


CR 2019/33 - Property Exchange Australia Limited - Employee Share Option Plan - Commissioner's discretion to reduce the minimum holding period in relation to options acquired

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Class Ruling

Property Exchange Australia Limited – Employee Share Option Plan – Commissioner’s discretion to reduce the minimum holding period in relation to options acquired

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📌 Relying on this Ruling

This publication (excluding appendixes) 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 the ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this ruling.

Further, if we think that the ruling disadvantages you, we may apply the law in a way that is more favourable to you.

Summary – 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 provisions

2. The relevant provisions dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
 - Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997)
 - Subdivision 83A–B of the ITAA 1997
 - section 83A–25 of the ITAA 1997
 - subsection 83A–25(1) of the ITAA 1997
 - section 83A–30 of the ITAA 1997
 - subsection 83A–30(1) of the ITAA 1997
 - section 83A–33 of the ITAA 1997
 - section 83A–45 of the ITAA 1997
 - subsection 83A–45(4) of the ITAA 1997

- subsection 83A–45(5) of the ITAA 1997
- paragraph 83A–45(5)(a) of the ITAA 1997
- subparagraph 83A–45(5)(a)(i) of the ITAA 1997
- subparagraph 83A–45(5)(a)(ii) of the ITAA 1997
- paragraph 83A–45(5)(b) of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1936 or the ITAA 1997 unless otherwise indicated.

Abbreviations

3. The following abbreviations are used in this ruling:

ESOP	PEXA Employee Share Option Plan, approved on 12 April 2017
LMC	LMC BidCo Pty Ltd
PEXA	Property Exchange Australia Limited
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
IPO	Initial Public Offering
SPA	Share Purchase Agreement, under which all PEXA equity was acquired by LMC
Options	The options acquired by employees (or their associates) under the ESOP on or around 6 December 2017

Class of entities

4. The class of entities to which this Ruling applies is the employees (including those who are treated as employees for the purposes of Division 83A by the application of section 83A-325 of the ITAA 1997) of Property Exchange Australia Limited (PEXA) who:

- acquired Options (or are treated as having acquired Options for the purposes of Division 83A by the application of section 83A-305 of the ITAA 1997) under the Property Exchange Australia Limited Employee Share Option Plan (ESOP) on or around 6 December 2017
- were Australian tax residents within the meaning of subsection 6(1) of the ITAA 1936 at the time they acquired the Options and remained Australian tax residents until completion of the share purchase agreement (SPA)
- were not temporary residents within the meaning of subsection 995-1(1) of the ITAA 1997

- were employed by PEXA at all times from the acquisition date of the Options until completion of the SPA
- upon acquiring the Options did not hold (for the purposes of Division 83A) a beneficial interest in more than 10% of the shares, or rights to acquire shares, in PEXA
- were 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 PEXA, and
- held their Options (for the purposes of Division 83A) at all times from the date of acquisition of the Options until completion of the SPA.

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

Qualifications

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

7. 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 10 to 43 of this Ruling.

8. 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

9. This Ruling applies from 1 July 2018 to 30 June 2019. The Ruling continues to apply after 30 June 2019 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 *Public Rulings*).

Scheme

10. The following description of the scheme is based on information provided by the applicant.
11. PEXA is an Australian resident company. It does not have, and has never had, equity interests listed on a stock exchange.
12. PEXA operates an Australian online property exchange network. It was formed in 2010 to provide a single national electronic conveyancing solution to the Australian property industry. PEXA provides an online platform for lawyers, conveyancers and financial institutions to complete financial and property settlements electronically.
13. PEXA has a wholly owned subsidiary by the name of PEXA SETTLEASSIST Pty. Ltd., incorporated in August 2017. PEXA SETTLEASSIST Pty. Ltd. is and always has been unlisted on any stock exchanges.
14. PEXA did not have a holding company, until it was acquired by LMC pursuant to the SPA.
15. In February 2017 PEXA's management team and the Board conducted a review of PEXA's strategy, which concluded that PEXA should expand its operations. This gave rise to an additional funding requirement.
16. On 19 April 2017 PEXA shareholders unanimously passed a shareholder special resolution for PEXA to pursue a dual track IPO/trade sale process (simultaneously running an IPO process and a trade sale process). That resolution required that in the case of a trade sale, a bidder must acquire more than 50% of the PEXA shares.
17. On 12 October 2017 a Board meeting was held, which concluded that an IPO was more likely than a trade sale.
18. On 16 November 2017 the Board decided to defer the dual track IPO/trade sale process until the second half of 2018 due to potentially significant changes being made as a result of a review by a key regulator of the regulatory framework applicable to PEXA as an electronic lodgement network operator.
19. On or around 6 December 2017, 15 participants were granted options (the Options) under the ESOP established in April 2017. The ESOP replaced a long-term management incentive scheme that had matured in June 2017. The grant of the Options was to incentivise management and ensure that management was retained through an IPO transaction. The Options had vesting dates which extended over a period of two to four years from the date of grant. Further details of the ESOP are set out in paragraphs 37 to 43 of this Ruling.
20. In the event of an IPO the Board envisaged that the current management team would be maintained and that the Options would continue to be held through both the vesting period and the minimum holding period. In the event of a trade sale, the Board had been

