



Australian Government
The Treasury

TSY/AU

Employee Share Schemes

Consultation Paper

April 2019

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Consultation Process

Request for feedback and comments

The purpose of this consultation paper is to seek comments on the Government's proposals to improve the ability for small businesses to offer employee share schemes to help employers attract, retain and motivate employees and grow their businesses.

Comments received will be taken into account in developing legislation required to implement this measure, helping to ensure it operates appropriately and achieve its policy objectives.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted. All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Closing date for submissions: 30 April 2019

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The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Employee Share Schemes

Introduction

The Government is committed to ensuring that small businesses have the support they need to be able to attract the right staff to help their business grow and prosper.

Small business is a key contributor to the Australian economy, representing 99 per cent of all businesses in Australia and employing 5.7 million Australians. Having the right people with the right skills is critical to growing businesses and creating jobs for Australians, contributing to economic growth.

The Government has announced a number of initiatives designed to support small and medium sized companies in Australia, including cutting company tax rates and improving access to lending through the Australian Business Securitisation Fund.

On 13 November 2018, the Government also announced proposals to simplify and expand the current regulatory exemptions that apply to an employee share scheme (ESS) to help reduce the time and cost burden for small businesses offering ESSs and to help them attract, retain and motivate employees to grow their business.¹

The current regulatory framework for ESS offers is complex and fragmented, which may discourage businesses – particularly small businesses – from offering an ESS. The Government proposes to make ESSs more attractive and user-friendly by:

- consolidating and simplifying the statutory exemptions and ASIC class order relief from disclosure, licensing, hawking, advertising and on-sale obligations in the *Corporations Act 2001* (Corporations Act);
- increasing the value limit of financial products that an unlisted company can offer in a 12 month period from \$5,000 per employee to \$10,000 per employee;
- expanding relief for unlisted companies offering an ESS to cover contribution plans, where an employee can make a monetary contribution to acquire financial products; and
- allowing small companies that cannot come within these exemptions to offer an ESS under a disclosure document lodged with ASIC, without publicly disclosing commercially sensitive financial information, unless they are otherwise obligated to do so.

These changes build on improvements the Government has previously made to make ESSs more attractive to small business, including improving the taxation treatment of ESSs and allowing disclosure documents lodged with ASIC by ‘start-ups’ making ESS offers to be kept confidential.

This paper outlines and seeks feedback on the Government’s new proposals to further assist small business seeking to offer an ESS to their employees.

1 ‘Government proposes to double the value limit available under employee share schemes’, 13 November 2018, Media Release, the Hon Josh Frydenberg MP, Treasurer, and Senator the Hon Michaelia Cash, Minister for Small and Family Business, Skills and Vocational Education.

Features of an ESS

ESSs involve an employer offering shares, options or other financial products to employees as part of an employee's remuneration package. ESSs may be offered to employees as a bonus or as part of the employee's remuneration, with or without a financial contribution from the employee.

ESSs are used by companies of all sizes, including listed and unlisted companies, across a range of industries. A 2017 report² by the Department of Industry, Innovation and Science (DIIS) found that the use of an ESS is most common in large and mature mining, professional, scientific and technical services and finance and insurance services companies. However, the ESS component of total remuneration is on average 4.5 times higher for small and medium enterprises than for large companies.

Benefits of an ESS

ESSs are generally designed to encourage the retention of staff by aligning the interests of employees with the interests of their employer and enabling an employee to share in their employer's growth and success. In some instances, an ESS provides tax advantages for employees as well as economic benefits associated with ownership interests in a company.

ESSs may also provide an effective mechanism for small business to attract employees, particularly when a business is in the start-up phase and is cash poor. The 2017 report by DIIS identified that compared with their non-ESS counterparts, companies with an ESS have:

- lower employee churn;
- higher sales;
- higher labour productivity; and
- higher value added growth.

The same report also found that the positive relationship between having an ESS and company performance is greatest for small to medium enterprises.

