


# ***CR 2004/68 - Income tax: Freedom Group Limited Employee Share Plan (Exempt)***

 This cover sheet is provided for information only. It does not form part of *CR 2004/68 - Income tax: Freedom Group Limited Employee Share Plan (Exempt)*



## Class Ruling

### Income tax: Freedom Group Limited Employee Share Plan (Exempt)

---

Contents	Para
What this Class Ruling is about	1
Date of effect	9
Arrangement	10
Ruling	21
Explanation	26
Detailed contents list	42

#### **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 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);
- 139BA of the ITAA 1936;
- 139C of the ITAA 1936;
- 139CC of the ITAA 1936;
- 139CD of the ITAA 1936;
- 139CE of the ITAA 1936;
- 139E of the ITAA 1936;
- 139FA of the ITAA 1936;
- 139FB of the ITAA 1936;
- 139G of the ITAA 1936;
- 139GF of the ITAA 1936; and
- 130-80 of the *Income Tax Assessment Act 1997* (ITAA 1997).

## Class of persons

3. The class of persons to which this Ruling applies are the Australian resident employees of Freedom Group Limited (Freedom) who participated in the Freedom Group Limited Exempt Employee Share Plan (the plan) and who have made elections for the purposes of section 139E of the ITAA 1936.

4. They are persons whose shares were transferred pursuant to the scheme of arrangement (the scheme) implemented on 18 December 2003. The scheme is described in the Arrangement part of this Ruling. In this Ruling this class of persons is referred to as a participating employee.

## Qualifications

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

6. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is in accordance with the arrangement described below at paragraphs 10 to 20 in this Ruling.

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

- (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.

8. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration  
Intellectual Property Branch  
Department of Communications, Information Technology  
and the Arts  
GPO Box 2154  
CANBERRA ACT 2601

or by e-mail to: [commonwealth.copyright@dcita.gov.au](mailto:commonwealth.copyright@dcita.gov.au)

---

## Date of effect

---

9. This Ruling applies from the 2003/2004 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 and 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

---

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

- Letter from Greenwoods & Freehills dated 24 October 2003 enclosing the application for Class Ruling and other material;
- The Freedom Group Employee Share Plan (Exempt) Plan Rules (the plan rules);
- Freedom Group Employee Share Plan Information Booklet;
- Facsimile from Greenwoods & Freehills dated 4 February 2004; and
- Facsimile from Greenwoods & Freehills dated 4 May 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.*

11. The plan commenced in July 2003 and provided an opportunity for eligible employees of Freedom to acquire ordinary shares in Freedom, an Australian resident listed public company.

12. Employees who were eligible to acquire shares under the plan were permanent full time or permanent part time employees of Freedom who had completed any probationary period that was a condition of employment with Freedom.

13. The plan was administered by the board of directors (the board) of Freedom in accordance with the plan rules. The offer to eligible employees to acquire shares under the plan was at the discretion of the board.

14. A participating employee who participated in the plan was provided with either \$500 or \$1000 worth of shares per year. The shares under the plan were offered to the participating employee so that the discount received was not greater than \$1,000.

15. The purchase of Freedom ordinary shares by a participating employee was to be wholly funded by way of an effective salary sacrifice arrangement within the meaning of paragraph 19 to 23 of Taxation Ruling TR 2001/10. A participating employee was not required to contribute any other funds to acquire the shares.

16. A participating employee had full legal and beneficial ownership of the shares allotted and had full shareholder voting and dividend rights.

17. The plan rules stated that during the three year period after the date of issue of shares to a participating employee, the shares acquired must not be disposed of, unless the participating employee ceased to be an employee of Freedom.

18. As stated by the applicant, the plan was to be operated such that:

- at no time would a participating employee hold a legal or beneficial interest in more than 5% of the shares of Freedom;
- at no time would 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 Freedom;
- all offers to acquire shares in Freedom under the plan would be made on a non-discriminatory basis.

