


CR 2005/22 - Income tax: Westpac Banking Corporation Employee (Exempt) Share Plan

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Class Ruling

Income tax: Westpac Banking Corporation Employee (Exempt) Share Plan

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Preamble

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **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 laws' 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 laws 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 139CE 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 139GF 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 110-25 of the ITAA 1997;
- section 115-100 of the ITAA 1997;
- section 130-80 of the ITAA 1997; and
- section 130-83 of the ITAA 1997.

Class of persons

3. The class of persons to which this Ruling applies is all Australian resident employees of the Westpac Group (the Group) who participate in the Westpac Banking Corporation Employee Share Plan (the ESP) as described in the arrangement part of this Ruling. In this Ruling, a person belonging to this class of persons is referred to as a participating employee. The Group comprises:

- Westpac Banking Corporation (Westpac);
- 1925 (Commercial) Limited;
- M.A.C. Nominees Pty Limited;
- Mazbond Pty Limited;
- Palaver Pty Limited;
- Reveille Pty Limited;
- Brenmar Holdings Pty Limited;
- Runkelli Pty Limited;
- 1925 (Industrial) Limited;
- A.C.N 001 231 027 Pty Limited;
- Personaldirect Limited;
- A.C.N 007 552 454 Limited;
- Colmso Pty Limited;
- Colmtea Pty Limited;
- Como Properties Pty Limited;
- Autodirect Pty Limited;
- 1925 (Insurance Premium Funding) Limited;
- 1925 (Properties) Limited;
- 1925 House Limited;
- Ormiston Pty Limited;
- Hesse Pty Limited;
- Pranbrooke Pty Limited;
- 1925 Advances Limited;

- General Credits Holdings Limited;
- General Credits Limited;
- G.C.L. Investments Limited;
- Island Princess Holdings Pty Limited;
- Reef International Pty Limited;
- Bill Acceptance Corporation Limited;
- Mortgage Management Limited;
- Biralto Pty Limited;
- CBA Limited;
- Westpac Properties – Vic – Limited;
- Westpac Properties – NSW – Pty Limited;
- Westpac Matching Gifts Limited;
- Huben Holdings Pty Limited;
- Hull 4381 and 4382 Leasing Pty Limited;
- Partnership Pacific Limited;
- Westpac Administration Pty Limited;
- Carseldine Pty Limited;
- Glenunga Pty Limited;
- Maliny Pty Limited;
- Partnership Pacific Securities Limited;
- Wistow Pty Limited;
- The Mortgage Company;
- Piccadilly of Sydney Pty Limited;
- Jaunty Pty Limited;
- Pitco Pty Limited;
- Sarnia Pty Limited;
- Sixty Martin Place (Holdings) Pty Limited;
- Claremont Bond Pty Limited;
- Comserv (No. 3011) Pty Limited;
- Enfield Downs Pty Limited;
- Westpac Equipment Finance (No. 1) Pty Limited;
- Ivaness Pty Limited;
- Oakjet Pty Limited;
- Westpac Direct Equity Investments Pty Limited;

- Teuton Pty Limited;
- Loy Yang B Agencies Pty Limited;
- Westpac Asian Lending Pty Limited;
- Westpac Debt Securities Pty Limited;
- Westpac Equipment Finance Limited;
- Westpac Equipment Finance (Vic) Pty Limited;
- Infrastructure Australia (No. 1) Limited;
- Infrastructure Australia (No. 2) Limited;
- Infrastructure Australia (No. 3) Limited;
- Infrastructure Australia (No. 4) Limited;
- Packaging Properties 1 Pty Limited;
- Packaging Properties 2 Pty Limited;
- Packaging Properties 3 Pty Limited;
- EHM Investco Pty Limited;
- Westpac Group Investments Australia Pty Limited;
- Howlong Pty Limited;
- Westpac Infrastructure Management Limited;
- WIML Services Pty Limited;
- Westpac Alpha Pty Limited;
- Westpac Investment Vehicle Pty Limited;
- Westpac Resources and Infrastructure Pty Limited;
- Westpac Structured Investments Limited;
- Pacific Structured Funding Limited;
- Vicpac Chatswood Pty Limited;
- Westpac Structured Products Limited;
- Net Nominees Limited;
- Westpac Securities Limited;
- Westpac Equity Holdings Pty Limited;
- Belliston Pty Limited;
- Westpac Financial Consultants Limited;
- Westpac Information Technology Services Pty Limited;
- Westpac Training Services Pty Limited;
- Westpac Private Equity Pty Limited;
- Westpac Retirement Plan Pty Limited (ex Torlane P/L);

