

CR 2006/118 - Income tax: Westpac Banking Corporation Restricted Share Plan



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Class Ruling

Income tax: Westpac Banking Corporation Restricted Share Plan

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ⓘ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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 provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139BA of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FA of the ITAA 1936;
- section 139FB of the ITAA 1936;

- section 139G of the ITAA 1936;
- section 139GA of the ITAA 1936;
- section 160APHD of the ITAA 1936;
- section 160APHJ of the ITAA 1936;
- section 160APHM of the ITAA 1936;
- section 102-20 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997;
- section 109-5 of the ITAA 1997;
- section 109-10 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 116-30 of the ITAA 1997;
- section 130-80 of the ITAA 1997;
- section 130-83 of the ITAA 1997; and
- section 207-145 of the ITAA 1997.

All provisions mentioned hereinafter relate to the ITAA 1936 unless stated otherwise.

Class of entities

3. The class of entities to which this Ruling applies is all persons who are employees of the Westpac Banking Corporation Group (the Group) listed below, who acquire shares under the Westpac Restricted Share Plan (RSP) in accordance with paragraph 17 of this Ruling. In this Ruling, a person belonging to this class of entities is referred to as a participating employee. The Group comprises:

- Westpac Banking Corporation (Westpac);
- 1925 Advances Limited;
- General Credits Holdings Limited;
- General Credits Limited;
- G.C.L. Investments Limited;
- Australian Loan Processing Security Company Pty Limited;
- Australian Loan Processing Security Trust;
- Bill Acceptance Corporation Limited;
- Mortgage Management Limited;
- BLE Capital Limited;
- BLE Capital Investments Pty Limited;

- BLE Development Pty Limited;
- BLE Holdings Pty Limited;
- Brenmar Holdings Pty Limited;
- Castlereagh Pacific Investments Pty Limited;
- CBA Limited;
- Belliston Pty Limited;
- Westpac Properties-Vic-Limited;
- Westpac Properties-NSW-Pty Limited;
- Challenge Limited;
- Challenge Finance Limited;
- Challenge Funds Management Limited;
- Challenge Information Technology Pty Limited;
- Partnership Pacific Limited;
- Partnership Pacific Securities Limited;
- RESI-Statewide Corporation Limited;
- RESI-Statewide Mortgage Corporation Limited;
- Sallmoor Pty Limited;
- Sixty Martin Place (Holdings) Pty Limited;
- 1925 (Commercial) Limited;
- 1925 (Industrial) Limited;
- A.C.N 001 231 027 Pty Limited;
- 1925 (Insurance Premium Funding) Limited;
- 1925 (Properties) Limited;
- 1925 House Limited;
- Athena Finance Pty Limited;
- Colmso Pty Limited;
- Colmtea Pty Limited;
- Como Properties Pty Limited;
- Comserv (No 3011) Pty Limited;
- EHM Investco Pty Limited;
- Enfield Downs Pty Limited;
- Halcyon Securities Limited;
- Infrastructure Australia (No. 1) Limited;
- Infrastructure Australia (No. 3) Limited;

- Infrastructure Australia (No. 4) Limited;
- Ivaness Pty Limited;
- Oakjet Pty Limited;
- Packaging Properties 1 Pty Limited;
- Packaging Properties 2 Pty Limited;
- Packaging Properties 3 Pty Limited;
- Piccadilly of Sydney Pty Limited;
- Sarnia Pty Limited;
- Teuton Pty Limited;
- Victor Funding Pty Limited;
- Victor Finance Pty Limited;
- Victor Investments Pty Limited;
- Westpac Administration Pty Limited;
- Westpac Asian Lending Pty Limited;
- Westpac Debt Securities Pty Limited;
- Westpac Direct Equity Investments Pty Limited;
- Westpac Equipment Finance Limited;
- Westpac Equipment Finance (No. 1) Pty Limited;
- Westpac Group Investments Australia Pty Limited;
- Westpac Investment Vehicle Pty Limited;
- Novacare Health Solutions No. 1 Pty Limited;
- Novacare Health Pty Limited;
- Novacare Health Solutions Pty Limited;
- Novacare Services Pty Limited;
- Novacare Solutions No. 1 Pty Limited;
- Novacare Solutions Pty Limited;
- Westpac Resources and Infrastructure Pty Limited;
- Westpac Syndications Management Pty Limited;
- Tasman Pacific Investments Pty Limited;
- The Mortgage Company Pty Limited;
- Westpac Alpha Pty Limited;
- Westpac Equity Holdings Pty Limited;
- Altitude Administration Pty Limited;
- Altitude Rewards Pty Limited;

