CR 2014/30 - Income tax: Macmahon Holdings Limited 2009 and 2013 Executive Equity Plans

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This document has changed over time. This is a consolidated version of the ruling which was published on *19 March 2014*

Class Ruling
Income tax: Macmahon Holdings Limited 2009 and 2013 Executive Equity Plans

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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);
- section 83A-105 of the ITAA 1997;
- section 83A-120 of the ITAA 1997;
- section 83A-310 of the ITAA 1997; and
- section 110-55 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is employees of Macmahon Holdings Limited (Macmahon) or subsidiaries in the Macmahon Group of companies (Macmahon Group) who:

- were granted Share Performance Rights (SPRs) under an invitation dated 1 December 2009 under the Macmahon 2009 Executive Equity Plan (2009 EEP) (2009 SPRs); and / or
- were granted SPRs under an invitation dated 1 July 2013 under the Macmahon 2013 Executive Equity Plan (2013 EEP) (2013 SPRs); and/or
- are granted SPRs under subsequent invitations under the Macmahon 2013 EEP; and
- are residents of Australia within the meaning of that expression in section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936); and
- are not 'temporary residents' within the meaning of that expression in subsection 995-1(1).

4. In this Ruling, a person belonging to this class of entities is referred to as a Participant.

Qualifications

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

6. 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 31 of this Ruling.

7. 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.

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. The following documents, or relevant parts of them, form part of and are to be read with the description:

- the application for a Class Ruling dated 23 October 2013;
- the Executive Equity Plan Invitation dated 1 December 2009;
- the Macmahon 2009 EEP Rules;
- the Executive Equity Plan Invitation dated 1 July 2013;
- the Macmahon 2013 EEP Rules; and
- additional correspondence related to the Class Ruling.

Macmahon executive equity plans

10. The Macmahon 2009 EEP and 2013 EEP are part of Macmahon's remuneration program which seeks to retain Participants in employment with Macmahon and reward Participants' performance in support of the achievement of Macmahon's business strategy. The 2009 EEP Rules and the 2013 EEP Rules provide for Participants, as nominated by the Board of Macmahon, to receive an offer of SPRs. The SPRs will only be granted to Participants upon receipt by Macmahon of a completed and signed acceptance form from the Participant. Participants are not required to make any payment for SPRs granted to them. A SPR is a right to acquire a fully paid ordinary share in the capital of Macmahon (Share) for no consideration. Each SPR that vests will entitle a Participant to receive one Share.

11. Participants are restricted from disposing of their SPRs. The grant of a SPR also does not confer any right or interest in a Share until the SPR has vested.

12. A SPR granted to a Participant will be automatically forfeited if the Participant does not remain employed by the Macmahon Group prior to the SPR vesting point ('the minimum employment condition').

13. However, the Board may determine that all or a portion of unvested SPRs are not subject to this restriction (and all or a portion of unvested SPRs are not forfeited) if any of the following events occur:

- a Participant ceases to be an employee because of any circumstance beyond the Participant's control;
- a change of control of Macmahon; or
- Macmahon is wound up or delisted.

14. The applicant has advised that:

- the Board's discretion to determine that all or a portion of unvested SPRs are not forfeited if any of these events occur will not be exercised on a routine basis;
- the predominant business of Macmahon is not the acquisition, sale or holding of shares, securities or other investments (whether directly or indirectly through one or more companies, partnerships or trusts); and
- immediately after acquiring SPRs, no Participant will hold a beneficial interest in more than 5% of the shares in Macmahon nor be in a position to cast, or to control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of Macmahon.

SPRs granted under the 2009 EEP

15. The 2009 SPRs were granted on 15 January 2010 under the 2009 EEP and are subject to the terms and conditions in the 2009 EEP Rules and the invitation relating to the offer.

Vesting conditions

16. 25% of the 2009 SPRs will be eligible to vest if Participants remained employees of the Macmahon Group for two years after the Grant Date.

17. The remaining 75% of the 2009 SPRs are subject to a relative Total Shareholder Return (TSR) performance condition. The TSR performance condition is measured over four performance periods. Participants are required to remain employees of the Macmahon Group at the end of each performance period, the first of which ends two years after the Grant Date.

18. The extent to which the remaining 75% of the 2009 SPRs are eligible to vest depends on the extent to which Macmahon satisfies the TSR performance condition determined by comparing Macmahon's TSR rank with a Comparative Group. The TSR performance condition is cumulative. If all or some SPRs are not eligible to vest at the end of a performance period the unvested SPRs are retested at the end of the subsequent performance period. Any SPRs that are not eligible to vest at the end of the last performance period will lapse.

