

***CR 2003/60 - Income tax: Employee Share Scheme:
Exemption conditions: disposal of shares held under
Bank of Western Australia Limited General Employee
Share Ownership Plan within three years of
acquisition***

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2002*



Class Ruling

**Income tax: Employee Share Scheme:
Exemption conditions: disposal of shares held
under Bank of Western Australia Limited
General Employee Share Ownership Plan
within three years of acquisition**

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are sections:
- 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - 139BA of the ITAA 1936;
 - 139CC of the ITAA 1936;
 - 139CE of the ITAA 1936;
 - 139E of the ITAA 1936; and
 - 139GF of the ITAA 1936.

Class of persons

3. The class of persons to which this Ruling applies is employees of the Bank of Western Australia Ltd (BankWest) who have acquired shares on 19 July 2002 by participating in an offer made under the General Employee Share Ownership Plan (GESOP). These persons may be compelled to dispose of their shares to Scottish Western Australia Holdings Pty Ltd (SWAH) as part of the Scheme outlined below. In this Ruling, this class of persons is referred to as the 'participating employees.'

Qualifications

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

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 10 to 19.

6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- (b) this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to the years of income ended 30 June 2003 and 30 June 2004. 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 30 June 2004. The Ruling continues to apply, in respect of the tax laws ruled upon to all persons within the specified class who enter into a specified arrangement during the term of the Ruling. Thus the Ruling continues to apply to persons, even following its withdrawal, for arrangements entered into prior to the withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

10. The arrangement 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 arrangement are:

- Letter from KPMG dated 4 July 2003 enclosing Application for Class Ruling and other material;
- BankWest General Employee Share Ownership Plan (GESOP) Rules;
- Copy of the Scheme booklet prepared in relation to the proposed takeover of BankWest by SWAH;
- Email dated 15 July 2003 from BankWest; and
- Facsimile dated 17 July 2003 from KPMG.

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

11. The GESOP commenced in 1997. It provides an opportunity for eligible employees of BankWest to acquire ordinary shares in the company.

12. The GESOP is administered by the board of BankWest in accordance with the GESOP rules. Annually, if the earnings per share for BankWest meets a specific performance criterion, eligible

employees are offered participation in the GESOP and upon acceptance of the offer, the eligible employee becomes a Participant.

13. Shares acquired under the GESOP are allotted to the participant who has full legal and beneficial ownership of the shares acquired. The Participant has full shareholder voting and dividend rights.

14. The GESOP rules provide that during the three year period after the date of issue of shares to the Participant, the shares acquired must not be disposed of by the participant, unless the employee ceases to be an employee of BankWest.

15. On 19 July 2002, those eligible employees who were entitled to participate in the GESOP were provided share benefits of less than \$1,000.

16. At no time has the total number of ordinary shares in the capital of BankWest acquired by any participant under the GESOP exceeded 5% of the total number of ordinary shares of the capital of BankWest.

Scheme of Arrangement

17. SWAH has proposed to BankWest that it acquire all of the shares it does not currently hold in BankWest by way of a Scheme of Arrangement (Scheme) between BankWest and its shareholders, subject to the approval of BankWest's shareholders (other than SWAH) and the Federal Court of Australia under section 411 of Part 5.1 of the *Corporations Act 2001(Cth)*.

18. Before Federal Court approval can be given, the Scheme requires approval by a majority in number of BankWest shareholders who vote at the Scheme meeting (in person or by proxy) and at least 75% of the total number of shares voted at the Scheme meeting (in person or by proxy). Note: SWAH can not vote.

19. If Shareholder and Federal Court approval is given, SWAH will compulsorily acquire all BankWest shares. All approvals are expected to allow completion of the Scheme on or before 11 September 2003.

Ruling

All subsequent references are to the *Income Tax Assessment Act 1936*.

20. Provided that the GESOP rules are not varied to lift the disposal restrictions referred to in paragraph 14 above, it would be concluded that the exemption conditions in section 139CE have been

satisfied in relation to the shares acquired by the participating employees, in that:

- the GESOP did not contain any conditions which allowed for shares acquired by participating employees to be forfeited;
- the GESOP has been operated so that participating employees would not be permitted to dispose of shares acquired until three years after their acquisition, or until the participating employees cease to be employed by BankWest – whichever occurs earlier; and
- the GESOP has been operated on a non-discriminatory basis in accordance with terms of section 139GF.

