



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 218

Employee incentive schemes

November 2013

About this paper

This consultation paper is for persons offering and receiving shares or other financial products under an employee incentive scheme.

It seeks feedback on our proposals to facilitate further relief by revising our relief currently in Class Order [CO 03/184] *Employee share schemes* and our guidance in Regulatory Guide 49 *Employee share schemes* (RG 49) to cover a wider range of employee incentive schemes. This paper attaches a draft updated version of RG 49.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 14 November 2013 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on employee incentive schemes. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section I, 'Regulatory and financial impact'.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 31 January 2014 to:

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What will happen next?

Stage 1	14 November 2013	Release of ASIC consultation paper and draft updated RG 49
Stage 2	31 January 2014	Comments due on the consultation paper
	April 2014	Final drafting of new class order and updated regulatory guide
Stage 3	May 2014	Class order and updated RG 49 released

A Background to the proposals

Key points

Employee share schemes enable employers to offer shares and other financial products to employees as part of an employee's remuneration package. They are generally designed to encourage the retention of staff and long-term interdependence by aligning the interests of employers with the interests of their employees. In many instances, such schemes provide tax advantages as well as the economic benefits generally associated with ownership interest.

Class Order [CO 03/184] *Employee share schemes* provides relief from certain provisions of the *Corporations Act 2001* (Corporations Act) for employee share schemes. Regulatory Guide 49 *Employee share schemes* (RG 49) gives guidance on our relief and the underlying policy objectives.

Since issuing [CO 03/184], we have provided case-by-case relief in a number of situations not covered by the class order. There have also been changes to the Corporations Act that are relevant to the class order, as well as developments in market practice for structuring employee share schemes.

In light of these factors, we propose to update our guidance (see the draft updated version of RG 49 attached to this paper) and provide a new class order. In doing so, we intend to use the term 'employee incentive scheme' in the new class order. This will distinguish it from the term 'employee share scheme' used in [CO 03/184], which suggests a limitation to the types of financial products that may be offered.

Participation in employee incentive schemes

- 1 There is a large body of research on the benefits of employee ownership. Generally, the research indicates that ongoing ownership interests of employees, combined with the relevant organisational culture, can lead to improved business performance, greater employee engagement, and commitment, innovation and reduced absenteeism.¹
- 2 Therefore, many bodies wish to offer their employees an ownership interest in their enterprise, or to offer them some other financial benefit (in addition to their salaries), and many employees wish to participate in these arrangements.

¹ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared endeavours: Inquiry into employee share ownership in Australian enterprises*, report, Commonwealth of Australia, September 2000; G Nuttall, *Sharing success: The Nuttall review of employee ownership*, independent review for UK Department of Business, Innovation and Skill, July 2012; and I Landau, A O'Connell and I Ramsay, *Incentivising employees: The theory, policy and practice of employee share ownership plans in Australia*, Melbourne University Press, 2013.

- 3 Parliament has considered the benefits of these schemes. The Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 states that:
- Based on the benefits employee share schemes may bring to the wider economy the Australian Government has a general policy of supporting the use of employee share schemes (paragraph 5.21).
- 4 In Australia, the *Corporations Act 2001* (Corporations Act) regulates the offer to and investment by investors, including employees in their employer bodies. Unless a relevant exemption applies, or ASIC relief applies, the Corporations Act requires bodies establishing an employee share scheme to provide a prospectus or other disclosure document to employees and, in some instances, to obtain an Australian financial services (AFS) licence. The Act also prohibits certain other conduct in relation to offers under the scheme. Bodies establishing these schemes must also consider the requirements of tax law.
- 5 The Treasury and The Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education recently published a discussion paper seeking to review the administrative and taxation arrangements for employee share schemes for start-up companies.²

Our policy

- 6 ASIC recognises that employees are often offered the opportunity to participate in the ownership of an employer body under an employee incentive scheme—at least in part, to enhance the relationship between the employer and the employee for their long-term mutual benefit.
- 7 When employees are considering whether to accept such offers, they become potential investors in the relevant body and should therefore be afforded adequate protections under the Corporations Act. We consider that employees must be able to assess the appropriateness of participating in such schemes.
- 8 However, ASIC facilitates employee incentive schemes by relieving bodies from their obligations under the Corporations Act where we consider the benefits of the scheme outweigh the risks to employees. We consider that it is appropriate to reduce the compliance burden for employers if the following policy objectives are satisfied:
- (a) the objective of the offer is not fundraising, but rather to enable employees to participate in the financial success (including the benefits of ownership) of a body;

² *Advancing Australia as a digital economy—An update to the national digital economy strategy*, released 12 June 2013, followed by a discussion paper, *Employee share schemes and start-up companies: Administrative and taxation arrangements*, released 2 August 2013.

- (b) the offer sufficiently supports the long-term interdependence between the employer and the employee; and
- (c) there are adequate protections for employees and, in particular, a history of disclosure in a well-regulated financial market, which will help employees in determining a reliable alternative market price for the financial products they are being offered.

Current relief and guidance

- 9 Our current relief in relation to employee share schemes is provided in [CO 03/184]. We also provide relief on a case-by-case basis where our policy objectives are satisfied. Regulatory Guide 49 *Employee share schemes* (RG 49) gives guidance on our relief and the underlying policy objectives.

Note: In this paper, the term ‘employee share scheme’ is intended to describe schemes that meet the definition of this type of scheme in s9 of the Corporations Act, or that are currently covered under [CO 03/184]. ‘Employee incentive scheme’ refers to a broader class of offers to which our proposed new class order would apply.

- 10 Under [CO 03/184], we give certain bodies offering employee share schemes conditional class order relief from the following provisions of the Corporations Act:
- (a) the requirement to provide a disclosure document for offers under the scheme (disclosure relief);
 - (b) the requirement to hold an AFS licence for the provision of general advice when circulating and explaining the terms and conditions of the scheme (licensing relief);
 - (c) the prohibition on advertising or publicity before an offer or intended offer (advertising relief); and
 - (d) the prohibition on the issue or sale of financial products arising out of unsolicited contact with employees (hawking relief).
- 11 There are limited statutory disclosure exemptions that may apply to offers to employees. In our view, the exemptions in s708(15), 708(16) or 1012D(5) on the issue or transfer of shares and options for no consideration would generally not apply to offers made under an employee incentive scheme. This is because non-monetary consideration is provided by the employee in an employment situation regardless of whether the employee’s remuneration package is structured to specifically include a portion of the payment through participation in an employee incentive scheme.
- 12 We are also of the view that the exclusion from the definition of a ‘derivative’ of a contract for the future provision of services under s761D(3)(b) would also generally not apply to offers made under an employee incentive scheme to ensure that these do not involve the offer of a financial product.

- 13 In 2007, the Corporations Act was amended to exempt from the licensing and hawking provisions offers made under an ‘eligible employee share scheme’ to acquire financial products in a company or its holding company, where the offer is made with disclosure or in reliance on the senior manager exemption in s708(12). The amendments also sought to facilitate the use of offer information statements by providing that amounts raised using an offer information statement for an eligible employee share scheme are not included in the \$10 million fundraising limit for such statements.

Issues identified with current operation of [CO 03/184] and RG 49

The review process

- 14 We have recently undertaken a project to identify the difficulties that issuers have in relying on [CO 03/184] and the nature of offers that fall outside its scope. This project has involved:
- (a) reviewing individual applications for relief received for employee incentive schemes in the past 10 years and considering when we have granted relief and the terms of that relief;
 - (b) reviewing legal commentary and industry publications to understand the difficulties that issuers face when making offers under these schemes, including those faced by unlisted bodies; and
 - (c) undertaking preliminary consultation with industry bodies and participants, including lawyers and trust administrators of employee incentive schemes.
- 15 Our reviews and preliminary consultation indicated that [CO 03/184] did not cover aspects of employee incentive schemes that employers were implementing, or would like to implement, including (among other things):
- (a) offering employees a range of financial products, such as performance rights that are not securities;
 - (b) the use of trusts to hold shares in a pool on behalf of their employees;
 - (c) the use by unlisted bodies of loans to employees in connection with an employee incentive scheme; and
 - (d) unlisted bodies offering employees an interest in the company that can be realised if the company is sold.
- 16 There was also some confusion about how [CO 03/184] was to be applied, including in relation to:
- (a) whether performance rights could constitute nil (zero) exercise priced options;

- (b) the taxation consequences associated with the operation of ‘contribution plans’; and
 - (c) the timing and frequency of providing employee share scheme documents to ASIC.
- 17 We also note that the use of the term ‘employee share scheme’ in [CO 03/184], together with the definition of the term in s9 of the Corporations Act, has caused uncertainty about whether:
- (a) stapled securities can be offered;
 - (b) offers can be made to employees of related bodies corporate, or associated bodies corporate, of the issuer; and
 - (c) directors who receive a fee rather than a salary (such as non-executive directors) can receive offers.
- 18 We have considered these issues in formulating proposals for a new class order—Class Order [CO 14/xx] *Employee incentive schemes*—and in our proposed updated guidance in the renamed RG 49 *Employee incentive schemes*: see the draft updated guide attached to this paper.
- 19 We are very grateful for the time and consideration of those who participated in our review.

Options considered in this consultation paper

- 20 To seek to address the difficulties that we identified in our review process (see paragraphs 14–17), as well as to achieve our desired objectives (see paragraph 8), ASIC is considering the following options.
- (a) Option 1: Maintain our existing approach to relief for certain bodies offering employee incentive schemes in line with [CO 03/184]), together with some minor and technical changes, and updates that are mechanical in nature (see paragraph 21). *Not recommended.*
 - (b) Option 2: Make certain substantive changes to the current relief—for the most part, to make it easier for employers and issuers to develop an employee incentive scheme but also to impose a limited number of new conditions to support the interests of participants who are considering taking up such a scheme (see paragraphs 24–28 and Table 1). *Recommended.*
 - (c) Option 3: Expand the scope of our relief (similar to Option 2), but without imposing any conditions on such relief (see paragraph 23). *Not recommended.*

Proposal

A1 We propose to consult in detail on our proposed reforms to [CO 03/184], which seek to address the difficulties with the current regime and achieve our desired objectives.

We are considering three options (see paragraph 20):

- (a) Option 1: Maintaining our existing approach, together with some minor updates;
- (b) Option 2: Making certain substantive changes, subject to specified conditions, to better facilitate the use of employee incentive schemes; and
- (c) Option 3: Making certain substantive changes without imposing any conditions.

However, we recommend Option 2, and are therefore consulting in detail on this option.

Your feedback

A1Q1 We are very keen to better understand the legal, administrative and compliance impediments, including the costs or benefits that you face or may face in making offers under employee share schemes, whether:

- (a) in compliance with the Corporations Act;
- (b) in reliance on our relief in [CO 03/184]; or
- (c) by way of having to seek individual relief.

How do you consider these may be affected by adopting Options 1, 2 or 3, or any other alternatives you think should be considered by ASIC?

Please be as specific and as relevant as possible, and include any estimates about the costs and resources required (e.g. time, personnel, external resources and expertise) and any other impediments.

A1Q2 In relation to Option 1, do you believe that making minor and technical changes, and updates that are mechanical in nature, to [CO 03/184] and the policy settings in RG 49 will be sufficient to alleviate the need for employers to continue to seek case-by-case relief from ASIC in relation to offers? If not, why not?

A1Q3 In relation to Option 2, please provide your feedback on the particular detailed proposals set out in Sections B to H of this consultation paper.

A1Q4 In relation to Option 3, do you consider that:

- (a) the relationship between employers and employees means that it is unnecessary to impose any conditions because, for example, employees have adequate information about their employers; and

- (b) it is unnecessary to impose conditions on employers because employment arrangements and practices provide adequate protections for employees?

If so, how and why?

Rationale for not recommending Options 1 and 3

- 21 Option 1 would involve maintaining our existing approach in [CO 03/184] in addition to some minor or technical changes, and updates that are mechanical in nature. These would contemplate changes such as:
- (a) providing class order relief for contractors who currently satisfy the policy requirements in RG 49;
 - (b) revising the quotation period from 12 months to three months, and the suspension period from two trading days to five trading days in the shorter of the period in which the financial products have been quoted or the 12 months before the offer is made; and
 - (c) updating the names of the approved foreign markets that can rely on our class order relief.
- 22 Option 1 is not recommended because it will not significantly reduce the large number of individual applications for relief currently being sought for employee incentive schemes (e.g. in relation to the types of financial products being offered). It will also not address some of the important issues concerning risks to employees by introducing new requirements (e.g. the requirement that the offer be clear, concise and effective and contain appropriate risk disclosure).
- 23 Option 3 is also not recommended because there are certain fundamental investor protection measures that we consider need to be retained, and some additional conditions that we consider need to be introduced, when facilitating relief for employee incentive schemes. These would be lost if class order relief was provided without imposing any conditions.

Rationale for recommending Option 2

- 24 Based on the applications for relief we have received, and our recent review of employee incentive schemes, we are aware that many such schemes fall outside the scope of [CO 03/184] and that there are a number of impediments to their implementation. This is due to various factors, including the different nature of financial products (e.g. performance rights which are derivatives) offered under these schemes, the different ways they are structured (e.g. the use of trusts and contribution plans), and the different types of employees receiving the offers.
- 25 We are of the view that making minor or technical changes, and updates that are mechanical in nature, to [CO 03/184] and RG 49 will not sufficiently address some of the fundamental impediments to offering an employee incentive scheme in Australia. [CO 03/184] is only capable of providing

relief in limited situations, and as a result of changes in the taxation treatment of options, this class order no longer represents a large number of financial products that employers are seeking to offer.

- 26 We are also of the view that providing unconditional relief (Option 3) is inappropriate, given that employee incentive schemes involve the offer of financial products to employees who will mostly be retail investors. We believe a certain minimum level of information and disclosure is still warranted despite the existing employer–employee relationship.
- 27 Accordingly, we are consulting in detail on Option 2—to update guidance and provide a new class order to reflect our intention to cover many more types of employee incentive schemes, provided that the underlying policy objectives are satisfied. Our proposals are therefore aimed at broadening the scope of the current class order to cover employee incentive schemes for various types of financial products and employees, and using various structures.
- 28 We also propose to broaden the scope of our class order to include offers by unlisted bodies in a way that extends the offers that may be made, while ensuring our policy objectives regarding adequate protections and disclosure are met. In particular, our proposals are aimed at ensuring participants are provided with sufficient information to make an informed decision about whether to participate in the scheme.

Table 1: Overview of our proposed relief for employee incentive schemes

Topic	How we propose to facilitate employee incentive schemes	Issuer	Section
Who can make offers?	We propose that [CO 14/xx] will enable offers to be made by: <ul style="list-style-type: none"> • bodies listed on ASX or an approved foreign market and their associated bodies corporate; and • unlisted bodies and their wholly owned subsidiaries. 	Listed bodies	Section B
		Unlisted bodies	Section G
Who can receive offers?	We propose that [CO 14/xx] will enable offers to be made to: <ul style="list-style-type: none"> • full-time and part-time employees (including executive directors); • certain contractors and casual employees; • prospective employees; and • non-executive directors under specific, separate offers. 	Listed and unlisted bodies	Section C
What financial products can be offered by listed bodies?	We propose that [CO 14/xx] will include offers of: <ul style="list-style-type: none"> • shares; • certain depository interests; • stapled securities; • options over, and units in, any of these products; and • performance rights. 	Listed bodies	Section D

Topic	How we propose to facilitate employee incentive schemes	Issuer	Section
What structures can be used by listed bodies when making offers?	We propose revised and new class order conditions relating to: <ul style="list-style-type: none"> • trusts, with products held on trust on an allocated or unallocated basis; • contribution plans; and • certain types of loan arrangements. 	Listed bodies	Section E
What general conditions apply?	We propose revised and new general conditions so that: <ul style="list-style-type: none"> • the relevant quotation period is reduced; • the objective of the offer is not fundraising and includes a 5% share capital limit; • a significant portion of products must be held for a minimum of 12 months; • bodies relying on our new class order relief need only notify us of offers using ASIC Form XX <i>Notification of reliance on [CO 14/xx] Employee incentive schemes</i>; • offer documents must be clear, concise and effective; and • we may exclude a body from relying on our relief. 	Listed and unlisted bodies	Section F
What financial products can be offered by unlisted bodies and using what structures?	We propose to extend relief in [CO 14/xx] to cover offers of: <ul style="list-style-type: none"> • fully paid voting ordinary shares (ordinary shares) valued at up to \$1,000 per employee per year; • options over or performance rights relating to ordinary shares, provided that, at the time of exercise or vesting, the body is listed, provides a prospectus or offer information statement, or provides an independent expert report on a 100% disposal. 	Unlisted bodies	Section G
What other relief is available?	We propose to extend relief in [CO 14/xx] so that: <ul style="list-style-type: none"> • licensing, hawking and advertising relief is extended in line with the above proposals; • on-sale relief is extended in line with the above proposals; and • disclosure and on-sale relief applies for issues to trustees in certain circumstances. 	Listed and unlisted bodies	Section H

Other current and emerging issues

- 29 We appreciate that your submissions may raise a variety of new and existing issues of significance. As part of our process of updating our guidance, we welcome your views on other significant issues that you think we should consider or prioritise when planning future policy updates.

Issue

- A2 We would like to hear your views on other current and emerging issues, generally, in relation to employee offers and incentives.

Your feedback

A2Q1 Are there any other issues on which it would be useful to have ASIC guidance? If so, please give details.

A2Q2 Are there any other issues that may be appropriate for us to address through an exemption or modification by class order? Please be specific.

A2Q3 Are there any other policy considerations that may be appropriate for us to address in our regulatory guide? Please be specific.

B Who can make offers?

Key points

Our relief in [CO 03/184] from the disclosure provisions in the Corporations Act applies to certain offers made under an employee share scheme by bodies listed on ASX or an approved foreign market, as well as offers of options made by unlisted bodies.

In our new class order, we propose to clarify that the relief applies to offers made under an employee incentive scheme to participants of a listed body or its associated bodies corporate.

Under [CO 03/184], unlisted bodies may only make offers to their own employees. We propose to expand our relief under [CO 14/xx] so that wholly owned subsidiaries of unlisted bodies may also make offers.

Bodies listed on ASX or an approved foreign market

Proposal

- B1** We propose to provide relief for employee incentive schemes offered by listed bodies (or an associated body corporate of a listed body), where the body is listed on ASX or an approved foreign market.

Your feedback

- B1Q1** Do you agree with our proposal to limit our class order relief for listed bodies to those listed on ASX or an approved foreign market? If not, why not?

Rationale

- 30 Under [CO 03/184], listed bodies and their associated bodies corporate are exempt from the disclosure provisions of the Corporations Act for an offer and the issue of fully paid shares in an issuer in the same class as shares that have been quoted on ASX or an approved foreign market for the specified period of time. Options over, and units in, these shares may also be offered.
- 31 [CO 03/184] also exempts a person who makes such an offer or who arranges for the issue of such financial products.
- 32 We propose that [CO 14/xx] will apply to those bodies covered by [CO 03/184]. The list of approved foreign markets that is currently included in the class order, and that we propose to use, are those which ASIC considers to be comparable to ASX in terms of being fair, efficient, well-

informed and internationally competitive. In compiling this list, we had particular regard to whether the market:

- (a) is a member of the World Federation of Exchanges;
- (b) is internationally recognised;
- (c) has rules that meet ASX's listing and quotation, market information, regulatory, and trading and settlement principles;
- (d) is a key world trading centre; and
- (e) is overseen by a government regulatory authority.

Note: These criteria are set out in Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72). See the 'Key terms' list for our definition of 'approved foreign market'.

- 33 Our relief applies only to the main board of the markets listed in the class order definition of 'approved foreign market', unless otherwise stated.
- 34 We will continue to consider applications for relief on a case-by-case basis in relation to other markets, including any other Australian markets.