SPRs granted under the 2013 EEP

19. The 2013 SPRs were granted on 1 July 2013 under the 2013 EEP and are subject to the terms and conditions in the 2013 EEP Rules and the invitation relating to the offer.

Vesting conditions

20. The 2013 SPRs are subject to both employment and performance conditions.

Employment condition

21. The employment condition requires a Participant to remain an employee of the Macmahon Group for three years after the Grant Date.

Performance conditions

22. In addition to the employment condition, the 2013 SPRs are subject to TSR and Earnings per Share (EPS) performance conditions to be measured over the three year period from the Grant Date. The extent to which the 2013 SPRs are eligible to vest depends on the extent to which Macmahon satisfies the TSR performance condition and the EPS performance condition determined by comparing Macmahon's TSR rank with a Comparative Group and Macmahon's EPS compound annual growth rate with set benchmarks.

23. The TSR and EPS performance conditions are not cumulative. Any SPRs that are not eligible to vest at the end of the three year performance period will lapse.

Grant of future SPRs

24. Macmahon intends to grant SPRs to eligible employees under the 2013 EEP in subsequent years. These SPRs will be subject to similar employment and performance conditions as the 2013 SPRs.

Vesting of SPRs

25. Macmahon has established a Trust and arranges for the Trustee to subscribe for or purchase Shares to be held on trust on behalf of Participants in accordance with the EEP Rules. The Trustee is not related to Macmahon and operates the Trust independently.

26. Where the vesting conditions are satisfied, all or a portion of the SPRs become eligible to vest subject to approval by the Board. When the SPRs vest, the Board will give a Vesting Notice to the Participant specifying the number of Shares to which they are entitled to receive in respect of the vested SPRs. The vested Shares will be allocated to the Participant in the Trust.

27. Once a Participant is allocated Shares in the Trust, the Participant may request the Trustee to transfer the Shares into their own name on or at any time after the Vesting Date by giving a Withdrawal Notice to the Trustee.

28. Upon receipt of a Withdrawal Notice, the Trustee will seek permission from Macmahon to transfer the Shares as requested in the Withdrawal Notice. The Trustee must not transfer Shares to a Participant until it has received permission from Macmahon. Macmahon may give or withhold this permission in its absolute discretion.

29. Until the Trustee transfers Shares to a Participant, the Participant may not dispose of Shares held by the Trustee.

30. In the event a Participant ceases employment with the Macmahon Group once their SPRs have vested, the Participant must request the Trustee to transfer their Shares to them prior to their last date of employment.

Macmahon's Share Trading Policy

31. A Participant's ability to lodge a Withdrawal Notice is considered in conjunction with Macmahon's Share Trading Policy and the Macmahon Code of Conduct. The Share Trading Policy applies to employees who are either a Director of the company, the Chairman or an 'Officer' who, in the performance of their duties may become aware of price sensitive information. As all of the Participants are presumed to be in possession of price sensitive information, Macmahon's Share Trading Policy sets out periods of time where Participants are prohibited from dealing with their Shares and also provides that Participants are prohibited from trading any Shares until they obtain approval from the Chairman, Deputy Chairman or CFO.

Ruling

32. SPRs granted to Participants under the 2009 EEP and 2013 EEP are at a real risk of forfeiture for the purpose of subsection 83A-105(3). As a result, Subdivision 83A-C applies to the SPRs.

33. The ESS deferred taxing point will be the earliest of the following times:

- when a Participant ceases employment, the date the Participant ceases employment (subsection 83A-120(5));
- the end of the seven year period commencing when the Participant acquired the SPRs (subsection 83A-120(6)); and

- the time that the Participant is first notified by the Chairman, Deputy Chairman or CFO that the Participant has been given approval to dispose of Shares allocated upon the vesting of SPRs (subsection 83A-120(7)).

34. Where a Participant disposes of vested Shares within 30 days of the first occurrence of one of the times mentioned above, the ESS deferred taxing point will instead be the time of disposal (subsection 83A-120(3)).

Forfeiture

SPRs forfeited on or before the ESS deferred taxing point

35. Division 83A will not apply where a Participant's SPRs are forfeited or lapse because:

- the vesting conditions are not met, or
- the Participant ceases employment while they hold unvested SPRs.