Indicating the potential significance of ESSs as a form of remuneration preferred by small companies, small companies that use ESSs have a significantly higher proportion of their total wages and salaries being paid through ESS offers compared with larger companies (note that employment legislation does not authorise shares to be used as a component of payment of the minimum rate). For every dollar spent on wages and salaries, small companies using an ESS paid approximately 25 to 53 cents to employees in the form of share based payments, depending on the age of the company. Large companies paid 3 cents in the form of share based payments for every dollar of wages and salaries paid.³

Parliament has recognised the benefits of ESSs. The Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 states that, "Based on the benefits

2 *The performance and characteristics of Australian firms with Employee Share Schemes*, released by the Department of Industry, Innovation and Science in 2017.

3 *The performance and characteristics of Australian firms with Employee Share Schemes*, released by the Department of Industry, Innovation and Science in 2017.

employee share schemes may bring to wider economy the Australian Government has a general policy supporting the use of employee share schemes”⁴.

Current Regulatory Framework

An ESS involves an offer of shares, options or other financial products (collectively referred to as ‘financial products’) by an employer to an employee. The Corporations Act regulates offers to all investors, including employees who may acquire financial products in their employer under an ESS.

Consequently, offers under an ESS will trigger a range of obligations under the Corporations Act, including requirements in relation to disclosure, financial services licensing, advertising, hawking, managed investment schemes and the on-sale of financial products.

Disclosure

Disclosure for offers of financial products to employees is regulated by Chapter 6D (for shares and options) or Chapter 7 (for other financial products, such as performance rights relating to shares or options) of the Corporations Act. The disclosure obligations are intended to provide a safeguard for investors, including employees, to ensure they have adequate protections and sufficient information to make an informed investment decision.

Unless a relevant statutory exemption or ASIC relief applies, the Corporations Act requires a company making an offer of securities or other financial products under an ESS to provide a disclosure document – such as a prospectus or offer information statement (for offers of securities) or a Product Disclosure Statement (PDS) (for offers of other financial products) – to employees.

Prospectuses, offer information statements and some PDSs must be lodged with ASIC and are made available to the public (with a limited exemption for certain ESS offers, discussed below).

A prospectus contains the highest level of disclosure for investors and must include “all of the information investors reasonably require” to make an informed decision about investing in a company. The prospectus must disclose information about the company’s operations, financial position (including audited financial statements in most circumstances), the features of the securities being offered, prospects and the risks associated with the offer.

An offer information statement is a short form disclosure document that must include recent audited financial statements and may be used if the amount of capital being raised by the company is \$10 million or less (when added to all previous amounts raised).

A PDS is a disclosure document setting out key information about the company making the offer, the benefits and risks of acquiring the financial product, any costs related to the offer. It must also include information about dispute resolution procedures and the cooling-off period applicable to the purchase.

Licensing

The Corporations Act requires a person to hold an Australian Financial Service (AFS) licence to provide financial services. Companies and their agents involved in offering and operating ESSs may be required to hold an AFS licence for the following activities in connection with an ESS:

- provision of general advice, for example, when circulating and explaining the terms and conditions of the ESS;

4 Paragraph 5.21.

- providing custodial or other services in connection with an ESS, for example, where a company uses a professional trustee to manage their ESS;
- dealing in financial products, for example, where an ESS involves the purchase or sale of financial products by a person appointed by the company

Advertising and hawking

The Corporations Act also contains restrictions on the advertising that can be undertaken for an offer or intended offer of financial products, which apply to ESS offers.⁵ The prohibition on ‘hawking’ – the issue or sale of financial products arising out of unsolicited contact with investors – will also apply⁶. The hawking provisions apply to prohibit unsolicited meetings or telephone calls reasonably held or made in connection with ESS offers.

Other requirements

An ESS may also trigger the provisions in Pt 5C of the Corporations Act requiring the registration of a managed investment scheme (for example, as a result of the pooling or use of contributions in a common enterprise under a contribution plan used in an employee incentive scheme in relation to listed bodies only). The restrictions in s707 and 1012C of the Corporations Act on the on-sale of financial products issued without disclosure within 12 months of their issue may also apply.

Statutory exemptions

There are a number of limited statutory exemptions from disclosure, licensing and hawking provisions in the Corporations Act that a company can currently utilise when offering an ESS.

