
TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2022

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investments Commission

Chapter 1: Regulatory relief for businesses creating employee share schemes

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Outline of chapter

- 1.1 This Chapter provides an overview of the amendments in Schedule 1 to the Bill. These amendments make it easier for businesses to create employee share schemes.
- 1.2 References to the Act are to the *Corporations Act 2001*.

Context of amendments

- 1.3 An employee share scheme is an arrangement put in place by a business to reward people who contribute to the business, namely directors, employees and service providers (hereafter referred to as ‘participants’), with shares or other interests in the business in exchange for their labour.
- 1.4 Employee share schemes are often used by start-ups and cash poor businesses to attract employees when the business would be unable to compete with the salary and wages offered by larger and more established businesses.
- 1.5 Participants are generally offered the ability to join an employee share scheme for a business when they start their employment with the business or reach a new level of seniority with the business.
- 1.6 Employee share schemes come in many different forms. Employee share schemes:
- can be offered in addition to salary and wages;
 - can be offered to all or only certain groups of people participating in the business (such as senior managers and directors);
 - can be in shares or other interests in the business (such as options or units in a trust);
 - can involve trust arrangements where a trustee holds the shares on behalf of the participants; and
 - can require the participants to make payments or take out loans to participate in the scheme.
- 1.7 Offers under employee share schemes can take many different forms. Offers can be:
- created by separate offer rounds where a business offers interests to participants, with a deadline for those participants to accept the offer; or
 - permanently open to allow people who participate in the business to join the scheme at any time.
- 1.8 The Act contains a variety of rules for people who issue financial products and securities. These rules include a requirement to obtain an Australian financial services licence and restrictions on hawking and advertising and disclosure requirements.
- 1.9 Financial products and securities offered as a part of certain employee share schemes are excluded from some of these requirements under the Act.
- 1.10 Further exclusions are made in ASIC class orders CO 14/1000 and CO 14/1001. Class Order 14/1000 applies to listed bodies corporate and Class Order 14/1001 applies to unlisted bodies corporate.

- 1.11 As part of the Government's JobMaker Plan, the Government committed to reducing red tape for business, supporting job creation and competitive remuneration, and incentivising employers and employees to work together to contribute to a strong and sustained post COVID-19 economic recovery.
- 1.12 Going forward, businesses offering employee share schemes, where participants do not have to pay or borrow to participate in an employee share scheme will not have to consider or comply with any requirements under the Act in respect of the employee share scheme.
- 1.13 These reforms build on the:
- Government's previous announcement on 13 November 2018 that it would streamline the exclusions under the Act and ASIC class orders to make it easier for businesses to offer employee share schemes;
 - a consultation paper released on 3 April 2019 outlining possible approaches; and
 - changes announced as part of the 2020 - 2021 Budget.

Summary of new law

- 1.14 If an employee share scheme receives relief under the Bill, the standard regulatory requirements for operating a business offering shares and financial products to retail clients under the Act will not apply. This will mean:
- a scheme can be operated without an Australian financial services licence;
 - general financial advice can be provided in relation to the scheme without an Australian financial services licence;
 - the restrictions on advertising and hawking securities and financial products in the Act do not apply to the scheme; and
 - the disclosure requirements under the Act do not apply to offers under the scheme.
- 1.15 In simple terms, an employee share scheme can receive relief under the Bill if:
- the interests issued, sold or transferred to participants under the scheme fall within certain eligible categories of interests (for example – shares or options);
 - the participants in the scheme are directors, employees or service providers; or
 - if the scheme requires payment to participate:
 - certain disclosure documents are provided with the offer;
 - if the scheme has an associated contribution plan, loan or trust, the contribution plan, loan or trust meet certain requirements;

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- the total numbers of products issued under the scheme over the previous three years does not exceed the specified percentage of the body's issued capital (5% for listed bodies or 20% for unlisted body corporates); and
 - for an unlisted body corporate, all participants are limited to outlay a monetary cap of \$30,000 per year (which can be accrued for unexercised options over a 5-year period, up to a maximum of \$150,000), plus 70% of dividends and 70% of cash bonuses.

1.16 Generally, for an employee share scheme to receive relief under the Bill the interests issued, sold or transferred under the scheme to participants must be:

- for listed body corporates, the interest must be able to be traded on a financial market, and be one of the below types of interests;
 - a fully paid share;
 - a beneficial interest in a fully paid share;
 - a stapled security; or
 - a unit in, an incentive right in relation to, or an option to acquire one of the above interests;
- for unlisted body corporates:
 - a fully paid ordinary share; or
 - a unit in, an incentive right in relation to, or an option to acquire a fully paid ordinary share;
- for registered schemes:
 - an interest in the registered scheme that is tradable on a financial market; or
 - a unit in, an incentive right in relation to, or an option to acquire an interest in, the registered scheme that is tradable on a financial market.

1.17 Employee share schemes which require participants to pay for an interest to participate will need to provide disclosure in relation to offers under the scheme. The disclosure requirements are streamlined versions of the general requirements under the Act.

1.18 The disclosure documents required to be provided are:

- for a listed body corporate or registered scheme – certain warnings;
- for an unlisted body corporate:
 - certain warnings;
 - certain financial information about the body corporate;
 - a valuation of the interests; and

– a statement that the company is solvent.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

<i>New law</i>	<i>Current law</i>
If an employee share scheme does not require payment to participant, it is generally not required to comply with the Act.	Employee share schemes that do not require payment to participate are required to comply with a variety of obligations under the Act.
If an employee share scheme requires payment to participate, the scheme must comply with a streamlined set of obligations under the Act.	An employee share scheme must comply with a streamlined set of obligations under the class order, regardless of whether it requires payment to participate.
All people who provide services to a business are eligible to participate in an employee share scheme.	Only employees, directors and certain independent contractors are able to participate in an employee share scheme.
<i>For unlisted schemes</i>	
An employee share scheme can only allow participants outlay up to \$30,000 on offers over a 12-month period (\$150,000 accrued over 5 years for unexercised options), plus 70% of any dividends and 70% of cash bonuses received in that year.	An employee share scheme can only receive relief if each participant has received less than \$5,000 worth of interests from the scheme over the previous 12 months.
Relief is available to listed or unlisted entities even if the employee share scheme has an associated loan or contribution plan which requires participants pay for the interest.	Relief is only available to listed entities if the employee share scheme has an associated loan or contribution plan which requires participants pay for the interest.
<i>For listed schemes</i>	
An employee share scheme can receive regulatory relief regardless of how long the interests offered under the employee share scheme have been traded.	An employee share scheme can only receive regulatory relief if the interests offered under the scheme have been traded for 3 months before the offer is made.
An employee share scheme can receive regulatory relief regardless of whether the interests offered under the employee share scheme had been suspended from trading.	An employee share scheme can only receive relief if the interests offered have been not been suspended for more than 5 days from trading over the previous 12 months.
<i>For both listed and unlisted schemes</i>	
An employee share scheme can receive regulatory relief without disclosure, where those offers would otherwise not require	An employee share scheme can only receive regulatory relief with disclosure, even if the scheme would otherwise not require

<i>New law</i>	<i>Current law</i>
disclosure under the Act (for example offers to senior managers).	disclosure under the Act (for example offers to senior managers).

Detailed explanation of new law

Regulatory relief for employee share schemes

- 1.19 If an employee share scheme does not require payment to participate:
- the scheme can be operated without an Australian financial services licence;
 - general financial advice can be provided in relation to the scheme without an Australian financial services licence;
 - the restrictions on advertising and hawking securities and financial products in the Act do not apply to the scheme;
 - the design and distribution obligations do not apply to the issue, sale or transfer of interests under the scheme; and
 - no disclosure requirements apply to offers under the scheme.

