Contact: Nick Brown

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Dear Peng

ASIC Consultation Paper 218: Employee incentive schemes

We thank ASIC for the opportunity to submit a response to Consultation Paper 218 (**Consultation Paper**) regarding the proposed revision of ASIC's class order relief and guidance relating to employee incentive schemes.

Throughout our submission, we refer to ASIC's existing class order 03/184 as the **Class Order**.

We would welcome the opportunity to discuss our views, share our insights, and consider any other specific issues on which ASIC might like our view in respect of the proposals.

Responses to ASIC's proposals and queries

Our responses to ASIC's proposals and queries in the Consultation Paper are set out below. In the title to each subsection, we have referred to the relevant ASIC proposal or query number in the Consultation Paper. Please note that we have not responded to all of ASIC's proposals and queries.

1. Background to the proposal

1.1 *A1Q3: Option 2*

We support ASIC's adoption of Option 2 and have provided specific feedback on sections B to H of the Consultation Paper in this submission.

1.2 *A2: Other current and emerging issues*

It is our view that appropriate and effective employee incentivisation is critical to the ongoing development of a culture of innovation in Australia.

In our experience, there has been a significant growth in the use of equity instruments as a means of incentivising workforces. As these workforces become increasingly global, employee incentive plans have changed as issuing companies have sought to offer equity instruments that are understandable, effective and, where at all possible, consistent across national borders.

Presently, it is our experience that the framework of regulation in Australia is less facilitative of employee equity incentive issuance that most other developed jurisdictions.

When establishing an equity incentive plan, in our experience, issuing companies will consider factors such as securities laws, tax effect for both the issuing company and the participants, payroll obligations, financial reporting requirements, social security requirements, data privacy and employment law before determining to proceed with grants into a particular jurisdiction. For this reason, it is important that all aspects of regulation in Australia work together in a coherent way (and avoid any competing effect) to encourage employee equity incentivisation.

Given the above, we believe ASIC's efforts to broaden the relief set out in the Class Order will be greatly valued by both domestic and foreign issuing companies.

2. *Who can make offers?*

2.1 *B1: Bodies listed on ASX or an approved foreign market*

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?*

We agree with the approach taken to limit the Class Order relief to bodies listed on certain markets and certain unlisted bodies, subject to our specific comments set out in this submission.

We encourage ASIC to continue to consider specific relief applications from bodies that are not listed on ASX or an approved foreign market where those offers meet ASIC's policy objectives.

We note that the 'approved foreign market' definition will require ongoing review given the merger and consolidation activity underway in the global stock exchange market. For example, some of the markets separately listed in the Class Order (i.e. 'Bourse de Paris', 'Eurex Amsterdam', and 'New York Stock Exchange') have merged with Euronext. The Class Order should be amended to reflect the changes.

2.2 *C1: Contractors and casual employees*

C1Q1	Do you agree with our proposal to extend our class order to offers of eligible products to contractors?

We support ASIC's proposal subject to our specific comments in relation to the contractor and casual employee proposals set out below.

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)?

We support ASIC's proposal subject to our specific comments in relation to the contractor and casual employee proposals set out below.

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?*

We support ASIC's proposal subject to our specific comments in relation to the contractor and casual employee proposals set out below.

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?*

(a) We consider that the requirement that a contractor must have worked, during the 12-month period prior to the date of offer, the number of hours that are the pro-rata equivalent of 80% or more of a full-time position is too onerous. A bona fide contractor may have been engaged by other companies during that 12-month period which results in the 80% threshold not being satisfied. We consider that a 40% threshold would be more appropriate, in line with the test proposed for casual employees.

(b) The requirement for the issuing company to have an *ongoing* intention to continue the engagement of the contractor for at least the next 12 months may be problematic as it is not clear how often the issuing company will need to evidence its *ongoing* intention. It would be beneficial for ASIC to clarify that the issuing company must have the ongoing intention at the time of making of the offer only.

(c) In relation to the proposals in paragraph 53 of the Consultation Paper, we submit that there should be additional flexibility in relation to the bodies that may receive equity awards. For example, in our experience, it is common for contractors to engage with third parties through family companies where family members who do not provide services to the issuing company are shareholders and/or directors.

