



# ***CR 2018/35 - Income tax: CSL Limited Non-Executive Director Rights Plan***

 This cover sheet is provided for information only. It does not form part of *CR 2018/35 - Income tax: CSL Limited Non-Executive Director Rights Plan*

 This document has changed over time. This is a consolidated version of the ruling which was published on *15 August 2018*



## Class Ruling

### Income tax: CSL Limited Non-Executive Director Rights Plan

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#### **① This publication provides you with the following level of protection:**

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this Ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this Ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## Summary – what this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provisions

2. The relevant provisions dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
  - Division 83A of the ITAA 1997.
3. All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

### Class of entities

4. The class of entities to whom this Ruling applies are all Non-Executive Directors (NEDs) of CSL Limited (CSL) who:

- acquire share rights (Rights) under the CSL Limited Non-Executive Director Rights Plan (the Plan)

- are, at the time that they acquire the Rights under the Plan, treated as an employee of CSL for the purpose of Division 83A by section 83A-325
- are residents of Australia within the meaning of that expression in subsection 6(1) of the *Income Tax Assessment Act 1936* from the date of acquisition of the Rights to the date of the ESS deferred taxing point with respect to those Rights, and
- are not temporary residents within the meaning of that expression in subsection 995-1(1).

5. In this Ruling a person belonging to this class of entities is referred to as a Participant.

## Qualifications

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

7. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 12 to 45 of this Ruling.

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

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

9. If the relevant provisions on which this Ruling is based substantively change, then the parts of this Ruling dealing with the changed law cease to apply and will have no binding effect.

## Date of effect

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10. This Ruling applies only to the specified class of entities that enter into the scheme from 1 July 2018 to 30 June 2021, being the term of the Ruling. The Ruling continues to apply after 30 June 2021 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will 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 this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

11. However the Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

## Scheme

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12. The following description of the scheme is based on information provided by the applicant.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

### Background

13. CSL is a public company and its shares are listed on the Australian Securities Exchange (ASX).

14. The predominant business of CSL is not, and will not be at the time when the NEDs acquire Rights under the Plan, the acquisition, sale or holding of shares, securities or other investments (whether directly or indirectly through one or more companies, partnerships or trusts).

### The Plan

15. The Plan is a long term incentive scheme for NEDs which is to be a continuation of CSL's existing practice of encouraging NEDs to acquire CSL shares (with a disposal restriction) in order to improve the alignment between a NED's interests and those of CSL's other shareholders.

16. The Plan is operated in accordance with the CSL Limited Non-Executive Director Rights Plan – Plan Rules (Plan Rules).

17. In relation to the 2019 financial year, Participants were each sent a Participation Agreement (Australian Director) – FY19 (Participation Agreement) in June 2018 and asked to execute it and return it to CSL before 30 June 2018. The terms of each Participation Agreement are binding between each Participant and CSL from 1 July 2018, which is the commencement of the Plan year.

18. It is intended that the Plan will continue to be operated in subsequent financial years in the exact same manner as is outlined below for the 2019 financial year, using the same Plan Rules and the same overarching terms in the Participation Agreements.

19. Under the Participation Agreements, each Participant agrees to sacrifice a percentage of their NED fee (between 20% and 100%) for the 2019 financial year.

20. Each Participant is also required to nominate a disposal restriction period when entering into the Participation Agreement with CSL. The nominated restriction period must be between three years and fifteen years after the commencement of the income year in which the Rights are granted. During this time a Participant may not dispose of, or grant a security interest over, any CSL shares allocated to them as part of the Plan.

21. On the sixth business day following (and not including) the date on which CSL publicly releases its annual financial report for the income year ending 30 June 2018, each Participant will be granted Rights.
22. The number of Rights granted will be equal to the amount of NED fees that each Participant has agreed to sacrifice for the 2019 financial year divided by the five-day volume weighted average price of CSL shares (5-day VWAP) over the period immediately prior to the date of grant.
23. The Rights are not transferrable.
24. Each Participation Agreement specifies that Subdivision 83A-C applies to the Rights.
25. The Rights will be divided into two equal tranches with a different vesting date for each tranche.

