

EXPOSURE DRAFT

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Measures
for a later sitting) Bill 2021: Employee
Share Schemes**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule 1	The day after the end of the period of 3 months beginning on the day this Act receives the Royal Assent.	

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9

Schedule 1—Employee Share Schemes

10

Corporations Act 2001

11

1 Section 9 (paragraph (a) of the definition of *contribution plan*)

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13

Repeal the paragraph, substitute:

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(a) regular deductions are made from the wages or salary of an employee or director (the *contributor*) to acquire financial products that are offered for issue or sale to the contributor under a scheme for employees or directors of a company to acquire any of the following financial products of the company:

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(i) fully paid ordinary shares;

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(ii) options, offered for no more than nominal consideration, for the issue or transfer of fully paid ordinary shares;

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(iii) units in fully paid ordinary shares;

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EXPOSURE DRAFT

2 Section 9

Insert:

directors' valuation resolution means a resolution by the directors of a body corporate that values ESS interests of the body corporate.

3 Section 9 (definition of *eligible employee share scheme*)

Repeal the definition.

4 Section 9

Insert:

employee share buy-back means a buy-back under a scheme that:

- (a) has as its purpose the acquisition of shares in a company by, or on behalf of:
 - (i) employees of the company, or of a related body corporate; or
 - (ii) directors of the company, or a related body corporate, who hold a salaried employment or office in the company or in a related body corporate; and
- (b) has been approved by the company in general meeting.

5 Section 9 (definition of *employee share scheme*)

Repeal the definition, substitute:

employee share scheme: see subsection 1100E(1).

6 Section 9 (definition of *employee share scheme buy-back*)

Repeal the definition.

7 Section 9

Insert:

ESS contribution plan, for an offer for the issue of ESS interests of a body corporate or listed registered scheme, means a plan that has terms to the following effect:

- (a) an ESS participant of the body corporate or scheme, or a related person of the ESS participant referred to in subsection 1100E(3), (the *contributor*) may make regular payments, or elect to have regular deductions made from their wages or

EXPOSURE DRAFT

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- 1 salary, for the purpose of acquiring the ESS interests under
2 the offer;
- 3 (b) before acquiring the ESS interests under the offer, the
4 deductions or payments are held on trust in an account with
5 an Australian ADI that is kept solely for that purpose;
- 6 (c) the contributor may elect to discontinue the deductions or
7 payments at any time;
- 8 (d) if the contributor so elects:
- 9 (i) any deductions from the contributor's wages or salary
10 will cease, and any deductions made after the election
11 will be repaid to the contributor, within 45 days of the
12 election; and
- 13 (ii) the amount of the deductions or payments standing, at
14 the time when the election is made, to the credit of the
15 account for the contributor, and any interest on that
16 amount, will be repaid to the contributor within 45 days
17 of the election;
- 18 (e) before participating in the plan, the contributor must agree in
19 writing to the terms of the plan.

20 ***ESS disclosure documents*** for an ESS offer means the following:

- 21 (a) the ESS offer document;
- 22 (b) any application form for the ESS offer;
- 23 (c) any document that contains the ESS offer if the offer is not in
24 the ESS offer document or an application form for the ESS
25 offer;
- 26 (d) any ESS supporting information required under section
27 1100R for the ESS offer.

28 ***ESS interest:***

- 29 (a) of a listed body corporate—has the meaning given by
30 subsection 1100F(1); and
- 31 (b) of a body corporate that is not listed—has the meaning given
32 by subsection 1100F(2); and
- 33 (c) of a listed registered scheme—has the meaning given by
34 subsection 1100F(3).

35 ***ESS loan*** means a loan offered by a body corporate or a
36 responsible entity of a listed managed investment scheme to an
37 ESS participant of the body corporate or scheme, or a related
38 person of the ESS participant referred to in subsection 1100E(3),

EXPOSURE DRAFT

1 for the purpose of acquiring ESS interests in the body corporate or
2 scheme and which is offered on the following terms:

- 3 (a) that the loan has no interest or fees payable;
4 (b) that the rights of the body corporate or responsible entity as
5 against the ESS participant or related person, in the event of
6 default in payment of the loan, are wholly limited to
7 forfeiture of the ESS interests acquired using the loan.

8 **ESS offer:** see subsection 1100J(1).

9 **ESS offer document:** see section 1100Q.

10 **ESS participant** of a body corporate or listed registered scheme
11 has the meaning given by subsection 1100E(2).

12 **ESS supporting information:** see section 1100R.

13 **incentive right** means a right to be issued a security or financial
14 product or a right to be paid a cash amount (or a combination of
15 these rights) where the right is contingent on any of the following:

- 16 (a) the price or value of a security or financial product at a
17 particular time;
18 (b) the change in the price or value of a security or financial
19 product over a particular period;
20 (c) the amount of dividends or distributions paid in respect of a
21 security or financial product at a particular time;
22 (d) the change in the amount of dividends or distributions paid in
23 respect of a security or financial product over a particular
24 period.

25 **8 Section 9 (after paragraph (ma) of the definition of**
26 **managed investment scheme)**

27 Insert:

28 (maa) an ESS contribution plan for an ESS offer;

29 **9 Section 9 (paragraph (d) of the definition of selective**
30 **buy-back)**

31 Repeal the paragraph, substitute:

32 (d) an employee share buy-back.

33 **10 Subsection 257B(1) (table)**

34 Omit “employee share scheme”, substitute “employee share”.

EXPOSURE DRAFT

1 **11 Subsection 257B(1) (note)**

2 Omit “*employee share scheme buy-back*”, substitute “*employee share*
3 *buy-back*”.

4 **12 Section 703B (note)**

5 Omit “Note”, substitute “Note 1”.

6 **13 At the end of section 703B**

7 Add:

8 Note 2: Division 1A of Part 7.12 (Employee share schemes) contains a
9 separate regime for the making of ESS offers. The provisions of this
10 Part do not apply in relation to ESS offers (see subsection 1100K(1))
11 and certain sale offers of ESS interests (see subsection 1100L(1)).

