CR 2022/101 - Blackmores Limited - Employee and Director Rights Plan

Status: **legally binding**

Class Ruling

Blackmores Limited – Employee and Director Rights Plan

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.

Table of Contents	Paragraph

What this Ruling is about

1. This Ruling sets out the income tax consequences for employees and non-executive directors of Blackmores Limited (Blackmores) and its subsidiaries (collectively, the Blackmores Group) who participate in the Blackmores Employee and Director Rights Plan (the Plan).

2. Details of this scheme are set out in paragraphs 15 to 41 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 are an employee or non-executive director of the Blackmores Group (Eligible Person) who:

- participates in the Plan (Participant), and
- is a resident of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 15 to 41 of this Ruling.

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

Status: **legally binding**

When this Ruling applies

6. This Ruling applies from 3 December 2021 to 30 June 2026.

Ruling

ESS interests and indeterminate rights

7. The right to acquire a fully-paid ordinary share in Blackmores (Share) issued under the Plan (Right) is an indeterminate right for the purposes of section 83A-340.

8. If the Board determines that it will not exercise rule 9.1(d)(ii) of the Plan and will satisfy the Right by provision of a Share, the Right will be treated as a right to acquire a beneficial interest in a Share, and therefore be an ESS interest as defined in paragraph 83A-10(1)(b) from the time you acquired the Right.

Subdivision 83A-C and ESS deferred taxing point

9. Subdivision 83A-C will apply to the Right granted to you. However, Division 83A will not apply if the Right is settled with cash.

10. The taxation of the Right granted to you that is settled with a Share is deferred to the ESS deferred taxing point (section 83A-110).

11. The ESS deferred taxing point for your Right is the earliest of:

- the end of the period during which you are prohibited from dealing with your Share; this will generally be the restriction period you nominated (section 83A-120(6)), or
- the expiry of 15 years after you acquire the Right (section 83A-120(7)).

12. However, if you dispose of the Share within 30 days of the time which would otherwise be the ESS deferred taxing point, then the ESS deferred taxing point is taken to be the date of the disposal of the Share (subsection 83A-120(3)).

Amount included in assessable income at the ESS deferred taxing point

13. Your assessable income for the income year in which the ESS deferred taxing point occurs includes the market value of the Share at that time (subsection 83A-110(1) and section 83A-315.03 of the *Income Tax Assessment (1997 Act) Regulations 2021*).

Cash payment received upon cessation of employment prior to vesting of the Right

14. If you cease to be an employee or non-executive director and you receive a cash payment before the Right vests, the cash payment is included in your assessable income in the same income year in which you receive that payment (section 6-5).

Scheme

15. 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.

The Blackmores Employee and Director Rights Plan

16. The Plan is a scheme to encourage Eligible Persons to acquire Shares in order to:

- allow them the opportunity to become shareholders and share in the success of the Blackmores Group
- align their interests with those of shareholders
- allow them the opportunity to acquire Shares in a tax-effective manner.

17. The Plan is designed to provide the opportunity for Participants to acquire Rights to receive Shares through sacrificing a portion of their remuneration.

18. Remuneration means all or any of your pre-tax base salary (or in the case of a non-executive director or other Eligible Person that is not an employee, all or any of your pre-tax base fees), inclusive of compulsory superannuation contributions, which may be paid by a member of the Blackmores Group to you (Remuneration).

19. In November 2021, Participants were provided with a letter by a member of the Blackmores Group, setting out the terms and conditions of a grant of Rights for the 2021–22 income year (Offer Letter).

20. To participate in the Plan, you were required to complete an Application for Acquisition of Rights form and return it to Blackmores by 3 December 2021.

21. Upon acceptance of the Offer Letter, you agreed to sacrifice an amount or percentage of your Remuneration per annum (Participant Contribution) in return for a grant of Rights of an equivalent value.

22. The participation period, being the period over which the Participant agrees to make the Participant Contribution, was 1 January 2022 to 30 June 2022.

23. The Rights are not transferrable.

24. The Plan and the Offer Letter specify that Subdivision 83A-C applies to the Rights granted under the Plan.

Granting and vesting of Rights

25. You are granted Rights on or around the sixth business day following the release of Blackmores' half-yearly financial report for the half-year ended 31 December 2021 (Grant Date).

26. The number of Rights granted are determined by dividing the amount of Remuneration you agreed to sacrifice by the 5-day volume-weighted average closing price of the Shares on the Australian Securities Exchange over the period immediately prior to the Grant Date. Each Right is a right to acquire one Share.

27. Your Rights automatically vest on the business day immediately following the release of Blackmores 2021–22 annual financial report (Vesting Date), provided that you continue to hold office as a non-executive director or remain in employment with Blackmores up until that date.

28. Upon vesting, the Rights are exercised automatically and Shares are allocated to you on the third business day (or as soon as practicable after the Vesting Date), subject to any applicable laws and to any applicable securities dealing blackout periods under the Securities Dealing Policy.

