


***CR 2021/84 - Faethm Holdings Pty. Limited -
Employee Option Plan - Commissioner's discretion
to reduce the minimum holding period in relation to
options acquired***

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Class Ruling

Faethm Holdings Pty. Limited – Employee Option Plan – Commissioner’s discretion to reduce the minimum holding period in relation to options acquired

❶ Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for employees of Faethm Holdings Pty. Limited (Faethm) who were granted options under the Faethm Employee Option Plan (FEOP) which were subsequently disposed of pursuant to the scheme of arrangement initiated on 19 May 2021.
2. Full details of this scheme are set out in paragraphs 7 to 30 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:
 - were either
 - an employee of Faethm or a ‘subsidiary’ (as defined in the *Corporations Act 2001*) of Faethm (collectively referred to as the Faethm Group), or

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- an individual who was treated as an employee of Faethm for the purposes of Division 83A by the application of section 83A-325
- acquired options (or are treated as having acquired options for the purposes of Division 83A by the application of section 83A-305) under the FEOP on or around 10 July 2020 but no later than 20 September 2020
- were an Australian tax resident within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) at the time the options were acquired and remained an Australian tax resident until completion of the scheme
- were not a temporary resident within the meaning of subsection 995-1(1)
- were employed by a member of the Faethm Group at all times from the acquisition date of the options until completion of the scheme
- upon acquiring the options did not hold (for the purposes of Division 83A) a beneficial interest in more than 10% of the shares, or rights to acquire shares, in Faethm
- were not in a position to cast, or control the casting of, more than 10% of the maximum number of votes that might be cast at a general meeting of Faethm
- held the acquired options (for the purposes of Division 83A) at all times from the date of acquisition of the options until completion of the scheme
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme

Note: Division 230 will generally not apply to individuals unless they have made an election for it to apply.

When this Ruling applies

5. This Ruling applies from 1 July 2020 to 30 June 2022.

Ruling

6. The Commissioner will exercise the discretion under paragraph 83A-45(5)(a) to allow the minimum holding period for all options that qualify for concessional treatment under section 83A-33 and acquired under the FEOP to end at the earlier time of 21 September 2021.

Scheme

7. The following description of the scheme is based on information provided by the Applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.
8. Other information referenced is the Faethm Employee Option Plan Rules (FEOP Rules).

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Faethm Holdings Pty. Limited

9. Faethm is an Australian-resident company incorporated on 4 October 2018. It does not have, and has never had, equity interests listed on a stock exchange.

10. Faethm is the head company of an income tax consolidated group. It has two wholly-owned subsidiaries both of which have never been listed on a stock exchange:

- Faethm IP Pty. Limited, incorporated in October 2018
- Faethm Pty. Limited, incorporated in April 2016.

11. Faethm and its wholly-owned subsidiaries conduct a business of developing management software.

12. Faethm has 758,253 ordinary shares and 235,594 preference shares on issue (Faethm Shares).

Faethm Holdings Pty. Ltd Employee Option Plan Rules

13. In July 2020, Faethm established the FEOP.

14. The FEOP provides for options to subscribe for fully-paid ordinary shares in Faethm to be granted where vesting conditions are satisfied.

15. As at November 2020, Faethm has issued a total of 213,580 options under the FEOP, of which 73,127 were unvested, 114,501 vested and 25,952 have lapsed.

16. The FEOP is an employee share scheme for the purposes of section 83A-10.

17. The purpose of the FEOP is to provide employees with an opportunity to share in the growth in value of the shares of Faethm and to encourage them to improve the performance of the Faethm Group's return to shareholders. It is intended that the plan will enable the Faethm Group to retain and attract skilled and experienced employees and provide them with the motivation to make the Faethm Group more successful.

18. The FEOP Rules detail the default vesting conditions which specify that:

- Faethm's Board may determine or vary any vesting conditions or other vesting events in respect of any options
- an offer may specify vesting conditions or other vesting events which must be satisfied before an option vests.

19. Where there is an exit event, the FEOP Rules stipulate that all unvested options granted at least one year prior to the date of the exit event will automatically vest immediately prior to the exit event. Any other unvested options granted less than one year prior may vest at the Board's discretion.

20. The FEOP describes an exit event as a listing, a business sale, or a share sale, other than a restructure.

21. Rule 7.4 of the FEOP Rules imposes a restriction on the disposal of options stipulating that a legal or a beneficial interest in an option may not be disposed of until the earlier of:

- three years after the issue of the option or such earlier time as the Commissioner of Taxation allows in accordance with subsection 83A-45(5), and
- the date that an eligible person ceases to be employed or engaged by a company in the group.

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22. Faethm has always operated in accordance with the FEOP's primary objective to retain staff and any options provided in accordance with the FEOP were required to be held by employees for a minimum of three years.

23. Faethm and the FEOP satisfy the requirements under section 83A-33 allowing employees to access the start-up concession with respect to how the options are treated.

