Remuneration Strategies Group

30 April 2019

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Consumer and Corporations Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Nathania,

Employee Share Schemes (ESS)

We refer to the ESS publication released by The Treasury on 3 April 2019 and we provide feedback and commentary as set out below.

It is encouraging for our company (RSG) to have the Government announce proposals to improve the ability of small (and large) businesses to offer ESS's to help them attract, retain and motivate employees and grow their business.

We agree that the current regulatory framework is complex and fragmented and discourages some (probably all) business from offering ESS's.

It is also encouraging for RSG to have unlisted companies doubling the annual value of eligible financial products from $5,000 per employee to $10,000 per employee.

It is very encouraging for RSG to expand the relief afforded unlisted bodies by ASIC Class Order CO 14/1001 expanded to include employee contribution plans. This enables the employee to receive an interest free loan with which to make a contribution equal to the market value of the eligible product (i.e. employer shares and/or options).

The loan can be repaid by the employee when they sell their shares. By so doing, the employee will not have any taxable discount on the acquisition of the shares and will have established a capital gains tax (CGT) cost base.

This will ensure that the employees will only pay tax on their shares when they sell their shares. The loan repayment in their set-off and paid as ordinary assessable income (i.e. which is subject to the PAYG provisions for its employees).

Of course, under the CGT provisions, they will only pay tax on 50% of the profits made on those share sales.

RSG markets the Employee Remuneration Trust, under which participants (i.e. employees and contractors) only pay tax (CGT) on their shares when they sell their shares.

They will be provided with an interest free loan, which is only to be repaid when they sell their shares.

These loans will receive the benefits of the FBT "otherwise deductible rule" under section 19 (1) (b) FBTAA 97, which will reduce the FBT taxable value to a zero amount.

Introduction

In the Introduction of the ESS publication, the Government states that it intends consolidating and simplifying the statutory exemptions and ASIC class order relief provided under the Corporations ACT 2001 (Corporations Act)

The Government also states that it intends to expand he relief for limited companies, to cover contribution plans, where the employee makes a monetary contribution to acquire financial products.

Statutory Disclosure Exemption

The Government notes in its publication, that there are current disclosure exemptions for:

- "small scale offers" falling under subsection 708 (1) and 1012E (2) of the Corporations Act to 20 people or less being employees or executive directors for amounts of $2 million or less over a 12-month period; and
- the investor is a "senior manager" in a company and it extends to their spouse, parent, child, brother or sister (refer subsection 708 (12) of the Corporations Act).

Contractors and non-executive directors are not covered by this exemption.

The exemptions only apply to financial products company fully paid ordinary shares, options and units in those shares.

Other types of financial products (such as derivatives, including performance rights) are not covered.

AFS License

The exemption from the requirements to hold an AFS license "in connection with "an offer of financial products under eligible ESS extends to:

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

ASIC Class Order Relief

As the Government's publication points out, in addition to the statutory exemptions available under the Corporations Act, ASIC has also provided class order relief for offers of shares to employees under CO 14/1000 for listed companies and CO 14/1001 for unlisted companies.

However, as also pointed out in the Government's publication, the relief under CO 14/1001 for unlisted companies does not extend to contribution-based loan plans offered to their employees.

Limitations of the Current Relief Framework

The Government concludes that the current relief framework is "complex and fragmented".

It also concludes that relief conditions are overly restrictive and that the $5,000 relief limit should be doubled to $10,000 per annum per employee.

The Government also proposes to simplify and expand the regulatory exemptions for ESS's and extend the relief for unlisted companies to cover contribution plans, where the employees make a monetary contribution to acquire their shares.

RSG firmly supports their proposal to improve the regulatory exemptions for ESS's.

Questions put by the Government

In the publication the Government puts the following questions and requests comment from the public. RSG reproduces the questions below and provides a brief response for each question.

1.1 Do you support consolidating and simplifying the statutory exemptions and ASIC Class Order [CO 14/1001] in the Corporations Act?
Yes.

1.2 Does the complexity of the current regulatory framework for ESS's create significant difficulties for businesses looking to offer an ESS?
Yes.

1.3 Would there be significant benefits or risks for business in consolidating and simplifying the current regulatory regime?
Yes.

1.4 Would compliance be significantly easier if the obligations applying ESS's were all contained in the Corporation Act?
Yes.

1.5 Are there significant advantages or disadvantages in using ASIC class orders as opposed to primary legislation to regulate ESS's?
No.

1.6 Are there any requirements or conditions of the ASIC class order that should be removed or amended as part of the consolidation?
Yes.

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?
No.

2.1 Do you support increasing the offer cap per employee?
Yes.

2.2 What are the benefits or risks of increasing the employee offer cap?
Much more effective.

2.3 Is a $10,000 limit per employee per year appropriate or is a greater increase appropriate?
Yes, but a greater increase would be appropriate.

2.4 Should senior managers (within the meaning of s9 of the Corporations Act) be excluded from this cap?
Yes.

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?
Yes. No additional disclosure or protection would be 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.
Yes.

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?
Yes.

3.2 What are the benefits or risks of allowing unlisted companies to offer contribution plans as part of their ESS?
No, tax upfront or acquisition of shares and the growth in value is taxed under the CGT provisions.

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.
No.

3.4 Are there any significant advantages or cost savings for business as a result of allowing contribution plans?
Yes, they are the most effective plans. They are usually out outside of the Division 83A ITAA 97 taxing provisions.

4.1 Do you support expanding the types of ESS eligible for the exemption from public access to disclosure documents?
Yes.

4.2 What are the benefits or risks of expanding the types of ESS eligible for this exemption?
There is benefit in extending the eligibility for ESS's, with low risks.

4.3 Are there any other changes to the scope or availability of this exemption that are necessary or desirable? Please provide details.
It should extend the exemption to loan based, contribution plans such as the RSG's Employee Remuneration Trust.

5.1 Do you support simplifying and consolidating the relief for listed companies in the Corporations Act?
Yes.

5.2 What are the potential benefits or risks of consolidating the relief for listed companies in the Corporations Act?
Very beneficial as it will support ESS's for listed companies.

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.
No.

5.4 Are there any other barriers or costs for listed companies offering ESSs?
No.

6.1 Are there any other regulatory barriers to small businesses offering ESSs?
No.

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?
No.

Thank you for this opportunity to provide input into the Government's ESS Consultation Paper.

Please do not hesitate to contact us if you require further input or explanation of the comments provided.

We have been designing, implementing and administering effective ESS's since 1988.

Yours sincerely,
Remuneration Strategies Group

Gary Fitton | Director