

4 February 2022

Directors  
Market Conduct Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600

By email: ESSreforms@Treasury.gov.au

Dear Directors

## Submission: Employee Share Scheme Reforms

### Issue cap: ESS offers for consideration

Guerdon Associates appreciates the opportunity to provide its submission on the Government's changes to regulatory arrangements for employee share schemes. Specifically:

- The Exposure Draft legislation titled Treasury Laws Amendment (Measures for Consultation) Bill 2022: Employee Share Schemes (the "Bill").

Guerdon Associates acknowledges that the ED reflects longstanding requests to improve the regulatory requirements for employee share schemes.

This submission provides brief background on our firm, responds to the questions posed in the Consultation paper, and provides feedback and suggestions where we see the potential to regulatory requirements of employee share schemes for wider and deeper participation in employee ownership.

## About Guerdon Associates

Guerdon Associates is an independent<sup>1</sup> executive remuneration and board governance consulting firm. Our clients include a significant proportion of companies in the ASX 300, large private companies and pre-IPO companies. Offices are located in Melbourne and Sydney, with affiliate offices in London, Zurich, New York, Los Angeles, Singapore and Johannesburg. The firm has worked with the boards of many of Australia's listed, and non-listed high growth and pre-IPO companies.

The firm's submissions were among the most cited in the Productivity Commission's review of executive remuneration and, over the years, it has contributed to Treasury, Australian Taxation Office and CAMAC consultations on numerous Corporations Act and taxation legislation changes, as well as regularly engaging with APRA and ASIC on remuneration matters.

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<sup>1</sup> Independence is defined as a specialist provider of consulting services to boards to minimise conflicts of interest that may otherwise result from being a supplier of multiple services to both management and boards.

As a provider of remuneration and governance advisory services and an expert observer of the impact of executive remuneration internationally, the firm can provide useful insight into:

- the effects of various remuneration frameworks; and
- alternatives or modifications that may more effectively contribute to greater employee participation under sound governance frameworks.

## Feedback & Recommendations

We commend Treasury and the Government on the consolidation into the proposed Division 1A of Part 7.12 of the *Corporations Act 2001* of many of the complex regulatory requirements for ESS.

Guerdon Associates notes the substantial content of the consultation process and the consideration already given to the issues raised in submissions. However, it is considered appropriate to submit the following aspects for further consideration.

### ***Is there a need to restrict the extent of capital raising from employees? If so, on what basis?***

It is suggested that the monetary cap could be removed entirely as the Bill provides a dilution limit of 5% (listed) and 20% (unlisted) as well as prescribed disclosure requirements including financial reports and valuation information. The latter is sufficient information to enable an employee participant to seek independent professional advice on the risks involved.

However, it is recognised that a level of employee protection may be considered prudent in the early years of the improved relief regime. While the proposed increase of the offer value cap to \$30,000 is welcome, it limits the ability of employers (particularly those in the technology sectors that are competing for global talent), to keep pace with market remuneration.

As individual company circumstances vary widely, and that any cap will be an arbitrary value that should be adjusted over time, it is suggested to increase the cap to \$100,000 or no less than \$50,000. An increased limit will enable those cash poor companies to better able to attract senior people for whom this level of equity is common in global employers.

It is relevant in suggesting the increase that, in nearly all circumstances, the equity offer to employees will be via incentive rights requiring payment of an exercise price at a future time rather than at the time of grant. This provides an additional layer of protection for employees before making payment of knowledge of the business as an equity participant over the time from grant to exercise.

The disclosures proposed in the ED will be sufficient protection for increasing the offer cap value.

If the monetary cap is to be retained in the Bill, it is suggested that the Bill could incorporate a sunset or review requirement on the fifth anniversary of its introduction. The purpose of the review would be to determine the efficacy or otherwise of the monetary cap and improvements for implementation.

*If capital raising from employees should be restricted, is the issue cap the appropriate regulatory tool for doing so?*

As noted above, it is suggested that the disclosure requirements and other protections in both the existing legislation and the Bill should be sufficient protection for employees.

*Should an alternative regulatory tool be considered?*

The proposed changes as a consolidation of relief into Division 1.A of Part 7.12 are a welcome improvement on the scattered and haphazard approach of the existing legislation, class orders and other regulation.

We do not consider an alternative regulatory tool be considered other than that contemplated in the Bill and as suggested above.

### Concluding remarks

Guerdon Associates trusts that our observations and suggestions are of value, and appreciate the opportunity to make this submission.

We would be pleased to respond to any queries you may have in relation to this submission.

Yours faithfully

Guerdon Associates