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BY EMAIL

Mr Peng Lee
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Dear Peng

ASIC Consultation Paper 218 – Employee Incentive Schemes

We refer to the several discussions between you and Michelle Milligan concerning extensions for the date of our submissions responding to Consultation Paper 218 and the reasons that extensions were sought.

Please find enclosed our submissions responding to Consultation Paper 218. We appreciate that the submissions are somewhat late, but (having regard to the effort involved in their formulation) hope that ASIC will still take them into account in setting the new regulatory guide and class order.

We greatly appreciate the opportunity to engage with ASIC on the regulation of employee share schemes in Australia as those schemes are clearly:

(a) an important component of productivity and workplace engagement in Australia and throughout the world;

(b) a key way to foster alignment of interests between employees and shareholders.

We have three overall comments:

(a) Our view is that it would be profitable for ASIC to rethink its approach to regulation of employee share schemes. [CO 03/184] as it presently stands represents a fairly bureaucratic approach to regulation and while each individual condition of relief in isolation may be able to be tied to some or other policy goal, the overall effect is to increase costs and administrative inconvenience in circumstances where the policy objectives would probably have been largely achieved without any regulation by the voluntary behaviour of issuers (after all issuers are naturally concerned to ensure that share offers are well received by recipients). While the changes foreshadowed in CP 218 do ameliorate some administrative problems, this seems to have been balanced by the introduction of other administrative issues and a distinct narrowing of flexibility.

When the regulation of employee share schemes is considered, it should be kept in mind that they play an integral role in the international competitiveness of the Australian workplace. A light-handed regulatory model which leaves open the possibility of some undesirable behaviour would seem to be preferable to a model that marginalises employee share schemes.

(b) Assuming that the very detailed regulatory model is pursued, our view is that ASIC should consult on a draft class order before it is finalised, but after the regulatory guide is finalised. We say this because our experience with each of the general relief instruments for these types of schemes to date has been that there are numerous matters of detail which could (and perhaps should) have been addressed in the class orders (and are largely if not wholly within ASIC policy parameters) but were not.

(c) Some of our clients have obtained case-by-case relief from ASIC which incorporates the terms of [CO 03/184]. It would be very useful for ASIC to indicate how it intends to continue the operation of these relief instruments when [CO 03/184] is revoked.

If ASIC would like to discuss any aspect of our submissions, please call Michelle Milligan .

Yours faithfully
MINTER ELLISON

Michael Barr-David
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enclosure

MinterEllison LAWYERS

ASIC CONSULTATION PAPER 218: EMPLOYEE INCENTIVE SCHEMES

November 2013

RESPONSES OF MINTER ELLISON

Proposal		Questions		Response
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.	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.	We welcome the broad thrust of the changes proposed by ASIC and recognise the significant time and effort that has been devoted to addressing what had become serious difficulties with utilising the existing Class Order relief. On balance, we support ASIC's proposed adoption of Option 2, recognising that it would take a long time for ASIC to approve substantially reduced conditions attached to the relief provided from the important disclosure and financial services licensing provisions of the *Corporations Act*. ASIC is somewhat justified in taking such a position as any relief must be measured, reasonable and appropriate, and should not remove essential investor protections where not justified. Any conditions imposed must, however, be proportional and reasonable, and not inhibit the conferring of real employment benefits. The exemptions conferred must not discourage employers, particularly those overseas, from extending incentive plans to Australian employees due to an unnecessarily complex compliance burden. In particular, the way in which any relief is drafted should be adaptable and applicable to all types of employee incentives that are based on eligible financial products, regardless of any particular terminology used by the issuer in describing the plan or the nature of the offer. While, on balance, we support Option 2, it should be noted that many of the conditions attached to [CO 03/184] are in our view either unnecessary or of, at best, doubtful utility in achieving sensible policy objectives. Thus, fundamentally, our view is that it would be possible and desirable to redraft the relief contained in [CO 03/184] so that it was subject to materially less constraints and conditions. This would be the best outcome and would be more akin to Option 3. As to the legal, administrative and compliance impediments of the system now in place, please refer to our comments below. By way of one example, however, consider the conditions on offers of shares through a trust. Our experience is that the conditions of [CO 03/184] (specifically the requirement to have similar rights to a legal owner) are so onerous that offers of shares through a trust are often

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				avoided even though there are significant administrative benefits in operating an employee share scheme with shares vested in a trustee. In our experience, the most commonly used employee share scheme trusts at this time are those which are unregulated by [CO 03/184], for example, those where the trust is used to acquire shares prior to allocation to participants for the purpose of assisting the issuer to satisfy their delivery obligations on vesting.
		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?	No. It is clear that while many of the existing concerns of advisers with [CO 03/184] arise from interpretation problems, and changing market practice, there is also a need to extend the exemptions available in other ways so as to meet the policy objective of removing unnecessary compliance burdens on providing employee benefits where they are not justified. A more intensive reform is therefore called for.
		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.	We are pleased to provide responses to the questions raised in the Consultation Paper below. We would welcome further dialogue with ASIC, particularly on the development and drafting of the new Class Order [CO 14/xxx], and Minter Ellison specialists in this field will be pleased to make themselves available for further comment.
		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?	There is good reason for a complete exemption for employee incentives from disclosure and licensing regulation, but we recognise that the difficulty always lies in setting the boundaries of the nature of the incentives offered, and continuing to protect employees in circumstances where they may inadvertently be taking on liabilities that they may not understand. Thus our view is that ideally the only conditions that would be imposed on blanket relief would be those necessary to establish the 'employment' relationship and those requiring adequate disclosure of the terms of the offer. This is because those in an 'employment' relationship have in effect already made their 'investment' decision about the relevant entity by having made a decision to accept 'employment'. They are already so heavily invested in their 'employer' that normally investor protection notions are almost irrelevant. (As noted below, the types of relationships that should be covered go well beyond employment and it is for that reason we have used terms in inverted commas.)
A2	We would like to hear your views on other current and emerging issues, generally, in relation to employee offers and incentives.	A2Q1	Are there any other issues on which it would be useful to have ASIC guidance? If so, please give details.	**(1) Use of electronic offer and acceptance facilities** Both in Australia and overseas, it has become increasingly common practice for major listed entities to use electronic facilities operated by third party plan administrators to manage various aspects of the administration of their employee incentive schemes, including (relevantly) the electronic distribution of the

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				offer documentation and the processing of online acceptances/applications. For example, under a commonly used electronic facility operated by one of the leading plan managers in Australia (using proprietary technology), the offer and acceptance process is as follows: • the third party plan manager sends an email (on behalf of the issuer) to eligible employees which typically notifies them of their offer (**Offer Notification Email**), provides a hypertext link to the plan manager's website, advises them that the offer documentation is located on the website and gives them instructions about how to accept/apply for the relevant financial products through that website; and • by logging into the relevant website (using a PIN separately emailed to them), eligible employees are able to view, download and print the offer document and any accompanying documentation (including, where required, a copy of the rules of the employee share scheme), and to then submit an online acceptance/application. For the reasons discussed below, we think that ASIC should draft the revised class order relief to clarify that the offer document (and any required accompanying material) can be distributed using electronic facilities of this kind (including via hypertext links to a website where the offer documentation and accompanying material is available, rather than by providing a direct hypertext link to the offer documentation). Under [CO 03/184], a technical question arises as to whether the distribution of offer documentation through the use of these electronic facilities satisfies the requirements for the issuer to take reasonable steps to ensure that each eligible employee is 'given' a copy of the offer document and, where applicable, for the offer document to be 'accompanied' by a copy or summary of the plan rules (see paragraph 1(b) of the Schedule and paragraph 15(a) of the Interpretation section of [CO 03/184]). It seems to us that these requirements can be satisfied where electronic distribution facilities are used (particularly noting that: according to case law, a requirement to serve or give a document is satisfied where the mode of service brings the document to the attention of the intended recipient; [CO 03/184] specifically notes that the offer document can be provided by electronic means (by reference to s 25 of the *Acts Interpretation Act 1901* (Cth)); and ASIC has recognised in Consultation Paper 211 and newly released Regulatory Guide 107 *Fundraising: Facilitating electronic offers of securities* (**RG 107**) that the

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					provisions of Chapter 6D allow for the distribution of disclosure documents and application forms using the internet or other electronic means). However, it is not clear whether (or, if so, the extent to which) ASIC would consider its 'good practice guidance' in RG 107 to be applicable or relevant in the context of employee incentive scheme offers made in reliance on [CO 14/xx] (or [CO 03/184]). In this respect, the good practice guidance in RG 107 raises some potential doubt as to whether ASIC would consider that the electronic distribution of the offer document and other required material in the manner currently undertaken by some third party plan administrators would technically satisfy the above requirements of [CO 03/184] (and any corresponding requirements of [CO 14/xx]). We have not undertaken a review of the operation of the existing online facilities operated by third party plan administrators in light of the good practice guidance in RG 107. However, one issue is immediately apparent to us. In Principle 10 of RG 107, ASIC recommends that, where a hypertext link is used to distribute an electronic disclosure document by email, the link should not be used to take investors to material not forming part of the electronic disclosure document, other than jurisdictional confirmations or educational material. ASIC also suggest that a hypertext link should take an investor directly to the disclosure document itself, to a webpage containing the disclosure document or to a webpage confirming the investor's eligibility to participate in the offering. Under a commonly used, well established facility with which we are familiar, the hypertext link provided to eligible employees in their Offer Notification Email takes them, for security and privacy reasons, to a landing page where they are first required to login (using their PIN). Once logged in, their personalised 'employee portfolio' home page appears which includes (among other things, such as links to information about their existing employee holdings and any other current offers) a hypertext link to the relevant section of the website for the particular offer open for acceptance (where, by following the further steps provided, separate pdf copies of the offer document and each accompanying document are usually located). While employees have to click through a few hypertext links/steps before obtaining access to the offer documentation (and are provided with other information relevant to their participation in the offer and other offers or grants made by their

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				employer group within the same website), we do not think that this process for delivering the offer documentation should cause ASIC any policy concern or raises any potential regulatory detriment. We say this particularly noting that employees can only submit an application to participate in an offer through the relevant website where, before submitting an application, they have been given easy access to, and an opportunity to read and retain a copy of, the offer documentation (including any required accompanying documents). Accordingly, we think that ASIC should draft [CO 14/xx] in a way that facilitates the use of these established processes. **(2) Use of multiple offer documents** As recognised by ASIC at paragraph 194 of CP 218, the offer documentation for employee incentive scheme offers commonly comprises multiple documents. For example, overseas issuers will often include a supplement for employees in foreign jurisdictions including the specific information required for those jurisdictions (including, for Australia-based employees, the specific statements/ warnings required by [CO 03/184]), while the generally applicable terms of offer will be set out in the main document provided to all eligible employees. In Australia, it is also common practice for employees to be given a short personalised letter or email containing the specific details of their offer (eg the number of financial products being offered to them) and for the generally applicable terms of the offer (eg the vesting conditions) and the other information required by the Class Order to be set out in a separate document (which will either include a summary, or be accompanied by a copy, of the plan rules). To accommodate this common practice, [CO 14/xx] should clarify that the required 'offer document' can be comprised of multiple documents, with the information and statements required by the Class Order only being required to be located somewhere in those documents (as distinct from within the same document). There is currently some doubt about whether the inclusion of different parts of the required Class Order information in separate documents complies with [CO 03/184] (particularly because the Class Order distinguishes between information to be included 'in' the offer document itself and information that can 'accompany' the offer document (ie, the plan rules)). It seems to us that there is no regulatory benefit in requiring all relevant information to be provided in one document, so long as all the information is provided to eligible