[Schedule 1, item 31, sections 1100P and 1100Y]

- 1.20 If an employee share scheme requires payment to participate and the scheme meets the requirements in the Bill:
- the scheme can be operated without an Australian financial services licence;
 - general financial advice can be provided in relation to the scheme without an Australian financial services licence;
 - the restrictions on advertising and hawking securities and financial products in the Act do not apply to the scheme;
 - the design and distribution obligations do not apply to the issue, sale or transfer of interests under the scheme; and
 - a streamlined set of disclosure requirements apply to the scheme.

[Schedule 1, item 31, sections 1100Q, 1100R and 1100Y]

- 1.21 This relief also applies in relation to any contribution plan or loan which is related to the employee share scheme.

[Schedule 1, items 7 and 31, section 9 definition of ‘managed investment scheme’ and section 1100Y]

- 1.22 The relief applies to any person associated with the employee share scheme such as the:

- the body which issues, sells or transfers the interests under the scheme;
- an associated body corporate;
- a trustee which is engaged to manage the employee share scheme; or
- a third-party custodian who holds the interests.

[Schedule 1, item 31, section 1100Y]

- 1.23 This will allow businesses to run their own employee share schemes, without having the same regulatory obligations of financial services providers. This is appropriate because these regulatory obligations are designed for arm's length transactions to consumers, unlike an employee share scheme, where there is a pre-existing employment relationship between the business and participant.
- 1.24 An employer that is a national system employer is still required to comply with the requirements of the *Fair Work Act 2009* in relation to their employees. This includes paying wages in line with any applicable modern award or enterprise agreement, or the National Minimum Wage Order for award and agreement free employees. Any employee share scheme offer must be in addition to these wages, which must be paid in full and in money.

Requirements for an employee share scheme

- 1.25 An offer under an employee share scheme which does not require payment to participate will be entitled to relief if:
- the interests issued, sold or transferred to participants under the scheme fall within certain categories of eligible interests (generally shares and interests in shares);
 - the participants in the scheme are directors, employees or service providers;
 - any trustee used to manage the scheme meets certain requirements; and
 - the offer is expressed to be made under Division 1A of Part 7.12 of the Act.

[Schedule 1, item 31, section 1100P]

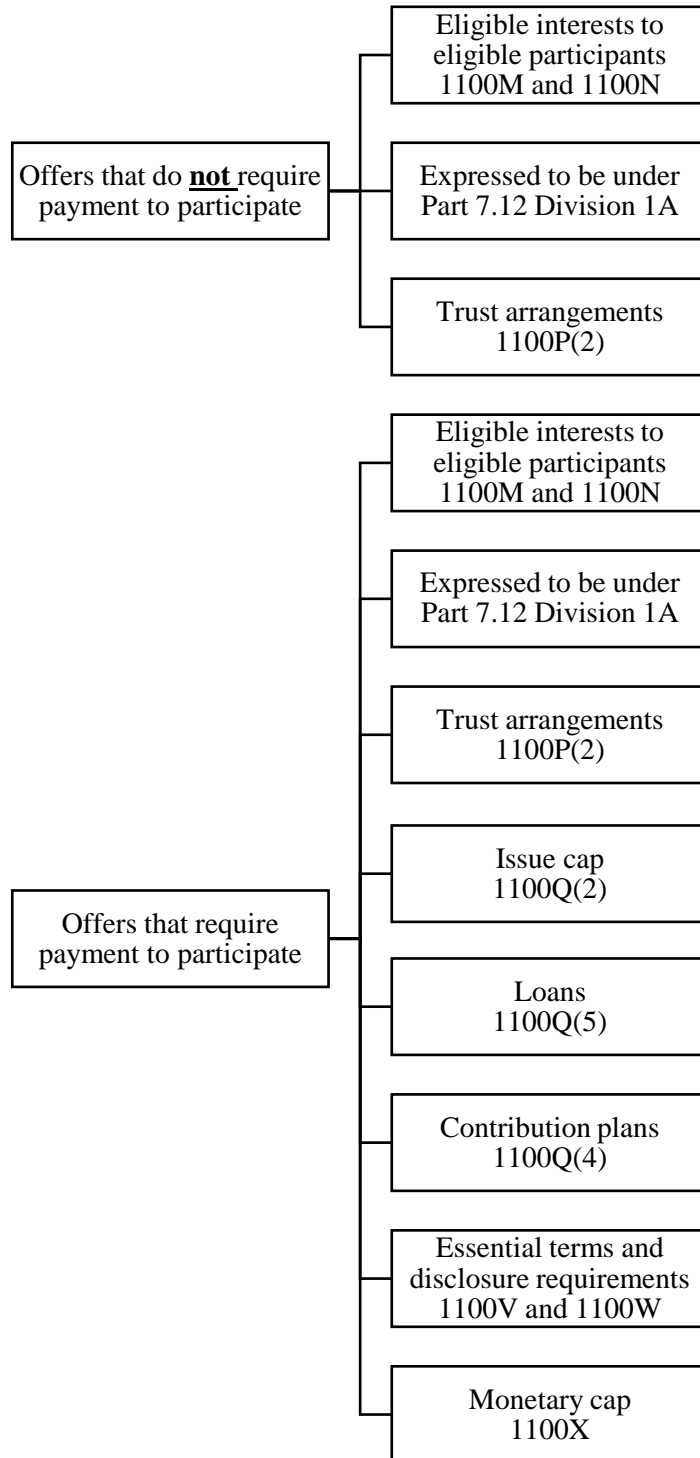
- 1.26 An offer under an employee share scheme which requires payment to participate will be entitled to relief if:
- the interests issued, sold or transferred to participants under the scheme fall within certain categories of eligible interests (generally shares and interests in shares);
 - the participants in the scheme are directors, employees or service providers;
 - any trustee used to manage the scheme meets certain requirements;

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- the offer is expressed to be made under Part 7.12 Division 1A of the Act;
 - if the scheme has an associated contribution plan or loan, the contribution plan or loan meet certain requirements;
 - the offer requires certain disclosure documents be provided;
 - the total numbers of products issued under the scheme over the previous three years does not exceed the specified percentage of the body's issued capital (5% for a listed body or 20% for an unlisted body corporate); and
 - for an unlisted body corporate no participant outlays more than \$30,000 worth of interest under the scheme in a 12-month period, and in the case of options, cumulative over 5 years to a maximum total of \$150,000.

[Schedule 1, item 31, section 1100Q and 1100R]

Diagram 1.1 Requirements for an offer under an employee share scheme

The below diagram sets out the requirements in order to qualify for regulatory relief for employee share scheme offers that do and do not require payment to participate.



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- 1.27 An offer under an employee share scheme, which would not require disclosure under the Act due to pre-existing exemptions from the disclosure rules (such as offers to senior managers, sophisticated investors or small-scale offerings) will receive relief under the Bill if:
- the interests issued, sold or transferred to participants under the scheme fall within certain categories of eligible interests (generally shares and interests in shares); and
 - the participants in the scheme are directors, employees or service providers.

[Schedule 1, item 31, section 1100S]

Participants in an employee share scheme

- 1.28 For an individual to participate in an employee share scheme they must be a director, employee or service provider of the body corporate that is issuing interests in an employee share scheme. These people are referred to in the Bill as *ESS participants*.

[Schedule 1, item 6, item 31, section 9, the definition of ‘ESS participant’ and subsections 1100M(1) and (2)]

- 1.29 A *primary participant* is an employee, director, or person who provides services to:
- the body corporate issuing the interests under the employee share scheme or an associated body corporate; or
 - in the case of an employee share scheme by a listed registered scheme – the responsible entity of the listed registered scheme or an associated body corporate.

[Schedule 1, item 6, item 31, section 9, the definition of ‘ESS participant’ and paragraph 1100M(1)(a)]

- 1.30 An employee includes a casual, part time or full-time employee. Directors include executive and non-executive directors as well as salaried and non-salaried directors.
- 1.31 A person can also participate in the employee share scheme if they are about to become one of the above eligible categories (e.g. a person who has received an offer to become an employee of the body issuing interests under the employee share scheme).