2.3 C2: Prospective employees

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

We agree with the proposal to extend the Class Order relief to cover offers to prospective employees, but we submit that this should also extend to prospective contractors. In our experience, it is not uncommon for companies (notably in the mining exploration and IT industries) to offer eligible products in connection with the offer of a senior contracting position (e.g. a consulting geologist to a mining exploration company) as well as an employed position.

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

We submit that the proposed condition that the offer of the eligible product is made under an *existing* employee incentive scheme of the issuer should not be adopted. For example, an issuing company may wish to make an offer to a potential new employee (or contractor) under a bespoke incentive scheme. In our view, provided the offer is for an eligible product, the extra requirement that it be under an existing incentive scheme is not necessary.

2.4 C3: Non-executive directors

C3Q2	*Do you agree with the proposed specific conditions in Table 3 for offers to non-executive directors? If not, why not?*

We make the following comments on the proposed specific conditions:

(a) As to proposed specific condition (a), we consider that the full range of eligible products that are available to the other classes of eligible participants should be available to non-executive directors. We consider it should be left to shareholders (often acting through well resourced and well funded proxy advisers) to decide whether a particular eligible product should be offered to non-executive directors, particularly given shareholders would need to approve the grant under the relevant provisions of the Corporations Act and ASX Listing Rules. Further, ASIC's concern with maintaining and preserving the independence of non-executive directors is, in our view, adequately addressed by proposed specific conditions (b) and (d) (with which we agree).

(b) We agree with proposed specific condition (c), however, we submit that ASIC clarify that the contribution of funds could take the form of sacrificing directors fees and/or the use of personal funds.

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?*

As to the proposed general conditions (a), (b) and (c), please see our responses to F2Q1, F4Q1, F4Q2 and F5Q1 – Q5.

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?*

In our experience, the small-scale offerings exemptions in s.708(1) and 1012E are not regularly relied upon for offers to non-executive directors. Often the issuing company will have exceeded the 20 investor ceiling prior to offering equity to non-executive directors. More commonly we see issuing companies rely upon the 'sophisticated investor' exemption when making offers to non-executive directors.

On a separate but related note, we submit that ASIC clarify for the purposes of s.708(5):

- offers that are made in compliance with the Class Order are to be disregarded when determining compliance with the 20 person ceiling and the $2 million ceiling; and
- if a particular investor receives multiple offers during the same 12 month period (other than in reliance upon the Class Order or a Corporations Act exemption to disclosure other than s.708(1)) then that investor will only be counted once when determining compliance with the 20 person ceiling.

3. What financial products can be offered by listed bodies?

3.1 *D3: Performance rights*

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?*

We support ASIC's proposal to refer to "nominal monetary consideration" rather than "nominal consideration".

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.*

We make the following comments regarding the proposed definition of 'performance rights':

(a) We note that the 'performance right' definition refers to the right to 'receive'. We submit that such receipt may occur by the issue, transfer or (where the relevant equity

instruments are held in a trust) allocation of the relevant equity instruments and that the definition should allow for this.

(b) We note that paragraphs D3(c)(v) and (vi) refer to a 'cash amount'. We note that many share appreciation rights plans allow for the participant to receive, upon the satisfaction of the relevant vesting conditions, a number of shares with a value equivalent to the increase in value of the relevant financial product. Arguably this approach is consistent with paragraph D3(c)(i) of the definition of 'performance right' however it would be helpful for ASIC to expressly clarify this. One possible alternative would be for paragraphs D3(c)(v) and (vi) to refer to "a cash amount or financial products set out in paragraph D3(c)(i) to D3(c)(iv) that is equivalent to any increase in value". Similarly, we have seen incentive plans that deliver the 'value' referred to in D3(c)(vii) in cash or financial products set out in paragraph D3(c)(i) to D3(c)(iv) and so a similar change could be made to paragraph D3(c)(vii).

(c) We support the use of "and/or" in paragraph D3(c)(vi) as, in our experience, both domestic and foreign issuing companies generally wish to grant equity instruments that have more than one of the features described in paragraphs D3(c)(i) to (vii).

