

31 January 2014

Mr P Lee
Senior Manager Corporations
Australian Securities and Investments Commission
Level 24, 120 Collins Street
Melbourne VIC 3000

Dear Mr Lee

Employee Incentive Schemes – Consultation Paper 218 (CP218)

We refer to the above (issued on 14 November 2013) and the invitation to comment on proposals contained in the paper.

Egan Associates is a specialist remuneration consulting practice based in Sydney. Our clients include large publicly-listed corporations, private company groups and government / public sector entities. A large part of our practice is involved in the development and implementation of employee incentive schemes for clients.

Performance rights

We are broadly supportive of proposal D3. In our experience, 'in substance' performance rights have been regularly granted under employee incentive schemes (EIS) for a significant period of time.

Responding to the specific questions in CP218:

- D3Q1 We agree with this proposal.
- D3Q2 The proposed definition is broad enough and would include share rights and share appreciation rights increasingly being granted under EIS. The inclusion of "and/or" in D3(c)(vi) allows for the grant of 'indeterminate rights', alluded to in paragraph 105(a).
- D3Q3 In our experience, it would be more reflective of market practice to define 'performance right' as a right offered for no monetary consideration.

Given the relevant employee will be providing non-monetary consideration for the grant (his or her continued service), requiring nominal monetary consideration is unnecessary. We note the implicit acknowledgement of this point in paragraph 182.

- D3Q4 In our experience, dividend equivalent rights are not widely offered under EIS. Including such rights in the definition may unnecessarily complicate the overall EIS structure given the associated payment and valuation issues.
- D3Q5 We agree with the option for cash settlement. This feature will allow for disclosure relief to formally apply to cash or equity settled 'in substance' performance rights. In our experience, cash settlement also better accommodates the grant of performance rights to overseas-based employees.
- D3Q6 Cash settlement is adequately captured by allowing for the receipt of cash to the value of the right and/or any increase in its value.

On a related matter, we question the stated likely treatment of rights discussed in paragraph 98 as derivatives given the 'performance right' definition is proposed to include rights involving a cash settlement feature. Disclosure relief should be available for equity-settled rights (whether the underlying shares are issued / identified or not) as for cash-settled rights.

Prospective employees

We are supportive of proposal C2.

In our experience, the development of remuneration arrangements for prospective employees have been unduly constrained by the definition of 'eligible employees' in CO 03/184. This proposal will better facilitate pre-employment commercial negotiations and accommodate specific sign-on and/or retention-based awards.

Responding to the specific questions in CP218:

- C2Q1 We agree with this proposal.
- C2Q2 Requiring the relevant offer to be made under an existing EIS is unduly restrictive. It should be sufficient that the relevant eligible product is offered under an EIS subject to CO 03/184.

Non-executive directors

We are broadly supportive of proposal C3. In our experience, there is widespread uncertainty about whether CO 03/184 extends to offers made under an EIS to non-executive directors (NEDs).

Responding to the specific questions in CP218:

- C3Q1 We broadly agree with this proposal.
- C3Q2 We broadly agree with the proposed specific conditions but suggest the Commission considers extending relief to EIS for NEDs involving a loan with features as described in paragraphed 151.

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We trust our comments above will assist in the development of the Commission's policy on employee incentive schemes.

Please do not hesitate to contact us with any queries.

Kind regards

Daniel Yin