[Schedule 1, item 31, subparagraph 1100M(1)(a)(iii)]

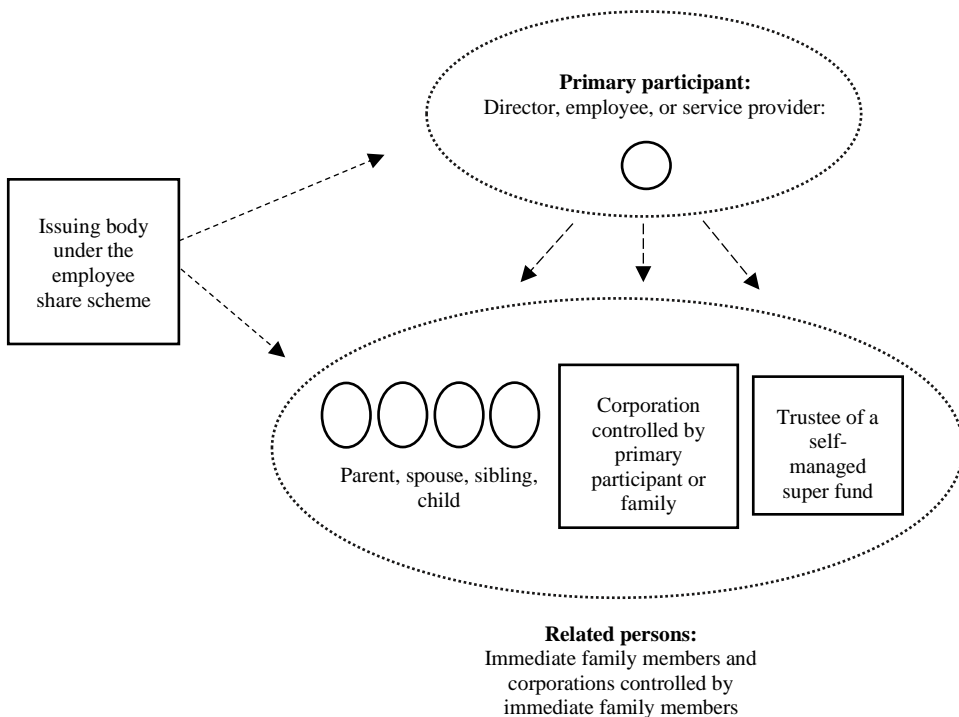
- 1.32 Certain people who are related to the primary participant can also participate in an employee share scheme. These are referred to in the Bill as *related persons*. They are:
- a spouse, parent, child or sibling of the primary participant;
 - a body corporate which is controlled by the primary participant or their spouse, parent, child or sibling; or

- a body corporate that is the trustee of the primary participant’s self-managed super fund.

[Schedule 1, item 31, paragraph 1100M(1)(b)]

Diagram 1.2 Primary participants and related participants

The below diagram represents the two kinds of participants in an employee share scheme – primary participants and related participants. Primary participants are an employee, director, or other service provider to a business. Related participants are certain family members of the primary participant and bodies corporate controlled by certain family members of a primary participant. Related participants can also participate in an employee share scheme through their relationship with the primary participant.



Interests in an employee share scheme

- 1.33 For an employee share scheme to receive relief under the Bill, the interests offered to participants must fall within certain eligible category of interests, referred to in the Bill as **ESS interests**.
- 1.34 The ESS interests for a listed body corporate are:
- a fully paid share which is tradable on an eligible financial market;
 - a beneficial interest in a fully paid share which is tradable on an eligible financial market;

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- a fully paid share which can be converted into a beneficial interest (or vice versa) without charge or for a nominal fee, where either the beneficial interest or share is tradable on an eligible financial market;
 - a unit in, an incentive right, or an option to acquire, any of the above interests; or
 - a fully paid stapled security which is tradable on an eligible financial market consisting of any of the above interests, or an interest in a listed registered scheme.

[Schedule 1, item 31, subsection 1100N(1)]

1.35 The ESS interests for an unlisted body corporate are:

- a fully paid ordinary share; or
- a unit in, an incentive right, or an option to acquire, a fully paid share.

[Schedule 1, item 31, subsection 1100N(2)]

1.36 The ESS interests for a listed registered scheme are:

- an interest in a listed registered scheme which is tradable on an eligible financial market; or
- a unit in, an incentive right, or an option to acquire, an interest in a listed registered scheme.

[Schedule 1, item 31, subsection 1100N(3)]

1.37 An ***incentive right*** is a conditional right to be issued a security or financial product or a right to be paid a cash amount where the right is contingent on:

- the price or value of the security or financial product;
- the change in the price or value of the security or financial product;
- the amount of dividends or distributions paid in respect of the security or financial product; or
- the change in the amount of dividends or distributions paid in respect of the security or financial product.

[Schedule 1, item 31, subsection 1100N(4)]

1.38 A body corporate or registered scheme is a listed body corporate or registered scheme if it is listed on a financial market operated by an Australian market licensee or a foreign financial market determined by ASIC by legislative instrument.

[Schedule 1, item 31, sections 1100K and 1100L]

Trustees managing an employee share scheme

- 1.39 A business can engage a trustee to manage the interests issued under an employee share scheme on their behalf, and still obtain relief under the Bill, if the trust deed meets certain requirements.
- 1.40 An employee share scheme with a trustee is only able to receive an interest in an employee share scheme if the trust deed states:
- the activities of the trustee are limited to managing only the employee share scheme – by either transferring interests under the scheme to participants or issuing units in the interests to participants;
 - the trustee keeps written records on the administration of the trust;
 - the trustee does not charge any fees or charges for administering the trust, other than reasonable disbursements charged to the business;
 - if the trustee is an associated body corporate of the body corporate issuing the interests or the responsible entity of the listed registered scheme – that the trustee only exercise voting rights in accordance with the instructions of the participants or consistently with their fiduciary duties; and
 - the trustee will not hold more than:
 - for a listed body corporate or listed registered scheme—5% of the fully paid ordinary shares of the body corporate or interests in the listed registered scheme; or
 - for a body corporate that is not listed—20% of the fully paid ordinary shares of the body corporate.

[Schedule 1, item 31, subsections 1100P(2) and (3) and subsection 1100Q(1)(d)]

- 1.41 The requirements are generally designed to minimise financial risk for the ESS participants, ensure the trustee acts in the best interests of the ESS participants and minimise the possibility of conflicts of interest.
- 1.42 If an offer that is made by a trustee who manages an employee share scheme requires a participant to make a payment to participate, the offer document must include:
- the trust deed; or
 - a summary of the trust deed and a statement that the full deed will be made available upon the participant's request.

[Schedule 1, item 31, paragraph 1100T(2)(h)]

- 1.43 If a participant has only been provided a summary of the terms of the trust deed for an offer under an employee share scheme and the participant then requests the full terms, those full terms must be provided within 10 days.
- [Schedule 1, item 31, paragraph 1100V(1)(h)]***

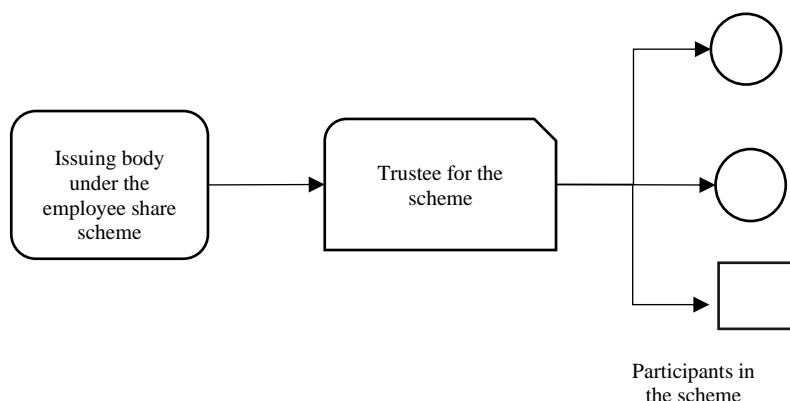
1.44 Offers of eligible interests to participants under an employee share scheme which would not ordinarily require disclosure are not required to comply with the trust requirements, such as offers to senior managers or small-scale offerings.

