



**Tax and Superannuation Laws
Amendment (Employee Share Schemes)
Act 2015**

No. 105, 2015

**An Act to amend the law relating to taxation, and
for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Tax and Superannuation Laws Amendment (Employee Share Schemes) Act 2015

No. 105, 2015

**An Act to amend the law relating to taxation, and
for related purposes**

[Assented to 30 June 2015]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Tax and Superannuation Laws
Amendment (Employee Share Schemes) Act 2015*.

*No. 105, 2015 Tax and Superannuation Laws Amendment (Employee Share Schemes)
Act 2015* 1

2 Commencement

This Act commences on the day after this Act receives the Royal Assent.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Improvements to taxation of employee share schemes

Part 1—Main amendments

Income Tax Assessment Act 1936

1 Paragraph 109NB(a)

Repeal the paragraph, substitute:

- (a) Subdivision 83A-B, and the provisions referred to in paragraphs 83A-33(1)(a) to (c), of that Act apply; or
- (aa) Subdivision 83A-B, and the provisions referred to in paragraphs 83A-35(1)(a) and (b), of that Act apply; or

Income Tax Assessment Act 1997

2 At the end of section 83A-5

Add:

- ; and (c) to increase the number of new entrepreneurial companies in Australia by assisting them to attract and retain employees by providing those employees with a tax concession for acquiring shares under such schemes.

3 Section 83A-15

Omit:

You may be entitled to reduce the amount included in your assessable income if you meet certain conditions which seek to limit the concession to genuine schemes broadly available to all permanent employees who do not already have anything other than a minor interest in their employer.

The income year in which you are taxed may be deferred if there is a real risk of forfeiture, or you acquired the shares or securities under particular salary sacrifice arrangements (see Subdivision 83A-C).

substitute:

You may be entitled to reduce the amount included in your assessable income if you meet one of 2 sets of conditions.
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4 Section 83A-30

Before “For”, insert “(1)”.

5 At the end of section 83A-30 (after the note)

Add:

- (2) Subsection (1) does not apply to an *ESS interest that is a beneficial interest in a right (or to the right of which it forms part), if section 83A-33 (about start ups) reduces the amount to be included in your assessable income in relation to the interest.

6 After section 83A-30

Insert:

83A-33 Reducing amounts included in assessable income—start ups

- (1) Reduce the total amount included in your assessable income under subsection 83A-25(1) for an income year by the total of the amounts included in your assessable income under that subsection, for the income year, for *ESS interests to which all of the following provisions apply:
 - (a) subsections (2) to (6) of this section;
 - (b) section 83A-45 (about further conditions);
 - (c) for ESS interests that are beneficial interests in *shares—subsection 83A-105(2) (about broad availability of schemes).

No equity interests listed on a stock exchange

- (2) This subsection applies to an *ESS interest in a company (the **first company**) if no *equity interests in any of the following companies are listed for quotation in the official list of any *approved stock exchange at the end of the first company’s most recent income year before you acquired the interest:
 - (a) the first company;

- (b) any *subsidiary of the first company at the end of that income year;
- (c) any holding company (within the meaning of the *Corporations Act 2001*) of the first company at the end of that income year;
- (d) any subsidiary of a holding company (within the meaning of that Act) of the first company at the end of that income year.

Note: For identifying any holding company, see also subsection (7).

Incorporated for less than 10 years

- (3) This subsection applies to an *ESS interest in a company if:
 - (a) the company (the ***first company***); and
 - (b) each of the other companies referred to in subsection (2);was incorporated by or under an *Australian law or *foreign law less than 10 years before the end of the first company's most recent income year before you acquired the interest.

Company has aggregated turnover not exceeding \$50 million

- (4) This subsection applies to an *ESS interest in a company if the company has an *aggregated turnover not exceeding \$50 million for the company's most recent income year before the income year in which you acquire the ESS interest.

Note: For working out aggregated turnover, see also subsection (7).

Conditions relating to market value

- (5) This subsection applies to an *ESS interest in a company if:
 - (a) in the case of an ESS interest that is a beneficial interest in a *share—the discount on the ESS interest is no more than 15% of its *market value when you acquire it; or
 - (b) in the case of an ESS interest that is a beneficial interest in a right—the amount that must be paid to exercise the right is greater than or equal to the market value of an ordinary share in the company when you acquire the ESS interest.

