GLOBAL HOT SPOTS

New Issues, Trends and Difficult Developments

Jo Garland, Manager – Executive Remuneration and Employee Share Plans, Wesfarmers

Erica Kidston, Senior Associate, Baker & McKenzie

Jessica Mitchell, Global Incentives Adviser, Tapestry Compliance
• **Jo Garland** manages the employee share plans for Wesfarmers, one of the largest employers within Australia as well as managing their executive remuneration. Jo has experience of managing a wide variety of equity plans, mainly across Australia, New Zealand and the UK.

• **About Wesfarmers:**
  
  – From its origins in 1914 as a Western Australian farmers’ cooperative, Wesfarmers has grown into one of Australia’s largest listed companies
  
  – Its diverse business operations cover: supermarkets, department stores, home improvement and office supplies; coal production and export; chemicals, energy and fertilisers; and industrial and safety products
  
  – Wesfarmers is one of Australia’s largest employers and has a shareholder base of approximately 500,000
  
  – The primary objective of Wesfarmers is to provide a satisfactory return to its shareholders
• **Erica Kidston** is a senior associate with Baker & McKenzie who specialises in advising on the taxation of employee share schemes (ESS) and employment related tax issues. Erica assists a broad range of Australian and multinational clients with ESS reporting, preparing taxation summaries on ESSs, requesting class rulings and advising on ESS and other employment tax issues.

• **About Baker & McKenzie:**
  – Global law firm with more than 50 years experience in the Asia Pacific region
  – More than 5,600 legal professionals throughout 47 countries
  – One of the few law firms in Australia able to advise on all aspects of income tax (including transfer pricing), stamp duty, GST and employment taxes relevant to multinational companies and cross border investment
  – For the sixth consecutive year, Acritas has named Baker & McKenzie the world’s strongest law firm brand, ranking us No. 1 globally in awareness, favorability and consideration for cross-border deals and litigation
• Jessica Mitchell is an Australian and UK qualified lawyer who works with Tapestry Compliance. She has over 10 years’ experience specialising in legal and tax due diligence for international share plans run by the world’s leading companies.

• About Tapestry:
  – UK-based law firm with the largest incentives team in the country
  – Runs the only UK-accredited course for employee share plans
  – Maintains a interactive online subscription database with legal and tax compliance information for 8 types of plan in over 100 countries
  – Works with a network of expert local counsel in around 120 countries to help update the database and advise on client-specific work
  – Numerous awards, including Boutique Law Firm of the Year in The Lawyer Awards 2015
On the Agenda

What are the current hot topics in global equity plan compliance, and how are companies dealing with them so far?

• Regulatory
  – Securities Law Exemptions (Australia, New Zealand, EU)
  – Malus and Clawback (EU, UK, USA)
  – Data Protection and Localisation (EU, Spain, Singapore, South Korea, Russia)
  – China SAFE Filings
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What are the current hot topics in global equity plan compliance, and how are companies dealing with them so far?

• Tax
  – Employer Withholding (New Zealand, Singapore, Greece)
  – Internationally Mobile Employees and Exit Tax (UK, Germany, France, Japan, Singapore)
  – Tax Favourable Plans (France, Spain, UK, USA)
  – Filings (China, UK)
  – Altered Treatment of Equity Awards (Brazil, Denmark, Venezuela)
Regulatory
Securities Law Exemptions

- Trends
- Australia
- New Zealand
- European Union
Securities Law Exemptions – Trends

• Easing of restrictions and requirements where employee offers are specifically addressed
• Recognition of the difference between employee offers, even to thousands of people, and public offers
• Balanced with ongoing need to protect employee investors
Securities Law Exemptions – Australia

• October 2014 Class Orders
  – Covering a greater range of employee awards
  – Greater range of offerees
  – Reduced ASIC filing obligations
  – Ongoing employee disclosure requirements applicable to each offer
  – Limiting restrictions for private companies