(d) We consider it unnecessary to require that the right 'automatically vests' as that would exclude rights requiring a positive exercise act on behalf of the participant (for completeness we note that not all performance rights that require exercise will fall into the definition of an option or unit).

(e) We consider it unnecessary to specify the vesting conditions that qualify a right as a 'performance right' (see paragraphs D3(c)(viii) and (c)(ix) in the Consultation Paper). In our view, this should be a matter for the issuing company. As an example, it is common for mining exploration companies to adopt vesting conditions linked to project milestones. Whether such a vesting condition would be a 'performance condition' for the purposes of the new Class Order is not clear.

(f) We note ASIC's comments in paragraphs 92 to 101 of the Consultation Paper in relation to the legal characterisation of performance rights. We respectfully disagree with ASIC's view set out in paragraph 100. We do not consider that, when having regard to the definition of 'derivative' in s761D, all of the performance rights that have the elements in paragraph 98 fall within the definition of a derivative.

D3Q4 *Do you agree with our proposal to include dividend equivalent rights in the definition of 'performance right'?*

Yes. It is not uncommon for equity awards to have a design feature of dividend equivalent rights and believe it should be included with the definition of 'performance right'.

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.*

We support the inclusion of a cash equivalent amount in the definition of 'performance right'. Having a cash equivalent amount alternative is a particularly common design feature in global incentive plans as it is more suitable under certain foreign regulatory regimes.

By including the cash equivalent amount alternative, the issuing company can often use a single set of plan rules across the various jurisdictions in which its workforce resides. This has the benefit of simplicity and transparency when administering the plan.

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.*

As a practical matter, issuing companies use different approaches to determine the value of the relevant underlying financial product when the relevant right has vested. In our experience, the use of volume weighted average prices over a period prior to a specified time (e.g. prior to payment of award) or the use of closing prices at a specified time is most common and we assume ASIC does not object to these approaches.

3.2 *D4: Cash bonuses*

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?*

We support ASIC's proposal to 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 purpose of Chapter 7.

We note that paragraph D3(c)(v) in the "performance right" definition on page 32 of the Consultation Paper appears to provide adequate relief for the offer of employment or employment-like remuneration arrangements, under which commissions or bonuses may be payable, where the value *is* derived from the value of a financial product. We support such an approach as the regulatory treatment of phantom share plans as derivatives for the purpose of Chapter 7 has been a cause of concern for offerors for some time.

4. *What structures can be used by listed bodies when making offers?*

4.1 *E1: Use of trusts*

E1Q3	*Do you agree with the proposed conditions of relief in respect of allocated products? If not, why not?*

As to proposed general condition (a), specific condition (a) relating to allocated products and specific condition (a) relating to unallocated products (see rows 1, 2 and 3 of table 4 on page 41 of the Consultation Paper respectively), in our experience, it is common for a trust to hold securities on behalf of participants in multiple employee incentive schemes of the issuing company and therefore the reference to "scheme" in the singular in the proposed condition would mean such a trust is excluded.

As to proposed specific condition (c) (see row 2 of table 4 on page 41 of the Consultation Paper), in our experience, there are instances where allocated products within a trust structure have not yet "vested" (for example, in respect of performance share plans where the vesting conditions have not been satisfied), in which case the participant would not have substantially the same rights in relation to those relevant eligible products as if it were the legal owner (as failure to satisfy those vesting conditions may result in the forfeiture of their interest in the performance shares). We believe that maximum flexibility should be afforded to the issuing company in setting out the conditions as to when allocated products "vest". Accordingly, in our view, specific condition (c) is not required.

E1Q4	*Do you agree with the proposed conditions of relief in respect of unallocated products? If not, why not?*

As to proposed general condition (c) (see row 1 of table 4 on page 41 of the Consultation Paper), we submit that ASIC should clarify that if a trustee recovers from or obtains reimbursement from the assets of the trust of any third party costs incurred by that trustee in the operation and administration of the trust (i.e. not just brokerage and tax costs but other third party costs such as audit and legal fees) that such cost recovery or reimbursement does not constitute a "fee" or a "charge" levied by the trustee.