[Schedule 1, item 31, section 1100S]

1.45 This requirement applies regardless of whether the offer is made by a listed body corporate, listed registered scheme or unlisted body corporate.

Diagram 1.3 Trustees under employee share schemes

The below diagram demonstrates the relationship between the body corporate issuing interests under the employee share scheme, a trustee holding those interests and the participants in the scheme. A body corporate generally issues interests in an employee share scheme directly to a trustee, who holds the interests on behalf of participants. The trustee can subsequently issue the interests to the participants, as new participants join the businesses. The trustee can also issue units over interests it holds to participants, and still hold legal title to the interests in the scheme.



Employee share scheme contribution plans

1.46 Employee share schemes can have contribution plans associated with the scheme to allow participants to purchase the interests and still receive regulatory relief under the Bill.

1.47 An employee share scheme contribution plan enables employees to pay for an interest over time. The employee only receives the interest after fully paying off the interest under the plan. A contribution plan contrasts with a loan arrangement, where the employee receives full ownership of the interest up front and repays the loan over time.

1.48 Contribution plans generally require the participants to make repayments or allow for deductions to be made from their salary or wages.

1.49 An employee share scheme can be eligible for relief under this Bill even if it has an associated contribution plan. However, the contribution plan must meet certain requirements (referred to in the Bill as an *ESS contribution plan*).

- 1.50 For an employee share scheme with an associated contribution plan to be eligible for relief, the contribution plan must:
- have contributions held on trust in an account with an Australian authorised deposit-taking institution which is solely kept for that purpose;
 - allow the participant to discontinue from the deductions or payments at any time;
 - if the participant decides to discontinue, within 45 days any deductions from salary or wages must cease and all deductions or payments, not yet exchanged for interests, must be repaid to the participant; and
 - before participating in the plan, the participant must agree in writing to the terms of the plan.

[Schedule 1, items 6 and 31, section 9 definition of ‘ESS contribution plan’ and subsection 1100Q(4)]

- 1.51 If an offer is made with a related ESS contribution plan, each participant receiving the offer must be provided with:
- the terms of the contribution plan; or
 - a summary of the terms and a statement that the full terms will be made available upon the participant’s request.

[Schedule 1, item 31, paragraph 1100T(2)(g)]

- 1.52 If a participant has only been provided a summary of the terms of the contribution plan for an offer under an employee share scheme and the participant then requests the full terms, those full terms must be provided within 10 days.

[Schedule 1, item 31, paragraph 1100V(1)(g)]

- 1.53 The obligation for payment for a contribution plan provided in associated with an employee share scheme must fall on the individual who receives the interests under the scheme, whether they be the primary participant or a related participant. ***[Schedule 1, item 31, subsection 1100Q(4)]***

- 1.54 Offers of eligible interests to participants under an employee share scheme which would not ordinarily require disclosure are not required to comply with the contribution plan requirements, such as offers to senior managers or small-scale offerings.

[Schedule 1, item 31, section 1100S]

- 1.55 This requirement applies regardless of whether the offer is made by a listed body corporate, listed registered scheme or unlisted body corporate.

- 1.56 The existence of a settlement period between paying for an interest and receiving that interest does not automatically create a contribution plan and trigger the additional regulatory obligations associated with contribution plans.

Employee share scheme loans

- 1.57 An employee share scheme with an associated loan can be eligible for relief if the loan meets certain requirements.
- 1.58 A loan in relation to an employee share scheme allows the participant to take full ownership of their interest immediately, as opposed to a contribution plan, where a participant acquires their interests over time. The participant can then pay for their interests over time, while receiving full ownership of their ESS interest upfront along with any of the rights associated with that interests (for instance, voting rights attached to shares).
- 1.59 For an employee share scheme with an associated loan to be eligible for relief:
- the loan cannot be provided to an existing shareholder;
 - the loan must have no interest or fees payable; and
 - in the event of non-payment of the loan, the rights against the participant, are limited to forfeiture of the interests acquired using the loan.

[Schedule 1, item 31, subsection 1100Q(5)]

- 1.60 These conditions are designed to avoid employees suffering losses due to interest payments or loss of security for the loans other than the interest itself. The requirement that a loan is not provided to an existing shareholder is designed to prevent a tax liability under Division 7A of the *Income Tax Assessment Act 1936*.
- 1.61 If an offer is made with a related loan each participant receiving the offer must be provided with:
- the terms of the loan; or
 - a summary of the terms and a statement that the full terms will be made available upon the participant's request.

[Schedule 1, item 31, paragraph 1100T(2)(g)]

- 1.62 If a participant has only been provided a summary of the terms of the loan for an offer under an employee share scheme and the participant then requests the full terms, those full terms must be provided within 10 days.

[Schedule 1, item 31, paragraph 1100V(1)(g)]

- 1.63 The obligation for repayment for a loan provided in association with an employee share scheme must fall on the individual who receives the interests under the scheme, whether they be the primary participant or a related participant. ***[Schedule 1, item 31, paragraph 1100Q(5)(b)]***
- 1.64 This requirement applies regardless of whether the offer is made by a listed body corporate, listed registered scheme or unlisted body corporate.
- 1.65 Offers of eligible interests to participants under an employee share scheme which would not ordinarily require disclosure, such as offers to senior managers or small-scale offerings, are not required to comply with the loan

requirements.

[Schedule 1, item 31, section 1100S]

The issue cap

- 1.66 An offer from an employee share scheme which requires payment to participate can only be eligible for relief if it complies with the issue cap.
[Schedule 1, item 31, subsections 1100Q(1) to (2)]
- 1.67 Employee share schemes are only intended to allow businesses to attract and keep employees. They are not intended to allow a body corporate to raise funds. If a body corporate wishes to raise funds it must use other means (for example, issuing shares under a prospectus).
- 1.68 The issue cap limits the proportion of its share capital a body corporate can issue under an employee share scheme to ensure the offer is genuinely for attracting and retaining employees.
- 1.69 The issue cap also limits the proportion of shares that may be subsequently issued under interests made as part of an offer under an employee share schemes (for example, an offer of options under an employee share schemes which can be exercised and result in shares being issued 12 months later).
- 1.70 An offer by an employee share scheme complies with the issue cap if the sum of the two below numbers do not exceed the specified percentage of interests actually issued by the body corporate:
- the number of shares that may be issued, directly or indirectly, as a result of the offer; and
 - the number of shares that have been issued or could be issued as a result of previous offers under an employee share scheme made during the previous three years.
- 1.71 The specified percentage is 5% for a listed body corporate and 20% for an unlisted body corporate.
[Schedule 1, item 31, subsection 1100Q(2)]
- 1.72 The issue cap does not apply to interests issued under an employee share scheme where payment is not required to participate.
[Schedule 1, item 31, section 1100P]
- 1.73 Offers of eligible interests to participants under an employee share scheme which would not ordinarily require disclosure are not required to comply with the issue cap, such as offers to senior managers or small-scale offerings.
[Schedule 1, item 31, section 1100S]
- 1.74 Treasury is consulting on the necessity of the issue cap and any alternative regulatory mechanisms that could be used to minimise the risk of fund raising through employee share schemes.

