



ASIC

Australian Securities & Investments Commission

REPORT 417

Response to submissions on CP 218 Employee incentive schemes

October 2014

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 218 *Employee incentive schemes* (CP 218) and details our responses in relation to those issues.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 49 *Employee incentive schemes* (RG 49)).

Contents

A	Overview	4
	Responses to consultation.....	4
	ASIC's response	5
B	Listed bodies: Who can make offers?	11
	Bodies listed on an eligible financial market.....	11
	Associated bodies corporate of listed bodies	12
C	Listed bodies: Who can participate in offers?	13
	Eligible participants: An expanded definition	13
D	Listed bodies: What financial products can be offered?	16
	Eligible products	16
E	Listed bodies: What structures can be used?	20
	Use of trusts.....	20
	Contribution plans	23
	Loans	24
F	Listed bodies: What general conditions apply?	26
	Period of quotation.....	26
	Issue limit of 5%.....	27
	Criteria for demonstrating interdependence	28
	Disclosure to participants and ASIC	28
	ASIC's exclusion power	29
G	Unlisted bodies: What relief is available?	31
	Who can make offers?	31
	Who can participate in offers (eligible participants)?	32
	What financial products can be offered (eligible products)?	32
	What structures can be used?	33
	What conditions apply?.....	33
	Other issues and responses	38
H	Listed and unlisted bodies: Incidental relief and transitional arrangements	39
	Licensing, advertising and hawking relief	39
	On-sale relief	40
	Transitional arrangements	40
	Appendix: List of non-confidential respondents	42

A Overview

- 1 In Consultation Paper 218 *Employee incentive schemes* (CP 218), we consulted on proposals to widen the scope of class order relief from the disclosure, licensing, managed investment scheme, advertising, hawking and on-sale provisions of the *Corporations Act 2001* (Corporations Act) for offers of financial products under employee incentive schemes.
- 2 This report highlights the key issues that arose out of the submissions received on CP 218 and our responses to those issues. The report is not meant to be a comprehensive summary of all responses received, nor is it a detailed report on every question from CP 218.
- 3 For a list of the non-confidential respondents to CP 218, see the appendix. Copies of these submissions are on the ASIC website at www.asic.gov.au/cp under CP 218.

Responses to consultation

- 4 We received 21 responses to CP 218 from law firms, specialist remuneration consultants, share registries and industry associations. We are grateful to respondents for taking the time to send us their comments.
- 5 The main issues raised by respondents related to:
 - (a) our proposed definition of ‘performance rights’;
 - (b) the conditions we proposed for the use of trusts and loans;
 - (c) the 5% share capital issue limit available in a five-year period for making offers under an employee incentive scheme;
 - (d) the limited scope of relief available to make offers to non-executive directors; and
 - (e) the limited scope of relief available to unlisted issuers.
- 6 Because we asked a large number of technical questions in the consultation paper, when we describe the attitude of respondents to a particular proposal, we are referring only to those who specifically commented on that proposal, and only in a summarised way. We have not drawn any inferences on proposals where respondents did not specifically comment.

ASIC's response

General approach

- 7 We are prepared to provide conditional class order relief where an employee incentive scheme is designed to support interdependence between the employer and its employees for their long-term mutual benefit by aligning their respective interests. This must be done in a way that also provides adequate safeguards for the participants.
- 8 Our approach to our class order relief is to cater for the majority of common circumstances in which employee incentive schemes are offered. This has enabled us to keep the class order simple to use. We will consider case-by-case relief for schemes offered in more unusual circumstances.
- 9 We recognise that the Corporations Act already provides other avenues for offering employee incentive schemes, including making offers to employees with a disclosure document, or in reliance on various exemptions from the need for a disclosure document.
- 10 Because the users of our relief will be different, we have separated our relief into two class orders: one for offers relating to listed bodies—Class Order [CO 14/1000] *Employee incentive schemes: Listed bodies*; and another for offers relating to unlisted bodies—Class Order [CO 14/1001] *Employee incentive schemes: Unlisted bodies*. We have structured this report, and Regulatory Guide 49 *Employee incentive schemes* (RG 49), along the same lines to reflect these differences.
- 11 Where we consider it to be appropriate, we have responded to feedback and adopted a less prescriptive approach. Our class order relief in relation to unlisted bodies is more restrictive in scope, given the lower level of information available to participants. We acknowledge that it will not meet the requirements of all unlisted bodies but consider this to be unavoidable, given the need to ensure that participants have adequate information to make an informed investment decision.

Summary of our final class order relief

- 12 We have included below a summary of our final class order relief in [CO 14/1000] (for listed bodies) and [CO 14/1001] (for unlisted bodies), compared with our previous relief in Class Order [CO 03/184] *Employee share schemes*, and our proposed changes in CP 218: see Table 1.

Note: This is a high-level summary only. For the actual requirements and our guidance, see [CO 14/1000] and [CO 14/1001], and the updated RG 49.

Table 1: Summary of our class order relief in [CO 03/184], our proposed changes in CP 218, and our final relief in [CO 14/1000] and [CO 14/1001]

Relief in [CO 03/184]	Listed bodies		Unlisted bodies	
	Changes proposed in CP 218	Final relief in [CO 14/1000]	Changes proposed in CP 218	Final relief in [CO 14/1001]
Who can make offers?				
<ul style="list-style-type: none"> • Issuers • Associated bodies corporate of the issuer (20% voting power) 	<p>No change</p> <p>Note: See Section B of CP 218.</p>	<p>No change, as proposed</p> <p>Note: See Section B of this report.</p>	<ul style="list-style-type: none"> • Wholly owned subsidiaries of the issuer <p>Note: See Section B of CP 218.</p>	<p>No change, as proposed</p> <p>Note: See Section G of this report.</p>
Who can participate in offers?				
<ul style="list-style-type: none"> • Full-time employees • Part-time employees • Directors 	<ul style="list-style-type: none"> • Contractors (80% of full-time equivalent position (personal, through company or through professional services contracting company)) • Casual employees (12 month prior history and 40% of full-time equivalent position) • Non-executive directors (shares and options only; no performance conditions so no incentive rights) • Prospective participants <p>Note: See Section C of CP 218.</p>	<p>Same as proposed changes except:</p> <ul style="list-style-type: none"> • Contractors (reduced to 40% of full-time equivalent; professional services company omitted) • Casual employees (12 month prior history omitted) • Non-executive directors (all conditions omitted—replaced with ASIC guidance in RG 49 on corporate governance concerns) <p>Note: See Section C of this report.</p>	<p>Same as for listed bodies</p> <p>Note: See Section C of CP 218.</p>	<p>Same as final relief for listed bodies</p> <p>Note: See Section G of this report.</p>

