MTAA Submission to the Treasury Consultation Paper on Employee Share Schemes (ESS)

Motor Trades Association of Australia Limited

PO Box 6298

Kingston ACT 2913
(02) 52008239

18 May 2019

PO Box 6298
Kingston ACT 2604
Phone: 02 6233 0800
Fax: 02 6273 9399
Email: admin@amif.com.au

Contents

PO Box 6298
Kingston ACT 2604
Phone: 02 6233 0800
Fax: 02 6273 9399
Email: admin@amif.com.au

1. Introduction

1.1. The Motor Trades Association of Australia Limited (MTAA) appreciates the opportunity to provide this *MTAA Submission to the Treasury Consultation Paper on Employee Share Schemes (ESS)*.

1.2. MTAA is a federation of various states and territory motor trades associations and automobile chambers of commerce. MTAA and members represents, and is the national voice of, the 69,365 retail motor trades businesses which employ over 379,000 Australians and contribute around $37.1 billion to the Australian economy equating to about 2.2% of GDP. MTAA member constituents include automotive retail, service, maintenance, repair, dismantling recycling and associated businesses that provide essential services to a growing Australian fleet of vehicles fast approaching 20 million by 2020. The vast majority of these businesses are small and family owned and operated enterprises.

2. Employee Share Schemes (ESS)

Introduction

2.1. As stated on page 1 of the *Treasury Consultation Paper on Employee Share Schemes* dated April 2019:

> "The current regulatory framework for ESS offers is complex and fragmented, which may discourage businesses – particularly small businesses – from offering an ESS. On 13 November 2018, the Government announced proposals to simplify and expand the current regulatory exemptions that apply to an [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. These changes build on improvements the Government has previously made to make ESSs more attractive to small business."

2.2. MTAA always supports any measures to "help reduce the time and cost burden for small businesses". As MTAA reminds on page 17 of *Keeping Australia Moving*, which is a recent public release of a MTAA position paper for the 2019 Federal election:

> "Australia has become a costly place for automotive small businesses to hire, retain and manage staff. It is also one of the most heavily regulated labour markets in the world, consistently ranking poorly on flexibility and responsiveness when compared internationally."

Benefits of an ESS

2.3. Treasury highlights on page 3 of the *Consultation Paper* the potential benefits for companies including small-to-medium sized enterprises (SMEs):

> "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

PO Box 6298
Kingston ACT 2604
Phone: 02 6233 0800
Fax: 02 6273 9399
Email: admin@amif.com.au

> 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. [C]ompanies with an ESS have: lower employee churn; higher sales; higher labour productivity; and higher value added growth."

2.4. SMEs in the auto and other sectors of the economy can certainly use any (legal and ethical) competitive advantage they can get, especially given the plethora of (legal but unethical) government advantages on offer to big business. As stated by MTAA on page 7 of *Keeping Australia Moving*:

> "[T]he Automotive sector [is] one of the most substantial and important industries to the Australian economy. Put simply without an automotive sector, Australia stops. The majority of automotive businesses are small and family owned enterprises that require sound policies and meaningful reform to allow them to grow and employ more people. Rising energy costs, skills shortages, onerous red-tape, over-taxation and outdated workplace regulations are just some examples of issues working against the competitiveness and productivity of automotive businesses."

2.5. For example, far more often than not, government red-tape (as well as environmental and climate green-tape and UN and international blue-tape) intentionally or unintentionally provides an unfair competitive advantage to big business over SMEs including in auto.

3. Current Regulatory Framework

Introduction

3.1. The Treasury *Consultation Paper* explains on page 4 that:

> "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."