The monetary cap

- 1.75 For offers of interests in an unlisted company under an employee share scheme which require payment to receive relief under the Bill, the offer must comply with the monetary cap.
- 1.76 Put simply, the monetary cap only allows a participant to outlay up to \$30,000 on offers over a 12-month period, plus 70% of any dividends and 70% of cash bonuses received in that year.
[Schedule 1, item 31, subsection 1100X(5)]
- 1.77 The first 12-month period applies from the day when the participant accepts the offer under an employee share scheme.
[Schedule 1, item 31, subsection 1100X(1)(a)]

Application of the cap

- 1.78 The monetary cap applies to the total amount of expenditure by a participant under offers from an employee share scheme. The monetary cap does not just apply to an individual offer. If multiple offers are made to a participant, which if accepted would breach the monetary cap, the terms of offers would need to be drafted so payments can only be made up to the monetary cap.
[Schedule 1, item 31, subsection 1100X(1)]
- 1.79 The cap is used up as the participant expends money or takes out loans on offers. This includes current offers, for example purchasing shares upfront, as well as exercising rights to purchase shares under earlier offers of options. This includes payments made directly or payments made using a contribution plan.
[Schedule 1, item 31, subsection 1100X(4)(a)]
- 1.80 Repayments made under an employee share scheme loan do not use up the monetary cap. Only the principal of the loan is relevant for assessing the monetary cap.
- 1.81 The monetary cap is per person directly entitled. Should offers be made to a primary participant and a related participant, then the cap applies in relation to payments made by both the primary participant and the related participant.
[Schedule 1, item 31, subsection 1100X(3)]

Dividends and cash bonuses

- 1.82 The monetary cap for a participant in each year will increase by 70% of the value of any dividends the participant received from interests in the issuing company issuing the employee share scheme interest and 70% of any cash bonuses they receive from their employment in that company in that year.
[Schedule 1, item 31, paragraphs 1100X(5)(b) and (c)]
- 1.83 This will allow more senior individuals receiving more remuneration in the company to have a higher cap for a particular year.

- 1.84 Cash bonuses and dividends are also additional payments, the loss of which should not significantly affect an individual's take home pay, hence there is less financial risk to participants.

Accrual of the cap for option plans

- 1.85 The cap can be accrued in circumstances of an option plan, in respect of unexercised options.
[Schedule 1, item 31, subsection 1100X(5)]
- 1.86 The amount accrued is the value of interests the participant has the right to purchase in that year under their option plan, which they have chosen to not purchase.
- 1.87 This will still be subject to the cap of \$30,000 per year and have a maximum cap of \$150,000 accrued over a 5-year period. The dividends and cash bonuses component of the cap cannot accrue.
- 1.88 The first 12-month period applies from the day when the participant accepts an options plan under an employee share scheme.
[Schedule 1, item 31, paragraph 1100X(1)(a)]
- 1.89 After the 5-year period, any unspent amounts can continue to be accrue (or 'roll over') to increase the monetary cap, however, any unspent monies under the cap from year one would no longer contribute to the cap in the 6th year.

Exemption from the cap – liquidity events

- 1.90 The monetary cap does not apply when there is a liquidity event.
[Schedule 1, item 31, paragraphs 1100X(4)(b) to (c)]
- 1.91 The exemption works in conjunction with the monetary cap. The monetary cap is applied up until a liquidity event occurs, which will result in the cap being lifted so that participants can purchase an unlimited amount of interests.
- 1.92 For the purposes of this Bill, a liquidity event means the point at which either:
- an unlisted company is listed on an official list of a financial market; or
[Schedule 1, item 31, subparagraphs 1100X(4)(b)(i) and (c)(i)]
 - there is an executed sale agreement to acquire interests, covering the participant's interests or underlying shares, open to acceptance by the participant or related person.
[Schedule 1, item 31, subparagraphs 1100X(4)(b)(ii) and (c)(ii)]
- 1.93 The intention behind this exemption is that there is limited financial risk in these types of offers where participants are not making out-of-pocket payments, and are instead, waiting for a liquidity event so that they are able to crystallise gains immediately.
- 1.94 In summary, the monetary cap for a particular participant in a particular year will be the sum of:
- \$30,000; and

- if there are unexercised options from previous 5 years, and amount equal to the price that would have been paid for those unexercised options; and
- 70% of the dividends from interests in the businesses the participant has received in that year; and
- 70% of the cash bonuses the participant has received in that year.

Diagram 1.4 Monetary cap

The below diagram shows how the monetary cap applies over 6 years, for both standard offers as well as options. In the case of options, it demonstrates how the cap is accrued over the 6 years.

Monetary Cap

Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
<\$30,000 +70% of dividends +70% of bonuses	<\$30,000 +70% of dividends +70% of bonuses	<\$30,000 +70% of dividends +70% of bonuses	<\$30,000 +70% of dividends +70% of bonuses	<\$30,000 +70% of dividends +70% of bonuses	<\$30,000 +70% of dividends +70% of bonuses

Monetary Cap for Options and Incentive plans

Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
<\$30,000 +70% of dividends +70% of bonuses	<\$30,000 +70% of dividends +70% of bonuses + < unexercised options from Y1	<\$30,000 +70% of dividends +70% of bonuses + < unexercised options from Y1, Y2	<\$30,000 +70% of dividends +70% of bonuses + < unexercised options from Y1, Y2, Y3	<\$30,000 +70% of dividends +70% of bonuses + < unexercised options from Y1, Y2, Y3, Y4	<\$30,000 +70% of dividends +70% of bonuses + < unexercised options from Y2, Y3, Y4, Y5

- 1.95 Offers of eligible interests to participants under an employee share scheme which would not ordinarily require disclosure are not required to comply with the monetary cap, such as offers to senior managers or small-scale offerings. *[Schedule 1, item 31, section 1100S]*

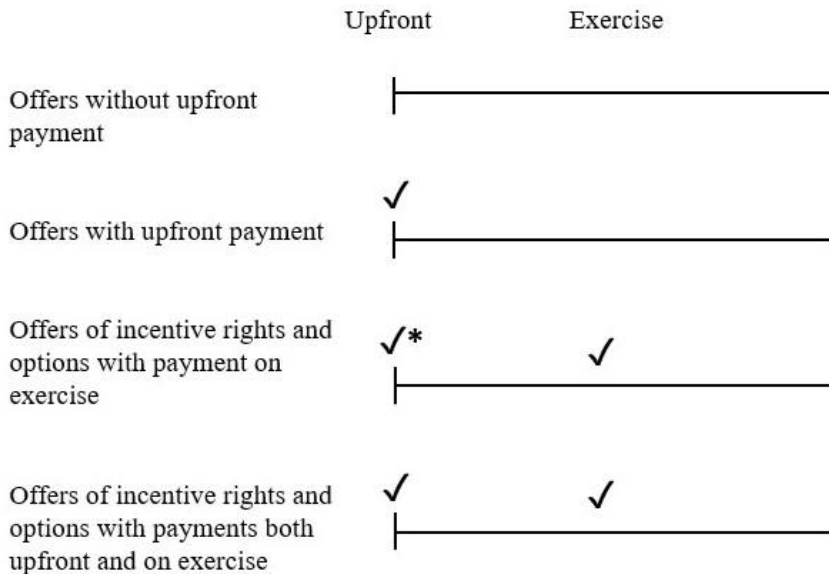
Disclosure under an employee share scheme

- 1.96 In order to ensure participants can make an informed choice to participate in an employee share scheme, the Bill requires that employers provide participants information in relation to the interests they receive.
- 1.97 These disclosure documents are less onerous than the existing disclosure requirements for shares and financial products issued to the general market (for example prospectuses and product disclosure statements under Chapter 6D and Part 7.9 of the Act).
- 1.98 Disclosure can be required at three different points in time in relation to an offer:

- upfront, before the interest is issued or sold in exchange for payment; and
- on vesting, before an option or incentive right can be exercised; and
- when participant request disclosure, at any point in time.