Proposal		Questions		Response
				employees. **(3) Summary of employee incentive scheme rules** [CO 14/xx] should be drafted to make it clear that any required summary of the rules of an employee incentive scheme need only cover the material rules of the scheme that are applicable to the particular offer. Many companies adopt 'umbrella' style plan rules which facilitate the offer and grant of different types of products (eg, performance rights, options and restricted shares). Any summary of the plan rules should not be required to cover those features of the plan that are irrelevant to the particular offer (eg, because they concern the offer/ grant of different products). **(4) Offers to arrange the transfer of existing shares** [CO 14/xx] should clarify that the relief can be relied upon where an employee incentive scheme involves (or includes) an offer to arrange for the acquisition or transfer of shares purchased on-market (or sourced off-market - eg from a trustee). While an offer of this kind would generally be outside of: • Chapter 6D (because the issuer would not have the capacity to transfer the shares (see s 700(3) and the offer would therefore not usually be considered as involving an offer of shares for 'sale'); and • Part 7.9 (because that Part does not apply in relation to an offer of securities), the operation of these schemes should have the benefit of the ancillary relief provided by the Class Order (for example, to enable the issuer to provide general financial product advice in connection with the offers).
		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.	Yes. Please see our comments below, as well as our responses to E4Q1 (in relation to a suggested declaration under s 206J(8)) and D4Q1. **(1) Offers to former employees** In our view, the Class Order relief proposed under [CO 14/xx] should be extended to permit eligible products to be offered and granted to former employees where the products are offered or granted to the person as remuneration in respect of a period of employment before the person ceased to be an eligible employee. The background to this suggestion, and our

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				comments on the policy considerations, are as follows. In accordance with APRA's prudential standards and guidelines for remuneration[1], it has become common practice (over the last few years) for APRA-regulated institutions in the financial services industry to defer payment of a portion of senior executives' annual short term incentive (**STI**) awards (ie, performance bonuses). The deferred portion of STI awards is typically provided in the form of equity (eg, share rights or restricted shares) subject to a time-based vesting period and forfeiture or clawback in certain circumstances. There is also a growing trend outside the financial services sector towards the adoption of STI deferral arrangements. According to APRA, *'Prudent practice suggests that a substantial portion and preferably a majority of performance-based remuneration will be deferred and at risk for an extended period. Such remuneration would therefore be exposed to potential reduction or elimination until performance is suitable validated with time*[2]'. One of the benefits of STI deferral is that it is an effective mechanism for enabling the clawback of remuneration (eg, where perceived necessary to respond to changes in an entity's financial circumstances over the deferral period, such as a material misstatement in the company's financial statements for the STI performance period). In this respect, we note that the proposed 3rd edition of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* includes a recommendation for listed entities to introduce a clawback policy (see draft Recommendation 8.3). In practice, the nature of STI deferral arrangements is such that the offer of the equity-based instruments constituting the deferred component of an executive's STI award may need to be made after the executive has ceased employment. This is because STI awards are earned for a senior executive's services and performance over a specified performance period (eg, a financial or calendar year), but are not determined and awarded until after the end of that period (when corporate and individual performance for the period are capable of being measured).

[1] See: APRA Prudential Standard CPS 510 - *Governance* and Prudential Practice Guide PPG 511 - *Remuneration*; and APRA Prudential Standard SPS 510 - *Governance* and Prudential Practice Guide SPG 511 - *Remuneration.*

[2] See PPG 511 at paragraph 54.

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				Where an executive's employment ceases: • after the end of the performance period; or • during the performance period in 'good leaver' circumstances (eg, redundancy, disability, retirement, termination on notice or by agreement, and death), they will commonly still become entitled to an STI award for their work during the performance period (which is usually calculated on a pro rata basis where they only worked for part of the year). Even though an executive has ceased employment before the determination of STI awards for the prior performance period, it may nevertheless be necessary or appropriate for a portion of the executive's STI award to be deferred into equity (with time-based vesting conditions and risk of forfeiture). For APRA-regulated institutions, deferral in these circumstances would be consistent with (and possibly required by) APRA standards and guidance. In this respect, we note APRA's guidance that *'It would not be prudent practice for deferred payments to vest automatically upon cessation of employment with a regulated institution. It is preferable for deferral and vesting arrangements to remain in place.. APRA remains of the view that a prudent remuneration policy will include deferral of some benefits to dates that are independent of and beyond cessation of employment.*'[3] The payment of the entire STI award immediately in cash following cessation of employment would also involve treating former employees beneficially compared with continuing employees (which may be prohibited by s 200B of the *Corporations Act* unless shareholder approval is obtained) and would deprive the company of any workable mechanism for clawing back this performance-based remuneration if the company's circumstances change. Typically, deferred STI awards would not be offered until after the company's determination of STI outcomes and awards (ie, once the number and value of equity instruments being offered, if any, is known). However, the offer of deferred equity-based awards to any former employee would not be covered by the existing or proposed Class Order relief as they would not be 'eligible employees' at the time of the offer. We submit that the extension of the relief to permit offers to

[3] See PPG 511 at paragraph 66.

Proposal		Questions		Response
				former employees in these circumstances would be consistent with ASIC's policy objective of supporting the long-term interdependence between the employer and employee for their mutual benefit (even though there would no longer be an ongoing employer-employee relationship between the issuer and the offeree in these circumstances). As reflected in APRA's standards and guidance, the fundamental rationale for providing a portion of STI awards in the form of deferred equity is to encourage behaviour that supports an entity's long-term financial soundness and risk management framework (and to thereby discourage 'short-termism' and excessive risk taking). While the STI award (including the deferred component) is not allocated until after the end of a STI performance period, the potential to receive an STI award and the knowledge that a portion of it will be provided as a deferred equity benefit (and subject to clawback) is intended to operate as an incentive to encourage long-term stewardship by executives, even when approaching the end of their employment. STI deferral arrangements therefore support the long-term mutual benefit of both parties, consistent with ASIC's policy objectives. Additionally, it seems to us that the commercial benefit of expanding the relief in the way we propose would clearly outweigh any regulatory detriment arising from the expanded relief. **(2) Exemption from insider trading laws for participation in 'non-discretionary' employee incentive plans** While not a matter for ASIC class order relief, we would encourage ASIC to approach the Commonwealth Treasury to seek the introduction of a regulation to exempt participation in employee incentive plans from the application of the insider trading laws where (in short) the participant agrees to participate in the plan at a time when they do not possess inside information and no discretions can be exercised under the plan at a time when the participant holds inside information (other than the discretion to withdraw from the plan). The introduction of such an exemption was supported by CAMAC in its *Insider Trading Report* dated November 2003, having regard to the US exemption for non-discretionary plans provided by SEC Rule 10b5-1 (see Recommendation 16 of the CAMAC report), but no such exemption has been implemented to date.

Proposal		Questions		Response
		A2Q3	Are there any other policy considerations that may be appropriate for us to address in our regulatory guide? Please be specific.	See our response to A2Q1.
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.	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	Yes, but we note and welcome proposals to extend the relief available for unlisted companies (see our responses to G1 and G2 below). We understand that it is still ASIC policy to confine relief to companies listed on the main board of an approved foreign market (although this is no longer clear from CO 03/184). We suggest that this be clarified in [CO 14/xx] by referring specifically to the 'main board of an approved foreign market' in the definition of eligible product.
	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.	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?	Yes. The existing Class Order [CO 03/184] relief extends to stapled securities of groups that operate through two listed holding companies (such as Reed Elsevier, Shell and Unilever), and ensuring that companies that are "associated bodies corporate" and not simply "related bodies corporate" can have offers made to their employees recognises this type of group structure.
		B2Q2	Do you agree with the proposed definition of 'associated body corporate'? If not, why not?	Yes, noting that 'voting power' for these purposes will follow the definitions or 'relevant interest' and 'voting power' is sections 608 and 610 of the *Corporations Act* so that voting power that is indirectly held through other bodies corporate will be included.
		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.	See B2Q1. Other than the examples referred to there, our experience is that reliance on these thresholds is not common but very useful when required.
		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%?	Yes.
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.	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?	Yes. However, consideration should be given to allowing the relief not just for wholly-owned subsidiaries but also for subsidiaries in respect of which the issuer holds the majority of the voting power. Private companies can often be structured with senior management holding a minority equity position (often as a result of a partial acquisition which leaves shares in the hands of the founders of the business), and employees of those businesses should not be denied

Proposal		Questions		Response
	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.			the opportunity to be offered incentives by the ultimate parent simply because there may be some existing minority equity interests in the employing subsidiary. ASIC may wish to adopt the 'associated body corporate' test referred to in B2Q1, but perhaps setting the voting power threshold higher at, say, 50%.
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.	C1Q1	Do you agree with our proposal to extend our class order to offers of eligible products to contractors? If not, why not?	Yes. The relationship of employer and employee is becoming less common in a world of flexible working and independence, and many persons who would otherwise be employees now choose to operate as contractors or as self-employed consultants. Provided there is still a sufficiently close nexus between the contractor and the issuer group, contractors should be treated in the same way as employees.
		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?	Yes. The manner in which the contractor is engaged should not determine their eligibility to receive an offer. In this regard, we consider that the requirement that any company to whom an offer is made must have no members or directors other than individuals who perform work for the issuer is too restrictive and should be extended to cover companies 'controlled' by the relevant individual/s. This recognises that individual contractors will commonly set up private family companies, the members and directors of which will often include other family members (eg, the individual's spouse and/or children).
		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?	Yes, for the reason enunciated at C1Q1.
		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?	No. It should be enough that the contractor or casual employee relationship is, itself, a sufficient association with the issuer group and the period of engagement and the actual number of hours worked should be irrelevant, as the employer/issuer should be permitted to make its own commercial judgement as to what length of service or number of hours worked should qualify a contractor or casual employee for participation in any incentive plan offering. Full time, and indeed part time, employees can be offered benefits immediately after employment (and perhaps earlier, if ASIC's proposals at C2 proceed), and there is no reason why contractors or casual employees should be required to have a longer period of qualifying engagement with the employer/issuer. Similarly, part-time employees might be engaged for much less than 40% of a full time position and currently be eligible to receive offers under [CO 03/184]. It should only be necessary to show that there is an employment relationship or contractual arrangement for the provision of services

Proposal		Questions		Response
				in place (or at least proposed) at the time of the offer (whether those services have been provided in the past or are to be provided in the future). While it might be suggested that employers/issuers choose to engage personnel as contractors or casuals because they believe that the relationship is much less permanent than an employment relationship, this is not necessarily the case. First, many employers/issuers do so to facilitate workplace flexibility without regard to the permanence of the relationship in any particular case. Second, even where an employment relationship exists there is no guarantee of longevity – the employee may well intend or decide to resign after a short period. Over-prescriptive rules simply add to the compliance burden for employers and have unintended results that will lead to the need for continuing special relief applications or will cause persons to miss out on potentially valuable incentives because of irrelevant circumstances.
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.	C2Q1	Do you agree with our proposal to extend our class order relief to cover offers to prospective employees? If not, why not?	Yes. This has been a longstanding difficulty with the practical application of the existing Class Order and we welcome ASIC's proposal to address it. It is common and widely recommended practice for a significant part of the remuneration of executives of listed entities to be 'at risk' and equity-based (eg, long term incentives, deferred bonuses and retention arrangements). Accordingly, employers clearly need to be permitted to provide prospective employees with information about the equity-based components of their remuneration package so that employees can assess the terms being offered to them in deciding whether to accept the offer of employment. We have in the past applied for, and received, special relief for prospective employees where the offer is part of the employment benefit package offered to a new employee. Provided that the offer, or acceptance of the offer, is conditional on employment being taken up (as it inevitably is), there seems to be no reason why prospective employees should not be included in the relief. As well as permitting offers to be made to prospective employees, relief from the advertising restrictions in ss 734 and 1018A of the *Corporations Act* should be extended to enable the provision of information to prospective employees in relation to future offers that they are, or may become, eligible to receive under an employee incentive scheme after their employment commences (for example, short term and long term incentive awards). See our comments on Proposal H1 below.