4.2 *E2: Limit of 5% on eligible products held on trust as unallocated products*

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?*

Please see our response to F2Q1.

E2Q2	*Do you agree with our proposal about how the 5% limit would be calculated? If not, why not?*

Please see our response to F2Q1.

4.3 *E3: Contribution plans*

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

We support the inclusion of bonuses in the definition of 'contribution plan'.

We note ASIC's comments in paragraphs 146 and 147 of the Consultation Paper in relation to the timing for the 'opt-out' requirement. We are aware of issuing companies having concerns around participants being able to 'opt-out' at any time even when they possess inside information. We consider that there should be flexibility in the timing for the 'opt-out' requirement so that companies can impose further conditions on 'opt-out' to ensure compliance with their securities trading policies.

4.4 *E4: Loans*

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?*

We support the proposed condition (a)(i) in respect of the loan or similar financial assistance.

We submit that condition (a)(ii) is not appropriate as some plans require the participant to use the after-tax amount of dividends or distributions paid on the eligible products issued to be used to pay down the loan. This is a legitimate strategy for the issuing company to recover the loan and involves no cash outlay for the participant. For administrative simplicity, it is common for an issuing company to assume, when calculating the after-tax amount of dividends or distributions, to assume all participants are on the highest marginal tax rate in Australia.

We further submit that condition (a)(iii) is not appropriate as there may also be instances where interest is charged on the loan.

Where a loan is non interest bearing, fringe benefit tax (**FBT**) will not be payable to the extent the "otherwise deductible" rule apples. This rule applies where, if interest had been charged, it would have been deductible to the participant. For interest to be deductible to the participant, there must be a reasonable expectation of assessable dividends from the underlying shares acquired with the loan.

In instances where there is no reasonable expectation of assessable dividends (e.g. the shares are non-dividend paying shares or the business will not generate income for a long time), the otherwise deductible rule would not apply. To overcome this issue, some loan plans are designed such that interest is payable on the loan at the FBT benchmark rate and FBT is therefore not payable on the loan fringe benefit.

In addition, some companies choose to impose interest on the loan for non-tax purposes. Provided the interest charged to the participants does not exceed commercial parameters or the

FBT benchmark rate, in our view, there is no fund raising purpose to the loan.

In our view, neither condition (a)(ii) nor condition (a)(iii) are necessary for ASIC to achieve the policy objectives set out in paragraph 150 of the Consultation Paper.

5. *What are the conditions of relief?*

5.1 *F1: Period of quotation*

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 short of the period in which the products have been quoted or 12 months? If not, why not?*

We support ASIC's proposal in relation to the reduction of quotation periods and the increase in days of suspension.

5.2 *F2: Share Capital limit*

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

We do not agree with the proposal for calculating the 5% share capital limit for employee incentive schemes. The 5% calculation is one of the most complex requirements of the Class Order and one of the hardest for our domestic and international clients to ensure they comply with. This is particularly so when calculating the 5% limit in connection with an offer of share appreciation rights when the number of shares that will be issued is determined by reference to future performance.

We note ASIC's comment in paragraph 172 that the intention of the 5% limitation is to ensure that the scheme is not for fundraising. We believe there is a case for excluding from the 5% calculation all eligible products in respect of which the participants pay no or nominal monetary consideration as they will raise no or nominal funds for the issuing company.

In addition, we submit that the new Class Order does not need to manage the concern set out in paragraph 172 of the Consultation Paper in relation to an issuing company's exposure to cash liabilities for cash settled performance rights as the directors' duties and insolvency regime in the Corporations Act adequately deals with this already.

5.3 *F4: Offer for mutual benefit: 12-month holding*

F4Q1	*Do you agree with the proposed new condition to impose a partial 12-month holding requirement? If not, why not?*

The proposed condition to impose a partial 12-month holding requirement is, in our view, unnecessary. This should be a matter for the issuing company. Examples where the 12-month restriction may be inappropriate include:

- where, within 12 months of grant, shareholders receive an unsolicited offer that they wish to accept;
- in connection with a pre-IPO offer, where shareholders are rolled up into a new head company immediately prior to the IPO and within 12 months of grant; or
- in connection with a tax exempt plan where the conditions imposed to ensure tax exemptions require participants to hold until the 3rd anniversary of the grant of the shares or, if earlier, until their employment ends. If such employment ends within 12 months of grant, the participant would retain the tax exemption but the status of the company and the class order is not clear.