3.2. If legally and economically feasible, MTAA would like ESS to be available to other types of business entities as well as corporations (listed and unlisted). In general, people conduct their economic lives in way that maximises their profit (monetary and/or psychic). Profit is an all-encompassing concept of benefits over costs which includes such diverse targets as a person's income or a desire to help another. Such persons try to maximise their profit in their capacity as both consumers and participants in the production process. If they are involved in the production process (as entrepreneurs, managers or workers) then they have a variety of options open to them in how they best organise their business activities. These options are invariably governed by the legal framework around them. Broadly speaking, an entrepreneur can: A) go it alone as a sole trader; B) become involved with two or more persons in a partnership; or C) form a company with two or more other persons. Each option has attached to it benefits and costs that result from the powers and privileges, and duties and obligations, that are granted and imposed by the law.

PO Box 6298
Kingston ACT 2604
Phone: 02 6233 0800
Fax: 02 6273 9399
Email: admin@amif.com.au

Disclosure & Exemptions

3.3. A balance will always need to be struck between the clarity and uniformity of once-size-fits-all regulatory solutions and the innovation and flexibility of bespoke market solutions. The onus of proof should always be on the former rather than the latter. This is in large part because as Friedrich von Hayek said in his 1974 Nobel Prize Lecture on *The Pretence of Knowledge*:

> "Into the determination of prices and wages there will enter the effects of particular information possessed by every one of the participants in the market process … the knowledge of particular facts [that] will be utilized which exists only dispersed among uncounted persons, than any one person can possess."

Licensing & Exemptions

3.4. A balance will always need to be struck between the clarity and uniformity of once-size-fits-all licensing solutions and the innovation and flexibility of bespoke standards solutions. The onus of proof should always be on the former rather than the latter. This is in large part because of the following point. This point is the one MTAA quoted on page 5 of the Treasury submission on *Enforceability of Financial Services Industry Codes* from the PC in a study entitled *Business Licences and Regulation Reform*:

> "Some common explanations for the use of business licensing are, broadly: to account for spillover effects or externalities; to address information failures; to restrict competition and enhance market power; and paternalism. The first two involve correcting market failures. The third is a potential outcome of licensing and may or may not be an objective. The last may often be an implicit motive for licensing. … It is sometimes argued that the purpose of licensing suppliers of goods and services is to secure a minimum level of quality or safety to protect some consumers who are gullible, preoccupied or careless or who miscalculate. However, these potential problems may be addressed through means other than licensing…which may carry less danger of unnecessarily entrenching economic power in the hands of licensed suppliers."

Advertising / Hawking & Exemptions

3.5. SMEs in auto and other sectors are more likely than big businesses to rely on third party assistance for ESS including shopping around with the aid of advertisements. Shopping around is one form of economic transaction cost, which advertising may help reduce especially for resource-constrained SMEs. Page 40 of *Appendix A* of the Brisbane Airport Corporation's 2011 *Submission to the Productivity Commission's Inquiry into Economic Regulation of Airport Services* expanded on the concept of transaction costs:

> "From the customers point of view these costs are mainly driven by the time and effort of searching for alternatives, along with the agreement (formal and informal) in exchanging their patronage and payment for these services. From a service provider's point of view these costs are mainly driven by: the degree to which a transaction is supported by transaction-specific investments (ie asset specificity); the uncertainty involved in the transaction; and the frequency or recurrence of the

PO Box 6298
Kingston ACT 2604
Phone: 02 6233 0800
Fax: 02 6273 9399
Email: admin@amif.com.au

> transactions. Asset specificity, in turn, is driven by the costs of: selecting and securing a location (ie site-specific investments); securing machinery, equipment and plant (ie physical asset-specific investments); and education, training and development of human resources (ie human asset-specific investments)."

Tax Concessions

3.6. The Treasury *Consultation Paper* notes on page 7 that:

> "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 tax."

3.7. Regarding tax reform, MTAA made the following observation in 2015 on page 3 of a document for the Treasury *Tax White Paper Task Force* entitled *Initial Submission on the Tax Reform Discussion Paper*:

> "A consequence of simplifying the tax system must be streamlined administration with reduced costs. The benefits of compliance cost reductions will translate into reduced business costs thereby increasing profitability and consequently increasing the tax revenue base. In addition, operators will be encouraged to establish new small business and enterprises further broadening the tax revenue base."