- Autodirect Pty Limited;
- Pacific Structured Funding Limited;
- PersonalDirect Limited;
- Qvalent Pty Limited;
- Westpac Financial Consultants Limited;
- Westpac Financial Services Group Limited;
- BT Financial Group Pty Limited;
- BT Australia Pty Limited;
- BT Australia Corporate Services Pty Limited;
- BT Finance Pty Limited;
- BT Nominees Pty Limited;
- Chifley Services Pty Limited;
- BT Funds Management Limited;
- BT Finance & Investment Pty Limited;
- Oniston Pty Limited;
- BT Life Limited;
- BT Portfolio Services Limited;
- Magnitude Group Pty Ltd;
- BT Funds Management No. 2 Limited;
- BT Investment Management No. 2 Limited;
- Hargrave Investments Pty Limited;
- BT Investment Management No. 3 Pty Limited;
- Westpac Custodian Nominees Limited;
- Westpac Financial Services Limited;
- Westpac Funds Management Limited;
- Westpac Funds Management Administration Pty Limited;
- Westpac Life Insurance Services Limited;
- Westpac Securities Administration Limited;
- Westpac General Insurance Services Limited;
- Westpac Equity Pty Limited;
- Westpac General Insurance Limited;
- Westpac Lenders Mortgage Insurance Limited;
- Westpac Information Technology Services Pty Limited;

- Westpac Private Equity Pty Limited;
- Westpac Securities Limited;
- Net Nominees Limited;
- Westpac Securitisation Management Pty Limited;
- Westpac Structured Management Pty Limited;
- Westpac Training Services Pty Limited;
- Westpac Financial Holdings Pty Limited;
- BT Securities Limited;
- BT (Queensland) Pty Limited;
- Westpac Funding Holdings Pty Limited;
- Westpac Institutional Holdings Pty Limited;
- Westpac Leasing Nominees Pty Limited;
- Hume Funding Pty Limited;
- Westpac Leasing Nominees-Vic.-Pty Limited;
- Westpac Leasing Pty Limited;
- Westpac Matching Gifts Limited;
- Westpac Overseas Holdings Pty Limited;
- Westpac Overseas Holding No. 2 Pty Limited;
- Westpac Overseas Funding Pty Limited;
- Westpac Properties Limited;
- Collins Wales Pty Limited;
- Westpac Property Investments Pty Limited;
- Westpac Securitisation Holdings No. 2 Pty Limited;
- Westpac Securitisation Holdings Pty Limited;
- Westpac Structured Products Limited;
- Westpac Tasman No. 1 Pty Limited; and
- Westpac Tasman No. 2 Pty Limited.

Qualifications

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

5. 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 12 to 25 of this Ruling.

6. 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.

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Date of effect

8. This Ruling applies from 1 July 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

12. The scheme that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- the request for Class Ruling from Allens Arthur Robinson (the Applicant) dated 21 August 2006 received on 28 August 2006;
- the Rules of the Westpac Restricted Share Plan (the RSP Rules) dated 18 August 2005;
- the Westpac Employee Equity Plan Trust Deed Poll dated 25 July 2006 (Trust Deed);
- letter from Applicant dated 22 September 2006; and
- letter from Applicant dated 3 October 2006.

Note: certain information received has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information Legislation.

13. The RSP was established as part of the employee share strategy of Westpac and commenced in the year ending 30 June 2007.

