

RESPONSE TO CONSULTATION PAPER 364 - MODIFICATIONS TO THE ESS REGIME

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1. This submission responds to ASIC's proposals in [Consultation Paper 364 – Modifications to the ESS Regime dated September 2022](#) to give relief in relation to:
 - a. secondary sales of quoted ESS interests issued by listed entities; and
 - b. salary sacrifice arrangements.

SECONDARY SALES

2. We welcome ASIC's proposal to give relief in relation secondary sales of quoted ESS interests issued by listed entities, as well as ASIC's decision to continue the secondary sale relief in relation to sale offers of securities issued under the existing ASIC Class Order 14/1000.
3. As we have explained in our previous submissions on this topic¹, such relief is much needed for listed entities. Without the relief, there will be significant regulatory costs and burdens resulting from the new ESS regime². As ASIC recognises, ESS plans are commonly predicated on participants being able to sell the financial products they receive under the plans on-market without restriction as to the potential purchasers.³ However, in the absence of relief:
 - a. a disclosure document for the sale offers would need to be prepared and lodged with ASIC (effectively by both the company and all relevant selling participants); or
 - b. a cleansing statement would need to be issued, or a prospectus lodged, under s 708A

if ESS participants are to be able to sell shares issued to them freely within 12 months of their issue. Listed entities are not always able to rely on the cleansing

¹ See our submissions dated 22 August 2022 and 29 August 2022

² Being Division 1A of Part 7.12 of the Corporations Act

³ CP 364 at [14]

notice regime in s 708A, and issuing a disclosure document is a significant exercise.

4. In addition, as we mentioned in our earlier submissions, many listed entities will not have available free cash to acquire in the secondary market the financial products required for provisions to ESS participants under the plans.
5. Accordingly, we consider that a broad exemption for quoted financial products from the on-sale provisions is appropriate.
6. In relation to the proposed conditions that must be satisfied for the exemption to apply⁴, we note these are in terms that differ from clauses 7 and 8 of existing ASIC Class Order 14/1000. A key difference appears to be the introduction of a condition to the effect that "*the body corporate or the responsible entity of the scheme did not issue the financial product with the purpose of the person to whom the financial product was issued:*
 - (i) *selling or transferring the financial product; or*
 - (ii) *granting, issuing or transferring interests in, or options or warrants over, the financial product"* (**Condition (d)**).⁵ There is no such condition in the existing Class Order.
7. The Consultation Paper does not explain why Condition (d) has been included. We submit that it is neither necessary nor appropriate to include Condition (d).
8. We submit Condition (d) is not necessary because other provisions that should ensure that employee share schemes cannot be used by issuers for a fundraising objective, if that is the concern. For the ESS regime to apply, there must be compliance with the other applicable conditions of the ESS regime⁶, including the 5% issue cap in s 1100V which applies where ESS interests were issued, sold or transferred to ESS participants for monetary consideration.
9. We also submit that Condition (d) is not appropriate because it assumes that the person making the sale offer will be in a position to form a view on whether or not the body corporate or responsible entity concerned issued the financial products with the proscribed purpose. Although an ESS participant making a sale offer may simply assume this to be the case, it is inappropriate to require, in effect, the ESS participant to make this assumption. The ESS participant may not have first-hand knowledge of the facts needed in order to base the assumption. Would it be reasonable in such circumstances for an ESS to make the assumption? If the assumption is incorrect, the ESS participant will potentially incur significant

⁴ As proposed in notional s 1100ZD(2)

⁵ Para (d) of notional s 1100ZD(2)

⁶ Refer Subdivision C

legal liability for breaches of Chapter 6D.2 and 6D.3 or Part 7.9 (as the case may be).

SALARY SACRIFICE ARRANGEMENTS

10. We agree with the proposal to modify s 1100T so that amounts that an ESS participant has "salary sacrificed" are not required to be held in a bank account with an Australian ADI and are not subject to repayment requirements. The ESS regime should facilitate the operation of effective salary sacrifice arrangements for employee share schemes.
11. It strikes us, however, that the proposed drafting does not sit comfortably with a conceptual analysis of a salary sacrifice arrangement. This is because the proposed notional amendments to be made by clause 5 of the draft Instrument seek to exclude from the ambit of paragraphs (b) and (d) of s 1100T "*payments in the form of future gross (before-tax) salary or wages*". With a salary sacrifice arrangement, there is no "*payment*" because the employee elects to forego their future entitlement to salary or wages as benefits (such as ESS interests) prior to earning the entitlement to that salary or those wages. That is to say, there is then no payment, and there is no deduction from, the employee's salary or wages because the employee agreed to a reduction in their future salary or wages in exchange for the promise to be provided with a benefit in kind (i.e., ESS interests).
12. In light of this, we suggest for ASIC's consideration that an alternative formulation may be to stipulate that:
 - a. the requirements of paragraphs (b) and (d) of s 1100V do not apply in relation to wages or salary of the ESS participant to the extent that they are reduced under an effective salary sacrifice arrangement for or in relation to the acquisition of ESS interests; and
 - b. for this purpose, wages or salary of the ESS participant are reduced under an effective salary sacrifice arrangement for or in relation to the acquisition of ESS interests where:
 - i. the ESS participant agreed to acquire the ESS interests in return for a reduction in their salary or wages that would not have happened apart from the agreement; or
 - ii. as part of the ESS participant's remuneration package, in circumstances where it is reasonable to conclude that the ESS participant's salary or wages would be greater if the interest was not made part of that package.



13. Paragraph (b)(ii) above uses wording that is adapted from the employee share scheme provisions (Division 83A) of the *Income Tax Assessment Act 1997* (Cth)⁷.

⁷ See section 83A-105(4)(a)