Proposal		Questions		Response
		C2Q2	Do you agree with the proposed conditions for this relief? If not, why not?	We support condition (b) but think conditions (a) and (c) should be deleted for the reasons outlined below. (1) **Condition (a):** Our view is that the requirement that the employee incentive scheme offer be made 'at the same time' as the offer of employment is unnecessarily prescriptive and likely to be problematic in practice. We say this because, in practice, the timing of an employee incentive scheme offer will vary depending on the circumstances and may not be simultaneous with the offer of employment. By way of example, there will be circumstances in which an employee incentive scheme offer is made after the offer of employment but before the employee has become, or agreed to become, an employee (while being conditional on their acceptance of the employment offer). To illustrate: as a result of negotiations with a highly desirable candidate, an employer may decide to offer a special 'sign-on' incentive to them (in recognition, say, of 'at risk' entitlements that the candidate would forfeit by resigning from their existing employment). This offer may therefore not coincide with the contractual offer of employment. It is also worth noting that, as a technical matter, it may be difficult to pinpoint the precise time at which an employee incentive scheme offer is made (particularly given the non-contractual interpretation that the courts have given to the term 'offer' in the fundraising provisions of the *Corporations Act*[4]). There will typically be various communications and discussions between an employer and an employment candidate (and their representatives) before any formal offer of employment is made. In many cases (particularly involving senior roles), these discussions will involve negotiation of the terms of employment. During those pre-offer communications and discussions/negotiations, some (if not all) details of the incentive and equity-based components of the remuneration package for the role (or other potential employment benefits) may need to be provided to the candidate. In these circumstances, it is not inconceivable that the offer could technically be taken to have been made at an earlier time than when the offer document is provided to the employee. In any event, these pre-offer communications would seem to constitute advertising (or hawking in relation to) a future offer, for which specific relief should be extended – see our comments on Proposal H1 below.

[4] See, for example, *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd* (No 2) (2005) 53 ACSR 305 (applied in *Krypton Nominees Pty Ltd v Joseph Isaac Gutnick* [2013] VSC 446.

Proposal		Questions		Response
				(2) **Condition (c)**: In our view, this condition will unduly limit the flexibility of employers to establish incentive arrangements that are appropriate for the circumstances of individual candidates for employment. For example, employers will sometimes wish to offer tailored sign-on arrangements so as to attract and retain a highly sought after candidate for employment, and these arrangements may require the establishment of a new, stand-alone plan (eg, to mirror features of incentives that the candidate would forfeit by leaving their existing employment). Given that the prospective employee must be given a summary or copy of the rules of the applicable plan with the offer document (as required by the Class Order relief), we do not see the policy justification for requiring an offer to prospective employees to be made under an existing employee incentive scheme. In addition, see our response to F4 below
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.	C3Q1	Do you agree with our proposal to only provide limited conditional relief for non-executive directors? If not, why not?	No. In draft RG 49, ASIC outlines the three policy objectives that must be met for an employee incentive scheme offer to qualify for relief from the disclosure and financial services licensing provisions of the *Corporations Act* and recognises that it is appropriate to reduce the compliance burden for issuers where these policy objectives are met (see RG 49.2-RG 49.4). Applying these three policy objectives, we do not see any basis for differentiating between the relief available for offers to non-executive directors and that available for offers to full or part time employees. Rather, it seems to us that these policy objectives are equally satisfied in the case of offers to non-executive directors for the following reasons. • Issuing any kind of eligible financial product (within the full range proposed to be covered by the revised Class Order) to a non-executive director would align the interests of the director and the issuing entity (by giving the director an economic interest in the entity's performance or 'skin in the game'), and thereby support their long-term interdependence. The fact that non-executive directors are legally appointed to provide their services under a letter of engagement and the company's constitution (rather than a contract of employment) makes no difference to the question of interdependence. • The interests of non-executive directors would be adequately protected by the conditions of the Class Order relief in exactly the same way as the interests of employees. • As with offers to employees, offers to non-executive directors

Proposal		Questions		Response
				would be subject to the conditions of the Class Order relief designed to ensure that the objective of the offer is not fundraising. More generally, the disclosure provisions of Chapter 6D and disclosure and licensing provisions of Chapter 7 (from which the Class Order provides relief) are fundamentally directed at ensuring a proper level of investor protection for the recipient of the financial product or financial service. No investor protection concerns would arise from extending the Class Order relief so that it covers offers to non-executive directors on the same basis as those to employees. The disclosure exemptions for directors and other senior managers provided by section 708(12) (as modified by [CO 04/899]) implicitly recognise that those involved in the management of a company (invariably including the directors) have sufficient information about the company's affairs to make an informed decision whether to accept an offer of securities in the company, without the need for a disclosure document. We understand that ASIC's proposed limitations on the types of offers that could be made to non-executive directors under the revised Class Order reflect aspects of the ASX Corporate Governance Council's 'Guidelines for non-executive director remuneration' (in Box 8.2) and ASIC's concerns that performance-based remuneration may undermine the independence of non-executive directors. However, we submit that the Class Order relief for employee incentive schemes is not an appropriate place for mandating or enforcing corporate governance standards or guidelines. Moreover, the proposed inclusion of these limitations in the Class Order relief is inconsistent with the non-binding nature of the Council's *Corporate Governance Principles and Recommendations* and the 'if not, why not' philosophy that underpins them. This philosophy is summarised by the following statements made by the Council: *The Recommendations are not prescriptions, they are guidelines, designed to produce an outcome that is effective and of high quality and integrity. This document does not require a "one size fits" all approach to corporate governance. Instead, it states suggestions for practices designed to optimise corporate performance and accountability...If a company considers that a Recommendation is inappropriate to its particular circumstances, it has the flexibility not to adopt it - a flexibility tempered by the requirement to explain why - the 'if not , why not' approach....*

Proposal		Questions		Response
				Disclosure of a company's corporate governance practice, rather than conformity with a particular model is central to the ASX Corporate Governance Council's approach.[5] As recognised by the 'if not why not approach', the board of a company should have the flexibility to determine the governance and remuneration arrangements that best suit the company's circumstances, with transparency and accountability to shareholders through the disclosure framework and subject to any necessary shareholder approval under the ASX Listing Rules (or other applicable stock exchange rules), the *Corporations Act* (or other applicable law) or its constitution. As the extension of the Class Order relief to offers to non-executive directors will satisfy the stated policy objectives of the relief (and will not compromise the investor protection principles underlying Chapters 6D and 7), we believe that it should apply to those offers on the same basis, and subject to the same conditions, as offers to employees, In addition, the proposal to support Australian corporate governance guidelines through limitations on the Class Order relief also fails to recognise that the Class Order will be relied upon by issuers all over the world, including those in jurisdictions that may have governance standards and practices which permit, or perhaps encourage, the extension of equity incentive plans to directors.
		C3Q2	Do you agree with the proposed specific conditions in Table 3 for offers to non-executive directors? If not, why not?	No. For the reasons noted in C3Q1, there does not appear to be any relevant policy rationale (in the context of the Class Order relief) for restricting the type of financial product that can be offered to a non-executive director (or the terms on which a financial product can be offered), if the relevant financial product can be offered to other directors and to employees on those terms. More specifically, the exclusion of options and rights from the eligible categories of financial products is likely to be problematic for some listed companies (particularly those with relatively small market capitalisation and limited cash flows, including some small exploration companies in the mining and resources sectors) who currently grant options to their non-executive directors instead of paying the level of cash fees that those directors may otherwise require to provide their services. This enables these companies to attract and retain the services of qualified and experienced

[5] See pages 5 and of the *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2nd edition, published by the ASX Corporate Governance Council.

Proposal		Questions		Response
				independent, non-executive directors, despite their limited cash resources. In this respect, ASIC has acknowledged that some start-up bodies prefer to remunerate directors by issuing financial products, particularly where cash reserves are low (see paragraph 69 of CP 218). However, the proposed exclusion of options from the products qualifying for the relief fails to recognise that some companies (typically outside the ASX 200) currently use options or rights for the purpose of remunerating directors (with shareholder approval, where required under the ASX Listing Rules, related party provisions of the *Corporations Act*, or otherwise). The proposed requirement that non-executive directors contribute their own funds to acquire the eligible products is difficult to reconcile with ASIC's acknowledgement that non-executive directors may be granted free shares rather than fees on a start up, or may acquire shares under a 'fee contribution plan'. Where a fee contribution plan is structured as a salary-sacrifice arrangement, the plan will necessarily involve directors agreeing to forego or waive their entitlement to a portion of their cash fees and to receive shares (or other relevant securities) in lieu of the relevant portion of their fees. This structure is required for the arrangement to be an effective salary sacrifice arrangement for tax purposes. If ASIC limits the relief in this way, the relief will not cover offers to provide shares to non-executive directors in lieu of cash fees despite ASIC's stated support for these kinds of arrangements. As noted at C3Q1 above, we do not support ASIC's proposal to limit the types of remuneration arrangements that can be offered to non-executive directors based on non-mandatory corporate governance guidelines applicable to ASX listed companies. Aside from this issue, it is also worth noting that ASIC's view that a non-executive director should not be offered equity-based incentives that are subject to performance conditions on the basis that such incentives would compromise the director's independence fails to recognise that Recommendation 2.1 of the ASX Corporate Governance Council *Principles and Recommendations* does not require each non-executive director to be independent. Rather, the recommendation is satisfied where only a majority of the board is independent. There are many examples of companies who have non-executive directors who are not considered independent (including in cases where a majority of the board is nevertheless independent in accordance with Recommendation 2.1).

Proposal		Questions		Response
		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?	Yes, but see our responses to E1, F5 and F6 below.
		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?	While useful, it is often not usable because the 708(1) exemption applies only to securities, and that in 1012E applies only to managed investment products, but not to other employee incentive offers that are derivatives (for example options over existing shares, performance rights, or any offer that may be settled in cash or which has other cash payments associated with it, such as dividend equivalents). For offers to senior personnel whose gross income for each of the previous 2 financial years exceeded $250,000, the exemptions in ss 708(8)(c) and 761G(7)(c) are sometimes used. Section 708(12) (as amended by CO 04/899) can also be used, but there is no exemption from the securities hawking provisions in the case of either 708(1) or 708(12). It is possible that sections 708(10) and 761GA are relied upon in some cases. The relief provided by [CO 03/184] is currently used in some cases. We note that ASIC expresses the view in CP 218 that the Class Order incorporates the s 9 definition of employee share scheme and therefore does not cover offers to non-executive directors. In our view, the s 9 definition of employee share scheme does not apply in the context of the Class Order. A contrary intention is indicated by the fact that the definitions of 'eligible employee' (which specifically refers to directors) and 'associated body corporate' clearly contemplate the use of the Class Order for offers to a broader range of people than those covered by the s 9 definition.
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	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?	Yes, but we think ASIC should go further. There is no effective difference in the nature of the interest being provided to an employee between a share or stock and a depository interest that represents that share or stock for trading and settlement purposes, save that the CDI is a separate instrument the enforcement of which depends upon the issuer of the CDI meeting its contractual and equitable obligations as a custodian of the underlying shares. ASIC should go further in that: (i) it should not matter whether the CDI or underlying security is quoted on ASX; (ii) it should not matter whether multiple layers of depository interests are involved; and (iii) the relief should extend to the circumstance where the underlying security is a stapled security.

Proposal		Questions		Response
	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.	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?	Yes, but we think ASIC should go further. Other exchanges (for example, Singapore) have arrangements for depository interests. Having approved such markets for [CO 03/184] purposes, it is incongruous that associated depository instruments are not eligible for relief. Further, CREST CDIs are not the only depositary interests that are traded through CREST on the London market. Depositary interests are also issued, with the approval of Euroclear, by a small number of trustees or custodians and these are accepted by Euroclear for trading and settlement through CREST. They are issued at present, for example, by Computershare and Capita, two of the leading registrars in the United Kingdom under procedures that are closely regulated and controlled by Euroclear. Our London office can provide more information on these depositary interests if you wish. These depositary interests should also be included in the scope of the exemption. As a matter of policy, it should be sufficient that the market operator or regulator of the relevant approved foreign market has admitted the relevant depository interest to trading on that market for the depositary interest to be acceptable as an alternative instrument benefitting from relief under [CO 14/xx]. That is, it should be sufficient that an approved foreign market has approved the depository interests for quotation or settlement on its market. ASIC's proposal to entertain case-by-case applications would have the undesirable consequence that significant costs would be incurred in such cases and thus, if there are only a few Australian employees in a global offer, those employees would inevitably be excluded.
		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?	Yes, but we think ASIC should go further in that the underlying security ought to extend to stapled securities as well. It does not make sense for [CO 14/xx] to force the issue of depository interests of another country merely because those depository interests are quoted by a relevant exchange. This is because arrangements for depository interests usually provide for underlying interests to be entered into or withdrawn from depository form readily. The interests offered to personnel should normally be those which are most administratively convenient for the personnel. To take an example, it makes no sense for an Australian company which has ADRs (actually ADSs) quoted on NYSE to be forced to offer ADRs to its employees in Australia – it is highly likely that the underlying shares are more easily able to be dealt with by people in Australia.