- Westpac Securitisation Management Pty Limited;
- Westpac Financial Services Group Limited;
- Westpac Financial Services Limited;
- Westpac Insurance Services (Brokers) Limited;
- Westpac Equity Pty Limited;
- A.F.G. Insurances Limited (in vol liq);
- Westpac General Insurance Limited;
- Westpac Investment Management Pty Limited;
- Westpac Securities Administration Limited;
- The Wales Nominees (Vic) Pty Limited;
- Westpac Custodian Nominees Limited;
- Westpac Insurance Services Superannuation Fund Limited;
- Westpac Nominees – Canberra – Pty Limited;
- Westpac Nominees – SA – Pty Limited;
- Westpac Lenders Mortgage Insurance Limited;
- Westpac Life Insurance Services Limited;
- Westpac Funds Management Limited;
- Westpac Finance Pty Limited;
- Westpac Investment Holdings Pty Limited;
- Westpac Leasing Nominees Pty Limited;
- Westpac Leasing Nominees – Vic – Pty Limited;
- Westpac Leasing Pty Limited;
- Westpac OMG Holdings Pty Limited;
- Qvalent Pty Limited;
- Westpac Structured Management Pty Limited;
- Westpac Overseas Funding Pty Limited;
- Westpac Overseas Holdings Pty Limited;
- Altitude Rewards Pty Ltd;
- Altitude Administration Pty Ltd;
- Westpac Altitude Rewards Trust;
- Westpac Properties Limited;
- Collins Wales Pty Limited;
- Westpac Institutional Holdings Pty Limited;

- Westpac Property Investments Pty Limited;
- Westpac Syndications Management Pty Limited;
- Westpac Tasman No. 1 Pty Limited;
- Westpac Tasman No. 2 Pty Limited;
- BLE Capital Pty Limited;
- BLE Capital Investments Pty Limited;
- BLE Development Pty Limited;
- BLE Holdings Pty Limited;
- Westpac Funding Holdings Pty Limited;
- Challenge Limited;
- Challenge Finance Limited;
- Challenge Funds Management Limited;
- Challenge Information Technology Pty Limited;
- RESI-Statewide Mortgage Corporate Limited;
- RESI-Statewide Nominees Limited;
- RESI-Statewide Corporation Limited;
- Maracorp Financial Services Pty Limited;
- Salmoor Pty Limited;
- S.A.L. Financial Services Pty Limited;
- MFS Services Pty Limited;
- 52 Collins St Pty Limited;
- Sagitta Wealth Management Limited;
- Sagitta Investment Management Limited;
- Hargrave Investments Pty Limited;
- BT (Queensland) Pty Ltd;
- BT Australia Corporate Services Pty Ltd;
- BT Australia Pty Ltd;
- BT Finance & Investments Pty Ltd;
- BT Finance Pty Ltd;
- BT Financial Group Limited;
- BT Funds Management Ltd;
- BT Life Ltd;
- BT Nominees Pty Ltd;
- BT Portfolio Services Ltd;

- BT Securities Ltd;
- BT Wealth Management Pty Ltd;
- Chifley Services Pty Ltd;
- Oniston Pty Ltd;
- Hastings Funds Management Limited; and
- QVI Pty Ltd.

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 9 to 22.

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

- 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
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Furthermore this Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*;
- it is not taken to be withdrawn by an inconsistent Public Ruling; or
- the relevant taxation laws are not amended.

Arrangement

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

9. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents:

- The Westpac Banking Corporation Employee Share Plan Rules (the ESP Rules);
- the application for Class Ruling dated 27 February 2003;
- facsimile from Westpac dated 30 June 2003;
- letter from Westpac dated 9 October 2003;
- letter from Westpac dated 17 December 2003; and
- letter from Westpac dated 19 February 2004.

These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description.

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.