Relief in [CO 03/184]	Listed bodies		Unlisted bodies	
	Changes proposed in CP 218	Final relief in [CO 14/1000]	Changes proposed in CP 218	Final relief in [CO 14/1001]
What financial products can be offered?				
<p>Listed bodies:</p> <ul style="list-style-type: none"> • Shares and stocks on ASX or an approved foreign market • Options over shares and stocks on ASX or an approved foreign market <p>Unlisted bodies:</p> <ul style="list-style-type: none"> • Options over shares and stocks on ASX or an approved foreign market 	<ul style="list-style-type: none"> • Fully paid, and units in, shares or stocks quoted on ASX or an approved foreign market • Depository interests, as specified (e.g. Australian CHESS Depository Interests, UK CREST Depository Interests, US American depository receipts) • ASX quoted stapled securities where one is a share • Options relating to the above • Incentive rights relating to the above (prescribed conditions relating to automatic vesting for no monetary consideration, length of service and performance of issuer or participant) <p>Separate class order for the avoidance of doubt in relation to cash commissions and bonuses</p> <p>Note: See Section D of CP 218.</p>	<p>Similar to proposed changes except:</p> <ul style="list-style-type: none"> • Depository interests (broadened to depository interests in a class able to be traded on an eligible financial market) • Beneficial interests in underlying eligible products that are in a class able to be traded on an eligible financial market • registered managed investment schemes in a class able to be traded on ASX • stapled securities in a class able to be traded on ASX (the need for one of the stapled components to be a share omitted) • Incentive rights (proposed conditions omitted) <p>Separate class order in relation to cash commissions and bonuses replaced with guidance in RG 49</p> <p>Note: See Section D of this report.</p>	<ul style="list-style-type: none"> • Fully paid voting ordinary shares (no other classes of shares permitted) • Options over ordinary shares (no other classes of shares permitted) • Incentive rights relating to ordinary shares (prescribed conditions relating to automatic vesting for no monetary consideration, length of service and performance of issuer or participant) <p>Note: See Section G of CP 218.</p>	<p>Similar to changes proposed except:</p> <ul style="list-style-type: none"> • Fully paid voting ordinary shares (but issuer can have other classes of shares) • Units in fully paid voting ordinary shares • Options over fully paid voting ordinary shares (restriction on the unlisted body having other classes of shares omitted) • Incentive rights relating to ordinary shares (proposed conditions omitted) <p>Note: See Section G of this report.</p>

Relief in [CO 03/184]	Listed bodies		Unlisted bodies	
	Changes proposed in CP 218	Final relief in [CO 14/1000]	Changes proposed in CP 218	Final relief in [CO 14/1001]
What structures can be used?				
<ul style="list-style-type: none"> • Trusts (5% limit, audit obligation) • Contribution plans (no loans) • Loans (no contribution plans) 	<ul style="list-style-type: none"> • Trusts (5% limit and no voting for unallocated holdings, audit obligation) • Contribution plans (30 days opt-out) • Loans (no recourse or limited recourse, no interest payable) <p>Contribution plans can operate alongside loans</p> <p>Note: See Section E of CP 218.</p>	<p>Similar to proposed changes except:</p> <ul style="list-style-type: none"> • Trusts (5% holding limit; the trustee able to vote at its own discretion if in the best interest of beneficiaries and trustee is not the body or an associate of the body; separate audit obligation omitted; reasonable disbursements) • Contribution plans (opt-out increased to 45 days; new requirement that contributions result in underlying eligible products being held on allocated basis and, if so, that this bestows right to direct voting (if any) and right to dividends) • Loans ('no fees' requirement added) <p>Note: See Section E of this report.</p>	<p>Trusts, contribution plans or loans prohibited</p> <p>Note: See Section G of CP 218.</p>	<ul style="list-style-type: none"> • Trusts permitted (no separate audit obligation; holding limit is 20%; the trustee able to vote at its own discretion if in the best interest of beneficiaries and trustee is not the body or an associate of the body; reasonable disbursements) • Contribution plans and loans still prohibited <p>Note: See Section G of this report.</p>
What general conditions apply?				
<ul style="list-style-type: none"> • Quotation period (12 months) • Suspension period (2 days) 	<ul style="list-style-type: none"> • Quotation period (3 months) • Suspension period (5 days) 	<p>Similar to proposed changes except:</p> <ul style="list-style-type: none"> • 5% issue limit changed to current offer plus offers over past 3 years, and formula simplified 	<p>Similar to listed bodies except:</p> <ul style="list-style-type: none"> • Quotation and suspension period (not relevant to unlisted bodies) 	<p>Similar to final relief for listed bodies except:</p> <ul style="list-style-type: none"> • Offers of only fully paid voting ordinary shares (but other classes of shares for non-participants permitted)

Relief in [CO 03/184]	Listed bodies		Unlisted bodies	
	Changes proposed in CP 218	Final relief in [CO 14/1000]	Changes proposed in CP 218	Final relief in [CO 14/1001]
What general conditions apply? (continued)				
<ul style="list-style-type: none"> • 5% issue limit (based on current offer and offers over past 5 years) • Certain prescribed disclosure (e.g. about general advice warning, terms of loans, acquisition price) • Provision of offer document and related documents to ASIC within 7 days 	<ul style="list-style-type: none"> • 5% issue limit (current offer plus offers over past 5 years with detailed formula for calculating this percentage) • Interdependence test (not more than 75% of employee incentive scheme value vests absolutely within 12 months) • Clear, concise and effective offer document • Risk disclosure • Notice to ASIC (prescribed content, within 7 days of first offer) • ASIC has power to exclude body from relying on our class order <p>Note: See Section F of CP 218.</p>	<ul style="list-style-type: none"> • Interdependence test (75% within 12 months test omitted and replaced with an 'object' clause) • Risk disclosure substantially reduced to general product risks • Notice to ASIC (prescribed form, content significantly reduced, increased notification period to no later than one month) <p>Note: See Section F of this report.</p>	<ul style="list-style-type: none"> • \$1,000 ordinary share offer (unlisted body may only have one class of shares, being fully paid voting ordinary shares; and a number of conditions including audited accounts or expert's report, expert's report on exercise/vesting) <p>Note: See Section G of CP 218.</p>	<ul style="list-style-type: none"> • Offers of ordinary shares, units in shares, options and incentive rights) for no more than nominal monetary consideration • Up to \$5,000 limit per participant per year • Basis of valuation disclosed and approved by directors • Unaudited financial report and directors' solvency declaration (changed from audited accounts) unless statutory obligation to prepare audited accounts or audited accounts are otherwise prepared • Obligation to provide future financial report • Prominent warning about illiquidity and realisation value • Payment of monetary consideration on exercise or vesting, where: underlying shares are quoted; or current disclosure document (offer information statement or prospectus) provided; or consideration verified if at arm's length and not with an associate; or an independent expert's report provided if not at arm's length or with an associate of the body • Issue limit of 20% (up from 5%) based on current offer plus offers over past 3 years; calculation formula simplified (same formula as for listed bodies) <p>See Section G of this report.</p>

Relief in [CO 03/184]	Listed bodies		Unlisted bodies	
	Changes proposed in CP 218	Final relief in [CO 14/1000]	Changes proposed in CP 218	Final relief in [CO 14/1001]
What other relief applies?				
<ul style="list-style-type: none"> Licensing relief Advertising relief Hawking relief Incidental managed investment scheme relief On-sale relief [CO 04/671] 	<p>Minor broadening as a result of other changes discussed above.</p> <p>Note: See Section H of CP 218.</p>	<p>Similar to changes proposed except:</p> <ul style="list-style-type: none"> Trustees added to advertising and licensing relief for advice and incidental managed investment schemes <p>Note: See Section H of this report.</p>	<p>Same as for listed bodies</p> <p>Note: See Section H of CP 218.</p>	<p>Same as for listed bodies (except no incidental managed investment scheme relief)</p> <p>Note: See Section H of this report.</p>

B Listed bodies: Who can make offers?

Key points

Responses were generally supportive of the proposed updates to our relief and guidance in relation to which listed bodies and their related parties can make offers under an employee incentive scheme.

We received feedback suggesting that we should broaden the scope of our class order relief to include bodies listed on other foreign markets. We do not agree and have retained our list of specified eligible financial markets.

We also received feedback that ASIC should leave it to the bodies to determine whether there is a sufficient connection between participants and the listed body. We do not consider it appropriate to leave it to the listed body to decide whether relief should apply, and have retained our proposal that our class order relief should cover the listed body and its associated bodies corporate.