Associated bodies corporate of listed bodies

Proposal

- B2** We propose to facilitate relief for employee incentive schemes by:
- (a) clarifying that [CO 14/xx] applies to offers of, or offers to arrange for the issue of, quoted eligible products made by a listed issuer or its associated body corporate; and
 - (b) defining 'associated body corporate' as it is currently defined in [CO 03/184], rather than adopting the narrower definition of 'related body corporate' in s9 of the Corporations Act.

Your feedback

- B2Q1 Do you agree with our proposal to clarify that [CO 14/xx] applies to offers of, or offers to arrange for the issue of, quoted eligible products made by an issuer or its 'associated body corporate', rather than only to offers made by an issuer or its 'related body corporate'? If not, why not?
- B2Q2 Do you agree with the proposed definition of 'associated body corporate'? If not, why not?
- B2Q3 How common is it for companies to rely on the 20–50% thresholds in paragraphs (b) and (c) of the definition of 'associated body corporate' in [CO 03/184]? Please provide examples.
- B2Q4 Do you consider there is a sufficient level of interdependence between the employer and employee where the employee receives eligible products in a body:

- (a) with voting power of 20% in its employer; or
- (b) in which its employer has voting power of 20%?

Rationale

- 35 Under [CO 03/184], a person who makes an ‘eligible offer’ or arranges for the issue of relevant financial products under an employee share scheme is exempt from the disclosure provisions of the Corporations Act. Because [CO 03/184] permits ‘eligible offers’ to be made to eligible employees of the issuer or an associated body corporate of the issuer, the person making the offer or arranging for the issue of financial products could be the issuer’s associated body corporate.
- 36 An ‘associated body corporate’ of an issuer is defined in [CO 03/184] as:
- (a) a body corporate that is a related body corporate of the issuer; or
 - (b) a body corporate that has voting power in the issuer of not less than 20%; or
 - (c) a body corporate in which the issuer has voting power of not less than 20%.
- 37 However, the definition of ‘eligible employee’ in [CO 03/184] also refers to offers made under an ‘employee share scheme’. This term is defined in s9 of the Corporations Act and refers to securities being acquired by employees or directors of the issuer or its ‘related bodies corporate’. The definition of ‘employee share scheme’ in the Corporations Act applies to our relief under [CO 03/184] unless a contrary intention is indicated in the class order. There is a question as to whether a contrary intention is evidenced by the continuing use of the term ‘associated bodies corporate’ in [CO 03/184].
- 38 We understand that relief for offers by ‘associated bodies corporate’ of an issuer may be applicable to some employee incentive schemes, such as one involving a joint venture, where the employee of one of the joint venture partners may be offered securities in the other body. An example is where a listed issuer holds an interest of between 20% and 50% in an unlisted joint venture body and the employee of the unlisted joint venture body is offered securities in the listed issuer.
- 39 As such, we propose to clarify in [CO 14/xx] that the wider scope of ‘associated body corporate’ applies, to capture a wider range of employee incentive schemes.

Unlisted bodies

- 40 Under the third exemption in [CO 03/184], a person is exempt from the disclosure provisions of the Corporations Act in relation to an offer and the issue of options over fully paid shares that are not quoted at the time of the offer or issue. The main purpose of this exemption is to delay the time of providing disclosure for unlisted bodies from the time of offer to the time of

exercise of the options and issue of the underlying shares, where those shares remain unquoted.

- 41 The third exemption sets out certain conditions of relief, including that the offer can be extended only to eligible employees of the issuer (and not employees of the issuer's associated body corporate, as for listed bodies).

Wholly owned subsidiaries of unlisted bodies

Proposal

- B3** We propose to facilitate relief for employee incentive schemes by extending its scope to cover offers of, or offers to arrange for the issue of, certain financial products made by an unlisted issuer or its wholly owned subsidiary.

Note: See Section G for our proposals relating to the types of financial products issued by an unlisted body that may be offered under an employee incentive scheme and the relevant conditions of our relief.

Your feedback

- B3Q1 Do you agree with our proposal to provide class order relief to offers of, or offers to arrange for the issue of, certain financial products made by an unlisted issuer or its wholly owned subsidiary? If not, why not?

Rationale

- 42 We propose to permit offers made under employee incentive schemes by wholly owned subsidiaries of unlisted issuers under [CO 14/xx] to cover a broader range of corporate structures. We understand that many unlisted bodies are part of a group of bodies, some of which may be operating bodies or own the business assets and others are the employer.
- 43 We do not propose to expand our relief to facilitate offers to employees of associated bodies corporate of unlisted issuers. We consider that, when the potential benefits and risks are considered, there is less justification for facilitating offers to employees of an associated body corporate of an unlisted issuer.

C Who can receive offers?

Key points

We propose to facilitate relief for employee incentive schemes under [CO 14/xx] by broadening the range of persons covered by our relief to include, in addition to employees:

- certain contractors and casual employees; and
- prospective employees as part of an offer of employment.

We also propose to provide limited class order relief for offers of certain eligible products by listed bodies to non-executive directors, subject to additional conditions.

Participants: An expanded definition

44 The first, second and fourth exemptions of [CO 03/184] currently apply to an employee share scheme of listed issuers where offers are made to an eligible employee. An ‘eligible employee’ is defined in [CO 03/184] as a person who, at the time of the offer, is a full-time or part-time employee or director of the issuer or of an associated body corporate. The third exemption of [CO 03/184] applies to offers made under an employee share scheme by unlisted bodies to eligible employees of the issuer only.

45 We are considering expanding the range of persons who will be eligible to receive offers under the new class order to include:

- (a) full-time or part-time employees (including executive directors);
- (b) contractors and casual employees who meet the conditions in proposal C1;
- (c) prospective employees who meet the conditions in proposal C2; and
- (d) non-executive directors who participate in an offer that meets the conditions described in proposal C3.

Where the issuer is listed on ASX or an approved foreign market, participants can be employed by either the issuer or its associated bodies corporate.

Where the issuer is an unlisted body, participants can be employed by either the issuer or its wholly owned subsidiaries.

Contractors and casual employees

Proposal

- c1 We propose that [CO 14/xx] will cover the offer or issue of eligible products to contractors and casual employees of issuers (and associated bodies corporate of listed issuers or wholly owned subsidiaries of unlisted issuers) where the additional conditions in Table 2 are met.

Your feedback

- C1Q1 Do you agree with our proposal to extend our class order to offers of eligible products to contractors? If not, why not?
- C1Q2 Do you agree that offers to contractors should include individual contractors engaged personally, or through a company (whether controlled by the individual contractor or a third-party professional services contractor that provides the services of many individual contractors)? If not, why not?
- C1Q3 Do you agree with our proposal that our new class order should cover offers of eligible products to casual employees? If not, why not? Are there any other conditions or requirements that may be appropriate?
- C1Q4 Do you agree with the work history criteria applying to contractors and to casual employees, as outlined in our proposal? If not, why not? Are there other criteria that may be more appropriate?

Table 2: Proposed additional conditions for offers to contractors or casual employees

Type of person	Conditions of relief
Contractors	<p>Relief would apply for contractors only if:</p> <p>(a) the offer or issue is made to:</p> <ul style="list-style-type: none"> (i) the individual who performs the work under a contract for the issuer (or for an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer); or (ii) a company, all of whose members or all of whose directors are individuals who perform work under a contract for the issuer (or for an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer); and <p>(b) the individual who performs the work under contract:</p> <ul style="list-style-type: none"> (i) has done so for the 12 months prior to the date of the offer; and (ii) during that time has worked the number of hours that are the pro-rata equivalent of 80% or more of a full-time position with the issuer (or with an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer).

Type of person	Conditions of relief
Casual employees	Relief would apply only if the casual employee: <ul style="list-style-type: none"> <li data-bbox="715 342 1385 465">(a) has been in employment with the issuer (or with an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer) for the 12 months prior to the date of the offer; and <li data-bbox="715 477 1385 629">(b) during that time has worked the number of hours that are the pro-rata equivalent of 40% or more of a full-time position with the issuer (or with an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer) and continues to work on this basis.

Rationale

- 46 We have previously granted relief on a case-by-case basis for offers to contractors and casual employees, taking into account the past relationship and likely ongoing relationship between the parties, where we consider:
- (a) the necessary level of interdependence exists to justify granting the relief; and
 - (b) obtaining an ownership interest in the issuer enhances the relationship between the employer and employee for their long-term mutual benefit.
- 47 We therefore propose that our new class order will cover contractors and casual employees where the additional conditions in Table 2 are met.

Contractors

- 48 We propose to include contractors as eligible to receive offers under the new class order on a basis that is similar to our current policy in RG 49.
- 49 The definition of ‘employee share scheme’ in s9 contemplates contractors acquiring securities under such a scheme in paragraph (b) of that definition, but only where all of the members of the corporation that acquire securities under the offer are employees, or directors holding a salaried employment or office, of the issuer or its related body corporate. The definitions of ‘eligible offer’ and ‘eligible employee’ in [CO 03/184] have the effect that offers under employee share schemes to contractors may not be eligible for relief.
- 50 We understand that contractors may be employed by bodies using different corporate ownership structures, which then enter into agreements to provide the services of the contractor. These structures may include companies where the contractor is the sole member and director, a small and closely held company of which the contractor is a member, or a third-party professional contracting services company.
- 51 We propose that our new class order will cover offers made to contractors, regardless of whether the contractor contracts directly with the issuer, its

associated body corporate or related body corporate, or contracts through a third-party contracting company.

- 52 To qualify as a contractor, eligible to receive an offer under [CO 14/xx], we propose that:
- (a) the contracting individual must have performed work under contract for the 12 months prior to the date of the offer;
 - (b) the contracting individual must have, during that time, worked the number of hours that are the pro-rata equivalent of 80% or more of a full-time position with the issuer (or with an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer); and
 - (c) the employer has an ongoing intention to continue employing the contractor on an equivalent basis for at least the next 12 months.

- 53 We also propose that the offer or issue must be made to:
- (a) the individual who performs the work under a contract for the issuer (or for an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer); or
 - (b) a corporation, all of whose members or all of whose directors are individuals who perform work under a contract for the issuer (or for an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer).

54 If an individual is employed by a third-party professional contracting company or body which provides the services of many individuals to various companies, the offer must be made to the individual for the offer to qualify for our new class order relief. This condition reflects our policy requirement of interdependence which would not be met if the offer or issue was made to a third-party professional services company.

55 We will continue to consider applications for case-by-case relief involving contractors in other situations provided that our policy objectives are satisfied.

Casual employees

56 In line with our current policy in RG 49, we propose to expressly include casual employees as eligible to receive offers under our new class order.

57 While the definition of 'employee share scheme' in s9 does not differentiate between types of employees, the definitions of 'eligible offer' and 'eligible employee' in [CO 03/184] have the effect that only offers to full-time and part-time employees are eligible for relief.

58 To qualify as a casual employee under [CO 14/xx], we propose that the employee must have:

- (a) been in employment with the issuer (or an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer) for the 12 months prior to the date of the offer; and
 - (b) during that time, worked the number of hours that are the pro-rata equivalent of 40% or more of a full-time position with the issuer (or an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer) and continues to work on this basis.
- 59 Our current policy in RG 49 states that we will consider granting case-by-case relief in respect of offers to a casual employee who has been employed for more than 12 months and who is regarded by their employer as working on a basis equivalent to either a full or part-time employee. However, this criterion is subjective and therefore not appropriate to include in class order relief.
- 60 We have therefore proposed an objective measure that, where a casual employee has worked the number of hours that are the pro-rata equivalent of 40% or more of a full-time position, they will be considered to be equivalent to a part-time employee for the purposes of our new class order relief. The number of hours that is the pro-rata equivalent of 40% or more of a full-time position is likely to be approximately two days of work per week.
- 61 We will continue to consider applications for case-by-case relief involving other thresholds for employees where an applicant can satisfy our policy requirements.

Prospective employees

Proposal

- c2 We propose that [CO 14/xx] will cover offers of eligible products made to prospective employees (or an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer) on the conditions that the offer:
- (a) is made at the same time as an offer of full-time or part-time employment;
 - (b) can only be accepted if the offer of full-time or part-time employment is also accepted; and
 - (c) is made under an existing employee incentive scheme of the issuer.

Your feedback

- C2Q1 Do you agree with our proposal to extend our class order relief to cover offers to prospective employees? If not, why not?

C2Q2 Do you agree with the proposed conditions for this relief?
If not, why not?

Rationale

- 62 [CO 03/184] provides disclosure, licensing, hawking and advertising relief in respect of offers made to ‘eligible employees’. We understand that issuers may wish to make offers of eligible products as part of an offer of employment. Such offers would currently fall outside our relief under [CO 03/184] as the offer is made before the person becomes an employee. Hawking relief is particularly relevant to allow employers to discuss the possibility of potential employees participating in an employee incentive scheme.
- 63 The proposed additional conditions, together with the proposed condition that a significant portion of eligible products offered be held for 12 months (see proposal F4), are designed to support our policy objective of providing relief where the employee incentive scheme supports long-term mutual benefit.

Non-executive directors

Proposal

- c3 We propose to expressly exclude non-executive directors from the general class of persons eligible to receive offers, and instead provide limited relief for participation by non-executive directors in employee incentive schemes of an issuer (or an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer), where the conditions in Table 3 are met.

Note: For a discussion of the term ‘non-executive director’, as it relates to our proposed relief, see paragraphs 64–71.

Your feedback

- C3Q1 Do you agree with our proposal to only provide limited conditional relief for non-executive directors? If not, why not?
- C3Q2 Do you agree with the proposed specific conditions in Table 3 for offers to non-executive directors? If not, why not?
- C3Q3 Do you agree with our proposal to impose four of the general conditions of our new class order relief (set out in Table 3) on offers to non-executive directors? If not, why not?

C3Q4 To what extent is the small-scale offerings disclosure exemption in s708(1) or 1012E relied on for offers to non-executive directors? Is this exemption useful for such offers? Please give reasons. Are any other exemptions relied on?

Table 3: Proposed conditions for offers to non-executive directors

Requirements	Conditions of relief
Specific conditions	<p>The following specific conditions must be met:</p> <ul style="list-style-type: none"> (a) the offer is only for quoted shares, depository interests or stapled securities; (b) the acquisition of these products is not subject to a condition linked to the performance of the body; (c) directors must contribute their own funds to acquire these products; and (d) the employee incentive scheme for non-executive directors must not involve a loan or other financial assistance to the directors.
General conditions	<p>The following general conditions in [CO 14/xx] would also apply:</p> <ul style="list-style-type: none"> (a) the condition that the objective of the offer is not fundraising and includes a 5% share capital limit (see proposal F2); (b) the conditions for offers using a trust (see proposal E1); (c) the conditions for offer documents and completing and submitting to ASIC Form XX (see proposal F5); and (d) the ability for ASIC to exclude a body from relying on the relief (see proposal F6).

Rationale

Our current class order relief

64 We understand that there is uncertainty about whether [CO 03/184] provides relief for offers made under an employee share scheme to non-executive directors. This class order defines ‘eligible employee’ to include ‘a full or part-time employee or a director’ but does not expressly differentiate between executive and non-executive directors. However, as [CO 03/184] incorporates the definition in s9 of the Corporations Act of ‘employee share scheme’, this refers to directors of the company, or of a related body corporate, who hold a salaried employment or office in the company or a related body corporate.

65 Where non-executive directors receive fees for the provision of their services but do not hold ‘salaried employment’, our view is that they are not included in the definition of ‘employee share scheme’ in s9. We consider this to be the appropriate position as it supports generally accepted standards of corporate governance as discussed below.

Offers to non-executive directors

- 66 An independent director is described in the commentary to Recommendation 2.1 of the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations (ASX Principles and Recommendations) as:
- a non-executive director who is not a member of management and who is free of any business or other relationship that could materially interfere with—or could reasonably be perceived to materially interfere with—the independent exercise of their judgement.³
- 67 We consider that employee incentive schemes that are subject to conditions linked to the body’s performance should not be offered to non-executive directors. Where such conditional offers are made to non-executive directors, we consider that these directors cannot be considered to be independent of management and this may lead to bias in their decision making.
- 68 Therefore, we do not propose to extend our class order to cover offers of eligible products to non-executive directors that are subject to a condition linked to the performance of the body. There is broad support for the view that it is usually not appropriate for a non-executive director to participate in an executive-style employee incentive scheme.⁴
- 69 The proposed specific conditions for offers to non-executive directors under an employee incentive scheme recognise that an ownership interest in the body by directors carries benefits, including the alignment of the interests of shareholders and directors. We appreciate that bodies may wish to encourage non-executive directors to acquire equity in the body through investing a portion of their fees. Non-executive directors need not be unaligned with the interests of members. We also understand that some start-up bodies prefer to remunerate directors by issuing financial products, particularly where cash reserves are low.
- 70 The proposed condition requiring non-executive directors to contribute their own funds to acquire the eligible products is also designed to maintain the objectivity of the director. Contributions could be made through a fee contribution plan or some other arrangement in respect of their fees or personal funds. We do not propose to facilitate participation by these

³ ASX Corporate Governance Council, *ASX corporate governance principles and recommendations with 2010 amendments*, 2nd edn, p. 16.

⁴ ASX Corporate Governance Council, *ASX corporate governance principles and recommendations with 2010 amendments*, 2nd edn, Recommendation 8.3 and Box 8.2; Investment and Financial Services Association Limited (IFSA), *Corporate governance: A guide for fund managers and corporations (IFSA Blue Book)*, June 2009, Guideline 11.12; Australian Council of Superannuation Investors (ACSI), *Governance guidelines: A guide for superannuation funds to monitor listed Australian companies*, July 2013, paragraphs 16.1 and 16.2; Australian Institute of Company Directors, *Non-executive director remuneration*, policy, 9 January 2003, www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Papers/2003/NonExecutive-Director-Remuneration; and Productivity Commission, *Executive remuneration in Australia*, inquiry report, Commonwealth of Australia, No. 49, 19 December 2009, p. 198–200.

directors in an employee incentive scheme through a loan or other financial assistance.

- 71 We note that the personal small-scale offerings disclosure exemption in s708(1) or 1012E could be used to make offers to non-executive directors. Bodies may wish to consider whether the terms of such offers should also observe the generally accepted standards of corporate governance discussed above.

D What financial products can be offered by listed bodies?

Key points

Our relief in [CO 03/184], as it applies to listed bodies, currently covers offers for the issue or sale of fully paid shares, fully paid stapled securities, and options over, or units in, fully paid shares.

To reflect the larger range of financial products now being offered under employee incentive schemes, we propose to facilitate relief for such schemes by widening the scope of [CO 14/xx] to include offers by listed bodies under an employee incentive scheme of:

- certain specified depository interests;
- options over, or units in, specified depository interests and stapled securities; and
- rights to receive certain securities that are conditional on performance.

Eligible products: A new class order definition

- 72 Currently, [CO 03/184] covers offers made under employee share schemes by listed bodies or their related bodies corporate for the issue or sale of:
- (a) fully paid shares in the issuer;
 - (b) options for the issue or transfer of these shares;
 - (c) units in these shares; and
 - (d) fully paid stapled securities, comprising two or more financial products (at least one of which is a share).
- 73 We are considering broadening our relief to include offers under employee incentive schemes of various other financial products, regardless of whether they are classified as securities or derivatives. To this end, we are considering including a new definition of ‘eligible products’ in [CO 14/xx], which will include:
- (a) fully paid shares quoted on ASX;
 - (b) fully paid shares or stock quoted on an approved foreign market;
 - (c) CHESSE Depository Interests (Australian CDIs) quoted on ASX, and CREST Depository Interests (UK CDIs)⁵ and American depository

⁵ For the purposes of this paper, ‘UK CDI’ refers to any CREST Depository Interest where the underlying security is a share or stock that is quoted on an approved foreign market, including the London Stock Exchange.

- receipts (ADRs) quoted on an approved foreign market, with a share or stock as the underlying security (see proposal D1);
- (d) fully paid stapled securities quoted on ASX;
 - (e) options over, or units in, any financial product in paragraphs 73(a)–73(d); and
 - (f) performance rights relating to any financial product in paragraphs 73(a)–73(d) (see proposal D3).

