

***CR 2005/90 - Income tax: National Australia Bank Limited - Staff Share Allocation Plan (2005 Australian Mid-Year employee share offer)***



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## Class Ruling

### Income tax: National Australia Bank Limited – Staff Share Allocation Plan (2005 Australian Mid-Year employee share offer)

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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

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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 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 109-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 115-30 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 National Australia Bank Group (the National Group) listed below who acquired shares under the National Australia Bank Staff Share Allocation Plan (the Plan) 2005 Australian Mid-Year Employee Share Offer (the Offer). In this Ruling a person belonging to this class of persons is referred to as a participating employee. The National Group comprises:

- National Australia Bank Limited (the National);
- Medfin Australia Pty Ltd;
- National Wealth Management Services Ltd; and
- Australian Market Automated Quotation (AUSMAQ) Systems Limited.

## **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 19.

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

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8. This Ruling applies from the 2005/2006 year of income. 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 (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore, the 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 later public ruling; or
- the relevant tax laws are not amended.

## Arrangement

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

- Class Ruling application dated 25 May 2005;
- National Australia Bank Staff Share Allocation Plan Trust Deed (Trust Deed);
- National's Australia 2005 Mid-Year Employee Share Offer Booklet (Offer Booklet);
- Letter from Applicant of 26 July 2005;
- Letter from Applicant of 15 August 2005; and
- Letter from Applicant of 22 September 2005.

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

10. As part of the remuneration policies of the National Group, the National offers employees shares under the Plan. National Australia Trustees Limited (the trustee) has been appointed to implement and administer the Plan in accordance with the Trust Deed.

11. Eligible employees (as referred to in the Offer Booklet) were offered National shares in accordance with the Plan under the Offer.

12. Employees were taken to have accepted the Offer unless they notified the National of their intent to 'opt-out' of the Offer. The applicant advised that the opt-out period was not less than 14 days.

13. Employees who have been allocated shares under the Offer become participating employees.

14. The National issued ordinary National shares to the trustee who on the 19 September 2005 allocated 15 shares to each participating employee to be held on trust for the benefit of each participating employee. The applicant has advised that the market value of ordinary National shares on the 19 September, as determined in accordance with Subdivision F of Division 13A of Part III of the ITAA 1936, was \$31.76.

15. Under the Trust Deed, a participating employee is unable to deal with shares held by the trustee on their behalf before the earlier of:

- 3 years from the date the shares were allocated to them by the trustee; or
- the time when the participating employee ceases to be an employee of either a National Group company or their employer when they were allocated the shares,

unless the trustee is compelled by law to deal with them.

16. Where the disposal restrictions imposed under the Trust Deed end, the participating employee becomes absolutely entitled to shares held by the trustee on behalf of the participating employee. The trustee may then transfer the shares to the participating employee or sell the shares and pay the net proceeds to the participating employee.

17. Immediately after the allocation of shares under the Offer no participating employee will hold a legal or beneficial interest in more than 5% of the shares of the National or be in a position to vote or control the voting of more than 5% of the shares of the National.

18. Participating employees will not be required to pay for shares acquired under the Offer.

19. To satisfy the conditions in section 139CE of the ITAA 1936, the applicant has advised that the Plan will operate at all times such that shares will not be subject to forfeiture and participating employees will not be permitted to dispose of their shares until the expiration of the relevant period described in section 139CE of the ITAA 1936.

## **Ruling**

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*All legislative references are to the ITAA 1936 unless stated otherwise.*

20. A participating employee acquires a qualifying share for the purposes of Division 13A of Part III (Division 13A) when the trustee acquires a National share under the Offer and allocates the share to the participating employee.

### **Where an employee makes an election**

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

22. 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 of acquisition. The market value of the share at this time is \$31.76 as advised by the applicant.

23. As the exemption conditions in section 139CE are satisfied in relation to the Offer, no amount is included in the assessable income of the participating employee when they acquire a National share under the Offer.

24. Where a participating employee is allocated a National share under the Offer they will acquire the share for capital gains tax (CGT) purposes when they become absolutely entitled to the share, pursuant to section 109-5 of the ITAA 1997.

25. However, for the purposes of determining whether any capital gain is a discount capital gain, the participating employee will be taken to have acquired the share when it was allocated to them under the Plan, pursuant to section 115-30 of the ITAA 1997.

26. Where the share is subsequently disposed of by or on behalf of the participating employee, the participating employee makes a capital gain where the capital proceeds from the disposal are more than the cost base of the share. Conversely, a capital loss will arise where the capital proceeds are less than the reduced cost base of the share.