Bodies listed on an eligible financial market

- 13 We proposed in CP 218 that our class order relief would cover issuers that are listed on Australian Securities Exchange (ASX) or on an approved foreign market, as set out in [CO 03/184]. We consider these markets to be comparable to the ASX in terms of being fair, efficient, well-informed and internationally competitive markets.
- Note: The approved foreign markets, as proposed in CP 218, comprised the American Stock Exchange, Borsa Italiana, Bourse de Paris, Bursa Malaysia Main Board and Bursa Malaysia Second Board, Eurex Amsterdam, Frankfurt Stock Exchange, Hong Kong Stock Exchange, JSE (also known as the Johannesburg Stock Exchange), London Stock Exchange, Nasdaq Global Market, Nasdaq Global Select Market, New York Stock Exchange, New Zealand Stock Exchange, Stock Exchange of Singapore, SWX Swiss Exchange, Tokyo Stock Exchange and the Toronto Stock Exchange.
- 14 Some submissions suggested that, instead of specifying eligible financial markets by name, we should apply a principles-based approach, based on certain criteria, including being a member of the World Federation of Exchanges and overseen by a government regulatory authority. It was also suggested that this would avoid the impact of name changes when consolidation or mergers occur.
- 15 We also received feedback that we should include foreign markets in our class order relief, where ASIC has given individual relief in relation to those markets, and make it clear whether this relief covers only financial products quoted on the main board of those approved markets.

ASIC's response

We have retained our names-based approach in relation to issuers operating on approved foreign markets (see the list of eligible financial markets set out at Table A in [CO 14/1000]) because we are satisfied that these markets are comparable to ASX, as stated above. We will continue to consider case-by-case relief for other markets: see RG 49.21–RG 49.22.

While we may have given individual relief in relation to other markets, such relief is based on a number of factors, only one of which is the market on which the issuer is listed. This means there may be instances where approval for an issuer in relation to a market where we have previously granted individual relief may not be granted in all other cases.

Associated bodies corporate of listed bodies

- 16 In CP 218, we proposed to provide relief for listed bodies and their associated bodies corporate (i.e. those with a holding of 20% or more) to offer employee incentive schemes under our new class order. We proposed this 20% threshold because we considered that it would provide a sufficient connection between the listed body and the associated body corporate so that an offer of eligible products relating to the listed body by an associated body corporate would still achieve the objective of interdependence between the employer and employee.
- 17 While this was broadly supported, some respondents submitted that interdependence should be a matter for the boards rather than a matter that ASIC should prescribe.

ASIC's response

We think that permitting bodies to assess whether there is a sufficient level of interdependence may result in uncertainty and inconsistency in approach. This would permit bodies to decide that a contractual relationship between the listed body and an employer would be sufficient to establish interdependence between the employer and employee.

We have proceeded with our proposal that class order relief should apply to listed bodies and their associated bodies corporate.

C Listed bodies: Who can participate in offers?

Key points

There was widespread support from respondents to expand the categories of eligible participants that would be covered by our class order relief to include contractors, casual employees and prospective employees.

Some submissions suggested that some of our proposed parameters were still too narrow.

We have retained the categories of participants that we proposed in CP 218 but reduced the requirements in relation to contractors and removed the restrictions applying to non-executive directors.

Eligible participants: An expanded definition

- 18 In the context of persons who are engaged by an employer to provide services, we considered in CP 218 that a relationship of interdependence could be established for contractors and casual employees. We also proposed to include prospective participants in our class order relief, as we understand that it may be necessary to communicate with these candidates prior to engagement, and it may also be the case that offers in relation to an employee incentive scheme are made concurrently with an offer of engagement. This proposal was widely supported.

Contractors

- 19 While the majority of submissions supported the inclusion of contractors in our class order, on the terms we proposed, two submissions suggested that we apply the definition of ‘contractors’, as used in the *Income Tax Assessment Act* (s83A–325). Another submission suggested that we not impose conditions because the requirement for interdependence should be a commercial matter for the relevant parties.
- 20 A suggestion was also made to include prospective contractors who are engaged for six or more months, as well as a reduction in the pro-rata equivalent hours from 80% to 40% (in line with the condition that ASIC has proposed for long-term casual employees). One submission suggested that it did not make sense that a part-time employee working less than 40% of a full-time equivalent position would be eligible, but not a contractor or casual employee engaged on the same basis.
- 21 One respondent proposed that ASIC require that the vesting should not occur for a period of 12 months, rather than requiring a qualifying 12-month period before an offer can be made.

ASIC's response

We have not proceeded with our proposal to require a 12-month prior relationship with the contractor as we agree that there are many other ways to establish interdependence.

Also, for consistency, we have reduced the requirement for part-time contractors to work the pro-rata equivalent of a full-time position from 80% to 40%. This brings it into line with the requirements for part-time casual employees.

Casual employees

- 22 There was broad support for including casual employees in our new class order.
- 23 One respondent submitted that requiring a pro-rata equivalent of 40% of a full-time position does not accommodate longstanding full-time casual employees such as those employed in some seasonal industries (e.g. agricultural, cultural and sporting events).

ASIC's response

We have proceeded with the proposal that casual employees are those who are, or might reasonably be expected to be, engaged to work the pro-rata equivalent of 40% or more of a comparable full-time position.

We have not extended our class order relief to cover seasonal casual employees because we consider the circumstances to be too variable. We will consider any such instances on a case-by-case basis.

Prospective employees

- 24 There was broad support for the new class order to enable employers to discuss their employee incentive schemes with prospective employees. Some respondents submitted that this should encompass prospective contractors and prospective casual employees.
- 25 While most respondents agreed with some of our proposed conditions, there were a number who pointed out that relief should not be restricted to offers made under an existing employee incentive scheme. The example provided was an employee incentive scheme offered to a senior executive who would be compensated under a new employee incentive scheme arrangement for the loss they would incur from an early departure from their existing employer's employee incentive scheme.

ASIC's response

We have proceeded with our proposed class order relief (advertising and hawking relief) that will enable bodies to discuss the terms of their employee incentive schemes with candidates for employment, and to make offers that are conditional on the acceptance of an offer. The candidates (or 'prospective employees') are referred to in our new class orders and updated guidance as 'prospective participants' and will include persons being engaged as employees, contractors or casual employees.

We have removed the requirement that offers can only be made in relation to an existing employee incentive scheme, as we accept that there may be circumstances where an existing arrangement may not always be appropriate when making offers to prospective participants.

Non-executive directors

- 26 While a number of respondents agreed with our proposal to provide a separate, more restricted, regime for offers under an employee incentive scheme made to non-executive directors, there was also strong disagreement from a number of respondents.
- 27 A dissenting view suggested that we were seeking to apply our disclosure relief powers to address an unrelated purpose concerning governance-related matters; and that our reliance on the ASX Corporate Governance Principles and Recommendations was not appropriate, given that these relate to a non-mandatory disclosure regime that is addressed on an 'if not, why not' basis.
- 28 One respondent submitted that ASIC should permit offers of options to non-executive directors, provided that there were no conditions relating to the performance of the issuer.

ASIC's response

We have decided not to proceed with our proposal to require more restrictive conditions for offers under an employee incentive scheme made to non-executive directors. Not all non-executive directors are independent directors and we can see some disadvantages in imposing requirements appropriate to independent directors on all non-executive directors.

Instead, we have provided guidance in RG 49 by emphasising that schemes with performance-based features or conditions should not be offered to non-executive directors, and that directors electing to receive a portion of their fees in the form of shares without any performance conditions would better satisfy 'best practice' corporate governance principles.

D Listed bodies: What financial products can be offered?

Key points

There was strong support for our proposal to expand the scope of our relief to cover offers by listed bodies of equity-based securities, including stapled securities, certain quoted depository interests, and options over and performance rights in relation to these quoted financial products.

Some respondents submitted that we had not gone far enough in covering the types of financial products to which relief should apply and that the conditions proposed for our definition of 'performance rights' would exclude a large number of derivatives currently being offered under employee incentive schemes.

We decided to expand our class order relief to cover offers by listed bodies of units in registered managed investment schemes (registered schemes) in a class able to be traded on ASX; and stapled securities in a class able to be traded on ASX, without the need to be stapled to a share. We have also modified the definition of 'performance right' (referred to in our new class orders and updated RG 49 as an 'incentive right') so that it will encompass a significant number of derivatives that are being offered in relation to listed bodies.

