

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2009 No.**

#### **Issued by authority of the Assistant Treasurer**

*Income Tax Assessment Act 1997*

*Income Tax Assessment Amendment Regulations 2009 (No. )*

Subsection 909-1(1) of the *Income Tax Assessment Act 1997* (the Act) provides that the Governor-General may make regulations prescribing matters that the Act requires or permits to be prescribed, or are necessary or convenient to prescribe for carrying out or giving effect to the Act.

An employee shares scheme is a scheme under which a company provides shares (or rights to acquire shares) in itself (ESS interests) to its employees (or their associates).

Generally, an individual's assessable income includes the amount of any discount they receive on ESS interests provided to them (or to their associates) under an employee share scheme.

Section 83A-315 of the Act provides that the regulations may specify an amount to be used instead of market value for the purposes of working out that discount for the purposes of Division 83A. It also applies to any use of 'market value' in that Division.

These Regulations specify an amount (by way of a methodology) that can be used instead of market value in relation to ESS interests that are beneficial interests in *unlisted rights*. It can not be used for interests in shares or for listed rights.

Under the Act, market value is determined according to ordinary principles but with the modifications set out in Subdivision 960-S of the Act.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments. However, they apply to ESS interests that are acquired on or after 1 July 2009.

Whilst the application date is earlier than the date on which these regulations were registered, subsection 12(2) of the *Legislative Instruments Act 2003* does not have any application. Subsection 12(2) prohibits the retrospective operation of regulations that adversely affect the rights of, or impose liabilities upon, a person. [Section # of the *Income Tax (Transitional Provisions) Act 1997* prevents subsection 12(2) applying to these regulations.

The Regulations do not substantially alter existing arrangements. Accordingly, a Regulation Impact Statement is not mandatory and was not prepared. [Public consultation on a draft of these regulations was undertaken ...]

## ATTACHMENT

### Details of the *Income Tax Assessment Amendment Regulations 2009* (No. )

**Regulation 1:** Names the regulations as the *Income Tax Assessment Amendment Regulations 2009* (No. ).

**Regulation 2:** Provides that the Regulations commence on the day after registration.

**Regulation 3:** Provides that Schedule 1 amends the *Income Tax Assessment Regulations 1997* (the Principal Regulations).

Schedule 1: Amendments

Item 1 inserts a Division 83A into the Principal Regulations.

The object of Division 83A is to preserve rules under the former Division 13A of Part III of the *Income Tax Assessment Act 1936* about valuing unlisted rights to acquire a share under an employee share scheme.

These regulations replicate the effect of former sections 139FC to 139FN of the *Income Tax Assessment Act 1936*.

Regulation 83A-315.01 provides that these regulations set an amount that can be used instead of market value in relation to ESS interests that are unlisted rights. Use of these regulations by a taxpayer is voluntary. Taxpayers may choose to calculate market value using general principles (as modified under Subdivision 960-S of the Act).

The amount provided by the regulations is determined by reference to a point in time. Therefore, the amount will be different for different days. The relevant amount to be used instead of market value will be the amount calculated using the day that the market value was to be calculated for.

Regulation 83A-315.02 sets out how to calculate the amount that is to be used instead of market value and which ESS interests these rules apply to. Use of these rules instead of the general principles for calculating market value is limited to rights not quoted on an approved stock exchange (as defined in the Act). That is, it is limited to *unlisted* rights.

The amount that is to be used instead of market value is calculated as the greater of 2 possible amounts. The first possible amount (***first amount***) is the market value of the underlying share (using general principles as modified by the Act) reduced by the lowest amount that must be paid to exercise the right. The second possible amount (***second amount***) is calculated by reference to formulas and tables set out in regulations 83A-315.05 to 83A-315.09.

If, in calculating the first amount, the lowest amount that must be paid to exercise the right cannot be ascertained or is nil, the amount provided by the regulations to be used instead of market value, is the market value of the underlying share (using general principles as modified by the Act). [***Regulation 83A-315.03***]

These regulations do not provide an amount that can be used instead of market value for rights that can be exercised more than 7 years after they were acquired. [*Regulation 83A-315.02(b)(ii)*]

DRAFT FOR CONSULTATION