

Australia: Employee Share Schemes

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Briefing Note

Overview

The extension of multi-national employee share plans to Australian employees requires compliance with Australian securities, financial services and taxation laws. This guide briefly outlines the issues that must be considered before any offer or communication can be made to employees in Australia.

The accompanying flow charts provide an illustration of the questions that need to be asked to determine whether it is possible to make an offer without a complying prospectus and the tax treatment of share plan benefits in the hands of employees.

Securities Laws

As in most jurisdictions, an offer of securities or financial products can only be made with a complying prospectus unless a relevant exemption or relief is available. Australian law distinguishes between securities (shares, options to subscribe for shares and debentures) and other financial products (which can include, in this context, options over existing shares and any cash payment arrangements, for example a stock appreciation right or dividend equivalent payments), and different prospectus regimes apply to each. The exemptions available differ depending as to whether a security or a financial product is being offered and care must be taken to identify the nature of the rights being provided for this reason.

A number of statutory exemptions can be used in the context of an employee share plan offer for offers of securities (but not other offers of other financial products). The exemptions most commonly used in this context include those for offers to senior managers, offers resulting in the issue to no more than 20 persons in any 12 month period, offers to certified high net worth individuals and offers where no consideration is being provided.

The Australian Securities and Investments Commission (**ASIC**) has also issued class order relief to enable certain such offers to be made without a prospectus by companies listed either in Australia or on approved foreign markets. The class order requires that certain information be given to employees with the offer and that copies of the offer document be filed with the ASIC after it has been made. Special rules apply also in the case of savings plans and offers involving employee benefit trusts.

Eligible employee share schemes can also use a form of simple prospectus known as an offer information statement, but this requires the provision of audited accounts complying with Australian accounting standards.

Financial Services

Australia's financial services regulatory regime must also be considered in the context of an employee share scheme as companies and their advisers can often, in the context of extending offers to Australian employees, provide financial advice or financial services which in the ordinary course would require the holding of an Australian financial services licence. These requirements can apply even if the financial services are being provided from outside Australia and there is no other Australian presence. This issue can apply not only to the company making the offer but also to its Australian subsidiaries, the trustees and custodians providing services in relation to the plan and brokers assisting with share transactions on behalf of employees.

Some relief from the licensing requirement is provided by the ASIC's employee share scheme class order, but only to the issuer and to its associated companies. An offer which is made on the basis of a statutory exemption will not benefit from this class order relief.

Taxation

Australia has a specific regime for the taxation of benefits derived by an employee under an employee share scheme. Income tax and Australia's Medicare levy are payable by the employee by self assessment.

Income tax on shares or rights can be deferred only if the shares or rights are subject to a 'real risk of forfeiture' or shares are provided under certain salary sacrifice arrangements. If there is no real risk of forfeiture, tax is payable by the employee, in the year of issue or grant of shares or rights, on their market value less any amount paid for them. If there is a real risk of forfeiture, tax will be payable on the market value of the share or right on the earlier of there ceasing to be a real risk of forfeiture (and in the absence of other forfeiture conditions or restrictions on disposal), the expiry of 7 years after issue or grant, and termination of group employment.

Shares may also be subject to capital gains tax when ultimately sold by the employee, but a 50% discount is available if the shares are held for at least 12 months.

The Australian regime also provides certain employees up to A\$1,000 per annum in tax free benefits under an employee share scheme, but only if the scheme is non-discriminatory, if it imposes certain conditions on the disposal of shares or rights, and if the awards are not subject to a real risk of forfeiture.

Australian employers must pay payroll tax on any share scheme benefits provided to employees.

Issuers of shares or rights under an employee share scheme will have annual reporting obligations to the Australian Taxation Office and to employees. Issuers will also have tax withholding obligations if an employee has not provided them with a tax file number.

Other Issues

Most forms of employee equity participation commonly used in the US, the UK and other European jurisdictions can be extended to Australian employees without the need for Australian specific rules.

Consideration should be given to the effect of an employee share plan offer on employee contractual entitlements and the impact of Australia's data privacy laws.

Care should be exercised if offers are to be communicated to employees electronically or by making documents available on an intranet, or if there is to be any advertising or notification to employees in advance of the actual offer being made to them.

Where an Australian subsidiary is reimbursing its parent for the cost of providing employee share scheme benefits to its employees, the possible application of the prohibition on providing financial assistance for the purchase of shares should also be considered.

Australia has robust anti-discrimination laws and offers to employees should be made on a non-discriminatory basis.

