
- no election
- qualifying share

### *Legislative references:*

- ITAA 1936 Pt III Div 13A
  - ITAA 1936 139B(3)
  - ITAA 1936 139CA
  - ITAA 1936 139CA(2)
  - ITAA 1936 139CA(2)(a)
  - ITAA 1936 139CA(2)(b)
  - ITAA 1936 139CA(2)(c)
  - ITAA 1936 139CA(3)
  - ITAA 1936 139CD
  - ITAA 1936 Div 13A Subdiv DA
  - ITAA 1936 139DQ
  - ITAA 1936 139DQ(1)
  - ITAA 1936 139DQ(3)
  - ITAA 1936 139DR
  - ITAA 1936 139E
  - ITAA 1936 Div 13A Subdiv F
  - ITAA 1936 139GBA
  - ITAA 1997 Div 83A
  - ITAA 1997 Div 83A Subdiv AC
  - ITAA 1997 83A-125
  - ITAA 1997 104-10(1)
  - ITAA 1997 110-25(2)
  - ITAA 1997 110-55(2)
  - ITAA 1997 112-15
  - ITAA 1997 Div 115
  - ITAA 1997 Subdiv 130D
  - ITAA 1997 130-80(1)
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  - ITAA 1997 130-80(1)(b)
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  - ITAA 1997 130-80(2)
  - ITAA 1997 Div 230
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  - IT(TP)A 1997 Subdiv 83A-A
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### ATO references

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