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Resource Implications of
Employee Share Plans*

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The logo for Curtin Business School, featuring a stylized staircase graphic with a grid of dots above it, all enclosed in a square frame.

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TAX EFFECTS AND HUMAN RESOURCE IMPLICATIONS OF EMPLOYEE SHARE PLANS

by

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ABSTRACT

The use of employee share plans is on the increase in Australia. However, many organisations have not yet fully embraced the concept of employee share plans. This paper reviews the current human resource literature on employee share plans and provides an overview of the current and pending taxation treatment of these plans in Australia. Organisations are provided with arguments supporting the use of employee share plans based on increased motivation, commitment and productivity of employee ownership along with the associated benefits of reduced turnover and absenteeism. However, there is a set of complex tax requirements and incentives, several of which are changing, which require time, effort and money to implement. Organisations committed to encouraging greater worker involvement and a greater share of financial information should turn to employee share plans irrespective of changing taxation requirements and treatment of such plans.

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1. INTRODUCTION

In recent years, there has been an expansion in the use of employee share plans in Australia and overseas.¹ The number of full time employees receiving shares has risen in Australia from 2.5 per cent of the workforce in 1987 to 3.4 per cent in 1992.²

Employee share ownership refers to a system whereby employees are encouraged to hold shares in the company they are employed by. Employee share ownership plans may differ between companies in many ways. Plans may vary on the amount of financial assistance given to the employee, the type of share allocated to the plan and whether those shares are held individually or in trust.

Employee share plans are a valuable means for Australian companies to be competitive. This paper clarifies the current industrial relations and taxation issues as they relate to employee share plans. Managers need to know this information when considering the implementation of employee share plans, in order to take advantage of the positive organisational outcomes which such plans can provide.

When organisations decide to make use of employee share plans in their organisations the decision to do so cannot be solely attributed to tax incentives. The United States General Accounting Office found in its 1986 survey of firms with Employee Share Ownership Plans (ESOPs) that tax considerations were only one of several reasons that firms cited for starting an ESOP. Providing a benefit to employees was cited by 91 per cent of firms as one of the principle reasons for starting an ESOP. This compared with 74 per cent for taking advantage of tax incentives and 70 per cent for improving productivity.³ Three central issues need to be focused on when considering any form of financial involvement. These are the taxation and financial implications, the impact on industrial relations and the organisational performance implications. The industrial relations implications of share plans will be discussed in this paper under the two broad headings of enterprise bargaining and employee participation.

¹ M. Poole and G. Jenkins, *The Impact of Profit Sharing and Employee Shareholding Schemes*, *Journal of General Management*, (1991), Vol 16 (3) pp 52-72.

² Australian Bureau of Statistics, *Employment Benefits Australia*, Summary Cat No. 6334, (Canberra: AGPS, 1992).

³ United States General Accounting Office, *Employee Stock Ownership Plans: Interim Report*. (Washington DC: United States General Accounting Office, 1986).

2. ENTERPRISE BARGAINING

Enterprise bargaining is the process of negotiation within a single enterprise, undertaken by management, employees and unions. Its ultimate aim is the achievement of an agreement on the actual implementation of enterprise specific measures designed to improve enterprise productivity and efficiency in return for wage increases. Enterprise specific measures are negotiated with the organisation, which is a major move away from the previous centralised processes of the former industrial relations system, which did not focus on an individual enterprise but operated at a macro level within an adversarial industrial relations environment.

Effective enterprise agreements need to address both efficiency and equity aspects of initiatives contained in the agreements. The efficiency and equity concepts require a sharing of productivity gains beyond wage increases. At present in Australia, enterprise bargaining agreements have sought to address sharing of productivity gains beyond wage increases by such initiatives as longer annual leave entitlements, paid parental and study leave, and various forms of child care initiatives.

