


# ***CR 2023/56 - Abacus Property Group - de-stapling and re-stapling as Abacus Group and Abacus Storage King - employee share scheme***

 This cover sheet is provided for information only. It does not form part of *CR 2023/56 - Abacus Property Group - de-stapling and re-stapling as Abacus Group and Abacus Storage King - employee share scheme*



Status: **legally binding**

## Class Ruling

# Abacus Property Group – de-stapling and re-stapling as Abacus Group and Abacus Storage King – employee share scheme

### **❶ Relying on this Ruling**

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

<b>Table of Contents</b>	<b>Paragraph</b>
What this Ruling is about	1
Who this Ruling applies to	4
When this Ruling applies	6
<b>Ruling</b>	<b>7</b>
<b>Scheme</b>	<b>17</b>
<b>Appendix – Explanation</b>	<b>42</b>

### **What this Ruling is about**

1. This Ruling sets out the income tax consequences for employees of entities who formed part of the Abacus Property Group (Abacus), or one of its subsidiaries, who were participants in an Abacus employee share scheme at the time Abacus undertook a restructure on 3 August 2023 (De-stapling Implementation Date).
2. Details of this scheme are set out in paragraphs 17 to 41 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if:
  - immediately prior to the De-stapling Implementation Date, you held one of the following
    - a right (Old Right) to a stapled security in Abacus (Abacus Security) under the following employee incentive plans operated by Abacus
      - Long Term Incentive Plan
      - Short Term Incentive Plan or
      - Executive Incentive Plan

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- an Abacus Security you acquired under the Employee Security Plan offered by Abacus that remained subject to trading restrictions (Old ESP Security), and
- on the De-stapling Implementation Date, you were
  - a resident of Australia (as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*), and
  - not a temporary resident (as defined in subsection 995-1(1)).

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 17 to 41 of this Ruling.

**Note:** Division 230 will not apply to individuals unless they have made an election for it to apply.

### **When this Ruling applies**

6. This Ruling applies from 1 July 2023 to 30 June 2024.

## **Ruling**

### **ESS interests under an employee share scheme**

7. Your Old Right or Old ESP Security were ESS interests acquired under an employee share scheme (section 83A-335 and subsections 83A-10(1) and (2)).
8. The rights you acquired (New Rights) when each Old Right was replaced with a right to one stapled security in the Abacus Storage King (ASK) stapled group (ASK Security) and a right to one stapled security in the Abacus Group (ABG) stapled group (ABG Security) are ESS interests acquired under an employee share scheme (section 83A-335 and subsections 83A-10(1) and (2)).
9. The stapled securities you acquired (New ESP Securities) when each Old ESP Security was replaced with one ASK Security and one ABG Security are ESS interests acquired under an employee share scheme (section 83A-335 and subsections 83A-10(1) and (2)).

### **New ESS interests treated as continuation of old interests**

10. Your New Rights will be treated as a continuation of your Old Rights for the purposes of Division 83A (subsection 83A-130(2)).
11. Your New ESP Securities will be treated as a continuation of your Old ESP Securities for the purposes of Division 83A (subsection 83A-130(2)).

### **Rights issued under the Long Term Incentive Plan, Short Term Incentive Plan or Executive Incentive Plan**

#### ***Capital gain or capital loss disregarded at time of restructure***

12. You disregard any capital gain or capital loss made when your Old Rights were replaced with New Rights (section 130-80).

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**No ESS deferred taxing point at time of restructure**

13. No ESS deferred taxing point occurred to your Old Rights pursuant to section 83A-130.

14. In the income year an ESS deferred taxing point occurs to your New Rights, your assessable income includes the market value of the ASK Securities and ABG Securities acquired upon vesting of the New Rights at the ESS deferred taxing point, less the cost base of the New Rights (subsection 83A-110(1)).

**Not a reportable fringe benefits amount**

15. You do not have a reportable fringe benefits amount (as defined in subsection 995-1(1)) when your Old Rights are replaced with New Rights (paragraph 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)).