IPOs, Takeovers and Schemes

The rearrangement of employee options and other rights consequent upon an IPO or a takeover can have both securities laws and taxation implications and it should be assumed that the arrangements proposed constitute an entirely new offer, and a surrender of existing entitlements, as rollover relief is subject to strict conditions. Advice should always be taken as to the impact of the arrangements in all such cases.

More information and London contact

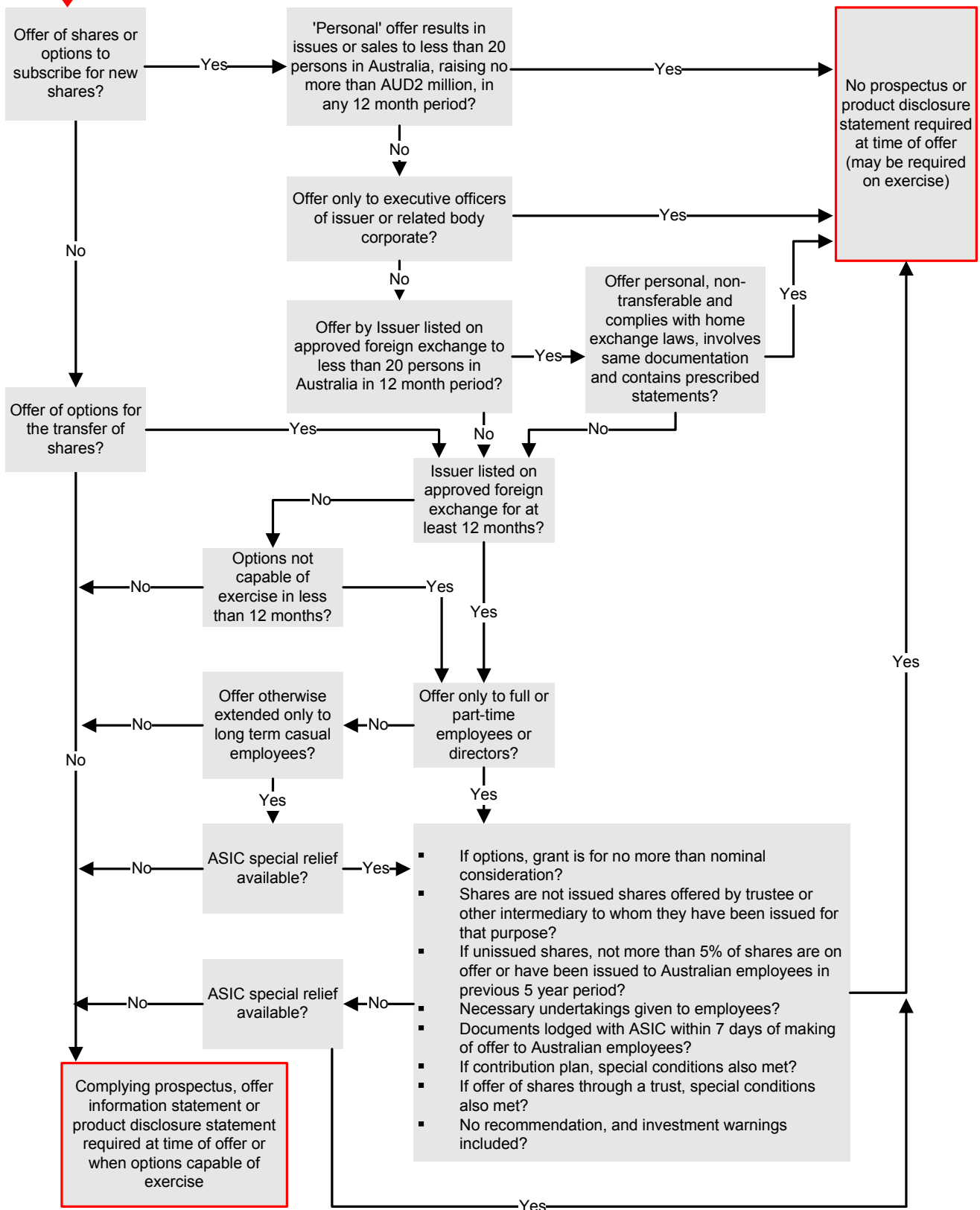
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*Disclaimer