Enterprise bargaining may be used to increase individual employee rights through share plans. As shareholders, employees have certain legal rights to information about a company's operations and finances. These employees have voting rights which enable them to participate more actively in decisions such as selecting board members, setting corporate direction by actions such as mergers, and calling to account major management decisions. Cynics would argue that in most organisations which have employee share plans in place, the employees would play the part of minority shareholders without any real power. Such arguments may be countered on the basis that a certain number of organisations may have workforces with a large number of employee shareholders within a close geographical proximity, capable of mobilising opposition to management in a more effective manner than outside shareholders.

Employee shareholders would have a greater incentive to intervene when company performance declines because not only is the value of their shares affected but their jobs may be threatened.

3. EMPLOYEE PARTICIPATION

As a result of change in the culture of Australian organisations, there has been a movement away from the traditional adversarial relationships between managerial employee and non-managerial employee. This change has to a large extent being facilitated by both unions and management. Each of these parties have been responsible for two major developments to occur in the Australian workforce in recent years. The first is the reduced levels of industrial disputation and the second is the trend towards flatter organisational structures that have developed in Australian organisations.⁴

Explanations for Australia's recent low levels of industrial disputation may be attributed to a number of factors such as high unemployment; low inflation; reduced levels of company profits; a decline in trade union membership; and the greater use of employee financial participation plans.

The Australian Council of Trade Unions (ACTU) Congress held in November 1988 resulted in union's giving share plans their approval providing they included employee participation in decision making. Trade unions have not however sought to place employee shareholding plans on the negotiation agenda. Some unionists would argue that while employees generally do not make a major monetary contribution to participate in an employee shareholding plan, employees do forego wages or benefits not paid that might have been paid in lieu of the employee shareholding plan. Others would see such plans as reducing the traditional role of trade unionism as representative of the working class.⁵

While the role of unions may change if substantial productivity gains are distributed via employee share plans, Poole and Jenkins⁶ have argued that this may not necessarily be to the detriment of trade unions.

⁴ Department of Industrial Relations , Workplace Bargaining a Best Practice Guide, (Canberra: AGPS, 1992).

⁵ K. Bradley and A. Gelb, Worker Capitalism: The New Industrial Relations, (London: Heinemann, 1983).

⁶ See M. Poole and G. Jenkins, *supra* note 1, pp 52 - 72.

It has been explained that in the United States unions:⁷

have perceived the leverage secured from employee ownership as part of a strategy for gaining control of relatively prosperous companies, retaining capital mobility, organising workers, and defending their interests in cases of mergers and takeovers. From an initial position of hostility in 1974, organised labour has moved to a point where employee ownership is being considered as a potentially useful strategic asset.

The role of unions would be to ensure that an appropriate share of profits and dividends is paid to their members. Decentralised union structures that should result from enterprise bargaining may not eventuate in such a scenario because the level of financial expertise required, can only be provided through a centralised union structure.

From the management perspective, the virtues of employee ownership plans lie in the attitudinal and motivational aspects of such plans. Management considers that performance is engendered as a by-product from the increased sense of ownership. Pryce and Nicholson have found that half the management in their study stated that the most important reason for the introduction of employee share plans was to motivate employees.⁸

To maximise the benefits of an employee share plan, management and unions need to ensure as much employee involvement as possible.

In Australia, in recent years, the Australian Industrial Relations Commission has encouraged management and unions to move away from the regimented Taylorist approach to work arrangements.⁹ Australian organisations are continually seeking to develop mechanisms that allow for greater involvement and consultation on a whole range of matters.

⁷ R. G. McElrath, and R. L. Rowan The American Labor Movement and Employee Ownership: Objections to and uses of Employee Stock Ownership Plans. *Journal of Labor Research*, (1992), Vol XIII, 1 Winter, p 101.

⁸ V. Pryce, and C. Nicholson, The Problems and Performance of Employee Ownership Firms, *Employment Gazette*, June 1988, pp 346-350.

⁹ J. T. Ludeke, What Ever Happened to the Prerogatives of Management?, *Journal of Industrial Relations*, (1991), Vol 33 (3) pp 395-411.