36. A Participant will not make a capital gain or capital loss from the forfeiture of SPRs, provided that there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element.

SPRs forfeited after the ESS deferred taxing point

37. Where in relation to a SPR:

- the Board allows a Participant who ceased employment to retain the SPR before the SPR is eligible to vest; and
- an amount is included in the Participant's assessable income under Subdivision 83A-C; and
- the unvested SPR subsequently lapses because performance conditions are not met,

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

Commissioner of Taxation
19 March 2014

Appendix 1 – Explanation

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

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

39. Each SPR granted to a Participant under the 2009 EEP and the 2013 EEP is a right to acquire a Share. As a result, SPRs granted to Participants are ESS interests for the purposes of subsection 83A-10(1), and are acquired by Participants at the time they are granted by Macmahon.

40. The SPRs will be ESS interests acquired under an employee share scheme under subsection 83A-10(2) as the SPRs are granted to Participants in relation to their employment as an employee of the Macmahon Group.

41. As the SPRs are awarded to employees for no consideration, the SPRs will be acquired at a discount.

Real risk of forfeiture

42. Subsection 83A-25(1) in Subdivision 83A-B requires that assessable income for the income year in which the ESS interest is acquired includes the discount in relation to the interest. However, Subdivision 83A-B will not apply if Subdivision 83A-C applies.

43. Subdivision 83A-C provides that where certain conditions are satisfied, the discount in relation to an ESS interest is not included in an employee's assessable income when they acquire the interest. Instead, under section 83A-110 the assessable income of the employee will include at a later time (the 'ESS deferred taxing point') any gain made in relation to the interest up until the ESS deferred taxing point. The conditions to be satisfied for the interest to be eligible for an ESS deferred taxing point are listed at subsection 83A-105(1).

44. The first condition is that Subdivision 83A-B would, but for section 83A-105, have applied to the interest.

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

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

47. The fourth condition is that:

- the predominant business of the company in which the interests are acquired is not the acquisition, sale or holding of shares, securities or other investments (directly or indirectly); or if it is
- 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)).

48. The fifth condition is that immediately after the interest is acquired the employee will not hold a beneficial interest in greater than 5% of the shares, or be in a position to control the casting of greater than 5% of the votes that might be cast at a general meeting of the company (subsection 83A-35(9)).

49. The Commissioner accepts for the purposes of Subdivision 83A-C that, in relation to SPRs acquired by a Participant under the 2009 EEP and the 2013 EEP, the first five conditions have been satisfied.

50. The sixth and final condition that must be satisfied is that there must be a real risk, under the scheme rules, that:

- the Participant will forfeit or lose the interest (other than by disposing of it, exercising the right or letting the right lapse); or
- if the right is exercised, the Participant will forfeit or lose the beneficial interest in the share (other than by disposing of it).

51. 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.

52. '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. 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.

53. The Commissioner accepts that a condition of an employee share scheme that imposes a minimum term of employment of at least twelve months provides more than a 'mere' or 'rare' possibility of forfeiture.

54. As Participants must remain employees of the Macmahon Group for at least two years after the Grant Date for 2009 SPRs to be eligible to vest and for three years after the Grant Date for 2013 SPRs, and unvested SPRs may be forfeited if a Participant ceases employment with the Macmahon Group before these times, then subject to the discussion below regarding the discretion of the Board, the Commissioner accepts that the 'real risk of forfeiture' test is met for SPRs granted under the 2009 EEP and the 2013 EEP.

55. The 2009 EEP Rules and the 2013 EEP Rules provide that the Board has a discretion to allow Participants to retain all or a portion of their unvested SPRs should they cease employment with the Macmahon Group before their SPRs are eligible to vest in any of the following events:

- any circumstance beyond a Participant's control;
- a change of control of Macmahon; or
- Macmahon is wound up or delisted.

56. As the Board's discretion is not routinely exercised, the Commissioner does not consider that the availability of the discretion will prevent SPRs granted under the 2009 EEP and 2013 EEP from being at a real risk of forfeiture.

57. As there is a real risk that Participants will forfeit or lose their SPRs other than by disposing of them, the sixth condition is satisfied. Subsection 83A-105(3) will apply to SPRs granted to Participants under the 2009 EEP and 2013 EEP.

58. As a result, Subdivision 83A-C applies to the SPRs and Subdivision 83A-B does not apply. The taxation of SPRs granted to Participants under the 2009 EEP and 2013 EEP will be deferred until an ESS deferred taxing point occurs.