**Stapled securities subject to trading restrictions under the Employee Security Plan**

16. Subsection 83A-45(4) is taken to apply to your New ESP Securities so that any discount previously excluded from your assessable income under section 83A-35 in respect of Old ESP Securities will continue to be excluded (subsection 83A-130(3)).

**Scheme**

17. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

**Abacus Property Group**

18. Abacus was a real estate investment trust (REIT) and was listed on the Australian Securities Exchange (ASX) in November 2002 as ABP.

19. Abacus was a 6-stapled group with each Abacus Security comprising a:

- fully-paid ordinary share in Abacus Group Holdings Limited (AGHL)
- fully-paid ordinary share in Abacus Group Projects Limited (AGPL)
- fully-paid ordinary unit in Abacus Income Trust (AIT)
- fully-paid ordinary unit in Abacus Trust (AT)
- fully-paid ordinary unit in Abacus Storage Property Trust (ASPT), and
- fully-paid ordinary share in Abacus Storage Operations Limited (ASOL).

20. Abacus operated the following 3 investment portfolios:

- Office portfolio – office spaces in Sydney, Melbourne and Brisbane and assets in Canberra and Adelaide
- Self Storage portfolio – 127 self storage assets across Australia's east coast and New Zealand
- Retail & Other portfolio – retail shopping centres across New South Wales and Queensland.

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### **Restructure of the Abacus Property Group**

21. Due to the rapid growth of the Self Storage portfolio over the last 5 years, it was considered commercially desirable for the Self Storage portfolio to be separated from the remainder of Abacus, listed separately on the ASX and have its own capital structure.

22. On the De-stapling Implementation Date:

- each ASPT unit and each ASOL share on issue was de-stapled from each other and from the remainder of the Abacus Securities, and re-stapled to each other on a one-for-one basis to form ASK Securities, and
- the securities in each of AGHL, AGPL, AIT and AT remained stapled to each other to form ABG Securities.

### **Employee Incentive Plans**

23. Storage King Services Pty Ltd (SKSPL) is a subsidiary of ASOL (that became part of ASK).

24. Abacus Funds Management Limited (AFML) is a subsidiary of AGHL (that became part of ABG).

25. The employees of Abacus were employed by either SKSPL or AFML, and remained employed by the same employer on the De-stapling Implementation Date, except for 4 AFML employees who were transferred to SKSPL as part of the restructure.

26. SKSPL and AFML employees were eligible to participate in the following employee incentive plans operated by Abacus:

- Long Term Incentive Plan (LTIP)
- Short Term Incentive Plan (STIP)
- Executive Incentive Plan (EIP), and
- Employee Security Plan (ESP).

### ***Long Term Incentive Plan, Short Term Incentive Plan and Executive Incentive Plan***

27. Under the LTIP, STIP and EIP:

- participants were granted Old Rights for nil consideration
- the rights were subject to vesting conditions until the relevant vesting date
- upon vesting, the rights can be exercised for nil exercise price within the relevant exercise period, and
- the board of Abacus (Board) has a discretion to settle vested rights with a cash equivalent payment.

28. Under the LTIP and STIP, Abacus Securities allocated upon exercise are not subject to trading restrictions. Under the EIP, Abacus Securities allocated upon vesting cannot be traded while participants remain employed, except to the extent required to fund any tax liabilities.

29. On 19 June 2023, the Board unconditionally approved that, for rights issued under the LTIP that were due to vest after July 2023, the performance conditions would be based on earnings before interest and taxes based on compound annual growth rate and relative

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total shareholder return based on the relevant S&P/200 ASX A-REIT, instead of funds from operations per security.

30. The Board's decision to change the performance condition was due to the funds from operations per security target, measured by average annual growth rate, being unlikely to be achieved in the future without the benefit of fixed interest rates at historical prices. The structural change in the interest rate environment had created a circumstance where operating performance had been overwhelmed by changes in the cost of debt.

31. The Board's decision to change the performance condition for rights issued under the LTIP was made independently of the decision to restructure the Abacus Group, was not conditional on the restructure occurring and was to be implemented regardless of whether or not the restructure was approved by the Abacus securityholders.

