THE TAX INSTITUTE

THE MARK OF EXPERTISE

9 February 2015

Mr Tom Reid
General Manager
Law Design Practice
The Treasury
Langton Crescent
PARKES ACT 2600

By email: taxlawdesign@treasury.gov.au

Dear Mr Reid,

Improvements to the Taxation of Employee Share Schemes

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the Exposure Draft *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015: Improvements to the taxation of employee share schemes* (**Exposure Draft**).

Summary

The Tax Institute is supportive of the changes proposed to the taxation of employee share schemes. The proposed changes go a long way to reversing the unfavourable amendments made to these rules in 2009 that, in particular, hindered start-ups from providing shares or rights to employees in a cost-effective manner.

In particular, we strongly support the following proposals:

a) reversing some of the changes made in 2009 to the taxing point of rights;
b) extending the maximum tax deferral period from 7 years to 15 years;
c) changing the refund rules so they can apply to lapsed rights;
d) changing the option valuation tables; and
e) introducing Employee Share Scheme (**ESS**) concessions for start-ups.

Level 10, 175 Pitt Street
Sydney NSW 2000
Tel: 02 8223 0000
Fax: 02 8223 0077
info@taxinstitute.com.au
taxinstitute.com.au
ABN 45 008 392 372

However, there are a number of technical issues in the proposed changes that The Tax Institute suggests warrant further consideration. In particular:

Provisions relating to Start-ups

a) it should be made clear that the 'start-up' concession should prevail over the existing deferral rules in Subdivision 83A-C (i.e. that qualifying options in start-ups will be entitled to the concession in new section 83A-33 even where the real risk of forfeiture test is satisfied on grant);
b) the requirement for a broad based offer be removed from the start-up concession; and
c) the Commissioner be given discretion to allow certain start-up companies to access the start-up concession even where certain requirements are not met.

General Provisions

a) a variety of valuation issues affecting ESS interests should be addressed;
b) transitional rules be introduced to allow some of the amendments to apply to ESS interests granted before 1 July 2015; and
c) some suggested changes to the deferred taxing points including 'cessation of employment' as an ESS deferred taxing point be removed.

Detailed discussion of the issues related to the start-up provisions is contained in Appendix A and discussion of the issues related to the general provisions is contained in Appendix B.

Yours sincerely

Stephen Healey
President

APPENDIX A – Start-Ups

1. Interaction with Subdivision 83A-C

In practice, most ESS option plans adopted (or intended to be used) by start-up companies contain a “risk of forfeiture”. This is because, commercially, the founders want the employees to remain tied to the business in order to achieve ongoing success. Options typically “vest” over a 3 to 4 year term. A common plan would have 25% of the options “vesting” one year after the date of grant, with the remainder vesting over the following 3 years. If the employee leaves the company prior to vesting, the options are forfeited. This genuine risk of forfeiture would place typical options plans adopted by start-ups within Subdivision 83A-C of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**)[1]. These are similar to the common terms usually adopted in US start-up option plans, and are designed to mimic the US plans in order to compete in the labour market on equal footing with US companies.

We understand from the various Government announcements made in relation to the start-up concession for qualifying options that the concession is to be available regardless of whether deferred tax (Subdivision 83A-C) would have otherwise applied, but for the concession. That is, we assume the Government’s intention is that the holders of such options will be entitled to the start-up concession regardless of whether there is a real risk of forfeiture on grant.

This does not appear to be reflected in the current draft legislation. In particular, we note that proposed section 83A-33(1) has the effect of reducing amounts that would have otherwise been included in assessable income under section 83A-20 (up-front tax) but there does not appear to be any proposed amendments to section 83A-105(1) to make it clear that rights which satisfy section 83A-33 are not subject to Subdivision 83A-C. As noted above, in practice it might be expected that most qualifying options will satisfy the real risk of forfeiture test (e.g. time based vesting with forfeiture for leavers) and therefore a concession which does not apply in such circumstances is likely to be of very little practical use and would not achieve the stated aim of the amendments - being to stimulate the growth of start-ups by enabling them to be more competitive in the labour market.

The Tax Institute requests that the draft legislation be amended to make it clear that Subdivision 83A-C will have no application to rights which satisfy section 83A-33.

2. Broad availability of schemes - Interaction with the new ASIC class order for unlisted companies (CO 14/1001)

The proposed tax exemption for shares requires that the employee pay more than 85% of the market value of the shares. However, the recent ASIC class order relief for the

[1] In practice, the other requirements for deferred taxation are usually also satisfied.

acquisition by employees of shares in an unlisted company (CO 14/1001) is generally only available where the employee provides no more than nominal consideration for the acquisition of the shares. Therefore it would seem that the adoption of a share plan which qualified for start-up tax concessions would not satisfy class order relief and would need to rely on other exemptions under the *Corporations Act 2001* (Cth) (**Corporations Act**), apply for specific relief from ASIC, or comply with the disclosure requirements.