14. The Board of Westpac (the Board) will invite eligible employees to apply to acquire shares in Westpac under the RSP.

15. Upon acceptance of the application, eligible employees will become participating employees.

16. At least 75% of permanent employees will have the opportunity, in a particular year, to participate in the RSP or another employee share scheme operated by Westpac.

17. Shares may be acquired by participating employees under the RSP either by:

- Westpac issuing shares directly to participating employees;
- Link Market Services Limited or any other company appointed by Westpac as the plan company (the Plan Company) purchasing shares on-market and allocating them to participating employees; or

- the shares being transferred to the participating employees by the trustee of Westpac Employee Equity Plan Trust (the Trust), Pacific Custodians Pty Limited (the Trustee).

However, the applicant has advised that the only shares that will be held by the Trustee are those that are forfeited, mistakenly allocated (refer to paragraph 23 of this Ruling) or purchased by the Trustee out of any excess income generated by forfeited or mistakenly allocated shares held and such shares will not be held beneficially for a participating employee.

18. The RSP does not provide for participating employees to provide consideration for the acquisition of shares under the RSP.

19. All shares acquired under the RSP will be ordinary shares in Westpac and will be listed on the Australian Stock Exchange (ASX).

20. Shares acquired under the RSP will be subject to a holding lock. Under the holding lock a participating employee will not be permitted to dispose of shares acquired under the RSP until the earliest of:

- (i) the 10th anniversary of the acquisition date, or such other time as may be determined by the Board;
- (ii) the date the participating employee ceases employment within the meaning of subsection 139CA(3);
- (iii) the time of receipt by the Plan Company of a written consent of the Board approving a release request made by a participating employee; or
- (iv) if the Board so determines, the date on which the participating employee's employer ceases to be part of the Group.

21. Until the holding lock is released a participating employee's ownership of shares acquired under the RSP may be forfeited where:

- the employee has acted fraudulently or dishonestly or is or has been in material breach of his or her obligations to the Group; or
- if the shares are not vested, at the date a participating employee ceases employment with the Group (exceptions apply as specified in the RSP Rules in the case of death, total and permanent disablement, retirement, retrenchment and change of control).

22. Upon forfeiture, the participating employee's shares will be transferred to the Trust and the Trustee will deal with the shares in accordance with the RSP Rules and the Trust Deed. The Trustee will pay a total of \$1 to the participating employee for all their forfeited shares.

23. Where shares are mistakenly allocated to a participating employee (the mistaken employee), that employee will:

- have no right or interest in those shares;
- hold the shares absolutely for the benefit of the Trustee; and
- irrevocably appoint each member of the Plan Company to act as their attorney to transfer the shares to the Trustee within a reasonable period of time.

24. At no time will a participating employee hold a legal or beneficial interest in more than 5% of the shares of Westpac. Also at no time will a participating employee be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of Westpac.

25. In relation to the shares acquired by a participating employee under the RSP, the participating employee will be entitled to:

- receive dividends or other distributions paid or made on those shares;
- exercise voting rights attaching to those shares;
- any bonus shares in respect of those shares, however those bonus shares will be vested or unvested, and subject to the holding lock as if they were the original shares with respect to which they were issued;
- participate in any pro rata rights issue of shares in respect of those shares; and
- sell any renounceable rights acquired in respect of shares held under the RSP.

Ruling

26. Under the RSP a participating employee will acquire a qualifying share (within the meaning of section 139CD) when:

- Westpac issues a share to a participating employee;
- the Plan Company purchases a share on-market and allocates it to the participating employee; or
- a share is transferred to the participating employee by the Trustee.

Where an employee makes an election

27. Where a participating employee makes an election under section 139E, the discount given in relation to a share acquired under the RSP will be included in their assessable income in the year of income in which the share is acquired, pursuant to subsection 139B(2).

28. The discount to be included in the participating employee's assessable income is an amount equivalent to the market value of the share at the time it is acquired. The market value of a share at this time is determined under section 139FA.