32. On 11 July 2023, the Board resolved that it would not exercise its discretion to settle Old Rights with a cash equivalent payment, whether before or after the De-stapling Implementation Date. That is, the Old Rights and New Rights could only be settled with securities on vesting.

33. Subdivision 83A-C applies to an Old Right because:

- there is a real risk that the participant will forfeit the right, or lose it, other than by disposing of it, or
- the participant is genuinely restricted from immediately disposing of the right and the rules expressly state that Subdivision 83A-C applies.

#### ***Employee Security Plan***

34. Under the ESP, participants were awarded \$1,000 of Old ESP Securities which were:

- subject to trading restrictions until the earlier of 3 years or cessation of employment, and
- not subject to risk of forfeiture.

35. All AFML employees other than key management personnel are eligible to participate in the ESP.

36. Only a small number of SKSPL employees are eligible to participate in the ESP.

#### ***Impact of Restructure on the Old Rights and Old ESP Securities***

37. On the De-stapling Implementation Date:

- each Old Right was replaced with New Rights, and
- each Old ESP Security was replaced with New ESP Securities.

38. Noting the change in performance conditions for rights issued under the LTIP referred to in paragraph 29 of this Ruling, all attributes of the New Rights such as the vesting conditions, vesting dates, exercise period and exercise price, remained the same as the Old Rights.

39. All attributes of the New ESP Securities remained the same as the Old ESP Securities. The New ESP Securities remained subject to trading restrictions for the relevant remainder of the 3-year trading restriction period (or until the participant ceased employment with ASK or ABG, as relevant).

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40. On the De-stapling Implementation Date, no employee will have a beneficial interest in more than 10% of the ASK Securities or ABG Securities, or be in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of ASK or ABG.

41. Participants did not receive any other benefit as a result of the restructure.

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**Commissioner of Taxation**

4 October 2023

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Status: **not legally binding**

## Appendix – Explanation

**❶** *This Explanation 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.*

<b>Table of Contents</b>	<b>Paragraph</b>
ESS interests under an employee share scheme	42
New ESS interests treated as continuation of old interests	47
<i>Restructure</i>	49
<i>New ESS interests reasonably match old ESS interests</i>	52
<i>Other requirements</i>	58
Rights issued under the Long Term Incentive Plan, Short Term Incentive Plan or Executive Incentive Plan	62
<i>Capital gain or capital loss disregarded at time of restructure</i>	62
<i>No ESS deferred taxing point at time of restructure</i>	66
<i>Not a reportable fringe benefits amount</i>	71
Stapled securities subject to trading restrictions under the Employee Security Plan	73

### **ESS interests under an employee share scheme**

42. An employee share scheme is a scheme under which ESS interests in a company are provided to employees of the company in relation to the employee's employment (subsection 83A-10(2)). An ESS interest in a company is defined 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 (subsection 83A-10(1)).

43. A stapled security is treated in the same way as a share for the purposes of Division 83A, if at least one of the elements in the stapled security is a share in a company (subsection 83A-335(1)). Rights to acquire such stapled securities are treated as rights to acquire shares (Note to subsection 83A-335(1)).

44. Prior to the restructure of the Abacus Group, an Abacus Security comprised of at least one share in a company. Therefore, Division 83A applied to the Abacus Security in the same way as a share in a company.

45. Following the restructure of the Abacus Group, an ASK Security and an ABG Security will each comprise of at least one share in a company. Therefore, Division 83A will apply to an ASK Security and an ABG Security in the same way as a share in a company.

46. As an Abacus Security, ASK Security and ABG Security, or a right to those securities, is treated as a beneficial interest in a share in a company, or a beneficial interest in rights to acquire a beneficial interest in a share in a company, they are ESS interests (subsection 83A-10(1)) provided under an employee share scheme, being the ESP, LTIP, STIP or EIP (subsection 83A-10(2)).