Depository interests

Proposal

D1 We propose to widen the scope in [CO 14/xx] to include offers under an employee incentive scheme of:

- (a) depository interests that are:
 - (i) Australian CDIs, quoted on ASX, where the underlying security is a share or stock; or
 - (ii) UK CDIs and ADRs, quoted on an approved foreign market, where the underlying security is a share or stock;

Note: Our relief for ADRs is limited to Level II and Level III ADRs. This is because Level I ADRs are not able to be traded on a recognised exchange and there are very limited filing requirements. Levels I, II and III are defined under the Rules of the US Securities and Exchange Commission.

- (b) the underlying security of these depository interests, where that underlying security is a share or stock; and
- (c) options over, or units in, these depository interests or their underlying securities.

Your feedback

D1Q1 Do you agree with our proposal to extend relief in our new class order to cover offers of Australian CDIs where the underlying security is a share or stock? If not, why not?

D1Q2 Do you agree with our proposal to extend our class order to cover offers of certain UK CDIs and ADRs where the underlying security is a share or stock and the UK CDIs or ADRs are quoted on an approved foreign market? If not, why not?

D1Q3 Do you agree with our proposal to extend our class order to cover offers of underlying securities of depository interests? If not, why not?

D1Q4 Do you agree with our proposal to extend our class order to cover offers of options over, or units in, depository interests or their underlying securities? If not, why not?

Rationale

- 74 We have granted case-by-case relief for offers of UK CDIs and ADRs where the underlying security is equity (as opposed to debt) and where we were satisfied that the policy objectives in RG 49 and the key conditions of [CO 03/184] were met. We propose to include offers of such depository interests in [CO 14/xx].
- 75 We have previously granted relief because we consider that depository interests align employer and employee interests in much the same way as shares and options over shares, because they provide the economic equivalent to participation in the ownership of the body. The value of such depository interests can readily be determined, given that they are quoted on an approved foreign market, which provides a history of disclosure in a well-regulated financial market.
- 76 We understand that, without relief, Australian employees could be disadvantaged by being excluded from offers of these depository interests due to the burden of complying with the disclosure and licensing requirements of the Corporations Act.
- 77 We propose to extend the scope of our class order to include offers of Australian CDIs, even though we usually receive applications relating to foreign depository interests (UK CDIs or ADRs) or foreign securities that can be converted into Australian CDIs.

Types of depository interests that would qualify for class order relief

- 78 Australian CDIs are financial products that are quoted on ASX and confer beneficial interests in foreign securities. Under the ASX Settlement Operating Rules, Australian CDI holders have the same economic and other entitlements as holding the underlying foreign body's securities, except in relation to voting arrangements.
- 79 UK CDIs are securities governed by English law that are used to allow trading through CREST on UK exchanges and represent interests in underlying securities of non-UK bodies. The underlying securities can be shares, Eurobonds, domestic bonds and depository receipts. Generally, UK CDI holders have the same economic and other entitlements as holding the underlying securities.
- 80 Similarly, ADRs represent securities of non-US bodies, and some types of ADRs may be traded on a US exchange. The proposed requirement that ADRs be quoted on an approved foreign market would limit the types of ADRs that qualify for our new class order relief to Level II and Level III ADRs, which involve the issuing companies registering with the Securities and Exchange Commission, filing at least annual reports in compliance with

generally accepted accounting principles (GAAP) standards and complying with the listing rules of the relevant US exchange.

81 We do not propose to extend our class order to cover offers under employee incentive schemes of depository interests quoted on other approved foreign markets, such as Canadian or European exchanges, because we have not received many applications for relief in respect of these particular products and exchanges.

82 We will continue to consider such relief applications on a case-by-case basis where these interests are quoted on an approved foreign market, are equity based, and our policy objectives are met.

Types of underlying eligible products

83 We propose to limit the scope of our new class order to offers of depository interests where the underlying security is a share or stock. While depository interests can be issued over bonds, we do not consider that facilitating an offer of a debt interest is consistent with our policy reasons for permitting relief for employee incentive schemes. In particular, the price of a debt interest may not reflect the performance of the issuer, and holding an interest in debt may not lead to a similar relationship of interdependence.

Stapled securities

Proposal

D2 We propose to extend [CO 14/xx] to include offers of options over, and units in, fully paid stapled securities quoted on ASX.

Your feedback

D2Q1 Do you agree with our proposal to extend relief in our class order to cover offers of options over, and units in, fully paid stapled securities? If not, why not?

Rationale

84 Relief is currently provided under [CO 03/184] only in respect of offers of fully paid stapled securities that have been quoted on ASX. Stapled securities are defined as two or more financial products (at least one of which is a share) which, under the terms of which each is traded, must be transferred together.

85 While we will retain the requirement that the fully paid stapled securities are quoted on ASX, and at least one of these is a fully paid share, we propose to extend our class order to cover offers of options over, and units in, such stapled securities. We do not propose to extend our class order to cover stapled securities beyond this because such applications for relief are not very common.

- 86 We consider there is no regulatory detriment in extending our class order to cover offers of options over, and units in, such stapled securities, as these offers are able to establish the relationship of interdependence that exists for fully paid shares.

Performance rights

Proposal

D3 To facilitate offers under employee incentive schemes, we propose to:

- (a) retain class order relief in relation to options offered for no more than nominal monetary consideration;
- (b) provide class order relief for offers of performance rights for no more than nominal monetary consideration; and
- (c) define a 'performance right' as a right to receive:
 - (i) fully paid shares quoted on ASX;
 - (ii) fully paid shares or stock quoted on an approved foreign market;
 - (iii) depository interests;
 - (iv) fully paid stapled securities quoted on ASX;
 - (v) a cash amount that is equivalent to the value of a financial product in D3(c)(i)–D3(c)(iv) and/or any increase in their value;
 - (vi) a cash amount that is equivalent to the dividends or distributions paid to holders of a financial product in D3(c)(i)–D3(c)(iv); and/or
 - (vii) the value of the dividends or distributions paid to holders of a financial product in D3(c)(i)–D3(c)(iv),

which automatically vests in the recipient for no monetary consideration if conditions are met which relate to:

- (viii) the length of service of the recipient; and/or
- (ix) the performance of the recipient, the issuer or an associated body corporate of the issuer.

Your feedback

D3Q1 Do you agree with our proposal to extend our class order to cover offers of performance rights offered for no more than nominal monetary consideration? If not, why not?

D3Q2 Do you consider the proposed definition of 'performance right' is broad enough to cover the conditional rights usually offered under an employee incentive scheme? If not, what other rights do you think should be included in the definition? Please provide a detailed explanation of the nature of these rights and why they should be included.

- D3Q3 Do you agree with our proposal to define 'performance right' as a right offered for no more than nominal monetary consideration? If not, why not? Is it more reflective of market practices to define 'performance right' as a right offered for no monetary consideration? If so, please provide details and examples.
- D3Q4 Do you agree with our proposal to include dividend equivalent rights in the definition of 'performance right'? If not, why not?
- D3Q5 Do you agree with our proposal to include as a component of the definition of 'performance right' the ability to receive the cash amount equivalent to the relevant financial product? If not, why not?
- D3Q6 Do you consider that paragraphs D3(c)(v)–D3(c)(vi) adequately capture the ability for some performance rights to be cash settled? If not, why not?

Rationale

- 87 Employee incentive schemes involving an offer of performance rights have become increasingly common among Australian and foreign listed issuers. Such rights are given various names, including phantom shares, performance rights, stock appreciation rights, share rights, equity rights, restricted stock units and performance awards.
- 88 Since publishing RG 49, we have considered case-by-case relief for offers to employees of various rights, including rights to receive shares in a listed issuer, their cash equivalent, dividends or cash to the value of an increase in share price which is payable on the satisfaction of specified performance and/or retention criteria.
- 89 We have granted case-by-case relief for offers of such performance rights where we were satisfied that our policy objectives were met, including:
- (a) conditions being imposed, to be fulfilled before vesting, with the effect that the performance rights would be held for a substantial period of time, enabling a relationship of long-term mutual benefit between the employer and employee (see paragraphs 185–189 for our proposed new condition regarding a minimum period for the rights to be held before the employee receives unrestricted title to the underlying financial product);
 - (b) the offer being made for no more than nominal monetary consideration in relation to both the granting and vesting of the performance rights; and
 - (c) adequate disclosure to ensure that investor safeguards are not unduly compromised.

90 We propose to extend our class order to cover offers under employee incentive schemes of rights that meet our proposed definition of ‘performance right’ to the extent that such rights are not already covered under [CO 03/184].

91 In relation to employee incentive schemes offered by multinational bodies, we understand that, without relief, overseas employers are unlikely to extend the offer to Australian employees due to the disproportionately burdensome cost of complying with the disclosure and licensing requirements of the Corporations Act. Australian employees could therefore be disadvantaged in comparison with their colleagues overseas.

Legal characterisation of performance rights

92 Some performance rights are options over a share, a unit in a share or a conditional offer of shares. As explained below, if a performance right is not within one of these legal characterisations, it is likely to be a derivative.

93 A performance right could be classified as an option and therefore qualify for relief under [CO 03/184] if:

- (a) it is to be satisfied by way of issue of a new share on vesting; and
- (b) its terms require the employee to exercise their right to the new share, rather than an automatic issue on vesting.

94 In our view, if a performance right does not have an exercise mechanism, but vests automatically, it cannot be considered to be an option.

95 Where the performance right has an exercise mechanism and is to be satisfied by way of transfer of an existing share on exercise (i.e. it is held for a particular employee), it may be classified as an interest in a share within the meaning of paragraph (c) of the s761A definition of ‘security’.

96 A performance right that has other characteristics may mean it does not meet the definition of ‘security’ in s761A, and so may not be excluded from the definition of ‘derivative’. This may be the case where, for example, there is no exercise mechanism and the rights may be satisfied by a cash payment (equivalent to the value of the shares or other eligible products, or the value of an increase in their price) to the employee.

97 We consider that a performance right that confers an automatic right to receive a specified issued share (and nothing else) on the satisfaction of performance or service conditions, absent other terms, is likely to be a unit in a share. Such a performance right may also be classified as a conditional offer of shares, which would also qualify for relief under [CO 03/184].

98 Other performance rights are likely to be derivatives and to fall outside the scope of [CO 03/184]. We consider that a performance right may not be a unit in a share if any of the following circumstances apply:

- (a) the right is an entitlement to an unissued share;
- (b) the right is an entitlement to an unidentified issued share, either:
 - (i) held in a pool of shares, on trust, for the purpose of transfer to employees on vesting of the rights (as a specific share is not held for a specific employee); or
 - (ii) to be purchased on-market at the relevant time by a trustee for an employee incentive scheme (as the specific share is not identified at this point); or
- (c) on vesting of the performance right, the issuer or trustee for an employee incentive scheme has the discretion to provide the employee with either a new share by way of issue or an existing share.

99 We also do not consider that the exemption from the definition of ‘derivative’ in s761D(3)(b) for a contract for the future provision of services would usually apply to arrangements made in relation to an employee incentive scheme.

100 Accordingly, the offer of performance rights that have the elements discussed at paragraph 98 would, but for relief, be subject to the disclosure requirements under Ch 7 of the Corporations Act on the basis that the performance right is a derivative.

101 We propose to extend our class order to cover offers of the types of rights that appear to be the most commonly used where our policy objectives are met, regardless of their legal characterisation.

Definition of ‘performance right’

102 The proposed definition of ‘performance right’ is designed to capture the most common types of rights that have been the subject of relief applications, as well as other similar types of rights.

103 We will consider case-by-case relief where rights are offered that provide for the right to receive a financial product that is not within our definition of an ‘eligible product’, or that does not meet the proposed definition of ‘performance right’, provided that our policy objectives for offers under employee incentive schemes are adequately addressed.

Terms of issue of performance rights and options

104 The proposed definition of ‘performance right’ includes two components: the performance condition, and the eligible product (or cash equivalent) that the participant will receive once the performance conditions are met. Apart from the condition relating to the length of service, we have not sought to include other specific conditions as these will vary from employer to employer.

- 105 For example, offers of performance rights may be made on terms that include:
- (a) the ability to choose between receiving a financial product or cash in lieu of the financial product at either the board's or the participant's election;
 - (b) a dividend reinvestment facility; and
 - (c) the ability for 'cashless exercise'.
- 106 Offers of options often permit cashless exercise. This generally involves terminating a number of the options, and offsetting the value of those options against the exercise price payable in respect of the remaining options that the employee is entitled to exercise. This occurs when the options are 'in the money' (i.e. where the value of the underlying shares is greater than the cost of exercising the options).
- 107 We do not consider that the particular terms relating to the granting, vesting or exercise of options, or to the granting or vesting of performance rights that meet our definition, would generally preclude an offer under an employee incentive scheme from meeting our policy objectives.
- 108 While we propose to provide relief for offers of performance rights and options that may include the above terms, we do not intend to provide relief for offers of options or performance rights that involve:
- (a) more than a nominal monetary consideration;
 - (b) a contribution plan; or
 - (c) a loan.
- 109 This is because such terms and arrangements have the potential to increase the financial and economic exposure of a participant. We do not think it is desirable to facilitate relief where the risks are further elevated with such arrangements.

Cash bonuses

Proposal

- D4** We propose to provide guidance (including potentially issuing, for the avoidance of doubt, a separate class order declaration under s765A(2) of the Corporations Act) that employment or employment-like remuneration arrangements, under which commissions or bonuses may be payable, are not financial products for the purposes of Ch 7. This would ensure that such arrangements are not regulated as derivatives for the purposes of Ch 7.

Your feedback

D4Q1 Do you agree with our proposal to provide guidance (and to potentially issue a separate class order declaration) that employment or employment-like remuneration arrangements, under which commissions or bonuses may be payable, are not financial products for the purposes of Ch 7? If not, why not?

Rationale

- 110 Our proposed definition of ‘performance right’ is not intended to capture cash payments offered in the context of employment or employment-like remuneration arrangements, where the amount of cash payable is determined by a measure other than an underlying eligible product. For example, a cash bonus where the amount of the bonus is determined by the employer’s sales, profits or the level of its carbon emissions, would not meet our proposed definition of ‘performance right’ and therefore not qualify for our new class order relief.
- 111 We do not consider that such cash payments, where the value is derived from something other than a financial product, such as a sales commission or a cash bonus—is intended to be caught by the disclosure and licensing provisions of Ch 7.
- 112 Accordingly, for the avoidance of doubt, we are considering whether to issue a separate class order under s765A(2) of the Corporations Act to declare that employment or employment-like arrangements, under which such cash commissions or bonuses may be payable, are not financial products for the purposes of Ch 7.

Other financial products**Proposal**

- D5 We propose to continue to consider on a case-by-case basis applications for relief for other financial products, such as interests in a managed investment scheme offered under an employee incentive scheme (other than those stapled to a share).

Your feedback

D5Q1 Do you agree with our proposal to continue to consider on a case-by-case basis applications for relief for other financial products? If not, why not?

D5Q2 Are there other financial products that we should consider including in [CO 14/xx]? If so, what are they, and in what circumstances are they offered?

Rationale

- 113 We have received a small number of applications for relief over the past five years for offers of interests in managed investment schemes under an employee incentive scheme, other than when these are a component of stapled securities. We have received even fewer applications for relief for offers of interests in foreign collective investment schemes.
- 114 We will continue to consider relief applications for such offers, or any other types of financial products, on a case-by-case basis.

E What structures can be used by listed bodies when making offers?

Key points

We propose to facilitate employee incentive schemes that involve the market practice of using third-party bodies to provide trustee and trust administration services for the purposes of operating an employee incentive scheme.

In this regard, we propose that [CO 14/xx] would:

- extend relief to cover offers of certain specific financial products that are held on trust and are allocated to specific participants, and also to include underlying eligible products held in a pool for participants generally on an unallocated basis;
- impose a new condition, for products held on trust on an unallocated basis, that no more than 5% of the issuer's eligible products to which voting rights attach may be held on trust for participants;
- expand the definition of 'contribution plan' to include salary sacrifice arrangements of future earnings as well as deductions from taxed salary amounts; and
- impose a condition that loans must be limited or no recourse, in line with our current policy that participants should not be exposed to liabilities other than forfeiture of the eligible products.

Use of trusts

115 Under [CO 03/184], issuers, or the associated bodies corporate of listed issuers, may issue eligible products directly to participants. However, we understand that in many cases issuers also use trust structures in connection with their employee incentive schemes.

Relief for employee incentive schemes using a trust

Proposal

E1 We propose:

- (a) that [CO 14/xx] will provide relief to cover offers of underlying eligible products (i.e. eligible products excluding options and performance rights) under employee incentive schemes that use a trust structure where the relevant conditions in Table 4 are met. The conditions that apply will depend on whether the trustee holds:
 - (i) specific underlying eligible products on trust for, and allocated to, specific participants (allocated products); or

- (ii) underlying eligible products in a pool on trust for participants generally (unallocated products); and
- (b) to remove from the current conditions relating to trusts the ability for the trust deed to expressly exclude the beneficiary from having the capacity to authorise the trustee to sell at or above the current market price the shares to which they are entitled.

Note: For our proposed disclosure and on-sale relief for the issue of underlying eligible products to trustees of trusts used for employee incentive schemes, see proposal H2.

Your feedback

- E1Q1 Do you agree with our proposal to extend our new class order to include offers of underlying eligible products, regardless of whether a trustee holds specific products on trust for specific participants, or the trustee holds underlying eligible products in a pool on trust for participants generally? If not, why not?
- E1Q2 Are there other ways of using a trust structure to offer underlying eligible products to participants that we should expressly include in [CO 14/xx]? Please provide examples.
- E1Q3 Do you agree with the proposed conditions of relief in respect of allocated products? If not, why not?
- E1Q4 Do you agree with the proposed conditions of relief in respect of unallocated products? If not, why not?
- E1Q5 Do you agree with our proposal to remove from the conditions relating to trusts the ability for the trust deed to expressly exclude the beneficiary from having the capacity to authorise the trustee to sell at or above the current market price the shares to which they are entitled? If not, why not?
- E1Q6 [CO 03/184] currently provides licensing relief for associates of issuers. Do you consider that other types of trustees (that may not be associates of issuers) also require licensing relief in the context of employee incentive schemes? If so, please provide examples and explain why such relief is needed.
- E1Q7 Are there other trust structures, including those involving the offers of units in a trust, that we should give guidance on or that should be covered in our new class order? Please provide details, including details of the trust structure, the nature of the financial product offered, the terms of the offer, the reason for making offers in this way and how our key policy objectives are satisfied.

Table 4: Proposed conditions for employee incentive schemes using a trust

How underlying products are held on trust	Proposed conditions of relief
General conditions applying to both allocated products and unallocated products	<p>For the relief to apply:</p> <ul style="list-style-type: none"> (a) the sole purpose of the trust must be to hold underlying eligible products on trust for participants who become entitled to those products under the employee incentive scheme; (b) the trustee must maintain proper written financial records on the activities of the trust and cause those records to be audited annually and made available for inspection by the beneficiaries at an office of the trustee or a place of business of the issuer (or of the issuer's associated body corporate) during business hours or such other time as agreed with the relevant beneficiary or beneficiaries; and (c) the trustee must not levy any fees or charges for operating and administering the trust that are payable directly by the beneficiaries or out of the assets of the trust, other than reasonable brokerage and tax legitimately levied or incurred in connection with the trust's operation, which may be paid out of the assets of the trust.
Specific conditions applying to allocated products	<p>For the relief to apply:</p> <ul style="list-style-type: none"> (a) the trustee must hold eligible products on trust for each participant who is or may become entitled to receive underlying eligible products under the employee incentive scheme; (b) the trustee must identify in written records (such as a sub-register) the underlying eligible products being held for a relevant participant; and (c) the trust deed must contain covenants binding the trustee and its agents, if any, to the effect that a beneficiary possesses substantially the same rights in relation to the relevant eligible products as if they were the legal owner of those products, including the right to: <ul style="list-style-type: none"> (i) direct the trustee how the voting rights attaching to the underlying eligible products held for that beneficiary shall be exercised; and (ii) receive the income deriving from the underlying eligible products held for that beneficiary, including dividends and/or distributions.
Specific conditions applying to unallocated products	<p>For the relief to apply:</p> <ul style="list-style-type: none"> (a) the trustee must hold eligible products on trust in a pool for participants who are, or who may become, entitled to underlying eligible products under the offer; (b) the trustee must not, at its own discretion, exercise the voting rights attaching to any of the underlying eligible products it holds on trust; and (c) the trustee must not hold more than 5% of the ordinary shares in the issuer as unallocated products, calculated in accordance with proposal E2.