21. Furthermore, the conclusion reached in the previous paragraph is not affected by the fact that shares acquired under the GESOP might be compulsorily disposed of by participating employees due to operation of the Scheme.

22. Accordingly, as the exemption conditions in section 139CE have been satisfied, section 139BA applies to participating employees in respect of qualifying shares acquired under the GESOP in the 2002-03 year of income, provided that the employee has made an election under section 139E for that year. This means that the total amount of discounts, assessable to the employee in relation to such shares, is only assessable under subsection 139B(2) to the extent that it is greater than \$1,000.

23. As the discount is not greater than \$1,000, no amount will be included in a participant's assessable income in the 2002-03 year of income.

Disposal of shares as a result of an alteration to the GESOP Rules

24. However, should the shares acquired by the participating employees under the GESOP be disposed of within three years of acquisition, as a result of an alteration to the GESOP rules made by the board of BankWest, the exemption condition in subsection 139CE(3) **will not be satisfied**.

25. Accordingly, as the exemption condition in subsection 139CE(3) would not be satisfied, section 139BA will not apply to the participating employees for the relevant years of income. Thus employees are required under subsection 139B(2) to include in their assessable income for the 2002-03 year of income the total value of the discount given. Existing assessments may be required to be amended where a participating employee has excluded an amount of discount given from their assessable income.

Explanation

26. A taxpayer who acquires shares under an employee share scheme is required by section 139B to include in his or her assessable income, in an income year, the value of the discount given in relation to each share acquired in that year. Where subsection 139B(2) applies to the discount, it is calculated under subsection 139CC(2) by deducting the amount of consideration paid or given for the share from the market value of the share at the time it was acquired.

Elections under section 139E

27. A taxpayer who acquires qualifying shares under an employee share scheme is able to make an election under subsection 139E(1) that subsection 139B(2) applies for a year of income to each qualifying share acquired by the taxpayer in that year.

28. Subsection 139E(2) requires that the election be made in writing in a form approved by the Commissioner before the taxpayer lodges his or her return of income for the year of income, or within such further time as the Commissioner requires.

The exemption conditions

29. Section 139CE contains three exemption conditions:

- The first exemption condition is that the scheme did not contain any conditions which could result in recipients forfeiting ownership of the shares that were acquired under the Share Plan (subsection 139CE(2));
- The second exemption condition is that the scheme is operated so that no recipient would be permitted to dispose of shares acquired under the Share Plan until three years after the acquisition or until the recipient ceases to be an employee of the employer - whichever event occurs earlier (subsection 139CE(3)); and
- The third exemption condition is that the employee share scheme and any financial assistance scheme in respect of the acquisition of shares under the employee share scheme is operated on a non discriminatory basis (subsection 139CE(4)).

30. As the reference to 'the scheme' in subsections 139CE(2) to (4) is effectively a reference to the mechanism by which participating employees acquire qualifying shares, the exemption conditions initially must be satisfied by the GESOP at the time of the offer of shares to the employees. However, as part of the purpose of section 139CE is to ensure that qualifying shares are held for the nominated period in order to access the concession in section 139BA, satisfaction of the conditions at the time of offer, of itself, may not be enough. The GESOP needs to continue to be operated in a manner that satisfies the exemption conditions.

Forfeiture of ownership

31. The *Macquarie Dictionary* (1997, Third Edition) defines 'forfeit' as 'something to which the right is lost by the commission of a crime or misdeed, the neglect of a duty, a breach of a contract etc.' The context in which 'forfeiting' is used in subsection 139CE(2) connotes a meaning somewhat broader than the legal definition - taking in a 'relinquishing', or a 'loss', without due recompense.

32. Rule 12 of the GESOP rules allows for the amendment of the Plan rules. The provision recognises that a consequence of amending the GESOP rules could be a reduction of the rights of participating employees in respect of the shares issued. However, adverse amendments can only occur if participants give their written consent.

33. Irrespective of the foregoing Rule in the GESOP relating to a possible reduction of rights, it is accepted that shares acquired under the GESOP have been acquired and are owned by the Participants. It would not be possible for any amendment - even a retrospective amendment - to the GESOP to affect the title of participating employees to those shares.

34. If SWAH and BankWest gain Court approval for the proposed Scheme, the current shareholders of BankWest will receive the consideration offered by SWAH. The value of that consideration will not differ between the participating employees and other shareholders. An entitlement to that consideration precludes a finding that the acquired shares had been 'forfeited'. Thus the GESOP does not contain any conditions which could result in shares acquired by Participants being forfeited.