10. The ESP was established as part of the employee share strategy of Westpac. The ESP commenced in the year ending 30 June 2003 and is administered by Employee Share Plan Pty Limited (the Plan Company) or such other person as nominated from time to time by the Board of Westpac (the Board).

11. The Board will invite eligible employees to apply to acquire shares in Westpac.

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

13. The ESP does not provide for a participating employee to provide consideration for the acquisition of shares.
14. The ESP will be operated on a non-discriminatory basis within the meaning of that expression in section 139CE and section 139GF.
15. Westpac may issue shares to the Plan Company in the name of respective participating employees, or the Plan Company may purchase shares on-market and immediately allocate them to participating employees.
16. The Plan Company will fund on-market acquisitions with funds contributed by Group companies.
17. All shares acquired under the ESP will be ordinary shares in Westpac which are listed on the Australian Stock Exchange (ASX).
18. Shares acquired under the ESP will be subject to a holding lock.
19. Under the holding lock participating employees will not be permitted to dispose of shares acquired under the ESP until the earliest of:
- the third anniversary of the acquisition date, or such other time as may be determined by the Board subject to the satisfaction of the exemption conditions set out in section 139CE; or
 - the date the participating employee ceases employment within the meaning of subsection 139CE(5).
20. A participating employee's ownership of shares acquired under the ESP cannot be forfeited.
21. Where shares are mistakenly allocated to a participating employee (the mistaken employee), the employee will have no right or interest in the shares and will hold the shares absolutely for the account of the Plan Company and where directed by the Plan Company must transfer the shares to the Plan Company as soon as practicable.
22. 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.

Ruling

23. Under the ESP a participating employee will acquire a qualifying share (for the purposes of section 139CD) when Westpac issues a share to the Plan Company in the name of the participating employee, or the Plan Company purchases a share on-market and allocates it to the participating employee.

Where an employee makes an election

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

25. The discount to be included in the participating employee's assessable income will be equivalent to the market value of the share at the time of acquisition. The market value of a share at this time is determined under section 139FA. As the exemption conditions in section 139CE are satisfied, only the total amount of the discount greater than \$1,000 is included in assessable income.

Capital gains tax

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

27. 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.

28. The cost base of the share will be an amount comprising the market value of the share, calculated under section 139FA of the ITAA 1936, plus any other amounts identified in accordance with section 110-25 of the ITAA 1997.

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

Where an employee does not make an election

30. 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).

31. The cessation time will be the earliest of:

- the time when the share is released from the holding lock;
- the time when the participating employee ceases employment with their employer or a Group company; or
- the end of the 10 year period starting when the participating employee acquired the share.

Disposal within 30 days

32. 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).

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

Disposal after 30 days

34. 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).

35. Where a participating employee disposes of a share acquired under the ESP other than in an arm's length transaction within 30 days of the cessation time, a capital gain or loss may arise (refer to paragraph 27 of the Ruling).

36. 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.

Shares allocated in error

37. Where under the ESP a share is mistakenly allocated to a participating employee and subsequently transferred to the Plan Company:

- the mistaken employee does not acquire a share under an employee share scheme for the purposes of Division 13A of Part III (Division 13A); and
- the mistaken employee does not acquire a share for CGT purposes and no capital gain or loss arises on the transfer of the share to the Plan Company.

Explanation

38. A share will be acquired under an employee share scheme, pursuant to Division 13A, if it is:

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

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

40. Under the ESP a participating employee acquires a legal interest in a Westpac share when Westpac issues the share to the Plan Company in the name of respective participating employee or when the Plan Company purchases a share on-market and allocates it to the participating employee. Thus a participating employee will acquire a share within the meaning of section 139G.

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

42. As the ESP does not provide for a participating employee to provide consideration for the acquisition of a share, a participating employee will acquire the share for less than market value, pursuant to subsection 139C(3).

43. As the ESP will be operated on a non-discriminatory basis within the meaning of that expression in section 139CE and section 139GF, the Commissioner accepts that the fourth condition specified in subsection 139CD(5) is satisfied. Thus as the other conditions in section 139CD are satisfied, a share acquired under the ESP will be a qualifying share for the purposes of Division 13A.

44. 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.

45. 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 that share.

Where an employee makes an election

46. An employee can elect under section 139E that subsection 139B(2) apply 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.

47. 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.

48. 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.