Capital gains tax

29. Where a participating employee acquires a share under the RSP they also acquire the share for capital gains tax (CGT) purposes.

30. A participating employee is taken to have acquired the share for CGT purposes when:

- the share is allotted to them by Westpac;
- the share is transferred to them by the Plan Company; or
- the share is transferred to them by the Trustee.

31. Where the share is disposed of a capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely a capital loss will arise if the reduced cost base of the share exceeds the capital proceeds.

32. The first element of the cost base of the share will be an amount equivalent to the market value of the share, calculated under section 139FA, at the acquisition time.

33. Where the disposal is 12 months or more after acquisition, any capital gain that results from the disposal will be a discount capital gain.

34. Where shares are forfeited under the RSP, they will be disposed of for CGT purposes when the participating employee transfers the shares to the Trustee. The capital proceeds for the forfeited shares will be the amount of \$1 received from the Trustee.

Where an employee does not make an election

35. Where a participating employee does not make an election under section 139E, the discount given in relation to a share will be included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

36. The cessation time will be the earliest of:
- the time when the share is disposed of in accordance with the RSP forfeiture provisions;
 - the time when the holding lock is lifted;
 - the time when the participating employee ceases to be employed by their employer or a Group company, pursuant to subsection 139CA(3); or
 - the end of the 10 year period starting when the participating employee acquired the share.

Disposal within 30 days

37. Where the participating employee subsequently disposes of the share in an arm's length transaction within 30 days of the cessation time, the discount assessable at the cessation time will be the amount of consideration received on the disposal of the share, in accordance with subsection 139CC(3).

38. Where shares are disposed of as a result of forfeiture, the discount for such shares will be \$1, being the amount the participating employee receives from the Trustee for the forfeited shares.

39. Any capital gain or capital loss made as a consequence of such a disposal will be disregarded.

Disposal after 30 days

40. Where the share is not disposed of by the participating employee in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the share at the cessation time in accordance with subsection 139CC(4).

41. Where a participating employee disposes of the share acquired under the RSP other than in an arm's length transaction within 30 days of the cessation time, a capital gain or a capital loss may arise (refer to paragraphs 29 to 33 of this Ruling).

42. In determining the gain or loss the first element of the cost base of the share is the market value of the share at the cessation time, pursuant to subsection 130-80(2) of the ITAA 1997. The market value is calculated in accordance with section 139FA of the ITAA 1936.

Shares allocated in error

43. Where under the RSP a share is mistakenly allocated to a participating employee and subsequently transferred to the Trustee:

- the mistaken employee does not acquire the share under an employee share scheme for the purposes of Division 13A of Part III (Division 13A);

- the mistaken employee does not acquire the share for CGT purposes; and
- no capital gain or capital loss arises on the transfer of the share to the Trustee.

Qualified person with respect to dividends

44. In the absence of any other long or short positions in respect of the shares that may result in a material diminution in the risk of loss or opportunity for gain, the RSP will not prevent a participating employee from being a qualified person for the purposes of section 207-145 of the ITAA 1997 with respect to dividends received by them on shares acquired under the RSP, provided the shares are held for the requisite period of time during the relevant qualification period.

Commissioner of Taxation29 November 2006

Appendix 1 – Explanation

① *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. An employee will acquire a share under an employee share scheme, pursuant to Division 13A, if the share is:

- acquired within the meaning of section 139G;
- acquired in respect of the employment of the employee, pursuant to subsection 139C(1); and
- acquired for less than market value, pursuant to subsection 139C(3).

46. Section 139G provides that an employee will acquire a share in several circumstances, including by acquiring a legal interest in the share, or having it allotted or transferred to them by another person.

47. Under the RSP a participating employee acquires a legal interest in a Westpac share when:

- Westpac issues the share to them;
- the Plan Company purchases the share on-market and allocates it to them; or
- the share is transferred to the participating employee by the Trustee.

Thus, a participating employee will acquire a share within the meaning of section 139G.