Rationale

116

[CO 03/184] currently provides relief in respect of offers under an employee share scheme made through a trust on the condition that an eligible employee holds a beneficial interest in a share, and is afforded most of the benefits that a legal owner of those shares would have. The beneficial interest is referred to as a 'unit of share'. We consider that a unit in a share

can only be created in respect of a specific existing share that is allocated to a specific eligible employee. The relief contemplates a specific set of circumstances in which a trust may be used in connection with an offer under an employee share scheme.

117 In [CO 14/xx], we propose to describe these circumstances as holding the specific shares (or other underlying eligible products) as allocated products by the trustee for the specific participant. We propose to apply conditions of relief to these trust arrangements that are similar to those currently contained in [CO 03/184], including in relation to the right to direct how the voting rights are exercised and the right to receive dividends.

118 However, we propose to remove the provision for the trust deed to be able to expressly exclude the beneficiary from having the capacity to authorise the trustee to sell at or above the current market price, the shares to which they are entitled. We consider this is contrary to the concept of providing for the beneficiary to have rights that are generally equivalent to a legal owner. We think such a provision is more appropriate when held by a trustee in relation to unallocated products: see paragraphs 120–122.

119 We understand that many employee incentive schemes may wish to use trust structures. The reasons include assisting bodies to manage their obligations to have sufficient shares or other underlying eligible products available to vest if the performance conditions are met. Trusts holding relevant underlying eligible products on trust for specified persons may meet the current conditions of relief under [CO 03/184].

120 However, where these trusts are used to ‘warehouse’ underlying eligible products in a pool on behalf of participants generally, the current class order conditions cannot be met. Such products may be held as unallocated products for a number of reasons, including that the conditions have not yet been satisfied, or that an employee for whom allocated products were held has forfeited their right to those products. A trustee could be holding some eligible underlying products as allocated products and others as unallocated products.

121 The benefits of using trusts to hold unallocated products include spreading the timing of acquisitions to avoid larger trades on-market and the potential price implications, to average out the cost of acquiring these products, and to make the acquisitions during open trading periods.

122 We do not see any regulatory detriment in facilitating this commercial practice, providing the other conditions of our relief are met. Our proposed relief therefore covers unallocated products as well as allocated products held on trust. However, because unallocated products are not marked for a specific participant, we consider it is appropriate to impose different conditions for these structures.

123 We also consider it is reasonable for our new class order to apply where the trust holds underlying eligible products other than shares (i.e. depository interests and stapled securities).

Units and interests in a trust

124 We are aware that some employees are offered units or interests in a trust, or become beneficiaries of a trust, which holds the underlying eligible products. Where the underlying eligible products are shares, if the employee has a legal or equitable right in the specific shares, this is an offer of a unit in a share and is therefore an offer of a security that must comply with Ch 6D. As an offer of a unit of a share, it could, depending on its terms, be eligible for relief under [CO 14/xx].

125 However, unit holders or beneficiaries of the trust may have a beneficial interest in the assets of the trust as a whole, but not a specific interest in any particular asset. This is likely in circumstances including where the shares or other underlying eligible products are held in a pool on an unallocated basis. Depending on the terms of the offer, it may be that employees are being offered:

- (a) interests in a managed investment scheme;
- (b) a derivative; or
- (c) something that is not a financial product regulated under the Corporations Act.

126 If the financial product offered meets our proposed definition of ‘performance right’ (i.e. it is offered for no monetary consideration, comprises a right to obtain an underlying eligible product or certain cash or non-cash equivalents, and vests on the satisfaction of certain conditions), the offer may qualify for relief under [CO 14/xx], provided that the relevant conditions of relief are satisfied. If the product offered does not meet this definition, and no statutory exemption applies to the offer, case-by-case relief would be required where the product is a derivative or an interest in a managed investment scheme. Alternatively, if the product is not a financial product, it may not be regulated by the Corporations Act.

Professional trustees

127 We understand that many issuers use professional trustees who are AFS licensees to act as the trustee of their employee incentive scheme trust and to operate the scheme. However, [CO 03/184] also envisages the use of a trustee that is an associate of the issuer, in that the fourth exemption provides licensing relief to an associate of the issuer in respect of the provision of custodial or depository services in connection with the offer.

- 128 We propose to limit the scope of this relief to associated bodies corporate of the issuer: see proposal H1. This is because the definition of ‘associate’ in s9 of the Corporations Act is very broad and we wish to limit our relief to apply to incidental financial services provided as part of an employee incentive scheme.
- 129 We note that, where the trustee is a body controlled by the issuer, the provisions regarding self-acquisition in Pt 2J.2 of the Corporations Act must also be complied with: see Regulatory Guide 233 *Indirect self-acquisition: Relief for investment funds* for details (RG 233). Also, where a body, including a trust, holds a substantial holding in a company or scheme, it must provide a substantial holding notice under Pt 6C.1 of the Corporations Act.
- 130 We will continue to consider applications for relief by foreign issuers that use a trust structure on a case-by-case basis, to the extent that the scheme structure is not already included in our new class order relief.

Limit of 5% on eligible products held on trust as unallocated products

Proposal

E2 We propose to:

- (a) impose a condition in [CO 14/xx] that the number of underlying eligible products to which voting rights attach that are held on trust for participants as unallocated products must not exceed 5% of the total voting rights attaching to eligible products on issue at any point in time; and
- (b) specify that the 5% limit be calculated as the number of underlying eligible products held on trust as unallocated products as a percentage of the total number of those eligible products combined with any other class of voting financial product on issue at any point in time.

Your feedback

- E2Q1 Do you agree with our proposal to impose a new condition in our new class order relief to limit the number of eligible products that may be held by a trustee of an employee incentive scheme trust at any given time? If not, why not?
- E2Q2 Do you agree with our proposal about how the 5% limit would be calculated? If not, why not?

Rationale

- 131 As noted in paragraphs 116–123, we understand that underlying eligible products offered under an employee incentive scheme are often held in a trust, either as allocated products or unallocated products. For the purposes of the proposed conditions relating to allocated products in [CO 14/xx], the participant has the ability to direct voting in respect of allocated products.

- 132 However, if the underlying eligible products are held on trust as unallocated products, where neither the trustee nor the employee beneficiaries exercise the voting rights attached to those underlying eligible products, there is a risk that this may distort the voting power of all other holders. This is the same concern that we articulate in relation to indirect self-acquisition at RG 233.22.
- 133 We therefore propose to impose a new condition in our new class order relief that the number of underlying eligible products to which voting rights attach held on trust as unallocated products must not exceed 5% of the total voting rights attaching to eligible products on issue at any point in time.
- 134 We also propose that the 5% be calculated as the number of eligible products held on trust as unallocated products (i.e. where employees are not able to direct how the attaching voting rights are exercised) as a percentage of the total number of eligible products combined with any other class of voting financial product on issue at any point in time. Voting rights are likely to attach to underlying eligible products that are shares, depository interests and stapled securities. We think it is important to include other classes of voting financial products so that the calculation reflects all voting rights in respect of the issuer.
- 135 The proposed condition aims to balance the benefits of an appropriately designed employee incentive scheme against the voting distortion and potential issuer control risks. This is the reason for excluding from the 5% calculation the number of underlying eligible products held on trust as allocated products (i.e. where the participant is able to direct how the voting rights are exercised).

Contribution plans

Proposal

E3 We propose to:

- (a) include in [CO 14/xx] offers under an employee incentive scheme that involve a contribution plan where the conditions in Table 5 are met; and
- (b) redefine 'contribution plan' to mean:

A plan under which a participant may make monetary contributions towards the acquisition of eligible products (other than performance rights or options) offered under an employee incentive scheme from earned, or future entitlements to, wages, salary or bonus payments or from their own funds.

Your feedback

E3Q1 Do you agree with the proposed new definition of 'contribution plan'? If not, why not?

- E3Q2 In particular, do you consider that the proposed new definition of 'contribution plan' includes both deductions made from earned salary (described as an 'ineffective salary sacrifice' arrangement in Income Tax Ruling TR 2001/10 (TR 2001/10)) and agreements to take future salary in the form of eligible products (described as an 'effective salary sacrifice' arrangement in TR 2001/10)? If not, why not?
- E3Q3 Do you agree with the proposed conditions for how contributions are to be held? If not, why not?
- E3Q4 Do you agree with our proposal to change the timing for the opt-out requirement from 'any time' under [CO 03/184] to 'a notice period of no more than one month', with all money deposited for that participant at that time with an Australian ADI, including any accumulated interest, to be transferred to that participant as soon as practicable? If not, why not?
- E3Q5 Are there any other conditions that should be imposed in respect of employee incentive schemes involving contribution plans?

Table 5: Proposed conditions for offers involving contribution plans

Requirements	Proposed conditions of relief
Electing to participate	For any contribution plan, written authorisation must be obtained for: <ol style="list-style-type: none"> deductions from the participant's salary, wage or bonus; contributions from the participant's personal funds; and an agreement to receive a future salary, wage or bonus in the form of eligible products.
Opting out	The contribution plan must provide for: <ol style="list-style-type: none"> participants to discontinue their participation in the contribution plan with a notice period of no more than one month; and any money deposited for that participant with an Australian authorised deposit-taking institution (ADI), including any accumulated interest (less any tax), to be repaid to that participant as soon as practicable after the participant opts out.
How contributions are held	If a participant makes contributions from earned, or future entitlements to, salary, wages or bonuses or from their personal funds, those contributions must be either: <ol style="list-style-type: none"> held in cash as follows, until the relevant eligible products are acquired for the participant in the participant's name or acquired and held on trust for the participant in accordance with paragraphs (c) or (d): <ol style="list-style-type: none"> by the issuer, its associated body corporate, a trustee that is an associated body corporate of the issuer, or an AFS licensee with the appropriate authorisation;

Requirements	Proposed conditions of relief
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- | | |
|--|--|
| | <ul style="list-style-type: none"> (ii) on trust for the contributing participant; and (iii) in an account with an Australian ADI which is established only for the purpose of depositing contribution money and other money paid by participants for the eligible products on offer under the employee incentive scheme; or |
| | (b) used to fund eligible products that are issued or transferred to the participant prior to the participant receiving their salary, wage or bonus (these eligible products may be subject to restrictions from disposal which expire as the participant becomes entitled to each relevant component of the salary, wage or bonus); or |
| | (c) held in a trust as an allocated product for the benefit of each relevant participant, until transferred to the relevant participant; or |
| | (d) held in a trust as an unallocated product, until held as an allocated product in accordance with paragraph (c) or transferred to the relevant participant. |

Rationale

136 [CO 03/184] currently provides conditional relief for offers of fully paid quoted shares that involve a contribution plan. A contribution plan is defined as one that requires:

- (a) the eligible employee, on the same application form as the offer or a form included in the offer document, to authorise regular deductions from their wages or salary towards paying for shares only (including through salary sacrifice arrangements);
- (b) contributions to be held in trust by the issuer for the eligible employee with an Australian ADI, held only for that purpose; and
- (c) that the eligible employee be entitled to discontinue the contribution plan at any time, and all money contributed plus any interest must be repaid as soon as practicable.

137 In 2007, a definition of ‘contribution plan’ was inserted into s9 of the Corporations Act that is broadly similar to that in [CO 03/184].

Contributions from earned, or future entitlements to, salary, wages or bonuses

138 While the definition of ‘contribution plan’ in s9 does not affect [CO 03/184] (as the class order has its own definition of ‘contribution plan’), we understand that the language of both definitions may be construed to refer only to salary sacrifice arrangements that are classed as ‘ineffective salary sacrifice arrangements’ for the purposes of TR 2001/10.

- 139 In particular, we understand that there are doubts that references to deductions and the requirement to hold contributions in an Australian ADI have the effect of referring to post-tax contributions because they imply that a portion of cash is deducted from earned salary, wages or bonuses⁶ and because TR 2001/10 provides that such benefits (e.g. shares) are assessable income at the time the employee has earned the entitlement to receive the salary, wages or bonus.⁷ However, we understand that many employers wish to use contribution plans that permit pre-tax contributions. We understand that ‘effective salary sacrifice arrangements’ are those where an employee elects to receive part of their future entitlement to salary, wages or bonuses as benefits (such as shares) prior to earning the entitlement to that salary, wage or bonus.⁸ TR 2001/10 provides that these benefits are exempt income (i.e. not assessable income) if derived as ordinary or statutory income.⁹
- 140 We do not intend to differentiate between pre-tax and post-tax contributions for the purposes of facilitating offers under employee incentive schemes that involve contribution plans. Therefore, our proposals are not designed with particular taxation consequences in mind.
- 141 We also understand that, in the case of pre-tax contributions, employees can receive the underlying eligible products upfront and subject to a restriction from disposal, rather than in periodic tranches. They may have the right to vote and receive dividends in respect of these products, but may not dispose of them. Alternatively, the relevant underlying eligible products may be held in a trust as an allocated product.
- 142 The proposed conditions are intended to ensure that, in this case, the participant either receives the relevant underlying eligible product or it is held on trust for the participant regardless of the timing of the contributions.
- 143 In addition, the definition of ‘contribution plan’ in [CO 03/184] currently excludes the contribution of bonuses because it only refers to salary and wages and to regular deductions. It is possible for employees to elect to contribute all or part of their earned or future bonus to acquiring eligible products under an employee incentive scheme. We see no reason for excluding this method of contribution.

Associated bodies corporate of the issuer

- 144 [CO 03/184] currently includes offers that involve contribution plans only if the contributions are held on trust for the eligible employee by the issuer. However, in some cases contemplated by [CO 03/184], eligible employees will be employed by an associated body corporate of the issuer, and we

⁶ See the definition of ‘ineffective SSA’ in paragraph 22 of TR 2001/10.

⁷ See paragraphs 25 and 27 of TR 2001/10.

⁸ See the definition of ‘effective SSA’ in paragraph 21 of TR 2001/10.

⁹ See paragraphs 26 and 29 of TR 2001/10.

understand many issuers use licensed professional third-party trustees to administer their employee incentive schemes.

145 We propose that these trustee structures be provided for in [CO 14/xx] as we do not see any regulatory detriment in doing so where the contribution plan giving rise to the financial service is only an incidental part of the employee incentive scheme and the participant is otherwise adequately protected.

The timing for the ‘opt-out’ requirement

146 [CO 03/184] requires that eligible employees may elect to discontinue their participation in the contribution plan ‘at any time’ and for all money deposited in the Australian ADI in relation to that eligible employee to be repaid as soon as practicable. We understand that the ability for participants to opt out at any time may impose an unreasonable administrative burden on the employer body.

147 To reduce this administrative burden, we propose to change the election period to a maximum of one month’s notice to coincide with a pay cycle, which we assume will generally be no more than monthly. Any money deposited for that participant with an Australian ADI, including any accumulated interest (less any tax), would need to be repaid to that participant as soon as practicable after the participant opts out.

Contribution plans not permitted for offers of options and performance rights

148 We do not propose to permit contribution plans for offers of non-quoted eligible products (i.e. options and performance rights). This is because we do not consider there is sufficient certainty about the value of non-quoted eligible products to justify disclosure relief where participants are providing monetary consideration, or where they are placed in a position of potential liability.

Loans

Proposal

E4 We propose to:

- (a) limit the circumstances in which a loan or similar financial assistance may be provided to participants for acquiring underlying eligible products under an employee incentive scheme that qualifies for class order relief to loans that are:
 - (i) either no recourse arrangements or limited recourse arrangements, with recourse limited to the forfeiture of the underlying eligible products issued under the loan arrangement;
 - (ii) not repayable for the duration of the loan; and
 - (iii) interest free; and

- (b) provide class order relief so that an offer under an employee incentive scheme can involve both a loan and a contribution plan.

Your feedback

- E4Q1 Do you agree with the proposed limited or no recourse limitation on loans offered for acquiring underlying eligible products (i.e. eligible products excluding options and performance rights) under an employee incentive scheme that qualifies for class order relief? If not, why not?
- E4Q2 Do you agree with permitting employee incentive schemes that involve a loan as well as a contribution plan? If not, why not?

Rationale

Limitations on loan arrangements

149 The first exemption in [CO 03/184] provides disclosure relief for certain offers of quoted securities under an employee share scheme that may involve a loan, but does not involve a contribution plan. However, [CO 03/184] does not place any restrictions on the terms of such loans.

150 Our current stated policy is that eligible employees should not be placed in a position of loss of contributed money or of any future liability, other than forfeiting the financial products acquired under the employee incentive scheme (see RG 49.25 in respect of partly paid shares). Because [CO 03/184] does not expressly include any limitations on the loan terms, there is the potential that loan arrangements may be established that contradict this policy.

151 To reflect our policy, our proposal is that [CO 14/xx] will require that loans are:

- (a) without recourse, or with recourse limited to the forfeiture of the eligible products that are the subject of the loan;
- (b) not repayable during the life of the loan; and
- (c) interest free.

Combined loans and contribution plans

152 While the first exemption under [CO 03/184] refers to offers that involve a loan but not a contribution plan, the second exemption refers to offers that involve a contribution plan but not a loan for the acquisition of financial products under an employee share scheme.

153 We propose to provide relief for employee incentive schemes that involve both contribution plans and loans or other financial accommodation. We consider that the proposed conditions for contribution plans will provide

adequate protections to participants in respect of their contributions; and that the limited or no recourse restriction on loans or other financial accommodation will also provide adequate protections to participants such that those arrangements should be capable of being offered together.

F What are the conditions of relief?

Key points

We propose to facilitate employee incentive schemes by amending a number of conditions of our class order relief to:

- change the period of quotation from a 12-month period without suspension for more than two trading days, to a three-month period without suspension for more than five trading days in the shorter of the period in which the financial products have been quoted or the 12 months before the offer is made, in line with recent changes to the Corporations Act and case-by-case relief we have granted;
- clarify how the 5% share capital limit is to be calculated;
- clarify that offers of options and performance rights should be made for 'no more than nominal monetary consideration' rather than 'no more than nominal consideration';
- include a new condition that participants must not receive a significant portion (i.e. 25% or more) of the underlying benefit of an offer under an employee incentive scheme for a minimum period of 12 months (as we understand this reflects current market practice);
- introduce a requirement that offer documents are worded and presented in a clear, concise and effective manner with appropriate risk disclosure;
- replace the requirement for the body relying on our relief to provide offer documents to ASIC with the requirement that the body notify ASIC within seven days of making an offer under an employee incentive scheme, and complete and submit the information specified in Form XX; and
- include a new condition allowing ASIC to exclude a body from relying on our new class order.

Period of quotation

Proposal

- F1 We propose to provide disclosure relief under [CO 14/xx] for an issuer to make offers under an employee incentive scheme of eligible products that have been quoted, at the time of the offer, on ASX or an approved foreign market for a period of at least three months without suspension for more than five trading days in the shorter of the period in which the products have been quoted or the 12 months before the offer is made.

Your feedback

- F1Q1 Do you agree with our proposal to change the quotation period required under our class order to a period of at least

three months without suspension for more than five trading days in the shorter of the period in which the products have been quoted or 12 months? If not, why not?