Employee share plans allow organisations to increase the involvement of their employees in the workplace by improving both the level of financial understanding of employees and the level of communication between employees and management. Quarrey¹⁰ found that employee ownership is more effective when worker participation is present.

Two studies in the United States¹¹ found that employee share ownership does not lead to productivity gains unless coupled with participation in decision-making.

4. CORPORATE PERFORMANCE

The industrial relations and productivity effects of employee share ownership plans will depend upon the type of employee share plan.¹² Much of the available evidence from the United States on ESOPs is concerned with the job-saving impact of employee buy-outs. A number of studies have pointed to the low failure rate of firms in distress that had adopted employee share ownership.¹³ Research carried out on United States firms¹⁴ has shown that the effect of employee ownership on productivity depended on the percentage of the firm that employees had. Productivity did improve in firms where the employees had a small ownership stake, whereas a firm entirely owned by its workers was less productive.

Several early studies in the United States had suggested that employee ownership was linked to improved corporate performance. However these studies looked at companies after they had set up ESOPs and then compared them to non-ESOP firms.

¹⁰ M. Quarrey, *Employee Ownership and Corporate Performance*. National Centre for Employee Ownership: Arlington, Virginia, 1986.

¹¹ United States General Accounting Office, *Employee stock ownership plans. Little evidence of effects on corporate performance*. (Washington DC: United States General Accounting Office, 1987). See also M. Conte and J. Svejnar, *Productivity Effects of Worker Participation in Management: Worker Ownership of Assets and Unionisation in US Firms*, *International Journal of Industrial Organization*, 1988, 6, pp 139-151.

¹² S. Estrin, P. Grout and S. Wadhvani, *Profit Sharing and Employee Share Ownership*, *Economic Policy*, 1987, 2, pp 13-52.

¹³ D. Jones and J. Pliskin, *The Effects of Worker Participation, Employee Ownership and Profit Sharing on Economic Performance: A Partial Review*. In *International Handbook of Participation in Organisations*, Vol II (Russell, R and Rus, V Edition) pp 43-63. (Oxford: Oxford University Press, 1991).

¹⁴ See M. Conte and J. Svejnar, *supra* note 11, pp 139-151.

As Rosen (1991:41) states "the studies could not tell whether the ESOP caused the change in performance, or whether it was only that better companies set up the plans in the first place".

Rosen and Quarry published a report which sought to address the ambiguity as stated above.¹⁵ They found that ESOP firms had 3-4 per cent higher annual employment growth and sales, than they would have had without an ESOP. Clearly based on this comprehensive research companies do better after setting up ESOPs. In a more recent study¹⁶ found a positive and statistically significant relationship between the presence of an employee share plan and the productivity of an organisation. After a comprehensive coverage of the empirical literature on the link between employee share plans and productivity, the authors concur with Rosen; Klein and Young (1986:10-11) who have commented that:¹⁷

...the best plans are the ones where employees receive regular, substantial stock contributions, have participation opportunities..., are treated as managers and supervisors, understand how their plan works, and are frequently...reminded of their ownership stake in the firm".

5. TAX TREATMENT OF EMPLOYEE SHARE PLANS

5.1 INTRODUCTION

In this Part of the Paper, the taxation treatment of employee share plans will be examined. The current law applicable to employee share plans will be considered first, followed by a discussion and consideration of major changes in this area which have recently been announced by the Government. The policy reasons underlying these changes will also be examined, along with an assessment of the likely impact such changes will have on the use of employee share plans in Australia.

¹⁵ C. Rosen and M. Quarrey, How well is employee ownership working, *Harvard Business Review*, Sept/Oct 1987 pp 126-128, 132.

¹⁶ S. C. Kumbhaker and A. E. Dunbar, The elusive ESOP - productivity link evidence from US firm-level data, *Journal of Public Economics*, 1993, 52, pp 273-283.

¹⁷ C. M. Rosen, K. J. Klein and K. M. Young, *Employee ownership in America*. (Lexington Books: Lexington MA, 1986).