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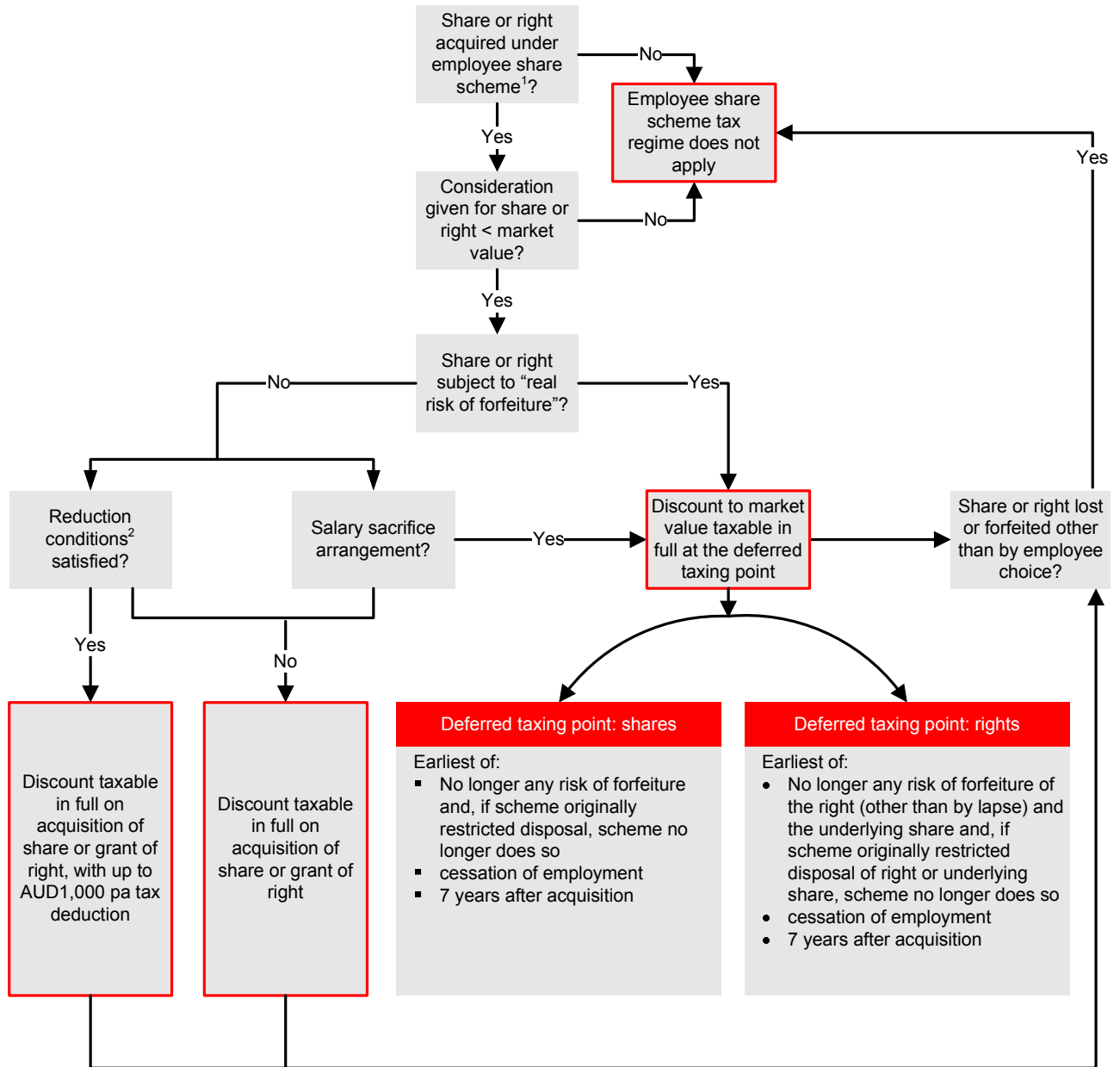
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MULTINATIONAL EMPLOYEE SHARE SCHEMES: AUSTRALIA

EMPLOYEE TAXATION



¹ Employee share scheme

- Ordinary shares
- Share or right acquired under employee share scheme
- Interest is in employer or its holding company
- Company not predominantly an investment company
- Employee will not hold > 5% of shares or votes in company

² Reduction Conditions

- No condition under which employee could forfeit ownership
- No disposal of share or right before earlier of 3 years or cessation of employment
- Scheme must be operated on non-discriminatory basis for at least 75% of employees
- Employee's adjusted taxable earnings ≤ AUD180,000

IMPORTANT NOTE: This guide is not intended as a substitute for proper professional advice. The extension of multinational employee participation schemes to Australian employees may have implications under other Australian laws not dealt with in this guide, including company and offshore taxation, the laws relating to managed investment schemes, corporations, financial services and trade practices laws, and employment and banking laws. Proper professional advice should always be taken before making any offer of participation in such a scheme is made to an Australian resident employee.