Proposal		Questions		Response
		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?	Yes.
D2	D2 We propose to extend [CO 14/xx] to include offers of options over, and units in, fully paid stapled securities quoted on ASX.	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?	Yes, but we think ASIC should go further in that the stapled securities (or depository interests over stapled securities) ought be able to quoted on any approved market.
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	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?	Yes. If the employee is to receive an acceptable type of financial product as an incentive in the future, it should not matter whether that financial product is to be delivered under an option or some other contractual right or arrangement, and the method of delivery need not be the subject of regulation.
		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.	No, it seems to us that the proposed definition of performance rights is unnecessarily prescriptive and is likely to create difficulties in practice. In particular, we note the following. (1) The requirement that performance rights must be subject to conditions relating to the 'length of service of the recipient' and/or the 'performance of the recipient, issuer or an associated body corporate' is too restrictive and likely to unreasonably exclude some share rights offered by listed entities from the relief, and to create uncertainty about whether various other kinds of share rights are covered by the relief. To give a few examples: • Some entities offer conditional share rights that are not subject to performance conditions (for example, where the rights are granted as the deferred component of a participant's short-term incentive award for a past performance period, or as a long-term retention tool). These types of share rights would therefore only be covered by the proposed definition if they are subject to conditions relating to 'the length of service of the recipient'. Rights of this kind would generally not vest until the end of a specified vesting period and would be subject to lapse/ forfeiture if, say, the employee voluntarily resigned or their employment was terminated for cause during the vesting period. However, if the employee's employment were to cease during the vesting period in 'good leaver' circumstances (eg, redundancy, disability, death or retirement), the share rights would often be retained (whether 'automatically' under the

Proposal		Questions		Response
	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.			terms of the rights or by exercise of board discretion). We think it is technically doubtful that share rights granted on these terms would be correctly characterised as subject to a condition 'relating to the length of service of the recipient' (given that, in good leaver circumstances, the terms would not require the employee to remain employed throughout the vesting period). Rather, these share rights would be subject to time-based vesting conditions and subject to forfeiture in 'bad leaver' circumstances. • ASIC's proposed definition of performance rights may be taken to imply or require that performance rights can only vest if the relevant performance and/or service-based conditions are met. However, the terms of performance rights will often provide for either 'automatic' or discretionary vesting of the rights in limited circumstances, such as a takeover or change of control. Additionally, the plan rules will almost invariably give the board (or a committee) power to vary or waive the applicable vesting conditions (subject to various conditions). The question would therefore arise whether these typical features of performance rights would cause them to fall outside the definition and exclude them from the relief. • The requirement that a condition relate to the performance of the recipient, the issuer or an associated body corporate may also give rise to difficulties of interpretation and application. For example, would a performance condition based on relative TSR (and therefore based on the external performance of shares in the issuer) be properly interpreted as relating to the performance of 'the issuer'? Would a performance condition based on the performance of a business unit within the issuer relate to the performance of the issuer (particularly where the business unit does not materially affect the overall financial performance of the issuer)? Would a performance condition based on the performance of the recipient's team relate to the performance of the recipient? • It also seems doubtful that a performance condition based on the performance (eg the unit value) of a managed fund of which the issuer or an associated body corporate is the responsible entity would satisfy the requirement to be a condition relating to the performance of the

Proposal		Questions		Response	
					issuer/associated body corporate. As performance rights are economically equivalent to zero-exercise priced options (and, as ASIC has recognised in CP 218, are legally characterised as options where they include an exercise mechanism), we cannot see any policy justification for limiting the terms on which performance rights can be granted when compared with options. Under [CO 03/184] and its predecessors, listed entities have always been permitted to offer options for the issue or transfer of shares subject to the vesting conditions (if any) determined by the board. To our knowledge, the common market practice of issuing options and performance rights in reliance on the existing Class Order relief for options has not given rise to any mischief or regulatory detriment in more than a decade. In our view, the board of the issuer of performance rights should have the same freedom to determine the vesting conditions (if any) that will apply to performance rights as it presently has in relation to options. Boards should have the flexibility to tailor their remuneration arrangements and employee incentive schemes in the way they determine is best suited to the circumstances and interests of the relevant entity. This is supported by the findings of the Productivity Commission Report Inquiry Report into Executive Remuneration in Australia (No. 49, 19 December 2009). In particular, we note the statement in Finding 2 that: '*Remuneration structures are company and context-specific and a matter for boards to resolve rather than being amenable to prescriptive direction.'* (2) We are also concerned about the proposed use of the term 'automatically vests' in the definition of performance right. While this terminology is commonly used in practice to convey to participants that they do not have to exercise their rights or (personally) take any other action to receive shares, it is not a term of art. Strictly speaking, the process of allocation of the underlying securities on vesting is not automatic. The issuer needs to issue the underlying securities or arrange for their on-market acquisition or off-market transfer (or take steps to make any cash payment). Typically, a power of attorney is given by participants to a company officer (eg the company secretary) or third party plan administrator to act on behalf of the participant to do anything necessary to effect the allocation of securities to them (eg, signing an off-market transfer on behalf of the participant). In a similar vein, vesting is often subject to determination by the board of the issuer (and is therefore also not 'automatic' in the sense that it is subject to approval). We do

Proposal		Questions		Response
				not see the need to build the concept of automatic vesting into the definition of performance right. However, if ASIC considers it necessary to incorporate this concept into the Class Order, we would suggest referring to vesting and conversion into the underlying product without the need for any action by the recipient personally (as distinct from by an agent on their behalf or by the issuer/its associated bodies corporate/agents etc). (3) To clarify the intended operation of the definition and to acknowledge that the issuer (or an associated body corporate) may have the discretion to determine whether performance rights are satisfied by the delivery of the underlying securities or in cash, we would also suggest that a final paragraph be added to the definition to cover *'a right to receive any one or more of the things covered by paragraphs (i) to (vii) (including a right to receive any one or more of those things as determined in the discretion of the issuer or an associated body corporate)*'. This would also avoid the need to use the 'and/or' formulation at the end of paragraph (vi) (which creates interpretation difficulties criticised in various judgments). (4) The references to shares or other securities 'quoted' on ASX or an approved foreign market need to be extended to cover shares or other relevant securities in the same class as shares/other securities quoted on the relevant exchange. This is because newly issued shares or other securities will not be quoted until after they are issued to participants (see, for example, ASX Listing Rule 2.7) – so the security received by the participants is not quoted at the time of receipt. Additionally, shares or securities that are subject to restrictions on transfer may not be quoted on ASX while they remain subject to those restrictions (as permitted by ASX Listing Rule 2.4). In this respect, we note that some issuers do choose to impose restrictions on the transfer of securities delivered on vesting of performance rights. Such post-vesting restrictions can be beneficial to participants as they may enable continuing tax deferral. The same issues apply in relation to the proposed definition of 'eligible products'.
		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.	While it is unusual to offer either options or performance rights for any monetary consideration, there may be circumstances in which an option or right is issued for consideration, albeit nominal consideration (eg, for contractual reasons or to satisfy particular jurisdictional requirements). We would favour adopting the 'no more than nominal monetary consideration' formulation for that reason. We are concerned at the suggestion that there must also be no

Proposal		Questions		Response
				monetary consideration provided on vesting of a performance right. US style stock purchase plans involve the regular purchase (usually monthly or quarterly) of shares out of deductions from salary. The offer of participation and the employee's agreement to have deductions made from salary creates a right to receive the purchased shares in the future. With no element of optionality, this would therefore seem to be characterised as a performance right under the class order. These plans would not be possible under [CO 14/xx] if there was a bar on consideration being payable at the time of vesting. Similarly, we note, in paragraph 108 of the Consultation Paper, that it is proposed that a performance right cannot involve a contribution plan. Both the US style stock purchase plans just referred to, and UK style Save As You Earn (SAYE) plans are contribution plans (the latter differs only in that it involves the grant of options that can be exercised using savings at the end of the savings period, usually 3 or 5 years), and both of these types of plan have been offered to employees in Australia extensively in the past under [CO 03/184]. We can see no reason why they should now not benefit from class order relief simply because the right or option requires consideration from the employee for the purchase of shares on vesting.
		D3Q4	Do you agree with our proposal to include dividend equivalent rights in the definition of 'performance right'? If not, why not?	Yes.
		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?	Yes, but see below and our response to D3Q6. The relief should also be extended to allow options to be settled in cash in the same circumstances as performance rights. The existence of an exercise mechanism (resulting in the characterisation of a right as an option) should not make any difference to the extent of the relief available for options when compared with performance rights.
		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?	No, for the following reasons. (1) The 'value' of a financial product will vary depending on the valuation methodology used (eg, whether a VWAP or average closing price), the valuation period and the date of valuation. The use of an undefined concept of 'value' could therefore give rise to interpretation difficulties. To address this, we suggest that the term be defined as *'the value of a financial product determined by the issuer (or an associated body corporate) in accordance with the terms, and as at the date or over the*

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				period, set out in the offer document or the rules of the employee incentive scheme under which the offer is made'. (2) Typically, any cash amount that the recipient is entitled to receive on vesting of a right will be less than (not equivalent to) the value (or any increase in value) of the relevant underlying product (or the value of dividend equivalents). One of the key reasons for this is that the gross amount otherwise payable will be reduced for applicable tax withholdings or deductions (eg PAYG). In some cases, a reduction may also be made to take into account any additional compulsory or voluntary superannuation contributions that an employer may make in relation to the participant's cash entitlement on vesting of the rights. For example, the amount of the participant's pre-tax cash entitlement may be reduced so that the reduced pre-tax amount plus the amount of any Australian superannuation contributions made for the benefit of the participant and attributable or referable to the reduced pre-tax amount equals the pre-tax cash entitlement (disregarding the reduction for those contributions). In this respect, we note that calculating the amount of the reduction on account of superannuation contributions is not as straightforward as simply reducing the pre-tax amount payable by the amount of the additional superannuation contributions (as the reduction of the pre-tax amount payable on vesting will itself reduce the amount of the required superannuation contributions). The definition also does not take into account that the value of the underlying financial product or dividend may be in a different currency to the currency in which the cash payment is to be made (for example, where a payment is to be made in Australian dollars to an Australian employee based on the value of shares of an overseas issuer). We expect that there may also be other circumstances in which the cash amount payable may not be equivalent to the relevant underlying value – for example, reductions may be provided to set off amounts owed by the participant to the issuer. Provided that the offer document or rules of the employee incentive scheme specify how any cash amount payable on vesting of the right would be calculated, we cannot see any regulatory detriment in allowing issuers greater flexibility in determining the amount of the cash payment payable on vesting of a right. Accordingly, we suggest that the reference to a cash amount that is 'equivalent' to the relevant value in paragraphs (v) and (vi) of the proposed definition of performance right be