aware for an extended period that there were a number of shareholders who had stated an intention not to dispose of their holdings. Consequently the Board believed that it was unlikely that there would be a 100% takeover and, therefore, that the Options would continue to be held through both the vesting period and the minimum holding period.

21. In March 2018 the Board recommenced the dual track IPO/trade sale process in order to be able to complete the process in the second half of 2018.

22. On 14 June 2018 Macquarie Capital (Australia) Limited and Morgan Stanley Australia Securities Limited were appointed as Joint Lead Managers (JLMs) for the IPO process.

23. On 8 October 2018 the indicative IPO valuation and the final binding trade sale bids were submitted to PEXA. The only potential trade buyer that submitted a trade sale bid was LMC BidCo Pty Ltd (LMC).

24. On 11 October 2018 the Board met to consider the indicative IPO valuation and the final binding trade sale bid. On the basis that the indicative IPO valuation was higher than the trade sale bid, the Board opted for the IPO.

25. On 24 October 2018 the JLMs commenced the book-build in relation to the IPO and it was substantially complete at the close of business on 24 October 2018. The draft prospectus for the IPO outlined that existing Options would continue in existence with the 3 year Minimum Holding Period continuing to apply post IPO.

26. On 25 October 2018 the Board was expecting to enter PEXA into an Underwriting Agreement in respect of the proposed IPO and to finalise the prospectus and lodge it with ASIC on the following day. However, the value of shares traded on the NASDAQ fell significantly the night before, creating associated market volatility on the ASX on the morning of 25 October 2018, and resulting in the IPO (and entry into the proposed underwriting Agreement) not proceeding at that time. The PEXA Board resolved to keep the IPO process open, and wait for the market volatility to subside.

27. A revised IPO proposal was put to shareholders for consideration on 3 November 2018.

28. There was pressure from some of the shareholders at this time to enter the trade sale, while others wanted to keep their shares in PEXA.

29. On 4 November 2018 the PEXA Board met to consider the current status of the proposed IPO and the trade sale bid from LMC which was due to expire on 5 November 2018. A process was put in place under which shareholders were given the opportunity to choose between the IPO and the trade sale bid.

30. On 5 November 2018 the Board received documentation signed by shareholders who collectively held 55.4% of the issued equity and had accepted the offer from LMC for the acquisition of

their shares in PEXA. The level of acceptance by shareholders in respect of the trade sale process on this date meant the closing date of the offer was automatically extended to 9 November 2018.

Share Purchase Agreement (SPA)

31. By 9 November 2018 PEXA shareholders that collectively held more than 75% of the issued PEXA shares had signed the SPA. This level of acceptance meant that LMC would be entitled under Clause 27B.5 of the PEXA Replacement Shareholders' Deed, once the SPA otherwise became unconditional, to compulsorily acquire all of the remaining PEXA shares.

32. Under the SPA, the sale consideration for the PEXA shares was either a cash amount or shares in LMC, depending on whether the selling shareholder elected to receive cash or shares in LMC.

33. The completion of the sale of all of the shares in PEXA was subject to a number of conditions.

34. One such condition was that all option-holders agree in writing with PEXA to the cancellation of their options on completion of the SPA, including the Options granted in December 2017 under the ESOP. This occurred on 19 December 2018.

35. Consideration for the cancellation of the Options was funded by the issue of shares to LMC on completion of the SPA.

36. On 16 January 2019 all shares in PEXA were compulsorily acquired by LMC, following the satisfaction or waiving of all conditions precedent to the SPA.