12 **14 Subsection 709(5)**

13 Omit “eligible”.

14 **15 Section 725A (note)**

15 Omit “Note”, substitute “Note 1”.

16 **16 At the end of section 725A**

17 Add:

18 Note 2: Division 1A of Part 7.12 (Employee share schemes) contains a
19 separate regime for the making of ESS offers. The provisions of this
20 Part do not apply in relation to ESS offers (see subsection 1100K(1))
21 and certain sale offers of ESS interests (see subsection 1100L(1)).

22 **17 Paragraph 736(2)(d)**

23 Omit “12 months; or”, substitute “12 months.”.

24 **18 Paragraph 736(2)(e)**

25 Repeal the paragraph.

26 **19 At the end of subsection 736(2)**

27 Add:

28 Note: Subsection (1) also does not apply to employee share schemes: see
29 subsection 1100K(5).

30 **20 Paragraphs 911A(2)(ed), (ee), (ef) and (eg)**

31 Repeal the paragraphs.

EXPOSURE DRAFT

21 Subsection 911A(2) (note)

Omit “Note”, substitute “Note 1”.

22 At the end of subsection 911A(2)

Add:

Note 2: A person is also exempt from the requirement to hold an Australian financial services licence in relation to certain services connected with ESS offers: see subsection 1100K(4).

23 Subsection 992A(1) (note)

Omit “Note”, substitute “Note 1”.

24 At the end of subsection 992A(1)

Add:

Note 2: This subsection does not apply to an ESS offer: see subsection 1100K(6).

25 Subsection 992A(3) (note)

Omit “Note”, substitute “Note 1”.

26 At the end of subsection 992A(3)

Add:

Note 2: This subsection does not apply to an ESS offer: see subsection 1100K(6).

27 Subsection 992A(3B)

Repeal the subsection.

28 Paragraph 992AA(2)(c)

Omit “12 months; or”, substitute “12 months.”.

29 Paragraph 992AA(2)(d)

Repeal the paragraph.

30 At the end of subsection 992AA(2)

Add:

Note: Subsection (1) also does not apply to an offer of interests in a managed investment scheme if the offer is an ESS offer: see subsection 1100K(7).

EXPOSURE DRAFT

31 Subsection 1010A(1) (note)

Omit “Note”, substitute “Note 1”.

32 At the end of subsection 1010A(1)

Add:

Note 2: Division 1A of Part 7.12 (Employee share schemes) contains a separate regime for the making of ESS offers. The provisions of this Part do not apply in relation to ESS offers (see subsection 1100K(2)) and certain sale offers of ESS interests (see subsection 1100L(1)).

33 Section 1010BA (heading)

Repeal the heading, substitute:

1010BA Part does not apply to contribution plans and ESS contribution plans

34 At the end of section 1010BA

Add “or ESS contribution plans for ESS offers”.

35 At the end of paragraph 1041H(3)(a)

Add:

(iv) section 1100X (misleading or deceptive ESS disclosure document); or

36 After Division 1 of Part 7.12

Insert:

Division 1A—Employee share schemes

Subdivision A—Definitions and preliminary matters

1100E Meaning of *employee share scheme* and *ESS participant*

Meaning of employee share scheme

(1) An *employee share scheme* of a body corporate or listed registered scheme means a scheme under which an ESS interest of the body corporate or listed registered scheme may be issued:

(a) for a body corporate—by the body corporate to an ESS participant of the body corporate; or

EXPOSURE DRAFT

1 (b) for a listed registered scheme—by the responsible entity of
2 the listed registered scheme to an ESS participant of the
3 listed registered scheme.

4 Note: The obligation under subsection 994B(1) to make a target market
5 determination for a financial product does not apply in relation to a
6 security that has been or will be issued under an employee share
7 scheme: see paragraph 994B(3)(c).

8 *Meaning of ESS participant*

9 (2) Any of the following is an **ESS participant** of a body corporate or
10 listed registered scheme:

- 11 (a) an employee or director of the body corporate or of the
12 responsible entity of the listed registered scheme;
13 (b) an employee or director of an associated entity (an **associate**)
14 of the body corporate or of the responsible entity of the listed
15 registered scheme;
16 (c) an independent contractor who provides services
17 predominantly to the body corporate or to the responsible
18 entity of the listed registered scheme or to an associate of the
19 body corporate or responsible entity;
20 (d) a prospective person to whom paragraph (a) or (b) may
21 apply.

22 Note: An ESS participant who is an employee may be entitled to certain
23 protections, conditions and minimum wages under the *Fair Work Act*
24 *2009*, and protections under other laws of the Commonwealth,
25 including section 31 of Schedule 2 to the *Competition and Consumer*
26 *Act 2010* (misleading conduct relating to employment).

27 *Related persons of ESS participants*

28 (3) For the purposes of subsection (1), the ESS interest may also be
29 issued to any of the following related persons on behalf of the ESS
30 participant:

- 31 (a) an immediate family member of the ESS participant;
32 (b) another body corporate where each member of the other body
33 corporate is either:
34 (i) the ESS participant; or
35 (ii) an immediate family member of the ESS participant;
36 (c) a body corporate that is the trustee of a self-managed
37 superannuation fund (within the meaning of the
38 *Superannuation Industry (Supervision) Act 1993*) where the
39 ESS participant is a director of the body corporate.
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EXPOSURE DRAFT

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- 1 (4) If an ESS interest is offered or issued to a related person referred to
2 in subsection (3) on behalf of an ESS participant:
3 (a) the ESS interest is taken, for the purposes of this Division, to
4 have been offered or issued to the ESS participant; and
5 (b) this Division applies in relation to the ESS interest and
6 related person in the same way as the Division would apply if
7 the ESS interest were instead offered or issued to the ESS
8 participant.