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				replaced with a reference to '*a cash amount that is determined or derived (wholly or <u>in part</u>) by reference to*'..[the value of a financial product] etc. The underlined words recognise that other factors may be taken into account in calculating the amount payable (including the deductions and withholdings outlined above). In our view, issuers should have the flexibility to determine any appropriate deductions or withholdings and ASIC should not attempt to prescribe these. However, if ASIC sees the need to refer to permitted deductions or withholdings in the definition, then the definition should (at least) expressly allow the relevant cash amount to be adjusted (where applicable) by reference to any tax or other amount that the issuer (or an associated body corporate) is required or permitted to withhold or deduct from the payment in accordance with the terms of offer or the rules of the employee incentive scheme, and/or by reference to an exchange rate for conversion of the currency in which the relevant value or amount is expressed into a different currency. We have recently obtained special relief from ASIC to allow the calculation of cash-settled incentives on a similar basis. (3) The reference to a cash amount referable to 'the dividends or distributions paid to holders of a financial product' also gives rise to the question of the period over which this is to be calculated. We suggest clarifying this to refer to the amount of dividends or distributions paid to holders of a financial product over *'any period determined by the issuer (or an associated body corporate) and specified in the offer document or rules of the employee incentive scheme under which the offer is made*'. (4) We assume that the reference to 'value' in D3(c)(vii) is intended to allow payment of an amount that takes into account the value of franking credits. If so, it would be useful for this to be made clear, either in RG 49 or [CO 14/xx].
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	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?	Yes. Cash incentive arrangements (such as commissions and bonuses determined by reference to internal measures of financial performance) were not regulated before the commencement of the *Financial Services Reform Act 2002* (Cth) and it is apparent that the possible technical characterisation of some of these arrangements as derivatives was an anomalous and unintended result of the introduction of the extremely wide, functional definition of 'derivative' in Ch 7. We welcome ASIC's clarification (at paragraph 111 of CP 218) that it does not consider such cash incentives, granted in the context of an employment or employment-like relationship, to be derivatives where their value is derived from something other than a

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	such arrangements are not regulated as derivatives for the purposes of Ch 7.			financial product. We understand that ASIC is considering whether to confirm this position by issuing a separate class order under section 765A(2) of the *Corporations Act*. Given the breadth and history of the definition of derivative (and the ability of third parties - other than ASIC - to take action for breach of the relevant *Corporations Act* provisions), we consider that it is necessary for ASIC to remove the existing uncertainty by issuing this separate class order relief. In the absence of this relief, many employers will continue to be in the unacceptable position that they may be inadvertently and unknowingly breaching the disclosure and licensing requirements of the *Corporations Act*, and potentially triggering the operation of the insider trading provisions, by simply offering and granting cash bonuses/commissions that are not discretionary. On the other hand, those aware of the risk may choose to structure their incentive schemes as discretionary bonuses so as to fall outside of the definition of derivative, thereby depriving employees or other participants of enforceable rights. . There does not seem to be any policy consideration that militates against allowing employers or other entities to offer participation in cash bonus or commission schemes. They are an increasingly common part of remuneration packages, rewarding performance and linking reward to the success of the issuing company or group in different ways.
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).	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?	Yes.
		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?	Yes, in our view, all financial products offered in the course of an employment or contractor relationship should be exempted from the disclosure and licensing requirements of Chapter 7, including those that were not regulated by the *Corporations Act* before the amendments made by the *Financial Services Reform Act*.
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	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?	No. In our view there is no need for any regulation of the use of trusts holding <u>unallocated products</u> over which employees can only ever have an expectancy of holding a financial product or security for which Class Order relief has already been given. Some employers may use employee benefit trusts to hedge their obligation to provide shares on the vesting of options or performance rights (in which case, no property interest in shares is typically given until shares are allocated to a participant by transfer out of the trust following vesting). There should be no policy reason to distinguish between

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	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.			this situation and one where the employer satisfies the obligation to deliver shares through a new issue or by arranging the market purchase of shares after vesting. It is the contractual obligation of the issuer to deliver shares on vesting on which the employee relies, not access to any pool of shares to which the employee has no legal entitlement that an unconnected trustee might or might not hold to enable the issuer to satisfy that obligation. In other words, there is no policy justification to impose stricter requirements in terms of security of entitlement to benefits just because a trust is mentioned than would exist for employee share schemes where shares are delivered by new issue or on-market acquisition.
		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.	In our view, the regulation of 'offers through trusts' (whatever that opaque phrase means) should be less extensive than the regulation of those offers under [CO 03/184]. While other types of trust arrangements would likely be used in conjunction with employee share scheme offers, they should be unregulated.
		E1Q3	Do you agree with the proposed conditions of relief in respect of allocated products? If not, why not?	No. (1) In relation to allocated products, it is also not clear under the existing Class Order [CO 03/184] whether the requirements imposed on trust arrangements are also intended to extend to a simple custodian arrangement (where an employee acquires shares, for example under a share purchase plan, and is invited to use a nominee or custodian to hold those shares to facilitate future dealing or share plan administration). This is a valuable service provided to employees who may not otherwise have access to brokers. Imposing general conditions on nominee or custodian arrangements is not necessary, whether or not the nominee or custodian is the holder of an AFSL, as a nominee or custodian will always be required to act on the instructions of the beneficial owner of the share in any event given that nominee or custodian arrangements in Australia involve bare trusts. (2) Trustee restrictions of the kind proposed by ASIC are only potentially required to protect employees who have obtained fully vested entitlements to shares that are then subject to dealing or delivery restrictions for a qualifying period and are held under specific trusts for that purpose, but we would suggest that the rules of the plan, and the legal obligations placed on the trustee, will be sufficiently clear and enforceable in that respect, obviating any need for further compliance restrictions or conditions. (3) In particular, and with reference to the requirements set out in

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					paragraph 4 of the schedule to [CO 03/184], most of the requirements either set out general trust principles or are unnecessarily (and in some cases inappropriately) restrictive: (a) paragraphs (a) to (c) mostly restate general trust principles but also impose an audit and inspection requirement on the trust accounts – it is only these added requirements that need be mentioned at all, but they would seem to add nothing to the general supervision of trusts by the courts; (b) in terms of paragraph (d), it is not clear why, as a matter of policy, trustees should be prevented from levying fees for their services payable by employees, if that is made clear in the terms on which the shares are offered, particularly if employees are tardy (perhaps for taxation related reasons) in requesting that shares be withdrawn after they are first able to request withdrawal. In any case, if the requirement in this paragraph is to remain, it should be clarified that it does not extend to out-of-pocket expenses incurred by the trustee (such as the costs of sale of shares withdrawn from the employee share scheme); (c) paragraph (e) in its current form, and more particularly so in the proposed form which would not permit the trust deed to limit the obligation, is simply misguided. Employees should not necessarily have a power to require sale, but if ASIC chooses to insist that they do, the power should only exist once the employee has requested that the shares be withdrawn from the employee share scheme (in accordance with the terms of the employee share scheme). Putting this another way, employees should not have the right to mandate sale (if at all) until they are fully entitled to the shares (eg, after any applicable vesting conditions have been satisfied). However, it is not worth including a requirement in those terms as it will sometimes be appropriate for other reasons to ensure that full entitlement does not occur until a request for withdrawal is made; (d) the requirement for lodgement of the trust deed with ASIC under paragraph (f) would not be needed if the trust deed requirements were reformed sensibly (although ASIC may wish to preserve the right to request a copy of the trust deed on demand); and (e) paragraph (g) in its current form is either misleading or

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				misguided. Our preferred interpretation is that the paragraph should be interpreted as requiring equivalent rights to those that would be enjoyed by participants in a hypothetical, equivalent employee share scheme where shares are registered in participants' names. Under this interpretation, the paragraph adds little and should probably be deleted. If this interpretation is not intended, the paragraph is unreasonably restrictive and would have the effect that trusts (barring case-by-case relief) could only be used for employee share schemes where entitlements are always fully vested (that is, no performance or service based conditions could apply) and are not subject to restrictions on transfer or forfeiture conditions. Our view is that, as a theoretical proposition, employees should only have rights equivalent to a legal owner once the employees are fully entitled to the shares. However, it is not worth including a requirement in those terms as it will sometimes be appropriate for other reasons to ensure that full entitlement does not occur until a request for withdrawal is made. (4) The proposed conditions in Table 4 largely reflect the current requirements of [CO 03/184] and need no further comments, except that the new requirement that a trust be for the sole purpose of holding underlying products for participants does not seem to have any substantial policy justification and may potentially be administratively inconvenient in some circumstances.
		E1Q4	Do you agree with the proposed conditions of relief in respect of unallocated products? If not, why not?	No. See our response to E1Q1. Further, an attempt to regulate completely unallocated shares held under a trust is likely to be ineffective as there will likely be too little nexus with an offer. If ASIC strongly desires to regulate such trusts, legislative reform will be necessary.
		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?	No. See E1Q3 (3)(c).
		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	Yes. We have made a number of applications for, and have been granted, relief for independent trustees, not part of the issuer's group, from the requirement to hold an AFSL where the trustees principally carry on business outside Australia and therefore do not

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			incentive schemes? If so, please provide examples and explain why such relief is needed.	hold an AFSL. This relief is appropriate for trustees who otherwise have no connection with Australia and are not carrying on a financial services business in Australia other than in the context of the plan – see section 911D. The same argument could be advanced on behalf of overseas share scheme administrators. While not acting as custodians, they often provide services to employee shareholders that could be considered to be 'dealing' (i.e. arranging deals) for the purposes of s911A (when read in conjunction with the jurisdictional reach provided for in s911D) insofar as they arrange for the transfer of shares to employees on vesting and may also assist employees who wish to sell their shares through overseas dealers engaged by the administrator for that purpose. They may also assist with rights issues and dividend reinvestment arrangements. Where administrators are acting entirely outside Australia, where the Australian employees are not in a direct relationship with the administrator (who will have been engaged and remunerated by the issuer) and where the Australian employees constitute only a small proportion of the overall worldwide employees serviced by that administrator, there would appear to be strong grounds for relief from the requirement to hold an AFSL being provided. ASIC has accepted on a number of occasions, both generally and with reference to specific plans, that requiring an overseas trustee to hold a licence in these circumstances would be overly burdensome, and it has therefore provided relief. That relief is often on the condition that the number of Australian employees offered participation in the plan do not represent more than 5% of the total number of employees worldwide, but while we accept that there should be a point beyond which a trustee or administrator's work for Australian employees becomes material, we would submit that a 5% limit is too low, and would recommend, say, 15%. It would, in fact, be more logical to calculate the proportion which Australian employees, as clients of the trustee or administrator, represents to the total number of employees globally for which that trustee or administrator provides services under all employee share plans, in which case a 5% limit may be more reasonable.
		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.	No. To the extent that 'offers through trusts' are regulated at all, that regulation should be limited to the circumstance where shares are held on a fully allocated basis.