It is also noted that, under the proposal, both the tax exemption for shares and the tax concession for options will only be available where the employer operates a broadly based employee share or rights plan. In limited cases, this could cause practical problems for more well established start-ups (i.e. more than 3 years old with more than 20 employees). When introducing a new plan, these start-ups may prefer to make offers to less than 20 employees in order to satisfy the Corporations Act 20/12 rule (assuming class order relief is not available). If this does not satisfy the “75% of permanent employees with 3 years’ service” test, the start-up concessions would not be available to any employee.

Accordingly, The Tax Institute suggests that paragraph 83A-33(1)(c) (requiring section 83A-105(2) about broad availability of schemes be satisfied) be removed (at least for options).

3. Commissioner discretion

Proposed subsections 83A-33(2) (not listed), 83A-33(3) (10 year rule) and 83A-33(6) (Australian resident employer) contain some "company profile" pre-requisites for an employee to be entitled to the start-up concession. It is not difficult to envisage circumstances where it would reasonably be expected the concession would theoretically be available, but these requirements may not always be satisfied in practice (e.g. where a new start-up acquires an "older" company that is small in value compared to the start-up’s business, or where an off-shore start-up is operating in Australia through a branch structure).

Also, it is quite common for Australian originated start-ups to need to incorporate in the US in order to attract capital investments from the larger US markets. To deny the start-up concessions to Australian employees would encourage these companies to move all of their operations to the US, rather than maintain a presence in Australia through branch operations.

The Tax Institute requests that consideration be given to providing the Commissioner with a discretion to allow the start-up concession to still be available in such cases.

4. ‘Associates’ of a start-up

There is potential risk for a start-up to exceed the $50 million turnover in section 83A-33(4) in the event a Private Equity or Venture Capitalist firm acquires a stake in the start-up. We query whether such an entity meets the requirements of being an affiliate entity for the purpose of determining the aggregated turnover for this provision. If this were to be the case, it may unfairly result in otherwise qualifying start-ups missing out on being able to apply the new concession. In this regard, we suggest Treasury consider providing the Commissioner with discretion to exclude these types of interest holders for the purposes of determining the aggregated turnover of a start-up. Alternatively, an exclusion could be modelled on current section 118-440(3).

5. Section 83A-33(5)(a) (less than 15% discount)

Section 83A-33(5)(a) requires that the discount on the purchase price of the shares be *less than* 15%. As the commercial focus for employers and employees is likely to be on the price of the shares to be paid by the employees (rather than the allowed discount), The Tax Institute requests that "less than" be changed to "not more than" so employers can safely offer shares at 85% of the market value without inadvertently breaching the provision.

6. Availability of CGT discount

The Tax Institute suggests Treasury consider how the requirement to hold assets for a period of at least 12 months to obtain access to the 50% CGT discount could potentially be alleviated with respect to shares acquired following the exercise of options obtained under an ESS, particularly for start-ups.

Start-ups rely on utilising ESS interests to attract, retain and incentivise staff by providing equity through an ESS as a way to “top up” salaries. To do this effectively, employees should be taxed only when they realise value from the ESS interests provided.

Under the new start-up concession contained in section 83A-33, it is intended that the discount on the ESS interest is not taxed upfront to the employee if the scheme meets certain conditions. Rather, the shares and/or options acquired will be subject to the capital gains tax provisions[2] and therefore gains will be taxed at a later time under the CGT rules. In this regard, we expect that the cost to the revenue of the 50% CGT discount has been taken into account in determining the likely impact on revenue from the operation of this new concession.

There are circumstances beyond an employee’s control where ESS interests are disposed of, for example where an employee has held an option for ten years and the company in which the option is held is then sold. This can result in the option being

[2] See paragraphs 1.65 and 1.66 of the EM.

exercised and the shares being automatically (immediately) sold such that the employee does not have the choice of when to dispose of the underlying shares.

The CGT discount is unlikely to be available in this case as the employee is unable to satisfy the 12 month holding period in respect of the disposal of the underlying shares. This is not an equitable outcome. It is suggested that the restriction imposed by the minimum holding period in section 83A-45(4) could be imputed on an ESS interest holder and counted towards satisfying the 12 month holding period for CGT purposes (so long as the ESS interest was held for a minimum of 12 months) in these cases.

It may be opportune at this time for Treasury to consider whether the 12 month holding period requirement could be dispensed with for shares acquired upon exercise of an ESS option provided through a scheme issued by a start-up that qualifies for the concession. In the alternative, the holding period requirement could be deemed to be satisfied if the ESS option that gives rise to the acquisition of the underlying shares has itself been held for at least 12 months for the purpose of satisfying the CGT discount rules (and all the conditions for the concession for start-ups have been satisfied).