5.2 THE CURRENT TAXATION TREATMENT

The main provision governing the taxation of employee share plans is section 26AAC of the ITAA.¹⁸ While this section contains the basic income tax rules applicable to employee share plans, Australia now has a fringe benefits tax ("FBT") and capital gains tax ("CGT"). Accordingly, consideration needs to be given to the implication of these taxes on employee share plans. Accordingly, the following discussion will consider the taxation of employee share plans under the following headings:

- employer company tax
- employee income tax
- fringe benefits tax
- capital gains tax

EMPLOYER COMPANY TAX

Company tax is payable under the ITAA, currently at a general rate of 33%, and obviously it is taxation of the income of companies rather than that of individuals.

Company tax is normally unaffected by employee share plans. One issue in relation to a company providing such a plan is what costs of raising capital in this way are deductible to the company. As a matter of practice, the Australian Taxation Office ("ATO") appears to have taken the view that many costs associated with an employee share plan are costs incurred in the course of carrying on of a business and are accordingly deductible to the company issuing the plan.¹⁹ Thus legal costs associated with setting up the plan, costs of conducting information sessions, costs of associated publicity, administration and maintenance costs would all normally be deductible to the company.

Another implication for company tax is where the employer conducts the employee share plan through a trust.

¹⁸ References to sections in this part of the Paper are references to the *Income Tax Assessment Act 1936* (Cth) unless otherwise stated.

¹⁹ See R. Stradwick, *Employee Share Plans*, (Melbourne: Longman Professional, 1992), para. [8.8], p. 140.

This type of arrangement has become increasingly popular in Australia and is attractive to employers as amounts contributed by an employer to a trust established for the purpose of conducting an employee share plan through the trust may be deductible for company tax purposes.

EMPLOYEE INCOME TAX

Income tax may be payable by employees under an employee share plan in three situations:

- on any discount received when shares are purchased
- on dividends received
- when the shares are sold (this will be considered when capital gains tax is discussed - *infra*)

As mentioned, section 26AAC is the main provision applicable to employee share plans. This section was inserted into the ITAA to provide for the taxation of benefits that arise from shares, or rights to acquire shares, acquired under an employee share plan by an employee of a company, or a relative of an employee, for services rendered by the employee.

Where shares, or rights to acquire shares, are acquired under an employee share plan at a discount, section 26AAC may operate to include this discount in assessable income in the year of acquisition. This discount is calculated as the difference between the value of the share when it was acquired less any consideration paid or payable for the share itself or for any right the exercise or operation of which results in the acquisition of the share.²⁰ There are several important points relating to the operation of section 26AAC:

1. Section 26AAC generally only operates in relation to **employees**, including associates of employees. This means that for the section to apply the share or right to acquire the share must be in relation (directly or indirectly) to the employment or services rendered by an employee or a relative of the employee.

²⁰ Subsection 26AAC(5).

Recently, the ATO has interpreted the section to apply where shares are issued under an employee share plan to a contractor or consultant for services rendered to the company.²¹ This is somewhat surprising given that a contractor or consultant would not normally be regarded as an employee.

2. Where a employee share plan uses a trust, section 26AAC may not apply. In such a case, a typical arrangement is where shares of the company, or of another company, are issued to a trustee to be held on behalf of the employees (or their relatives). For section 26AAC to apply to such an arrangement, the trustee must be authorised to sell or transfer the shares to the employees or their relatives. Normally, the constituent trust deed will provide that the trustee will transfer the shares at the discretion of the employer. In this case, the issue of shares will be caught by the operation of section 26AAC.²²
3. The date of acquisition is a critical element in determining liability under section 26AAC. Where there are no restrictions on disposal, the date of acquisition is the date on which the shares have been allotted to the employee.²³ Where shares are subject to restrictions or conditions so that there are restrictions on disposal of the share, section 26AAC operates to deem these shares to be acquired when the restrictions or conditions cease to have effect.²⁴ This allows a deferral opportunity.