Disclosure exemptions

The requirement to provide a disclosure document for an offer of financial products can be a significant cost on the company making the offer. Statutory exemptions exist from the disclosure requirements in certain circumstances, relevantly where:

- the offer is a ‘small scale offer’ – companies are able to offer financial products without a disclosure document where the number of people to whom the products are issued under the offer (and all offers in the last 12 months) is 20 people or less and the amount being raised under the offer (and all offers in the last 12 months) is \$2 million or less⁷; and
- the investor is a ‘senior manager’, that is, a person who is concerned with, or takes part in, the management of the company regardless of the person’s designation and their spouse, parent, child or siblings⁸. There is no restriction on the number or value of the securities that may be offered.

These exemptions recognise that when an offer is private or personal the person being offered the financial products is likely to know about the company already and can make inquiries directly and

5 See sections 734, 1018A and 1018B of the Corporations Act.

6 See sections 736, 992A, and 992AA of the Corporations Act.

7 See subsection 708(1) and s1012E(2) of the Corporations Act.

8 See subsection 708(12) of the Corporations Act, subsection 1012D(9A) and ASIC Corporations (Disclosure Relief – Offer to Associates) instrument 2017/737.

personally of the company. The value of preparing a prospectus or other disclosure document in these cases is therefore unlikely to be high and may not offset the cost of preparing the document.

Exemption from public access to disclosure documents

The Corporations Act provides an exemption from public access to disclosure documents lodged with ASIC for certain eligible ESS offers by start-ups eligible for certain tax incentives⁹.

This exemption from public access to disclosure documents was introduced by the Government in 2017, under the National Innovation and Science Agenda, to protect commercially sensitive information (for example, financial information) that may be contained in the eligible start-up's disclosure document, to prevent or reduce any loss of competitive advantage.

Licensing and hawking exemptions

The Corporations Act also provides some limited exemptions from the licensing obligations and prohibition on hawking for 'eligible ESSs'.¹⁰ There is currently no statutory exemption available from the restrictions on advertising.

An 'eligible ESS' is defined in section 9 of the Corporations Act and covers offers made under an ESS where the following conditions are met:

- the financial products are offered under a disclosure document (for example, a prospectus or offer information statement, for offers of securities, or a PDS, for offers of other financial products) or are offered with disclosure under the 'senior managers' exemption (discussed above);
- the offer is made to employees or executive directors of the company making the offer or a related body corporate. Contractors and non-executive directors are not covered; and
- the ESS is for certain types of financial products only being fully paid ordinary shares, options, offered for no more than nominal consideration, for the issue or transfer of shares and units in fully paid ordinary shares. Other types of financial products (such as derivatives, including performance rights) are not covered.

In relation to licensing, the exemption from the requirement to hold an AFS licence covers the following financial services, where they are 'in connection with' an offer of financial products under an eligible ESS:

- the provision of general advice;
- dealing in financial products;
- providing a custodial or depository service; and
- dealing in an interest in a contribution plan.

In relation to the prohibition on hawking, this prohibition does not apply to offers of securities or financial products under an eligible ESS.

There is no express statutory exemption from the advertising restrictions under the Corporations Act for ESS offers that require a regulated disclosure document. However, if a company is making ESS offers without a disclosure document in reliance on ASIC class order relief (see below), then the advertising prohibition for offers of securities¹¹ in the Corporations Act will not apply.

9 See subsection 1274(2AA) of the Corporations Act.

10 See subsection 911A(2)(ed) – 911A(2)(eg), 992A(3B), 992AA(2)(d) of the Corporations Act.

11 See section 734 of the Corporations Act.

Tax concessions

In 2015, the Government made changes to the tax treatment of shares and rights offered through an ESS for 'eligible start-ups'. This enabled eligible start-ups to issue options or shares to their employees at a small discount, and have that discount exempted (for shares) or further deferred (for options) from income tax¹².

ASIC Class Order relief

In addition to the statutory exemptions currently available under the Corporations Act, ASIC has also provided class relief for both listed and unlisted companies offering eligible financial products to their employees under an 'employee incentive scheme' ([CO 14/1000] and [CO 14/1001] (ASIC class orders))¹³.