48. The RSP Rules note that the RSP has been established as an initiative for creating a stronger link between employee reward and increasing shareholder value. As such, any share acquired under the RSP is considered to be acquired by a participating employee in respect of their employment, pursuant to subsection 139C(1).

49. As no consideration is paid or given by participating employees for the acquisition of a share, participating employees will acquire a share for less than market value, pursuant to subsection 139C(3).

Qualifying shares

50. In order for a share to be a qualifying share, the conditions set out in section 139CD must be satisfied. These conditions are as follows:

- (1) the share is acquired by a taxpayer under an employee share scheme (subsection 139CD(2));
- (2) the company in which the share is acquired is the employer of the taxpayer or a holding company of the employer of the taxpayer (subsection 139CD(3));

- (3) all the shares available for acquisition under the scheme are ordinary shares and all the rights available for acquisition under the scheme are rights to acquire ordinary shares (subsection 139CD(4));
- (4) at the time the share was acquired, at least 75% of the permanent employees of the employer were, or at some earlier time had been, entitled to acquire:
 - (i) shares or rights under the scheme; or
 - (ii) shares or rights in the employer, or a holding company of the employer, under another employee share scheme (subsection 139CD(5); and
- (5) immediately after the acquisition of the share, the taxpayer does not hold a legal or beneficial interest in more than 5% of the shares in the company or is not in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the company (subsections 139CD(6) and 139CD(7)).

51. As a share acquired by a participating employee is acquired at a discount and in respect of employment, the share will be acquired under an employee share scheme, thus the first condition is satisfied.

52. To satisfy the second condition, the share acquired by the participating employee must be a share in their employer (as defined in subsection 139GA(3)) or the holding company of their employer. As the Commissioner accepts that Westpac or a subsidiary of Westpac will be the employer (as defined in subsection 139GA(3)) of the participating employee, the second condition will be satisfied.

53. The shares available for acquisition under the RSP are ordinary shares, thus the third condition will be satisfied.

54. The applicant has advised that at least 75% of permanent employees will have the opportunity, in a particular year, to participate in the RSP or another employee share scheme operated by Westpac, thus the Commissioner accepts that the fourth condition will be satisfied.

55. As the applicant has advised that the RSP will be operated such that at no time will a participating employee:

- hold a legal or beneficial interest in more than 5% of the shares of Westpac; or
- be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of Westpac,

the Commissioner accepts that the last of the conditions will be satisfied.

56. As the Commissioner accepts that all the conditions in section 139CD are satisfied, a share acquired by a participating employee under the RSP will be a qualifying share for the purposes of Division 13A.

57. Where an employee acquires a share under an employee share scheme, the discount given in relation to the share is included in their assessable income in accordance with Subdivision B of Division 13A. Where the share is a qualifying share, the amount of the discount, and the year of income in which the discount is included is dependent on whether the employee makes a section 139E election.

58. Where an employee acquires a share under an employee share scheme, pursuant to subsection 139B(1), the assessable income of the employee, subject to section 139BA, includes the discount given in relation to the share.

59. Where the share is a qualifying share the year of income in which the discount is included and the amount of the discount depend on whether the employee has made a section 139E election in relation to the acquisition of the share.

Where an employee makes an election

60. An employee can elect under section 139E that subsection 139B(2) applies in respect of all shares acquired by the employee in a year of income. Subsection 139B(2) provides that the discount in relation to a share is included in the employee's assessable income in the year of income in which the share is acquired.

61. The amount of the discount to be included is calculated in accordance with subsection 139CC(2). The discount being the market value of the share at the time it was acquired by the employee.

62. Subdivision F of Division 13A contains special provisions to determine the market value of a share on a particular day. As the ordinary shares in Westpac are listed on the ASX, section 139FA provides that their market value is:

- if there was at least one transaction on the ASX in those shares in the week up to and including the date of acquisition - the weighted average of the prices at which those shares were traded on the ASX during that week; or
- if there were no such transactions in the week up to and including the date of acquisition - the last price at which an offer was made on the ASX in that period to buy such a share, or if no offer was made, the value as determined under section 139FB.