## **Scheme of Arrangement**

19. On 19 August 2003, Freedom announced that the board had received a proposal to privatise Freedom (privatisation proposal), from Bravoscar Nominees Pty Ltd (Bravoscar), a company owned by certain members of Freedom's management team (management consortium).

20. The privatisation proposal, structured as a scheme of arrangement, was implemented on 18 December 2003 following Court, shareholder and other regulatory approvals. Subsequent to the scheme, Bravoscar compulsorily acquired all of the shares in Freedom including those shares held by the management consortium. On 19 December 2003, Freedom became a wholly owned subsidiary of Bravoscar.

## **Ruling**

---

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

21. Where a participating employee acquired shares under the plan they are qualifying shares for the purposes of section 139CD.

22. Where the participating employee makes an election under section 139E, the discount on the shares acquired under the plan will be included in the assessable income of the employee in the year of income in which the shares were acquired, pursuant to subsection 139B(2).

23. The discount to be included in the employee's assessable income is equivalent to the market value of the shares at the time they were acquired, pursuant to subsection 139CC(2). The market value of a share at this time is determined under section 139FA.

24. The plan as described in the arrangement satisfies the exemption conditions contained in Section 139CE. Accordingly, only the amount of the discount greater than \$1,000 is included in the employee's assessable income, pursuant to section 139BA.

25. Under subsection 130-80(2) of the ITAA 1997, the first element of the cost base or reduced cost base of each share that was acquired under the plan was the market value of the share at the time it was acquired.

## **Explanation**

---

26. For the purposes of Division 13A of Part III (Div 13A), section 139G provides that a person acquires a share in several circumstances, including by having a share allotted to them by another person. Under the plan, a participating employee acquired a share when it was issued to them by the board in accordance with the plan rules.

27. For Div 13A to apply, shares must be acquired under an employee share scheme. Subsection 139C(1) provides that a share is acquired under an employee share scheme if the share is acquired in respect of, or in relation directly or indirectly to, any employment of the taxpayer. This condition is satisfied with respect to shares acquired by participating employees under the plan.

28. Subsection 139C(3) provides that a share is not acquired under an employee share scheme unless it is acquired for less than its market value. Consideration paid or given by an employee to acquire shares does not include amounts sacrificed under an effective salary sacrifice arrangement. Thus as participating employees were not required to provide any consideration, they acquired the shares for less than market value, pursuant to subsection 139C(3).

29. Therefore, a participating employee acquired shares under an employee share scheme within the meaning in section 139C, as the shares were acquired by them for less than market value and were provided in respect of or in relation to their employment.

30. Where an employee acquires shares under an employee share scheme the discount given is included in assessable income in accordance with section 139B.

31. The time at which the discount is included in a participating employee's assessable income depends on two material factors. The first is whether the shares were qualifying shares within the meaning of that term in section 139CD. The second is whether the employee has made an election under section 139E to include the discount in assessable income in the year the shares were acquired.

32. A share is a qualifying share for the purposes of Div 13A if it meets the conditions specified in section 139CD. As stated by the applicant, shares acquired under the plan were considered to be qualifying shares because they satisfy the conditions of section 139CD.

33. All participating employees have elected under section 139E that subsection 139B(2) applies for a year of income. The election will apply to each qualifying share acquired by the employee in the year of income. Subsection 139B(2) provides that the discount on a share is included in the taxpayer's assessable income in the year of acquisition of the share, that is, in the year when the board issued the share to the employee.

34. The amount of the discount to be included in assessable income is calculated in accordance with subsection 139CC(2). As a participating employee was not required to provide any consideration for the acquisition of the share, the discount is equivalent to the market value of the share at the time it was acquired by the employee.

35. Subdivision F of Div 13A, contains special provisions to determine the market value of shares on a particular day. As the ordinary shares in Freedom were listed on the Australian Stock Exchange (ASX) at the time shares were acquired under the plan, 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**

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

The exemption conditions are:

- the scheme does not contain any conditions which could result in an employee forfeiting ownership of any shares that were acquired under the scheme;
- the scheme is 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; or
  - (b) the time when the employee is no longer employed within the Freedom group or by the same employer as at the time the shares were acquired; and
- the scheme is operated on a non-discriminatory basis as set out in section 139GF.