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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.	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?	No. As noted above (in C3Q1 and E1Q4), the purpose of the Class Order relief proposed is to ameliorate the requirements for disclosure and financial services licensing in the case of offers of employee incentives. The Class Order is not the place for making laws or imposing requirements in relation to the wider question of the extent to which employee benefit trusts can hold equity on an unvested basis. It would be for the legislature to impose such restrictions. In addition, some foreign jurisdictions may welcome and encourage the holding of equity by employee benefit trusts. Particular problems with definitions in this case may also arise in relation to: (1) nominee holdings, which an employer may have difficulty identifying as being held for particular employees or otherwise; (2) employee co-operatives, where a large number of shares may be held by a trustee; and (3) company superannuation trustees who hold shares on behalf of employees and annuitants. Imposing this condition would require every relevant issuer with an employee benefit trust to monitor the extent of employee benefit trust interests to establish whether the class order could be relied upon, adding an onerous and unnecessary compliance burden.
		E2Q2	Do you agree with our proposal about how the 5% limit would be calculated? If not, why not?	See E2Q1 above. If, despite the comments above, ASIC proceeds with its proposal to regulate trusts of unallocated interests, we suggest that shares which, under the terms of the trust, cannot be voted be excluded from the 5% calculation during the times that they cannot be voted. If the shares cannot be voted, they cannot affect the voting power of all other shareholders.
E3	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	E3Q1	Do you agree with the proposed new definition of 'contribution plan'? If not, why not?	No. First, see E3Q2. Secondly, the words 'or from their own funds' would make every stock purchase plan into a contribution plan, even if shares are purchased with the amount contributed immediately. Special provisions are required for contribution plans in that case only if there is an element of pooling of contributions and a delay in their application to the purchase of shares. Thirdly, and as noted above, many US and UK style stock purchase plans and savings plans involve both a contribution plan and the grant of a right or option. The definition as drafted would permit only the immediate purchase of shares upon the deduction from salary

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	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.			being made and not any deferred or future purchase. [CO 03/184] recognises this by imposing protective provisions in relation to employee savings that are not immediately applied in the purchase of shares. We would therefore submit that: (1) the definition should be limited to post-tax amounts; (2) the words 'where such contributions are to be pooled before being applied in the acquisition of shares' be added; and (3) the words in brackets '(other than performance rights or options)' be removed, so that the definition reads: A plan under which a participant may make monetary contributions towards the acquisition of eligible products offered under an employee incentive scheme from earned, or future amounts of, wages, salary or bonus payments or (where such contributions are to be pooled before being applied for such acquisitions) from their own funds. We also note, in passing, that the definition of 'contribution plan' in section 9 of the Corporations Act applies only to Australian companies and only to employee share plans that involve the issue of a disclosure document or are exempted from doing so by virtue only of section 708(12). This is a result of the restrictive definitions of 'employee share plan' and 'eligible employee share plan' in section 9. That definition cannot therefore be used in any class order exemption if the exemption is also to benefit foreign companies.
		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?	No. ASIC's goal of regulating pre-tax and post-tax contributions in the same way is not achievable. The fundamental reason for this is that in a pre-tax plan there are no contributions held on behalf of participants. If there were, those contributions would have been earned by the participants and therefore treated as income for taxation purposes. In other words, requiring notional pre-tax contributions to be held for participants will itself cause those contributions to be post-tax (rather than pre-tax) contributions. In effect, defining contribution plans to include pre-tax arrangements will prohibit those pre-tax arrangements. There appears to be no policy justification for doing so. While it might be tempting for ASIC to treat an entitlement to an amount of cash similarly to an entitlement to, say, a share, there is no policy need to do so. When employees enter into salary sacrifice arrangements, it is made clear that they are forgoing their future rights to receive cash remuneration and instead receiving an

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				entitlement to a benefit in a different form. It is clearly implicit that there is a different risk of non-delivery of the substituted entitlement. Further, to the extent that ASIC is motivated by concerns that an issuer may become insolvent in the period between the time when the cash income forgone would have been earned and the time that the substitute benefit is given, there is no benefit in providing early attribution of entitlement because holding, say, a share in an insolvent company will not give any advantage over holding a right to be given a share. For these reasons the contribution plan provisions should only apply to post-tax arrangements.
		E3Q3	Do you agree with the proposed conditions for how contributions are to be held? If not, why not?	There will also be circumstances where deductions made from salary will immediately be applied in the purchase of eligible products by an employer, and therefore where neither (a) nor (b) in the conditions in Table 5 under this heading will be satisfied. For example, an employer will pay employees their salary net of any contributions to be made towards the purchase of shares and, at the same time as paying the net salaries, will remit a sum of money to a broker or share plan trustee or administrator with an instruction to make an immediate purchase of shares. We would suggest the addition of the following paragraph before paragraph (b) in that section of the table (and in the corresponding provisions in any corresponding conditions in [CO 14/xx]): ( ) paid or transferred to a licensed dealer*, the issuer (in the case of the issue of the eligible product) or to the trustee of an employee benefit trust (established or funded by the issuer) for the immediate issue or transfer to the participant of eligible products; or * A definition of 'licensed dealer' will be required: we would recommend simply adopting paragraphs 6(e)(i) and (ii) in the Fourth Exemption of [CO 03/184] for this purpose.
		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?	Yes.
		E3Q5	Are there any other conditions that should be imposed in respect of employee incentive schemes involving contribution plans?	No. We would also make the comment that there does not appear (particularly in the light of the removal of loan restrictions on

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				contribution plans foreshadowed by proposal E4) to be any reason to have a separate exemption for the relief for contribution plans (as is currently the case with the second exemption in [CO 03/184]), but simply an additional condition for relief under the principal exemption where the offer involves a contribution plan. This has the merit of setting out the additional conditions applicable to contribution plans in the schedule of conditions, rather than in the definitions, and will simplify the principal exemption wording, which need not refer to contribution plans.
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.	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?	No. We see no policy reason why employees should not be held fully accountable for financial obligations entered into by them to acquire shares or other eligible products in their employer group, provided that they are given sufficient information about the liabilities they are incurring, and the terms of payment. This is particularly the case with vanilla stock purchase plans offered by overseas issuers, where the issuer may permit employees to acquire eligible products immediately, and to enjoy immediately the benefits of share ownership (including dividends and everything that comes with equity ownership), but on deferred payment terms. These plans, and the benefits conferred by them, will disappear, if employers are required to offer deferred payment terms only on a limited recourse basis. Employees will be forced to make immediate payment in full, or to enter into separate bank loans or other third party facilities to help them to fund their purchase (which would not, of course, be limited recourse, and may involve much higher rates of interest than may be offered by an employer). In practice, Australia's tax rules militate against the delivery of shares immediately (as this generally creates an immediate and non-deferrable tax liability), and plans that involve rights and options (and therefore deferred delivery and payment) are more likely. The taxation consequences, at least for the issuer, are different for a no- or limited-recourse loan as compared to a full-recourse loan. The protection-of-participants policy justification seems inadequate to justify removing the flexibility to use full-recourse loans. That policy concern would be adequately addressed by an obligation to provide a prominent 'health warning' about the possible downsides of participation if the shares, etc fall in value and the loan becomes due. The draft formulation 'not repayable for the duration of the loan' is circular, as the duration of a loan will always turn upon its terms and, as a matter of contract law, no loan can be repayable other than on its terms. Unless ASIC wishes to specify in detail what repayment terms are to be permissible and acceptable (which would add an

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				unnecessary level of complexity) we would recommend deleting this condition in any event. In practice, interest on employee share scheme loans is often used as a way of 'eliminating' dividends on unvested shares (by charging interest at a rate equivalent to the amount of any cash dividends paid on the shares). For this reason, and for the reason stated above (forcing employees to take out more expensive third party loans to enable them to acquire eligible products), we would also recommend not imposing a condition that employer loans be interest free. Additionally, we note that an employer may be prohibited or restricted from providing a loan to employees on a limited recourse or interest free basis by: (1) rules relating to the provision of benefits to directors and senior managers (Chapter 2E, *Corporations Act*); (2) rules restricting or preventing termination benefits (eg loan waivers)(Chapter 2D, *Corporations Act*); and (3) the financial assistance rules (Part 2J.3, *Corporations Act*). We also note that there is a possible view that section 206J of the *Corporations Act* would prohibit a member of the key management personnel of a company from entering into a limited (or no) recourse loan with the company in relation to unvested (or vested but restricted) products. While we do not consider that this was the legislature's intention, we think that ASIC should put this issue beyond doubt by making an appropriate declaration under section 206J(8) in relation to such loan arrangements. Finally, we note that draft RG 49.85 includes a statement that the exemption under s 260C(4) for approved employee share schemes does not apply to employee incentive schemes relying on [CO 14/xx]. This statement should be reworded to clarify that the exemption under s 260C(4) will only apply if the relevant, approved employee incentive scheme falls within the narrower s 9 definition of 'employee share scheme'.
		E4Q2	Do you agree with permitting employee incentive schemes that involve a loan as well as a contribution plan? If not, why not?	Yes. There appears to be no reason to prevent employers from providing additional financial accommodation in the form of loans to employees in the context of a contribution plan. A contribution plan that involves the advance issue or transfer of shares, with subsequent payment being made by deductions from salary (as is implied by Table 5 in E3 above, and paragraphs 141 and 142 of the Consultation Paper) must involve a loan relationship, as the employee will have a debt obligation in respect of the payments to

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				be made in the future.
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.	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?	Yes. This a sensible change which we welcome. **(1) Takeovers and schemes of arrangement** We would, however, also make the case for the extension of relief for the offer of financial products that are derived from, and are similar in nature to, other financial products that have the necessary history of listing, for example in the context of a takeover or scheme of arrangement or other reorganisation, as noted in paragraph 159 of the Consultation Paper. Australian and certain foreign takeovers and schemes of arrangement already benefit from disclosure relief (see [CO 07/9] and [CO 09/68]) and there seems to be no reason why they should not also benefit from relief if, coincidentally, they are making offers to employees of new employee incentives (usually to replace existing benefits and incentives provided to them by the previous listed holding company which can no longer be recognised). Providing such relief in similar circumstances (effectively extending the relief already provided for offers to existing shareholders to employees holding existing but unvested rights) would remove the need for applications for special relief in these cases. **(2) Approved foreign markets** We would also recommend that the list of approved foreign markets be revised and expanded to include any foreign markets in respect of which the ASIC has previously provided special relief on terms similar to [CO 03/184]. We have, for example, obtained relief on two occasions for companies whose shares are listed on the Helsinki stock exchange, ASIC appearing to be satisfied in that case that the exchange imposed rules and obligations on listed companies that met the disclosure and transparency standards expected of an approved foreign market. There does not seem to be any reason, ASIC having satisfied itself on that point, not to include those exchanges permanently in any future class order relief, to

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				obviate the need to make further special relief applications on that ground alone.
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.	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.	No. We see little policy justification for limiting the number of shares or other financial products that can be offered in reliance on this class order relief in any way. ASIC has advanced two justifications for this limit: (1) to ensure that the offer is not primarily for the purpose of fund-raising; and (2) to protect existing creditors' interests and shareholders from dilution. Our response to these is that: (1) as the calculation of the 5% limit does not take into account other offers that would benefit from alternative disclosure relief (eg, offers of securities to senior managers), or are made pursuant to a disclosure document, it is difficult to see that the limitation does or will impose any meaningful restraint on total employee offers by the company; and (2) as existing creditors will stand ahead of the holders of equity in any winding up and given the financial assistance restrictions under s 260A, it is difficult to see how creditors can be prejudiced by the offer and issue of equity to employees. In addition, the proper place for restrictions on the extent of employee equity is the listing rules of the relevant exchange on which the company benefitting from the class order relief is listed (see, for example, ASX Listing Rule 7.1, which effectively limits all, including employee, equity issues in any 12 month period to 15% of issued capital without shareholder approval of the employee share scheme). A limitation of this nature would also prevent start-up companies that are largely employee controlled (or where owners are willing to share the possibility of future growth in value of the business with employees) from involving employees in early stage equity at a time when the employees are likely to gain the greatest benefit from equity participation. We therefore do not see any real benefit being obtained by introducing a complex and unnecessary test to determine whether

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				the class order can be relied upon. Further, the proposal seems to envisage that the number of shares used to calculate a cash settlement of a derivative would be caught in the limit. This seems incongruous as the stated primary policy concern is fundraising and the test primarily focuses on the number of shares issued or to be issued. A cash settled derivative (and indeed a derivative settled by delivery of shares acquired on-market) does not involve fundraising or issue. Therefore, if ASIC decides to proceed with a limit, reference to shares underlying cash settled arrangements should be deleted. As is presently the case under [CO 03/184]), CP 218 implies (and we assume) that the limit will be clearly drafted to exclude offers that are satisfied by the transfer of existing shares (whether via on-market purchase or off-market transfer). This continues to be appropriate because these offers do not have a fundraising purpose and are non-dilutive.
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.	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.	Yes. See our comment at D3Q3.
		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?	No. This fails to take into account consideration expressed in a foreign currency. In addition, it does not reflect the fact that the underlying value of the share which is the subject of the option or right might have only a similar "nominal" value, for example one or two cents.
		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.	No. See our comments at D3Q3.
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	F4Q1	Do you agree with the proposed new condition to impose a partial 12-month holding requirement? If not, why not?	No. While fostering a relationship of interdependence and long-term benefit is a key policy justification for the relief for employee share schemes, it is not the case that every offer will necessarily be long-term in nature. Short- or medium- term offers may, and often are, part of the long term relationship between 'employers' and 'employees'. There does not appear to be any need to impose a partial 12-month holding requirement, which is in any event commonly imposed by employers, on continuing employees, under market practice in any event. Further, such a condition does not sit well with current taxation

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	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.			requirements for employees who cease employment – tax will generally be payable for the tax year in which cessation occurs. If, for example, shares are granted in May and an employee ceases employment in June as a result of permanent disablement, the condition would restrict the ability of an employer to provide the shares granted on cessation of employment, even though tax might become payable in respect of all the shares when the employee files their tax return in October. In addition, such a condition would prevent employers from benefitting from the class order in the following cases: (1) giving employees the election to convert an existing cash bonus right into an immediate right to equity; (2) providing immediately available equity as a short-term bonus; (3) providing an employee incentive as a short-term retention incentive (eg, in the context of a takeover bid or other change of control transaction or sale of a subsidiary) or as a sign-on incentive (eg, in recognition of entitlements forfeited on resignation from former employment); (4) US style stock purchase plans (usually delivering shares on a three month rolling basis); and (5) the early release of shares to employees who are 'good leavers' (generally in cases of hardship such as permanent illness or death, or on retirement). It should also be noted that it is common for issuers to calculate a 12 month vesting or deferral period from a date earlier than the date of grant (eg, from the date of board determination of the award to be offered to eligible employees or from the date of the offer). Creating exceptions for these cases would unnecessarily complicate the class order for no real overall benefit. Employers should be left to make their own decisions about the restrictions that it is appropriate to impose on employee equity to achieve their short, medium and long-term 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?	No. See F4Q1 above. The relationship of interdependence is simply created by the holding of equity in the first place, not by any restrictions on disposal or on the exercise of options.