Capital gains tax

63. Where a share is issued to a participating employee or transferred to a participating employee by the Plan Company or by the Trustee, the employee will acquire the share for CGT purposes, pursuant to sections 109-5 and 109-10 of the ITAA 1997.

64. When the share is subsequently disposed of a capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely a capital loss will arise if the reduced cost base exceeds the capital proceeds, pursuant to subsection 104-10(4) of the ITAA 1997.

65. The first element of the cost base of the share, is determined in accordance with subsection 130-80(2) of the ITAA 1997. As the ordinary shares in Westpac are listed on the ASX, the first element of the cost base of the share will be the market value of the share, determined under section 139FA of the ITAA 1936, at the time the participating employee acquires the share.

66. Where the disposal is 12 months or more after the acquisition, any capital gain that results from the disposal will be a discount capital gain under Subdivision 115-A of the ITAA 1997.

Forfeiture of shares

67. On forfeiture of a share under the RSP, CGT event A1 will happen when ownership of the share is transferred to the Trustee. The participating employee will make a capital gain if the capital proceeds from the disposal exceed the cost base of the share, or a capital loss, if the reduced cost base exceeds the capital proceeds, pursuant to section 104-10 of the ITAA 1997.

68. Where the Trustee pays a total of \$1 to a participating employee for all their forfeited shares, the participating employee will have received capital proceeds in respect of the disposal.

69. As the RSP Rules apply equally to all participating employees, the Commissioner accepts that a participating employee and the Trustee will deal with each other at arm's length in connection with the disposal. Thus the market value substitution rule in subsection 116-30(2) of the ITAA 1997 will not apply, and the capital proceeds from the disposal will be \$1, pursuant to subsection 116-20(1) of the ITAA 1997.

Where an employee does not make an election

70. Where an employee acquires a qualifying share and does not make an election under section 139E, the discount given in relation to the share is included in the employee's assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

71. As the RSP contains forfeiture provisions, the cessation time will be determined in accordance with subsection 139CA(2). As the RSP Rules provide for a share to be forfeited up until the holding lock is released, the cessation time will be the earlier of:

- the time when the share is disposed of in accordance with the RSP forfeiture provisions;
- the time when the holding lock is lifted;
- the time when the participating employee ceases to be employed by their employer or a Group company, pursuant to subsection 139CA(3); or
- the end of the 10 year period starting when the participating employee acquired the share.

72. The amount of the discount to be included in an employee's assessable income is determined under section 139CC and will depend on whether the share is disposed of in an arm's length transaction within 30 days of the cessation time.

Disposal within 30 days

73. Where an employee disposes of the share in an arm's length transaction within 30 days of the cessation time the discount to be included in assessable income, is the amount or value of any consideration received by the employee for the disposal less the amount or value of any consideration paid or given by the employee for the acquisition of the share, pursuant to subsection 139CC(3).

74. Where a participating employee forfeits shares under the RSP the Commissioner accepts the disposal will be at arm's length (refer to paragraph 69 of this Ruling). Thus the discount to be included in assessable income will be the amount of \$1 that the participating employee receives from the Trustee, for all the forfeited shares.

75. Any capital gain or loss made as a consequence of an arm's length disposal within 30 days of the cessation time is disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

Disposal after 30 days

76. Where the employee does not dispose of a share in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the share at the cessation time less the amount or value of any consideration paid or given by the employee for the acquisition of the share, pursuant to subsection 139CC(4).

77. Where the share is a qualifying share and no election is made under section 139E of the ITAA 1936, a capital gain or loss may arise upon disposal (refer to paragraphs 29 to 33 of this Ruling) and the first element of the cost base of the share will be its market value at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997.

78. For the purposes of subsection 139CC(4) and subsection 130-83(3) of the ITAA 1997, the market value of a share acquired under the RSP is determined under section 139FA of the ITAA 1936.

Shares allocated in error

79. An employee will acquire a share for the purposes of Division 13A if another person transfers or allots the share to the employee or the employee otherwise acquires a legal or beneficial interest in the share from another person.