It should be noted however that an election is available in the case of shares which are subject to restrictions.²⁵ In such a case, a taxpayer may elect to be assessed in the year in which the shares were acquired and not in the year in which the restrictions or conditions cease. There may be a variety of reasons for an employee choosing to do this, including the fact that by so electing, the employee will know exactly what his or her tax obligations will be. Another reason is for the ease in calculating tax.

4. The market value of the share is the other critical element in determining liability under section 26AAC.

²¹ *Taxation Determination* TD 93/42

²² See also *Taxation Ruling* IT 2609.

²³ *Ibid.*

²⁴ Subsection 26AAC(15).

²⁵ Subsections 26AAC(15A) - (15C).

The ATO considers that the value of a share for the purposes of section 26AAC is the price of a similar share obtainable on the open market on the day of acquisition, although the ATO will accept arrangements whereby the value of the shares at the time of acquisition is calculated as the weighted average market selling price of the shares on the local stock exchange during the five business days immediately before or after the date of the offer.²⁶

5. **Concessional treatment** is available for shares issued under certain approved employee share plans.

This concession excludes up to \$ 200 per year from the assessable income of an employee on shares or rights to acquire shares, although the amount may be 'clawed-back' later under the capital gains tax provisions. If this concession is used, the taxpayer cannot take advantage of the deferral opportunity outlined in point 3 above.

As mentioned before, this incentive of \$ 200 a year is pitifully low. Further, the conditions which need to be complied with for the employee share plan to qualify as an approved plan are rigorous, some would say pedantic and others would label them as draconian. Hence this concession is largely meaningless.

FRINGE BENEFITS TAX

Fringe benefits tax (FBT) is payable under the *Fringe Benefits Tax Assessment Act* 1986. Excluded from the operation of FBT are employee share plans.²⁷

From a tax policy perspective, this treatment is unusual in that the discount provided under an employee share plan is treated as if it were a fringe benefit, yet income tax is imposed on this so-called benefit on the employee rather than on the employer, as happens with other employer-provided fringe benefits.²⁸

²⁶ *Taxation Ruling* IT 2609.

²⁷ See definition of "fringe benefit" in para. (h) of subsection 136(1) of the *Fringe Benefits Tax Assessment Act* 1986.

²⁸ See R. Stradwick, *supra* note 19, p. 141.

This treatment may change soon as the Government has announced radical changes to the tax treatment of employee share plans and one of the central features is the imposition of FBT on discounts. These proposals will be detailed later in the Paper.

CAPITAL GAINS TAX

Many argue that what the Government purports to give with one hand it quickly grabs with the other hand. Such a contention is often levelled at employee share plans - that is, any concessions given are quickly clawed-back due to the CGT rules.

The CGT provisions apply generally to deem the cost of acquisition of shares to the employee to be the market value of the shares that was taken into account in calculating the income arising to the taxpayer under section 26AAC.

Where concessional treatment is provided for the shares or rights, the CGT provisions also operate to reduce the cost base of the shares and rights to acquire shares. This is achieved by reducing the market value of the shares or rights to acquire shares by the amount of the discount allowed under section 26AAC.

Thus, these provisions effectively 'claw-back' the concession made available by section 26AAC by reducing the cost base of the shares or rights to acquire shares and therefore increasing the taxpayer's liability to CGT - hence the criticism that what the Government gives with one hand, it quickly takes back with the other!

5.3 THE WINDS OF CHANGE

The Government has announced its intention to make major changes to the taxation treatment of employee share plans in Australia²⁹ to reduce the perceived exploitation of the existing rules as detailed above.

Before detailing the changes which the Government intends to implement, it is necessary to understand how the main employee share plans in Australia operate and to examine the potential for exploitation of the rules, so the policy basis underlying the changes may be appreciated.

²⁹ This announcement was made by the Treasurer on 10 May 1994 as part of the 1994-95 Budget process.

COMPANY ISSUED SHARE PLANS

Traditionally, the most common plans simply provide employees with fully or partly paid shares which are often funded by low cost loans from the employer.