In our view, the proposed requirements around the eligibility of participants (i.e. the proposed rules regarding casual employees etc) will ensure that sufficient mutual interdependence exists between the issuing company and the relevant participants and therefore therefore we submit that the additional 12 month holding requirement is unnecessary to achieve ASIC's stated policy objectives.

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?*

We do not support the proposal that the holding period be for a minimum of 3 years. We note ASIC's comment in paragraph 188 that many employee incentive schemes are made on terms of a vesting period of 3 years or more. In our experience, while 3-year vesting periods are relatively common for senior executives, they are less common for more junior staff to whom offers are made.

As noted in respect of F4Q1 above, in our view, there are sufficient measures in other parts of the proposed Class Order for sufficient mutual interdependence to exist between the issuing company and the relevant participants. Additional requirements in this respect will in our view act as a disincentive for employers to establish employee incentive schemes for the benefit of Australian participants.

5.4 *F5: Disclosure to participants and ASIC*

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?*

We disagree with the proposed additional requirement.

We are concerned that this new test (in the context that this requirement already exists where a prospectus is required) will be interpreted as requiring issuing companies to meet a prospectus standard of disclosure notwithstanding that a class order compliant offering cannot be for the purpose of fundraising. This will act as a significant cost disincentive as adviser fees will increase substantially were this to be the case. In addition, this requirement is also likely to lead to more detailed offer documents which in our experience does not necessarily lead to greater understanding by participants.

We note that issuing companies are already required to:

- prepare offer documents so as to ensure they meet all of the requirements in the Class Order (e.g. the requisite undertakings etc); and
- provide detailed information on their employee incentive schemes under the employee share scheme reporting for tax purposes. In addition, foreign issuing companies already have the difficult task of preparing employee incentive scheme documents which comply with the financial and legal requirements of multiple jurisdictions.

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?*

We do not support the proposal to replace the current requirement with the proposed "Form XX".

We are concerned that this new Form XX will act as a disincentive for employers to establish employee incentive schemes for Australian participants as it will increase adviser fees associated with the offer of any equity award. The content of Form XX requires some qualitative analysis to be undertaken which is additional to current requirements.

We support the retention of the existing regime or submit that issuing companies have a choice to lodge Form XX or anonymised offer documents.

If ASIC does require the submission of Form XX, we submit that paragraphs (ii), (iv), (v) be deleted. The provision of this information will often require judgement calls and is likely to lead to higher adviser fees and/or internal costs.

With regard to the timing of lodging documents with ASIC, we consider that the timing for lodgement should be within 28 days of the issuer making its first offer to Australian participants under an employee incentive scheme. This timing is consistent with other ASIC requirements associated with the issue of shares, notably the lodgement period for a Form 484.

We also propose that ASIC accept late lodgement of offer documents in exchange for a late lodgement penalty, rather than issuing companies facing the non-availability of Class Order relief. Again, this is consistent with the approach taken by ASIC with share issues and Form

484's.

F5Q3	*Do you agree with including the information at F5(b)(i)– F5(b)(xi) in Form XX? If not, why not?*

See our comments at F5Q2.

F5Q5	*Do you agree that some or all of this information should not be made public? If not, why not?*

From a public company perspective, there are already requirements under the ASX Listing Rules as to the level of information public companies are required to disclose and foreign listed companies have analogous requirements. In our view, additional disclosure to the public is not necessary or appropriate.

From a private company perspective, we do not consider that any of the information should be made available to the public. The Corporations Act already stipulates what approvals are required to be sought by directors/shareholders to implement employee incentive schemes, and what information they would be required to receive to provide those approvals. In addition, there are the requirements in the Class Order (both presently and if amended in accordance with the Consultation Paper) as to the level of information that participants are required to be provided with. It is unnecessary for any other parties to be able to access detailed information on any employee incentive schemes developed by companies, and indeed could act to reduce the competitive advantage a company may have by offering a favourable employee incentive scheme.

