


***CR 2023/18 - InterContinental Energy Australia Pty Ltd - employee share option scheme - InterContinental Energy Holdings Group Limited 2021 Omnibus Incentive Plan***

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Status: **legally binding**

## Class Ruling

# InterContinental Energy Australia Pty Ltd – employee share option scheme – InterContinental Energy Holdings Group Limited 2021 Omnibus Incentive Plan

### **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.

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

1. This Ruling sets out the income tax consequences for employees of InterContinental Energy Australia Pty Ltd (InterContinental Energy Australia) who, on 4 February 2022, were granted options over the ordinary shares in InterContinental Energy Holdings Group Limited (InterContinental Energy Holdings) under the InterContinental Energy Holdings Group Limited 2021 Omnibus Incentive Plan (Incentive Plan).
2. Details of this scheme are set out in paragraphs 10 to 27 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*.

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

4. This Ruling applies to you if you:
  - acquired an option over the ordinary shares in InterContinental Energy Holdings under the Incentive Plan on 4 February 2022, and
  - were an employee of InterContinental Energy Australia at all times from the date you acquired the options until 30 June 2022.

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**When this Ruling applies**

5. This Ruling applies from 1 July 2021 to 30 June 2022.

**Ruling****Subdivision 83A-B applies to your option**

6. Subdivision 83A-B applies to the option that you acquired on 4 February 2022 under the Incentive Plan.
7. Subdivision 83A-C will not apply to the option (paragraph 83A-105(1)(d)).

**Discount on the option to be included in your assessable income**

8. Your assessable income for the income year in which you acquired the option includes the discount given in relation to the option (subsection 83A-25(1)). The discount given in relation to the option you acquired is equal to its market value at the time you acquired it because you acquired it for nil consideration.
9. The market value of the option is to be worked out by disregarding any restrictions that prevent you from converting the option into money, such as selling the underlying shares only during a capital raising event (section 960-410).

**Scheme**

10. 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.
11. InterContinental Energy Holdings is a private company that was incorporated in the British Virgin Islands on 5 June 2019.
12. InterContinental Energy Holdings is a holding company whose subsidiaries (which together form the InterContinental Energy Group) are involved in the development of green fuels projects in Australia, Oman and Saudi Arabia.
13. InterContinental Energy Holdings owns 100% of the shares in InterContinental Energy Australia, a company that was incorporated in Australia on 19 May 2021.
14. All employees of the InterContinental Energy Group that live in Australia are employed by InterContinental Energy Australia. There are 12 individuals employed by InterContinental Energy Australia.
15. The ordinary shares of InterContinental Energy Holdings and its subsidiaries are not listed for quotation on any stock exchange. As a result, the shares of InterContinental Energy Holdings can only be sold (as a secondary sale) at the point of a capital raising event.

**InterContinental Energy Holdings Group Limited 2021 Omnibus Incentive Plan**

16. InterContinental Energy Holdings operates the Incentive Plan which was adopted and approved by InterContinental Energy Holdings' board on 30 September 2021. The Incentive Plan will expire on 31 December 2024.

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17. The purpose of the Incentive Plan is to help InterContinental Energy Holdings:
- attract, retain and motivate key employees (including prospective employees) and consultants
  - align the interests of such persons with the company's stockholders, and
  - promote ownership of the company's equity.
18. Section 7.3.5 of the Incentive Plan provides the Board the exclusive power, authority and discretion to determine whether, to what extent and pursuant to what circumstances an Award may be cancelled, forfeited, or surrendered (subject to any specific designation in the Share Plan).
19. The terms of the Incentive Plan do not expressly state whether Subdivision 83A-C applies to the plan.
20. On 24 January 2022, InterContinental Energy Holdings and Buckland Investment Pte Ltd (a wholly owned subsidiary of GIC Private Limited (GIC), a global institutional investor) entered into a share subscription agreement (GIC Agreement) whereby Buckland Investment Pte Ltd agreed to acquire preferred shares in InterContinental Energy Holdings.
21. The GIC Agreement was subject to conditions precedent, one of which included GIC receiving approval from the Foreign Investment Review Board (FIRB).
22. Where GIC is unable to obtain FIRB approval within 4.5 months from the signing date of the GIC Agreement, GIC has the option to terminate the GIC Agreement.
23. On 4 February 2022, 11 of the 12 InterContinental Energy Australia employees (Participants) were granted options under the Incentive Plan that provided them a right to purchase a number of ordinary shares in InterContinental Energy Holdings, as prescribed in their respective Stock Option Award Agreement, at an exercise price of US\$1 per share.
24. The options were provided to the Participants at a discount.
25. Each option has a term of 10 years from the date they were granted and vests on the earlier of:
- the 'Closing Date' of the GIC Agreement, and
  - 6 months after the grant date of the options.
26. The 'Closing Date' of the GIC Agreement is 27 April 2022.
27. At the time the options were granted to Participants:
- no Participants held a beneficial interest of more than 10% of InterContinental Energy Holdings, and
  - no Participants were 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 InterContinental Energy Holdings.

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**Commissioner of Taxation**

12 April 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.*

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### **Options are ESS interests provided under an employee share scheme**

28. An ESS interest in a company is a beneficial interest in a share in the company or a right to acquire a beneficial interest in a share in the company (subsection 83A-10(1)).

29. The Participants were each granted an option under the Incentive Plan on 4 February 2022. As these options provided each Participant a right to acquire ordinary shares in InterContinental Energy Holdings, the options are ESS interests as defined in subsection 83A-10(1).