Rationale

Quotation period

- 154 [CO 03/184] currently provides disclosure relief for offers under an employee share scheme of shares and certain stapled securities where they have been quoted on ASX or an approved foreign market for 12 months, without suspension for more than two trading days during that period.
- 155 Our disclosure relief for offers of quoted securities under these schemes currently imposes a 12-month quotation requirement, without suspension for more than two trading days during that period. To align our relief with s708A(5)(a) of the Corporations Act, we propose to change this requirement so that the eligible products must have been quoted for at least three months without suspension for more than five trading days in the shorter of the period in which the eligible products have been quoted or the 12 months before the offer is made.
- 156 Parliament considered that the 12-month quotation requirement for offers of continuously quoted securities and the on-sale exemption in s708A(5) were excessively restrictive and noted that the listing period could be reduced without compromising the protection offered to investors: see paragraph 5.17 of the Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007. A listing period of three months was considered sufficient to provide investors with appropriate disclosure of information.
- 157 We consider that the rationale for Parliament's reduction in the quotation period for offers of continuously quoted securities and the on-sale exemption is equally applicable to offers of securities under an employee incentive scheme. In light of these legislative amendments, we consider that it is appropriate to reduce the prescribed quotation period to three months.
- 158 The three-month quotation period with suspension for a maximum of five trading days in the shorter of the period in which the products have been quoted or 12 months will also apply under our new class order to eligible products that are quoted either on ASX or an approved foreign market.
- 159 We will consider case-by-case relief in exceptional circumstances for offers under employee incentive schemes involving financial products that have been quoted on either ASX or an approved foreign market for less than three months—for example, in a reconstruction involving a merger where each of the companies has been individually listed for more than three months, or the acquirer is a foreign body; or in a demerger under, for example, a scheme of

arrangement under Pt 5.1 of the Corporations Act. We will have regard to our policy on disclosure relief for reconstructions: see RG 188.19–RG 188.21.

Approved foreign markets

- 160 In our class order, we intend to update the definition of ‘approved foreign market’ to include the new names of some markets currently included in this definition. However, we do not intend to add new markets.
- 161 The criteria we use in determining this list of approved foreign markets is the same as that set out in Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72). We have included foreign markets that we have previously considered to be comparable to ASX in terms of being fair, efficient, well-informed and internationally competitive markets.
- 162 In doing so, we had particular regard to whether the market:
- (a) is a member of the World Federation of Exchanges;
 - (b) is internationally recognised;
 - (c) has rules that meet ASX’s listing and quotation, market information, regulatory and trading and settlement principles;
 - (d) is a key world trading centre; and
 - (e) is overseen by a government regulatory authority.
- 163 Our relief applies only to the main board of the markets listed in the definition of ‘approved foreign market’ in the class order, unless otherwise stated. We will continue to consider applications for relief on a case-by-case basis for other markets or second boards of markets.

Share capital limit of 5%

Proposal

- F2 We propose to:
- (a) specify that the 5% share capital limit for the purposes of our new class order relief must be calculated based on the relevant type and class of eligible product, as set out in Table 6; and
 - (b) give guidance clarifying that all offers made under an employee share scheme in reliance on [CO 03/184] and under an employee incentive scheme in reliance on [CO 14/xx] in the past five years are to be included in the calculation of the 5% share capital limit of the current offer.

Your feedback

F2Q1 Do you agree with our proposal for calculating a 5% share capital limit for employee incentive schemes? If not, why not? Please give details of any alternatives that you consider to be appropriate.

Table 6: Proposed calculation for the 5% share capital limit

Type of offer	How it would be calculated
Shares or stapled securities	<p>For relief to apply, the aggregate of the following must be no more than 5% of the total number of the relevant type and class of eligible product issued in reliance on [CO 03/184] and [CO 14/xx] under the current offer and any offer under an employee incentive scheme in the five years before the date of the current offer:</p> <ul style="list-style-type: none"> (a) the number of shares or stapled securities (as relevant) issued or that might be issued if any such offers that are outstanding are accepted; and (b) the maximum number of the same type and class of underlying eligible products that might be issued, or used to calculate the cash payment, on the vesting of performance rights or the exercise of options for those products (regardless of whether the participant will or may receive cash rather than the underlying eligible product on vesting or exercise).
Depository interests and underlying eligible products	<p>For relief to apply, the aggregate of the following must be no more than 5% of the total of the number of the relevant type and class of underlying shares or stock on issue (<i>whether or not represented by an equivalent number of depository interests</i>) in reliance on [CO 03/184] and [CO 14/xx] under the current offer and any offer under an employee incentive scheme in the five years before the date of the current offer:</p> <ul style="list-style-type: none"> (a) the number of underlying shares or stock on issue or that might be issued if any such offers that are outstanding are accepted; and (b) the maximum number of the same type and class of underlying shares or stock that might be issued, or used to calculate the cash payment, on the vesting of performance rights or the exercise of options (regardless of whether the participant will or may receive cash rather than the underlying eligible product on vesting or exercise).

Rationale

- 164 To ensure that offers under employee incentive schemes that are in part relying on our relief are not for fundraising purposes or do not create a significant exposure which may materially prejudice creditors' interests, we have imposed a 5% share capital limit on the amount of capital that may be issued under the relief, or the amount of cash that may, or will, be payable.
- 165 Under [CO 03/184], the 5% share capital limit is calculated by aggregating the number of shares issued (or that might be issued on the exercise of options) under the current offer, the number of shares in the same class that would be issued if each outstanding offer of shares, options or units under an employee share scheme were accepted or exercised, and the number of shares in the same class issued during the previous five years under the scheme or other employee share schemes offered to eligible employees.

- 166 This is intended to capture all shares that are issued, or that might be issued, under the current and previous offers under any employee share scheme offered to eligible employees in the five years before and including the date of the current offer.
- 167 [CO 03/184] also specifically excludes from the calculation of the 5% share capital limit options or shares acquired under offers received outside this jurisdiction, excluded offers (made before 13 March 2000), offers that do not require a disclosure document or Product Disclosure Statement (PDS) because of exemptions in s708 or 1021D, and offers made under a disclosure document or PDS. The exclusions are intended to capture all shares issued, or that might be issued, where the disclosure requirements of the Corporations Act have either been met or do not apply. In these cases, reliance on our relief is not necessary.
- 168 Our new class order will also not include in the calculation of the 5% share capital limit offers under an employee incentive scheme that are made without a disclosure document, in reliance on an exemption from this requirement in the Corporations Act, or that are made in a disclosure document under the Corporations Act.

All eligible products covered in calculation of 5% share capital limit

- 169 We propose that the 5% share capital limit will be calculated by reference to shares, stock, stapled securities and depository interests, and options over and performance rights relating to these underlying eligible products.
- 170 In relation to depository interests, the proposed calculation will include in the calculation the number of underlying shares or stock on issue, rather than the number of depository interests on issue, because:
- (a) depository interests may be accepted by taking the underlying shares or stock rather than the depository interests;
 - (b) depository interests may be converted into the underlying shares or stock at any time; and
 - (c) the ratio of depository interests to the underlying shares or stock may not always be 1:1.
- 171 In relation to options and performance rights, we propose that the calculation of the 5% share capital limit will include:
- (a) the maximum number of underlying eligible products that will or may be issued on the exercise or vesting of the options or performance rights; and
 - (b) the number of underlying eligible products that are used to determine the cash amount where the performance rights are only able to be cash settled.

- 172 We consider that including in the 5% share capital limit the maximum number of underlying eligible products (in the past five years) in reliance on ASIC relief for employee share schemes and employee incentive schemes is appropriate to ensure that the scheme is not for fundraising and limits the cash liability in relation to cash settled performance rights. In relation to the latter, we see this as analogous to the protections in Ch 2J of the Corporations Act regarding fairness to the issuer's shareholders as a whole and not materially prejudicing the issuer's ability to pay its creditors.
- 173 We understand that the 5% share capital limit remains a generous limit when balancing the different policy and commercial objectives, and that including these underlying eligible products in the calculation is unlikely to inhibit the ability of the majority of issuers from relying on our relief.

Nominal monetary consideration

Proposal

- F3 In [CO 14/xx], we propose to use the term 'nominal monetary consideration' rather than 'nominal consideration' when referring to offers of options and performance rights.

Your feedback

- F3Q1 Do you agree with our proposed use of the term 'nominal monetary consideration'? If not, why not? Please provide details of alternative definitions that you consider appropriate.
- F3Q2 Do you consider that the definition of 'nominal consideration' in [CO 03/184], which sets a limit of one cent per option, is appropriate? If so, why?
- F3Q3 Do you consider that it would be preferable for our new class order relief to require that options and performance rights be offered for 'no monetary consideration' instead of for 'no more than nominal monetary consideration'? Please explain your answer.

Rationale

Nominal monetary consideration

- 174 Our relief in [CO 03/184] applies to offers for the issue or sale of options for the issue or transfer of shares that are offered for 'no more than nominal consideration'. We consider that it is appropriate in our new class order to refer to offers of options and performance rights for 'no more than nominal monetary consideration' to support our view that continued employment is a form of consideration given by the participant.

175 As noted in paragraph 11, we do not consider that offers under an employee incentive scheme are for ‘no consideration’ because the participant is providing continued services and, in some cases, may consider that the products offered under the scheme are part of their remuneration or are a reason for not moving to another employer.

176 The value of this consideration in kind may not always be nominal. Therefore, we consider it appropriate to specify in [CO 14/xx] that we are referring to nominal monetary consideration.

Token or trivial amount

177 [CO 03/184] defines ‘nominal consideration’ as ‘consideration of not more than one cent per option’.

178 However, for some companies, a value of one cent per option may not constitute a nominal amount when compared to the value of the underlying share—for example, where an option is offered at one cent and the underlying share is trading at five cents. This may be the case even before taking into account any exercise price, which will also involve a further monetary payment.

179 In addition, it is preferable that the nominal consideration apply to the entire offer to each participant under an employee incentive scheme, rather than each option or performance right. This is because, using the example above, even where one cent per option is considered to be a trivial amount for the value of each option or underlying share, where a large number of options are offered, the consideration payable by each participant may add up to an amount that is not trivial.

180 The concept of ‘nominal consideration’ is intended to refer to an amount that is not valuable, but is given to acknowledge a contract has been made.¹⁰ It is not intended to be a relative concept that is tied to value of the consideration.¹¹ However, given the examples above, if an amount is specified as nominal in our definition without any other clarification, there is a risk that the amount specified for a particular product offered or a particular offer to a participant may not be nominal under general principles, but may still qualify for relief.

¹⁰ See *Re Abbott (A Bankrupt), Ex parte Trustee of the Property of the Bankrupt v Abbott (P.M.)* [1983] 1 Ch 45 (*Re Abbott*) per Sir Robert Megarry V.C. at 57. However, nominal consideration may lead to an outcome where equity denies specific performance where the contract is treated as a gift that is not perfected: see *Nicholas Joseph Costin v Robert Warren Costin* NSW Unreported Judgment, Supreme Court of NSW Equity Division, Santow J, 8 August 1994, 13 September 1994, (*Costin v Costin*) at 12-14.

¹¹ See *Costin v Costin*, at 13.

- 181 For this reason, we consider that ‘nominal monetary consideration’ represents a ‘token or trivial’ amount. This is to acknowledge that a contract has been made, rather than doing so by expressly including a value.¹²
- 182 Given that the proposed definition of ‘nominal monetary consideration’ would also apply to performance rights, which are usually offered for no monetary consideration, a definition that does not include a value limit is also preferable.

Offer for mutual benefit: 12-month holding

Proposal

- F4 Consistent with what we understand to be the current market practice, we propose:
- (a) to impose a further condition in [CO 14/xx] that each offer of eligible products under an employee incentive scheme must not result in the participant receiving a significant portion of their entitlements under the offer as cash or shares (which are not subject to restrictions from disposal) until the expiry of a minimum 12-month period commencing on the granting of the eligible products; and
 - (b) that a significant portion of a participant’s entitlements would mean 25% or more of their entitlements under each offer.

Your feedback

- F4Q1 Do you agree with the proposed new condition to impose a partial 12-month holding requirement? If not, why not?
- F4Q2 Do you agree with our proposal that the relevant minimum period be 12 months? If not, why not? Would your response be different if the proposed minimum period were three years to further support our policy objective of ensuring offers are made for the purposes of creating a relationship of interdependence? If so, why?
- F4Q3 Do you agree with our proposal that a significant portion of a participant’s entitlements means 25% or more of their entitlements under each participant’s offer? If not, why not?

Rationale

- 183 A key policy objective in granting relief for offers under an employee incentive scheme is that the scheme creates a relationship of interdependence

¹² See *Barton v Official Receiver* (1986) 66 ALR 355 (*Barton*), per Gibbs CJ, Mason, Wilson and Dawson JJ at 361, referring to *Re Abbott* at 57; *Re Florance, ex parte Andrew*, (1983) 52 ALR 339 (*Re Florance*), per Sweeney J referring to same at 345–346. Note that *Re Florance* was overturned in *Florance and Another v Andrew* (1985) 58 ALR 377, but that the findings regarding nominal consideration were not disputed in the subsequent decision.

and long-term mutual benefit for both parties. However, this policy objective is not currently reflected in the conditions of relief in [CO 03/184].

184 From our experience, we understand that the terms of most employee incentive schemes include a condition that the employee remain in employment for periods usually between 12 months and three years before they may receive the eligible products that are the subject of the offer, or the shares underlying those products (or their cash equivalent) in the case of performance rights or options. This is often either because employers wish to give employees an incentive over a longer period of time and/or to allow employees to defer the point at which they are taxed in relation to financial products granted to them under the scheme.

185 We also understand that, under the terms of some employee incentive schemes, the performance rights may vest or the options may vest and be exercisable, but a restriction may be imposed to prevent, for a certain period (e.g. a minimum period of 12 months), the disposal of the underlying share by the participant. In relation to performance rights or options that are cash settled, the cash is often only payable after a period of at least 12 months has expired or a performance condition would only be capable of being met after at least a 12-month period.

186 We consider that a participant will have an ownership (or equivalent) interest in their employer (or its associated body corporate, for listed bodies) and a relationship of interdependence with their employer as long as the participant holds:

- (a) a share, depository interest or stapled security;
- (b) an entitlement to a share, depository interest or stapled security, either directly or through holding an option over, unit in, or performance right relating to that product; or
- (c) an entitlement to cash, the value of which is determined by the price of a share, stapled security or depository interest.

187 The long-term mutual benefit for both parties is a fundamental aspect of our policy objective in providing relief. It is largely reflective of market practice that a period of time must pass before an award is made, or that there is a restriction on the period before disposal is permissible. We therefore consider it appropriate to reflect this as a condition of [CO 14/xx].

188 We have proposed a condition that requires a significant portion of the eligible products to remain unvested or subject to restrictions from disposal over a minimum period of 12 months to ensure the relationship of interdependence is observed. We consider that a significant portion of a participant's entitlements is 25% or more of their entitlements under each offer made to them. We are also considering whether 12 months is sufficient to foster a relationship of long-term mutual benefit, and whether this

minimum period should be longer. We understand that different industries may make offers under employee incentive schemes with differing terms for various reasons, but that many are made on terms of a vesting period of three years or more.

189 We will consider applications for relief on a case-by-case basis where the relevant period is less than the minimum period under [CO 14/xx], where our other policy objectives are capable of being satisfied.

Disclosure to participants and ASIC

Proposal

F5 We propose to:

- (a) include requirements in [CO 14/xx] that:
 - (i) the offer document should be worded and presented in a clear, concise and effective manner, with a brief summary of the key risks; and
 - (ii) the offer document and all other accompanying documents given to participants in connection with an offer under an employee incentive scheme must be made available to ASIC on request; and
- (b) replace the current requirement for the body relying on our relief to provide offer documents to ASIC with the requirement that the body notify us, using Form XX, within seven days of making its first offer under an employee incentive scheme made in reliance on our new class order relief. Form XX would contain the following information:
 - (i) the identity of the issuer;
 - (ii) the identity of the employer (if not the issuer);
 - (iii) the date of the first offer under the employee incentive scheme;
 - (iv) the duration, and tranches (if any), of the employee incentive scheme;
 - (v) whether there are performance hurdles;
 - (vi) the type(s) of eligible product being offered;
 - (vii) the type(s) of participant to whom the offers are made;
 - (viii) the identity of the trustee, if any, and the trust structure used (allocated or unallocated);
 - (ix) whether a contribution plan is offered;
 - (x) whether a loan facility is offered; and
 - (xi) an acknowledgement of compliance with the relevant conditions of [CO 14/xx].

Your feedback

- F5Q1 Do you agree with our requirement that the offer document should be clear, concise and effective, and include a brief summary of the key risks? If not, why not?
- F5Q2 Do you agree with our proposal to replace the current requirement to provide offer documents to ASIC with a requirement to notify us of an offer using Form XX? If not, why not?
- F5Q3 Do you agree with including the information at F5(b)(i)–F5(b)(xi) in Form XX? If not, why not?
- F5Q4 Is there any other information that ASIC should be made aware of in this notification?
- F5Q5 Do you agree that some or all of this information should not be made public? If not, why not?

Rationale

190 [CO 03/184] requires that an offer document for offers under an employee share scheme be provided to eligible employees and ASIC. An ‘offer document’ is defined in [CO 03/184] as a document setting out an offer under an employee share scheme which includes, among other things, a copy or a summary of the rules of the scheme under which the offer is made and sets out the acquisition price of the shares in Australian dollars (or the formula to determine the price).

191 We do not propose to significantly alter the requirement to provide employees with an offer document and the scheme rules. However, we propose to make some consequential changes in relation to offer documents in our new class order relief.

Clear, concise and effective offer documents with a brief summary about key risks

192 One of the key policy objectives that must be taken into account when granting disclosure relief is that adequate disclosure is provided to employees: see RG 49.20. While giving relief from the obligations associated with preparing a disclosure document or PDS, we consider it appropriate to impose a condition under [CO 14/xx] that the offer document is worded and presented in a clear, concise and effective manner and includes a brief summary about the key risks. We do not intend to remove the obligations on issuers to ensure that employees can easily understand the nature of the offer being made to them.

193 While Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) and Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* apply to prospectuses and other disclosure documents, we consider the principles

included in these guides on clear, concise and effective disclosure are also applicable to employee incentive scheme documents. For example, RG 228 includes suggestions that the document:

- (a) highlights key information, particularly where the offer document is accompanied by, or embodied in, a long or complex plan document in relation to a multinational plan;
- (b) uses plain language (see Table 3 of RG 228);
- (c) is as short as possible (see RG 228.30–RG 228.45);
- (d) explains complex information, including any technical terms (see Table 3 of RG 228); and
- (e) is logically ordered and easy to navigate (see Table 4 of RG 228).

194 The guidance is particularly relevant to offers that include multiple documents, including in the context of multinational offers. The nature of the offer made to participants resident in Australia must be clearly identified. Where parts of an offer are not relevant to a participant for jurisdictional or legal reasons, this should be made clear.

195 We do not expect the offer document for an employee incentive scheme to include the level of disclosure required for a disclosure document. For instance, a disclosure document under the Corporations Act is prepared in order to comply with specific content requirements for public fundraising purposes, while the audience for an offer document will be employees with a familiarity with the company. We consider the guidance provided in RG 228 (Section E) and RG 168 will assist employers in describing the key risks to disclose about their employee incentive scheme.

Providing offer documents to ASIC

196 Under [CO 03/184], offer documents and all accompanying documents provided to eligible employees must be provided to ASIC, but they are not a prescribed statutory lodgement. No fee is payable and the documents are not placed on the publicly accessible record which ASIC maintains. We propose to remove the requirement to provide these employee incentive scheme documents to ASIC, and to replace it with a requirement to notify us of offers under an employee incentive scheme using Form XX: see paragraphs 198–202.

197 We also propose to include a condition of [CO 14/xx] that, on request, the body relying on relief is to provide ASIC with copies of the offer document and all other accompanying documents given to participants in connection with the employee incentive scheme. We may seek access to these documents from time to time to ensure that issuers are complying with the conditions of relief.

