



25 August 2021

Directors
Market Conduct Division and
Individual and Indirect Taxation Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email address: ESSreforms@treasury.gov.au

Dear Sir/Madam

Submission on ‘Treasury Laws Amendment Bill 2021: Employee Share Schemes

We thank Treasury for the opportunity to submit a response to the ‘Treasury Laws Amendment Bill 2021: Employee Share Schemes’ (**Reforms**).

Our specialised Employee Share Scheme (**ESS**) practice regularly assists domestic and global offerors (listed and unlisted) to prepare and document incentive programs and provides advice in relation to Australian securities law and listing rule implications of their incentive programs. It can be a complex task as relevant factors for our clients include securities laws, tax laws (noting the effect on offerors and the participants), payroll obligations, financial reporting requirements, social security requirements, data privacy and employment laws.

We have previously made submissions to the Australian Securities & Investment Commission (**ASIC**) in relation to ‘ASIC Consultation Paper 218: Employee Incentive Schemes’, and were provided with the opportunity to review and provide comments on the drafts of ASIC Class Order [CO 14/1000] (**Class Order 14/1000**) and ASIC Class Order [CO 14/1001] (**Class Order 14/1001**). We also made submissions to Treasury regarding the ‘National Innovation and Science Agenda - Employee Share Schemes Consultation Paper’ in December 2016 and the ‘Treasury Employee Share Schemes Consultation Paper’ in April 2019.

We would welcome the opportunity to discuss our views, share our insights, and consider any other specific issues on which Treasury might like our view in respect of this submission. Please note that we have not responded to every proposal in the Reforms.

Introduction

ASIC’s efforts thus far to broaden the regulatory relief for ESS through the introduction of Class Order 14/1000 have had a significant and positive impact on the implementation of ESS by domestic and foreign listed companies. However, in our view, the introduction of Class Order 14/1001 has been considerably less impactful as the conditions which unlisted companies must satisfy in order to rely on that relief (in particular the value threshold of \$5,000) meant that the effort of establishing an ESS was inconsistent with the perceived incentive effect of the grants under

PricewaterhouseCoopers, ABN 52 780 433 757
2 Riverside Quay, SOUTHBANK VIC 3006, GPO Box 1331 MELBOURNE VIC 3001
T: +61 3 8603 1000, F: +61 3 8603 1999, www.pwc.com.au

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that ESS.

Accordingly, we are strongly supportive of any efforts made to make the legal framework surrounding ESS in Australia, particularly for unlisted companies, more practical and more accessible.

We note also that there are broader trends afoot in the market in remuneration and the nature of engagement between offerors and their workforces and the legal framework does need to stay relevant in that context. We have explored some of these issues in our comments below.

Meaning of employee share scheme and ESS participant

We welcome the extension of the definition of 'employee share scheme' within the draft legislation to include a scheme that involves offers to non-executive directors, prospective employees and directors and certain contractors. However, in order to facilitate simple interpretation of the term 'ESS participant' (which is relevant to the definition of 'employee share scheme'), we submit the following:

1. Independent contractor (proposed section 1100E(2)(c) and 'related persons of ESS participants' (proposed section 1100E(3)): The draft legislation refers to 'independent contractor' in several places. The purpose of including the term 'independent' is not clear and as such we consider further clarification is required.

We are increasingly seeing contractors performing senior roles and tasks within organisations. As such, clients are regularly contacting us with a desire to offer ESS to persons or entities who provide contracting services to them, regardless of whether those persons or entities are direct contractors to the offeror or employed by the direct contractor to provide those services to the offerors.

In research and development collaborations for example, it is not uncommon for a university and a corporate entity to enter into a contracting arrangement where employees of the university spend all or effectively all of their working time on research and development tasks for the corporate entity. Those employees are not direct contractors with the corporate entity however are generating intellectual property for the corporate entity and therefore their exertions and work product are of high value to the corporate entity. If the legislation permitted the offering of equity awards to employees of contracting entities where those employees' working time is predominantly spent providing services to the offeror through their employing entity, this would facilitate a common request from our client base. We believe this could be simply achieved by broadening the concept of 'related person of an ESS participant' in proposed section 1100E(3) to include such employees of contractors to the offeror.