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### **New ESS interests treated as continuation of old interests**

47. ESS interests in a new company that are acquired in connection with a takeover or restructure are treated as a continuation of the ESS interests held just before the takeover or restructure for the purposes of Division 83A if certain conditions are satisfied (section 83A-130). This is to ensure that employees are not adversely affected by, nor receive any additional benefit as a result of, takeovers and restructures.<sup>1</sup>

48. Section 83A-130 applies where:

- you held ESS interests (the old interests) in a company acquired under an employee share scheme just before that company was subject to a takeover or restructure (subsection 83A-130(1))
- as a result of the takeover or restructure, you stop holding the old interests and acquire new interests in a new company which can reasonably be regarded as matching the old interests (subsection 83A-130(2))
- the new interests relate to ordinary shares (subsection 83A-130(4))
- at or about the time you acquire the new interests, you are employed by the new company or a related company, and
- at the time you acquire the new interests
  - you do not hold a beneficial interest in more than 10% of the shares in the new company (subparagraph 83A-130(9)(b)(i)), or
  - you are not in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of the new company (subparagraph 83A-130(9)(b)(ii)).

### **Restructure**

49. There is a restructure if there is a change in the ownership (including the structure of the ownership) of the old company and as a result of the change, ESS interests in the old company are reasonably regarded as having been replaced, wholly or partly, by ESS interests in one or more other companies (subparagraph 83A-130(1)(a)(ii)).

50. There was a change in the structure of the ownership of the Abacus Group as:

- each ASPT unit and each ASOL share on issue was de-stapled from each other and from the remainder of the Abacus Securities, and re-stapled to each other on a one-for-one basis to form ASK Securities, and
- the securities in each of AGHL, AGPL, AIT and AT remained stapled to each other to form ABG Securities.

51. Therefore, there is a restructure for the purposes of section 83A-130 as your Old Rights and Old ESP Securities (which are ESS interests) were replaced with New Rights and New ESP Securities (which are also ESS interests) in the new entities, ASK and ABG.

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<sup>1</sup> Paragraphs 1.244 and 1.252 of the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009.

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***New ESS interests reasonably match old ESS interests***

52. In determining to what extent something can reasonably be regarded as matching the old ESS interest, one of the factors to consider is the respective market values of the new ESS interest and the old ESS interest (Note to subsection 83A-130(2)).

53. Before the restructure, you held Old Rights or Old ESP Securities, which were beneficial interests in the Abacus Group consisting of 6 entities. Following the restructure, your New Rights or New ESP Securities are beneficial interests in ASK and ABG, which together consists of the same 6 entities. Therefore, the market value of the ASK and ABG Securities received in exchange for the Abacus Securities reasonably match the market value of the Abacus Securities.

54. Another factor to consider is the attributes of the New Rights and New ESP Securities, such as vesting conditions, vesting dates, exercise price, exercise period and trading restrictions. The attributes of the New Rights and New ESP Securities reasonably match the attributes of the Old Rights and Old ESP Securities.

55. While the vesting condition for rights issued under the LTIP changed on 19 June 2023, this change was unconditionally approved prior to the restructure, was made independently of the decision to restructure, was not conditional on the restructure occurring and was to be implemented regardless of whether or not the restructure was approved by Abacus securityholders. Therefore, the Commissioner accepts that the amendment of the vesting condition for rights issued under the LTIP did not form part of the restructure. As the amendment occurred prior to the restructure, this attribute remained the same for both the Old Rights and the New Rights.

56. You did not receive any other benefit as a result of the restructure.

57. Therefore, the New Rights and New ESP Securities received by you as part of the restructure reasonably match your Old Rights and Old ESP Securities.

***Other requirements***

58. You were employed by a subsidiary of the new company at the time of the restructure.

59. On the De-stapling Implementation Date, no employee will have a beneficial interest in more than 10% of the ASK Securities or ABG Securities, or be in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of ASK or ABG.

60. ASK Securities and ABG Securities are comprised of at least one ordinary share.

61. Therefore, your New Rights will be treated as a continuation of your Old Rights, and your New ESP Securities will be treated as a continuation of your Old ESP Securities as the conditions in section 83A-130 are satisfied.