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		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?	See F4Q1 above. It is unclear from the wording of CP218 whether the proposal is that at least 25% of any award must be held for at least 12 months or at least 75%. We understand from our discussion with Peng Lee of ASIC that the former is the intention. Of course, the higher the retention requirement, the greater the issues discussed above. In any case, if there is to be a limit, it should recognise that many international schemes have three year vesting periods, which means that up to 34% of shares may be made available in the first year.
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:	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?	No. It is not clear what ASIC has in mind by the reference to 'key risks' and, in particular, whether this is intended: • to refer only to the risks specific to the financial product being offered (eg that performance hurdles may not be met and performance rights may therefore not vest, or that the price or value of shares may rise or fall) (**product risks**); or • to extend to risks to the issuer and its business (**business risks**). The references to RG 228 suggest that ASIC may be intending that business risks be summarised in the offer document. If this is ASIC's intention, we are concerned that this proposal would significantly erode any benefit that issuers might otherwise derive from the class order relief by imposing a *de facto* prospectus disclosure standard (noting that relief from the disclosure provisions in Parts 6D and 7.9 is the essence of the class order). In this respect, it is also difficult to see how business risks can be meaningfully summarised in an offer document in isolation from general discussion of the issuer's business model, financial position and performance, and prospects. A requirement to summarise business risks would significantly reduce the utility of the Class Order relief and would probably deter some issuers (particularly many foreign issuers) from making equity-based offers to employees in Australia. For many foreign issuers, the additional costs of ensuring that the offer document contained adequate risks disclosure (including the costs of obtaining legal advice and undertaking due diligence) would be excessive for the small number of employees involved, with the likely result that Australian employees would be deprived of benefits made available to their overseas counterparts. The existing requirement of [CO 03/184] to the effect that the offer document must set out the terms of the offer and include or be accompanied by a copy or summary of the rules of the scheme appears to have met the test of time. We are not aware of any concerns having been expressed that employees have received

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	(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].			insufficient information on which to base a judgement as to whether or not to participate in the relevant scheme. Accordingly, it is not apparent to us that there is any regulatory need to change the existing disclosure requirements. If ASIC nevertheless considers it necessary to require a brief summary of key risks in the offer document, we consider that this requirement should be expressly limited to product risks. The existing Class Order relief for listed entities recognises that disclosure relief is appropriate because there is an adequately informed market in the securities (or, in the case of options and performance rights, the underlying securities) of the issuer, through the continuous disclosure and periodic reporting requirements. As reflected in ASIC Regulatory Guide 247: *Effective disclosure in an operating and financial review*, entities listed on ASX are required to discuss their material business risks in the operating and financial review section of the directors' report (under s299A of the Corporations Act). If ASIC thought necessary, the offer document could be required to include a statement referring the recipient to the entity's most recent annual report (or, for newly listed entities, the entity's prospectus and, for overseas listed entities, the corresponding report in their relevant jurisdiction) and advising them where the report is available.
		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?	Yes. We would actually argue for there being no notification requirement to ASIC at all. The essence of Australia's laws is that all persons subject to them are expected to comply with them without the need to tell a regulator that they are doing so. The exemptions from disclosure in Chapters 6D and 7 of the Corporations Act can be relied upon without the need for any filing or any claim for exemption and we fail to see any need for ASIC to monitor the extent to which the Class Order is being relied upon, other than for statistical purposes, when it is not going to be in a position, based on the information provided to it by this form, to monitor compliance in any event.
		F5Q3	Do you agree with including the information at F5(b)(i)–F5(b)(xi) in Form XX? If not, why not?	No. The acknowledgement proposed at F5(b)(xi) would, in our view, impose an unduly onerous burden on the individual who signs and lodges Form XX on the relevant entity's behalf. The proposed acknowledgement should be replaced by a requirement (consistent with that required on other ASIC forms) to certify that the information provided on the form is true and complete. We say this for the following reasons: • responsibility for compliance with the Class Order conditions

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				(and the consequences of any non-compliance) should properly rest with the entity relying on the relief (eg, the issuer) - this responsibility and potential liability should not be extended to an individual officer (eg, the company secretary) simply because they are charged with the administrative function of attending to ASIC lodgements; • the requirement to provide this acknowledgement would potentially expose the individual officer to strict criminal liability under sections 1308(2) and (4) (including if they fail to take 'reasonable steps' to ensure that the acknowledgement is correct, potentially requiring them to undertake due diligence and obtain legal advice as to the requirements of the Class Order) - particularly if disclosure of business risks is required; • in our experience and as ASIC has recognised in CP 218, the existing Class Order relief has given rise to numerous interpretation issues, difficulties and uncertainties for those seeking to rely on it. To date, it has been possible for issuers (sometimes at ASIC's prompting[6]) to take a pragmatic approach in dealing with some of these issues and rely on the Class Order in circumstances that might not, on a strict legal interpretation, comply with conditions of relief but would nevertheless appear to satisfy ASIC's underlying policy objectives and intent. However, taking a pragmatic approach in such circumstances would not be possible if this would expose an individual officer to an appreciable risk of personal liability; and • we cannot see why a compliance acknowledgement is warranted in this context when no similar acknowledgement is required on various other ASIC forms (eg PDS 'in use' notices, Form 388 for lodgement of copies of financial reports etc, Form 389 for notification of reliance on financial reporting relief). If ASIC proceeds with its proposal to require the proposed compliance acknowledgement on Form XX, we think it would be incumbent on ASIC to issue binding guidance, in granular detail, as to the interpretation of the conditions of the class order. In the absence of binding guidance, we anticipate that various

[6] For example, there have been occasions where ASIC has refused to grant case-by-case relief on the apparent basis that the requested relief fell within the policy objectives of the existing Class Order relief (notwithstanding technical doubt about the applicability of the Class Order relief).

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				interpretation issues and difficulties (including some highlighted elsewhere in these submissions) will need to be resolved by applications to ASIC for special relief. The extent of the other information proposed on Form XX could also be considered excessive, and it is not clear why ASIC needs this information. For example, it is not clear why ASIC would need to know: • whether performance conditions were imposed by the scheme; • the types of participant (presumably they would simply be 'eligible employees' or contractors); • the identity of any trustee (unless the trustee is holding allocated shares); or • whether a contribution plan is offered; or • whether a loan facility is offered. In relation to the information proposed at F5(b)(iv), it is also not clear to us what ASIC has in mind by the reference to the duration and tranches of the employee incentive scheme. Is this intended to capture the vesting periods applicable to the products being offered under the particular offer and, if these are to be divided into different tranches, the vesting period applicable to each tranche? If so, this should be clarified (noting that the vesting periods would typically be built into the terms of offer rather than the rules of the scheme). The employee incentive scheme itself will typically have an open-ended duration (unless and until terminated or suspended by the board) and the future offers/tranches to be issued under the scheme is unlikely to be known when the Form XX is lodged. At its simplest, it seems to us that the form only needs to provide the information requested by paragraphs F5(b)(i), (ii) and (iii) and the confirmation suggested above.
		F5Q4	Is there any other information that ASIC should be made aware of in this notification?	No.

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		F5Q5	Do you agree that some or all of this information should not be made public? If not, why not?	Yes. The nature and extent of employee equity ownership should, except to the extent considered by any relevant securities exchange to be disclosable to the market, be a commercial matter for the employer issuer and not subject to public exposure simply on the ground that it has relied upon a class order relief. It should not be the role of the class order to impose a public disclosure obligation on an employer issuer in circumstances where it would not otherwise have arisen. The policy objectives of the disclosure and licensing provisions from which the Class Order provides relief are concerned with protection of the recipients of financial products, not broader concerns of disclosure, transparency or accountability to shareholders, other stakeholders, or the market.
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).	F6Q1	Do you agree with our proposal to provide a determination process? If not, why not?	Yes. This is a more appropriate and proportionate remedy for breaches of the Class Order than potential civil and criminal liability for breach of the disclosure and other provisions of the Corporations Act from which the Class Order provides relief. In this respect, we note that ASIC indicates, at draft RG 49.105, that a failure to comply with the condition proposed at F5(a)(i) will not mean that the relief ceases to apply to the offer (in the absence of a determination by ASIC excluding a body from the relief). We welcome this proposed approach. It is not clear, however, whether this approach will apply in relation to compliance with other conditions of the class order. We suggest that this is also the appropriate remedy for breach of other conditions of the Class Order. In particular, we submit that failure to lodge the proposed Form XX within the requisite seven day period should not invalidate the relief. There is a significant risk of inadvertent non-compliance with this requirement (particularly for overseas issuers) and we think that the consequences of late lodgement (or inadvertent non-lodgement) should not be disproportionate to the seriousness of that failure (as would be the case if this automatically invalidated the relief).
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.	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?	If the conditions to the relief are minimised, yes. If they proceed as proposed in CP218, there is a significant risk that the relief will be regarded as not particularly attractive and therefore less used. In terms of the specific restrictions: (a) if restriction (a) means that the body can have only one class of shares in total (as distinct from can only issue one class under the class order), it will likely mean that the relief is unworkable; this is because unlisted companies often have many classes of shares reflecting the different ownership interests of the various persons involved with the body;

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				(b) restriction (b) is unnecessary – the value limit should be a total annual amount per participant; (c) there would be value in increasing the value limit in restriction (c) so that it corresponds to the amount of shares that can be offer tax free under the tax rules; (d) the warning statement in restriction (c) should incorporate a prescribed form of risk statement which removes the need for a risk warning in restriction (i); and (e) our comments above apply to restrictions (g) and (h) (5% capital limit and long-term mutual benefit).
		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?	No. This would impose a requirement to prepare audited accounts on a large number of smaller private companies that presently do not have that obligation imposed on them. The cost of preparing and having audited accounts to a higher standard would discourage private companies from making use of the class order. It is not clear also why employees receiving free shares should be provided with audited accounts when they are not making an investment in the company in the same way as an ordinary investor, and when an ordinary investor in a private company can make such an investment without any financial information or disclosure being required at all. Further, where general purpose accounts are not required, employees may not appreciate the significance of special purpose accounts or the fact that audit does not guarantee the correctness of accounts.
		G1Q3	Do you agree with the proposed risk disclosure statement? If not, why not?	No. See our comments in F5Q1 and G1Q2 above.
		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?	No. Most start-ups and almost all technology companies do not have significant tangible assets, and basing share valuations on net tangible assets would allow the issue of a very large number of shares in these cases. We cannot see any reason why employees should be provided with any valuation of shares provided to them for free, as that can lead to unrealistic expectations of future value, and could lead to claims for misrepresentation against issuers and their directors. All reasons why a company would be discouraged from making such an issue in reliance on the class order. Valuation should therefore only be relevant in establishing compliance with any limits imposed by the class order, and this could be a matter for the issuer to make its own judgment of value, with the obvious need to justify that valuation if called upon to do so