Diagram 1.5 Disclosure timing

The below diagram shows the timing requirements of disclosure documents. Disclosure requirements are indicated by a tick (✓) at the necessary points in time, either upfront when issuing the offer or at the point of exercising the offer.



* Offer document only

1.99 Different disclosure documents are required for different types of employee share schemes, in particular for listed and unlisted schemes. Different disclosure documents are also required depending on the interest under the scheme (for example, shares as opposed to options and incentive rights).

Disclosure for offers without payment

1.100 Offers that do not require payment to participate, do not require disclosure to be eligible for regulatory relief.

[Schedule 1, item 31, subsection 1100P(1) and section 1100S]

1.101 This only applies to offers where there is no payment required upfront, nor at any future stage, for the issue or transfer of ESS interests (such as under an option plan).

Disclosure for interests with payment upfront (not options)

1.102 Offers that require upfront payment must provide disclosure in accordance with the Bill.

[Schedule 1, item 31, subsection 1100Q(1)]

1.103 For an offer that requires payment upfront, 14 days before making an offer, the participant must be provided with:

- a set of warnings (referred to in the Bill as an *ESS offer document*);
- in addition, for an unlisted body corporate:
 - certain financial information about the body corporate;
 - a valuation of the interests;
 - a statement that the company is solvent; and
- if the offer is made with a related loan, employee share scheme disclosure documents in relation to the loan;
- if the offer is made with a related contribution plan, employee share scheme disclosure documents in relation to the contribution plan; and
- if the interests are to be held by a trustee for the participants, disclosure in relation to the trustee.

[Schedule 1, item 31, subsection 1100Q(1) and sections 1100T to 1100U]

1.104 A participant cannot acquire an ESS interest until 14 days after receiving the above documents. This mandates a waiting period ensuring a participant has time to consider their decision or seek additional legal or financial advice.

[Schedule 1, item 31, paragraph 1100V(1)(a)]

1.105 The documents must be updated within 60 days of any material or substantive changes occurring.

[Schedule 1, item 31, paragraph 1100V(1)(b)]

1.106 If the offer document included only a summary of the terms of the offer or of a loan, contribution plan or a trust deed then the body corporate or responsible entity must provide the participant with a copy of the full version if the participant requests it, within 10 business days.

[Schedule 1, item 31, paragraphs 1100V(1)(f) to (h)]

1.107 The offer document, any other applicable supporting information and the terms of offer must not include any misleading or deceptive statements.

[Schedule 1, item 31, paragraph 1100V(1)(c)]

1.108 There is an obligation on the certain people listed in the legislation (directors of the body, people named in the offer etc) to inform the body corporate or responsible entity of the employee share scheme during the application period, if they become aware of any misleading, deceptive, out of date, omitted or otherwise materially incorrect elements in the above documents.

[Schedule 1, item 31, paragraph 1100V(1)(d)]

- 1.109 If a participant suffers loss or damage from an out of date offer document or deceptive or misleading statement and omissions, then they can recover for their loss or damage from the following liable people:
- the body corporate or responsible entity making the offer;
 - each director of the body corporate or responsible entity making the offer;
 - a person named in any disclosure document with their consent as a proposed director of the body corporate or responsible entity of a listed registered scheme whose interests are being offered; and
 - in the case of misleading or deceptive statements or omissions only: a person named in the offer document, any supportive information under section 1100R or the terms of the offer with their consent, having made the misleading or deceptive statement or an omission or statement on which the misleading or deceptive statement or omission is based.
 - In the case of a failure to notify, the persons in the above three dot points who fail to notify the body corporate or responsible entity.

[Schedule 1, item 31, paragraph 1100V(1)(e) and subsection 1100V(2)]

- 1.110 Above persons may not be liable for such contravention if:
- the persons made all necessary enquiries that were reasonable in the circumstances and after doing so, believed on reasonable grounds that the statements were not misleading or deceptive; or
 - the person did not know that the statement was misleading or deceptive; or
 - if the person is a body corporate or a responsible entity of a listened registered scheme, relied on information from someone other than a director, employee or agent; or
 - if the person is an individual, relied on information from someone other than an employee or agent of the individual.

[Schedule 1, item 31, paragraph 1100V(3)]

ESS offer document

- 1.111 For a listed body corporate, the ESS offer document must:
- include the terms of the offer, or a summary of the terms of the offer with a statement that, on request, a copy of the full terms of the offer will be provided to the participant;
 - provide general information about the risks of acquiring and holding the interests being offered;
 - state that advice given in relation to the offer does not take into account the participants objectives, financial situation and needs;

-
- suggest that the participant obtain personal advice in relation to the offer;
 - explain how the participant may, from time to time, calculate the value of the interests;
 - state the application period during which participants may accept the ESS offer; and
 - draw the participant's attention to relevant disclosure documents produced in the previous 12 months.

[Schedule 1, item 31, section 1100T(2)]

1.112 The disclosure requirements for a listed body corporate or listed registered scheme are less onerous than those for an unlisted body corporate as the value of an ESS interest which is listed is easy to ascertain when compared to an unlisted body corporate.

Additional documents for an unlisted employee share scheme

1.113 For an unlisted body corporate, the ESS offer document must:

- include the terms of the offer, or a summary of the terms of the offer with a statement that, on request, a copy of the full terms of the offer will be provided to the participant;
- provide general information about the risks of acquiring and holding the interests being offered;
- state that advice given in relation to the offer does not take into account the participants objectives, financial situation and needs;
- suggest that the participant obtain personal advice in relation to the offer;
- explain how the participant may, from time to time, calculate the value of the interests;
- state the application period during which participants may accept the offer;
- state whether the financial information accompanying the offer has been audited;
- draw the participant's attention to relevant disclosure documents produced in the previous 12 months; and
- state that the ESS interest may not have any value and that the value of the interest will depend on future events that may not occur; and
- state that the participant may request disclosure documents, including full terms of offer, full trust deed, loan or plan terms and contribution plan terms at any point after receiving the offer.

[Schedule 1, item 31, sections 1100U and 1100T]

- 1.114 The financial information about an unlisted body corporate, which must be provided with an ESS offer to each participant is:
- if the body corporate must lodge a report for a financial year with ASIC under section 319 of the Act—a copy of the most recent report lodged with ASIC; or
 - if the body corporate is a registered foreign body corporate—a copy of the most recent balance sheet lodged with ASIC under section 601CK; or
 - a balance sheet and profit and loss statement prepared in compliance with the accounting standards.

[Schedule 1, item 31, subsection 1100U(2)]

- 1.115 A valuation can include:
- a valuation prepared consistently with section 960-412 of the *Income Tax Assessment Act 1997*.
[Schedule 1, item 31, paragraph 1100U(3)(a)]
 - a disclosure document for any other securities in the same class as the interest that are on offer at the same time and that have been lodged with ASIC.
[Schedule 1, item 31, paragraph 1100U(3)(b)]
 - a disclosure document for any financial products in the same class as the interest that are on offer at the same time.
[Schedule 1, item 31, paragraph 1100U(3)(c)]
 - a copy of an executed or draft agreement of any interests of the same class are to be acquired at arm's length terms by a third party who is not an associate of the person making the offer if the agreement specifies the amount of monetary consideration to be paid for an ESS interest in that class.
[Schedule 1, item 31, paragraphs 1100U(3)(d) and (e)]

- 1.116 A draft sale agreement can only be used if a sale agreement that is not materially different from the draft sale agreement is subsequently executed, otherwise the relief under the Bill will be revoked.
[Schedule 1, item 31, paragraph 1100W(2) and (3)(d) and section 1100ZA]

- 1.117 The policy intent is for a body corporate, where possible, to be able to use the same valuations that they make, to assist participants with determining their income tax liabilities.

