global UPDATES

Australia

After some uncertainty, the Australian government introduced the new Bill on 21 October which will affect the taxation of share schemes. At the time of going to press a detailed review of its provisions is underway but there are some positive aspects to the legislation in the wake of some of the uncertainty its initial drafting created. Specifically, it was stated on its release that the Bill would:

• Make sure a refund is possible when share scheme benefits are forfeited on leaving employment;
• Include extra guidance on the real risk of forfeiture test;
• Amend the provisions on salary sacrifice arrangements;
• Exempt employee share trusts from capital gains tax on shares bought to satisfy share scheme rights
• Change tests such as the requirement to offer to a broad cross-section of employees, to make them easier to comply with.

On an initial review, options will be taxable (the deferred taxing point) when they become exercisable if at that point forfeiture conditions (such as continued employment) no longer apply. Many plans do not require continued employment before exercise so there will normally be tax on vesting. Companies had also hoped to avoid tax when the option vests by providing that an option can be forfeited right up to the actual date of exercise if employment ceases. While this may not be as much of an issue as immediately thought (as the new legislation may in fact allow a refund of tax if the option is never exercised (see above)), it now appears that this type of clause will not work and tax will be on vesting.

However, owing to the recent nature of the legislation we would advise all clients to seek local advice on the tax consequences. The withholding and notice provisions are also problematic. Withholding only applies if an employee does not provide a tax file number (which is rare), but the notice and valuation provisions could cause constant administrative headaches for employers. Although only an annual employer's report is required, the employer is required to give an estimate of the market value of the rights or shares provided at each deferred taxing point throughout that tax year (for example every time an employee ceases employment and every option).

Overall, companies would be advised to take advice on the taxation of all of their plans (particularly options or ESPPs) initially before the legislation has been thoroughly worked through.