The ASIC class orders reduce the compliance burden for companies offering ESS by providing conditional relief from the following provisions of the Corporations Act:

- the requirement to lodge a disclosure document with ASIC for the offer;
- the requirement to hold an AFS licence for the incidental provision of financial services in connection with the scheme;
- the advertising and hawking provisions;
- the requirement to register a managed investment scheme for a contribution plan (listed bodies only); and
- the on-sale provisions.

In place of the disclosure, licensing and other obligations under the Corporations Act, the class orders contain a number of conditions designed to protect employees from undue exposure to risk and to ensure that a minimum level of disclosure is provided to employees.

These conditions include restrictions on the type of financial products that can be offered (for example, shares, options and incentive rights for unlisted companies), the number of shares or financial products than can be issued under ESS offers in a 12 months period (20 per cent of issued capital for unlisted companies and 5 per cent of issued capital for listed companies).

In the case of unlisted companies, there is also a restriction on the value of the offer that can be made to each employee. Offers must be made for no more than nominal monetary consideration and, in aggregate, must not exceed \$5,000 in value per employee per year. In addition, the relief does not allow for contribution plans or loan arrangements to be extended to employees of unlisted companies.

A minimum level of information must be provided to employees in an 'offer document' (which is not lodged with ASIC, but ASIC may request it). This includes information on risks and the company's financial report.

The conditions for listed companies are less onerous than those applying to unlisted companies, given that a listed company is subject to enhanced supervision and disclosure through its continuous disclosure obligations under market listing rules. There is also a reliable market price for shares in a listed company, compared to an unlisted company.

12 *Tax and Superannuation Laws Amendment (Employee Share Schemes) Act 2015.*

13 ASIC Class Order [CO 14/1000] applies to companies listed on an eligible financial market and ASIC Class Order [CO 14/1001] applies to unlisted companies.

Table 1 below provides an overview of the ASIC class order relief and the conditions for companies seeking to make ESS offers utilising the relief. Further guidance and explanation can also be found in ASIC Regulatory Guide 49 *Employee Incentive Schemes* (RG 49).

ASIC also has the power to grant individual relief from the disclosure, licensing and other obligations in the Corporations Act, for example, where the requirements of its class order relief cannot be met¹⁴. RG 49 sets out ASIC's policy on granting relief, and indicates that ASIC may provide individual relief where the following policy objectives are met:

- the scheme supports the interdependence between the employer and the employees for their long term mutual benefit;
- there are adequate protections for participants in the scheme, including appropriate disclosure and pricing information for the products offered; and
- the objective of the offer is not fundraising.

14 ASIC publishes regular public reports outlining its decisions on applications for relief. ASIC also publishes a copy of relief instruments it issues in the ASIC Gazette. Copies of ASIC's public reports and gazettes are available at www.asic.gov.au.