ESS deferred taxing point

59. As Subdivision 83A-C applies to SPRs granted under the 2009 EEP and the 2013 EEP, section 83A-120 will apply in determining the ESS deferred taxing point.

60. Section 83A-120 provides that the ESS deferred taxing point for rights to acquire shares occurs at the earliest of the following times:

- when the right has not been exercised, there is no real risk of forfeiting the right, and the scheme no longer genuinely restricts disposal of the right (subsection 83A-120(4));
- when the Participant ceases the employment in respect of which they acquired the rights within the meaning of section 83A-330 (subsection 83A-120(5));

- seven years after the Participant acquired the rights (subsection 83A-120(6)); and
- when there is no real risk of forfeiting the right or underlying share, and the scheme no longer genuinely restricts exercise of the right or disposal of the resulting share (subsection 83A-120(7)).

61. Subsection 83A-120(4) cannot apply as Participants are restricted from disposing of SPRs.

62. Shares allocated to Participants in the Trust when SPRs vest are subject to Macmahon's Share Trading Policy. Under Macmahon's Share Trading Policy, Participants are required to obtain the approval of the Chairman, Deputy Chairman or CFO prior to disposing of Shares that there is no impediment to disposing of Shares. The Chairman, Deputy Chairman or CFO will primarily consider whether a Participant possesses price sensitive information. Participants are assumed to possess price sensitive information and are restricted from disposing of Shares until approval to dispose of the Shares is given. The Chairman, Deputy Chairman and CFO do not routinely approve the disposal of Shares.

63. As a result, the ESS deferred taxing point will be the earliest of the following times:

- when the Participant ceases employment (subsection 83A-120(5));
- the end of the seven year period commencing when the Participant acquired the SPR (subsection 83A-120(6)); and
- the time that the Participant is first notified by the Chairman, Deputy Chairman or CFO that the Participant has been given approval to dispose of Shares allocated upon the vesting of SPRs (subsection 83A-120(7)).

64. However, where a Participant disposes of vested Shares within 30 days of the first occurrence of one of the times mentioned above, the ESS deferred taxing point will instead be the time of disposal (subsection 83A-120(3)).

Forfeiture

SPRs forfeited on or before the ESS deferred taxing point

65. If the SPRs are forfeited or lapse because a Participant ceased to be an employee of the Macmahon Group before the SPRs are eligible to vest or the vesting conditions are not met, Division 83A will not apply to the SPRs. This is on the basis that the SPRs were subject to an ESS deferred taxing point, and an ESS deferred taxing point did not arise prior to the forfeiture or lapse of the Participant's SPRs. As a result there would be no amount included in the Participant's assessable income under the provisions of Division 83A, and no tax on the forfeited or lapsed SPRs would be payable.

SPRs forfeited after the ESS deferred taxing point

66. If a Participant is permitted by the Board to retain their SPRs in circumstances where the Participant ceases employment, an ESS deferred taxing point will arise at that time.

67. If the SPRs subsequently lapse because performance conditions are not met, section 83A-310 will apply such that Division 83A (apart from Subdivision 83A-E) will be taken never to have applied in relation to the lapsed SPRs. As a result, the deferred taxing point that occurred when the Participant ceased to be an employee will be taken never to have occurred in respect of the lapsed SPRs. Where an amount has been included in the Participant's assessable income in an earlier year, the Participant can request an amendment to exclude the amount.

68. Where the SPRs lapse in the same income year as the Participant ceases employment, no amount will be included in the Participant's assessable income in respect of the lapsed SPRs.

CGT consequence of forfeiture

SPRs forfeited on or before the ESS deferred taxing point

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

70. Where CGT event C2 happens, a capital gain is made if the capital proceeds from the event are more than the asset's cost base. A capital loss is made 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 a SPR is forfeited on or before the ESS deferred taxing point, subsection 130-80(1) does not apply to disregard any capital gain or capital loss.

71. Although a Participant pays nothing for a SPR, 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).

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

73. 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 SPR.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- employee share schemes

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1997
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 83A-25(1)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105
- ITAA 1997 83A-105(1)
- ITAA 1997 83A-105(3)
- ITAA 1997 83A-110
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(5)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- ITAA 1997 Subdiv 83A-E
- ITAA 1997 83A-310
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- ITAA 1997 104-25(1)
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