## **Vesting of the Rights under the Plan**

26. Tranche 1 Rights will vest on the business day immediately following the date on which CSL publicly releases its half-yearly financial report for the 2019 financial year.
27. Tranche 2 Rights will vest on the business day immediately following the date on which CSL publicly releases its annual financial report for the 2019 financial year.
28. No CSL shares will be allocated to Participants on the vesting dates.
29. Upon vesting, Tranche 1 Rights will be exercised automatically and CSL shares will be allocated to each Participant on the third business day after the date on which CSL publicly releases its half-yearly financial report for the 2019 financial year.
30. Upon vesting, Tranche 2 Rights will be exercised automatically and CSL shares will be allocated to each Participant on the third business day after the date on which CSL publicly releases its annual financial report for the 2019 financial year.

## **Disposal restrictions**

31. The transfer or disposal of vested CSL shares received under the Plan is subject to restrictions under the Plan Rules and CSL's Securities Dealing Policy, dated 1 May 2017 (Securities Dealing Policy).
32. Under the Plan Rules, a disposal restriction period will apply to the CSL shares received by the Participants. This period was nominated by each Participant when entering into the Participation Agreement with CSL.

33. Each Participation Agreement provides that the disposal restriction period cannot be amended by agreement between each Participant and CSL subsequent to the execution of the Participation Agreement.

34. Upon exercise of the Rights and allocation of CSL shares to the NEDs, the CSL shares will have a holding lock applied within the meaning of the ASX listing rules whereby the Participants will be unable to dispose of the CSL shares until their Nominated Restriction Date. If the Participant ceases to be a NED of CSL this holding lock may be lifted earlier.

35. CSL's Securities Dealing Policy applies to any director, officer, employee, contractor or consultant to the CSL Group (known as 'CSL People').

36. Under the CSL Securities Dealing Policy, CSL People are:

- prohibited from dealing in CSL Securities during Blackout Periods (as defined in clause 2.2 of the CSL Securities Dealing Policy)
- prohibited from dealing in Blacklisted CSL Securities when notified in writing that they are subject to a blacklist in relation to a particular CSL security (as defined in clause 2.3 of the CSL Securities Dealing Policy), and
- prohibited from dealing in CSL Securities if they possess any Inside Information (as defined in clause 1.2 of the CSL Securities Dealing Policy).

37. Under the CSL Securities Dealing Policy, Designated Persons (which includes each NED) are:

- prohibited from dealing in CSL Securities outside Blackout Periods until written approval has been given by the Chairman of CSL (in the case of Participants, as set out in clause 3.2 of the CSL Securities Dealing Policy).

**Discretion to grant exemption from prohibition on trading within Blackout Periods in 'exceptional circumstances'**

38. Under clause 2.2.3 of the CSL Securities Dealing Policy, Participants may be given prior written clearance to dispose of (but not acquire) CSL Securities where they would otherwise be restricted due to the application of a Blackout Period.

39. The discretion is only available in exceptional circumstances, where the person:

- is in severe financial hardship or other exceptional circumstances apply

- is not actually in possession of Inside Information in relation to CSL Securities, and
- has consulted the CSL Chairman (in the case of participants) who has given prior written approval to dispose of the CSL Securities.

40. The CSL Chairman, in the case of Participants, has sole discretion to decide whether or not exceptional circumstances exist and approval should be granted.

### **Requests for approval to trade outside Blackout Periods**

41. Under clause 2.2.3 of the CSL Securities Dealing Policy, a Participant must complete a written request in the form specified by CSL from time to time to seek approval to deal in CSL Securities outside of a Blackout Period.

42. In accordance with the CSL Securities Dealing Policy, any breaches of the policy are considered serious and may result in disciplinary action against the Participant, including potential termination of employment.

### **Ceasing to be a NED**

43. If a Participant ceases to be a NED of CSL before the Rights allocated to them are exercised:

- any vested Rights will not lapse
- a pro rata number of unvested Rights (based on the number of weeks in the financial year that have elapsed at the time that the Participant ceases to be a NED of CSL) will vest with the remaining unvested Rights lapsing without any corresponding payment being made to the NED in respect of those unvested Rights, and
- the pro rata number of vested Rights will then be automatically exercised and CSL shares will be delivered to the Participant within sixty days of the day on which the Participant ceases to be a NED of CSL.