While this type of plan is simple, there are two disadvantages. First, if the employer experiences financial difficulties, employees face a double-edged sword - shares of no value and loans to repay.

Second, even in the case of viable companies, a fall in share price due to market influences leaves employees with loans to repay which could be in excess of the value of shares in the company.

TRUST STRUCTURE

Some of these problems have been overcome by use of a "trust structure" whereby the shares of the company, or of another company, are issued to a trustee to be held on behalf of the employees (or their relatives). This type of plan is popular because much of the emphasis for funding now falls on the employer, who effectively buys the shares on behalf of the employees. Further, it is common with such plans that when they are established, the employer gives a cash contribution to the trust to acquire the shares. The amount contributed to the trust is then tax deductible to the employer and does not attract fringe benefits tax, and the use of a trust in this way provides an ideal opportunity to introduce a profit sharing plan that allows employees to build up a stake in the company.

On the other hand, the possibilities of double tax and the lack of any real physical asset (employees have only beneficial interests in the trust) still make these plans unattractive to some.

OPTION PLANS

Option plans are the latest trend in which employees have the right to acquire shares but avoid the need to borrow and the commitment to take them at a pre-determined price. Under these plans, employees obtain the right to acquire shares at a given time and at a set price.

If at the time the employee is required to exercise the option, the share has fallen below the pre-determined price, the employee can simply choose not to proceed with the transaction. This is an attractive feature of these plans.

NEW GENERATION SHARE PLANS

Finally, there is the so-called "new generation" share plans which are designed to allow executives to use the employee share plan rules to effectively establish their own investment portfolios.

Typically, what happens is that an employer sets up a special purpose company, an Employee Share Acquisition Company (ESAC), for the benefit of a specific employee.

The employer normally funds the company (and claims a tax deduction for the funding cost, which is also not subject to FBT). The company buys investments, at the direction of the employee, or invests in an entity associated with the provider of the scheme. The employee is then issued with shares in the ESAC. These shares may be issued subject to restrictions - for example, the employee might be prohibited from selling the shares until, say, the earlier of five years or ceasing to work for the employer.

In this way, an ESAC acts as a plan administrator, share delivery vehicle, share warehouse and a market for an organisation's employee shares. It is the Australian equivalent to the United States' ESOP and section 401 (k) employee share save plan. It is also equivalent to the United Kingdom's ESOP, profit share and share save structures.

These schemes have become popular because they create a win/win situation. For employees, there is no assessability until withdrawn and are therefore enable the deferral of tax on what otherwise would have been fully taxed salary.

Further, an ESAC allows the employee to invest in a broad range of assets which are not limited only to shares in the employer's company. Moreover, employees earn a greater return by investing with pre-tax rather than post-tax dollars.

For employers, they are entitled to a tax deduction for funds contributed into the ESAC on the employee's behalf and no FBT applies to such contributions. Further, such companies provide employers with an effective means to bind employees to the employer in its objectives.

In a wider context, these new generations plans allow a way around changes made to the superannuation rules which restrict how much can be contributed to a superannuation fund. They have accordingly emerged as a viable tax effective alternative to wealth creation, especially for executives.

Further, while superannuation is designed to provide funding for retirement, these plans allow the ability to access money for medium term capital needs to be met.

They also generally encourage savings and facilitate investment in Australian businesses and allow flexibility to people who may not be able to contribute any more money towards superannuation or to cater for those who simply do not wish to commit their savings to superannuation.

BACKGROUND TO CHANGES

It is against the background of these plans, especially the new generation share plans, that the Government decided to review the existing taxation arrangements applicable to employee share plans.

In announcing the review of the taxation treatment of employee share plans, the Treasurer explained that the Government was concerned by the following:

- the emerging exploitation of a feature of the existing legislation which allowed tax deferral on remuneration channelled through an employee share plan without any limit on the amount or time of the deferral. This is particularly a feature of new generation share plans explained above.
- the lack of restriction on the nature of the underlying investments, which could include shares in the employer's company as well as other domestic and foreign companies as well as in property and other investments.