Table 1: Overview of ASIC Class Order relief

	ASIC Class Order for UNLISTED companies CO 14/1001	ASIC Class Order for LISTED companies CO 14/1000
Eligible Employees	<ul style="list-style-type: none"> • Full or part-time employees • Directors (incl. non-executive) • Contractors or casual employees (working at least 40 per cent of a comparable full-time position) • Prospective eligible employees 	<ul style="list-style-type: none"> • Full or part-time employees • Directors (incl. non-executive) • Contractors or casual employees (working at least 40 per cent of a comparable full-time position) • Prospective eligible employees
Financial products that can be offered	<ul style="list-style-type: none"> • Fully paid voting ordinary shares • Units in or options over fully paid voting ordinary shares • Incentive rights to receive ordinary shares or a cash amount, or some combination of both. 	<ul style="list-style-type: none"> • Fully paid shares • Depository interests • Fully paid units in registered managed investment schemes • Fully paid stapled securities • Options over, units in and incentive rights in relation to any of the above
Limit on total number of financial products offered	An aggregate of up to 20 per cent of the issued capital of the company over a 3 year period	An aggregate of up to 5 per cent of the issued capital of the company over a 3 year period
Limit on value per offer	Up to \$5,000 per employee per year	No limit
Number of offers or employees	No limit – but effectively limited by the 20 per cent of issued capital limit	No limit – but effectively limited by the 5 per cent of issued capital limit
Maximum amount to be paid by employee	No more than nominal monetary consideration. If more than nominal consideration is payable on the exercise of options or units, then an expert valuation must be provided.	No more than nominal monetary consideration if the product being offered (that is, options or rights) is not able to be traded on an eligible financial market
Structures that can be used to make offers	Trusts (but not contribution plans or loan arrangements)	Trusts, contribution plans and certain types of loan arrangements
Minimum disclosure requirements	<p>An offer document including a copy or summary of the terms of the ESS, general information on the risks of acquiring products under the ESS, a general risk warning on the value of the products and a warning about general advice.</p> <p>The offer document must be accompanied by a copy of the annual report (including financial statements), a director’s solvency resolution and a valuation resolution (including an explanation of the methodology used by the directors).</p> <p>If the ESS involves a trust, a copy or summary of the trust deed.</p>	<p>An offer document including a copy or summary of the terms of the ESS, general information on the risks of acquiring products under the ESS, and a warning about general advice.</p> <p>If the ESS involves a trust, contribution plan or loan arrangements, a copy or summary of the relevant arrangements (for example, trust deed or terms of the contribution plan).</p>

Limitations of the current regulatory framework

Complex and fragmented

While the current regulatory framework provides a range of exemptions to facilitate ESS offers, these exemptions are complex and fragmented, increasing the time and cost associated with offering ESSs.

It may be difficult for employers to understand how the various statutory exemptions and ASIC relief work, given the relief is located across the both the Corporations Act and ASIC class orders. The differing scopes and conditions associated with the exemptions and ASIC relief adds to the legal complexity.

In addition, many small businesses have limited digitalisation of their systems and processes and their capacity to keep track of compliance with regulatory requirements is more limited.

Too restrictive

While the ASIC class orders provide relief to minimise the compliance burden for ESS offers, some stakeholders may consider the conditions of this relief to be overly restrictive.

Anecdotally, we understand that some of the conditions of the ASIC Class Orders, particularly the \$5,000 limit per employee, the inability to utilise contribution plans or the requirement to obtain an independent valuation in certain circumstances, may constrain a company from making ESS offers. In some cases, companies have sought individual relief from ASIC to make an ESS offer in excess of the \$5,000 limit, which also increases the time and cost burden for companies.

Public disclosure of commercially sensitive information

Some stakeholder feedback has indicated that the disclosure obligations under the law can discourage small businesses from implementing an ESS because it may result in the public release of commercially sensitive information.

While there is currently an exemption from the public access requirement for disclosure documents lodged with ASIC, this exemption only applies to eligible ESS offers by start-ups businesses (that are eligible for ESS taxation concessions)¹⁵. There may be other small businesses that wish to make ESS offers that do not have the benefit of this exemption.

15 See subsection 1274(2AA).

Options for reform

The Government's proposals to simplify and expand the regulatory exemptions for ESSs include:

- consolidating the statutory exemptions from disclosure, licensing, advertising, anti-hawking, managed investment scheme and on-sale obligations under the Corporations Act and ASIC class order relief in [CO 14/1000] and [CO 14/1001] and simplifying the requirements of these exemptions;
- increasing the value limit of financial products that unlisted companies can offer in a 12 month period from \$5,000 per employee to \$10,000 per employee;
- expanding the relief for unlisted companies to cover contribution plans, where an employee can make a monetary contribution to acquire eligible financial products through an ESS; and
- allowing small companies to make ESS offers under a lodged disclosure document without publicly disclosing commercially sensitive financial information, unless they are otherwise obligated to do so.

The aim of these proposals is to make the regulatory framework less complex, reducing the time and cost burden for small businesses offering an ESS.

The proposals also seek to maintain the rationale underpinning the relief provided by the ASIC class orders - in that they are designed to facilitate ESSs that aim to support the interdependence between the employer and the employees for their long term mutual benefit, where a minimum level of information is provided to employees to help them decide whether to accept an ESS offer and where the objective of the ESS is not fundraising.