Employer to be an Australian resident company

- (6) This subsection applies to an *ESS interest you acquire under an *employee share scheme if, when you acquire the interest, your employer is an Australian resident.

Disregard certain investments

- (7) For the purposes of subsections (2) and (4), disregard:
- (a) *eligible venture capital investments by a *VCLP, *ESVCLP or *AFOF; and
 - (b) investments by an *exempt entity that is a *deductible gift recipient;
- when identifying any holding company (within the meaning of the *Corporations Act 2001*) or working out *aggregated turnover.

7 Section 83A-35 (heading)

Repeal the heading, substitute:

83A-35 Reducing amounts included in assessable income—other cases

8 Subsection 83A-35(1)

Omit all the words after “*ESS interests”, substitute:
to which all of the following provisions apply:

- (a) subsections (6) and (7) of this section;
- (b) section 83A-45 (about further conditions).

9 At the end of subsection 83A-35(2)

Add:
; and (c) subsection (1) does not apply if section 83A-33 (about start ups) reduces the amount to be included in your assessable income for the income year for the *ESS interests.

10 Subsections 83A-35(3), (4), (5), (8) and (9)

Repeal the subsections.

11 At the end of Subdivision 83A-B

Add:

83A-45 Further conditions for reducing amounts included in assessable income

Employment

- (1) This subsection applies to an *ESS interest in a company if, when you acquire the interest, you are employed by:
- (a) the company; or
 - (b) a *subsidiary of the company.

Employee share scheme relates only to ordinary shares

- (2) This subsection applies to an *ESS interest you acquire under an *employee share scheme if, when you acquire the interest, all the ESS interests available for acquisition under the scheme relate to ordinary *shares.

Integrity rule about share trading and investment companies.

- (3) This subsection applies to an *ESS interest in a company unless, when you acquire the interest:
- (a) the predominant business of the company (whether or not stated in its constituent documents) is the acquisition, sale or holding of *shares, securities or other investments (whether directly or indirectly through one or more companies, partnerships or trusts); and
 - (b) you are employed by the company; and
 - (c) you are also employed by any other company that is:
 - (i) a *subsidiary of the first company; or
 - (ii) a holding company (within the meaning of the *Corporations Act 2001*) of the first company; or
 - (iii) a subsidiary of a holding company (within the meaning of the *Corporations Act 2001*) of the first company.

Minimum holding period

- (4) This subsection applies to an *ESS interest you acquire under an *employee share scheme if, at all times during the interest's *minimum holding period, the scheme is operated so that every acquirer of an ESS interest (the *scheme interest*) under the scheme is not permitted to dispose of:

- (a) the scheme interest; or
- (b) a beneficial interest in a *share acquired as a result of the scheme interest;

during the scheme interest's minimum holding period.

Note: This subsection is taken to apply in the case of a takeover or restructure: see subsection 83A-130(3).

- (5) An *ESS interest's *minimum holding period* is the period starting when the interest is acquired under the *employee share scheme and ending at the earlier of:

- (a) 3 years later, or such earlier time as the Commissioner allows if the Commissioner is satisfied that:
 - (i) the operators of the scheme intended for subsection (4) to apply to the interest during the 3 years after that acquisition of the interest; and
 - (ii) at the earlier time that the Commissioner allows, all *membership interests in the relevant company were disposed of under a particular *scheme; and
- (b) when the acquirer of the interest ceases being employed by the relevant employer.

10% limit on shareholding and voting power

- (6) This subsection applies to an *ESS interest in a company if, immediately after you acquire the interest:
- (a) you do not hold a beneficial interest in more than 10% of the *shares in the company; and
 - (b) you are not in a position to cast, or to control the casting of, more than 10% of the maximum number of votes that might be cast at a general meeting of the company.
- (7) For the purposes of subsection (6), you are taken to:
-

- (a) hold a beneficial interest in any *shares in the company that you can acquire under an *ESS interest that is a beneficial interest in a right to acquire a beneficial interest in such shares; and
- (b) be in a position to cast votes as a result of holding that interest in those shares.

12 Section 83A-100

Omit “7 years”, substitute “15 years”.

