

AUSTRALIAN EMPLOYEE OWNERSHIP ASSOCIATION

Australian Employee Ownership Association Inc . GPO Box 2649 Sydney NSW 2001 . Ph (02) 9299 2829 .  
Fax (02) 9299 1991

2 September 1999

The Secretary  
House of Representatives Standing Committee on Employment  
Education and Workplace Relations  
R1. 116, Parliament House  
CANBERRA ACT 2600

**LIMITATIONS OF DIVISION 13A : an illustration**

Dear Sir,

The Australian Employee Ownership Association (AEOA) recently made submissions to the inquiry of the House of Representatives Standing Committee on Employment, Education and Workplace Relations into

The extent to which employee share ownership schemes have been established in Australian enterprises and the resultant effects on:

- (a) workplace relations and productivity in enterprises; and
- (b) the economy.

In these submissions our Association recommended, among other things, lifting the prohibition in Division 13A (Income Tax Assessment Act) against ESOPs using equities other than ordinary shares.

I am writing to illustrate, with a very recent case, the kind of problem which this prohibition poses for companies and their employees. I refer to the case of Mirvac Limited. The problem has been created by the merger of Mirvac Limited, Mirvac Property Trust and Capital Property Trust.

Prior to the merger Mirvac Limited offered employees, via a share plan, an ordinary share in the company, thus qualifying under Division 13A. Following the merger, it has been proposed to issue employees with a security - a Mirvac Group Stapled Security - representing an interest in the whole of the newly merged entity. The stapled security would consist of a share in Mirvac Limited and a unit from each of the Mirvac and Capital property trusts. Unfortunately, since a stapled security does not meet the criteria set by Division 13A, the employees would be subject to FBT on the stapled units.

Attached to this letter (Attachment A) is an advice from Price Waterhouse Coopers to Mirvac Limited about the 'downside' for employees of a stapled security. The AEOA also understands that the Stockland Corporation is faced with a similar problem.

In this situation an employer is being frustrated in its desire to implement a broad-based employee share plan by legislation which does not reflect legitimate practice in the structuring of corporate equity. A reform of Division 13A is clearly required. In regard to this particular issue, we believe that Division 13A should be amended to allow an employer to offer an employee any equity in the employer's company.

Yours faithfully

(Gary Scarrabelotti)  
Executive Consultant

PricewaterhouseCoopers  
**201 Kent Street**  
**GPO Box 2650**  
SYDNEY NSW 1171  
Telephone (02) 6266 0000

Mr. Dennis Broit  
Executive Finance Director  
Mirvac Limited  
99 Forbes Street  
WOOLLOOMOOLOO NSW 2011

29 July, 1999

**Subject: Employee Share Schemes**

Dear Dennis

I refer to our recent discussions concerning the Mirvac employee share schemes. As requested I have outlined below my thoughts on the taxation implications arising from further issues of securities under the schemes subsequent to the merger of Mirvac Limited ("*Mirvac*"), Mirvac Property Trust ("MPT") and Capital Property Trust (CPL").

The application of Division 13A of the Income Tax Assessment Act requires, among other matters, that a taxpayer acquire a share or right in respect of, or for or in relation directly or indirectly to, any employment of the taxpayer or an associate of the taxpayer: Division 13A does not apply to units in a trust.

In the absence of amendments to the current operation of the Mirvac share schemes, Division 13A should continue to apply to the Mirvac share component of the future Mirvac Group Stapled Securities (MGSS) issued to participants. However, Division 13A will not apply to the component of the MGSS which relates to units in MPT and CPL.

Upon issue of the MGSS to the share scheme participants, a property fringe benefit will be provided to participants in respect of the MPT and CPL units acquired. This is based on the fact that the participants receive the units in respect of their employment with Mirvac, rather than in respect of their shareholding.

Accordingly the sham scheme provisions of the Act, as presently drafted, do not cater for the (ever increasing) use of stapled instruments.. Given it is my understanding that the overriding principle behind the employee share scheme provisions is to encourage employee participation in the equity of their employees, it would appear inequitable to not allow employees of stapled security entities or unit trusts to be afforded the same benefits as those available to employees of companies.

As you are aware, the Minister of Employment, Workplace Relations and Small Business has requested that the House of Representatives Standing Committee on Employment, Education and Workplace Relations ("the Committee") inquire into employee share schemes. The Committee is to report on the extent to which employee share ownership schemes have been established in Australian enterprises and the resultant effects on:

- a) workplace relations and productivity in enterprises; and
- b) the economy.

The Chairman of the Committee has noted the positive effects of such schemes overseas including the encouragement of national savings, improvement of employer/employee relations and the increase in productivity. Accordingly, the Committee is examining whether there are any barriers which may inhibit the future development of such schemes in this country.

Submissions from various interested organisations and individuals have been received by the Committee and a number of public hearings have been held. One such submission by the Remuneration Planning Corporation recommended a review of the tax and corporations laws governing employee share schemes to remove barriers to the implementation of these schemes.

It is understood that the Committee has asked that written submissions be forwarded by 30 April 1999, although apparently the Committee will accept submissions throughout the course of the inquiry.

I have asked a colleague to raise with the Commission, the technical deficiency in the law as it applies to employees of stapled security entities and unit trusts.

Should you have any questions in relation to the above or require further information, please do not hesitate to contact me on 8266 3354.

Yours sincere

Colin Dunn  
Partner

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