Providing Form XX to ASIC

- 198 [CO 03/184] currently requires the offer document and a copy of any other offer documents provided to eligible employees participating in an employee share scheme to be provided to ASIC by the body no later than seven days after the provision of this material to the eligible employee: see RG 49.46(d).
- 199 We propose to replace this requirement with an obligation for the issuer to notify ASIC within seven days of making its first offer under an employee incentive scheme in Australia in reliance on [CO 14/xx]. Our new class order would require notification using Form XX, which would be retained by ASIC but would not appear on ASIC's public register.
- 200 We envisage that further notification to ASIC using an additional Form XX will only be necessary if the terms of the employee incentive scheme are substantially amended or a new plan is offered under the scheme. Notification would not be necessary for new offers made under the same scheme rules, either to new participants, or the same participants for a further tranche of offers under those rules.
- 201 We consider that completing and submitting Form XX will reduce the administrative burden for bodies and ASIC, while preserving a level of visibility for ASIC on bodies relying on [CO 14/xx].
- 202 We envisage that Form XX will include the following information:
- (a) the identity of the issuer;
 - (b) the identity of the employer (if not the issuer);
 - (c) the date of the first offer under the employee incentive scheme;
 - (d) the duration, and tranches (if any), of the employee incentive scheme;
 - (e) whether there are performance hurdles;
 - (f) the type(s) of eligible product being offered;
 - (g) the type(s) of participant to whom the offers are made;
 - (h) the identity of the trustee, if any, and the trust structure used (allocated or unallocated);
 - (i) whether a contribution plan is offered;
 - (j) whether a loan facility is offered; and
 - (k) an acknowledgement of compliance with the relevant conditions of [CO 14/xx].

Excluding a body

Proposal

F6 We intend to include a condition in [CO 14/xx] that enables ASIC to determine and notify a body in writing that it may not rely on this relief (which we may then subsequently revoke or vary).

Your feedback

F6Q1 Do you agree with our proposal to provide a determination process? If not, why not?

Rationale

203 We wish to reserve an ability to exclude bodies from relying on our new class order relief where we consider this appropriate. For example, if we become aware that an offer document is potentially misleading or is confusing, we may issue a notice to the issuer preventing them from relying on our new class order relief. If our concerns are adequately addressed, we may subsequently revoke or amend that exclusion notice.

G What relief is available for unlisted bodies?

Key points

Employee share scheme relief is available to unlisted bodies under the third exemption in [CO 03/184] and is limited to offers of options over fully paid shares.

We propose to facilitate employee incentive scheme relief for unlisted bodies where the body:

- only has one class of shares, being fully paid voting ordinary shares (ordinary shares);
- offers \$1,000 worth of ordinary shares for no more than nominal monetary consideration (which can be made annually);
- offers options over and/or performance rights relating to ordinary shares for no more than nominal monetary consideration;
- makes such offers in an offer document, presented in a clear, concise and effective manner and containing appropriate risk disclosure; and
- at the time the options are exercisable, or the performance rights vest:
 - the body has been listed on ASX or an approved foreign market for at least three months without suspension of more than five trading days in the shorter of the period in which the financial products have been quoted or the 12 months before the offer is made;
 - all the ordinary shares in the body are disposed of and an independent expert report is provided to participants on the value of the ordinary shares; or
 - an offer information statement or prospectus is given to the participant.

Annual offers of ordinary shares by unlisted bodies: \$1,000 value

Proposal

G1 We propose that [CO 14/xx] will facilitate offers of ordinary shares for no monetary consideration, without providing disclosure prescribed by the Corporations Act to participants of the issuer, where these shares are valued at no more than \$1,000 per offer, and the conditions in Table 7 are met.

Your feedback

G1Q1 Do you agree with our proposal to provide class order relief to cover annual offers for no monetary consideration of ordinary shares valued at no more than \$1,000 per participant? If not, why not?

- G1Q2 Do you agree that unlisted bodies should only be entitled to relief to make these offers where they prepare and provide current audited accounts? If not, why not?
- G1Q3 Do you agree with the proposed risk disclosure statement? If not, why not?
- G1Q4 Do you agree with our proposal about how the \$1,000 value of the ordinary shares is to be calculated? If not, why not?

Table 7: Proposed conditions for \$1,000 annual offers

Requirements	Conditions of relief
Specific restrictions relating to making the offer	<p>For [CO 14/xx] to apply, the following conditions must be met:</p> <ul style="list-style-type: none"> (a) the body can only issue one class of shares, being fully paid voting ordinary shares (ordinary shares); (b) the offer is made no more than once a year; (c) the ordinary shares must be valued at no more than \$1,000; (d) a warning statement is included in the offer document, which states that: <ul style="list-style-type: none"> (i) the \$1,000 value for the offer of the ordinary shares is based on the company's audited accounts or an independent expert's valuation (a copy of which must be provided to the participant and to ASIC at the time of the offer); (ii) the offer is unlikely to represent the market value of the ordinary shares, which may have a value less than \$1,000; and (iii) the ability to dispose of, and realise the value of, the ordinary shares may be limited or may not be available; (e) ordinary shares are offered for no more than nominal monetary consideration; (f) the offer does not involve a loan, contribution plan or use a trust; (g) the objective of the offer is not fundraising and includes a 5% share capital limit (see proposal F2); (h) the offer meets the condition relating to long-term mutual benefit (see proposal F4); (i) the offer document is presented in a clear, concise and effective manner and provides a prominent and appropriate risk warning (i.e. that there is no certainty that the participant will be able to dispose of their ordinary shares, or will ultimately receive a financial return as a sale, or that listing on ASX or an approved foreign market may not occur, or may not occur at a price per ordinary share that provides the participant with a financial return) (see proposal F5); and (j) we have not excluded the body from relying on the class order relief (see proposal F6).
Calculating the value	<p>The \$1,000 value of the ordinary shares must be calculated by reference to either:</p> <ul style="list-style-type: none"> (a) the net tangible assets of the company, as set out in the company's audited accounts (which must be prepared in accordance with the Australian accounting standards, be for a 12-month period and have a balance date that occurs within the last six months before the offer); or (b) a valuation determined by an independent expert.

Rationale

- 204 We consider that an offer for no monetary consideration to each participant of ordinary shares valued at no more than \$1,000 per year is sufficiently low to enable providing employee incentive scheme relief. This low amount involves a relatively small financial decision and balances the risks of not providing a disclosure document prescribed by the Corporations Act with the benefits of giving employees incentives and encouraging ownership interests by employees in their unlisted employer.
- 205 In determining an appropriate way of valuing the ordinary shares offered for the purposes of our relief, participants should be able to refer to objective information (such as audited accounts or an independent valuation).
- 206 While there are many ways to value the ordinary shares, we consider the net tangible asset method is a simple method that can be easily determined by reference to audited accounts. Alternatively, an unlisted body should have the choice of obtaining a share valuation from an independent expert. If so, this would need to be provided to the participants and also to ASIC.
- 207 While a method of valuing the ordinary shares is necessary for our proposed relief, the unlisted body will also need to provide an appropriate warning statement in the offer document about the \$1,000 valuation. We consider it is important for participants to understand that there is limited liquidity for ordinary shares in an unlisted body and that the valuation may not represent the price that the participant would be able to obtain if they were able to sell the ordinary shares.

Offers of options and performance rights by unlisted bodies

Proposal

- G2 We propose to:
- (a) provide class order relief to include offers of options and performance rights by unlisted bodies to participants provided that the conditions in Table 8 are met; and
 - (b) define a 'performance right' for the purposes of this relief as a right to receive:
 - (i) fully paid voting ordinary shares (ordinary shares); and/or
 - (ii) a cash amount that is equivalent to the value of such shares, which vests automatically for no monetary consideration if conditions are met relating to:
 - (iii) the length of service of the recipient; and/or
 - (iv) the performance of the recipient or the issuer.

Your feedback

- G2Q1 Do you agree with the proposed definition of 'performance rights' for the purposes of this relief? If not, why not?
- G2Q2 Do you agree with our proposal that offers by unlisted bodies of options and performance rights should relate only to ordinary shares? If not, why not?
- G2Q3 Do you agree that the provision of an independent expert report at the unlisted body's expense if there is a sale of all of the ordinary shares in the issuer is appropriate? If not, why not?
- G2Q4 Do you consider class order relief should be provided if there is a sale of less than 100% of the ordinary shares in the issuer, or where there is a disposal of the business/assets of the issuer? If so, please provide details, addressing our concerns discussed in paragraph 219.
- G2Q5 Do you agree that unlisted bodies should only have one class of ordinary shares on issue (to which the options and performance rights relate) to qualify for relief? If not, why not?
- G2Q6 Do you consider that offers using a trust should be permitted under [CO 14/xx] for unlisted bodies? If so, please give a detailed explanation of your reasons, including how the nature and terms of the trust arrangement would meet our policy considerations, and what would be the benefits of a trust over a direct contract with participants.
- G2Q7 Are there other offers under employee incentive schemes for unlisted bodies that ASIC should facilitate that are consistent with our policy parameters and proposed conditions? If so, please provide full details.

Table 8: Proposed conditions for offers of options and performance rights

Requirements	Conditions of relief
Specific conditions	<p>For our new class order relief to apply, the terms of the employee incentive scheme must provide for the following:</p> <ul style="list-style-type: none"> (a) at the time of exercise or vesting, the underlying shares are in the same class as those that have been quoted on ASX or an approved foreign market for at least three months without suspension for more than five trading days in the shorter of the period in which the financial products have been quoted or the 12 months before the offer is made; (b) all shares in the issuer are disposed of in a single transaction, and the participants must participate in that transaction and will receive the same monetary consideration per ordinary share as the substantial holders of the body, provided that, at the body's expense, an independent expert report: <ul style="list-style-type: none"> (i) is given to participants at least 14 days before the vesting of the performance rights or the exercise of options; and (ii) is provided to ASIC at the same time; and (c) a prospectus or an offer information statement that is current at the time of exercise or vesting is given to participants at least 14 days before the exercise or vesting.
General conditions	<p>For our new class order relief to apply, <i>all of the following general conditions</i> must be met (in addition to one of the specific conditions in this table):</p> <ul style="list-style-type: none"> (a) the body has only one class of ordinary shares on issue; (b) the options or performance rights, the value of which is derived by reference to the underlying ordinary share, are offered for no more than nominal monetary consideration; (c) the offer does not involve a loan, contribution plan or use a trust; (d) the offer does not exceed the 5% share capital limit (see proposal F2); (e) the offer meets the condition relating to long-term mutual benefit (see proposal F4); (f) the offer document is presented in a clear, concise and effective manner and provides a prominent and appropriate risk warning (i.e. that there is no certainty that the participant will be able to dispose of their ordinary shares, or will ultimately receive a financial return as a sale, or that listing on ASX or an approved foreign market may not occur, or may not occur at a price per ordinary share that provides the participant with a financial return) (see proposal F5); and (g) we have not excluded the body from relying on the class order relief (see proposal F6).

Rationale

Offers of options over and performance rights relating to ordinary shares

208 The third exemption in [CO 03/184] currently provides disclosure relief for offers of options over fully paid shares in an unlisted body for no more than nominal consideration under an employee share scheme provided, before exercise, eligible employees are provided with a prospectus, or the shares have been quoted on ASX for 12 months without suspension for more than two trading days.

- 209 This relief is based on the underlying principle that there is a reliable alternative market price against which eligible employees can compare the amount to pay on exercise and the value of the share they will receive on exercise.
- 210 [CO 03/184] does not provide relief for the offer of shares by unlisted bodies because, in the absence of a disclosure document, participants do not have a reliable market price, or have knowledge about the issuing body with a history of disclosure in a well-regulated financial market.
- 211 Our proposed disclosure relief for the offer of options and performance rights by unlisted bodies delays the point at which some additional disclosure is required to the time of exercise or vesting.
- 212 We consider that performance rights (as we propose to define them) relating to shares are economically similar to options over shares in that they entitle the participant to receive shares (or a cash equivalent amount to the value of those shares) on vesting of the performance rights if certain conditions are met. Options entitle the participant to acquire shares on exercise by the participant, again if certain conditions are met (which often relate to the expiry of a certain time period or the achievement of performance hurdles).
- 213 When the underlying shares vest automatically or on exercise, the price of the issuer's shares is relevant for the participant so that they have information to understand the value of the shares they will receive or how the amount of the cash they will receive is derived. Even where the exercise of an option occurs for no monetary consideration, as there has been no prior disclosure about the value of the options, we consider that the participant should be adequately informed about the value of their underlying shares at the time they decide whether to exercise their options or not.
- 214 We propose that unlisted bodies can only offer options or performance rights where the underlying products are fully paid voting ordinary shares. We also consider it unlikely that unlisted bodies would offer other types of financial products to participants under an employee incentive scheme. We have also not included the right to receive cash in the amount equivalent to an increase in the share price as this concept is more applicable to listed bodies, and we do not consider it appropriate for unlisted bodies with little, or no, liquidity.
- Vesting or exercise where underlying ordinary shares have been quoted for requisite time**
- 215 We consider that there will be sufficient disclosure to warrant relief from the requirement to prepare a prospectus or offer information statement where the underlying shares have been quoted on ASX or an approved foreign market for a period of at least three months without suspension for more than five trading days in the shorter of the period in which the shares have been quoted or the 12 months before the vesting of rights or exercise of options: see paragraph 158.

Vesting or exercise where a disposal of all the ordinary shares occurs

- 216 While our relief for offers by unlisted bodies covers the situation where the body is listed via an IPO, with the participants able to exit after a period of time from the date trading on ASX commences or at the time the prospectus is issued, another possible alternative to an IPO is a sale of the ordinary shares to a third-party buyer (sometimes referred to as a trade-sale).
- 217 For the purposes of our new class order, we propose to provide relief where the employee incentive scheme provides that the disposal transaction will be required to comprise all of the ordinary shares in the body sold in the one transaction. This is a clear liquidity event which will ensure that all shareholders, including participants, will receive the same consideration. To achieve this, relief is only available where the body has only one class of ordinary shares on issue: see paragraph 225.
- 218 The unlisted body would need to ensure that the relevant agreements and the terms of the employee incentive scheme would require the participant to sell their shares at the same time and price as the substantial owners (sometimes referred to as ‘drag-along provisions’) and to give the participant the right to sell their shares at the same time and price as the substantial owners (sometimes referred to as ‘tag-along provisions’). In these circumstances, the value at which the shares are bought by a third party is often determined by taking into account a professional valuation.
- 219 However, to ensure that adequate protections are in place for participants under our new class order, we propose to require that an independent expert report be provided to participants at the unlisted body’s expense, at least 14 days before vesting of rights or exercise of options. This will enable participants to be informed as to whether the price they are obtaining under the disposal transaction is equivalent to the market value of the ordinary shares. In addition, where the participants must pay an amount to exercise any options they hold, they can assess how the amount they would be required to pay compares to the transaction value of the underlying ordinary shares.
- 220 We consider that it would be sufficient for an independent expert to report on the value of the ordinary shares, rather than to opine on whether the transaction is fair and reasonable. However, if the issuing body decides to commission such a report, this should also be provided to participants. In either case, the expert must comply with the relevant sections of Regulatory Guide 111 *Content of independent expert reports* (RG 111) and Regulatory Guide 112 *Independence of experts* (RG 112).

Offers by unlisted bodies using an offer information statement or prospectus

- 221 Consistent with amendments to the Corporations Act in 2007, we propose to allow unlisted bodies to use an offer information statement as an alternative to a prospectus: see Table 8. These amendments to s709(4) and (5) of the

Corporations Act have the effect that where an offer information statement is used to make offers under an eligible employee share scheme, any funds raised are not counted towards the \$10 million maximum fundraising for which such statements may be used. We understand that the intention behind these amendments was to facilitate the use of offer information statements for employee share schemes.¹³

222 An offer information statement imposes a lower level of disclosure than a prospectus and can be used where the total amount of funds to be raised under the statement (including in previous fundraisings) is under \$10 million (amounts raised under an employee share scheme are excluded from this calculation).

223 While some issuers and their advisers may still see the use of an offer information statement as imposing significant impediments, we consider that it is a shorter form of disclosure document than a prospectus and provides employees with important information, including audited accounts.

224 Our proposal is that unlisted bodies must provide an offer information statement or prospectus in sufficient time for participants to consider its contents before the vesting of rights or the exercise of options. We consider that 14 days is sufficient time. We also consider that, because these disclosure documents must be provided if the ordinary shares have not been quoted for the relevant period, participants need to be made aware that the lack of liquidity of shares in unlisted bodies is a salient risk. A condition of our proposed relief is that a relevant warning statement be included in the employee incentive scheme offer documents. For the types of risks that should be included, see Section E of Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228).

One class of voting ordinary share only

225 We are also concerned to ensure that participants are treated in an equivalent manner to the substantial holders. Accordingly, we consider that relief should only be provided where the body has a single class of voting ordinary shares on issue, and that options or performance rights issued under an employee incentive scheme have those ordinary shares as their underlying product. Such a condition is designed to prevent unlisted bodies issuing ordinary shares to preferred parties that have more voting rights than shares issued to participants.¹⁴

¹³ See the Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007, paragraph 5.41.

¹⁴ This is possible where an unlisted body's constitution overrides the replaceable rule in s250E of the Corporations Act in respect of different classes of shares. The rule requires that each member has one vote on a show of hands and one vote per share held on a poll.

Other applicable conditions of our relief

- 226 In addition to providing sufficient protections to participants of employee incentive schemes offered by unlisted bodies, the following general conditions will apply:
- (a) the offer does not exceed the 5% share capital limit (see proposal F2);
 - (b) the offer meets the condition relating to long-term mutual benefit (see proposal F4);
 - (c) the offer document is presented in a clear, concise and effective manner and provides a prominent and appropriate risk warning (see proposal F5); and
 - (d) we have not excluded the body from relying on the class order relief (see proposal F6).
- 227 We will continue to consider applications for relief on a case-by-case basis where offers by unlisted bodies under an employee incentive scheme cannot meet the conditions for relief.

H What other relief is available?

Key points

The fourth exemption in [CO 03/184] gives licensing, hawking and advertising relief for offers under employee share schemes that are exempt from the disclosure provisions because of the first, second or third exemptions.

We propose to provide licensing, hawking and advertising relief to cover offers made under employee incentive schemes and to limit this to listed issuers and their associated bodies corporate, and unlisted issuers and their wholly owned subsidiaries.

Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products* currently provides relief from the on-sale provisions in s707(3)–(4) and 1012C(6)–(7) of the Corporations Act for the on-sale of certain financial products issued under [CO 03/184].

We also propose to modify the on-sale relief we provide, to clarify that listed issuers and their associated bodies corporate are able to issue financial products to trustees of an employee incentive scheme, before those products are transferred to a participant.

Licensing, hawking and advertising relief for offers relying on our class order disclosure relief

Proposal

- H1 We propose that [CO 14/xx] will provide licensing, hawking and advertising relief to a listed issuer and its associated bodies corporate, and an unlisted issuer and its wholly owned subsidiaries, where those bodies are relying on [CO 14/xx] for disclosure relief to make their offers under an employee incentive scheme.

Your feedback

- H1Q1 Do you agree with our proposal to limit the persons who can rely on relief in relation to licensing, hawking and advertising to listed issuers and their associated bodies corporate, and to unlisted issuers and their wholly owned subsidiaries? If not, why not?
- H1Q2 Do you agree with our proposal to extend our licensing and hawking relief where an employee incentive scheme involves a managed investment scheme only by reason of operating a contribution plan? If not, why not?

Rationale

228 Under [CO 03/184], where an employee share scheme qualifies for disclosure relief, we also provide relief for financial services provided as part of the scheme, provided that there are adequate employee protections. We propose to extend our licensing, managed investment scheme, hawking and advertising relief to cover employee incentive schemes that qualify for disclosure relief under [CO 14/xx].