**Rights issued under the Long Term Incentive Plan, Short Term Incentive Plan or Executive Incentive Plan**

***Capital gain or capital loss disregarded at time of restructure***

62. CGT event A1 happened to your Old Rights when they were replaced with New Rights (subsection 104-10(1)).

63. As the Old Rights are ESS interests acquired under an employee share scheme, any capital gain or capital loss made from CGT event A1 happening is disregarded if the

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disposal occurred on or before an ESS deferred taxing point and not due to the Old Rights being forfeited or lost (section 130-80).

64. As section 83A-130 will apply to treat your New Rights as a continuation of your Old Rights:

- the ESS deferred taxing point that will occur to your New Rights will be after CGT event A1 happens to your Old Rights, and
- your Old Rights will not be treated as forfeited or lost.

65. Therefore, any capital gain or capital loss made when your Old Rights were replaced with New Rights will be disregarded (section 130-80).

#### **No ESS deferred taxing point at time of restructure**

66. Where the ESS interest is a right to acquire shares, the ESS deferred taxing point will occur at the time determined by section 83A-120.

67. As section 83A-130 will apply to treat your New Rights as a continuation of your Old Rights for the purposes of Division 83A, no ESS deferred taxing point will occur to your Old Rights when they were replaced with New Rights on the De-stapling Implementation Date.

68. However, when an ESS deferred taxing point occurs to your New Rights subsequent to the restructure, the amount included as assessable income in the income year the ESS deferred taxing point for the New Rights occurs will be the market value of the ESS interest reduced by the cost base of that interest (if any) (subsection 83A-110(1)).

69. Where the ESS interest is a right to acquire a beneficial interest in a share, the market value of the right at the ESS deferred taxing point is the market value of the share at the time (section 83A-315.03 of the *Income Tax Assessment (1997 Act) Regulations 2021*).

70. The amount included in your assessable income at the ESS deferred taxing point of the New Rights is the market value of the ASK Securities and ABG Securities acquired upon vesting of the New Rights at the ESS deferred taxing point, less the cost base of the New Rights. As the New Rights are granted for nil consideration and no amount is paid to exercise them, the first element of the cost base of the New Rights is nil (subsections 83A-110(1) and 110-25(2)).

#### **Not a reportable fringe benefits amount**

71. No reportable fringe benefits amount (as defined in subsection 995-1(1)) arises for you as the definition of 'fringe benefit' in paragraph 136(1)(h) of the FBTA provides that an ESS interest to which Subdivision 83A-C or Subdivision 83A-B applies is not a fringe benefit.

72. Your New Rights are ESS interests granted under an employee share scheme and therefore, do not constitute a fringe benefit.

#### **Stapled securities subject to trading restrictions under the Employee Security Plan**

73. If you were provided with Old ESP Securities, you were able to reduce the amount included in your assessable income by up to \$1,000, provided you met the conditions in section 83A-35 and section 83A-45, including subsection 83A-45(4).

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74. Subsection 83A-45(4) is taken to apply to your New ESP Securities so that any discount previously excluded from your assessable income under section 83A-35 in respect of Old ESP Securities will continue to be excluded (subsection 83A-130(3)).

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## References

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### *Legislative references:*

- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 83A-35
- ITAA 1997 83A-45
- ITAA 1997 83A-45(4)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-110(1)
- ITAA 1997 83A-120
- ITAA 1997 83A-130
- ITAA 1997 83A-130(1)
- ITAA 1997 83A-130(1)(a)(ii)
- ITAA 1997 83A-130(2)
- ITAA 1997 83A-130(3)
- ITAA 1997 83A-130(4)
- ITAA 1997 83A-130(9)(b)(i)

- ITAA 1997 83A-130(9)(b)(ii)
- ITAA 1997 83A-335
- ITAA 1997 83A-335(1)
- ITAA 1997 104-10(1)
- ITAA 1997 110-25(2)
- ITAA 1997 130-80
- ITAA 1997 Div 230
- ITAA 1997 995-1(1)
- ITAA 1936 6(1)
- FBTAA 136(1)
- FBTAA 136(1)(h)
- ITAR (1997 Act) 2021 83A-315.03

### *Other references*

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009

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### ATO references

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