9 *ESS interests issued through trusts*

- 10 (5) For the purposes of subsection (1), a body corporate or responsible
11 entity of a listed registered scheme may issue ESS interests of the
12 body corporate or scheme to another body corporate that is the
13 trustee of a trust covered by subsection (6), for the purposes of that
14 trustee issuing ESS interests of the body corporate or scheme to
15 ESS participants of the body corporate or scheme.
- 16 (6) A trust is covered by this subsection if the trust deed of the trust
17 contains terms to the following effect:
18 (a) the activities of the trustee of the trust are limited to
19 managing the employee share scheme of the body corporate
20 or listed registered scheme referred to in subsection (5);
21 (b) the trustee of the trust will keep written records on the
22 administration of the trust;
23 (c) the trustee of the trust will not charge any fees or charges for
24 administering the trust, other than reasonable disbursements;
25 (d) if the trustee of the trust is an associated entity of the body
26 corporate or the responsible entity of the listed registered
27 scheme referred to in subsection (5)—that the trustee may
28 only exercise voting rights associated with the ESS interests
29 in accordance with the instructions of the ESS participants or
30 consistent with the trustee’s fiduciary duties;
31 (e) the trustee of the trust, either alone or together with any other
32 trustee of a trust, will not hold more than:
33 (i) for a listed body corporate or a listed registered
34 scheme—5% of the fully paid ordinary shares of the
35 body corporate or interests in the listed registered
36 scheme; or
37 (ii) for a body corporate that is not listed—20% of the fully
38 paid ordinary shares of the body corporate.

EXPOSURE DRAFT

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- 1 (7) If:
2 (a) an ESS interest of a body corporate or listed registered
3 scheme is issued to a trustee of the kind referred to in
4 subsection (5); and
5 (b) the trustee offers or issues ESS interests of the body
6 corporate or scheme to an ESS participant of the body
7 corporate or scheme;
8 the ESS interest is taken, for the purposes of this Division, to have
9 been offered or issued by the body corporate or scheme to the ESS
10 participant.

11 **1100F Meaning of *ESS interest***

- 12 (1) An *ESS interest*, of a listed body corporate, means any of the
13 following:
- 14 (a) a fully paid share in the body corporate that is able to be
15 traded on a financial market operated by a market licensee or
16 a foreign financial market (an *approved foreign financial*
17 *market*) prescribed by ASIC by legislative instrument for the
18 purposes of this paragraph;
 - 19 (b) a beneficial interest in a fully paid share in the body
20 corporate where that beneficial interest is able to be traded on
21 a financial market operated by a market licensee or an
22 approved foreign financial market;
 - 23 (c) a fully paid share in the body corporate that is convertible
24 into an interest referred to in paragraph (b), where the
25 conversion can be made without charge or for a nominal fee;
 - 26 (d) a beneficial interest in a fully paid share in the body
27 corporate that is convertible into an interest referred to in
28 paragraph (a), where the conversion can be made without
29 charge or for a nominal fee;
 - 30 (e) a fully paid stapled security, consisting of 2 or more interests
31 in the body corporate mentioned in paragraphs (a) to (d),
32 where the stapled security is able to be traded on a financial
33 market operated by a market licensee or an approved foreign
34 financial market;
 - 35 (f) a unit in, an incentive right granted in relation to, or an option
36 to acquire an interest mentioned in any of paragraphs (a) to
37 (e) to which either or both of the following applies:

EXPOSURE DRAFT

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- 1 (i) the unit, right or option is able to be traded on a
2 financial market operated by a market licensee or an
3 approved foreign financial market;
4 (ii) the unit, right or option is not acquired or exercisable (if
5 applicable) upon the payment of monetary
6 consideration.
- 7 (2) An *ESS interest*, of a body corporate that is not listed, means either
8 of the following:
9 (a) a fully paid ordinary share in the body corporate;
10 (b) a unit in, an incentive right granted in relation to, or an option
11 to acquire a fully paid ordinary share in the body corporate.
- 12 (3) An *ESS interest*, of a listed registered scheme, means either of the
13 following:
14 (a) an interest in the scheme that is able to be traded on a
15 financial market operated by a market licensee or an
16 approved foreign financial market;
17 (b) a unit in, an incentive right granted in relation to, or an option
18 to acquire an interest mentioned in paragraph (a) to which
19 either or both of the following applies:
20 (i) the unit, right or option is able to be traded on a
21 financial market operated by a market licensee or an
22 approved foreign financial market;
23 (ii) the unit, right or option is not acquired or exercisable (if
24 applicable) upon the payment of monetary
25 consideration.

1100G Notice of intent

- 26
- 27 (1) If:
- 28 (a) a body corporate or responsible entity of a listed registered
29 scheme establishes an employee share scheme; and
30 (b) the body corporate or responsible entity intends to make one
31 or more ESS offers in connection with the employee share
32 scheme, to which either or both of the following apply:
33 (i) the ESS interests to be offered include ESS interests
34 offered for issue in return for monetary consideration;
35 (ii) the ESS interests will be offered to one or more ESS
36 participants of the body corporate or listed registered
37 scheme who are independent contractors;

EXPOSURE DRAFT

1 the body corporate or responsible entity must lodge notice of that
2 establishment and intent with ASIC, in the prescribed form.

- 3 (2) The notice must be lodged before any ESS offers are made in
4 connection with the employee share scheme.