• ATO Standard Documents
  – In July 2015, the Australian Tax Office released a standard document package to help start-up companies implement employee share schemes under the new rules
  – Includes guidance from ASIC on the Corporations Act obligations
• December 2014: Implementation of the Financial Markets Conduct Act 2013 (FMCA)
  – Provides an “exclusion” for employee share plans with no filing or registration requirements (although ongoing employee disclosure requirements); the Securities Act and Financial Reporting Act exemptions previously used require Companies Office filing before each offer and annually following financial statements release
  – Transitional provisions allow companies to either opt in to the FMCA regime, or continue to rely on the old Securities Act exemption until 30 November 2016
  – Transitional issue: companies that have previously relied on the Securities Act exemption must file annual statements that comply with New Zealand GAAP if/when they opt in to the new regime (the Financial Reporting Act allows companies to file annual statements prepared for their own jurisdiction, but this is tied to the Securities Act exemption)

• 2015: Financial Markets Authority (FMA) consultation on proposed exemptions to address the financial reporting issue
Securities Law Exemptions – European Union

• Current Prospectus Directive exemptions/exclusions for employee plans:
  – No consideration
  – Non-transferable securities
  – Less than €5 million across the European Economic Area (EEA)
  – Fewer than 150 people
  – Employee share plan offered by company headquartered in the EEA, or listed on an EEA or equivalent exchange

• Differences between member states!
Securities Law Exemptions – European Union

• 2015 European Commission consultation:
  – Expand exemption thresholds
  – Extend employee share plan exemption to non-EEA private companies offering to EU-based employees
  – Single centralised online EU-wide prospectus filing system

• Equivalence decisions:
  – Commission is waiting for the European Securities and Markets Authority (ESMA) to conduct a technical analysis before making determinations
  – ESMA is busy with the financial services sector!
  – Likely to begin with NYSE and NASDAQ but not expected until 2016
Malus and Clawback

• What are they?
• EU
• UK
• USA
• General Issues
Malus and Clawback – What are they?

Malus

- Pre-vesting adjustment, i.e. to reduce (including to zero) unvested awards
- Can apply to cash, shares, and other instruments
- Aims:
  - to manage risk
  - to prevent payment for failure/poor performance
  - to increase market confidence
- Generally has “trigger events”, e.g. misconduct or financial misstatement
Clawback

• Post-vesting adjustment, i.e. to recover, or “claw back” vested awards
• Can apply to cash, shares, and other instruments
• Aims:
  – to manage risk
  – to prevent payment for failure/poor performance
  – to increase market confidence
• Generally has “trigger events”, e.g. financial misstatement
Malus and Clawback – What are they?

- Current rules and policies stem from the 2008 financial crisis (mostly)
- Remuneration structures, particularly in banks, are thought to have encouraged excessive risk taking for short-term gains
- Led to intervention by international organisations and governments
Malus and Clawback – EU

CRD IV (…and UCITS V, AiFMD, EBA Guidelines)

• Clawback required for credit institutions and investment firms

• Triggers: conduct resulting in significant losses; failure to meet appropriate standards of fitness and propriety; significant downturn; serious misconduct; failure of risk management
Malus and Clawback – UK

- Remuneration Codes (FCA and PRA)
- PRA Code – 7 years from awards being made
- Corporate Governance Code – applies to all UK premium listed companies
- Executive directors’ remuneration should include provisions enabling recovery of sums paid – companies must “comply or explain”
- Triggers: responsible for conduct … leading to significant losses; failed to meet standards of fitness and propriety
Malus and Clawback – UK

Review of FTSE 100 remuneration reports for 2015:

• Most companies have malus and clawback provisions
• They have a wide range of triggers
• For some it is a tick in the box
• For others it is “serious”
Malus and Clawback – USA

• Dodd-Frank Act
  – From 2017, all public filing companies must use a clawback policy allowing recovery of incentive-based compensation for at least 3 years
  – Trigger: financial restatement (only)

• Also of interest: new CEO Pay Ratio Disclosure Rule
Malus and Clawback – General Issues

- Increasing shareholder and investor expectations even when not legally required
- What should the triggers be?
- Enforceability issues under labour and contract laws
- Employee relations
- Process and communications
- Has it or will it change behaviour in practice?
Data Protection and Localisation

• Standard Requirements
• Above and Beyond
  – EU
  – Spain
  – Singapore
  – South Korea
  – Russia
• Trends in Issuer Approaches
Data Protection – Standard Requirements