29. All Shares allocated to you upon vesting of Rights:

- are credited as fully paid
- rank equally in all respects with other Shares for the time being on issue by Blackmores (except with regard to any rights attaching to such other Shares by reference to a record date prior to the date of your allocation), and
- subject to any applicable restrictions on dealing in Shares, confer on you the right to vote, to receive dividends and have all rights a Blackmores shareholder has in respect of those Shares.

30. Rule 9.1(d)(ii) of the Plan provides that the Board may settle some or all of a Participant's Rights (whether before, at or after vesting of those Rights) in cash rather than Shares, so that the Participant receives, in lieu of the relevant Shares, a cash payment equal to the market value of those Rights or Shares.

31. It is intended that the Plan will continue to be operated in subsequent financial years in the same manner as is outlined in paragraphs 16 to 30 of this Ruling, using the same rules and the same overarching terms and conditions as set out in the Plan and Offer Letter. In subsequent financial years, the participation period will be the 12-month period commencing 1 July and vesting will occur in 2 equal tranches after the end of each 6-month period.

Disposal restrictions

32. Unless the Board determines or the Offer Letter provides otherwise, you must not deal in any Shares allocated to you under this Plan during the applicable restriction period.

33. The restriction period is the period from the Vesting Date until the earlier of:

- the date you cease to hold office as a non-executive director or be employed by the Blackmores Group, or
- the end of the restriction period nominated by you in your Application for Acquisition of Rights form (which may be from 3 to 15 years after the Grant Date) (Restriction Period).

34. Blackmores may implement any procedure it considers appropriate to restrict you from dealing in Shares allocated to you under the Plan, including but not limited to imposing a holding lock on any Shares or requiring the Shares to be held by a Trustee on your behalf until all restrictions on dealings in respect of those Shares are lifted.

35. Under the Securities Dealing Policy, directors, management and staff of Blackmores are prohibited from buying or selling Shares at any point in time where they have knowledge which constitutes inside information (Inside Information Restriction).

Ceasing to be a non-executive director or employee

36. If you cease to be an employee or non-executive director of Blackmores after the Vesting Date, any restrictions on disposals or dealings applicable to your Shares are lifted immediately and you are free to dispose or otherwise deal with those Shares provided that all of your corresponding Participant Contribution are paid (subject to complying with any applicable laws and the Securities Dealing Policy).

37. To the extent that any Rights have vested but you have not fully paid your Participant Contribution, Blackmores may take any action deemed appropriate (subject to applicable Law) to seek payment from you for the outstanding amount for the Shares,

including withholding from any other amounts owed to you by a member of the Blackmores Group.

38. If you have not paid in full for the Shares at the time the Restriction Period ends, you remain subject to restrictions on dealings until your Participant Contribution is paid in full.

39. If you cease to be an employee or non-executive director of the Blackmores Group prior to the vesting of the Rights, your Rights automatically lapse and, subject to the Board's discretion, you are paid, in cash, an amount equal to the Participant Contribution you made from the start of the relevant participation period up until the date of cessation, in respect of those lapsed Rights.

Other matters

40. Immediately after the acquisition of any Rights under the Plan, you will not hold a beneficial interest in, or a right to acquire a beneficial interest in, more than 10% of the shares in Blackmores or be 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 Blackmores.

41. The predominant business of Blackmores is not the acquisition, sale or holding of shares, securities or other investments, whether directly or indirectly through one or more companies, partnerships or trusts.

Commissioner of Taxation
9 November 2022

Appendix – Explanation

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.

Table of Contents **Paragraph**

ESS interests and indeterminate rights

42. An ESS interest in a company is a beneficial interest in:

- a share in the company, or
- a right to acquire a beneficial interest in a share in the company (subsection 83A-10(1)).

43. Subsection 83A-340(1) applies where you acquire a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, which is referred to as an indeterminate right.

44. A person acquires an indeterminate right when they can enforce against their employer (under the terms of contract) rights that will later become a beneficial interest in a share (refer to Taxation Determination TD 2016/17 *Income tax: in what circumstances does a contractual right, which is subject to the satisfaction of a condition, become a right to acquire a beneficial interest in a share for the purposes of subsection 83A-340(1) of the Income Tax Assessment Act 1997?*).

45. At the time the Rights are acquired by you, they are not ESS interests but are indeterminate rights pursuant to section 83A-340 and TD 2016/17. This is because under rule 9.1(d)(ii) of the Plan, the Board can choose to settle the Rights in cash or by issue of Shares. In this circumstance, the Rights are not a right to acquire a beneficial interest in a share unless and until the time when the Board determines that it will not exercise rule 9.1(d)(ii) and will satisfy the Rights by the provision of a Share.