5 *Offence*

- 6 (3) A person commits an offence if the person fails to comply with this
7 section.

8 **1100H Offers and invitations both covered**

- 9 (1) For the purposes of this Division:
10 (a) offering ESS interests for issue includes inviting applications
11 for the issue of the ESS interests; and
12 (b) offering ESS interests for sale includes inviting offers to
13 purchase the ESS interests.
- 14 (2) For the purposes of this Division, the person who offers ESS
15 interests is the person who has the capacity, or who agrees, to issue
16 or transfer the ESS interests if the offer is accepted.

17 **Subdivision B—Employee share scheme offers**

18 **1100J ESS offers**

- 19 (1) An offer is an *ESS offer* if:
20 (a) it is an offer for the issue of ESS interests, of a body
21 corporate or listed registered scheme, to ESS participants of
22 the body corporate or scheme, in connection with an
23 employee share scheme; and
24 (b) in a case where some or all of the ESS interests are offered
25 for issue in return for monetary consideration:
26 (i) the body corporate or responsible entity of the listed
27 registered scheme reasonably believes the offer
28 complies with the issue cap (see subsection (2)); and
29 (ii) any related loan or contribution plan is an ESS loan or
30 an ESS contribution plan for the offer; and
31 (c) in a case where the offer is made by a body corporate that is
32 not listed and either or both of the following apply:
33 (i) some or all of the ESS interests are offered for issue in
34 return for monetary consideration;
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EXPOSURE DRAFT

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- 1 (ii) some or all of the ESS participants are independent
2 contractors;
3 the offer complies with the offer value cap (see
4 subsection (4)); and
5 (d) the offer is expressed to be made under this Division.

6 Note: The offer value cap is taken to have been complied with if the offer
7 would not have required disclosure under Part 6D.2 or Part 7.9: see
8 subsection (5).

9 *Issue cap*

- 10 (2) For the purposes of subparagraph (1)(b)(i), an offer of ESS
11 interests of a body corporate or listed registered scheme complies
12 with the issue cap if, at the time the offer is made:
13 (a) the total number of fully paid shares in the body corporate or
14 interests in the listed registered scheme that are covered by
15 the ESS interests of the body corporate or scheme that may
16 be issued under the offer; and
17 (b) the total number of fully paid shares in the body corporate or
18 interests in the listed registered scheme that are covered by
19 the ESS interests that have been issued, or could have been
20 issued, under ESS offers made at any time during the 3 year
21 period ending on the day the offer is made;
22 does not exceed the percentage referred to in subsection (3) of the
23 number of those fully paid shares or interests actually issued by the
24 body corporate or scheme (whether under an ESS offer or
25 otherwise) as at the start of the day the offer is made.
- 26 (3) The percentage is:
27 (a) for a listed body corporate or a listed registered scheme—
28 5%; or
29 (b) for a body corporate that is not listed—20%.

30 *Offer value cap*

- 31 (4) For the purposes of paragraph (1)(c), an offer complies with the
32 offer value cap if, at the time the offer is made, the sum of the
33 following for each of the ESS participants to whom the offer is
34 made is \$30,000 or less:
35 (a) the value of ESS interests to be offered to the ESS participant
36 under the offer (the *current offer*);

EXPOSURE DRAFT

1 (b) the sum of the value of ESS interests offered to the ESS
2 participant under any other offer made to the ESS participant
3 during the 12 month period ending on the day the current
4 offer is made.

5 Note: This subsection does not apply in relation to certain ESS participants,
6 such as senior managers: see subsection (6).

7 (5) An offer is taken to comply with the offer value cap if:

8 (a) the offer would not require disclosure to any investor under
9 Part 6D.2 (if that Part otherwise applied to the offer) because
10 of section 708 or 708AA; or

11 (b) the offer would not require any person to be given a Product
12 Disclosure Statement under Part 7.9 (if that Part otherwise
13 applied to the offer) because of section 1012D, 1012DAA,
14 1012DA or 1012E.

15 Note: Section 708 sets out when an offer of securities does not need
16 disclosure under Part 6D.2. Section 708AA sets out when a rights
17 issue does not need disclosure under Part 6D.2.

18 (6) Subsection (4) does not apply in relation to an ESS participant of a
19 body corporate or listed registered scheme if:

20 (a) the ESS participant is a senior manager of the body corporate
21 or the responsible entity of the listed registered scheme; or

22 (b) both of the following conditions are met:

23 (i) the offer to the ESS participant would not require
24 disclosure under Part 6D.2 (if that Part otherwise
25 applied to the offer) because of subsection 708(1), (8),
26 (10), (11), or (12);

27 (ii) the ESS participant would not need to be given a
28 Product Disclosure Statement under Part 7.9 (if that Part
29 otherwise applied to the offer) because of
30 section 1012D, 1012DAA, 1012DA or 1012E.

31 Note: Sections 1012D, 1012DAA, 1012DA and 1012E set out circumstances
32 where a Product Disclosure Statement does not have to be given to a
33 person in relation to an offer of a financial product.

34 **1100K Provisions that do not apply in relation to ESS offers**

35 (1) The provisions of Part 6D.2 or 6D.3 do not apply in relation to an
36 ESS offer.