Eligible products

- 29 We received wide support for the inclusion of the following categories of financial products, as proposed in CP 218.

Shares or stocks quoted on ASX or an approved foreign market

- 30 Respondents agreed with including fully paid ordinary shares quoted on ASX or fully paid ordinary shares or stocks quoted on an approved foreign market (but were concerned about these approved foreign markets being limited to a specific list: see paragraphs 13–15).

Units in registered schemes and stapled securities quoted on ASX

- 31 Respondents agreed that we should consider granting relief for offers of units in registered schemes—mainly raised in the context of stapled securities. The submissions suggested that our class order relief should cover units in registered schemes, whether traded on ASX or an approved foreign market, and should also include offers of options over and performance rights in relation to these products.

Depository interests

- 32 Respondents generally agreed with our proposal to include in our class order relief depository interests that are quoted on ASX or an approved foreign market—for example, CHESS Depository Interests (Australian CDIs) quoted on ASX, CREST Depository Interests (UK CDIs) quoted on the London Stock Exchange (LSE) and American depository receipts (ADRs) (also known as American depository shares (ADSs)) quoted on the New York Stock Exchange (NYSE) or Nasdaq—where the underlying security is a share or stock (i.e. our relief for ADRs would be limited to Level II and Level III ADRs).
- 33 However, a few respondents pointed out that there is a larger suite of foreign depository interests—which are either quoted on an approved foreign market, or the underlying security is a share or stock that is quoted on an approved foreign market—that are offered under employee incentive schemes, and that we should include these in the new class order on the grounds that they are economically and beneficially equivalent to the UK and US depository interests mentioned above.

Options over shares or stocks quoted on ASX or an ASIC-approved foreign market

- 34 [CO 03/184] already provides relief for these classes of financial products and respondents were generally supportive of our proposal to include these in our new class order.

ASIC's response

We have adopted the proposal in CP 218 to provide class order relief for offers under an employee incentive scheme of:

- shares or stocks in classes that are able to be traded on ASX or an ASIC-approved foreign market;
- units in registered schemes, and stapled securities, in classes that are able to be traded on ASX; and
- depository interests in shares or stocks in classes that are able to be traded on ASX or an ASIC-approved foreign market.

We understand that this covers the vast majority of employee incentive schemes that have either relied on [CO 03/184] or have sought individual ASIC relief.

We have not included offers of stapled securities traded on an approved foreign market as we have rarely been asked to grant relief for such offers.

We will continue to consider granting relief on a case-by-case basis for depository interests quoted on any other foreign market.

Performance (incentive) rights

- 35 Subject to the comments in paragraph 37, respondents agreed overwhelmingly with our proposal to include in our new class order offers of performance rights for ‘no more than nominal monetary consideration’.
- 36 We had proposed that offers of performance rights would require automatic vesting for no monetary consideration, and a length of service requirement or performance hurdle.
- 37 A large number of respondents did not support the imposition of these conditions as they said that bodies would not always adopt these features when offering performance rights. Many respondents submitted that these express requirements were too narrow and would impede the types of performance rights that employers would wish to offer. The responses suggested that ASIC should not be concerned about the offer of performance rights without these conditions because the value received would still relate to or be determined by the value of the underlying financial products, whether this is paid in cash or by the issue or transfer of underlying financial products.

ASIC’s response

In light of the responses received, we have decided to use the term ‘incentive rights’ (rather than ‘performance rights’) to refer to financial products that constitute a ‘derivative’ under the Corporations Act when offered under an employee incentive scheme. We note, in addition, that the term ‘performance rights’ has a specific narrower meaning in some markets (e.g. the ASX Listing Rules).

We have also decided not to require that:

- incentive rights must vest automatically—this condition was an attempt to differentiate between options under Ch 6D and derivatives under Ch 7, but we accept that such a distinction is unnecessary;
- vesting must occur for no monetary consideration—we accept that, on vesting, the issue or transfer of any underlying financial product may be conditional on payment of more than nominal monetary consideration (as can be the case with the exercise of options); and
- performance conditions apply (e.g. relating to the length of service or performance of the recipient or issuer)—we accept that prescriptive conditions may exclude some legitimate employee incentive scheme arrangements that are otherwise able to meet our policy objectives of supporting interdependence and of not being offered for fundraising purposes.

As long as the value to be received by the participant is referable to an underlying financial product—either directly (e.g. the value of the underlying financial product) or indirectly (e.g. the value of any appreciation in the share price of the underlying financial

product between two dates, the value of a dividend that is declared)—we believe that there is a sufficient connection to the underlying financial product to constitute a financial product that is a derivative for the purposes of Ch 7 of the Corporations Act that will be covered by the relief in our class order.

Other financial products

- 38 We received mixed responses about the inclusion of other financial products in our class order relief. Some respondents submitted that we should include, for example, foreign collective interests in our class order, while others agreed that we could continue dealing with other financial products on a case-by-case basis.

ASIC's response

Because we do not receive a high volume of these types of applications, we have decided to continue to assess on a case-by-case basis offers of any other classes of financial products, including collective investment interests quoted on any other Australian prescribed financial market or foreign market.

Commissions and cash bonuses

- 39 In CP 218, we said we would consider whether to provide a separate class order for the avoidance of doubt that employment or employment-like arrangements that awarded cash payments determined by measures unrelated to underlying financial products (e.g. volume-based commissions or bonuses) were not financial products for the purposes of Ch 7.
- 40 We received mixed responses to this proposal. While some welcomed the clarification, others submitted that there was currently no ambiguity and that, by introducing a new class order, it would have the contrary effect of introducing ambiguity where none existed.

ASIC's response

In light of the mixed responses, rather than create a new class order, we have stated in RG 49 that, in our view, remuneration-related arrangements that involve cash commissions or bonuses are not financial products intended to be regulated by Ch 7.

E Listed bodies: What structures can be used?

Key points

Respondents supported our proposal to permit the use of trusts for holding underlying eligible products on an allocated basis and an unallocated basis.

Some submissions did not agree with our proposed conditions relating to the auditing of financial records, the inability of trustees to claim fees and charges, and the requirement that participants have substantially the same rights as if they were the legal owner.

There was broad agreement with our proposal to permit the use of both contribution plans and loans in an employee incentive scheme.

While we retained a number of conditions for trusts, loans and contribution plans, we have decided:

- to remove the audit obligation for trusts;
- to recognise that dividends could be applied to pay down loans;
- to permit claims for reasonable disbursements; and
- not to prevent professional trustees who are not associates of the body from voting under their duties as trustee if it is in the best interest of beneficiaries for the trustee to do so.

Use of trusts

- 41 There was general support for our proposal to permit the use of trusts for holding underlying eligible products on an allocated basis and an unallocated basis. However, there were specific concerns about some of the conditions proposed, as outlined below.

General conditions for trusts

- 42 Respondents disagreed with a number of our proposed general conditions for trusts, including some that existed under [CO 03/184]. They suggested that:
- (a) requiring that the sole purpose of the trust must be to hold underlying eligible products was unnecessary as this was already a taxation requirement;
 - (b) there should be no annual audit requirement—where relevant, this would already be included as part of the audited financial statement obligation under the Corporations Act, and this requirement would otherwise represent an unreasonable burden;

- (c) the right of a beneficiary to inspect the financial records was not useful provided that the beneficiary would be given or have access to information about their own trust interest; and
- (d) restricting the levy of fees and charges out of assets of the trust—other than reasonable disbursements, brokerage and tax—was not appropriate because all legitimate fees and charges should be able to be deducted from assets of the trust.

- 43 One respondent submitted that it should be made clear that the trust should be entitled to hold financial products for employees in relation to an employee incentive scheme regardless of whether or not the scheme was operating in reliance on our class order relief.
- 44 CP 218 also proposed to limit licensing relief for trustees to the issuer or its associated bodies corporate, rather than the wider group of any associate of the issuer, as permissible under [CO 03/184].
- 45 We received submissions suggesting that licensing relief should be extended to non-associated bodies corporate of foreign issuers in situations where the non-associated body is appropriately licensed in the foreign jurisdiction, and where only a small number of Australian employees participate in a global employee incentive plan.