Noting that the proposed reforms are focused on making it easier for small businesses to attract and motivate staff through making it easier to access ESSs, the proposals in this paper are mostly targeted at unlisted companies. However, we recognise that some listed companies may be 'start-ups' or small in size and scale or that listed companies may similarly benefit from the proposed reforms. As such, a separate question has been included on possible reforms to assist listed companies, including whether the relief available for listed companies should also be consolidated, simplified or expanded.

Consolidating and simplifying existing exemptions and ASIC relief

While the current regulatory framework provides a range of exemptions that enable offers of financial products under an ESS, these exemptions are complex and fragmented across the Corporations Act and ASIC class orders. In addition the definition of ESS offers under the Corporations Act for the statutory exemptions does not align with the broader scope of ESSs covered by the ASIC class orders.

This legal complexity may result in increased legal costs for companies, which may discourage employers from offering an ESS. Consolidating the exemptions and ASIC relief may make it easier and less time consuming for businesses to understand and comply with the law.

A variety of options exist for simplifying the existing legislative regime. The definition of 'eligible ESS' under the statutory exemptions could be simplified and expanded to align with the broader category of ESSs eligible for relief under the ASIC class orders. The ASIC class order relief for disclosure,

licensing, advertising, hawking, managed investment scheme and on-sale obligations could be moved into the Corporations Act and consolidated with the existing statutory exemptions for licensing and hawking, to provide users with one complete set of obligations for ease of compliance.

It is proposed that ASIC would continue to have powers to grant individual relief from the disclosure, licensing and other obligations in the Corporations Act, consistent with the current regime.

Questions

- 1.1 Do you support consolidating and simplifying the statutory exemptions and ASIC Class Order [CO 14/1001] in the Corporations Act?
- 1.2 Does the complexity of the current regulatory framework for ESSs create significant difficulties for businesses looking to offer an ESS?
- 1.3 Would there be significant benefits or risks for business in consolidating and simplifying the current regulatory regime?
- 1.4 Would compliance be significantly easier if the obligations applying to ESSs were all contained in the Corporations Act?
- 1.5 Are there significant advantages or disadvantages in using ASIC class orders as opposed to primary legislation to regulate ESSs?
- 1.6 Are there any requirements or conditions of the ASIC class order that should be removed or amended as part of the consolidation?
- 1.7 Should ASIC be given an additional power to determine that a company should not be permitted to rely on a statutory exemption for an ESS?

Increasing the offer cap per employee

Currently unlisted companies seeking to make ESS offers without a disclosure document, in reliance on ASIC class order relief, can make offers up to \$5,000 in value per employee over a 12 month period. This cap is imposed to reduce an employee's risk, given it is difficult to establish a reliable market price for an unlisted company's shares and there is no regulated disclosure document. Even where there is no monetary consideration for the shares, there is consideration and risk, because ESS offers will be one element of a wider remuneration arrangement.

Some stakeholders have expressed concern about the relatively high administration costs that are created with small shareholders and have indicated that the \$5,000 limit may constrain their ability to offer an ESS.

One option is to increase the current \$5,000 limit to \$10,000 per employee. This would increase the shareholding per employee, and reduce per employee administrative costs associated with offering ESSs.

While increasing the value limit increases the potential risk for employees, the current condition for the offering company to provide a prescribed minimum level of disclosure to employees¹⁶ would be retained, or could be modified as appropriate while ensuring an adequate level of disclosure is maintained to offset any increased risk associated with increasing the employee limit.

Consideration would also be given to whether the other disclosure requirements and protections in the ASIC class order (for example, the requirement to provide an independent valuation in certain

16 As set out in Table 1.

circumstances) continue to be appropriate or whether they should be modified or simplified, in light of the proposed increase to the employee cap.

The proposed \$10,000 per employee limit is also consistent with the retail investor limits that apply under the crowd-sourced equity funding (CSEF) regime, which applies to start-ups and small to medium sized companies raising funds from the public. The disclosure requirements for CSEF offers are similar to those under the ASIC class order relief for unlisted companies.