37 (2) The provisions of Part 7.9 do not apply in relation to the either of
38 following:

EXPOSURE DRAFT

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- 1 (a) an ESS offer;
- 2 (b) the issue of an ESS interest to an ESS participant under an
- 3 ESS offer.
- 4 (3) Section 1012A does not apply in relation to financial product
- 5 advice relating to an ESS offer.
- 6 (4) A person is exempt from the requirement under
- 7 subsection 911A(1) to hold an Australian financial services licence
- 8 for a financial service they provide if:
- 9 (a) the service:
- 10 (i) is the provision of general advice by the person in
- 11 connection with an ESS offer; or
- 12 (ii) is, or is provided incidentally to, a custodial or
- 13 depository service that is provided by the person in
- 14 connection with an ESS offer; or
- 15 (iii) the service is issuing or dealing in a financial product by
- 16 the person in connection with an ESS offer; or
- 17 (iv) is dealing in an interest in an ESS contribution plan for
- 18 an ESS offer; and
- 19 (b) the person is:
- 20 (i) the body corporate or the responsible entity of the listed
- 21 registered scheme to which the ESS offer relates; or
- 22 (ii) an associated entity of that body corporate or
- 23 responsible entity.
- 24 (5) Subsection 736(1) does not prohibit an offer of securities if the
- 25 offer is an ESS offer.
- 26 (6) Neither subsection 992A(1) or (3) applies to an ESS offer.
- 27 (7) Subsection 992AA(1) does not apply to an offer of interests in a
- 28 managed investment scheme if the offer is an ESS offer.

29 **1100L Certain sale offers of ESS interests need disclosure under**

30 **Subdivision C**

- 31 (1) The provisions of Part 6D.2, 6D.3 or 7.9 do not apply in relation to
- 32 an offer for sale (a *sale offer*) of ESS interests of a body corporate
- 33 or listed registered scheme where:
- 34 (a) the sale offer is made by a person who is or was an ESS
- 35 participant (the *seller*) of the body corporate or listed

EXPOSURE DRAFT

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- 1 registered scheme at the time when the seller was issued the
2 ESS interests; and
- 3 (b) the ESS interests were issued to the seller under an ESS
4 offer.
- 5 (2) If, apart from subsection (1), a sale offer:
- 6 (a) would require disclosure to investors under Part 6D.2
7 because of subsection 707(2); or
- 8 (b) is made to a person who would be required to be given a
9 Product Disclosure Statement under Part 7.9 because of
10 subsection 1012C(5);
- 11 then Subdivision C of this Division applies in relation to the sale
12 offer with the modifications mentioned in subsection (3) of this
13 section.
- 14 (3) For the purposes of subsection (2), Subdivision C applies as if:
- 15 (a) the sale offer were an ESS offer of ESS interests offered for
16 issue in return for monetary consideration; and
- 17 (b) a reference to an ESS participant were a reference to the
18 person to whom the sale offer is made; and
- 19 (c) a reference to a body corporate or responsible entity of a
20 listed registered scheme making an ESS offer were a
21 reference to the seller making an ESS offer.

22 **1100M Offers may also be made in reliance on section 708**

23 The fact that a body corporate makes an ESS offer of securities
24 does not prevent the body corporate from also making an offer, in
25 reliance on a provision of section 708, of securities that are of the
26 same class as those offered under the ESS offer.

27 **Subdivision C—ESS disclosure documents**

28 **1100N Application of this Subdivision**

- 29 (1) This Subdivision applies in relation to an ESS offer by a body
30 corporate or responsible entity of a listed registered scheme to
31 which either or both of the following apply:
- 32 (a) the ESS interests to be offered include ESS interests offered
33 for issue in return for monetary consideration;

EXPOSURE DRAFT

1 (b) the ESS interests will be offered to one or more ESS
2 participants of the body corporate or listed registered scheme
3 who are independent contractors.

4 (2) Despite subsection (1), this Subdivision does not apply in relation
5 to an ESS offer if the offer would not require disclosure to
6 investors under Part 6D.2 (if that Part otherwise applied to the
7 offer) because of section 708 or 708AA.

8 Note: Section 708 sets out when an offer of securities does not need
9 disclosure under Part 6D.2. Section 708AA sets out when a rights
10 issue does not need disclosure under Part 6D.2.

11 (3) Despite subsection (1), this Subdivision does not apply in relation
12 to an ESS offer to a particular ESS participant if the participant
13 would not need to be given a Product Disclosure Statement under
14 Part 7.9 (if that Part otherwise applied to the offer) because of
15 section 1012D, 1012DAA, 1012DA or 1012E.

16 Note: Sections 1012D, 1012DAA, 1012DA and 1012E set out circumstances
17 where a Product Disclosure Statement does not have to be given to a
18 person in relation to an offer of financial products.

19 **1100P Making an ESS offer without ESS disclosure documents**

20 *ESS offer to be included in or accompanied by ESS offer document*

21 (1) A body corporate or responsible entity of a listed registered scheme
22 must not make an ESS offer to an ESS participant, or distribute an
23 application form for an ESS offer to an ESS participant, unless the
24 offer is made in, or accompanied by, an ESS offer document.

25 *ESS offer must be accompanied by ESS supporting information*

26 (2) A body corporate or responsible entity of a listed registered scheme
27 must not make an ESS offer to an ESS participant, or distribute an
28 application form for an ESS offer to an ESS participant, unless the
29 offer is accompanied by any ESS supporting information required
30 under section 1100R.

31 *Civil liability*

32 (3) A body corporate or responsible entity of a listed registered scheme
33 contravenes this subsection if the body corporate or responsible
34 entity contravenes subsection (1) or (2).