Licensing relief

229 [CO 03/184] currently provides licensing relief for offers under employee share schemes that qualify for disclosure relief subject to the following conditions:

- (a) where the offer document contains advice about the employee share scheme, it must include a warning statement to the effect that any advice given by the person in connection with the offer is general advice only, and that eligible employees should consider obtaining their own advice from an independent AFS licensee;
- (b) where any dealing by the issuer or its associate is in relation to ASX-quoted eligible products, it is outsourced to an AFS licensee, and in relation to those products quoted on an approved foreign market, to a relevantly licensed or authorised person in that jurisdiction; and
- (c) where any custodial and depository services are provided, they are provided by the issuer or its associate, and the custodian performs its duties lawfully and in good faith, and has sufficient resources to perform this role.

230 [CO 03/184] provides licensing relief to the issuer and any associate of the issuer. 'Associate' is not defined in the class order but is defined in s9 of the Corporations Act and can encompass a broad range of persons.

231 We consider that this relief relating to an employee incentive scheme should, in the case of a listed issuer, be limited to the listed issuer itself and its associated bodies corporate, and in the case of an unlisted issuer, be limited to the unlisted issuer and its wholly owned subsidiaries. We consider that other persons engaged to assist with such employee incentive schemes should be appropriately licensed, or authorised, in the relevant jurisdiction.

Hawking relief

232 [CO 03/184] also provides relief to issuers who qualify for disclosure relief in relation to offers made in the course of, or because of, unsolicited meetings or telephone calls reasonably held or made in connection with the offer. These are referred to as the hawking prohibitions in s736, 992A and 992AA of the Corporations Act.

233 We are of the view that relief from the hawking prohibitions under [CO 14/xx] should be limited to listed issuers and their associated bodies corporate, and unlisted issuers and their wholly owned subsidiaries, in relation to their respective employee incentive schemes. We do not consider that any other persons should be involved in such activities on behalf of an issuer.

Managed investment scheme relief

234 [CO 03/184] provides licensing and hawking relief to a person who operates a managed investment scheme only by reason of operating a contribution plan in relation to an employee share scheme.

235 We propose extending licensing and hawking relief to a person who operates a managed investment scheme only by reason of operating a contribution plans in relation to an employee incentive scheme under [CO 14/xx]. We do not see any reason to change or draw a regulatory distinction to equivalent relief currently available under [CO 03/184].

Advertising relief

236 Where an offer of a Ch 6 security does not need a disclosure document, the advertising prohibitions in s734 do not apply. This means that offers of shares and options that do not require a disclosure document because of [CO 03/184] or [CO 14/xx] are also not subject to the advertising prohibitions in s734.

237 However, there is no equivalent exclusion from the advertising prohibitions for financial products covered by Ch 7. We therefore propose to provide equivalent relief from the advertising prohibitions for eligible products that are covered by Ch 7 in relation to employee incentive schemes that qualify for relief under [CO 14/xx].

On-sale relief

Proposal

H2 In [CO 14/xx], we propose to:

- (a) extend the on-sale relief currently provided under Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products* to cover offers under employee incentive schemes of all eligible products to all participants;
- (b) provide on-sale relief to cover depository interests that may be offered under our new class order relief; and
- (c) provide disclosure relief and additional on-sale relief for offers of eligible products to the trustee of an employee incentive scheme.

Your feedback

- H2Q1 Do you agree with our proposal to extend our on-sale relief to cover offers of all eligible products to all participants under [CO 14/xx]? If not, why not?
- H2Q2 Do you agree with our proposal to extend our on-sale relief to cover depository interests that may be offered under our new class order relief? If not, why not?
- H2Q3 Do you agree with our proposal to provide on-sale relief where we have provided disclosure relief to facilitate the use of trusts? If not, why not?
- H2Q4 Do you consider there are other forms of on-sale relief that are necessary in the context of employee incentive schemes? If so, please provide details.

Rationale**General on-sale relief**

- 238 The on-sale provisions in s707(3)–(4) and 1012C(6)–(7) of the Corporations Act require disclosure for the offer of financial products for sale within 12 months of their issue where the products were issued without disclosure and where either:
- (a) the issuer issued the products with the purpose of the person to whom they were issued selling or transferring them (or granting, issuing or transferring interests in, or options over, them); or
 - (b) the acquirer acquired the products with that purpose.
- 239 The on-sale provisions seek to ensure that, regardless of whether financial products are issued directly to retail clients or indirectly, retail clients receive adequate disclosure and the issuer is liable to the retail clients for the efficacy of that disclosure.¹⁵
- 240 However, where retail clients are issued financial products without disclosure under a specific exemption from the disclosure provisions, they may not be able to on-sell these products within 12 months of their issue. Therefore, where retail investors have the benefit of comparable information that would otherwise be available under a disclosure document, we provide on-sale relief.¹⁶
- 241 [CO 04/671] provides relief from the on-sale provisions in Chs 6D and 7 for the on-sale of securities and financial products issued:
- (a) under [CO 03/184] or any other individual instrument of relief in similar terms for an employee share scheme; and

¹⁵ See Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173) at RG 173.2.

¹⁶ See RG 173.10.

(b) on the exercise of options issued in reliance on such relief.

242 [CO 04/671] operates by removing the purpose of the acquirer from the on-sale provisions. An employer would generally be issuing the financial products under an employee share scheme with the intention that the eligible employee hold the financial product and have an economic stake in the business rather than for an on-sale purpose.

243 Because we are proposing to broaden the type of products and the categories of participants that are eligible to be offered participation in the employee incentive scheme under [CO 14/xx], we also propose to provide on-sale relief in these broader circumstances.

244 We consider that on-sale relief is warranted because:

- (a) the cost of disclosure is likely to act as a disincentive for employers to establish, and for people to participate in, employee incentive schemes;
- (b) the anti-avoidance effect of the on-sale provisions is not significantly eroded by any relief, because the primary purpose of such a scheme is not fundraising but to foster interdependence between employers and participants to increase productivity; and
- (c) the exemptions that we provide are conditional on the issuer implementing other measures for participant protection.¹⁷

Relief for depository interests

245 We propose that our on-sale relief will include depository interests as these are equivalent to the other quoted financial products covered by our relief.

Relief for issues to trustees

246 Trustees of employee incentive schemes may be issued underlying eligible products to hold on trust for eligible employees as either allocated products or unallocated products.

247 As the issuer's purpose is to issue the eligible products to the trustee in anticipation of the trustee transferring the eligible products to an eligible employee in the future, [CO 04/671] does not provide relief because it does not remove the purpose of the issuer from the relevant tests under s707(3)(b)(i) and 1012C(6)(c)(i).

248 We therefore propose to include on-sale relief in our new class order to facilitate the issue of underlying eligible products to trustees of employee incentive schemes in anticipation of transferring those products to participants within 12 months.

¹⁷ See RG 173.51.

I Regulatory and financial impact

249 In developing the proposals in this paper (see paragraphs 14–28 and Table 1), we have carefully considered their regulatory and financial impact. On the information currently available to us, we think they will strike an appropriate balance between:

- (a) the needs of companies in offering financial products to employees through an employee incentive scheme; and
- (b) the needs of investors in obtaining adequate disclosure.

250 Before settling on a final policy, we will comply with the Australian Government’s regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or mechanical impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

251 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC’s policy is not to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

252 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See ‘The consultation process’, p. 5.

Key terms

Term	Meaning in this document
ADR	An American depositary receipt, with a share or stock as the underlying security
advertising relief	Relief from the prohibition in s734 of the Corporations Act on advertising or publicity before an offer or intended offer under an employee incentive scheme
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
allocated product	A specific underlying eligible product held on trust for, and allocated to, specific participants
approved foreign market	Any of the following financial markets: Borsa Italiana, Bourse de Paris, Bursa Malaysia Main Board and Bursa Malaysia Second Board, Eurex Amsterdam, Frankfurt Stock Exchange, Hong Kong Stock Exchange, Johannesburg Stock Exchange, London Stock Exchange, NASDAQ Global Market, New York Stock Exchange, New Zealand Stock Exchange, NYSE MKT, Singapore Exchange, SIX Swiss Exchange, Tokyo Stock Exchange or the Toronto Stock Exchange
ASIC	Australian Securities and Investments Commission
associated body corporate (of an issuer)	Means: <ul style="list-style-type: none"> • a body corporate that is a related body corporate of the issuer; • a body corporate that has voting power in the issuer of not less than 20%; or • a body corporate in which the issuer has voting power of not less than 20%
ASX	The exchange market operated by ASX Limited
ASX Principles and Recommendations	The ASX Corporate Governance Council's Corporate Governance Principles and Recommendations
Australian authorised deposit-taking institution (ADI)	Has the meaning given in s9 of the Corporations Act
Australian CDI	A CHESS Depositary Interest traded on ASX, with a share or stock as the underlying security
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7)

Term	Meaning in this document
[CO 03/184] (for example)	An ASIC class order (in this example numbered 03/184)
[CO 14/xx]	ASIC's proposed new class order [CO 14/xx] <i>Employee incentive schemes</i>
contribution plan	A plan under which a participant may make monetary contributions towards the acquisition of eligible products (other than performance rights or options) offered under an employee incentive scheme from earned, or future entitlements to, wages, salary or bonus payments or from their own funds
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of the Act
depository interests	Means: <ul style="list-style-type: none"> • Australian CDIs, quoted on ASX, where the underlying security is a share or stock; or • UK CDIs and ADRs, quoted on an approved foreign market, where the underlying security is a share or stock
disclosure document	Means a prospectus, offer information statement or PDS
disclosure relief	Relief from the requirement in Ch 6D of the Corporations Act to provide a disclosure document for offers of securities to employees and from the requirement in Ch 7 to provide a PDS for offers of financial products to employees
eligible products	Means: <ol style="list-style-type: none"> (a) fully paid shares quoted on ASX; (b) fully paid shares or stock quoted on an approved foreign market; (c) depository interests; (d) fully paid stapled securities quoted on ASX; (e) options over, or units in, any financial product in paragraphs (a)–(d); and (f) performance rights relating to any financial product in paragraphs (a)–(d)
employee incentive scheme	A scheme under which offers of eligible products may be made to participants, where the objective of the offer is not fundraising, but to support the interdependence between employees and their employer
employee share scheme	Has the meaning given in s9 of the Corporations Act
Form XX	ASIC Form XX <i>Notification of reliance on [CO 14/xx] Employee incentive schemes</i>

Term	Meaning in this document
hawking relief	Relief from the prohibition in s736, 992A and 992AA of the Corporations Act on the issue or sale of financial products arising out of unsolicited contact with employees for the purposes of an employee incentive scheme
issuer	Means the body issuing the eligible product
licensing relief	Relief from the requirement in the Corporations Act to hold an AFS licence for the incidental provision of financial services in connection with an employee incentive scheme
offer document	Means the document used by the body to make offers of eligible products under an employee incentive scheme
offer information statement	An offer information statement that is lodged with ASIC
on-sale relief	Relief from the on-sale provisions in s707(3)–(4) and 1012C(6)–(7) of the Corporations Act for the on-sale of certain financial products issued under an employee incentive scheme
ordinary shares	Fully paid voting ordinary shares
participant	<p>Means:</p> <ul style="list-style-type: none"> • full-time or part-time employees (including executive directors); • contractors and casual employees who meet the conditions relating to hours worked and length of service (see proposal C1); • prospective employees who are offered a full-time or part-time position (see proposal C2); and • non-executive directors (see proposal C3). <p>Where the issuer is listed on ASX or an approved foreign market, participants can be employed by either the issuer or its associated bodies corporate.</p> <p>Where the issuer is an unlisted body, participants can be employed by either the issuer or its wholly owned subsidiaries</p>
PDS (Product Disclosure Statement)	<p>A document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act</p> <p>Note: See s761A of the Corporations Act for the exact definition.</p>

Term	Meaning in this document
performance right	<p>A right to receive:</p> <ul style="list-style-type: none"> (a) underlying eligible products; (b) a cash amount that is equivalent to the value of such eligible products and/or any increase in value of such eligible products; (c) a cash amount that is equivalent to the dividends or distributions paid to holders of such eligible products; and/or (d) eligible products equivalent to the value of the dividends or distributions paid to holders of such eligible products, <p>which automatically vests in the recipient for no monetary consideration if conditions are met which relate to:</p> <ul style="list-style-type: none"> (e) the length of service of the recipient; and/or (f) the performance of the recipient, the issuer or an associated body corporate of the issuer; or, in the case of an unlisted body, the unlisted issuer or a wholly owned subsidiary of the issuer
prospective employee	A person to whom an offer of full-time or part-time employment is made
related bodies corporate	Has the meaning given in s50 of the Corporations Act
RG 49 (for example)	An ASIC regulatory guide (in this example numbered 49)
s708A (for example)	A section of the Corporations Act (in this example numbered 708A)
stapled securities	Two or more financial products quoted on ASX (at least one of which is a fully paid ordinary share) which, under the terms on which each is traded, must be transferred together
TR 2001/10	Income Tax Ruling 2001/10
UK CDI	A CREST Depository Interest traded on the London Stock Exchange or another approved foreign market, with a share or stock as the underlying security
unallocated product	An underlying eligible product held on trust in a pool for participants generally
underlying eligible products	Eligible products other than options, units or performance rights
unit	Means a right or interest, whether legal or equitable, in the share or other interest, by whatever term called, and includes an option to acquire such a right or interest in the future
unlisted body	Means a body that is not listed on ASX or an approved foreign market

List of proposals and questions

Proposal	Your feedback
<p>A1 We propose to consult in detail on our proposed reforms to [CO 03/184], which seek to address the difficulties with the current regime and achieve our desired objectives.</p> <p>We are considering three options (see paragraph 20):</p> <ul style="list-style-type: none"> (a) Option 1: Maintaining our existing approach, together with some minor updates; (b) Option 2: Making certain substantive changes, subject to specified conditions, to better facilitate the use of employee incentive schemes; and (c) Option 3: Making certain substantive changes without imposing any conditions. <p>However, we recommend Option 2, and are therefore consulting in detail on this option.</p>	<p>A1Q1 We are very keen to better understand the legal, administrative and compliance impediments, including the costs or benefits that you face or may face in making offers under employee share schemes, whether:</p> <ul style="list-style-type: none"> (a) in compliance with the Corporations Act; (b) in reliance on our relief in [CO 03/184]; or (c) by way of having to seek individual relief. <p>How do you consider these may be affected by adopting Options 1, 2 or 3, or any other alternatives you think should be considered by ASIC?</p> <p>Please be as specific and as relevant as possible, and include any estimates about the costs and resources required (e.g. time, personnel, external resources and expertise) and any other impediments.</p> <p>A1Q2 In relation to Option 1, do you believe that making minor and technical changes, and updates that are mechanical in nature, to [CO 03/184] and the policy settings in RG 49 will be sufficient to alleviate the need for employers to continue to seek case-by-case relief from ASIC in relation to offers? If not, why not?</p> <p>A1Q3 In relation to Option 2, please provide your feedback on the particular detailed proposals set out in Sections B to H of this consultation paper.</p> <p>A1Q4 In relation to Option 3, do you consider that:</p> <ul style="list-style-type: none"> (a) the relationship between employers and employees means that it is unnecessary to impose any conditions because, for example, employees have adequate information about their employers; and (b) it is unnecessary to impose conditions on employers because employment arrangements and practices provide adequate protections for employees? <p>If so, how and why?</p>

Proposal	Your feedback
<p>A2 We would like to hear your views on other current and emerging issues, generally, in relation to employee offers and incentives.</p>	<p>A2Q1 Are there any other issues on which it would be useful to have ASIC guidance? If so, please give details.</p> <p>A2Q2 Are there any other issues that may be appropriate for us to address through an exemption or modification by class order? Please be specific.</p> <p>A2Q3 Are there any other policy considerations that may be appropriate for us to address in our regulatory guide? Please be specific.</p>
<p>B1 We propose to provide relief for employee incentive schemes offered by listed bodies (or an associated body corporate of a listed body), where the body is listed on ASX or an approved foreign market.</p>	<p>B1Q1 Do you agree with our proposal to limit our class order relief for listed bodies to those listed on ASX or an approved foreign market? If not, why not?</p>
<p>B2 We propose to facilitate relief for employee incentive schemes by:</p> <p>(a) clarifying that [CO 14/xx] applies to offers of, or offers to arrange for the issue of, quoted eligible products made by a listed issuer or its associated body corporate; and</p> <p>(b) defining 'associated body corporate' as it is currently defined in [CO 03/184], rather than adopting the narrower definition of 'related body corporate' in s9 of the Corporations Act.</p>	<p>B2Q1 Do you agree with our proposal to clarify that [CO 14/xx] applies to offers of, or offers to arrange for the issue of, quoted eligible products made by an issuer or its 'associated body corporate', rather than only to offers made by an issuer or its 'related body corporate'? If not, why not?</p> <p>B2Q2 Do you agree with the proposed definition of 'associated body corporate'? If not, why not?</p> <p>B2Q3 How common is it for companies to rely on the 20–50% thresholds in paragraphs (b) and (c) of the definition of 'associated body corporate' in [CO 03/184]? Please provide examples.</p> <p>B2Q4 Do you consider there is a sufficient level of interdependence between the employer and employee where the employee receives eligible products in a body:</p> <p>(a) with voting power of 20% in its employer; or</p> <p>(b) in which its employer has voting power of 20%?</p>
<p>B3 We propose to facilitate relief for employee incentive schemes by extending its scope to cover offers of, or offers to arrange for the issue of, certain financial products made by an unlisted issuer or its wholly owned subsidiary.</p> <p>Note: See Section G for our proposals relating to the types of financial products issued by an unlisted body that may be offered under an employee incentive scheme and the relevant conditions of our relief.</p>	<p>B3Q1 Do you agree with our proposal to provide class order relief to offers of, or offers to arrange for the issue of, certain financial products made by an unlisted issuer or its wholly owned subsidiary? If not, why not?</p>

Proposal	Your feedback
<p>C1 We propose that [CO 14/xx] will cover the offer or issue of eligible products to contractors and casual employees of issuers (and associated bodies corporate of listed issuers or wholly owned subsidiaries of unlisted issuers) where the additional conditions in Table 2 are met.</p>	<p>C1Q1 Do you agree with our proposal to extend our class order to offers of eligible products to contractors? If not, why not?</p> <p>C1Q2 Do you agree that offers to contractors should include individual contractors engaged personally, or through a company (whether controlled by the individual contractor or a third-party professional services contractor that provides the services of many individual contractors)? If not, why not?</p> <p>C1Q3 Do you agree with our proposal that our new class order should cover offers of eligible products to casual employees? If not, why not? Are there any other conditions or requirements that may be appropriate?</p> <p>C1Q4 Do you agree with the work history criteria applying to contractors and to casual employees, as outlined in our proposal? If not, why not? Are there other criteria that may be more appropriate?</p>
<p>C2 We propose that [CO 14/xx] will cover offers of eligible products made to prospective employees (or an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer) on the conditions that the offer:</p> <ul style="list-style-type: none"> (a) is made at the same time as an offer of full-time or part-time employment; (b) can only be accepted if the offer of full-time or part-time employment is also accepted; and (c) is made under an existing employee incentive scheme of the issuer. 	<p>C2Q1 Do you agree with our proposal to extend our class order relief to cover offers to prospective employees? If not, why not?</p> <p>C2Q2 Do you agree with the proposed conditions for this relief? If not, why not?</p>