\$1,000 reduction in discount

49. Section 139CE contains exemption conditions that must be satisfied by a scheme before employees have access to the \$1,000 tax free threshold provided for in subsection 139BA(2).

50. The exemption conditions are:

- the scheme does not have any conditions that could result in any employee forfeiting ownership of shares acquired under the scheme.
- the scheme must be operated so that no employee is permitted to dispose of a share acquired under the scheme until the earlier of:
 - (a) three years after the acquisition of the share; or
 - (b) the time when the employee is no longer employed within the Group or by the same employer as at the time the share was acquired; and
- the scheme is operated on a non-discriminatory basis, pursuant to section 139GF.

51. As the ESP Rules provide for the holding lock not to be released until the earlier of:

- the third anniversary of the acquisition date, or such other date as may be determined by the Board in its discretion subject to the satisfaction of the exemption conditions (under section 139CE); or
- the date on which the participating employee ceases employment within the meaning of subsection 139CE(5),

and because the ESP contains no forfeiture provisions and will be operated on a non-discriminatory basis pursuant to the ESP Rules, the exemption conditions in section 139CE are satisfied. Thus section 139BA will apply so that only the total discount greater than \$1,000 will be included in a participating employee's assessable income.

Capital gains tax

52. Where a share is issued to an employee or purchased on-market and allocated to an employee the employee will acquire the share for CGT purposes, pursuant to section 109-5 of the ITAA 1997.

53. Where 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.

54. The cost base of a CGT asset consists of five elements. Where an employee makes a section 139E (of the ITAA 1936) election, the first element of the cost base of the share will be its market value (determined under section 139FA of the ITAA 1936) at the acquisition time, pursuant to subsection 130-80(2) of the ITAA 1997. Where the employee incurs incidental acquisition or disposal costs, non-capital holding costs, capital expenditure to increase the value of to establish, preserve or defend their title to the share, these amounts are also included in the cost base, pursuant to section 110-25 of the ITAA 1997.

55. 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 for the purposes of Subdivision 115-A of the ITAA 1997. The discount percentage for participating employees will be 50%, pursuant to section 115-100 of the ITAA 1997.

Where an employee does not make an election

56. 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).

57. As the ESP contains no forfeiture provisions and provides for disposal after three or more years, the cessation time will be determined in accordance with subsection 139CA(2) and will be the earlier of:

- the time when the participating employee disposes of the share;
- the time when the holding lock is released;

- the time when pursuant to subsection 139CA(3) the participating employee ceases employment with their employer or a Group company; or
- the end of the 10 year period starting when the participating employee acquired the share.

58. 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

59. Where an employee disposes of a 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).

60. Any capital gain or loss made as a consequence of such a disposal is disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

Disposal after 30 days

61. 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).

62. 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 paragraph 27 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.

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

Shares allocated in error

64. 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.

65. Where a share is mistakenly allocated to a participating employee under the ESP, the ESP 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 Plan Company, and must transfer the share to the Plan Company if directed by the Plan Company.

66. Whilst the ESP Rules state that the mistaken employee holds the share absolutely for the account of the Plan Company, 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

67. 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 ESP, 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.

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

69. Where a mistaken employee transfers the share to the Plan Company, CGT event A1 will only happen if there is a change in the ownership of a share from the employee to the Plan Company, pursuant to subsection 104-10(2). As the mistaken employee never owns the share, there can be no A1 event 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 Plan Company.

Detailed contents list

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Commissioner of Taxation

13 April 2005

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Not previously issued as a draft	- shares
<i>Related Rulings/Determinations:</i>	<i>Legislative references:</i>
CR 2001/1; TR 92/1; TR 92/20;	- TAA 1953 Pt IVAAA
TR 97/16	- Copyright Act 1968
	- ITAA 1936 Pt III Div 13A
<i>Subject references:</i>	- ITAA 1936 139B
- acquisition of shares	- ITAA 1936 139B(1)
- capital gains tax	- ITAA 1936 139B(2)
- CGT discount	- ITAA 1936 139B(3)
- CGT cost base	- ITAA 1936 139BA
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- ITAA 1936 139CE
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 - ITAA 1936 Pt III Div 13A Subdiv F
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 - ITAA 1997 130-80
 - ITAA 1997 130-80(2)
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ATO references

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