ASIC's response

We agree that trust arrangements are an effective mechanism to:

- issue or acquire eligible products and hold these products in anticipation of delivery under an employee incentive scheme; and
- assist in the administration of contribution plans and loans.

We have modified the 'sole purpose' requirement but have retained the obligation to maintain proper written financial records as our class order will be relied on by both Australian and foreign bodies. We have made it clear that, as long as the trust is being used for the purpose of an employee incentive scheme, it does not matter whether or not it is operating in reliance on our class order relief.

We have removed the requirement to have the financial records audited as we accept that the burden will be likely to outweigh the benefit where the body is not otherwise required to undertake an audit in respect of the trust arrangement.

We consider that any fees or charges should not be levied for operating and administering the trust, but that reasonable disbursements, brokerage and tax legitimately incurred by the trust may be payable from the assets of the trust. We consider this is a reasonable compromise between the interests of the issuer and those of the beneficiaries.

We have adopted the proposal that licensing relief for custodial and depository related services apply to the listed body and its associated bodies corporate; otherwise an appropriately licensed trustee should be used. We will consider individual relief in exceptional circumstances, such as where the custodial and depository services are provided to a small number of Australian-based employees of a foreign listed body (e.g. representing no more than 5%, globally, of the employees participating in the employer's employee incentive schemes).

Allocated products

- 46 Some respondents did not agree with our proposal to adopt the existing conditions in [CO 03/184] that the trust deed should provide binding covenants that give the beneficiary substantially the same rights as if they were the legal owner, including the right of the beneficiary to direct voting and to receive dividends.
- 47 The respondents submitted that this condition was too wide. They said that, despite the underlying financial products being held specifically for the benefit of a particular beneficiary, this did not mean that the beneficiary should have substantially the same rights as a legal owner. One respondent suggested that the above conditions should only be required when the financial products have vested, but remain in trust as a means of restricting disposal.

Unallocated products

- 48 Respondents generally welcomed our proposal to permit the use of trusts to hold unallocated products on a pooled basis under our class order relief.
- 49 A number of respondents disagreed with our proposal to prevent a trustee of a trust holding unallocated products from voting at the trustee's own discretion. They pointed out that trustees, as fiduciaries, have an obligation to act in the best interests of beneficiaries as a group, which may require them to exercise the right to vote at their own discretion.
- 50 Two respondents disagreed with our proposal to restrict holdings to no more than 5% of the issuer's voting ordinary share capital. It was suggested that this would be imposing a new legislative obligation and would impose an unreasonable compliance burden. One respondent said that the 5% limit should take into account corporate actions that may result in the 5% limit being exceeded, and another submitted that the 5% limit should not include unallocated holdings where the trustee was unable to vote. Another respondent suggested that we should permit the 5% limit to be increased if shareholder approval was obtained. There was also a suggestion that 10% would be beneficial and that limiting the percentage by which it could increase over a period of time would limit the ability for abuse by bodies attempting to build a blocking stake.

ASIC's response

[CO 14/1000] will facilitate the use of trusts in relation to employee incentive schemes and recognises that eligible products can be held in two ways. The class order provides that the trustee can hold underlying eligible products on an allocated basis (i.e. the products are recorded against the name of a particular participant), or on an unallocated basis (i.e. the products are held in a pool for the benefit of eligible participants generally).

The class order imposes a voting restriction on the trustee holding underlying eligible products on either an allocated or unallocated basis where the trustee is the listed body or its 'associate' (as defined in s10, 11, 13, 15 and 17 of the Corporations Act). We do not accept that it would be imposing a new legislative requirement to set a voting restriction in relation to relief for disclosure and financial services licensing, because of concerns with Ch 6 of the Corporations Act. ASIC is entitled to have regard to the operation of all legal requirements in the Corporations Act, and will take these into account when considering whether or not to facilitate relief. Parts 2J.1 and 2J.2 specifically deal with capital management and self-acquisitions. ASIC has also established policy—in Regulatory Guide 233 *Indirect self-acquisition: Relief for investment funds* (RG 233)—and facilitated class order and case-by-case relief.

We consider that a trustee who is not an associate of the listed body may be entitled to vote at the trustee's discretion in the discharge of its fiduciary obligations where the trustee considers it in the best interests of the beneficiaries.

We consider that setting a 5% holding limit is consistent with the 5% issue limit. We will consider taking a no-action position or granting case-by-case relief, if the 5% limit is or will be exceeded due to exceptional circumstances—which may include a corporate action.

Contribution plans

- 51 In general, respondents indicated that our proposed conditions for contribution plans were too prescriptive and would exclude contribution arrangements that were necessary to comply with certain taxation requirements.
- 52 Two respondents submitted that our proposal to prohibit the use of contribution plans to acquire options would prevent the use of savings plans such as the UK Government's tax-beneficial 'save-as-you-earn' (SAYE) schemes.
- 53 There was also general agreement with the proposed opt-out requirement, although some respondents submitted that this period should be subject to compliance with legal requirements and trading restriction requirements of the issuer.

ASIC's response

We have simplified our definition of 'contribution plans' by omitting some of the more prescriptive proposed requirements. We consider that the revised conditions will still safeguard a participant's contributions, while accommodating various taxation and operational requirements of the employer.

If after-tax contributions are held on behalf of the contributing participant, our class order will require that the funds are held in an account with an authorised deposit-taking institution (ADI). This can operate in Australia or offshore.

If underlying eligible products have been acquired using contributions made under a contributions plan, the eligible participant must have a right to exercise, or direct the exercise of, any voting rights in relation to the underlying eligible products, and have a right to receive any dividends.

As proposed, the class order will not facilitate employee incentive schemes that require contribution plans to be used to acquire options or incentive rights. In our view, option plans, such as the UK's SAYE schemes, are not excluded from our class order because the body is not receiving a contribution, and no contribution is being used by the body to acquire the eligible products.

The class order will provide a period of up to 45 days to opt out of a contribution plan. We do not consider that this requirement conflicts with trading blackouts because it is designed to enable a participant to withdraw from making further contributions. It does not seek to regulate the liquidation or closing out of positions which would remain subject to the body's trading policies.

Loans

- 54 While one submission supported the condition about loans being on terms that are no recourse or limited recourse, the other submissions that responded to this proposal considered that loans should be entitled to charge interest and pointed out that dividends were often applied to reduce the loan balance.
- 55 Our proposal to permit a loan arrangement to exist alongside a contribution plan was supported by all submissions that responded to this proposal.

ASIC's response

We have adopted the proposed limitation that loans must be on terms that are no recourse or limited recourse. This is to address the risks associated with offers of financial products with limited disclosure in circumstances where a participant's financial exposure to the body is already compounded by their employment relationship.

We consider that a body wishing to offer loans should do so at its own cost rather than at the expense of the participant. This means that our class order relief will apply where there are no fees and no interest payable on the loan. Our class order contemplates that dividends may be used to repay the outstanding loan balance.

While some respondents are likely to want to use other commercial arrangements—particularly, as there may be some taxation implications resulting from our restrictions—we note that it may be open to them to seek to rely on other statutory exemptions to offer such arrangements.

As proposed in CP 218, our class order will not preclude employee incentive schemes that use both contribution plans and loans from relying on our relief.

F Listed bodies: What general conditions apply?

Key points

All respondents supported a relaxation of the quotation requirements, and most respondents agreed that offers of options and incentive rights be offered for 'no more than nominal monetary consideration'.