35 Note: This subsection is a civil penalty provision (see section 1317E).

EXPOSURE DRAFT

1100Q Contents of ESS offer document

- 1
- 2 (1) An *ESS offer document* must:
- 3 (a) include the terms of the ESS offer, or a summary of the terms
- 4 of the offer, with a statement that, on request, a copy of the
- 5 full terms of the offer will be provided to the ESS participant;
- 6 and
- 7 (b) provide general information about the risks of acquiring and
- 8 holding the ESS interests being offered; and
- 9 (c) state that advice given in relation to the offer does not take
- 10 into account the ESS participant's objectives, financial
- 11 situation and needs; and
- 12 (d) suggest that the ESS participant obtain personal advice in
- 13 relation to the offer; and
- 14 (e) explain how the ESS participant may, from time to time,
- 15 calculate the value of the ESS interests; and
- 16 (f) state the period (the *application period*) during which ESS
- 17 participants may accept the ESS offer.
- 18 (2) If an ESS offer is made in relation to a body corporate that is not
- 19 listed, the *ESS offer document* must also state:
- 20 (a) whether the financial information accompanying the offer has
- 21 been audited; and
- 22 (b) that the ESS interest may not have any value and that the
- 23 value of the ESS interest will depend on future events that
- 24 may not occur.

25 Note: Financial information must accompany an ESS offer if the ESS offer

26 is offering ESS interests in a body corporate that is not listed: see

27 section 1100R.

28 1100R ESS supporting information

29 The *ESS supporting information* for an ESS offer is:

- 30 (a) if ESS interests may be acquired under the offer using an
- 31 ESS loan or ESS contribution plan for the ESS offer:
- 32 (i) the terms of the ESS loan or ESS contribution plan; or
- 33 (ii) a summary of the terms and a statement that the full
- 34 terms will be made available upon request; and
- 35 (b) if ESS interests will be held on trust for ESS participants
- 36 (other than by a body corporate of the kind mentioned in
- 37 paragraph 1100E(3)(c)):

EXPOSURE DRAFT

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- 1 (i) the trust deed; or
2 (ii) a summary of the trust deed and a statement that the
3 deed will be made available upon request; and
4 (c) if the offer is offering ESS interests in a body corporate that
5 is not listed:
6 (i) financial information required under section 1100S; and
7 (ii) a valuation, conducted in accordance with section
8 1100T, of the ESS interests being offered; and
9 (iii) a positive solvency resolution for the body corporate,
10 passed within the period of 1 month ending on the day
11 the offer is made.

12 Note 1: Paragraph 1100E(3)(c) allows ESS interests to be offered to a body
13 corporate that is the trustee of a self-managed superannuation fund
14 where the ESS participant is a director of the body corporate.

15 Note 2: If a summary of an ESS loan or ESS contribution plan or a summary
16 of a trust deed has been provided to an ESS participant, the participant
17 may request the full terms or deed, as the case may be. The person
18 making the offer must comply with the request: see section 1100U.

19 **1100S Financial information for a body corporate that is not listed**

20 For the purposes of subparagraph 1100R(c)(i), financial
21 information for an ESS offer of ESS interests in a body corporate
22 that is not listed is:

- 23 (a) if the body corporate must lodge a report for a financial year
24 with ASIC under section 319—a copy of the most recent
25 report lodged with ASIC; or
26 (b) if the body corporate is a registered foreign company—a
27 copy of the most recent documents lodged with ASIC under
28 section 601CK; or
29 (c) otherwise—a balance sheet and profit and loss statement
30 prepared in compliance with the accounting standards.

31 **1100T Valuation of ESS interests in a body corporate that is not** 32 **listed**

- 33 (1) A valuation for the purposes of subparagraph 1100R(c)(ii) for a
34 body corporate that is not listed must meet the following
35 requirements:
36 (a) the valuation must be conducted within the period of 1 month
37 ending on the day the offer is made;

EXPOSURE DRAFT

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- 1 (b) the valuation must set out the method used to conduct the
2 valuation;
3 (c) either:
4 (i) if the body corporate had an aggregated turnover greater
5 than \$50 million for the most recent financial year
6 ending before the day the offer is made—the valuation
7 must be an independent expert valuation; or
8 (ii) if the body corporate had an aggregated turnover not
9 exceeding \$50 million for the most recent financial year
10 ending before the day the offer is made—the valuation
11 must be an independent expert valuation or a directors'
12 valuation resolution.
- 13 (2) A valuation mentioned in subsection (1) must be conducted on a
14 reasonable basis.

15 **1100U Providing certain information to ESS participants upon** 16 **request**

- 17 (1) This section applies if a body corporate or a responsible entity of a
18 listed registered scheme has provided an ESS participant any of the
19 following:
20 (a) a summary of the terms of an ESS offer under paragraph
21 1100Q(1)(a);
22 (b) a summary of the terms of an ESS loan or ESS contribution
23 plan under subparagraph 1100R(a)(ii);
24 (c) a summary of a trust deed under subparagraph 1100R(b)(ii).
- 25 (2) The ESS participant may request that the body corporate or
26 responsible entity provide the participant the full terms or trust
27 deed, as the case may be.
- 28 (3) The body corporate or responsible entity must comply with the
29 request within 10 business days after the day the request is given to
30 the body corporate or responsible entity.
- 31 *Strict liability offence—failure to comply with request*
- 32 (4) A body corporate or responsible entity of a listed registered scheme
33 commits an offence of strict liability if the body corporate or
34 responsible entity contravenes subsection (3).

EXPOSURE DRAFT

Civil penalty—failure to comply with request

- 1
- 2 (5) A body corporate or responsible entity of a listed registered scheme
3 contravenes this subsection if the body corporate or responsible
4 entity contravenes subsection (3).

5 Note: This subsection is a civil penalty provision (see section 1317E).

6 **1100V Valuations in relation to units, options or incentive rights for**
7 **bodies corporate that are not listed**

- 8 (1) If:

- 9 (a) under an ESS offer, an ESS participant has been issued ESS
10 interests of a body corporate that is not listed; and
11 (b) the ESS interests are units in, incentive rights granted in
12 relation to, or options to acquire fully paid ordinary shares in
13 the body corporate; and
14 (c) the units or options are to be exercised, or the incentive rights
15 are to vest, upon the payment of monetary consideration;
16 the body corporate must provide the ESS participant a valuation of
17 the shares that complies with subsection (2).