44. If a Participant ceases to be a NED of CSL in the period after 1 July of an income year and before the Rights are granted the Participant will be paid a cash amount that the Participant would have received had they not entered into the Participation agreement (less any applicable taxes and superannuation contributions).

**Assumption**

45. Following the acquisition of Rights under the Plan no Participant will hold a beneficial interest in, or a right to acquire a beneficial interest in, more than 10% of the CSL shares on issue and would not 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 CSL.

**Ruling**

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**ESS interests and indeterminate rights**

46. Rights acquired under the Plan are indeterminate rights for the purposes of section 83A-340.

47. Once the vesting conditions have been met (either at the Tranche 1 or 2 vesting dates or in relation to the pro rata number of rights which vest when a Participant ceases to be a NED), and the Rights have been settled with CSL shares, the Rights will be treated as rights to acquire beneficial interests in CSL shares (that is, they will be treated as ESS interests for the purposes of subsection 83A-10(1)) from 1 July 2018).

**Subdivision 83A-C**

48. Subdivision 83A-C will apply to the Rights to defer the inclusion of any amount in the Participant's assessable income to the ESS deferred taxing point.

**ESS deferred taxing point**

49. The ESS deferred taxing point will be determined in accordance with section 83A-120 to be the earliest of the following times:

- the time when the employment in respect of which the Participant acquires the ESS interest ceases (that is, ceasing to be a NED of CSL) in accordance with section 83A-330, or
- the end of the 15 year period starting when the Participant acquires the Rights, or



- the date on which the CSL shares acquired, upon exercise of the Rights, are no longer subject to a genuine restriction on disposal. A genuine restriction on disposal includes the nominated restriction period and any genuine trading restrictions caused by the terms of the CSL Securities Dealing Policy such as Blackout Periods and periods when a Participant is in possession of Insider Information and legislated prohibitions against insider trading. A genuine restriction does not include the seeking of approval by a Participant from the CSL Chairman to deal in CSL shares or the mere existence of the ASX holding lock over the relevant CSL shares.

50. However, if the Participant disposes of the CSL shares granted on exercise of the Rights within 30 days after the earliest of the dates set out immediately above, then the ESS deferred taxing point would instead be the date of disposal of the CSL shares.

### **Amount included in assessable income**

51. In accordance with section 83A-110, the amount included in the Participant's assessable income, in the income year in which the ESS deferred taxing point occurs, will be the market value of the ESS interest at the ESS deferred taxing point reduced by the Participant's cost base in the ESS interest (if any).

52. Where a Participant ceases employment in the period between 1 July of an income year and when the Rights are granted and is paid a cash amount, Division 83A will not apply and the amount received will be assessable under section 6-5 in the year of receipt.

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**Commissioner of Taxation**

15 August 2018

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## Appendix 1 – Explanation

❶ ***This Appendix 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.***

### **ESS interests and indeterminate rights**

53. For the purposes of Division 83A, an ESS interest in a company is defined under subsection 83A-10(1) as a beneficial interest in:

- (a) a share in the company; or
- (b) a right to acquire a beneficial interest in a share in the company.

54. Under the Plan, each Participant will acquire Rights to acquire fully paid ordinary shares in CSL for no consideration. If a Participant ceases to be a NED before their Rights vest, a pro rata number of unvested rights will vest based upon the number of weeks in the 2019 financial year that have elapsed in that time and the remaining unvested Rights will lapse without any corresponding payment to the Participant. If a Participant remains a NED to the vesting dates applicable to each tranche, the Rights will vest and, upon vesting, those Rights will be automatically exercised and fully paid ordinary CSL shares will be allocated to each Participant three business days later.

55. As the right to acquire CSL shares under the Rights is contingent upon the Participant maintaining employment as a NED, the Rights themselves are not a right to acquire CSL shares at the time they are granted, but are beneficial interests in rights that will later become a right to acquire a beneficial interest in a share.

56. Section 83A-340 provides that where you acquire a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A will apply as if the right had always been a right to acquire a beneficial interest in the share.

57. In order for section 83A-340 to apply:

- the right acquired must be capable of becoming a right to acquire a beneficial interest in a share, and
- the right must in fact become a right to acquire a beneficial interest in a share.