Questions

- 2.1 Do you support increasing the offer cap per employee?
- 2.2 What are the benefits or risks of increasing the employee offer cap?
- 2.3 Is a \$10,000 limit per employee per year appropriate or is a greater increase appropriate?
- 2.4 Should senior managers (within the meaning of s9 of the Corporations Act) be excluded from this cap?
- 2.5 Is the level of disclosure currently required by the ASIC class order for unlisted companies sufficient to address any risk associated with an increased employee cap? Is any additional disclosure or protection necessary or desirable?
- 2.6 Are there any significant advantages or cost savings for business as a result of an increased cap per employee? Please provide details.

Facilitating the use of contribution plans

Some ESSs may include a contribution plan, where an employee makes a monetary contribution that is then used to acquire financial products offered under the scheme. Contributions may be made from either the employee's remuneration, whether from before-tax funds (salary sacrifice arrangements) or after-tax funds or private funds.

Currently unlisted companies seeking to make ESS offers without a disclosure document, in reliance on ASIC class order relief, cannot utilise contribution plans in connection with these offers. This restriction is designed to protect employees of unlisted companies, given the increased risk of providing monetary consideration to acquire financial products in the absence of a reliable market price and regulated disclosure document.

There may be benefits to both employees and employers through the use of a contribution plan in connection with an ESS. A contribution plan can act as a mechanism to streamline the process and reduce the costs for employers and employees of acquiring financial products through an ESS. A contribution plan generally does not create additional complexity that warrants greater consumer protection, however there is an increased financial risk for employees where a monetary contribution is made.

One option to enable the cost and ease of use benefits to be realised is to allow contributions plans to be offered to employees to help them participate in an ESS of unlisted companies. Given this will involve a monetary contribution by an employee, additional protections may be warranted. Such protections could include, for example, capping the monetary contribution at a \$10,000 per employee per year (consistent with the employee cap, noted above) or requiring an independent valuation to be provided to employees where a contribution plan is offered or the \$10,000 cap is exceeded (this is similar to the requirement in the ASIC class order for a valuation document to be provided to employees in circumstances where an employee contributes more than nominal consideration on the exercise of options or units).

Questions

- 3.1** Do you support contribution plans being able to be used to fund the acquisition of financial products for an ESS of unlisted companies?
- 3.2** What are the benefits or risks of allowing unlisted companies to offer contribution plans as part of their ESS?
- 3.3** Are any additional protections necessary for employees participating in contribution plans? For example, capping monetary contributions at \$10,000 per employee per year or requiring an independent valuation where a contribution plan is offered or the \$10,000 cap is exceeded. Please provide details.
- 3.4** Are there any significant advantages or cost savings for business as a result of allowing contribution plans?

Expanding the exemption from public access to disclosure documents

The costs associated with preparing disclosure documents and the public disclosure of commercially sensitive information (such as financial information) in lodged disclosure documents have previously been raised by stakeholders as barriers to offering an ESS.

The existing exemption from the requirement for disclosure documents lodged with ASIC to be made publicly available is currently only available for certain eligible ESS offers (within the meaning of the *Income Tax Assessment Act 1997 (Cth)*) made by 'start-ups' (being unlisted companies that are no more than 10 years old and with annual revenue of less than \$50 million)¹⁷.

The definition of ESS offers under income tax law is narrower than, and does not align with, the Corporations Act definition of 'eligible ESSs' or the scope of ESSs covered by the ASIC class orders. This narrower definition limits the application of this public access exemption, which has been underutilised since it was introduced in 2017.

One option is to expand the current exemption so that it applies to a broader range of companies (small companies, not just start-ups) and a broader range of ESS offers. This would enable small businesses offering an ESS to make offers under a disclosure document (where they cannot rely on the consolidated and expanded exemptions), which would still need to be lodged with ASIC but would not be accessible by the public. This will enable commercially sensitive financial information to be kept private, to minimise or eliminate any loss of competitive advantage for these businesses.

The expanded exemption would only apply to small companies, as large companies generally already have financial reporting obligations under the Corporations Act requiring them to lodge audited financial reports with ASIC, which are made available to the public.