APPENDIX B - General Provisions

1. Subsection 83A-105(6)(b)(ii) (tax deferral for rights where real risk of forfeiture is not satisfied)

Proposed new subsection 83A-105(6) will allow tax deferral for rights where the real risk of forfeiture test is not satisfied on grant but the rights are unable to be sold and "the governing rules of the scheme expressly stated that this Subdivision applies to the scheme (subject to the requirements of this Act)."

We understand the rationale for this requirement is to give employers who grant rights without a real risk of forfeiture the choice of whether employees participating in such plans will be subject to Australian tax on grant or, instead, generally on exercise.

The Tax Institute requests that Treasury make it clear in the EM that inserting the required terminology in the Australian offer documents will be sufficient for these purposes (including in the tax summary that may accompany the offer documents) and that any terminology in the offer documents which makes it clear that tax is not applicable on grant (whether or not it refers specifically to Subdivision 83A-C) will be sufficient for these purposes.

2. Section 83A-120 ESS deferred taxing point on disposal

Although the taxing point that arises on vesting (in the sense of forfeiture conditions ceasing to apply) has been replaced with the ‘time of exercise’, the taxing point that arises on the lifting of disposal restrictions has been retained in the current law. This is in stark contrast to former section 139CB(1)(a) of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**), which listed the equivalent taxing point as ‘actual disposal’.

The proposed changes therefore do not carry out the Government’s pledge to “reverse the changes made in 2009 to the taxing point for options”.

Options are typically less liquid than shares, and the mere fact that an employee becomes *permitted* to sell the options does not indicate that the options can be readily monetised to satisfy any tax liability. The imposition of a taxing point at this time would therefore impose some difficulty on employees, as they will not be able to monetise their options.

Should Treasury agree with this proposition, we suggest Treasury replace the wording in subsection 83A-120(4)(c)[3] with "you dispose of the right other than by exercise".

3. Subsection 83A-120(7)

The current 'heading' to subsection 83A-120(7) is 'No restrictions on exercising right and disposing of share'. This correctly reflects that the taxing time under that subsection in the existing law is generally on vesting of the right. Now that it is proposed that the taxing time under that section will generally be on exercise of the right (unless restrictions on the shares apply), it may be appropriate for the heading to change (for example to 'Exercising of right and no restrictions on disposing of share').

4. 10% limit on shareholding and voting power

The proposed change from a 5% limit on shareholding and voting power to a 10% limit is described in the draft EM as "relaxing" the significant ownership and voting rights limitations. The draft EM also describes (at paragraph 1.51) the current law as providing that the employee (*and their associates*) must not already have a significant ownership or voting rights in their employer or holding company of their employer (emphasis added).

Under the current law, an associate's interests in a company are only counted for the purposes of the 5% tests where those interests are issued to the associate in respect of the employee's employment (refer to section 83A-305). That is, any interests held by an associate which have not been acquired by the associate in relation to the employee's employment are *not* currently counted in the test (unless the employee has the capacity to control the votes on those interests which is a control test, not an associate test). Further, under the current law, rights to shares are not counted in the test (unless the employee has the capacity to control the votes on the shares which may be acquired from exercise of those rights which is not generally expected to be the case unless the rights were exercisable at the time). It is proposed that both of these aspects will be changed. That is, that the tests will become 'associate inclusive' tests (which is a significant adverse change to taxpayers – refer to section 83A-305(2)) and that rights will also be treated as shares under the test, regardless of whether or not those rights are vested at the time (which is also a significant adverse change to taxpayers – refer to section 83A-45(6)).

While the doubling of the limit from 5% to 10% may be a beneficial change for most taxpayers, it seems unlikely that this change, when coupled with the above two adverse changes, would necessarily be considered a 'relaxation' of the tests by all taxpayers. The Tax Institute therefore suggests that the draft EM be amended to reflect that, under the current law, the tests are <u>not</u> 'associate inclusive' (other than in the

[3] Should this proposition be adopted by Treasury, we also suggest removal of the words "No restrictions on" from the heading to the subsection.

limited circumstances where the associate has acquired those interests in respect of the employee's employment or the employee has the capacity to control) and that the changes, when read together, are not necessarily a 'relaxation' of the tests.

5. Section 83A-315 and the valuation regulations

a) Current Regulation 83A-5.01 indicates that Division 83A of the 1997 Act Regulations (**Regulations**) reserves rules under former Division 13A of the 1936 Act. The Tax Institute suggests that a change to this regulation be considered now that it is proposed to change the valuation tables from the tables which existed in Division 13A.

b) Current Regulation 83A-315.01(1) provides that the tables can only be used when the rights must be exercised within 10 years of grant. The Tax Institute requests that consideration be given to amending this regulation to apply to rights which are able to be exercised for up to 15 years from grant (to match the proposed extension to 15 years of the taxing time of such rights). Such a change would presumably need to be accompanied by the tables also being extended to cover exercise periods of up to 15 years.

c) Ordinarily, an ESS interest is not regarded as a "fringe benefit[4]". However, under the current valuation rules, an anomaly arises where an ESS interest can have a nil value according to the valuation tables in the Regulations, but still have some value and therefore can be regarded as a fringe benefit for the purposes of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**). This anomaly has been recognised in ATO ID 2012/68.