58. Therefore, where the Rights granted to a Participant ultimately vest and are settled with CSL shares after the vesting date, section 83A-340 will apply to those Rights. The Rights will be treated as if they had always been rights to acquire a beneficial interest in the share (that is, they will be treated as an ESS interest from 1 July 2018, which is when each Participation Agreement becomes binding between each NED and CSL, and each NED commenced sacrificing their agreed proportion of base fee in accordance with the Plan Rules and thereby obtains a right to Rights).

## Subdivision 83A-C

59. Subdivision 83A-C provides that where certain conditions are satisfied, the discount in relation to an ESS interest is not included in a Participant's assessable income when they acquire the ESS interest under Subdivision 83A-B. Instead, under section 83A-110, the assessable income of the Participant will include the market value of the ESS interest at the ESS deferred taxing point reduced by the cost base of the ESS interest.

60. The conditions to be satisfied to be eligible for the deferred inclusion in assessable income are listed in subsection 83A-105(1) and summarised as follows:

- Subdivision 83A-B would, but for section 83A-105, have applied to the interest (see section 83A-20)
- after applying section 83A-315, there is still a discount given in relation to the interest
- section 83A-33 does not reduce the amount to be included in the Participant's assessable income in relation to the interest
- the Participant is considered to be an employee of CSL at the time they acquire the ESS interest in CSL, and
- all ESS interests available under the Plan must relate to ordinary CSL shares
- the predominant business of CSL, in which the ESS interests are acquired, is not the acquisition, sale or holding of shares, securities or other investments (directly or indirectly) or, if it is, the Participant is not employed by CSL and also a subsidiary or holding company of CSL, or a subsidiary of the holding company
- immediately after the ESS interest is acquired, the Participant will not hold a beneficial interest in greater than 10% of the CSL shares on issue, or be in a position to control the casting of greater than 10% of the votes that might be cast at a general meeting of CSL, and
- the ESS interest is a beneficial interest in a right to acquire a beneficial interest in a share and at the time a Participant acquired the interest, the Plan genuinely restricted the Participant from immediately disposing of the Right and the Plan Rules stated that Subdivision 83A-C applies to the Plan.

61. The Commissioner accepts, for the purposes of Subdivision 83A-C, that in relation to Rights acquired by the Participant under the Plan, the conditions outlined in paragraph 60 of this Ruling are satisfied.

### **Conclusion**

62. As all of the requisite conditions outlined in subsection 83A-105(1) have been satisfied, section 83A-110 will apply such that the Participants will be entitled to exclude the amount of the discount received in relation to the Rights from their assessable income under Subdivision 83A-B in the year that they receive those Rights. Subsequently, Participants will include the market value of the Rights reduced by the cost base of the ESS interest at a later time, being the ESS deferred taxing point.

### **ESS deferred taxing point**

63. As Subdivision 83A-C applies to the Rights, section 83A-120 applies in determining the ESS deferred taxing point for the Rights.

64. Subject to subsection 83A-120(3), the ESS deferred taxing point for the Rights is the earliest of the times set out in subsections 83A-120(4) to (7):

- when the Right has not been exercised, there is no real risk of forfeiting the Right, and the scheme no longer genuinely restricts disposal of the Right (subsection 83A-120(4))
- when the Participant's employment in respect of which the Right was acquired ends (subsection 83A-120(5))
- the end of the 15 year period starting when the Participant acquired the Right (subsection 83A-120(6))
- 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)).

65. Under paragraph 83A-120(3)(b), if the Participant disposes of the share within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of the disposal.

66. It is noted that subsection 83A-120(4) will not be relevant to the scheme as the Participants will always be restricted from transferring the Rights until they are exercised or otherwise forfeited due to the cessation of employment. For the same reason paragraph 83A-120(3)(a) will not be relevant to the scheme.

## ***ESS deferred taxing point for Participants***

67. In considering the appropriate ESS deferred taxing point for Participants (other than those who cease employment with CSL) it must be determined when the scheme no longer 'genuinely restricts' disposal of the CSL share.