6. *What relief is available for unlisted bodies?*

6.1 *G1: Annual offers of ordinary shares by unlisted bodies: $1,000 value*

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?*

In practice, offers of tax exempt (or $1,000 plans) are generally structured to meet the tax exemption requirements of the Tax Act. Shares under those plans are given for no consideration, cannot be subject to forfeiture and the shares can be sold by the participant on the earlier of the date which is 3 years following the relevant grant date, or cessation of employment.

We submit that, as the offer of shares under those plans is for no monetary consideration and is not linked to a guaranteed period of future service (i.e. whether the future service was 1 week or 3 years, the participant is able to retain their shares), ASIC clarify that issuing companies are able to rely on the exemption in s708(15).

We make the following comments regarding the proposal to provide Class Order relief to cover annual offers of no more than $1,000 per participant:

(a) The $1,000 limit is low and in our view is unlikely to encourage any material change in the uptake of employee incentive schemes by unlisted companies.

(b) We submit that, where shares are being offered for *no monetary consideration* to participants, and indeed there is no real "financial decision" on the behalf of the participant, there should be no limit on the value of the shares being offered to participants. We consider that there are adequate measures elsewhere in the Class Order (both presently and if amended in accordance with the Consultation Paper) that reduce the risks to the participants of accepting the shares notwithstanding the absence of a disclosure document.

(c) We consider that the requirement that the body can only issue one class of shares, being fully paid voting ordinary shares (Table 7, condition (a)), is unnecessary and would preclude many legitimate employee incentive scheme structures. We commonly see, for genuine commercial reasons, employee incentive schemes designed such that different type of shares (sometimes with no voting rights) are offered by unlisted companies. The type of share being offered by the company, should be a decision of the issuing company, and in our view does not impact on whether or not ASIC's policy objectives are met or not.

(d) We note the condition (b) in Table 7 that "the offer is made no more than once a year". We presume that means the offer is made *to a participant* no more than once a year. We consider that condition should be clarified accordingly.

(e) Please see our comments on proposals F4 and F5 regarding conditions (h) and (i) in Table 7, respectively.

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?*

As stated above, in our view, where shares are being offered for *no monetary consideration* to participants, and indeed there is no real "financial decision" on the behalf of the participant, there should be no limit on the value of the shares being offered to participants. This would also alleviate the need for companies to prepare and provide current audited accounts.

Many proprietary companies are not required by the Corporations Act to prepare audited accounts. It is likely that the cost of engaging auditors and independent valuers, bearing in mind that the shares are being offered to participants for nil consideration, will act as a significant disincentive for bodies to establish employee incentive schemes.

G1Q3	*Do you agree with the proposed risk disclosure statement? If not, why not?*

We support the inclusion of the warning in the offer documents.

However, we do not agree with ASIC's new condition for the offer document to be presented in a 'clear, concise and effective manner'. Please refer to our comments on F5Q1.

1.2 G2: Offers of options and performance rights by unlisted bodies

G2Q1	*Do you agree with the proposed definition of 'performance rights' for the purposes of this relief? If not, why not?*

Please see our comments on D3Q2.

2. *Regulatory and financial impact*

2.1 *H2: On-sale relief*

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?*

If the proposed new Class Order under the Consultation Paper extends to more eligible products than under the current Class Order, we agree with ASIC's proposal that the related on-sale relief should similarly be extended.

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?*

We agree that ASIC should include on-sale relief in the new Class Order to facilitate the issue of underlying eligible products to trustees of employee incentive schemes to enable the transfer of those products to participants within 12 months. This would then avoid the need for issuers to seek case-by-case on-sale relief for these types of situations as [CO 04/671] does not provide the requisite relief.

If you have any queries, please contact Nick Brown on (03) 8603 0291 or Hayley Preston on (03) 8603 5318.

Yours sincerely
PricewaterhouseCoopers by

Nick Brown
Partner