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* Associated Firm
** In cooperation with
Trench, Rossi e Watanabe
Advogados

25 August 2021

Directors
Market Conduct Division and Individual and Indirect
Taxation Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email
ESSreforms@Treasury.gov.au

Dear Sir/Madam

Submission on Exposure Draft Legislation - Employee Share Schemes

We welcome the opportunity to provide comments on *Exposure Draft Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Employee Shares Schemes - Removing cessation of employment as a taxing point (Tax Exposure Draft)*.

1. Introduction

1.1 Baker McKenzie, a global law firm with over 6,000 lawyers in 76 offices in 46 countries, advises a large number of multinational corporations with regard to their global equity plans, most of whom make grants to Australian employees. In this regard, we maintain a current global database of the tax and securities law treatment of share plans in 50 countries. We also advise on a regular basis with regard to the taxation of internationally mobile employees and have direct ongoing experience with regard to the administrative issues relating to the grant and taxation of equity interests received by employees. Thus, we feel uniquely qualified to comment on both of the Exposure Drafts.

The Tax Exposure Draft

- 1.2 We are very supportive of the proposed change to remove cessation of employment as a taxing point and look forward to the improvements for employers and employees once they are enacted.
- 1.3 Having cessation of employment as a taxing point is out of step with the situation in most countries with which Australia competes for talent. While some companies have introduced complicated features into their share plans to navigate around the impact of this rule, many companies that operate globally have been unable to do so.
- 1.4 We would also welcome further changes to the employee share schemes rules in Division 83-A of the Income Tax Assessment Act 1997 that will encourage the greater use of employee equity awards to reward employees and simplify their tax treatment.

- 1.5 In our view, the Australian tax and regulatory rules should be more compatible with the rules in other countries in order to streamline the process for multinational companies offering ESS interests to employees working in Australia.
- 1.6 Our comments in relation to the Exposure Draft are set out below.
- 2. The Tax Exposure Draft - our submissions**
- 2.1 The change to remove the cessation of employment as a taxing point should be implemented with effect for all outstanding ESS interests at the time the legislation comes into effect rather than for awards granted after that date:
- (a) the ESS rules should be as simple as possible and easy for employers and employees to understand and implement;
 - (b) it will create administrative confusion to have some awards subject to cessation of employment as a taxing point and others not - this will create unnecessary tracking and monitoring of awards to determine which rules will apply and ESS reporting will be more complicated;
 - (c) communication to employees will be more complicated and confusing if the change only applies to new ESS interests granted after the change comes into effect;
 - (d) the cessation of employment rule has had extremely unfair results for some employees (particularly in the case of redundancy) and it is equitable to rectify the situation as soon as possible;
 - (e) having different rules for different outstanding awards encourages convoluted tax structuring and will likely encourage cancellation of existing awards;
 - (f) if the share price increases between cessation of employment and the next relevant ESS deferred taxing point, the impact on Government revenue of implementing the change for all outstanding awards will be positive as the amount of tax payable by the employee will be greater.
- 2.2 The start date for the change should not be deferred until 1 July following Royal Assent, but should have immediate operation
- 2.3 The impact of the change on ESS reporting should be considered:
- (a) consideration should be given to the ESS reporting requirements and how they can be satisfied several years after an employee has ceased employment - exceptions to the requirement to provide an ESS statement should be available where a provider no longer has employee details - lodging an ESS Annual Report should be sufficient in this situation

We would welcome the proposed change being introduced into Parliament as soon as possible with effect for all outstanding equity awards from the earliest time possible.

We are in the process of preparing submissions in relation to the proposed regulatory changes in relation to ESS and would appreciate your consideration of these submissions once finalised.

Please let us know any queries.

Regards

John Walker
Partner
+61 2 8922 5206
John.Walker@bakermckenzie.com

Erica Kidston
Special Counsel
+61 2 8922 5665
Erica.Kidston@bakermckenzie.com