ESOP

37. On 12 April 2017 the Board established the ESOP as an employee incentive plan. The plan facilitated the grant of options to PEXA executives and other employees.

38. The primary objective of the ESOP was to act as a retention tool for management. The previous long term management incentive scheme was due to come to an end later in 2017 and the Board considered it desirable to secure the services of key executives up to and through an IPO or trade sale.

39. On or around 6 December 2017, a grant of options (the Options) was made to 15 employees (Participants) in relation to their employment with PEXA under the ESOP for no consideration.

40. Each option granted under the ESOP represented a right to acquire an ordinary share in PEXA.

41. The Participants were not permitted to dispose of the Options, or any shares resulting from the exercise of those options, for a period of the earlier of three years from the grant date or cessation of

employment or the date of an arrangement (takeover or restructure) which met the requirements in section 83A-130 of the ITAA 1997.

42. On 16 January 2019 each shareholder received \$11.72861 per share for the shares they disposed of in the trade sale. The 15 Participants also received their consideration for the cancellation of their Options on this day and received the same amount less the exercise price of the Options.

43. Each Option had vesting and exercise conditions as set out in the Invitation which was provided to the relevant Participant. For example, for all Participants there were service conditions which needed to be met, otherwise the related Options would lapse. Furthermore, in line with the initial objectives of the Board, the service conditions provided for vesting to occur over a period of two to four years.

Ruling

Minimum holding period for the Options

44. For the purposes of section 83A-45(4) of the ITAA 1997, the Commissioner will exercise his discretion under paragraph 83A-45(5)(a) to allow the minimum holding period for all Options, if any, that qualify for concessional treatment under section 83A-33 to be reduced. The Commissioner will allow the minimum holding period to be the period starting when the Options were acquired on or around 6 December 2017 and ending at the time the SPA was completed on 16 January 2019.

Commissioner of Taxation

22 May 2019

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.*

45. The Options acquired under the ESOP by the Participants were ESS interests subject to Division 83A.

46. Section 83A-25 operates to include the discount the Participant receives in relation to their Options in their assessable income for the year in which they acquired the Options.

47. Section 83A-33 operates to reduce the amount included in the Participants' assessable income under section 83A-25 if certain conditions are met. Amongst the conditions that must be met are those contained in section 83A-45.

48. One of the conditions is stated in paragraph 83A-45(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).

49. An ESS interest's minimum holding period is defined in paragraph 83A-45(5) as:

... 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.

50. Under the ESOP, Participants were unable to dispose of their Options, or any shares from the exercise of the Options, unless three

years had passed from the time of acquisition, the Participant's employment ceased, or the disposal was under an arrangement which met the requirements of section 83A-130.

51. The Commissioner is satisfied that PEXA had intended, at the time that the Options were acquired by the Participants, that the Participants would be unable to dispose of the Options during the three years following their acquisition. The Commissioner is satisfied that at the time the Options were acquired, the Board intended that the Options would be held through any possible IPO or trade sale.

52. As part of the trade sale, all membership interests in PEXA were disposed of to LMC.

53. Thus, for the Options that qualify for concessional treatment under section 83A-33, if any, the Commissioner will allow the minimum holding period to be the period starting from the time the Options were acquired on or around 6 December 2017 until the time the trade sale was completed on 16 January 2019.

Appendix 2 – Detailed contents list

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References

<i>Previous draft:</i>	- ITAA 1997 83A-30
Not previously issued as a draft	- ITAA 1997 83A-30(1)
	- ITAA 1997 83A-33
<i>Related Rulings/Determinations:</i>	- ITAA 1997 83A-45
TR 2006/10	- ITAA 1997 83A-45(4)
	- ITAA 1997 83A-45(5)
<i>Legislative references:</i>	- ITAA 1997 83A-45(5)(a)
- ITAA 1936	- ITAA 1997 83A-45(5)(a)(i)
- ITAA 1936 6(1)	- ITAA 1997 83A-45(5)(a)(ii)
- ITAA 1997	- ITAA 1997 83A-45(5)(b)
- ITAA 1997 Div 83A	- ITAA 1997 83A-130(3)
- ITAA 1997 Subdiv 83A-B	- ITAA 1997 83A-305
- ITAA 1997 83A-25	- ITAA 1997 83A-325
- ITAA 1997 83A-25(1)	- TAA 1953

ATO references

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