13 Section 83A-100

Omit:

A share or stapled security you acquire under salary sacrifice arrangements can also be subject to this deferred taxing point if you get no more than \$5,000 worth of shares under those arrangements.

substitute:

This deferred taxing point can also apply to:

- (a) a share or stapled security you acquire under salary sacrifice arrangements, if you get no more than \$5,000 worth of shares under those arrangements; or
- (b) a right, if the scheme restricted you immediately disposing of the right, and stated that this Subdivision applies.

14 Before paragraph 83A-105(1)(b)

Insert:

- (ab) section 83A-33 (about start ups) does not reduce the amount to be included in your assessable income in relation to the interest; and

15 Paragraph 83A-105(1)(b)

Omit “83A-35(3), (4), (5) and (9)”, substitute “83A-45(1), (2), (3) and (6)”.

16 Paragraph 83A-105(1)(d)

After “subsection (3)”, insert “or (6)”.

17 Subsection 83A-105(1) (note)

Omit “83A-35(3), (4), (5), and (9)”, substitute “83A-45(1), (2), (3) and (6)”.

18 At the end of section 83A-105

Add:

Scheme’s rules state that this Subdivision applies

- (6) This subsection applies to an *ESS interest you acquire under an *employee share scheme during an income year at a discount if:
- (a) the interest is a beneficial interest in a right; and
 - (b) at the time you acquired the interest:
 - (i) the scheme genuinely restricted you immediately disposing of the right; and
 - (ii) the governing rules of the scheme expressly stated that this Subdivision applies to the scheme (subject to the requirements of this Act).

19 Subsections 83A-115(6) and 83A-120(6)

Omit “7 year”, substitute “15 year”.

20 Subsection 83A-120(7) (heading)

Repeal the heading, substitute:

No restrictions on disposing of a share after exercising the right

21 Paragraphs 83A-120(7)(a) and (b)

Repeal the paragraphs, substitute:

- (a) you exercise the right; and

22 Paragraph 83A-120(7)(c)

Omit “if you exercise the right”, substitute “after exercising the right”.

23 Subsection 83A-130(3)

Omit “83A-35(8) (about the 3 year rule)”, substitute “83A-45(4) (about the minimum holding period)”.

24 Subparagraphs 83A-130(9)(b)(i) and (ii)

Omit “5%”, substitute “10%”.

25 At the end of section 83A-130

Add:

- (10) For the purposes of paragraph (9)(b), you are taken to:
- (a) hold a beneficial interest in any *shares in the new company that you can acquire under an *ESS interest that is a beneficial interest in a right to acquire a beneficial interest in such shares; and
 - (b) be in a position to cast votes as a result of holding that interest in those shares.

26 Section 83A-305

Before “If an”, insert “(1)”.

27 At the end of section 83A-305

Add:

- (2) For the purposes of subsections 83A-45(6) and (7), subsection (1) of this section also applies if the *associate acquired the *ESS interest otherwise than in relation to the individual’s employment.

28 Section 83A-310

Before “This”, insert “(1)”.

29 Subparagraph 83A-310(c)(i)

Omit “by that individual to cease particular employment”, substitute “to which subsection (2) applies”.

30 At the end of section 83A-310

Add:

- (2) This subsection applies to the following choices by the individual:

- (a) a choice to cease particular employment;
- (b) in the case of an *ESS interest that is a beneficial interest in a right:
 - (i) a choice not to exercise the right before it lapsed; or
 - (ii) a choice to allow the right to be cancelled.

31 Subsection 115-30(1) (after table item 9)

Insert:

- | | | |
|----|---|---|
| 9A | A *share the acquirer *acquires by exercising an *ESS interest if: | When the acquirer *acquired the *ESS interest |
| | (a) section 83A-33 (about start ups) reduces the amount to be included in the acquirer's assessable income in relation to the ESS interest; and | |
| | (b) exercising the ESS interest causes Subdivision 130-B or Division 134 to apply | |

32 Paragraph 125-75(2)(b)

Repeal the paragraph, substitute:

- (b) these provisions apply to the beneficial interest:
 - (i) Subdivision 83A-B and the provisions referred to in paragraphs 83A-33(1)(a) to (c); or
 - (ii) Subdivision 83A-B and the provisions referred to in paragraphs 83A-35(1)(a) and (b); or
 - (iii) Subdivision 83A-C; and

33 Subparagraph 125-75(3)(a)(ii)

Repeal the subparagraph, substitute:

- (ii) the provisions referred to in subparagraph (2)(b)(i), (ii) or (iii) apply to the beneficial interest; and

34 At the end of subsection 130-80(4)

Add:

- ; or (c) you acquiring an ESS interest that:
 - (i) is a beneficial interest in a right; and
-

- (ii) is an ESS interest to which the provisions referred to in paragraphs 83A-33(1)(a) to (c) (about start ups) apply.