Some respondents did not agree with our formula for calculating the 5% issue limit, and many did not support our proposal to establish interdependence by imposing a 12-month condition (where no more than 75% of an employee incentive scheme could vest absolutely within a 12-month period). We have simplified the formula for calculating the 5% issue limit and are not proceeding with a quantitative formula for assessing interdependence.

We have also:

- significantly reduced the content of the notice of reliance on our class order;
- retained our requirement that the offer document be presented in a clear, concise and effective manner; and
- omitted the condition to provide disclosure of material risks of the body.

Period of quotation

- 56 Respondents agreed with our proposal to reduce the quotation period from 12 months to at least three months, and to increase the suspension period from two to five trading days in the shorter of the period since quotation or 12 months.
- 57 Two respondents submitted that our class order should also accommodate reconstruction situations where the new securities would not meet the quotation requirement but the old body's securities would.

ASIC's response

We have proceeded with our proposal to reduce the quotation period from 12 months to three months, and increase the suspension period from two to five days.

We will continue to consider case-by-case relief where the body is unable to satisfy the quotation requirements provided that other disclosure exists that can provide equivalent information to participants, or where there is no new investment decision to be made by investors due to the change in corporate ownership—for example, where there is a current prospectus, a Pt 5.1 scheme explanatory statement or a foreign scheme of arrangement that would qualify under Class Order [CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Part 5.1 schemes and foreign schemes of arrangement*.

Issue limit of 5%

- 58 We had proposed a formula for calculating the 5% issue limit that included the maximum number of underlying products that might be issued under the current offer when aggregated with the maximum number offered in the past five years. The policy rationale for the 5% issue limit in [CO 03/184] was to ensure that the purpose of the employee incentive scheme was not fundraising.
- 59 Some respondents highlighted a number of difficulties with our proposed formula of how the 5% was to be calculated. They pointed out that the number may not be known at the time of the offer, or may be cash settled which would not result in any issue.
- 60 In addition, some respondents submitted that, where offers were for nil or nominal monetary consideration, these should also be excluded from the calculation as they were not being offered for fundraising purposes.

ASIC's response

We consider that imposing a share capital issue limit of 5% serves a number of purposes, one of which is to ensure the object of the employee incentive scheme is not fundraising.

We also consider 5% to be a reasonable issue limit for listed bodies. Where a large amount of capital is intended to be issued under an employee incentive scheme arrangement, we consider that the benefits of providing disclosure relief do not outweigh the risks of removing the disclosure protections.

We therefore consider that it is not appropriate to provide class order relief to offers under an employee incentive scheme where the 5% issue limit may be exceeded. We will consider case-by-case relief in these circumstances (e.g. where a corporate action is about to occur).

We have also amended and simplified the formula used to calculate the 5% issue limit. The class order now requires that offers under an employee incentive scheme can only be made where the body reasonably believes it will not exceed the 5% issue limit, when the calculation includes:

- the number of underlying eligible products that may be issued under the current offer—including in relation to the exercise of options and vesting of incentive rights;
- the number of underlying eligible products that have been or may be issued as a result of offers made under an employee incentive scheme at any time during the previous three years in reliance on ASIC relief.

Because a large number of employee incentive schemes operate over a three-year period, we have reduced the number of years that need to be included when calculating the 5% issue limit from five years to three years.

Criteria for demonstrating interdependence

- 61 One of ASIC's fundamental policy objectives for granting employee incentive scheme relief is to reduce the burden of compliance on offers of financial products that support long-term mutual benefit between issuer-employers and their employees. Our proposal was to require that no more than 75% of the value of an employee incentive scheme could fully vest within 12 months. This was intended to operate as a proxy for this objective.
- 62 Most respondents did not agree with this requirement. They considered that the requirement was unnecessary to satisfy the principle of interdependence, that ASIC should not dictate how interdependence was to be achieved, and that this should remain a commercial issue for the body.
- 63 Some submissions also pointed out that many schemes build in a contingency for early vesting for unexpected events such as death, disability and redundancy, which would then breach our proposed requirement.

ASIC's response

We have updated our guidance in RG 49 to make it clear that interdependence is a fundamental principle underpinning our class order relief. This is included as an introductory 'object' clause in our class order relief.

However, we have removed the conditions that we had proposed would need to be satisfied in order to demonstrate that interdependence has been established. This will be left for the body to determine.

Disclosure to participants and ASIC

- 64 A number of respondents disagreed with our proposal to require that the offer document for an employee incentive scheme must be presented in a clear, concise and effective manner, with a summary of the key material risks. Respondents submitted that these were the requirements of a regulated disclosure document, which would diminish the purpose of reliance on ASIC class order relief.
- 65 We received support for the proposal to alleviate the administrative burden of having to lodge the offer documents along with trust deeds and plans or summaries of plans. While many respondents supported the introduction of a simplified form, others submitted that some of the information required was unnecessary and would have the effect of increasing compliance costs. One respondent submitted that it was unreasonable for a signatory to the form to have to attest to compliance, particularly where some of the obligations had subjective elements.

- 66 A few respondents submitted that these conditions related to administrative processes where relief should not be lost if there was a failure to adhere to the condition, such as having to lodge the notice to ASIC within a specified period of time.
- 67 Most respondents considered that none of the offer information in the notice to ASIC should be made publicly available. Two respondents pointed out that, in the context of listed entities, much of the information about an employee incentive scheme would already be covered in other continuous disclosure and financial reporting obligations.

ASIC's response

We have retained the requirement that the offer document must be presented in a clear, concise and effective manner. We do not think this is unduly onerous, given that we have alleviated the need to prepare a regulated disclosure document. We consider this provides an appropriate balance between the information needs of participants and the presentation and amount of information the body should be providing to participants to appropriately inform them about the terms of their employee incentive scheme.

We have replaced the requirement to include a summary of the key risks with a requirement to include general information about the risks of acquiring and holding the eligible product.

The general advice warning that was used in [CO 03/184] has also been retained.

The proposal to require notification to ASIC (using the revised ASIC Form CF08 *Notice of reliance on Class Order [CO 14/1000] Employee incentive schemes: Listed bodies; and Class Order [CO 14/1001] Employee incentive schemes: Unlisted bodies*) will replace having to provide the relevant employee incentive scheme documents to ASIC. We have further reduced and simplified the information content of this form and provided more flexibility with the notice period (i.e. no later than one month after an offer is first made in reliance on the class order).

ASIC's exclusion power

- 68 Respondents did not disagree with our proposal to preserve the power to exclude bodies from relying on our new class order relief. However, one respondent submitted that ASIC should provide guidance on when this power would be exercised.

ASIC's response

We will retain the power to exclude a particular body from being entitled to rely on our class order relief for employee incentive schemes.

We have set out in RG 49 that we will only seek to exercise this power in circumstances where we are concerned that there is substantial, systemic or repeated non-compliance with the conditions of ASIC relief, corporate governance failure, or non-compliance with the Corporations Act.

This exclusion would only be imposed after a body has been afforded procedural fairness to respond to our concerns, and, if imposed, could be withdrawn if the concerns were adequately addressed.

G Unlisted bodies: What relief is available?

Key points

Respondents supported the proposal to expand the scope of employee incentive scheme relief for unlisted bodies to cover wholly owned subsidiaries. The proposal to enable the offer of shares, options and performance rights (now renamed 'incentive rights') was also supported.

The majority of the restrictions we proposed in order to protect participants in the less regulated and less transparent environment of unlisted bodies were generally not supported.

Given that the users of our class order relief will be different to those seeking relief for offers relating to listed bodies, we decided to create a separate class order—[CO 14/1001]—specifically for unlisted bodies.

To maintain participant protections in the unlisted environment, we have retained the proposal that offers of all eligible products must be for no more than nominal monetary consideration, and must not involve contribution plans or loans. However, to assist unlisted bodies, we have omitted or amended a number of our other proposed restrictions, including permitting the use of trusts, raising the offer limit to \$5,000 in value per participant per year, and increasing the issue limit to 20% of the issued capital of the unlisted body.