30. An 'employee share scheme' is a scheme under which ESS interests in a company are provided to employees of the company or subsidiaries of the company in relation to their employment (subsection 83A-10(2)).

31. As the Incentive Plan provides options (which are ESS interests in InterContinental Energy Holdings) to employees of InterContinental Energy Australia (a subsidiary of InterContinental Energy Holdings) in relation to their employment, the Incentive Plan is considered to be an 'employee share scheme' as defined in subsection 83A-10(2).

### **Assessability of options under Subdivision 83A-B**

32. The options were issued at a discount pursuant to subsection 83A-20(1). The discount is included in your assessable income in the income year you acquired the option pursuant to subsection 83A-25(1).

33. Therefore, Subdivision 83A-B will apply to the option acquired by you under the Incentive Plan, unless Subdivision 83A-C applies.

### **Subdivision 83A-C does not apply to the options**

34. If Subdivision 83A-C applies, the ESS interest is subject to deferred taxation.

35. Subsection 83A-105(1) sets out the conditions that must be satisfied for Subdivision 83A-C to apply. Relevantly, paragraph 83A-105(1)(d) provides that subsection 83A-105(3) or (6) applies to the ESS interest.

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***Subsection 83A-105(3) does not apply to the options***

36. For an ESS interest that is a beneficial interest in a right to acquire a beneficial interest in a share, subsection 83A-105(3) applies if, when you acquire the interest:

- there is a real risk that, under the conditions of the scheme, you will forfeit or lose the ESS interest (other than by disposing of it, exercising the right or letting the right lapse), or
- there is a real risk that, under the conditions of the scheme, if you exercise the right, you will forfeit or lose the beneficial interest in the scheme (other than by disposing of it).

37. Paragraph 1.156 of the Explanatory Memorandum (EM) to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 states the following:

The 'real risk of forfeiture' test does not require employers to provide schemes in which their employee share scheme benefits are at a significant or substantial risk of being lost. However, 'real' is regarded as something more than a mere possibility. Something is not a real risk if a reasonable person would disregard the risk as highly unlikely to occur or as nothing more than a rare eventuality or possibility.

38. Paragraph 1.158 of the EM further states:

The 'real risk of forfeiture' test is intended to provide for deferral of tax when there is a real alignment of interests between the employee and employer, through the employee's benefits being at risk. The test is a principle based test, intended to deny deferral of tax where schemes contrive to present a nominal risk of forfeiture, without complying with the intent of the proposed law.

39. Therefore, for the 'real risk of forfeiture' condition to be met for 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, and
- the risk of forfeiture is 'real', that is, it must be genuine; not nominal; not artificial, apparent or contrived and the risk must not be a 'mere' possibility or 'rare' eventuality.

40. In considering whether a condition in a scheme imposes a real risk of forfeiture, regard should be had to whether a reasonable person would consider that there is a genuine connection between the forfeiture condition and aligning the interests of the employee and employer. If the risk of forfeiture is over a very short period of time to gain access to a relatively long period of deferral the risk will not be considered real.

41. The options that were granted to Participants on 4 February 2022 under the Incentive Plan were to vest on the earlier of:

- the 'Closing Date' of the GIC Agreement, and
- 6 months after the grant date of the options.

42. Based on the vesting conditions, there was no real risk that the Participants would forfeit or lose the options as they would vest within a period of not more than 6 months.

43. Therefore, subsection 83A-105(3) does not apply to the options that were acquired by the Participants.

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**Subsection 83A-105(6) does not apply to the options**

44. Subsection 83A-105(6) 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 acquire the interest:
  - (i) the scheme genuinely restricted you immediately disposing of the right, and
  - (ii) the governing rules of the scheme expressly stated that Subdivision 83A-C applies to the scheme (subject to the requirements of the Act).

45. As the Incentive Plan does not expressly state that Subdivision 83A-C applies to it, subsection 83A-105(6) does not apply to the options that were acquired by the Participants.

46. As neither subsections 83A-105(3) nor (6) apply to the options, Subdivision 83A-C will not apply to the options acquired by the Participants.

**Discount on options to be included in assessable income**

47. Subsection 83A-25(1) states that your assessable income for the income year in which you acquire the ESS interest includes the discount given in relation to the interest (section 83A-315 permits the application of the *Income Tax Assessment (1997 Act) Regulations 2021* in working out the discount).

48. However, the amount included in your assessable income under subsection 83A-25(1) can be reduced if specific conditions are satisfied.

49. Relevantly, one of those conditions is in subsections 83A-45(4) and (5) which requires the employee share scheme to be operated so that all employees must hold their ESS interests for the 'minimum holding period' of 3 years or when they cease employment.

50. As the Incentive Plan is not operated in a manner that prevents the Participants from disposing the options or underlying InterContinental Energy Holdings shares during the minimum holding period, subsection 83A-45(4) is not satisfied.

51. Therefore, you cannot reduce the amount included in your assessable income.

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Status: **not legally binding**

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## References

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### *Legislative references:*

- ITAA 1997 Subdiv 83A-B
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-20(1)
- ITAA 1997 83A-25(1)
- ITAA 1997 83A-45(4)
- ITAA 1997 83A-45(5)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105
- ITAA 1997 83A-105(1)
- ITAA 1997 83A-105(1)(d)
- ITAA 1997 83A-105(3)
- ITAA 1997 83A-105(6)
- ITAA 1997 83A-315
- ITAA 1997 960-410
- ITAA 1997 995-1
- Corporations Act 2001
- Income Tax Assessment (1997 Act) Regulations 2021

### *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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