Government Exposure Draft to Reform Employee Share Schemes

As announced in the 2021-22 Budget, the Commonwealth Government intends to remove cessation of employment as a taxing point for Division 83A ITAA 97 deferred Employee Share Schemes (ESS).

The remaining taxing points will be retained being the earlier of:

- Fifteen (15) years after acquisition of the equity; or
- When the equity is no longer subject to genuine restrictions on disposal; and
- There is no real risk of the employee forfeiting the right to the equity.

The amendments also doubled the maximum ownership and voting rights limitations from 5 per cent to 10 per cent for all the companies employees.

In respect of the Commonwealth Government's regulatory reforms, changes relative to what was consulted on previously:

- Completely removing *Corporations Act 2001* requirements for ESS offers to employees who do not pay or incur debt to participate in these schemes.
- Increasing the value cap, under which *Corporations Act 2001* requirements do not apply, to $30,000 for all other ESS offers of unlisted companies.
- Consolidating exemptions and class order relief from disclosure, licensing, hawking, advertising and other obligations under the *Corporations Act 2001*.
- Expanding relief for unlisted companies to include contribution plans and limited or no recourse loans, where an employee can make a monetary contribution to acquire eligible financial products.
- Relaxation of the requirements to lodge disclosure documents.

By removing these regulatory barriers, it will be easier for a viable, but cash poor, business to hire employees with ESS offers, in addition to wages.

The tax reforms remove the cessation of employment taxing point for the tax deferred ESS that are available for all companies. Tax will be deferred until the earliest of the remaining taxing points.

These reforms will make it easier for businesses to offer the ESS and will support Australian businesses to attract and retain the talent they need to compete on the global stage.

The Commonwealth Government is seeking stakeholder views on the exposure draft legislation and explanatory materials to give effect to these reforms. Public consultation on the exposure draft legislation and explanatory material will close on 25 August 2021.

Under the regulatory reforms released by the Commonwealth Government, employers will not have to consider the *Corporations Act 2001* when making ESS offers, provided that they do not charge or lend to employees that they offer these remuneration packages to and are not otherwise engaged in regulatory avoidance behaviour(s).

Where Employees pay, directly, or via a contribution plan through use of the loan, to participate in the ESS, these reforms:

- Increase the value limit of eligible financial products that can be offered by unlisted companies in a 12-month period from $5,000 per employee to $30,000 per employee.
- Relax the requirements to lodge disclosure documents.
- Consolidate exemptions and class relief from disclosure, licensing, anti-dash hawking, advertising and other obligations under the *Corporations Act 2001*.

The Employee Share and Investment Trust (ESIT)

These proposed amendments to the Division 83A ITAA 97 taxation of deferred employee share plans will not have any impact on the ESIT arrangements.

The ESIT arrangements are the most effective share and investment arrangements operating in the Australian and New Zealand marketplaces.

The ESIT arrangements retain their optimal effective taxation features including:

- Not being taxable up front upon acquisition.
- Not being limited to ordinary shares of the employer, enabling participants to invest in any income producing range of investments.
- Monies under the ESIT arrangement are only taxable when the participant sells their allocated investments and or receives divided distributions.
- Participants are not necessarily taxable upon termination of employment, or cessation of restrictions on disposal, or the removal of forfeiture conditions.
- When the allocated assets are disposed of, the issue price is paid out as ordinary assessable income and the growth in the value of investments are realized as capital gains. In Australia only 50 per cent of the capital gains are taxable, provided the investments have even held for at least one year; and
- In New Zealand, the capitals gains realised are tax free, because New Zealand does not have a capital gains tax system.

The Remstrategy ESIT structure utilises interest free, non-recourse loans, which are not subject to fringe benefits tax in both Australia and New Zealand.

Responses to the Governments Exposure Draft

The Commonwealth Government has stated that it will accept comments on the exposure draft legislation received up to 25 August 2021.

Signature of Director

GARY FITTON

Name of Director

Signature of Director / Company Secretary

JOHN KALLITSAS

Name of Director / Company Secretary