Who can make offers?

- 69 We proposed in CP 218 to expand the scope of our class order relief to include the unlisted body and its wholly owned subsidiaries.
- 70 We received some submissions suggesting that we should consider expanding this to cover a body in which the unlisted issuer has a controlling interest. This was submitted on the basis that this provides a higher level of interdependence than our proposal for listed bodies.

ASIC's response

We have proceeded with the proposal that our class order relief should apply to unlisted issuers and their wholly owned subsidiaries.

We consider that other considerations relating to the lower level of information and transparency about unlisted issuers, and the lack of liquidity of their eligible products, create greater risks for participants, which may then be compounded where the unlisted issuer controls but does not completely own a subsidiary. In such instances, we may still consider whether case-by-case relief is warranted.

Who can participate in offers (eligible participants)?

- 71 Respondents supported our proposal to extend class order relief for offers made in relation to unlisted bodies to include the same categories of participants that were proposed for relief in relation to listed bodies—that is, full-time or part-time employees (including executive directors), non-executive directors, contractors, casual employees and prospective participants: see also the responses discussed in Section C in relation to listed bodies.

ASIC's response

For the reasons discussed in paragraphs 19–28, we have adopted in our definition of 'eligible participant' in [CO 14/1001] the categories of full-time and part-time employees (including executive directors), non-executive directors, contractors, casual employees and prospective participants. We have applied the same criteria that we have applied to offers relating to eligible participants in relation to listed bodies.

What financial products can be offered (eligible products)?

Ordinary shares, units in shares, options and incentive rights

- 72 Respondents supported our proposal to provide class order relief for offers of shares, options and incentive rights.
- 73 Respondents did not agree that there could only be one class of ordinary shares for offers of shares, or as the underlying securities for options and incentive rights; nor did they agree that incentive rights had to vest automatically for no more than nominal monetary consideration, or that this requirement should depend on the length of service or performance of the participant or body.

ASIC's response

Subject to specific and more restrictive conditions (see ASIC's responses after paragraphs 75–86 below), [CO 14/1001] provides relief for the offer of fully paid voting ordinary shares, units in and options over fully paid voting ordinary shares, and incentive rights referable to fully paid voting ordinary shares, whether by delivery of shares or cash, or some combination of shares and cash.

We have adopted the same definition of 'incentive rights' as the definition we applied in relation to listed bodies. We have also removed the prescribed conditions relating to the automatic vesting of incentive rights for no more than nominal monetary consideration, and the length of service or performance of the issuer or participant (see ASIC's response after paragraph 37).

What structures can be used?

- 74 The proposal to exclude unlisted bodies from using a trust was also not supported. Respondents submitted that it was a useful and beneficial method of offering employee incentive schemes and that it would save costs (including avoiding the need to buy back and cancel shares). One respondent submitted that there was no policy rationale for ASIC excluding the use of trusts from class order relief.

ASIC's response

[CO 14/1001] will enable unlisted bodies to use a trust arrangement to hold fully paid voting ordinary shares. While all offers of eligible products relating to unlisted bodies must be for no more than nominal monetary consideration, it is still open to the unlisted body to create a trust where the ordinary shares are held either on an allocated or unallocated basis.

We have proceeded with our proposal not to provide class order relief for the use of contribution plans and loans for offers relating to unlisted bodies. This is because of the additional financial exposure that this would create for participants who may already be relying on the unlisted body as their primary or major source of income.

While we understand that contribution plans and loans are not uncommon, and may be tax effective—given our concerns about the potential financial risks as well as the adequacy of information available to participants, we consider that these are best dealt with through a disclosure document or in reliance on other appropriate statutory exemptions.

What conditions apply?

Only one class of shares

- 75 A number of respondents said that our proposal to limit our class order relief to offers where there is only one class of shares was unnecessary and too limiting. One respondent suggested that this could work if it was only the offers under the employee incentive scheme that were limited to one class of shares, but that the body should be entitled to issue other classes of shares.

ASIC's response

We have decided to adopt a more facilitative approach by providing that [CO 14/1001] will only apply where offers under the employee incentive scheme in reliance on ASIC relief relate to fully paid voting ordinary shares. The unlisted body is not prevented from issuing other classes of shares (just not to participants under our relief).

Annual share offer limit of \$1,000 per participant

- 76 Many submissions suggested that the offer limit of \$1,000 per participant per year was too low and needed to be raised significantly to be attractive, given the costs involved with establishing and maintaining an employee incentive scheme. Some submissions suggested that the limit should be \$5,000, while another respondent suggested that the limit should align with the tax concessionary thresholds, as adjusted from time to time.

ASIC's response

We have decided to adopt a more facilitative approach by increasing the value to an amount of up to \$5,000 per participant per year. This value will comprise the aggregate value of all shares, units in shares, options and incentive rights.

Valuation of offer

- 77 Respondents did not agree with the proposal to value the offer limit of \$1,000 based on either net tangible assets in audited accounts or in an independent expert's report. They submitted that the costs of auditing or obtaining an independent expert's report, as compared with the value of the offers, would not be justified. One respondent pointed out that some unlisted bodies (e.g. start-up companies) do not have much in the form of tangible assets.

ASIC's response

We have decided to adopt a more facilitative approach by removing the requirement for the valuation to be based on the company's audited accounts or an independent expert's report. This is replaced with a requirement that the directors pass a resolution determining the value and disclosing the methodology used to determine the value. This resolution must be made no more than 12 months prior to the date of the offers on which the valuation is based.

Audited accounts

- 78 It was submitted by some respondents that the proposal to require audited accounts would be too costly for unlisted bodies that did not otherwise prepare audited accounts. Some pointed out that, if the shares were being offered for no monetary consideration and related to the low value of \$1,000, requiring audited accounts was also unwarranted, and ASIC should treat such offers as being equivalent to being offered for nil consideration.

ASIC's response

We have decided to adopt a more facilitative approach by replacing the requirement to provide audited accounts—unless these are required to be prepared under the Corporations Act, or where the unlisted body has decided to prepare audited accounts—with the requirement to provide a special purpose financial report, at the time of the offer and covering a 12-month period; and, if requested to do so in the future, to provide to an eligible participant, within four months of the end of that financial year, the special purpose financial report (or audited financial reports) for that financial year. We will also require a directors' solvency resolution as additional disclosure about the financial position of the unlisted body. This must be approved by the directors no earlier than one month before the making of the offer.

Nominal monetary consideration

- 79 Respondents agreed that the term 'no more than nominal monetary consideration' was appropriate, rather than referring to a set amount, as currently applies under [CO 03/184] in relation to options. It was also preferred over the term 'no monetary consideration'.

ASIC's response

We have adopted the term 'no more than nominal monetary consideration' in [CO 14/1001] when referring to offers under an employee incentive scheme made by unlisted bodies and their wholly owned subsidiaries.

Share offers for no more than nominal monetary consideration

- 80 Some respondents pointed out that requiring these offers to be for no monetary consideration would deny their use under the tax exempt \$1,000 offers and the \$5,000 salary sacrifice offers as these required a contribution. Some submitted that, if offers had to be for no monetary consideration, it was unnecessary to require risk disclosure, given that the financial risk was minimal.

ASIC's response

We have retained the requirement that the offer of ordinary shares (as well as options and incentive rights) must be for no more than nominal monetary consideration. We do not agree that there is no financial risk where there is no monetary consideration required to acquire the shares—our view is that there is always consideration and risk, given that the employee incentive scheme is designed to promote interdependence, and forms an element of many remuneration arrangements.

Issue limit of 5%

- 81 The proposal to have a 5% issue limit was not supported. Some respondents suggested that this should be significantly higher for unlisted bodies.

ASIC response

We have increased the issue limit from 5% to 20% of the issued capital. As with listed bodies, this percentage is to be determined by the unlisted body, based on the number of shares that the unlisted body has reasonable grounds to believe may be issued under the current offer—including in relation to the exercise of options and vesting of incentive rights—when aggregated with offers made at any time over the previous three years in reliance on ASIC relief.