24. Specifically, the FEOP satisfies subparagraphs 83A-45(5)(a)(i) and (ii) as:

- Faethm intended for the prohibition on disposal of options under the FEOP to continue for three years after granting the options
- Rule 7.4 of the FEOP Rules prohibits the disposal of an issued option within three years of its granting or a shorter period as allowed by the Commissioner
- Faethm has always operated the FEOP in accordance with Rule 7.4 of the FEOP Rules
- the requirement for option holders to sell their options back to Faethm has been prompted by the sale of 100% of Faethm's shares.

25. If the scheme had not proceeded the option holders would continue to be bound by the disposal prohibition in Rule 7.4 of the FEOP Rules.

Share Purchase Agreement

26. Faethm's initial strategy for raising funds was to complete a capital raise during the middle of 2021.

27. During the process of discussions with potential investors, Pearson Australia Holdings Pty Ltd (Pearson) expressed an interest in acquiring the shares in Faethm.

28. Specifically, on 19 May 2021 discussions with Pearson shifted from the perspective of Faethm raising capital to the commencement of discussions with Pearson of a share sale. Following discussions and negotiations, an eventual completion of this proposed transaction took place on 21 September 2021.

29. Pursuant to the terms of the Share Purchase Agreement (SPA), all of Faethm's ordinary and preference shares on issue were sold to Pearson. This transaction did not apply to options and essentially Faethm was required to buy-back all vested options on issue for an amount determined with reference to the definition of the Option Holder Cash Payment Amount as defined in the SPA. This transaction was considered an exit event under the FEOP.

30. Under Rule 10.2 of the FEOP Rules, the Board notified option holders of the exit event and provided reasonable details of the event. The Board also enacted Rule 10.2(b)(i) of the FEOP Rules which required the Board to cancel some or all of the vested options by paying the option holder the amount per ordinary share that will be paid under the exit event, less the option holder's proportionate share of transaction costs.

Commissioner of Taxation

1 December 2021

Status: **not legally binding**

Appendix – Explanation

❶ *This Explanation 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.*

Minimum holding period

31. The options acquired under the FEOP were ESS interests subject to Division 83A.

32. Section 83A-25 operates to include the discount a participant receives in relation to their options in their assessable income in the year in which they acquired the options.

33. Section 83A-33 operates to reduce the amount included in a participant's assessable income under section 83A-25 if certain conditions are met. One of the conditions that must be met and relevant to the current scheme relates to the minimum holding period requirements which are set out in subsections 83A-45(4) and (5) as follows:

83A-45(4)

This subsection applies to an ESS interest you acquire under an employee share scheme if, at all times during the interest's minimum holding period, the scheme is operated so that every acquirer of an ESS interest (the **scheme interest**) under the scheme is not permitted to dispose of:

- (a) the scheme interest; or
- (b) a beneficial interest in a share acquired as a result of the scheme interest;

during the scheme interest's minimum holding period.

Note: This subsection is taken to apply in the case of a takeover or restructure: see subsection 83A-130(3).

83A-45(5)

An ESS interest's **minimum holding period** is the period starting when the interest is acquired under the employee share scheme and ending at the earlier of:

- (a) 3 years later, or such earlier time as the Commissioner allows if the Commissioner is satisfied that:
 - (i) the operators of the scheme intended for subsection (4) to apply to the interest during the 3 years after that acquisition of the interest; and
 - (ii) at the earlier time that the Commissioner allows, all membership interests in the relevant company were disposed of under a particular scheme; and
- (b) when the acquirer of the interest ceases being employed by the relevant employer.

34. Under Rule 7.4 of the FEOP Rules, option holders are unable to dispose of their options unless three years had passed from the time of acquisition, the employment ceased or the disposal was under an arrangement which met the requirements of section 83A-130.

35. The Commissioner is satisfied that Faethm had intended, at the time that the options were acquired by the employees, that the employees would be unable to dispose of the options during the three years following their acquisition unless the employee ceased to be employed by Faethm. Relevantly, no options were issued to employees after the discussions with Pearson for a share sale commenced on 19 May 2021.

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36. The purchase of the options by Faethm took place at the same time as the disposal of shares to Pearson took place.

37. Accordingly, the Commissioner is satisfied that the requirements in subparagraphs 83A-45(5)(a)(i) and (ii) are met. Thus, for the options that qualify for concessional treatment under section 83A-33, the Commissioner will allow the minimum holding period to be the period starting from the time the options were acquired on or around 10 July 2020 until the time the scheme was completed on 21 September 2021.

Status: **not legally binding**

References

Previous draft:

Not previously issued as a draft

Legislative references:

- | | |
|--|---|
| <ul style="list-style-type: none">- ITAA 1936 6(1)- ITAA 1997 Div 83A- ITAA 1997 83A-10- ITAA 1997 83A-25- ITAA 1997 83A-33- ITAA 1997 83A-45(4)- ITAA 1997 83A-45(5)- ITAA 1997 83A-45(5)(a) | <ul style="list-style-type: none">- ITAA 1997 83A-45(5)(a)(i)- ITAA 1997 83A-45(5)(a)(ii)- ITAA 1997 83A-130- ITAA 1997 83A-130(3)- ITAA 1997 83A-305- ITAA 1997 83A-325- ITAA 1997 Div 230- ITAA 1997 995-1(1)- TAA 1953- Corporations Act 2001 |
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ATO references

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