The Tax Institute recommends Treasury take the opportunity to amend the provisions to ensure that an ESS interest does not amount to a fringe benefit in any circumstance. It appears that the proposed amendment in Item 29 of the Exposure Draft may to some extent be trying to address this anomaly. However, as drafted, Item 29 will just create uncertainty around valuation as to whether Division 83A applies or not, particularly where consideration is paid for an option. The Tax Institute suggests that a simpler and more effective approach to achieve this outcome would be to remove Item 29 from the Exposure Draft and simply amend paragraph (h) of the definition of fringe benefit in the FBTAA by removing the words "to which Subdivision 83A-B or 83A-C of that Act applies".

The Tax Institute also suggests that it be made clear that the valuation tables will be able to be applied for the purposes of determining the taxable amount (which may be nil) under section 83A-25.

d) More broadly, The Tax Institute supports a valuation methodology which allows unlisted companies to utilise balance sheet net asset values from their most

[4] See definition of "fringe benefit" in section 136 of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**) at subsection (h).

recently produced financial statements as the basis of valuing the company. Where appropriate, the value attributable to any preference shares should be excluded (such as a sale or liquidation preference) in arriving at the remaining value attributable to the ordinary shares.

6. Transitional rules

It is proposed that the changes only apply to ESS interests granted on or after 1 July 2015. The Tax Institute requests that further consideration be given to transitioning ESS interests granted before that date into the new rules. In particular:

a) The Tax Institute suggests that the changes to section 83A-310 (forfeiture of ESS interests) to ensure a refund is available for rights which lapse unexercised should be extended to certain rights granted before 1 July 2015. For rights granted on or after that date, the amended section's relevance is likely to be limited to cessation of employment cases (refer below) and where a deferral of the taxing time was not available on grant (e.g. where the new 10% limits are breached). However, subject to any other transitional rules that may be developed, rights granted between 1 July 2009 and 30 June 2015 will continue to be taxed on vesting (not exercise) and therefore are most in need of an amended section which allows a refund of the tax paid on vesting in the event the rights ultimately lapse.

b) The Tax Institute suggests that the changes to the Regulations in relation to the value of options should also apply to options which have an ESS deferred taxing point (or a cessation time) on or after 1 July 2015, regardless of when those options were granted.

c) The Tax Institute suggests that the changes to section 83A-120(7) (the ESS deferred taxing point for rights) apply to all rights granted on or after 1 July 2009 which had not yet had an ESS deferred taxing point before 1 July 2015.

7. Cessation of employment as an ESS deferred taxing point

The Tax Institute is disappointed that the proposed changes do not include the removal of 'cessation of employment' as an ESS deferred taxing point. The draft EM refers to the changes as being designed to make Australia's taxation of ESS more competitive by international standards. However, the fact that Australia continues to tax employees on ESS interests on cessation of employment <u>notwithstanding</u> those interests are unable to be converted into cash at that time is clearly <u>not</u> competitive by international standards.

Employment income should be taxed when it is derived. Taxing ESS interests on cessation of employment where those interests are not at that time able to be sold (e.g. because they are not yet vested, or because the shares continue to be subject to a lock-up period post cessation of employment) means that tax is payable at a time and by reference to a share price which does not correspond to the derivation of income principles.

We understand the intention of Division 83A is to facilitate better alignment of interests between employers and their employees. This interest is clearly not served by having ‘cessation of employment’ as a taxing time. Employers often prefer that employees do not 'monetise' their ESS interests on leaving employment to ensure that, while employed, the employees remain focused on the long term interests in the company. That is, continuing to hold ESS interests after cessation of employment helps to ensure that decisions the employee makes in the lead up to them leaving the company continue to be in the longer term interest of the company (instead of making decisions for the short term interest only and then cashing in on that upon leaving the employment).

Any concerns that Treasury may previously have had about former employees appropriately reporting ESS interests for tax purposes after the employment has ceased should have been adequately dealt with by the employee ESS reporting rule which was introduced in 2009.

Accordingly, The Tax Institute requests that ‘cessation of employment’ as a taxing point for ESS interests be deleted. If this is not able to be achieved, then we strongly recommend that ‘cessation of employment’ be removed as a deferred taxing point in respect of a ‘good leaver’ (e.g. death, total and permanent disability, redundancy etc).