HWL EBSWORTH
LAWYERS

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Ms Nathania Nero
Senior Policy Adviser
Consumer and Corporations Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: ESSreforms@treasury.gov.au

Dear Ms Nero

Submission in response to Treasury Consultation Paper - Employee Share Schemes

HWL Ebsworth Lawyers (**HWLE**) is grateful for the opportunity to provide comments on the Government's proposed reforms to the employee share scheme framework, as set out in the Treasury's Employee Share Schemes Consultation Paper dated April 2019 (**Paper**).

HWLE regularly advises clients regarding employee share schemes, including in relation to the application of the current regulatory ESS framework to the making of offers under such schemes. HWLE is broadly supportive of each of the measures proposed in the Paper, on the basis that such reforms will reduce costs and provide greater flexibility for clients looking to implement employee share schemes, which are in turn beneficial given they support interdependence between the employer and its employees for their long-term mutual benefit by aligning their respective interests.

Our specific comments on each of the measures proposed are as follows:

1. Consolidating and simplifying existing exemptions and ASIC relief

HWLE broadly supports the proposal to consolidate and simplify the current statutory exemptions and ASIC Class Order relief into the *Corporations Act 2001* (Cth) (**Corporations Act**) to create a single framework for compliance.

We agree that the current regulatory framework is complex and fragmented, and adds to the costs for businesses looking to establish and make offers under employee share schemes.

In this regard, we are of the strong view that the single framework should apply to both shares (and options over shares) and performance rights. Currently, if the

Level 21, Westpac House, 91 King William Street, Adelaide SA 5000 Australia
GPO Box 286, Adelaide SA 5001 Australia
Telephone +61 8 8205 0800
Facsimile 1300 464 135 (Australia) +61 2 8507 6585 (International)
hwlebsworth.com.au
ABN 37 246 549 189

scheme is an incentive rights scheme, the disclosure requirements of Part 7.9 (rather than Chapter 6D) of the Corporations Act apply (as ASIC's (in our view incorrect) view is that incentive rights are generally to be treated as derivatives and not securities covered by Chapter 6D). This causes various complexities including, as highlighted below, that the senior manager disclosure exemption in Part 7.9 does not extend to offers of derivatives

However, we would need to consider the detailed drafting of the proposed amendments to the Corporations Act in order to provide further feedback.

2. Increasing the offer cap per employee

We agree with the proposal to increase the $5,000 monetary limit for unlisted companies. In our view, the current conditions in ASIC Class Order 14/1001 regarding the disclosure of risks, financial information and solvency and valuation resolutions (which presumably would be incorporated into the streamlined framework discussed above) provide sufficient protection for employees notwithstanding the proposal to increase the value limit.

We also strongly support the proposal to exclude senior managers from this cap. In our experience, unlisted clients frequently wish to use employee share schemes to reward and incentivise senior managers. This includes making not an immaterial proportion of their remuneration package contingent on meeting certain performance criteria. Under the current regulatory framework, our unlisted clients are unable to structure their employee share schemes to achieve this aim without seeking specific relief from ASIC as:

(a) the $5,000 monetary cap prevents them from relying on the disclosure and other relief in ASIC Class Order 14/1001;

(b) although certain statutory disclosure exemptions may apply under Chapter 6D of the Corporations Act to offers made to senior managers, corresponding exemptions to the licensing, hawking and advertising provisions in Chapter 7 may not apply; and

(c) if the scheme is an incentive rights scheme, the disclosure requirements of Part 7.9 (rather than Chapter 6D) of the Corporations Act apply and the senior manager disclosure exemption in Part 7.9 does not extend to offers of derivatives.

We understand that the intention of the monetary cap in ASIC Class Order 14/1001 is to reduce employees' risk given the difficulty of establishing a reliable market price for an unlisted company. However, in our view senior managers (as defined in section 9 of the Corporations Act) do not require such protection as they are sufficiently close to the operation of the business, and experienced enough to assess the risk of acquiring an interest in the company.

3. Facilitating the use of contribution plans

We strongly support expanding the relief for unlisted companies to allow them to use contribution plans.

In our view, the current protections in ASIC Class Order 14/1001 (including the monetary cap (as increased) and the disclosure requirements) are sufficient protect employees from the financial risk associated with providing monetary consideration to acquire shares in an unlisted company.

4. Expanding the exemption from public access to disclosure documents

We broadly support the expansion of the existing exemption as set out in Table 2 of the Paper so that a broader range of complies can lodge disclosure documents without those documents being made publicly available.

In our view, basing the availability of the exemption on the size of the business (determined by turn-over) rather than the time since its incorporation is a sensible reform. We also support the proposed expansion of the types of interests that may be acquired to align with the interests currently covered by ASIC Class Order 14/1001.

For completeness, however, we note that in our experience this exemption is rarely relied upon. Our unlisted clients generally structure their employee share schemes so as to avoid the requirement to prepare and lodge a disclosure document, whether by relying on the current statutory exemptions, the relief provided in ASIC Class Order 14/1001 or specific relief granted by ASIC.

We thank you again for the opportunity to provide feedback on the proposed reforms. Please do not hesitate to contact the writers should you have any queries or wish to discuss any issues raised in this submission.

Yours faithfully

Jamie Restas
Partner
HWL Ebsworth Lawyers

+61 8 8205 0581
jrestas@hwle.com.au

Cam Steele
Special Counsel
HWL Ebsworth Lawyers

+61 8 8205 0562
csteele@hwle.com.au