#### *Forfeiture*

37. The compulsory acquisition of a participating employee's shares due to the operation of the scheme does not give rise to a forfeiture for the purposes of subsection 139CE(2) as valuable consideration was provided for the disposal of the shares which did not differ between employees and other shareholders. Further, as the plan as outlined did not contain any forfeiture clauses, the exemption condition in subsection 139CE(2) is satisfied.



*Disposal restrictions*

38. The plan rules prohibited the disposal of shares acquired by participating employees under the plan, before the earlier of three years after acquisition or the time at which an employee ceased to be employed by Freedom. Further, as stated by the applicant, the plan was to operate in a manner where the plan rules would not be varied to lift the disposal restrictions as described in the arrangement.

39. The early disposal of shares acquired under the plan through the compulsory acquisition of shares under the scheme is considered to have had no connection with the operation of the plan and was outside the control of the board. Therefore, it is concluded that the plan was operated so that no participating employee could dispose of the shares acquired under the plan before the time set out in subsection 139CE(3). Accordingly, the exemption condition in subsection 139CE(3) is satisfied.

*Non-discriminatory operation*

40. Additionally, as stated by the applicant, the plan was to be operated on a non-discriminatory basis. The conditions in section 139GF were satisfied because all offers to acquire shares;

- were made to at least 75% of permanent employees;
- provided a reasonable time to accept an offer; and
- were made on the basis that the essential features of each offer would be the same for at least 75% of permanent employees.

Accordingly, the exemption condition in subsection 139CE(4) is satisfied.

41. As all the exemption conditions in section 139CE have been satisfied, subsection 139BA(2) will apply so that only the discount greater than \$1,000 will be included in a participating employee's assessable income.

42. For the purposes of the CGT provisions, the first element of the cost base of the shares will be determined in accordance with subsection 130-80(2) of the ITAA 1997. In this case it is the market value of the shares determined by the operation of section 139FA.

**Detailed contents list**

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

	Paragraph
What this Class Ruling is about	1
Tax law(s)	2

<b>Class of persons</b>	<b>3</b>
<b>Qualifications</b>	<b>5</b>
<b>Date of effect</b>	<b>9</b>
<b>Arrangement</b>	<b>10</b>
Scheme of Arrangement	19
<b>Ruling</b>	<b>21</b>
<b>Explanation</b>	<b>26</b>
\$1,000 reduction in discount	36
<i>Forteiture</i>	37
<i>Disposal restrictions</i>	38
<i>Non-discriminatory operation</i>	40
<b>Detailed contents list</b>	<b>42</b>

---

**Commissioner of Taxation**

30 June 2004

---

<i>Previous draft:</i>	- ITAA 1936 139C(1)
	- ITAA 1936 139C(3)
Not previously released in draft form.	- ITAA 1936 139CC
	- ITAA 1936 139CC(2)
	- ITAA 1936 139CD
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139CE
TR 92/1; TR 92/20; TR 97/16;	- ITAA 1936 139CE(2)
CR 2001/1; TR 2001/10	- ITAA 1936 139CE(3)
	- ITAA 1936 139CE(4)
	- ITAA 1936 139E
<i>Subject references:</i>	- ITAA 1936 139FA
- Employee Share Schemes	- ITAA 1936 139FB
	- ITAA 1936 139G
	- ITAA 1936 139GF
<i>Legislative references:</i>	- ITAA 1997 130-80
- ITAA 1936 Pt III Div 13A	- ITAA 1997 130-80(2)
- ITAA 1936 Pt III Div 13A subdiv F	- TAA 1953 Part IVA
	- Copyright Act 1968
- ITAA 1936 139B	
- ITAA 1936 139B(2)	
- ITAA 1936 139BA	
- ITAA 1936 139BA(2)	
- ITAA 1936 139C	

---

ATO references

NO: 2004/8562

ISSN: 1445-2014