According to the Treasurer:³⁰

“The Government is concerned to ensure that the tax concessions in this area are directed at ESAS encouraging employees to own shares in the company in which they are employed. Such schemes have significant industrial relations benefits and, in particular, could play a useful role in enterprise bargaining. Consequently, the measures ... will significantly increase the taxation benefits available to employees under schemes which encourage investment by employees in their employer company and which are available to all employees on a fair and equitable basis, while reducing the scope of certain other schemes which posed a significant risk to the revenue.” (Emphasis added)

THE LEGISLATION

As is usual with tax legislation, there is a significant lead time between the making of an announcement by the Government and the passage of the amending legislation. The changes announced here are no different. Announced on 10 May 1994, it was not until 13 October 1994 that the *Taxation Laws Amendment Bill (No 4) 1994* (“the Bill”), which gives effect to the changes, finally surfaced.

At the time of writing, the Bill is yet to pass through Parliament. Both the Opposition and the Democrats have publicly announced their opposition to the amendments contained in the Bill,³¹ arguing that it would effectively close down an array of legitimate share ownership plans.³² Moreover, it is understood that an array of companies such as BHP, Westpac, Lend Lease and Pacific Dunlop have all endorsed continuing opposition to the legislation.³³

In the face of this growing hostility, the Government has announced further changes to the amending Bill³⁴ and has recently withdrawn the changes from the amending Bill to give the Senate further time to consider the changes.

³⁰ *Ibid.*

³¹ Treasurer’s Press Release, 8 November 1994 and Australian Democrats media releases Nos 94/324 of 16 August 1994 and 94/503 of 8 November 1994.

³² M. Dwyer, ‘FBT changes run into more Senate hostility’, *Financial Review*, 8 December 1994, p. 3.

³³ *Ibid.*

³⁴ Treasurer’s Press Release, 7 December 1994.

The Treasurer has announced that the measures will be reintroduced when Parliament resumes in 1995.³⁵

Finally, if the Bill does eventually pass through Parliament, it will generally apply from 10 May 1994, the date of the Budget announcement by the Treasurer. This is considered entirely unsatisfactory, as the Bill is yet to be law and there have been so many changes during the passage of this Bill that it is entirely unfair for the Government to make it apply retrospectively from 10 May 1994 - yet another manifestation of legislation by press statement which is prevalent in Australia.

THE PROPOSED CHANGES

As the Bill is yet to pass through Parliament and is still undergoing constant change, it is not possible to give detailed information regarding the changes. However, the essential features of the proposed changes are as outlined below.

The most fundamental change is that fringe benefits tax will apply to share and share right discounts provided to employees (and associates) with concessional treatment by way of "deferral" or "exemption" for plans which satisfy certain conditions. It was noted earlier in the Paper that currently employee share plans are not subject to FBT.

The taxable value of the fringe benefit will be the market value of the share or right, less any amount paid by the employee.

Two types of FBT concessions are intended to be made available to reduce the taxable value of the discount benefits for the purpose of calculating the employer's FBT liability, although it should be noted that an individual employee can use only one of these concessions per year. These concessions will only be available if the following conditions are satisfied:

- The shares must be in an employer company - currently this requirement is that the share be in the employer company or related company.³⁶

³⁵ Treasurer's Press Release, 9 December 1994.

³⁶ Subsection 26AAC(4A).

This addresses the Government's concern as to the lack of restriction on the underlying investments of some of the existing plans, especially new generation plans (see earlier discussion).

- A maximum period for any restrictions on the sale of shares and therefore for deferral of income tax by the employee of 10 years. This addresses the Government's concern regarding the lack of limit on the amount or time of deferral possible under existing legislation.
- It was originally proposed that the employee would have to hold the shares for at least five years, but this proposal is likely to be abandoned,³⁷ at least in relation to the deferral concession - *infra*.
- non-discriminatory requirements, along the lines presently set out in the legislation.³⁸

For employee share plans meeting these conditions, either a "deferral concession" or an "exemption concession" will be available.