68. The phrase 'genuinely restricts' is not defined in the legislation. However the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 (the EM), which introduced Division 83A, outlines a number of key principles:

- If disposal of an ESS interest would be a criminal offence, for example under a law regulating insider trading, then the employee would be considered genuinely restricted from disposing of the share.
- A company's internal share trading policy is only considered to be a restriction preventing disposal for the purposes of deferring the taxing point if the penalty for breaking the policy constitutes an effective sanction.
- A restriction that otherwise meets the conditions for a genuine restriction, but is able to be lifted in cases of severe financial hardship, is nonetheless considered to be a genuine restriction.
- Restrictions preventing disposal are considered to be lifted once an opportunity arises in which a taxpayer can realise the share.
- In the case of a trading window, or restrictions that may lift and then re-engage, if the employee does not avail themselves of the opportunity to dispose of the share and the window subsequently closes, there is no further delay in the taxing point. The taxing point would still be at the commencement of the first trading window.
- A genuine restriction should not be open to manipulation, for example requiring the employee to apply for approval before trading (giving the employee a choice regarding whether and when to apply for approval).

69. The Commissioner considers that a scheme does not genuinely restrict disposal of an ESS interest if the employee can take action to enable the disposal of the ESS interest.

70. Whether the Participant is able to take action to deal with the CSL shares is a question of fact.

71. Under the Plan, Participants must nominate a nominated restriction date in their Participation Agreement, which will apply to the CSL shares that they acquire under the Plan. This nominated restriction date is not able to be varied once the Participation Agreement is executed and an ASX holding lock will apply for the nominated restriction period. Further, the Rights are not transferable, which restricts the Participants from dealing with the Rights at any point before they are either exercised or lapse under the Plan.

72. As outlined in paragraphs 36 and 37 of this Ruling, under the CSL Securities Dealing Policy, the Participants are prohibited from dealing with CSL Securities in certain circumstances, despite the nominated restriction date having been met.

73. The Commissioner accepts that the prohibition on Participants dealing with CSL Securities during Blackout Periods, where a Participant holds Blacklisted CSL Securities and where the Participant holds Insider Information are all genuine restrictions preventing disposal of the CSL shares by the Participant.

74. The Commissioner does not consider the seeking of approval by a Participant from the CSL Chairman to deal in CSL Securities, as per the CSL Securities Dealing Policy, to be a genuine restriction. A Participant's deferred taxing point will therefore be the first day from the nominated restriction date where the Participant could otherwise seek written approval to deal in their CSL shares acquired under the Plan, regardless of whether the relevant written approval is provided.

75. As such, the ESS deferred taxing point for the Rights of a Participant that are settled with CSL shares will occur at the earliest of the following times:

- the time when the employment in respect of which the Participant acquires the ESS interest ceases (that is, ceasing to be a NED of CSL) in accordance with section 83A-330, or
- the end of the 15 year period starting when the Participant acquires the Rights, or
- the date on which the CSL shares acquired, upon exercise of the Rights, are no longer subject to a genuine restriction on disposal. A genuine restriction on disposal includes the nominated restriction period and any genuine trading restrictions caused by the terms of the CSL Securities Dealing Policy such as Blackout Periods and periods when a Participant is in possession of Insider Information and legislated prohibitions against insider trading. A genuine restriction does not include the seeking of approval by a Participant from the CSL Chairman to deal in CSL Shares or the mere existence of the ASX holding lock over the relevant CSL shares.

76. However, if a Participant disposes of the CSL shares within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of disposal.

**Amount included in assessable income**

77. Under section 83A-110, the amount to be included as assessable income, in the income year in which the ESS deferred taxing point occurs, is the market value of the ESS interest at the ESS deferred taxing point, reduced by the cost base of the ESS interest (if any).

78. As the Rights and CSL shares were issued for no consideration the cost base for the CSL shares will be nil. In that case, the amount to be included in the Participant's assessable income, in the income year in which the ESS deferred taxing point occurs, is the market value of the ESS interest at the deferred taxing point.

## **Appendix 2 – Detailed contents list**

79. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Legislative references:*

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- ITAA 1936 6(1)
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- ITAA 1937 6-5
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
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- ITAA 1997 83A-20
- ITAA 1997 83A-33
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- ITAA 1997 83A-105
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- ITAA 1997 83A-340
- ITAA 1997 995-1(1)
- TAA 1953

*Other references:*

Explanatory Memorandum to the  
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ATO references

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