27. The first element of the cost base or reduced cost base of the share is the market value of the share at the time the trustee allocates the share to the participating employee, that is, when the participating employee acquires a beneficial interest in the share. The market value of the share at this time is \$31.76 as advised by the applicant.

### **Where an employee does not make an election**

28. Where a participating employee does not make an election under section 139E, the discount given in relation to a share is included in the participating employee's assessable income in the year of income in which the cessation time occurs.

29. The cessation time for the participating employee will be the earliest of the:

- the time when the participating employee disposes of the share;
- the time when any restriction preventing the participating employee from disposing of the share ceases to have effect;
- the time when the participating employee ceases to be employed by either their employer at the time they acquired the share or a National group company; and
- the end of the 10 year period starting when the participating employee acquired the share.

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

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

32. Where the participating employee does not dispose of the share in an arm's length transaction within 30 days of the cessation time, the amount of the discount assessable to the participating employee will be the market value of the share at the cessation time, in accordance with subsection 139CC(4). The market value of the share at this time is determined under Subdivision F of Division 13A.

33. For CGT purposes, when the participating employee disposes of the share, the first element of the cost base of the share is the market value of the share at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997. The market value is the same amount as determined in paragraph 32.

## Explanation

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34. An employee will acquire a share under an employee share scheme, for the purposes of 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).

35. Section 139G provides that an employee will acquire a share in several circumstances, including by acquiring a beneficial interest in the share. Under the Plan a participating employee acquires a beneficial interest in a share when it is allocated to them, thus the participating employee will acquire the share within the meaning of section 139G when the trustee allocates the share to them.

36. The Plan was established by the National Group as part of its remuneration policies. Thus shares acquired under the Offer are considered to be acquired in respect of the employment of participating employees, pursuant to subsection 139C(1).

37. Participating employees will not be required to pay for shares acquired under the Offer, thus the shares will be acquired for less than market value, pursuant to subsection 139C(3).

38. A share in a company will be a qualifying share if the conditions listed in section 139CD are satisfied.

39. Where a participating employee acquires a National share under the Offer, the share will, pursuant to paragraphs 11, 14 and 17 of this Ruling, satisfy these conditions. Thus the Commissioner accepts that a share acquired by the participating employee under the Offer will be a qualifying share for the purposes of Division 13A.

40. Where an employee acquires a share under an employee share scheme the discount given in relation to the share is included in the employee's assessable income in accordance with Subdivision B of Division 13A.

41. Where the share is a qualifying share the amount of the discount, and year of income in which the discount is included is dependent on whether the employee makes a section 139E election.

#### **Where an employee makes an election**

42. Where an employee makes an election under section 139E in respect of the year of income in which a share is acquired under an employee share scheme, the discount given in relation to the share is included in their assessable income in the year of income in which the share is acquired, subject to section 139BA.

43. The amount of the discount is calculated in accordance with subsection 139CC(2) and is the market value of the share at the time it is acquired by the employee less any consideration paid or given by the employee for the acquisition of the share.



44. Subdivision F of Division 13A contains special provisions to determine the market value of a share on a particular day. If the share is quoted on an approved stock exchange on the particular day section 139FA provides that its market value is:

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

If the share is not quoted on an approved stock exchange on that day, the market value of the share is determined under section 139FB.

45. The applicant has advised that the market value of a National share on the 19 September 2005, as determined in accordance with Subdivision F of Division 13A, was \$31.76.

### ***\$1,000 tax free threshold***

46. Where the share is acquired under an employee share scheme that satisfies the exemption conditions in section 139CE, the total amount of discount otherwise included in the employee's income under section 139B, in respect of shares acquired under the employee share scheme that are covered by the section 139E election, is only included to the extent that it is greater than \$1,000, pursuant to subsection 139BA(2).

47. The exemption conditions that must be satisfied require that:

- 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 shares acquired under the scheme until the earlier of;
  - (a) three years after their acquisition; and
  - (b) the time when the employee is no longer employed within a corporate group or by the same employer as at the time the shares were acquired; and
- the scheme is operated on a non-discriminatory basis, pursuant to section 139GF.

48. Where a participating employee acquires a National share under the Offer, the Commissioner accepts, having regard to paragraphs 11, 12, 15 and 19 of this Ruling, that the exemption conditions are satisfied in relation to the share.

49. Where an employee makes an election under section 139E in a year of income, the election covers each qualifying share or qualifying right acquired in that year by the employee.

50. Thus, where a participating employee makes an election under section 139E in the year they acquire National shares under the Offer, only the discount greater than \$1,000 in respect of shares or rights acquired by the participating employee in the year of income will be included in the participating employee's assessable income. Where in the year of the Offer a participating employee only receives shares under the Offer, no amount will be included in their assessable income as the total discount in respect of those shares will be \$476.40. That is, 15 shares having a market value per share of \$31.76 (as advised by the applicant).