Further details of this reform option are set out in Table 2 below.

¹⁷ See subsection 1274(2AA) of the Corporations Act.

Table 2: Proposal to expand the exemption from public access to disclosure documents lodged with ASIC for ESS offers

Current criteria for Corporations Act exemption from public access	Proposed expansion
Offers under an 'employee share scheme' of 'ESS interests' as defined in the <i>Income Tax Assessment Act 1997 (Cth)</i>). This covers offers of shares or rights to acquire shares only.	Expand to include all eligible financial products prescribed in the current ASIC class order for unlisted companies being: fully paid ordinary shares; units in the fully paid ordinary shares; options to acquire an ordinary share; and incentive rights in relation to ordinary shares.
Employees (including past or prospective) of the company or its subsidiaries	All 'eligible participants' prescribed in the current unlisted company ASIC class order, being full-time and part-time employees, executive and non-executive directors, contractors and casual employees who work an equivalent of 40 per cent or more of a comparable full-time position.
Offers must be made no more than 10 years since the company's incorporation	Remove as the restriction on turnover limit serves a similar purpose of restricting the exemption to small businesses. The time since incorporation is not an accurate indicator of a business's size (it is more indicative of a 'start-up').
In relation to an employee's employment with the issuing company or a subsidiary	No change. The ASIC class order for unlisted companies has not been extended to apply to associated bodies corporate or related bodies corporate that are not wholly owned subsidiaries. This is because the extent of control and interdependence is less in these instances, and would apply in situations that are less transparent than those that apply to listed bodies.
Applies to unlisted businesses only	No change. Listed entities are subject to public disclosure obligations due to the market listing rules they must comply with.
Eligible businesses must have a turnover of no more than \$50 million	No change. This criterion is intended to restrict the exemption to small businesses where information is more commercially sensitive (and therefore, the commercial benefit may outweigh the regulatory detriment, being decreased transparency).

Questions

- 4.1** Do you support expanding the types of ESS eligible for the exemption from public access to disclosure documents?
- 4.2** What are the benefits or risks of expanding the types of ESS eligible for this exemption?
- 4.3** Are there any other changes to the scope or availability of this exemption that are necessary or desirable? Please provide details.

Listed companies

Companies listed on an approved financial market¹⁸ must comply with the listing rules of that market as well as a number of enhanced corporate governance and reporting obligations under the Corporations Act.

Due to listed companies' enhanced disclosure and reporting requirements and the availability of reliable information about the price of the company's securities traded on the market, employees of listed companies will generally be well informed about the value and affairs of the company. As such, the conditions of ASIC's class order relief for listed companies offering an ESS are less onerous than those imposed on unlisted companies.

While, the Government has not received stakeholder feedback about the relief currently available for listed companies making ESS offers being overly restrictive or complex, there are likely to be benefits from streamlining in the law the exemptions for listed companies when offering an ESS.

Consolidating the class order relief in the Corporations Act should reduce legal complexity in interpreting the law and reduce the disincentive small businesses face in using an ESS. This would also provide unlisted and listed companies with the same benefits flowing from consolidation and simplification of the regulatory framework for ESSs.

Questions

- 5.1 Do you support simplifying and consolidating the relief for listed companies in the Corporations Act?
- 5.2 What are the potential benefits or risks of consolidating the relief for listed companies in the Corporations Act?
- 5.3 Are there any requirements or conditions of the ASIC class order that should be removed or expanded as part of the consolidation? If so, please explain why.
- 5.4 Are there any other barriers or costs for listed companies offering ESSs?

Other reforms

Questions

- 6.1 Are there any other regulatory barriers to small businesses offering ESSs?
- 6.2 Are there any other reforms to the regulatory framework for ESSs that would further facilitate or reduce costs for small businesses offering an ESS?

¹⁸ Australian financial markets that list companies include the Australian Securities Exchange (ASX), National Stock Exchange of Australia (NSX) and the Sydney Stock Exchange (SSX). A list of prescribed financial markets in Australia is contained in reg 1.0.02A of the Corporations Regulations 2001. ASIC also keeps an updated list on its website.