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				by ASIC. An alternative may be to impose a limit based on a percentage of the issued share capital of the private company. If we were to assume that ASIC would permit up to, say, 20% of a private company to be held by employee shareholders, and that more than 20 employees would need to benefit from any free share issue for the class order to apply (as offers to any lesser number would be able to rely upon s708(1)), this suggests that the maximum number of shares that could be issued to any one employee under the class order relief would be 1% of the issued capital. This would be a simple and easy measure to adopt and to apply.
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.	G2Q1	Do you agree with the proposed definition of 'performance rights' for the purposes of this relief? If not, why not?	No. See our response to D3Q2 above.
		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?	Yes. But see also our comments in G2Q5 below.
		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?	No. It is difficult to see how an issuer could enforce provisions relating to a sale of the company other than by arranging complex shareholder or constitutional documentation binding on all shareholders. Such provisions will only, in any event, be enforceable by the shareholders themselves. In addition, we consider that an expert's report should only be required if the purchaser is an existing shareholder or someone associated (as defined in s12(2) of the Corporations Act) with an existing shareholder. The company should not be put to the expense of an independent expert's report if the offer to purchase the shares is on arm's length. Further, the company should not be put to the expense of an independent expert's report if the holders of options or performance rights have no choice about whether to participate in a buy-out. Finally, the class order provides relief, at the time of the offer of shares or rights, from the disclosure and licensing obligations. It is difficult to see what sanctions could be imposed by ASIC as a result of a breach of a condition subsequent at a later date, or any failure of a company to enforce the type of contractual or constitutional provisions contemplated.
		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	Yes. See our general comments at G2Q3. It is conceivable that an existing shareholder may choose to acquire 100% of the company, but in that case the shares the subject of the offer would, by definition, be less than 100% of the issued capital (as the offer would

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			details, addressing our concerns discussed in paragraph 219.	exclude the shares already held by the existing shareholder and its associates). A better formula would be: all of the shares in the company other than those in which the offeror has a relevant interest
		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?	No. Most private companies, including venture capital funded start-ups, will have different classes of capital to reflect different interests of investors, protect seed investors or to provide conversion rights to debt funders, without which many new ventures cannot achieve funding. Excluding all companies other than those with only one class of ordinary shares will exclude many private companies and limit the availability of the class order unnecessarily.
		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.	On the basis that flexibility should be promoted and there is no clear justification for excluding offers using a trust, our view in principle is that offers through trusts should be permitted. On the other hand, we are not immediately aware of cases where offers in unlisted bodies through trust would be desirable.
		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.	We note that ASIC proposes not to allow the payment of a cash alternative on the vesting of a right granted by a private company (see paragraph 214 of the Consultation Paper). However, we would suggest that, as there is generally no market for the shares of a private company, other than perhaps an internal market, employees would be disadvantaged if they were denied the opportunity to receive a cash payment representing the value of their shares as an alternative. A restriction on the company 'cashing out' a share right could also be easily avoided simply by arranging for another shareholder to acquire the employee's shares immediately they are issued to the employee. We therefore recommend against any such restriction.
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.	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?	No. See response E1Q6 above in relation to share scheme trustees and administrators and licensing relief. We also have the following comments in relation to the proposed advertising relief under proposal H1. **(1) Existing relief from advertising restrictions in Chapters 6D and 7** Presently, the first exemption in [CO 03/184] provides relief from all provisions of Parts 6D.2, 6D.3 (except section 736) and 7.9 where, relevantly, a person makes an eligible offer. As these provisions include the advertising restrictions in ss 734 and 1018A, this means that the first exemption also provides relief

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					from these restrictions. This is consistent with existing RG 49, which confirms that ASIC's policy is to give relief from the advertising provisions (see RG 49.66) where relief is provided from either the prospectus or PDS disclosure requirements. That said, we welcome ASIC's proposal to provide specific relief from s 1018A in [CO 14/xx], particularly having regard to the timing issues discussed below. However, we think specific relief should also be provided from the advertising restrictions in s 734, for two reasons. First, to address the timing issues noted below. Secondly, it seems to us that there is some doubt as to the view expressed by ASIC at paragraph 236 of CP 218 (ie, that offers of shares and options that do not require a disclosure document because of the class order relief are therefore not subject to the advertising restrictions in s 734, without the need for any additional relief). We say this because s 706 states that an offer of securities for issue 'needs disclosure to investors...*unless section 708 or 708AA says otherwise* (and ss 707(1) and (2) provide similarly in relation to offers for sale). Accordingly, it is at least arguable that the reference, in s 734(2), to an offer of securities that 'needs a disclosure document' covers any offer of securities for issue or sale that does not have the benefit of one of the statutory disclosure exemptions in ss 708 or 708AA. On this view, a disclosure exemption granted by ASIC under s 741 will not 'automatically' exempt the offeror from the advertising restrictions in s 734 - rather, advertising relief would only apply where this relief is granted as part of the terms of ASIC's exemption/declaration under s 741. **(2) Timing of relief in context of pre-offer advertising** A significant difficulty with the relief provided by [CO 03/184] has always been that the advertising relief provided by the first exemption does not seem to apply until an 'eligible offer' has been made and the conditions in the Schedule have been satisfied (including that a complying offer document has been provided to eligible employees). The relief therefore does not apply at the time of any pre-offer communications to eligible employees. Once an eligible offer has been made in compliance with the Class Order, the relief retrospectively applies to the pre-offer communications. Structured in this form, the relief raises some technical issues concerning that retrospectivity. Working retrospectively is also undesirable because it is not possible for issuers to assess whether they have the benefit of

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				the relief at the time of any pre-offer advertising. Even if ASIC's view is correct that the advertising restrictions in s 734 do not apply to offers that do not require a disclosure document because of the Class Order relief, the same timing issues arises – that is, it is not possible to determine that a disclosure document is not required for the offer until an 'eligible offer' is made in compliance with the Class Order. **(3) Common communications with current and future employees** It is normal and widespread practice for employers (and their associated entities) to provide some information about the operation of their employee incentive plans and potential future incentives to current and prospective employees (and directors) before an employee incentive scheme offer is made to the relevant employee/director (or separately to the offer process). For example, pre-offer communications are common in the context of pre-employment negotiations and periodic remuneration reviews. The provision of this information is essential given that a substantial part of the remuneration of executives of listed entities is typically 'at risk' and equity-based (in accordance with widely recommended governance practices and, in the case of APRA-regulated institutions, APRA standards and guidance). To illustrate: • Most major ASX-listed entities operate equity-based long term incentive (**LTI**) schemes under which they make periodic (often annual) offers to eligible employees. Individual employment contracts will commonly refer to the fact that the employee is or may be eligible for consideration for an award under any LTI scheme operated by the issuer from time to time (at the issuer's discretion). Eligible employees (and prospective employees) will also typically require, and be given, some information about the current terms and operation of the scheme (eg, the types of products offered under the scheme, the current performance conditions and vesting periods, and the usual offer timetable and criteria). In some cases, employees (or prospective employees) will also expect (and be given) details of the potential value or range of incentive entitlements that they may become eligible to receive if and when offers are made (eg, a potential annual long term incentive award with a notional value equal to, say, 100% of their fixed annual remuneration or base salary).

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				• Employees (and prospective employees) are usually also provided with details of their potential discretionary short-term incentive (**STI**) entitlements and the current terms of the short-term incentive scheme. For example, they may be advised that their potential STI opportunity is between, say, 0% to 100% of their fixed remuneration. Where an element of any annual STI payment would be deferred into equity (as is commonplace in the financial services industry due to APRA-requirements and increasing practice in other sectors), employees would also typically be given information about how the deferral arrangements work (including the types of financial products, the vesting conditions and vesting period and usual award and offer timetable). • As part of their general employee communications and engagement strategies, major employers will also commonly make available general information (eg factsheets or FAQs) about the operation of their LTI and STI schemes and any other employee incentive schemes. This information is often provided on a company's intranet or via online facilities offered by a third party plan administrator. • Following the periodic (often annual) remuneration review process, employees will commonly be sent a letter or statement setting out their total remuneration package and the elements of that package. This may include details of the value (in notional dollar terms) of the LTI or other equity-based components of remuneration. This communication will often occur before the offer of the relevant financial products is made. In some cases, this timing gap will be dictated by the company's security trading policy (as the policy may, for example, require employee incentive scheme offers to be made during a trading window). As a technical matter, given the breadth of the advertising restrictions in ss 734 and 1018A, these types of communications might breach those restrictions in the absence of relief that operates at the time of the communication. **(4) Proposed extended relief** We submit that [CO 14/xx] should give relief from the advertising (and hawking) restrictions to permit the provision of any information to existing and prospective employees, directors and

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				contractors that is reasonably connected with their current or contemplated employment or service arrangement (including information about the remuneration for their services and any employee incentive plan in which they are, or may in future become, eligible to participate).
				
				To address any regulatory concerns that may otherwise arise from extending the relief to cover communications about future offers, the relief could be subject to conditions that require any pre-offer communication to include or be accompanied by:
				• a warning to the effect that the communication does not constitute an offer of financial products and does not give the recipient any entitlement to receive an offer or grant of the relevant financial products;
				• a statement to the effect that, if the person becomes eligible to receive an offer, an offer document will be made available to them when the relevant financial products are offered; and
				• a statement to the effect that, if the person receives an offer in future, they:
				  • should consider the offer document in deciding whether to accept the offer; and
				  • will only be able to accept the offer by following the instructions provided in the offer document.
				
				Unless the Class Order relief is extended to cover pre-offer (and ongoing) communications, we expect that many companies will continue to be in the unsatisfactory position that they may be inadvertently breaching the advertising (or hawking) restrictions in the *Corporations Act* merely through the routine provision of information to their current and prospective employees and contractors about the operation of their employee incentive schemes and potential future incentives.
				
				(5) Provision of financial services by third party administrators
				
				We would add that, where a trustee or administrator is also assisting with the communication of a share or incentive offer on behalf of the issuer (many large ASX listed companies and multinational groups outsource the implementation and administration of their share plans to third party specialist service providers of this nature), that trustee or administrator should also benefit from the same relief in relation to hawking and advertising to which the issuer is entitled.

Proposal		Questions		Response
		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?	Yes. The only reason to extend licensing and hawking relief to managed investment schemes other than in the context of a contribution plan would be where the offer of financial products that are interests in a managed investment scheme benefits from disclosure relief (see D5 above).
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.	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?	Yes
		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?	Yes
		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?	Yes. However, this relief should not be limited to circumstances in which disclosure relief under [CO 14/xx] is required, or relied upon, for the offers to employees. In other words, on-sale relief should be provided in relation to shares issued to the trustee of an employee incentive scheme, regardless of whether the shares are then used to satisfy offers made, or rights granted, to employees in reliance on the relief provided by [CO 14/xx] or using another available exemption (eg, the sophisticated investor or senior manager exemption, where available). Provided that the offers made to employees have the benefit of disclosure relief (whether under the Class Order or otherwise), it seems to us that no disclosure concern arises from extending the on-sale relief in this way.
		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.	None immediately come to mind. However, it is difficult to respond to this question without having seen the proposed terms of the revised on-sale relief.

We would welcome further consultation with ASIC on these proposals and would particularly appreciate the opportunity to comment on, and to contribute to the drafting of, the proposed new class order [CO 14/xx].

Any questions or requests for further comment or participation can be addressed to any of the Minter Ellison contacts below:

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