### **CGT**

51. Where a participating employee is allocated a share by the trustee under the Plan they acquire a beneficial interest in the share. When the disposal restrictions imposed under the Trust Deed end, the participating employee becomes absolutely entitled to the share as against the trustee and they acquire the share for CGT purposes (see event number E5 in the table in subsection 109-5(2) of the ITAA 1997).

52. When the participating employee subsequently disposes of the share, CGT event A1 happens and the participating employee makes a capital gain if the capital proceeds from the disposal exceed the cost base of the share. Conversely, a capital loss is made if the reduced cost base exceeds the capital proceeds.

53. Where the share is a qualifying share and a participating employee makes a section 139E election in respect of the share, item 8 of subsection 115-30(1) of the ITAA 1997 provides that for the purposes of determining whether the gain is a discount capital gain, the participating employee will be taken to have acquired the share when they first acquired a beneficial interest in the share. That is, at the time the trustee allocates the share to the participating employee.

54. As the share is a qualifying share and where the participating employee makes a section 139E election in respect of the share, the first element of the cost base or reduced cost base of the share is determined in accordance with subsection 130-80(3) of the ITAA 1997. That is, the first element of the cost base or reduced cost base is the market value of the share at the time the participating employee first acquires a beneficial interest in the share. The market value (worked out under Subdivision F of Division 13A) of the share at this time is \$31.76 (refer to paragraph 45).

55. 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.

## **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 in respect of the year of income in which the share is acquired, the discount given in relation to the share is included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

57. As the shares acquired by a participating employee under the Plan will be subject to disposal restrictions, the cessation time is determined in accordance with subsection 139CA(2) and will be the earliest of:

- the time when the participating employee disposes of the share;
- the time when any restriction preventing the participating employee from disposing of the share ceases to have effect;
- the time when the participating employee ceases to be employed by either their employer at the time they acquired the share or a National group company; and
- 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. Subsection 139CC(3) provides that where an employee disposes of a share in an arm's length transaction at or 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.

**CGT**

60. Subsection 130-83(2) of the ITAA 1997 provides that if the share is a qualifying share, an election is not made under section 139E and CGT event A1, C2, E1, E2 or E5 happen in relation to the share in an arm's length transaction at, or within 30 days of, the cessation time, any capital gain or capital loss the employee makes on the disposal is disregarded.

61. Therefore, if the share is disposed of in an arm's length transaction at or within 30 days of the cessation time, no capital gain or loss will arise in relation to that share.

***Disposal after 30 days***

62. Subsection 139CC(4) provides that 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. The market value of the share at this time is as calculated in paragraph 44.

**CGT**

63. Where an employee does not make an election under section 139E and does not dispose of the share in an arm's length transaction within 30 days of the cessation time, the first element of the cost base or reduced cost base of the share is the share's market value at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997. The market value of the share at this time is as calculated in paragraph 44.

**Detailed contents list**

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**Commissioner of Taxation**

26 October 2005

<i>Previous draft:</i>	- ITAA 1936 139CA
	- ITAA 1936 139CA(2)
Not previously issued as a draft	- ITAA 1936 139CC
	- ITAA 1936 139CC(2)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139CC(3)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 139CC(4)
TR 97/16	- ITAA 1936 139CD
	- ITAA 1936 139CE
<i>Subject references:</i>	- ITAA 1936 139E
- election	- ITAA 1936 Pt III Div 13A Subdiv F
- employee share scheme	- ITAA 1936 139FA
- discount	- ITAA 1936 139FB
- qualifying share	- ITAA 1936 139G
	- ITAA 1936 139GF
<i>Legislative references:</i>	- ITAA 1997 109-5
- Copyright Act 1968	- ITAA 1997 109-5(2)
- ITAA 1936 Pt III Div 13A	- ITAA 1997 115-30
- ITAA 1936 Pt III Div 13A Subdiv B	- ITAA 1997 115-30(1)
- ITAA 1936 139B	- ITAA 1997 130-80
- ITAA 1936 139B(2)	- ITAA 1997 130-80(3)
- ITAA 1936 139B(3)	- ITAA 1997 130-83
- ITAA 1936 139BA	- ITAA 1997 130-83(2)
- ITAA 1936 139BA(2)	- ITAA 1997 130-83(3)
- ITAA 1936 139C	- TAA 1953 Pt IVA
- ITAA 1936 139C(1)	
- ITAA 1936 139C(3)	

## ATO references

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ATOlaw topic: Income Tax ~~ Assessable income ~~ employee share schemes

Income Tax ~~ Capital Gains Tax ~~ CGT events E1 to E9  
- trusts