35 Subparagraphs 208-215(1)(b)(i) and (ii)

Omit “5%”, substitute “10%”.

36 At the end of section 208-215

Add:

- (3) For the purposes of paragraph (1)(b), you are taken to:
- (a) hold a beneficial interest in any *shares in the company that you can acquire under an *ESS interest that is a beneficial interest in a right to acquire a beneficial interest in such shares; and
 - (b) be in a position to cast votes as a result of holding that interest in those shares.

37 Section 768-915

Before “A”, insert “(1)”.

38 At the end of section 768-915

Add:

- (2) Subsection (1) does not apply in relation to *CGT event II if:
- (a) the CGT event happens in relation to an *ESS interest that is a beneficial interest in a right (or to a *share acquired by exercising such a right); and
 - (b) the provisions referred to in paragraphs 83A-33(1)(a) to (c) (about start ups) apply to the ESS interest.

39 Subsection 768-955(4)

Repeal the subsection, substitute:

- (4) This section does not apply to an *ESS interest if:
- (a) Subdivision 83A-C (about employee share schemes) applies to the interest, and the *ESS deferred taxing point for the interest has not yet occurred; or
 - (b) the provisions referred to in paragraphs 83A-33(1)(a) to (c) (about start ups) apply to the ESS interest.

40 Subsection 855-45(4)

Repeal the subsection, substitute:

- (4) This section does not apply to an *ESS interest if:
- (a) Subdivision 83A-C (about employee share schemes) applies to the interest, and the *ESS deferred taxing point for the interest has not yet occurred; or
 - (b) the provisions referred to in paragraphs 83A-33(1)(a) to (c) (about start ups) apply to the ESS interest.

41 Subsection 995-1(1)

Insert:

minimum holding period, for an *ESS interest, has the meaning given by subsection 83A-45(5).

Income Tax (Transitional Provisions) Act 1997

42 Paragraph 83A-5(4)(d)

Omit “83A-310(a), (b) and (c)”, substitute “83A-310(1)(a), (b) and (c)”.

Taxation Administration Act 1953

43 Subsection 14-155(2) in Schedule 1

Omit “section 83A-35”, substitute “sections 83A-33 and 83A-35”.

44 Application of amendments

The amendments made by this Part apply in relation to ESS interests acquired on or after 1 July 2015.

Part 2—Amendments about market value

Income Tax Assessment Act 1997

45 At the end of section 960-400

Add:

The Commissioner may approve methods to use for working out the market value of assets or non-cash benefits.
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46 After section 960-410

Insert:

960-412 Working out market value using an approved method

- (1) The *market value of an asset or *non-cash benefit that you work out using a method approved under subsection (2) for that kind of asset or benefit binds the Commissioner in relation to you.

Note: You do not have to use the method.

- (2) The Commissioner may, by legislative instrument, approve methods for working out the *market value of assets or *non-cash benefits. A method may include conditions.

Note 1: Different methods may be approved for different kinds of assets or non-cash benefits (see subsection 13(3) of the *Legislative Instruments Act 2003*).

Note 2: Any approved method would need to be consistent with the other rules about market value in this Subdivision.

Part 3—Technical amendments

Income Tax Assessment Act 1997

47 Subsection 83A-20(1) (note 3)

Repeal the note.

48 At the end of subsection 83A-25(1)

Add:

Note: Regulations made for section 83A-315 may be relevant to working out whether you acquire the ESS interest at a discount.

49 After paragraph 83A-105(1)(a)

Insert:

(aa) after applying section 83A-315, there is still a discount given in relation to the interest; and

50 Subsection 83A-315(1)

After “Whenever this Division”, insert “(other than section 83A-20)”.

51 Application of amendments

The amendments made by this Part apply to assessments for the 2011-12 income year and later income years.

[Minister’s second reading speech made in—
House of Representatives on 25 March 2015
Senate on 15 June 2015]

(39/15)