Proposal	Your feedback
<p>C3 We propose to expressly exclude non-executive directors from the general class of persons eligible to receive offers, and instead provide limited relief for participation by non-executive directors in employee incentive schemes of an issuer (or an associated body corporate of a listed issuer or a wholly owned subsidiary of an unlisted issuer), where the conditions in Table 3 are met.</p> <p>Note: For a discussion of the term 'non-executive director', as it relates to our proposed relief, see paragraphs 64–71.</p>	<p>C3Q1 Do you agree with our proposal to only provide limited conditional relief for non-executive directors? If not, why not?</p> <p>C3Q2 Do you agree with the proposed specific conditions in Table 3 for offers to non-executive directors? If not, why not?</p> <p>C3Q3 Do you agree with our proposal to impose four of the general conditions of our new class order relief (set out in Table 3) on offers to non-executive directors? If not, why not?</p> <p>C3Q4 To what extent is the small-scale offerings disclosure exemption in s708(1) or 1012E relied on for offers to non-executive directors? Is this exemption useful for such offers? Please give reasons. Are any other exemptions relied on?</p>
<p>D1 We propose to widen the scope in [CO 14/xx] to include offers under an employee incentive scheme of:</p> <p>(a) depository interests that are:</p> <p>(i) Australian CDIs, quoted on ASX, where the underlying security is a share or stock; or</p> <p>(ii) UK CDIs and ADRs, quoted on an approved foreign market, where the underlying security is a share or stock;</p> <p>Note: Our relief for ADRs is limited to Level II and Level III ADRs. This is because Level I ADRs are not able to be traded on a recognised exchange and there are very limited filing requirements. Levels I, II and III are defined under the Rules of the US Securities and Exchange Commission.</p> <p>(b) the underlying security of these depository interests, where that underlying security is a share or stock; and</p> <p>(c) options over, or units in, these depository interests or their underlying securities.</p>	<p>D1Q1 Do you agree with our proposal to extend relief in our new class order to cover offers of Australian CDIs where the underlying security is a share or stock? If not, why not?</p> <p>D1Q2 Do you agree with our proposal to extend our class order to cover offers of certain UK CDIs and ADRs where the underlying security is a share or stock and the UK CDIs or ADRs are quoted on an approved foreign market? If not, why not?</p> <p>D1Q3 Do you agree with our proposal to extend our class order to cover offers of underlying securities of depository interests? If not, why not?</p> <p>D1Q4 Do you agree with our proposal to extend our class order to cover offers of options over, or units in, depository interests or their underlying securities? If not, why not?</p>
<p>D2 We propose to extend [CO 14/xx] to include offers of options over, and units in, fully paid stapled securities quoted on ASX.</p>	<p>D2Q1 Do you agree with our proposal to extend relief in our class order to cover offers of options over, and units in, fully paid stapled securities? If not, why not?</p>

Proposal	Your feedback
<p>D3 To facilitate offers under employee incentive schemes, we propose to:</p> <ul style="list-style-type: none"> (a) retain class order relief in relation to options offered for no more than nominal monetary consideration; (b) provide class order relief for offers of performance rights for no more than nominal monetary consideration; and (c) define a 'performance right' as a right to receive: <ul style="list-style-type: none"> (i) fully paid shares quoted on ASX; (ii) fully paid shares or stock quoted on an approved foreign market; (iii) depository interests; (iv) fully paid stapled securities quoted on ASX; (v) a cash amount that is equivalent to the value of a financial product in D3(c)(i)–D3(c)(iv) and/or any increase in their value; (vi) a cash amount that is equivalent to the dividends or distributions paid to holders of a financial product in D3(c)(i)–D3(c)(iv); and/or (vii) the value of the dividends or distributions paid to holders of a financial product in D3(c)(i)–D3(c)(iv), which automatically vests in the recipient for no monetary consideration if conditions are met which relate to: <ul style="list-style-type: none"> (viii) the length of service of the recipient; and/or (ix) the performance of the recipient, the issuer or an associated body corporate of the issuer. 	<p>D3Q1 Do you agree with our proposal to extend our class order to cover offers of performance rights offered for no more than nominal monetary consideration? If not, why not?</p> <p>D3Q2 Do you consider the proposed definition of 'performance right' is broad enough to cover the conditional rights usually offered under an employee incentive scheme? If not, what other rights do you think should be included in the definition? Please provide a detailed explanation of the nature of these rights and why they should be included.</p> <p>D3Q3 Do you agree with our proposal to define 'performance right' as a right offered for no more than nominal monetary consideration? If not, why not? Is it more reflective of market practices to define 'performance right' as a right offered for no monetary consideration? If so, please provide details and examples.</p> <p>D3Q4 Do you agree with our proposal to include dividend equivalent rights in the definition of 'performance right'? If not, why not?</p> <p>D3Q5 Do you agree with our proposal to include as a component of the definition of 'performance right' the ability to receive the cash amount equivalent to the relevant financial product? If not, why not?</p> <p>D3Q6 Do you consider that paragraphs D3(c)(v)–D3(c)(vi) adequately capture the ability for some performance rights to be cash settled? If not, why not?</p>
<p>D4 We propose to provide guidance (including potentially issuing, for the avoidance of doubt, a separate class order declaration under s765A(2) of the Corporations Act) that employment or employment-like remuneration arrangements, under which commissions or bonuses may be payable, are not financial products for the purposes of Ch 7. This would ensure that such arrangements are not regulated as derivatives for the purposes of Ch 7.</p>	<p>D4Q1 Do you agree with our proposal to provide guidance (and to potentially issue a separate class order declaration) that employment or employment-like remuneration arrangements, under which commissions or bonuses may be payable, are not financial products for the purposes of Ch 7? If not, why not?</p>

Proposal	Your feedback
<p>D5 We propose to continue to consider on a case-by-case basis applications for relief for other financial products, such as interests in a managed investment scheme offered under an employee incentive scheme (other than those stapled to a share).</p>	<p>D5Q1 Do you agree with our proposal to continue to consider on a case-by-case basis applications for relief for other financial products? If not, why not?</p> <p>D5Q2 Are there other financial products that we should consider including in [CO 14/xx]? If so, what are they, and in what circumstances are they offered?</p>
<p>E1 We propose:</p> <p>(a) that [CO 14/xx] will provide relief to cover offers of underlying eligible products (i.e. eligible products excluding options and performance rights) under employee incentive schemes that use a trust structure where the relevant conditions in Table 4 are met. The conditions that apply will depend on whether the trustee holds:</p> <p>(i) specific underlying eligible products on trust for, and allocated to, specific participants (allocated products); or</p> <p>(ii) underlying eligible products in a pool on trust for participants generally (unallocated products); and</p> <p>(b) to remove from the current conditions relating to trusts the ability for the trust deed to expressly exclude the beneficiary from having the capacity to authorise the trustee to sell at or above the current market price the shares to which they are entitled.</p> <p>Note: For our proposed disclosure and on-sale relief for the issue of underlying eligible products to trustees of trusts used for employee incentive schemes, see proposal H2.</p>	<p>E1Q1 Do you agree with our proposal to extend our new class order to include offers of underlying eligible products, regardless of whether a trustee holds specific products on trust for specific participants, or the trustee holds underlying eligible products in a pool on trust for participants generally? If not, why not?</p> <p>E1Q2 Are there other ways of using a trust structure to offer underlying eligible products to participants that we should expressly include in [CO 14/xx]? Please provide examples.</p> <p>E1Q3 Do you agree with the proposed conditions of relief in respect of allocated products? If not, why not?</p> <p>E1Q4 Do you agree with the proposed conditions of relief in respect of unallocated products? If not, why not?</p> <p>E1Q5 Do you agree with our proposal to remove from the conditions relating to trusts the ability for the trust deed to expressly exclude the beneficiary from having the capacity to authorise the trustee to sell at or above the current market price the shares to which they are entitled? If not, why not?</p> <p>E1Q6 [CO 03/184] currently provides licensing relief for associates of issuers. Do you consider that other types of trustees (that may not be associates of issuers) also require licensing relief in the context of employee incentive schemes? If so, please provide examples and explain why such relief is needed.</p> <p>E1Q7 Are there other trust structures, including those involving the offers of units in a trust, that we should give guidance on or that should be covered in our new class order? Please provide details, including details of the trust structure, the nature of the financial product offered, the terms of the offer, the reason for making offers in this way and how our key policy objectives are satisfied.</p>

Proposal	Your feedback
<p>E2 We propose to:</p> <p>(a) impose a condition in [CO 14/xx] that the number of underlying eligible products to which voting rights attach that are held on trust for participants as unallocated products must not exceed 5% of the total voting rights attaching to eligible products on issue at any point in time; and</p> <p>(b) specify that the 5% limit be calculated as the number of underlying eligible products held on trust as unallocated products as a percentage of the total number of those eligible products combined with any other class of voting financial product on issue at any point in time.</p>	<p>E2Q1 Do you agree with our proposal to impose a new condition in our new class order relief to limit the number of eligible products that may be held by a trustee of an employee incentive scheme trust at any given time? If not, why not?</p> <p>E2Q2 Do you agree with our proposal about how the 5% limit would be calculated? If not, why not?</p>
<p>E3 We propose to:</p> <p>(a) include in [CO 14/xx] offers under an employee incentive scheme that involve a contribution plan where the conditions in Table 5 are met; and</p> <p>(b) redefine 'contribution plan' to mean:</p> <p style="padding-left: 40px;">A plan under which a participant may make monetary contributions towards the acquisition of eligible products (other than performance rights or options) offered under an employee incentive scheme from earned, or future entitlements to, wages, salary or bonus payments or from their own funds.</p>	<p>E3Q1 Do you agree with the proposed new definition of 'contribution plan'? If not, why not?</p> <p>E3Q2 In particular, do you consider that the proposed new definition of 'contribution plan' includes both deductions made from earned salary (described as an 'ineffective salary sacrifice' arrangement in Income Tax Ruling TR 2001/10 (TR 2001/10)) and agreements to take future salary in the form of eligible products (described as an 'effective salary sacrifice' arrangement in TR 2001/10)? If not, why not?</p> <p>E3Q3 Do you agree with the proposed conditions for how contributions are to be held? If not, why not?</p> <p>E3Q4 Do you agree with our proposal to change the timing for the opt-out requirement from 'any time' under [CO 03/184] to 'a notice period of no more than one month', with all money deposited for that participant at that time with an Australian ADI, including any accumulated interest, to be transferred to that participant as soon as practicable? If not, why not?</p> <p>E3Q5 Are there any other conditions that should be imposed in respect of employee incentive schemes involving contribution plans?</p>

Proposal	Your feedback
<p>E4 We propose to:</p> <p>(a) limit the circumstances in which a loan or similar financial assistance may be provided to participants for acquiring underlying eligible products under an employee incentive scheme that qualifies for class order relief to loans that are:</p> <p>(i) either no recourse arrangements or limited recourse arrangements, with recourse limited to the forfeiture of the underlying eligible products issued under the loan arrangement;</p> <p>(ii) not repayable for the duration of the loan; and</p> <p>(iii) interest free; and</p> <p>(b) provide class order relief so that an offer under an employee incentive scheme can involve both a loan and a contribution plan.</p>	<p>E4Q1 Do you agree with the proposed limited or no recourse limitation on loans offered for acquiring underlying eligible products (i.e. eligible products excluding options and performance rights) under an employee incentive scheme that qualifies for class order relief? If not, why not?</p> <p>E4Q2 Do you agree with permitting employee incentive schemes that involve a loan as well as a contribution plan? If not, why not?</p>
<p>F1 We propose to provide disclosure relief under [CO 14/xx] for an issuer to make offers under an employee incentive scheme of eligible products that have been quoted, at the time of the offer, on ASX or an approved foreign market for a period of at least three months without suspension for more than five trading days in the shorter of the period in which the products have been quoted or the 12 months before the offer is made.</p>	<p>F1Q1 Do you agree with our proposal to change the quotation period required under our class order to a period of at least three months without suspension for more than five trading days in the shorter of the period in which the products have been quoted or 12 months? If not, why not?</p>
<p>F2 We propose to:</p> <p>(a) specify that the 5% share capital limit for the purposes of our new class order relief must be calculated based on the relevant type and class of eligible product, as set out in Table 6; and</p> <p>(b) give guidance clarifying that all offers made under an employee share scheme in reliance on [CO 03/184] and under an employee incentive scheme in reliance on [CO 14/xx] in the past five years are to be included in the calculation of the 5% share capital limit of the current offer.</p>	<p>F2Q1 Do you agree with our proposal for calculating a 5% share capital limit for employee incentive schemes? If not, why not? Please give details of any alternatives that you consider to be appropriate.</p>

Proposal	Your feedback
<p>F3 In [CO 14/xx], we propose to use the term 'nominal monetary consideration' rather than 'nominal consideration' when referring to offers of options and performance rights.</p>	<p>F3Q1 Do you agree with our proposed use of the term 'nominal monetary consideration'? If not, why not? Please provide details of alternative definitions that you consider appropriate.</p> <p>F3Q2 Do you consider that the definition of 'nominal consideration' in [CO 03/184], which sets a limit of one cent per option, is appropriate? If so, why?</p> <p>F3Q3 Do you consider that it would be preferable for our new class order relief to require that options and performance rights be offered for 'no monetary consideration' instead of for 'no more than nominal monetary consideration'? Please explain your answer.</p>
<p>F4 Consistent with what we understand to be the current market practice, we propose:</p> <p>(a) to impose a further condition in [CO 14/xx] that each offer of eligible products under an employee incentive scheme must not result in the participant receiving a significant portion of their entitlements under the offer as cash or shares (which are not subject to restrictions from disposal) until the expiry of a minimum 12-month period commencing on the granting of the eligible products; and</p> <p>(b) that a significant portion of a participant's entitlements would mean 25% or more of their entitlements under each offer.</p>	<p>F4Q1 Do you agree with the proposed new condition to impose a partial 12-month holding requirement? If not, why not?</p> <p>F4Q2 Do you agree with our proposal that the relevant minimum period be 12 months? If not, why not? Would your response be different if the proposed minimum period were three years to further support our policy objective of ensuring offers are made for the purposes of creating a relationship of interdependence? If so, why?</p> <p>F4Q3 Do you agree with our proposal that a significant portion of a participant's entitlements means 25% or more of their entitlements under each participant's offer? If not, why not?</p>

Proposal	Your feedback
<p>F5 We propose to:</p> <p>(a) include requirements in [CO 14/xx] that:</p> <ul style="list-style-type: none"> (i) the offer document should be worded and presented in a clear, concise and effective manner, with a brief summary of the key risks; and (ii) the offer document and all other accompanying documents given to participants in connection with an offer under an employee incentive scheme must be made available to ASIC on request; and <p>(b) replace the current requirement for the body relying on our relief to provide offer documents to ASIC with the requirement that the body notify us, using Form XX, within seven days of making its first offer under an employee incentive scheme made in reliance on our new class order relief. Form XX would contain the following information:</p> <ul style="list-style-type: none"> (i) the identity of the issuer; (ii) the identity of the employer (if not the issuer); (iii) the date of the first offer under the employee incentive scheme; (iv) the duration, and tranches (if any), of the employee incentive scheme; (v) whether there are performance hurdles; (vi) the type(s) of eligible product being offered; (vii) the type(s) of participant to whom the offers are made; (viii) the identity of the trustee, if any, if any, and the trust structure used (allocated or unallocated); (ix) whether a contribution plan is offered; (x) whether a loan facility is offered; and (xi) an acknowledgement of compliance with the relevant conditions of [CO 14/xx]. 	<p>F5Q1 Do you agree with our requirement that the offer document should be clear, concise and effective, and include a brief summary of the key risks? If not, why not?</p> <p>F5Q2 Do you agree with our proposal to replace the current requirement to provide offer documents to ASIC with a requirement to notify us of an offer using Form XX? If not, why not?</p> <p>F5Q3 Do you agree with including the information at F5(b)(i)–F5(b)(ix) in Form XX? If not, why not?</p> <p>F5Q4 Is there any other information that ASIC should be made aware of in this notification?</p> <p>F5Q5 Do you agree that some or all of this information should not be made public? If not, why not?</p>

Proposal	Your feedback
<p>F6 We intend to include a condition in [CO 14/xx] that enables ASIC to determine and notify a body in writing that it may not rely on this relief (which we may then subsequently revoke or vary).</p>	<p>F6Q1 Do you agree with our proposal to provide a determination process? If not, why not?</p>
<p>G1 We propose that [CO 14/xx] will facilitate offers of ordinary shares for no monetary consideration, without providing disclosure prescribed by the Corporations Act to participants of the issuer, where these shares are valued at no more than \$1,000 per offer, and the conditions in Table 7 are met.</p>	<p>G1Q1 Do you agree with our proposal to provide class order relief to cover annual offers for no monetary consideration of ordinary shares valued at no more than \$1,000 per participant? If not, why not?</p> <p>G1Q2 Do you agree that unlisted bodies should only be entitled to relief to make these offers where they prepare and provide current audited accounts? If not, why not?</p> <p>G1Q3 Do you agree with the proposed risk disclosure statement? If not, why not?</p> <p>G1Q4 Do you agree with our proposal about how the \$1,000 value of the ordinary shares is to be calculated? If not, why not?</p>

Proposal	Your feedback
<p>G2 We propose to:</p> <p>(a) provide class order relief to include offers of options and performance rights by unlisted bodies to participants provided that the conditions in Table 8 are met; and</p> <p>(b) define a 'performance right' for the purposes of this relief as a right to receive:</p> <p>(i) fully paid voting ordinary shares (ordinary shares); and/or</p> <p>(ii) a cash amount that is equivalent to the value of such shares,</p> <p>which vests automatically for no monetary consideration if conditions are met relating to:</p> <p>(iii) the length of service of the recipient; and/or</p> <p>(iv) the performance of the recipient or the issuer.</p>	<p>G2Q1 Do you agree with the proposed definition of 'performance rights' for the purposes of this relief? If not, why not?</p> <p>G2Q2 Do you agree with our proposal that offers by unlisted bodies of options and performance rights should relate only to ordinary shares? If not, why not?</p> <p>G2Q3 Do you agree that the provision of an independent expert report at the unlisted body's expense if there is a sale of all of the ordinary shares in the issuer is appropriate? If not, why not?</p> <p>G2Q4 Do you consider class order relief should be provided if there is a sale of less than 100% of the ordinary shares in the issuer, or where there is a disposal of the business/assets of the issuer? If so, please provide details, addressing our concerns discussed in paragraph 219.</p> <p>G2Q5 Do you agree that unlisted bodies should only have one class of ordinary shares on issue (to which the options and performance rights relate) to qualify for relief? If not, why not?</p> <p>G2Q6 Do you consider that offers using a trust should be permitted under [CO 14/xx] for unlisted bodies? If so, please give a detailed explanation of your reasons, including how the nature and terms of the trust arrangement would meet our policy considerations, and what would be the benefits of a trust over a direct contract with participants.</p> <p>G2Q7 Are there other offers under employee incentive schemes for unlisted bodies that ASIC should facilitate that are consistent with our policy parameters and proposed conditions? If so, please provide full details.</p>
<p>H1 We propose that [CO 14/xx] will provide licensing, hawking and advertising relief to a listed issuer and its associated bodies corporate, and an unlisted issuer and its wholly owned subsidiaries, where those bodies are relying on [CO 14/xx] for disclosure relief to make their offers under an employee incentive scheme.</p>	<p>H1Q1 Do you agree with our proposal to limit the persons who can rely on relief in relation to licensing, hawking and advertising to listed issuers and their associated bodies corporate, and to unlisted issuers and their wholly owned subsidiaries? If not, why not?</p> <p>H1Q2 Do you agree with our proposal to extend our licensing and hawking relief where an employee incentive scheme involves a managed investment scheme only by reason of operating a contribution plan? If not, why not?</p>

Proposal	Your feedback
<p>H2 In [CO 14/xx], we propose to:</p> <ul style="list-style-type: none"> (a) extend the on-sale relief currently provided under Class Order [CO 04/671] Disclosure for on-sale of securities and other financial products to cover offers under employee incentive schemes of all eligible products to all participants; (b) provide on-sale relief to cover depository interests that may be offered under our new class order relief; and (c) provide disclosure relief and additional on-sale relief for offers of eligible products to the trustee of an employee incentive scheme. 	<p>H2Q1 Do you agree with our proposal to extend our on-sale relief to cover offers of all eligible products to all participants under [CO 14/xx]? If not, why not?</p> <p>H2Q2 Do you agree with our proposal to extend our on-sale relief to cover depository interests that may be offered under our new class order relief? If not, why not?</p> <p>H2Q3 Do you agree with our proposal to provide on-sale relief where we have provided disclosure relief to facilitate the use of trusts? If not, why not?</p> <p>H2Q4 Do you consider there are other forms of on-sale relief that are necessary in the context of employee incentive schemes? If so, please provide details.</p>