46. Rights granted to you that ultimately vest and are settled with Shares are treated as if they had always been rights to acquire a beneficial interest in the share (subsection 83A-340(2)). That is, they are treated as an ESS interest (for the purposes of subsection 83A-10(1)) from the date when the Rights are granted upon acceptance of the Participant's application by the Board.

Subdivision 83A-C and ESS deferred taxing point

47. As all of the relevant conditions in subsection 83A-105(1) are met, Subdivision 83A-C applies to the Rights granted to you that are settled with Shares.

48. As a result, the taxation of those Rights is deferred until an ESS deferred taxing point occurs (section 83A-110).

49. Subject to subsection 83A-120(3), the ESS deferred taxing point for the Rights is the earliest of:

- when the right has not been exercised and there is no real risk of forfeiting the right and the scheme no longer genuinely restricts disposal of the right (subsection 83A-120(4))
- the end of the 15-year period starting when you acquired the right (subsection 83A-120(6)), or
- when the right is exercised and there is no real risk of forfeiting the share and the scheme no longer genuinely restricts disposal of the share (subsection 83A-120(7)).

50. If you dispose of the Share within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point is instead the time of the disposal (paragraph 83A-120(3)(b)).

51. Subsection 83A-120(4) is not relevant to the Plan as you are always restricted from transferring the Rights until they are exercised or otherwise forfeited due to the cessation of employment.

52. At the time of application for the Rights, you are required to nominate a Restriction Period of between 3 to 15 years and you may not dispose of or grant a security interest over any Shares allocated to you as part of the Plan during the Restriction Period. Blackmores may implement any procedure it considers appropriate to restrict you from dealing in the Shares during the Restriction Period.

53. Under the terms of the Offer Letter, the Restriction Period ends at the earliest of:

- the date you cease to hold office as a non-executive director or be employed with Blackmores, or
- the end of the Restriction Period nominated by you.

54. If the Restriction Period ends because you ceased employment with Blackmores but you have not paid in full for the Shares at that time, you are subject to restrictions on dealings until the Participant Contribution is paid in full.

55. The Commissioner accepts for the purposes of subsection 83A-120(7) that this arrangement is a condition of the scheme that contractually prevents and genuinely restricts the disposal of the Shares. The Commissioner also accepts that the Inside Information Restriction in the Securities Dealing Policy is a genuine restriction.

56. Where there is more than one disposal restriction preventing you from immediately disposing of your ESS interest, the scheme will no longer restrict you from immediately disposing of the ESS interest when all the genuine disposal restrictions are lifted (refer to Taxation Determination TD 2022/4 *Income tax: when are you genuinely restricted from immediately disposing of an interest provided under an employee share scheme?*).

57. Therefore, the ESS deferred taxing point for Rights that are settled with Shares will occur at the earliest of:

- the end of the period during which you are prohibited from dealing with your Share; this will generally be the end of the Restriction Period provided the Participant Contribution is paid in full and you are no longer subject to the Inside Information Restriction in the Securities Dealing Policy (section 83A-120(6)), or
- the expiry of 15 years after you acquire the Right (section 83A-120(7)).

Amount included in assessable income at the ESS deferred taxing point

58. The amount included as assessable income at the ESS deferred taxing point is the market value of the ESS interest reduced by the cost base of that interest (if any) (section 83A-110).

59. Where the ESS interest is a right to acquire a beneficial interest in a share, the market value of the right at the ESS deferred taxing point is the market value of the share at that time (section 83A-315.03 of the *Income Tax Assessment (1997 Act) Regulations 2021*).

60. Therefore, the amount included in your assessable income at the ESS deferred taxing point is the market value of the Share acquired upon vesting of the Right at the ESS deferred taxing point, less the cost base of the Right.

61. As the Right is granted to you for nil consideration and no amount is paid to exercise the Right, the first element of the cost base of the Right is nil (subsections 83A-110(1) and 110-25(2)).

Cash payment received upon cessation of employment prior to vesting of the Right

62. The assessable income of an Australian-resident taxpayer includes ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during an income year (subsection 6-5(2)).

63. There is well established authority that 'ordinary income' includes remuneration, such as salary and wages.

64. Since the cash payment you receive in respect of a lapsed Right (due to cessation of employment) replaces the salary and wages foregone by you entering into the Plan, the cash payment is ordinary income and is assessable to you in the year in which the payment is received (section 6-5).

Status: **not legally binding**

References

Related Rulings/Determinations:

TD 2016/17; TD 2022/4

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 6-5
- ITAA 1997 6-5(2)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(1)(b)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105(1)
- ITAA 1997 83A-110
- ITAA 1997 83A-110(1)
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(3)(b)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-340
- ITAA 1997 83A-340(1)
- ITAA 1997 83A-340(2)
- ITAA 1997 110-25(2)
- ITAA 1997 Div 230
- ITAR(1997) 2021 83A-315.03

ATO references

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