
TREASURY LAWS AMENDMENT (MEASURES FOR A LATER SITTING)
BILL 2021

EXPOSURE DRAFT EXPLANATORY MATERIALS

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ESS	employee share scheme
ITAA 1997	<i>Income Tax Assessment Act 1997</i>

Chapter 1

Employee share schemes—removing cessation of employment as a taxing point

Outline of chapter

1.1 Schedule # to the Bill amends the ITAA 1997 to remove cessation of employment as a taxing point for ESS interests which are subject to deferred taxation.

1.2 All legislative references in this Chapter are to the ITAA 1997, unless otherwise stated.

Context of amendments

1.3 An employee share scheme (ESS) provides employees with a financial interest in the company they work for through the granting of shares or rights to shares in that company, or in another company if the employing company is a subsidiary of that other company.

1.4 An ESS interest is a beneficial interest in a share in a company or a beneficial interest in a right to acquire a beneficial interest in a share in a company. For simplicity of expression, this Chapter will reference these as shares or rights respectively.

1.5 Employers use ESS to attract, retain and motivate staff by issuing ESS interest such as shares or rights to their employees, usually at a discount.

1.6 Generally, any discount to the market value of ESS interests in shares or rights are taxed up-front, and the market value of the discount must be included in the employee's assessable income for that income year. This outcome reflects the inherent nature of the discount as remuneration from employment.

1.7 However, an employee can access deferred taxation on a discount where the ESS interest obtained under a complying ESS is:

- (i) at a real risk of forfeiture or loss under the conditions of the scheme; or
- (ii) obtained under a salary sacrifice arrangement, and the ESS interest acquired does not exceed \$5,000 in an income year; or
- (iii) in the case of a beneficial interest in a right, the ESS genuinely restricts the immediate disposal of the right and the

ESS rules expressly provide that Subdivision 83A-C applies to the scheme.

1.8 The deferred taxing point for an ESS interest which is a share is the earliest of:

- (i) when there is no real risk that the share will be forfeited or lost (other than by disposal) and there are no longer any genuine restrictions preventing the disposal, or
- (ii) when the employee ceases the employment in respect of which they acquired the share, or
- (iii) at the end of the 15-year period following the acquisition of the share.

1.9 The deferred taxing point for an ESS interest which is a right is the earliest of:

- (i) when the right has not been exercised, and there is no real risk that the right will be forfeited or lost (other than by disposal) and there are no longer any genuine restrictions preventing the disposal; or
- (ii) when the employee ceases the employment in respect of which they acquired the right; or
- (iii) at the end of the 15-year period following the acquisition of the right; or
- (iv) when the right has been exercised, and there is no longer any real risk that the right will be forfeited or lost and any genuine restrictions preventing the disposal of the right no longer apply.
- (v) when the right has been exercised, and there is no longer any real risk that the share will be forfeited or lost and any genuine restrictions preventing the disposal of the share no longer apply.

1.10 For both shares and rights, if the ESS interest (or the share acquired by exercising the ESS interest) is disposed of within 30 days of the earliest time of the above taxing points, the ESS deferred taxing point will instead be the time of the disposal.

1.11 Removing the cessation of employment taxing point for tax-deferred ESS will support Australian businesses to attract and retain the talent they need to compete on a global stage.

Summary of new law

1.12 Schedule # to the Bill removes cessation of employment as a taxing point for ESS interests which are subject to deferred taxation.

1.13 As a result, cessation of employment will no longer be a taxing point for ESS interests which are subject to deferred taxation. Where an employee ceases the relevant employment their deferred taxation arrangement will continue and the earlier of the remaining deferred taxation points will apply.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Cessation of employment is no longer a taxing point for ESS interests which are subject to deferred taxation.	Cessation of employment is one of the taxing points for ESS interests which are subject to deferred taxation.

Detailed explanation of new law

1.14 Schedule # to the Bill amends the ITAA 1997 to remove cessation of employment as a taxing point for ESS interests which are subject to deferred taxation. [Schedule #, items 3 and 6, subsections 83A-115(5) and subsection 83A-120(5)]

1.15 As a result, cessation of employment will no longer be a taxing point for ESS interests which are subject to deferred taxation. Where an employee ceases employment (in the manner and form set out in Division 83A) their deferred taxation arrangement will continue and the earliest of the remaining deferred taxation points will instead apply.

1.16 For ESS interests which are shares, the deferred taxing point will be the earliest of:

- (i) when there is no real risk that the share will be forfeited or lost (other than by disposal) and there are no longer any genuine restrictions preventing the disposal; or
- (ii) at the end of the 15-year period following the acquisition of the share.

1.17 For ESS interests which are rights, the deferred taxing point will be the earliest of:

- (i) when the right has not been exercised, and there is no real risk that the right will be forfeited or lost (other than by disposal)

and there are no longer any genuine restrictions preventing the disposal; or

- (ii) at the end of the 15-year period following the acquisition of the right; or
- (iii) when the right has been exercised, and there is no longer any real risk that the right will be forfeited or lost and any genuine restrictions preventing the disposal of the right no longer apply.
- (iv) when the right has been exercised, and there is no longer any real risk that the share will be forfeited or lost and any genuine restrictions preventing the disposal of the share no longer apply.

1.18 If the ESS interest (or the share acquired by exercising the ESS interest) is disposed within 30 days of the earliest time of the above taxing points, the ESS deferred taxing point will continue to be the time of the disposal.

Consequential amendments

1.19 Consequential amendments are made to sections 83A-115 and 83A-120 to reflect changes to internal references within those sections and wording used to provide numerical ordering to taxing points. *[Schedule #, items 2, 4, 5, 7 and 8, subsections 83A-115(2) and 83A-115(6)]*

1.20 Consequential amendments are also made to the non-operative guide to Subdivision 83A-C which outlines what the Sub-division is about to remove references to cessation of employment as a possible taxing point. *[Schedule #, item 1, section 83A-100]*

Application and transitional provisions

1.21 Schedule # to the Bill commences on the first day of the first quarter following Royal Assent.

1.22 The amendments apply to ESS interests issued on or after the beginning of financial year that follows Royal Assent.