EXEMPTION CONCESSION

When applicable, this concession will allow a company to provide each employee with \$ 500 of employer company shares or rights exempt from FBT.

In addition, an automatic tax deduction is provided to the employer of the amount of the benefit provided to employees under the concession up to \$ 500. Under existing arrangements, the employer does not receive a tax deduction for discounts in respect of newly issued shares.

The \$ 500 may represent up to 100 per cent of the value of the shares or rights acquired by the employee. Any excess over \$ 500 of share discount benefit will be liable to FBT.

For CGT purposes, the employee's cost base of the shares or rights will be their market value at the time of acquisition.

³⁷ Treasurer's Press Release, 7 December 1994.

³⁸ Subsections 26AAC(4A) - (4F).

It was noted earlier that under the existing arrangements, the \$ 200 maximum exemption which is available is effectively clawed- back under CGT when the shares are sold. Under the proposed arrangements, by including the value of the exemption in the CGT cost base, this ensures that the exemption is not lost.

The concession, which will allow a \$ 500 exemption is more generous than the maximum of \$ 200 with a maximum discount of 10 per cent presently contained in section 26AAC.

Further, employees will be able to obtain the full benefit without any outlay on their part. In contrast, under present arrangements, an employee has to outlay \$ 1800 to obtain the full benefit and this has limited the opportunities for many lower income employees to participate in such plans.

DEFERRAL CONCESSION

Where there are restrictions on the sale or disposal of the shares or rights by an employee (up to the maximum period of 10 years), up to \$ 5000 per employee per year of share discount benefit will be exempt from FBT. This amount was previously \$ 1500, but following intense lobbying by big companies and other groups the Government announced the increased amount.³⁹

On removal of the restrictions on the sale of the shares or rights, the employee will be required to include in his/her assessable income the difference between the market value of the shares or rights at the time the restrictions are removed and the market value at the time the employee acquired the shares or rights, reduced by the value that was exempt from FBT.

For CGT purposes, the cost base of the shares to the employee will be the market value of the shares when the restrictions are removed.

Tax deductions for the value of benefits subject to the deferral concession will not be automatic - deductions will be available to the extent allowed under the general provisions of the ITAA.

Employers will be able to offer both types of concessions to their employees, with employees able to choose the concession that best suits their needs.

³⁹ Treasurer's Press Release, 7 December 1994.

One final proposed change worthy of note is that income tax will apply to shares and share right discounts provided for services rendered by persons other than employees. This is in contrast to the existing rules which generally only apply to employees.

6. CONCLUSION

In concluding, it is clear that problems exist with the present arrangements for taxing employee share plans such that exploitation of the rules is possible, inconsistent with the Government's objectives in granting concessions to such plans.

However, many corporations have argued that the Government is using a sledge hammer to crack a nut, contending that the legislation (if passed) will have the effect of wiping out long-standing and genuine employee share plans. These corporations argue that the proposed changes will go far beyond what would be necessary to correct the mischief which the current provisions allow. In bringing employee share plans into the FBT net, the Government may in some cases completely alter the economics on which many of these plans are based.⁴⁰ No doubt many companies, whose employee share plans have been negotiated over long periods, will choose to pay a large FBT bill each year to keep things as they are.

Finally, even the Government concedes that the potential for abuse is its main worry rather than actual losses, which it has found considerable difficulty in trying to quantify. Therefore whether the changes will counter arrangements which exploit the current legislation and ensure that the concessions available are directed at employee share plans which encourage investment by employees in their employer company and which are available to all permanent employees on a fair and equitable basis remains to be seen - only time will tell.

In the meantime, no doubt further lobbying will occur (both by opposition political parties and large corporations) and it is likely that the legislation when finally passed will be a watered down version of the initially announced changes.

⁴⁰ P. Ellis and K. Johnson, 'Employee Share Scheme Proposals - While domestic employers have much to complain about, expatriate employers will be even harder hit', *Butterworths Weekly Tax Bulletin*, No. 5, May 1994, para. [68], p. 10.