2. Prospective person (section 1100E(2)(d)): The prospective person concept should, in our view, include prospective contractors. In our experience, it is common for companies (notably in the mining exploration and IT industries) to offer ESS awards in connection



with the offer of a senior contracting position. This position is also consistent with the approach that is already taken in Class Order 14/1000 and Class Order 14/1001.

Definition of 'employee share buy-back'

The proposed definition of 'employee share buy-back' retains references to the existing concepts of employees and salaried directors only. This is inconsistent with the remainder of the draft legislation which broadens eligibility beyond these categories to NEDs and contractors. As such, we submit that an employee share buy-back should relate to any buy-back of shares held by an 'ESS participant'.

Meaning of ESS interest for unlisted companies (proposed section 1100F)

The requirement that ESS interests in relation to an unlisted body can only relate to a fully paid voting ordinary share in our view excludes many legitimate ESS structures. For example, a common request from unlisted clients is to develop an ESS award that offers all of the economic rights of an ordinary share but not the voting rights. The purpose of this is to incentivise and align key members of the unlisted company's workforce without providing them with any control or governance rights. It would be a significant step forward if such structures could use the 'employee share scheme' mechanisms in the new legislation.

Notice of intent (proposed section 1100G)

We expect that the requirement to lodge a notice with ASIC *prior to* making any offers in connection with the ESS is likely to lead technical non-compliance with the requirements of the legislation notwithstanding that all other substantial requirements of the legislation have been met.

In our view, the requirement should instead be for lodgement of the notice within 1 month of the offeror first making an offer to Australian participants under an ESS. This timing is consistent with the CFO8 lodgement. We also submit that ASIC could consider accepting late lodgement of the relevant notice in exchange for a financial late lodgement penalty.

Employee Share Scheme offers (Division 1A, Subdivision B)

In relation to the 'issue cap' in proposed section 1100J(2), we submit that the issue cap should only relate to those ESS interests that are offered for monetary consideration and should exclude offers made outside Australia and/or in reliance on an exemption set out in Part 6D.2 or Part 7.9 of the Corporations Act.

In relation to the 'offer value cap' in proposed section 1100J(4), given different views in the market, we submit that further guidance on how eligible products are to be valued for the purposes of the cap would be appreciated by offerors and their advisers.

In relation to the requirement in proposed section 1100J(6)(b) that both conditions stated are met, there are many times where only the Part 6D.2 or Part 7.9 exemptions will apply to an offer and not both. On that basis, we submit that if an offer does not require disclosure under either of Part 6D.2 or Part 7.9, then that should be sufficient for the purposes of proposed section 1100J(6)(b).



Lastly, we support senior managers being excluded from the value cap on the basis that such persons have various methods of informing themselves about the value of the offeror and therefore do not require the offer cap as investor protection. In addition, we submit that a valuation document need not be provided to senior managers at the time of exercising a financial product linked with exercise price.

ESS disclosure documents (Division 1A, Subdivision C)

We submit that:

- the requirement in proposed section 1100Q(1)(e) for an ESS offer document to explain how the value of the underlying eligible product may be ascertained from time to time be amended and instead the document should explain how a participant may, from time to time, ascertain the market value of the underlying eligible product;
- given the relatively common use of 'opt-out' plans (particularly by foreign listed companies), the requirement to state the 'application period' requires further clarification;
- the practical effect of the requirements in proposed section 1100V(2) that a valuation be conducted within the 1 month prior to the exercise or vesting day but also delivered 14 days prior to that exercise or vesting day leaves a short period (14-17 days) in which to actually conduct and circulate the valuation. This is impracticable and we expect this will inhibit use of this mechanism by unlisted companies.
- limited recourse loan funded share plans are commonly used by unlisted companies in Australia and, as part of those plans, it is common for participants to be obliged to apply the after-tax value of dividends and distributions received from the offeror to pay down any loan received in connection with the grant of their shares. It would be valuable for clarification or guidance that the application of such funds is not inconsistent with the proposed new definition of 'ESS loan'.

If you have any queries, please contact Nick Brown by phone on (03) 8603 0291 or by email at nick.brown@pwc.com.

Yours sincerely
PricewaterhouseCoopers by

A handwritten signature in blue ink, appearing to read 'NJB', is written over a light blue horizontal line.

Nick Brown
Legal Partner
Direct Phone: (03) 8603 0291
Email address: nick.brown@au.pwc.com