- 18 (2) A valuation for the purposes of subsection (1) must meet the
19 following requirements:

- 20 (a) the valuation must be conducted within the period of 1 month
21 ending on the day (the *exercise or vesting day*) when the
22 units or options will be exercised or when the incentive rights
23 will vest;
24 (b) the valuation must be provided to the ESS participant at least
25 14 days before the exercise or vesting day;
26 (c) the valuation must set out the method used to conduct the
27 valuation;
28 (d) either:
29 (i) if the body corporate had an aggregated turnover greater
30 than \$50 million for the most recent financial year
31 ending before the exercise or vesting day—the valuation
32 must be an independent expert valuation; or
33 (ii) if the body corporate had an aggregated turnover not
34 exceeding \$50 million for the most recent financial year
35 ending before the exercise or vesting day—the valuation
36 must be an independent expert valuation or a directors'
37 valuation resolution;

EXPOSURE DRAFT

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- 1 (e) the valuation must be conducted on a reasonable basis.
- 2 (3) If a body corporate contravenes subsection (1), the body corporate
3 must refund all monetary consideration paid by the ESS participant
4 to acquire the units, options or incentive rights.
- 5 (4) An ESS participant who suffers loss or damage because a body
6 corporate contravenes subsection (1) may recover the amount of
7 the loss or damage from the body corporate.
- 8 (5) An action under subsection (4) may begin at any time within 6
9 years after the day on which the cause of action arose.
- 10 (6) This section does not affect any liability that a person has under
11 any other law.

12 **Subdivision D—ASIC stop orders**

13 **1100W ASIC stop orders**

- 14 (1) This section applies if ASIC is satisfied that:
15 (a) information in an ESS disclosure document is not worded
16 and presented in a clear, concise and effective manner; or
17 (b) an ESS offer to an ESS participant would contravene section
18 1100X; or
19 (c) an ESS offer document does not comply with section 1100Q;
20 or
21 (d) an ESS offer to an ESS participant would contravene
22 subsection 1100P(1) or (2); or
23 (e) an offer of ESS interests is to be purportedly made under this
24 Division, but would not be an ESS offer.
- 25 (2) ASIC may order that no offers, issues, sales or transfers of the ESS
26 interests be made while the order is in force.
- 27 (3) Before making an order under subsection (2), ASIC must:
28 (a) hold a hearing; and
29 (b) give a reasonable opportunity to any interested people to
30 make oral or written submissions to ASIC on whether an
31 order should be made.
- 32 (4) If ASIC considers that any delay in making an order under
33 subsection (2) pending the holding of a hearing would be
34 prejudicial to the public interest, ASIC may make an interim order
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EXPOSURE DRAFT

1 that no offers, issues, sales or transfers of the ESS interests be
2 made while the interim order is in force. The interim order may be
3 made without holding a hearing and lasts for 21 days after the day
4 on which it is made unless revoked before then.

5 (5) At any time during the hearing, ASIC may make an interim order
6 that no offers, issues, sales or transfers of the ESS interests be
7 made while the interim order is in force. The interim order lasts
8 until:

9 (a) ASIC makes an order under subsection (2) after the
10 conclusion of the hearing; or

11 (b) the interim order is revoked;

12 whichever happens first.

13 (6) An order under subsection (2), (4) or (5) must be in writing and
14 must be served on the person who is ordered not to offer, issue, sell
15 or transfer ESS interests.

16 Subdivision E—Prohibitions and defences

17 1100X Misleading statements in ESS disclosure documents etc

18 *Misleading or deceptive statements and new circumstances*

19 (1) A person must not make an ESS offer to an ESS participant, or
20 distribute an application form for an ESS offer to an ESS
21 participant, if there is:

22 (a) a misleading or deceptive statement in the ESS disclosure
23 documents for the offer; or

24 (b) a new circumstance that:

25 (i) has arisen during the application period for the offer
26 mentioned in paragraph 1100Q(1)(f); and

27 (ii) if the new circumstance had occurred before the ESS
28 offer was made, would have been required to be
29 included in an ESS disclosure document for the ESS
30 offer.

31 Note 1: See sections 1100ZA, 1100ZB and 1100ZC for defences.

32 Note 2: Section 1041H imposes liabilities in respect of other conduct related
33 to the offering of the securities.

EXPOSURE DRAFT

Offence if statement or new circumstance is materially adverse

- (2) A person commits an offence if:
- (a) the person contravenes subsection (1); and
 - (b) the misleading or deceptive statement, or the new circumstance, is materially adverse from the point of view of an ESS participant.

Civil liability if statement or new circumstance is materially adverse

- (3) A person contravenes this subsection if:
- (a) the person contravenes subsection (1); and
 - (b) the misleading or deceptive statement, or the new circumstance, is materially adverse from the point of view of an ESS participant.

Note: This subsection is a civil penalty provision (see section 1317E).

1100Y Right to recover for loss or damage resulting from contravention

Right to recover loss or damage

- (1) A person who suffers loss or damage because another person contravenes subsection 1100X(1) may recover the amount of the loss or damage from a person referred to in the following table if the loss or damage is one that the table makes the person liable for. This is so even if the person did not commit, and was not involved in, the contravention.