Disclosure for option plans and incentive rights

- 1.118 Option plans and incentive rights in a body corporate that is not included on an official list of a financial market require two points of disclosure in order to receive relief under the Bill.
[Schedule 1, item 31, section 1100W]

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- 1.119 Option plans and incentive rights require disclosure upfront, regardless of whether acceptance of the offer requires payment or not. However, where there is no payment, the offer document is the only form of disclosure required upfront in this scenario. Options with both an upfront price and exercise price will require streamlined disclosure at both points.
[Schedule 1, item 31, paragraph 1100Q(1)(b)]
- 1.120 Additionally, before an option or incentive right can be exercised or an amount can be paid allowing the incentive right to vest, a valuation, financial statements, solvency statements must be provided 14 days prior.
[Schedule 1, item 31, paragraph 1100W(3)(a)]
- 1.121 Additionally, an employer must provide a valuation, financial statements, solvency statements within 30 days of a request of a participant before the options or incentive rights expire.
[Schedule 1, item 31, paragraph 1100W(3)(b) and (c)]
- 1.122 The requirement to comply with an employee request for streamlined disclosure is an integrity requirement to ensure that, if an employee share scheme simply refuses to provide disclosure (which would prevent any option or incentive right vesting) the employee is still entitled to disclosure and will be able to exercise their option or incentive right.
- 1.123 If the participant is given a draft sales agreement that complies with this Bill, then the participant cannot exercise the option or right until a sales agreement is executed that is not materially different from the draft.
[Schedule 1, item 31, paragraph 1100W(2) and (3)(d) and section 1100ZA]

Enforcement and regulatory powers

Regulatory relief and consequences for breach

- 1.124 For an offer of interests under an employee share scheme to receive relief under the Bill, the compliance with certain regulatory requirements must be included as essential terms in the offer.
- 1.125 These requirements that must be included in the terms of offer are:
- the requirements for loans, trusts and contribution plans;
[Schedule 1, item 31, sections 1100P and 1100Q]
 - compliance with the monetary cap; and
[Schedule 1, item 31, section 1100X]
 - compliance with the issue cap; and
[Schedule 1, item 31, section 1100Q(2)]
 - the compliance with the various disclosure obligations;
[Schedule 1, item 31, subsections 1100Q to 1100W]
- 1.126 If an offer does not include these essential terms, it will not receive regulatory relief under the Bill. This means the offer will be in breach of various prohibitions in the Act such as selling securities or financial products without

disclosure (see sections 707 and 1012B).

[Schedule 1, item 31, sections 1100P and 1100Q]

- 1.127 If an offer of interests under an employee share scheme contains these essential terms, but subsequently does not comply with the terms and accepts payment, the regulatory relief under the Bill will be revoked and be taken to never have applied. As above, this means the offer will be in breach of various prohibitions in the Act such as selling securities or financial products without disclosure.

[Schedule 1, item 31, subsection 1100ZA(1)]

- 1.128 The regulatory relief will also be revoked where an employer fails to provide disclosure, in situations where the failure to provide the disclosure would prevent a participant exercising their options or incentive rights.

[Schedule 1, item 31, sections 1100ZA(2)]

Dealing with money received before an ESS interest is issued

- 1.129 A person who offers interests under an employee share scheme to participants in the scheme must:

- hold all application money on trust for the participants until the interests are issued or the money is returned to the participants; and
- if the money is required to be returned to the participants, return the money as soon as possible.

[Schedule 1, item 31, section 1100Z]

- 1.130 Failure to keep the money on trust is a strict liability offence with a penalty of 60 penalty units.

[Schedule 1, items 31 and 33, subsection 1100Z(1) and Schedule 3]

- 1.131 Failure to return the money as soon as possible is a strict liability offence with a penalty of 20 penalty units.

[Schedule 1, items 31 and 33, subsection 1100Z(2) and Schedule 3]

Subsequent sale relief

- 1.132 ESS participants can sell interests without disclosure if the participant reasonably believes they received that interest under an employee share scheme, and they reasonably believe they are selling their interest to another participant in the same employee share scheme.

[Schedule 1, item 31, section 1100ZC]

Regulatory powers for ASIC

- 1.133 The Bill gives ASIC a variety of regulatory tools to monitor, enforce and modify the requirements for employee share schemes.

Notice of intent to create an employee share scheme

- 1.134 Before an offer is made under an employee share scheme which relies on the relief under the Bill and requires payment to participate, the body issuing interests under the employee share scheme must give written notice to ASIC.
[Schedule 1, item 31 and 33, section 1100ZB]
- 1.135 If the body corporate or responsible entity of a listed registered scheme fails to give such notice, they will commit an offence.
[Schedule 1, items 31 and 33, subsection 1100ZB(3) and Schedule 3]
- 1.136 The offence has the penalty of 5 years in prison.
[Schedule 1, item 31, subsection 1100ZB(3) and Schedule 3]
- 1.137 The penalty is consistent with other provisions in relation to failing to provide disclosure documents (see Part 6D.3 Division 1 of the Act).
- 1.138 Offers under employee share schemes that do not require payment do not require notification to ASIC.
[Schedule 1, item 31 and 38, section 1100ZB]

ASIC exemption and modification powers

- 1.139 The Bill allows ASIC to exempt or modify Chapters 2L, 5, 5C, 6D and 7 of the Act with regard to employee share schemes. These chapters are the parts of the Act that are amended by this Bill, which contain the requirements for businesses which issue and sell financial products and securities.
[Schedule 1, item 31, section 1100ZD]
- 1.140 The Bill allows ASIC to modify the above chapters of the Act with regard to all, a class or an individual employee share scheme. In addition, ASIC can fully exempt all, a class or an individual employee share scheme from any combination of those chapters of the Act.
[Schedule 1, item 31, subsections 1100ZD(2) and (3)]
- 1.141 An exemption by ASIC can be subject to conditions. An employee share scheme which is relying on an exemption, must comply with any conditions of that exemption. Only ASIC may apply to the Court to ensure an employee share scheme complies with a condition of an exemption.
[Schedule 1, item 31, subsections 1100ZD(4) to (6)]
- 1.142 An exemption that relates to all or a specified class of employee share schemes must be made by legislative instrument. An exemption that relates to a specified employee share scheme must be made in a notifiable instrument.
[Schedule 1, item 31, subsections 1100ZD(7) to (8)]
- 1.143 ASIC must provide a copy of an exemption that relates to a specified employee share scheme to the relevant body corporate or responsible entity as soon as is reasonably practical after the exemption or declaration is made.
[Schedule 1, item 31, subsection 1100ZD(9)]
- 1.144 These exemption and modification powers are necessary to ensure flexibility in the regulatory regime. Employee share schemes are complex legal

arrangements that are used in a wide variety of industries which interact with a similarly wide variety of regulatory frameworks including rules in relation to selling of securities and financial products, financial advice, hawking and advertising of securities and financial products and disclosure obligations. Industry practice is also often evolving as new interests enter the market, which require changes in the regulatory framework. Therefore it is likely there are unforeseen circumstances and situations which it would not be appropriate to address in the primary law. The exemption and modification powers provide ASIC the ability to address these situations and ensure the regime operates in line with the policy intent.

- 1.145 Exemptions made in legislative instruments will be subject to Parliamentary disallowance.

ASIC stop orders

- 1.146 ASIC may issue a stop order to prevent an offer being made under an employee share scheme.
- 1.147 ASIC may issue a stop order in relation to an offer under an employee share scheme if:
- the offer is not worded and presented in a clear, concise and effective manner;
 - a disclosure document which is provided with the offer, does not contain the required material;
 - the offer does not contain the essential terms;
 - the offer contains a misleading or deceptive statement; or
 - a person has contravened, or is likely to contravene an essential term of the offer.

[Schedule 1, item 31, subsections 1100ZE(1) and (2)]

- 1.148 Before making the order, ASIC must hold a hearing and give a reasonable opportunity to any interested people to make oral or written submissions about whether such an order should be made.