• Data subject’s informed consent to data processing
• Information as to purposes, transfer to third parties, cross-border transfers, duration of processing, right to access and exercise rights in relation to data, etc
• Security of data to be processed and/or transferred
• Local employer filing with data protection regulator for HR data generally
Data Protection – Above and Beyond

- EU
- Spain
- Singapore
- South Korea
- Russia
Data Protection – Issuer Approaches

• Compliance:
  – Seek full technical compliance in all relevant jurisdictions
  – Ignore
  – Include robust global clause in the plan documents

• Consent:
  – Separate vs consolidated (with other plan terms)
  – Hard copy or electronic
China SAFE Filings

Update:

• Companies are increasingly seeking State Administration of Foreign Exchange (SAFE) approval under Circular 7, rather than operating cash plans in China

• Influenced by drive at the local level – although easier now than initially, SAFE processes are still time-consuming, expensive and require significant local input

• SAFE is vigilant about any grants made before approval and reporting requirements after approval; increasing referrals to the inspection department

• “Leavers” issue – out of China even if not out of the group

• Chargebacks remain unlikely to be approved
Tax
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## Employer withholding

<table>
<thead>
<tr>
<th>Country</th>
<th>Details</th>
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</thead>
<tbody>
<tr>
<td>New Zealand</td>
<td>Proposed Tax Bill: employers to report equity income and allowed to withhold tax on equity award income and remit withheld tax through PAYE system (intended to operate from 1 April 2017)</td>
</tr>
<tr>
<td>France</td>
<td>Tax withholding system to be introduced (effective 2018). Will require employers to withhold income tax as well as social security contributions.</td>
</tr>
<tr>
<td>Greece</td>
<td>Regulations and private tax ruling: equity award income not subject to income tax or solidarity tax withholding, but reporting required. Social insurance contributions due on equity award income and withholding required</td>
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## Internationally Mobile Employees and Exit Tax

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<tr>
<td>UK</td>
<td>6 April 2015: UK income tax and national insurance contributions payable on a proportion of share gain based on proportion of vesting period worked in UK</td>
</tr>
<tr>
<td>Germany</td>
<td>Court: RSUs compensation for future work performance and tax should be pro-rated for IME’s who work part of the vesting period in Germany even if they leave prior to vesting</td>
</tr>
<tr>
<td>France</td>
<td>ECJ Ruling: investment income should not be subject to 15.5% social taxes where taxpayer affiliated to social tax regime of another EU country</td>
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<td>Japan</td>
<td>New exit tax for Japanese residents moving abroad (1 July 2015 for citizens, 2020 for non-citizens)</td>
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<tr>
<td>Country</td>
<td>Description</td>
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<tr>
<td>France</td>
<td>French-qualified RSUs – employer social tax liability moved from grant to vesting (20% rate based on value at vesting), gain at vesting taxed at progressive rates, but capital gain reductions if shares held for certain period of time after acquisition</td>
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<tr>
<td>Spain</td>
<td>€12,000 annual exemption for broad based schemes - was going to be abolished, but continues if certain new conditions met</td>
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<td>China</td>
<td>Tax offices increasingly requiring more information, increased audit activity on Circular 35 filings, penalties imposed where favourable treatment applied, but filings not completed in timely manner</td>
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<tr>
<td>UK</td>
<td>Annual filings required from 6 April 2015 for both tax advantaged and non-tax advantaged schemes</td>
</tr>
<tr>
<td>USA</td>
<td>Proposed changes to remove requirement to submit section 83(b) election with tax return</td>
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Altered Treatment of Equity Awards

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<tr>
<td>Brazil</td>
<td>Recent cases: social tax due on equity income</td>
</tr>
<tr>
<td>Denmark</td>
<td>Ruling: RSUs with graded vesting schedules taxable at vesting dates and not – as previously ruled – at date of grant</td>
</tr>
<tr>
<td>Venezuela</td>
<td>Equity awards now taxed at exercise (stock options) / vesting (RSUs) (from fiscal year 2015 onwards) – previously not taxable</td>
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Questions?
Thank You

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