80. Where a share is mistakenly allocated to a participating employee under the RSP, the RSP Rules state that the mistaken employee will have no right or interest in the share, and that the mistaken employee holds the share absolutely for the account of the Trustee. Each participating employee appoints an officer in the Plan Company as the attorney of the participating employee to execute and deliver any instrument of transfer or other document necessary or desirable to affect such a transfer to the Trustee.

81. Whilst the RSP Rules state that the mistaken employee holds the share absolutely for the account of the Trustee, this is only to effect rectification of the mistake and the Commissioner accepts that the mistaken employee never acquires a right or interest in the share. Thus the mistaken employee will not acquire the share for the purposes of Division 13A.

Capital gains tax

82. For CGT purposes an employee will acquire a share if they become the owner. Where a share is allocated to a mistaken employee under the RSP, the mistaken employee does not acquire a right or interest in a share and thus will never own the share. In these circumstances the mistaken employee is taken never to acquire the share for CGT purposes.

83. A person will make a capital gain or loss if a CGT event happens, pursuant to section 102-20 of the ITAA 1997.

84. Where a mistaken employee transfers the share to the Trustee, CGT event A1 will only happen if there is a change in the ownership of a share from the employee to the Trustee, pursuant to subsection 104-10(2) of the ITAA 1997. As the mistaken employee never owns the share, CGT event A1 does not happen and as no other CGT event is considered to happen, no capital gain or loss will arise on the transfer of the share to the Trustee.

Qualified persons with respect to dividends

85. Where a franked dividend is paid to a participating employee on the shares, paragraph 207-145(1)(a) of the ITAA 1997 denies a gross-up and tax offset where the recipient is not a qualified person for the purposes of Division 1A of Part IIIAA of the ITAA 1936.

86. A participating employee will be a qualified person in relation to all dividends paid during a year of income on all shares that the participating employee held or held an interest in, if the total imputation credits in relation to the dividends do not exceed \$5,000. If the total imputation credits for a year of income exceed \$5,000 then, broadly speaking, the participating employee must satisfy both the holding period rule and the related payments rule in order to be a qualified person in respect of the dividend.

87. A participating employee will be taken to be a qualified person in respect of a dividend if the relevant shares are held at risk for a period of 45 days during the primary qualification period where no related payments are made, or the secondary qualification period where related payments are made.

88. Under subsection 160APHM(2), a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the net position of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares. The net position of a shareholder with respect to shares is determined in accordance with subsection 160APHJ(5). In particular, subsection 160APHJ(2), in defining the meaning of position provides:

....if a share, or an interest in a share, is an employee share scheme security, a condition attached to the share or interest, or a term of the document that created the interest, that prevents the holder of the share or interest from disposing of it or could result in the share or interest being forfeited is not a position in relation to the share or interest

89. Shares acquired by a participating employee will be employee share scheme securities, as defined in section 160APHD, as they will be qualifying shares for the purposes of Division 13A. The conditions attaching to those shares which prevent their disposal (that is, the holding lock), or which could result in the shares being forfeited (such as where the shares do not become vested shares or where the employee's actions as noted in the RSP Rules otherwise result in forfeiture) will by virtue of the definition referred to above, not constitute a position in relation to those shares for the purposes of Division 1A of Part IIIAA.

90. As the terms of the RSP Rules do not give rise to a position that may affect the calculation of the net position with respect to the shares, they will not consequently result in a material diminution of risks and opportunities with respect to the shares.

91. Therefore, in the absence of any other long or short positions in respect of the shares that may result in a material diminution in the risk of loss or opportunity for gain, the RSP will not prevent a participating employee from being a qualified person for the purposes of section 207-145 of the ITAA 1997 with respect to dividends received by them on shares acquired under the RSP, provided the shares are held for the requisite period of time during the relevant qualification period.

Appendix 2 – Detailed contents list

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Previous draft:

Not previously issued as a draft

Subject references:

- discount
- election
- employee share scheme
- qualifying share

Legislative references:

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