35. As the GESOP rules do not contemplate 'forfeiture' of the shares acquired by the participating employees, the exemption condition in subsection 139CE(2) is satisfied.

Restrictions on disposal

36. The GESOP rules prohibit the disposal of shares allocated to an employee under the GESOP before the earlier of:

- the period ending three years after the time of acquisition of the shares; and
- the time at which the employee ceased to be employed by the BankWest.

37. Compulsory acquisition of shares occurs automatically following Court approval of the Scheme, in conjunction with BankWest shareholder approval.

38. The Board of the BankWest have operated the GESOP to prevent disposal of the shares within the requisite three year period.

39. Any decision by SWAH to pursue acquisition of the shares acquired by the participating employees is out of the control of the employees, notwithstanding the ability of the participating employees to vote at company meetings. It is considered the total shareholding under the GESOP in relation to the total shares issued by BankWest, effectively means that the participating employees have no decision making influence on the Scheme. There is effectively no connection between any disposal of the shares and the operation of the GESOP. Any early disposal of the shares is outside the operation of the GESOP. While the board of directors of BankWest administers the operation of the GESOP, the directors have no decision making influence on the scheme other than that arising from their right to vote as shareholders. As the directors do not, in effect, influence the Scheme decision, it would be concluded that the GESOP has been operated so that no participating employee could dispose of the shares acquired under the GESOP before the time set out in subsection 139CE(3). Accordingly, the exemption condition set out in that subsection would be satisfied.

40. However, the position is different if the shares acquired by the participating employees under the GESOP are disposed of within three years of acquisition, as a result of an alteration to the GESOP rules made by BankWest.

41. Alteration of the GESOP rules is within the direct control of the board of BankWest. By altering the GESOP rules to allow disposal of shares within three years of acquisition, it could not be concluded that the GESOP is being operated in a manner that complies with the exemption condition in subsection 139CE(3).

42. Failure to meet the exemption condition in subsection 139CE(3) means that a participating employee who has made an election under section 139E for the 2002-03 year of income will not be able to avail themselves of the \$1,000 concession in section 139BA.

43. In these circumstances, employees may be required to amend their income tax return for the 2002-03 year to include in their assessable income the total amount of the discount.

Non-discriminatory operation

44. Subsection 139CE(4) requires that the employee share scheme and any financial assistance in respect of the acquisition of the shares must be operated on a non discriminatory basis.

45. In order for an employee share scheme to have been operated on a non discriminatory basis, the conditions listed in subsection 139GF(2) must be satisfied in relation to all offers to acquire shares under the scheme. These conditions are that:

- participation in the scheme is open to at least 75% of permanent employees;
- the time for acceptance of offers made is reasonable; and
- the essential features of each offer are the same for at least 75% of permanent employees.

46. The GESOP has been operated on a non discriminatory basis. Rule 2.2(c) of the GESOP provides that the plan shall be operated on a non-discriminatory basis. This is defined as being 'the meaning ascribed in terms of section 139GF of the *Income Tax Assessment Act 1936*.

47. As the three exemption conditions in section 139CE have been satisfied, section 139BA applies to participating employees in respect of qualifying shares acquired under the GESOP in the 2002-03 year of income. Under subsection 139B(2) discounts are only assessable to the extent that it is greater than \$1,000. This means that there is no amount to be included in a GESOP participant's assessable income as the discount is less than \$1,000.

Detailed contents list

48. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

30 July 2003

<i>Previous draft:</i>	- ITAA 1936 139B(2)
Not previously issued in draft form	- ITAA 1936 139BA
	- ITAA 1936 139CC
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139CC(2)
TR 92/1; TR 92/20; TR 97/16;	- ITAA 1936 139CE
CR 2001/1	- ITAA 1936 139CE(2)
	- ITAA 1936 139CE(3)
	- ITAA 1936 139CE(4)
<i>Subject references:</i>	- ITAA 1936 139E
- employee share scheme	- ITAA 1936 139E(1)
- election	- ITAA 1936 139E(2)
	- ITAA 1936 139GF
<i>Legislative references:</i>	- ITAA 1936 139GF(2)
- ITAA 1936 139B	- Copyright Act 1968

- Corporations Act 2001 411 Pt 5.1 - TAA 1953 Part IVAAA

ATO references
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