People liable on ESS disclosure documents for the ESS offer

Item	These people...	are liable for loss or damage caused by...
1	the body corporate or responsible entity making the offer	any contravention of subsection 1100X(1) in relation to the ESS disclosure documents
2	each director of the body corporate or responsible entity making the offer	any contravention of subsection 1100X(1) in relation to the ESS disclosure documents

EXPOSURE DRAFT

People liable on ESS disclosure documents for the ESS offer

Item	These people...	are liable for loss or damage caused by...
3	a person named in any ESS disclosure document with their consent as a proposed director of the body corporate or responsible entity of a listed registered scheme whose ESS interests are being offered	any contravention of subsection 1100X(1) in relation to the ESS disclosure document
4	a person named in any ESS disclosure document with their consent as having made a statement: (a) that is included in the document; or (b) on which a statement made in the document is based	the inclusion of the statement in the ESS disclosure document
5	a person who contravenes, or is involved in the contravention of, subsection 1100X(1)	that contravention

- 1 Note: Item 2—*director* includes a shadow director (see section 9).
- 2 (2) An action under subsection (1) may begin at any time within 6
- 3 years after the day on which the cause of action arose.
- 4 (3) This Division does not affect any liability that a person has under
- 5 any other law.
- 6 Note: Conduct that contravenes subsection 1100X(1) is expressly excluded
- 7 from the operation of section 1041H.

1100Z Obligation to inform person making the ESS offer about deficiencies in the ESS disclosure documents

- 10 (1) A person referred to in the table in section 1100Y must notify, in
- 11 writing, the body corporate or responsible entity of a listed
- 12 registered scheme making the ESS offer as soon as practicable if,
- 13 during the application period for the offer mentioned in paragraph
- 14 1100Q(1)(f), the person becomes aware that:
- 15 (a) a material statement in the ESS disclosure documents for the
- 16 offer is misleading or deceptive; or

EXPOSURE DRAFT

-
- 1 (b) a material new circumstance exists that:
2 (i) has arisen during the application period for the offer
3 mentioned in paragraph 1100Q(1)(f); and
4 (ii) would have been required to be included in an ESS
5 disclosure document for the offer if it had arisen before
6 the ESS offer was made.
- 7 (2) An offence based on subsection (1) is an offence of strict liability.

8 **1100ZA Due diligence defence for ESS disclosure documents**

- 9 A person does not commit an offence against subsection 1100X(2),
10 and is not liable under section 1100Y for a contravention of
11 subsection 1100X(1), because of a misleading or deceptive
12 statement in an ESS disclosure document for an ESS offer, if the
13 person proves that the person:
14 (a) made all inquiries (if any) that were reasonable in the
15 circumstances; and
16 (b) after doing so, believed on reasonable grounds that the
17 statement was not misleading or deceptive.

18 **1100ZB Lack of knowledge defence**

- 19 A person does not commit an offence against subsection 1100X(2),
20 and is not liable under section 1100Y for a contravention of
21 subsection 1100X(1), because of a misleading or deceptive
22 statement in an ESS disclosure document for an ESS offer, if the
23 person proves that the person did not know that the statement was
24 misleading or deceptive.

25 **1100ZC Reasonable reliance on information given by someone else**

- 26 (1) A person does not commit an offence against subsection 1100X(2),
27 and is not liable under section 1100Y for a contravention of
28 subsection 1100X(1), because of a misleading or deceptive
29 statement in an ESS disclosure document for an ESS offer if the
30 person proves that the person placed reasonable reliance on
31 information given to them by:
32 (a) if the person is a body corporate or a responsible entity of a
33 listed registered scheme—someone other than a director,
34 employee or agent of the body corporate or responsible
35 entity; or

EXPOSURE DRAFT

1 (b) if the person is an individual—someone other than an
2 employee or agent of the individual.

3 (2) For the purposes of subsection (1), a person is not the agent of a
4 body corporate or responsible entity merely because the person
5 performs a particular professional or advisory function for the body
6 corporate or responsible entity.

7 **37 In the appropriate position in subsection 1317E(3)**

8 Insert:

subsection 1100P(3)	making an ESS offer without ESS disclosure documents	uncategorised
subsection 1100U(5)	failure to comply with a request for full terms of an ESS offer, ESS loan, ESS contribution plan, or full trust deed	uncategorised
subsection 1100X(3)	misstatement in ESS disclosure documents	uncategorised

9 **38 In the appropriate position in Schedule 3**

10 Insert:

Subsection 1100G(3)	5 years imprisonment
Subsection 1100P(1)	15 years imprisonment
Subsection 1100P(2)	5 years imprisonment
Subsection 1100U(4)	50 penalty units
Subsection 1100X(2)	15 years imprisonment
Subsection 1100Z(1)	120 penalty units

11 **39 Subparagraph 1274(2)(a)(iva)**

12 Repeal the subparagraph, substitute:

13 (iva) an ESS disclosure document lodged with ASIC in
14 relation to an ESS offer of an ESS interest in a body
15 corporate (the *issuing body corporate*), if the conditions
16 set out in subsection (2AA) are satisfied; or

17 **40 Subsection 1274(2AA)**

18 Repeal the subsection, substitute:

19 (2AA) For the purposes of subparagraph (2)(a)(iva), the conditions are the
20 following:

EXPOSURE DRAFT

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- 1 (a) no equity interests in any of the following companies are
2 listed for quotation in the official list of any approved stock
3 exchange at the end of the issuing body corporate's most
4 recent income year (the *pre-lodgement year*) before the
5 income year in which the ESS disclosure document or
6 replacement document, or the ESS disclosure document
7 being supplemented by the supplementary document, is
8 lodged with ASIC:
- 9 (i) the issuing body corporate;
 - 10 (ii) any subsidiary of the issuing body corporate at the end
11 of the pre-lodgement year;
 - 12 (iii) any holding company of the issuing body corporate at
13 the end of the pre-lodgement year;
 - 14 (iv) any subsidiary of a holding company of the issuing
15 body corporate at the end of the pre-lodgement year;
16 and
- 17 (b) the issuing body corporate had an aggregated turnover not
18 exceeding \$50 million for the pre-lodgement year.