Class Order Relief

3.8. Page 7 of the Treasury *Consultation Paper* says:

> "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'. The ASIC class orders reduce the compliance burden for companies offering ESS by providing conditional relief from [certain] provisions of the *Corporations Act*. … In the case of unlisted companies, [o]ffers must be made for no more than nominal monetary consideration and, in aggregate, must not exceed $5,000 in value per employee per year."

3.9. Page 8 of the Treasury *Consultation Paper* adds:

> "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 met…and…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."

3.10. The **first-best policy** is for a legislative class exemption for small business based on a sound (once-and-for-all) definition of small business. The **second-best policy** is for ASIC class relief for small business also based on a sound definition of small business. The **third-best policy** is for ASIC

PO Box 6298
Kingston ACT 2604
Phone: 02 6233 0800
Fax: 02 6273 9399
Email: admin@amif.com.au

individual relief for in-need SMEs on a case-by-case basis. Rather than having a fixed (one-size-fits-all) dollar value like $5,000 or $10,000, a percentage approach like 5% or 10% of (all or only employee-related) revenues, expenses, assets, liabilities or cash flows would be more efficient and fair for small businesses (in the auto and other sectors) given that they vary so greatly in terms of size, nature and circumstances.

3.11. Regarding defining small business, MTAA's thoughts on pages 17 to 18 of *Keeping Australia Moving* are that:

> "Small business is defined differently by policy makers, legislators and regulators, taking into account the type of business, the laws and regulations they fall under, and the focus laws being administered. The [ABS], [ATO], Fair Work Australia, Regulators such as ASIC and ACCC and other portfolios all work to differing definitions which MTAA argues increases Red Tape. This has been further complicated with definitions within definitions to meet further legislative requirements."

Limitations of the Current Regulatory Framework

3.12. **MTAA largely agrees with the three major limitations outlined on Page 15 of the *Discussion Paper* and has provided relevant thoughts on these in the previous pages of this submission.**

3.13. Regarding red-tape in general, MTAA's position on page 30 of *Keeping Australia Moving* is that:

> "The retail sale, registration and repair of motor vehicles in Australia are made difficult by complex and inconsistent state-based legislation and regulation. Industry and consumers face confusing and varied red-tape requirements. ... In the era of the digital marketplace, regulation related to the retail automotive industry should be simplified. This would create a level playing field across states and territories and reduce costs for consumers and automotive businesses. … The next Australian Government should use COAG to identify areas for red-tape reduction and discuss opportunities to better align state-based legislation and regulation – improving business competitiveness and consumer certainty…across Australia."

4. Options for Reform

4.1. Page 15 of the Treasury *Consultation Paper* sets out the five major options for reform under the headings reproduced below at the end of this paragraph. Treasury states that: "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. … 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."

> "**Consolidating and simplifying existing exemptions and ASIC relief**"
>
> "**Increasing the offer cap per employee**"
>
> "**Facilitating the use of contribution plans**"
>
> "**Expanding the exemption from public access to disclosure documents**"
>
> "**Listed companies**"

PO Box 6298
Kingston ACT 2604
Phone: 02 6233 0800
Fax: 02 6273 9399
Email: admin@amif.com.au

4.2. MTAA supports these refrorm options subject to the relevant points made in the previous pages of this submission.

5. Conclusion

5.1. **Please accept this *MTAA Submission to the Treasury Consultation Paper on Employee Share Schemes (ESS)*.**

5.2. For any questions or comments regarding this submission document, at first instance contact Mr Darren Nelson. Darren is Director Policy & Industry Relations at MTAA in Canberra, and can be phoned on 0479 001 040 or emailed on Darren.Nelson@mtaa.com.au. MTAA look forward to any further Treasury consultation on this topic, or any other related topics, be that through submission, correspondence or discussion.

END OF SUBMISSION