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**Australia – Changes to 457 Visa and Employee Share Scheme Rules Proposed**

by KPMG, Australia (a KPMG International member firm)

## flash Alert

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On 14 October 2014, the Australian federal government released its *National Industry Investment and Competitiveness Agenda* ("the Agenda"). Although broad-ranging, the Agenda outlined the government's intention to modify the 457 visa program and improve tax arrangements for employee share schemes (ESS), proposed to apply for options provided from 1 July 2015.

### Why This Matters

The proposed changes to the Australian 457 visa program will help streamline processing of visas, facilitate the administration for employers around sponsorship requirements, and simplify the qualifying/requisite conditions for eligible employees.

The proposed changes to the Australian tax treatment of ESS will generally align the Australian tax treatment of stock options with international practices and potentially make it easier to move employees to Australia where they hold unvested options (as the taxing point in Australia may be more likely to mirror the taxing point in their home country).

### Immigration

#### 457 Visa Changes

The joint press release announced that the Australian federal government will introduce the following changes to commence in October 2014 and will roll out the changes in phases during 2014-15<sup>1</sup>:

- Streamline processing of 457 visas to reward low-risk applicants, while refocusing compliance and monitoring activities on high-risk applicants;
- Reform sponsorship requirements to reduce the time and cost to businesses;
- Increase the sponsorship approval period for start-up businesses from 12 months to 18 months;
- Provide greater flexibility in relation to English-language testing and skill requirements.

No changes will be made to the Temporary Skilled Migration Income Threshold, which is currently set at \$53,900 ahead of a review within the next two years. (All dollar figures noted are Australian dollars.) It will also continue to be a requirement that foreign workers receive at least the same market rates and conditions that are paid to an Australian doing the same job in the same work-place.

Separate to the 457 visa program, the federal government has also proposed the creation of a targeted "premium investor visa," which we describe below.

### ***Investor Visa Changes***

The government has expanded the investor visa program with a range of changes, including the creation of a Premium Investor visa (PIV) with Austrade (the Australian government's trade and investment development agency) as the nominator, and a \$15 million threshold. Austrade is also to be given a role in determining complying investment policy and will undertake this responsibility in consultation with stakeholders. Such investments will be in line with the government's national investment policy.

#### ***KPMG Note***

Streamlining of 457 visa processes is likely to be welcomed by businesses, however more detail of the proposed changes will need to be seen to determine whether this has any material positive effects. The specific initiatives to provide flexibility on the English language and skills should simplify and speed up areas that had become complicated. Companies should continue to be mindful of their compliance requirements, as the government is emphasizing the message that non-compliant sponsors will face tough penalties.

### **Employee Share Scheme Changes**

#### ***Summary of Current Law***

Effective 1 July 2009, the tax law changed to introduce a requirement that a 'real risk of forfeiture' exist in order to defer the taxing point of shares or options granted under an ESS past the date of grant (amongst other conditions).<sup>2</sup> The taxing point for such options under the current law is generally the date the "real risk of forfeiture" no longer exists (in most cases).

This means that for options granted after 1 July 2009, 'vest' (not exercise) was the common taxing point for options in Australia (termination of employment and a maximum time limit of seven years from grant being the possible other taxing point 'triggers').

#### ***Proposed Changes***

The federal government proposes the taxing point of options should be further deferred to the date of exercise.<sup>3</sup>

However a 'real risk of forfeiture' must still apply at the time of grant. This is generally in the form of a retention or performance hurdle.

The federal government has also proposed to revise the 'safe harbor' methodology available for determining the market value of unlisted rights/options and to provide various concessions to ESS participants of unlisted start-up companies with turnover of less than \$50 million.

#### ***KPMG Note***

There is now a consultation process in place with the changes proposed to take effect from 1 July 2015. It is unclear whether options will need to be granted from this date in order to be subject to the proposed rules.

**KPMG Note (cont'd)**

The proposed change in taxing point for options to the time of exercise is a positive change. It will generally bring the tax treatment of options in Australia back in line with international practices.

With the changes made in 2009, many companies that typically grant options were required to modify the grants made to Australian participants solely due to the adverse tax consequences which could arise. These companies may now be able to reconsider whether Australian participants should again participate in the company-wide employee stock option plan.

The proposed changes will make it easier to move employees to Australia where they hold unvested options, as the taxing point in Australia may be more likely to mirror the taxing point in their home country.

It would be welcome to see the government use the consultation period to address other issues that adversely impact the use of ESS. For instance, removing the taxing point that arises on cessation of employment would promote better corporate governance and again, help align the taxation treatment in Australia to international practices.

*Footnotes:*

1 See the 14 October 2014 government joint media release "Reforming skilled migration to improve Australia's competitiveness" at:

<http://www.minister.industry.gov.au/ministers/macfarlane/media-releases/reforming-skilled-migration-improve-australias-competitiveness> .

2 For related coverage, see the following issues of *Flash International Executive Alert*: [2009-199](#) (26 October 2009), [2009-164](#) (21 August 2009), [2009-125](#) (9 July 2009), [2009-106](#) (10 June 2009).

3 See the 14 October 2014 joint media release "Encouraging employee share ownership and entrepreneurship" at: <http://www.minister.industry.gov.au/ministers/macfarlane/media-releases/encouraging-employee-share-ownership-and-entrepreneurship> .

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