[Schedule 1, item 31, subsection 1100ZE(3)]

- 1.149 However, if ASIC considers that a delay in making the order caused by holding a hearing would be prejudicial to public interest, ASIC may make an interim order without holding a hearing for 21 days.

[Schedule 1, item 31, subsections 1100ZE(4) and (5)]

- 1.150 Such an order by ASIC must be made in writing and be served to the person who is ordered not to offer or issue interests under an employee share scheme.

[Schedule 1, item 31, subsection 1100ZE(6)]

Lodging documents with ASIC and public inspection

- 1.151 The Bill does not require ESS disclosure documents be lodged with ASIC. However in certain circumstances, ESS disclosure documents may be required to be lodged with ASIC under other provisions of the Act.
- 1.152 The current law provides that, if an ESS disclosure document is lodged with ASIC, members of the public are entitled to inspect lodged ESS disclosure documents unless (see section 1274 of the Act):
- the employee share scheme relates only to employees;
 - the ESS disclosure document relates to ordinary shares;
 - the body corporate was incorporated 10 years ago;
 - no equity interests in the body corporate or related bodies corporate are listed for quotation on a stock exchange; and
 - the issuing body corporate has an aggregated turnover of less than \$50 million.
- 1.153 This makes businesses more reluctant to offer employee share schemes as they may result in them making internal financial information public.
- 1.154 The Bill removes the requirements contained in the first three dot points above so that members of the public are not entitled to inspect ESS disclosure documents if:
- no equity interests in the body corporate or related bodies corporate are listed for quotation on a stock exchange; and
 - the issuing body corporate has an aggregated turnover of less than \$50 million.
- [Schedule 1, items 34 and 35, section 1274]*
- 1.155 This will encourage businesses to offer employee share schemes as any internal financial information contained in the ESS disclosure documents is less likely to be made public.

Modification by Regulations

- 1.156 The Bill creates regulation making powers which can modify the operation of the regime.
- 1.157 The Bill contains regulation making powers which can:
- add additional kinds of ESS participants;
[Schedule 1, item 31, subparagraphs 1100M(1)(a)(iv) and (1)(b)(iv)]
 - add new types of ESS interests;
[Schedule 1, item 31, subparagraph 1100N(1)(i), paragraphs 1100N(2)(d) and 1100N(3)(d)]

- add requirements for offers which do not require payment to participate to obtain the regulatory relief under the Bill;
[Schedule 1, item 31, paragraph 1100P(1)(e)]
- add requirements for offers which require payment to participate to obtain the regulatory relief under the Bill;
[Schedule 1, item 31, subparagraph 1100Q(1)(j), 1100R(f)]
- modify the monetary cap, including prescribing certain types of offers subject to or expenses included for the purposes of the monetary cap, or changing the monetary value of the cap; and
[Schedule 1, item 31, subparagraph 1100X(4)(d),(6), and (8)]
- modify the disclosure requirements, including exempting certain types of offer from requiring disclosure; and
[Schedule 1, item 31, subparagraphs 1100T(2)(j), 1100T(3), 1100U(1)(d), 1100W(4)]
- add requirements for ESS trust deeds, ESS contribution plans and loans.
[Schedule 1, item 31, subparagraph 1100P(3)(f), subsection 1100Q(4)(f) and 1100Q(5)(c)]

1.158 These regulation-making powers are necessary to ensure flexibility in the regulatory regime. Employee share schemes are complex legal arrangements that are used in a wide variety of industries which interact with a similarly wide variety of regulatory frameworks including rules in relation to selling of securities and financial products, financial advice, hawking and advertising of securities and financial products and disclosure obligations. Industry practice is also often evolving as new interests enter the market, which require changes in the regulatory framework. Therefore it is likely there are unforeseen circumstances and situations which it would not be appropriate to address in the primary law. Regulation making powers in addition to ASIC exemption and modification powers are necessary to ensure decisive action can be taken in circumstances where it would be inappropriate for ASIC (as an impartial regulator) to intervene, and to ensure the scheme is responsive to government policy.

1.159 Ministerial regulations made under the Bill will be disallowable and subject to parliamentary scrutiny.

Consequential amendments

1.160 The existing definitions of ‘employee share scheme’, ‘eligible employee share scheme’ and ‘employee share scheme buy-back’ are repealed and replaced by the new definitions inserted by the Bill.
[Schedule 1, items 2, 4 and 5, section 9, definitions of and ‘eligible employee share scheme’, ‘employee share scheme’ and ‘employee share scheme buy-back’]

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- 1.161 Consequential amendments are made to the definition and uses of ‘contribution plan’ throughout the Act and a new definition of ‘employee share buy-back’ is added.
[Schedule 1, items 1, 3, 8, 9, 10 and 15, section 9, definitions of ‘contribution plan’, ‘employee share buy-back’ and ‘selective buy-back’ and sections 709 and 257B]
- 1.162 Amendments are made to section 708 to direct readers to the rules for employee share schemes.
[Schedule 1, items 13 and 14, section 708]
- 1.163 An ESS contribution plan is excluded from the definition of a managed investment scheme in section 9 of the Act.
[Schedule 1, item 7, section 9, definition of ‘managed investment scheme’]
- 1.164 Amendments are made to sections 703B and 725A to indicate that Part 6D.3A of the Act does not apply to employee share schemes.
[Schedule 1, items 11, 12, 16 and 17, sections 703B and 725A]
- 1.165 The content relating to employee share schemes in section 911A of the Act is removed as it has been made redundant by the Bill.
[Schedule 1, items 18 to 20, section 911A]
- 1.166 The content relating to employee share schemes in relation to hawking securities and financial products, and the design and distribution obligations regime in sections 736, 992A and 994B of the Act is removed as it has been made redundant by the Bill.
[Schedule 1, items 21 to 24, sections 736, 992A and 994B]
- 1.167 Amendments are made to section 1010A and 1010BA of the Act to indicate that Divisions 5A, 5B, 5C and 6 do not apply to employee share schemes, as well as amendments to 1012E to direct readers to the new regime.
[Schedule 1, items 25 to 30 and section 1010A, 1010BA and 1012E]
- 1.168 The Bill contains a simplified outline of the rules for employee share schemes.
[Schedule 1, item 31, subsection 1100E]
- 1.169 The Bill covers interests that are received in this jurisdiction, regardless of where any resulting issue, sale or transfer occurs.
[Schedule 1, item 31, section 1100F]
- 1.170 The Bill covers offers of ESS interests, invitations for applications for the issue, sale or transfer of ESS interests and invitations to purchase ESS interests.
[Schedule 1, item 31, section 1100G]
- 1.171 The person who offers interests under the Bill is the person who has capacity or agrees to issue the interests if the offer is accepted.
[Schedule 1, item 31, section 1100H]
- 1.172 Offers made under an employee share scheme under the Bill can also simultaneously rely on other pre-existing disclosure exemptions in the Act.
[Schedule 1, item 31, section 1100J]

- 1.173 The Bill does not apply to unlisted registered schemes.
[Schedule 1, item 31, section 1100K]
- 1.174 Offers made under employee share schemes are not counted for the purpose of determining if the small-scale offerings exemption for disclosure applies under subsection 708(1).
[Schedule 1, item 31, subsection 1100Y(4)]

Transitional arrangements

- 1.175 The employee share scheme provisions will commence 3 months after Royal Assent.
[Schedule 1, Commencement table]
- 1.176 Shares from entities listed on financial markets listed in the *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669* will be treated as shares from entities listed in Australia for the purposes of the Bill until ASIC issues an instrument under the Bill prescribing a different set of foreign markets. That instrument prescribes foreign markets that are covered by the rules in CO 14/1000.
[Schedule 1, item 32, subsection 1696]