Options and performance (incentive) rights

- 82 While the proposal to include performance rights (referred to in this document as ‘incentive rights’) was supported, the majority of respondents did not agree with our proposed conditions of relief for options and incentive rights.
- 83 Three respondents submitted that only permitting relief for the offer of options and incentive rights where there was only one class of ordinary shares was too inflexible and contrary to market practice.

ASIC’s response

We have decided to adopt a more facilitative approach by not prohibiting the unlisted body from issuing other classes of shares, but requiring that class order relief only applies where the options and incentive rights relate to fully paid voting ordinary shares.

We still consider it necessary to impose more restrictive conditions on the offer of options and incentive rights relating to unlisted bodies than are imposed on offers relating to eligible products of a listed body, because of the additional difficulties participants face in obtaining adequate information about the price or value of the eligible products, the offer and the unlisted body.

Liquidity events

- 84 Our proposal to require an independent expert’s report in the event of a trade sale was also not supported. Respondents submitted that this requirement was too costly, and was unnecessary if holders were contractually bound to sell (i.e. ‘drag along’ rights), or if the sale occurred at arm’s length, as this would reflect the true market price.
- 85 A number of respondents submitted that limiting relief to circumstances where there is a sale of 100% of shares did not reflect that sales of less than

100% could also occur (e.g. an existing holder may be seeking to buy out other shareholders, or an existing majority holder may sell their stake). One respondent suggested that relief should be available for a sale of more than 50% of shares, while another suggested 75%.

ASIC's response

We have changed the requirements relating to liquidity events under [CO 14/1001] to apply to the exercise of options and the vesting of incentive rights for more than nominal monetary consideration, only if:

- the underlying eligible products (i.e. the fully paid voting ordinary shares) have been quoted on an eligible financial market for at least three months and have not been suspended for more than five trading days during the shorter of the period since quotation and 12 months before the exercise or vesting date; or
- a valuation document, dated no earlier than one month before it is given to the eligible participant, is given no later than 14 days before exercise or vesting, and this document comprises one of the following:
 - a current disclosure document (i.e. an offer information statement or a prospectus) relating to the fully paid voting ordinary shares;
 - an independent expert's report with an opinion on the value of the fully paid voting ordinary shares; or
 - a copy of an executed agreement which specifies the value of fully paid voting ordinary shares where these shares are to be acquired on arm's length terms by a third party that is not an associate of the body.

Clear, concise and effective and risk disclosure

86 These requirements were proposed to apply to both listed bodies and unlisted bodies. The proposals were not supported by a number of respondents (see the discussion at paragraph 64).

ASIC's response

In relation to the requirement to present the information in a clear, concise and effective manner, and the requirement to provide a general product risk warning (as discussed in relation to listed bodies: see ASIC's response after paragraph 67), we have decided to impose an additional requirement on unlisted bodies—that the offer document must provide a prominent warning on the cover page, in a box and in a minimum font size of 14 points, statements to the following effect:

- that the eligible products offered under the offer document may or may not have any value that is capable of being realised by the eligible participant; and
- that whether the eligible products have any value that is capable of being realised by the eligible participant will depend on future events which may or may not occur.

Other issues and responses

87 Our proposals in relation to the following topics applied similarly to both listed bodies and unlisted bodies—see the paragraph references below for a discussion of the feedback we received on these issues and ASIC’s response:

- (a) disclosure to participants (paragraphs 64–67);
- (b) notice of reliance on class order relief (paragraphs 65–67); and
- (c) ASIC’s exclusion power (paragraph 68).

H Listed and unlisted bodies: Incidental relief and transitional arrangements

Key points

Respondents agreed that advertising and hawking relief should apply to listed bodies and their associated bodies corporate, unlisted bodies and their wholly owned subsidiaries, and all classes of eligible products that we proposed to cover in the class order.

Some respondents submitted that advertising and hawking relief should also apply to third-party administrators.

Some respondents suggested that we should extend on-sale class order relief to any employee share scheme or employee incentive scheme, even if the scheme is not relying on ASIC class order relief.

We consider our proposals to be the appropriate setting for the above relief and, aside from providing some incidental relief to trustees, we have not adopted the suggestions from respondents.

Licensing, advertising and hawking relief

- 88 Respondents generally agreed with our proposed advertising and hawking relief.
- 89 Two respondents submitted that third-party administrators of contribution plans for issuers would require advertising and hawking relief where they sent out information relating to employee incentive schemes or contacted eligible employees on behalf of their client–issuer.

ASIC's response

[CO 14/1000] and [CO 14/1001] provide licensing, advertising, hawking and managed investment scheme relief to listed bodies and their associated bodies corporate, and to unlisted bodies and their wholly owned subsidiaries.

We have also extended relief to trustees under the class orders to cover:

- advertising relief where the trustee provides advertising material relating to the body's employee incentive scheme; and
- managed investment scheme relief where the trustee operates a contribution plan in relation to the employee incentive scheme.

We have not extended class order relief to hawking in relation to trustees. We do not regard a mailout by a trustee of materials relating to an employee incentive scheme on behalf of the body results in the trustee contravening the anti-hawking provisions.

On-sale relief

- 90 All respondents supported our proposals to provide on-sale relief in respect of eligible products, and also where eligible products are issued to a trustee for the employee incentive scheme.
- 91 Two respondents submitted that ASIC's class order should also provide on-sale relief where an employee incentive scheme is being offered under one of the statutory exemptions from requiring a disclosure document (e.g. s708(1) and 708(12)).

ASIC's response

We have proceeded with our proposal to provide on-sale relief where an offer has been made under an employee incentive scheme in reliance on our class order or individual relief.

Our class order relief in [CO 14/1000] or [CO 14/1001] is designed to provide participants with an offer document that meets certain minimum requirements, and provides participants with a level of investor protection and knowledge in respect of the eligible products and related activities.

We have not provided on-sale relief where an issuer has relied on a Corporations Act exemption to make offers under an employee incentive scheme, or similar scheme, because such offers are not subject to conditions that are equivalent to those that apply under our class orders.

Transitional arrangements

- 92 A number of stakeholders have raised concerns about the transitional arrangements, given the time delay between the date that employee incentive scheme arrangements may be approved (e.g. by the body's board members) and the date that offers are first made under the scheme.
- 93 Before the commencement of [CO 14/1000] or [CO 14/1001], listed and unlisted bodies and participants may have relied on—and some listed and unlisted bodies may have approved the implementation of employee share schemes in reliance on—relief provided under [CO 03/184] and on-sale relief under [CO 04/671]. These employee share schemes may give rise to continuing obligations requiring ongoing relief for a period of time (which may last for a number of years) after the initial offer is made.

ASIC's response

The new class orders provide that relief under [CO 03/184] and [CO 04/671] will be 'grandfathered'.

The grandfathered relief will entitle an employer to continue to rely on [CO 03/184] or [CO 04/671] after the commencement of [CO 14/1000] and [CO 14/1001], provided that the scheme was in place before the commencement of [CO 14/1000] and [CO 14/1001].

We may consider case-by-case relief for any variation of the transitional arrangements in rare and exceptional circumstances.

Appendix: List of non-confidential respondents

- Commonwealth Bank of Australia
 - D H Flinders
 - Egan Associates Pty Limited
 - Employee Ownership Australia & New Zealand
 - Gilbert + Tobin Lawyers
 - Godfrey Remuneration Group Pty Limited
 - Governance Institute of Australia Ltd
 - Guerdon Associates Pty Ltd
 - Hall & Wilcox Lawyers
 - Herbert Smith Freehills
 - Law Council of Australia, Business Law Section
 - Link Market Services Limited
 - Minters Ellison Lawyers
 - PricewaterhouseCoopers
 - Telstra Corporation Limited
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