

21 October 2022

Corporations Team
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email to: ess@asic.gov.au

Contacts

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Eora Country



MELBOURNE
SYDNEY

Partners
Mark M Leibler AC
Henry D Lanzer AM
Joseph Borenszajn AM
Leon Zwiier
Philip Chester
Ross A Paterson
Stephen L Sharp
Kenneth A Gray
Kevin F Frawley
Zaven Mandrossian
Jonathan M Weng
Paul Sokolowski
Paul Rubenstein
Peter M Seidel
John Mitchell
Ben Mahoney
Jonathan Milner
John Mengoian
Caroline Goulden
Matthew Lees
Genevieve Sexton
Jeremy Leibler
Nathan Briner
Justin Vaatsbra
Clint Harding
Susanna Ford
Tyrone McCarthy
Teresa Ward
Christine Fleer
Jeremy Lanzer
Bridget Little
Gia Cari
Jason van Grieken
Elyse Hilton
Jonathan Orher
Stephen Lloyd
Scott Phillips
Gavin Hammerschlag
Shawn Cartoon
Damien Cusidby
Dorian Hemerson
Rebecca Zwiier
Jennifer McCosker
Consultant
Jane C Sheridan
Special Counsel
Sam Dollard
Laila De Melo
Emily Simmons
Bridgid Cowling
Rosalie Cattermole
Rachel Soh
Senior Associates
Brianna Youngson
Kaitlin Lowdon
Stephanie Campbell
Claire Stukke
Briely Trolope
Laura Cochran
Greg Juak
Ben Fris-O'Toole
Ely Bishop
Raphael Leibler
Gabriel Sakhal
Mark Maorie
David Monteith
Rebekah French
Lisa Garson
Vidushee Deora
Luke Jedyrak
Emily Korla
Chris Murphy
Michael Regge
Anna Sapountsis
John Birrell
Rob Deev
Caitlin Edwards
Jessica Elliott
Alexandra Harrison-Ishlov
Claire Southwell
Luise Squire
Ari Bendet
Matthew Davies
Grace Cho
Lucy Eastoe
Naeha Lal
Timothy Jaeger
Michelle Answorth
Micaela Bemfield
Crosby Radburn
Jessica Wills
Mark Azfar

Dear Sir / Madam

Submission on ASIC Consultation Paper 364: Modifications to the ESS regime

Thank you for the opportunity to make submissions in response to ASIC's *Consultation Paper 364: Modifications to the ESS regime (CP 364)*.

We welcome ASIC's proposal to amend the new employee share scheme (**ESS**) regime contained in Division 1A of Part 7.12 the *Corporations Act 2001* (Cth) (**Corporations Act**), and in particular, ASIC's proposal to notionally extend the secondary sale exception contained in section 1100ZD of the *Corporations Act* as set out in Proposal B1.

We make the following submissions in respect of Proposal B1 and the provisions of the draft relief instrument attached to CP 364 (the **Draft Instrument**) that relate to Proposal B1.

The secondary sale exemption should extend to sale offers of financial products which are issued on exercise of options or other convertible securities

- 1 Based on our reading of the Draft Instrument, the relief provided in section 7(2) of the Draft Instrument would not apply to a sale offer of underlying financial products (such as shares or interests in a registered scheme) (**underlying financial products**) which are in a class of financial products that are able to be traded on a financial market if those underlying financial products were issued on exercise or conversion of overlying financial products (such as options, performance rights or other convertible securities) (**overlying financial products**) and the conditions in sections 7(2)(a), (c), and (d) of the Draft Instrument are otherwise satisfied.
- 2 We believe the above creates an anomaly whereby a sale offer of underlying financial products which are able to be traded on a financial market:
 - (a) is exempt from the secondary sale provisions in Parts 6D.2, 6D.3 and 7.9 of the Corporations Act if those underlying financial products were issued directly by a company or responsible entity to the participant, and the conditions in sections 7(2)(a), (c) and (d) of the Draft Instrument are otherwise satisfied; and
 - (b) is not exempt from the secondary sale provisions in Parts 6D.2, 6D.3 and 7.9 of the Corporations Act if those underlying financial products were issued on exercise or conversion of overlying financial products, and the conditions in sections 7(2)(a), (c) and (d) of the Draft Instrument are otherwise satisfied.
- 3 In other words, shares or interests in a registered scheme which are issued directly to a participant under an ESS which can be traded on a financial market would be exempt from the secondary sale provisions in the Corporations Act, whereas those same shares or interests would not be exempt from the secondary sale provisions in the Corporations Act if they were issued on exercise or conversion of options, performance rights or other convertible securities (in each case, provided the other conditions of the Draft Instrument are satisfied).

- 4 In our experience, companies and registered schemes rarely tend to offer underlying financial products directly to participants under an ESS. Instead, they generally opt to offer overlying financial products like options and performance rights to participants which vest and can then be exercised or converted into corresponding underlying financial products.
- 5 We believe the proposed secondary sale exemption in section 7(2) of the Draft Instrument would have limited use if the anomaly identified above is not rectified.
- 6 For completeness, we note that the precursor secondary sale exemption in ASIC Class Order 14/1000 (**CO 14/1000**) addressed the above anomaly by providing an exemption from Parts 6D.2, 6D.3 and 7.9 of the Corporations Act for a sale offer of financial products which were “*issued by reason of the exercise or vesting of an eligible product issued or granted under... an employee incentive scheme*” (see section 8 of CO 14/1000). While we appreciate ASIC’s comments at paragraph 17 of CP 364 that the secondary sale exemption in CO 14/1000 was too broad, we believe addressing the above anomaly is necessary for the secondary sale exemption to be workable and useful in practice.

The secondary sale exemption should be amended to facilitate ESS trust arrangements

- 7 Companies and registered schemes commonly establish trusts to facilitate their ESS programmes. In recognition of this practice, Parliament added provisions to the ESS regime in the Corporations Act which facilitate ESS trust arrangements (see, for example, section 1100S of the Corporations Act).
- 8 We submit that technical amendments should be made to the proposed secondary sale exemption in section 7(2) of the Draft Instrument in order for that exemption to be workable in the context of ESS trust arrangements.
- 9 Broadly speaking, under an ESS trust arrangement, the trustee on direction from the issuer company or responsible entity will transfer financial products in the company or registered scheme to participants under the ESS (or otherwise grant interests in those financial products to participants).
- 10 We submit that the requirements of section 7(2)(d) of the Draft Instrument likely cannot be satisfied by a company or registered scheme which utilises an ESS trust arrangement, as such company or registered scheme will always technically issue the relevant financial products to the trustee with the purpose identified in section 7(2)(d). In other words, a company or registered scheme will likely make an initial issue offer of financial products to the trustee “*with the purpose of the person to whom the financial product was issued [ie, the trustee] ... selling or transferring the financial product [ie, to participants under the ESS] ... or ... granting, issuing or transferring interests in, or options or warrants over, the financial product [ie, to participants under the ESS].*”
- 11 We note that the secondary sale exemption in CO 14/1000 specifically addressed ESS trust arrangements (see sections 7(a)(ii) and 8(a)(ii) of CO 14/1000), and we recommend that ASIC’s proposed modifications to the secondary sale exemption in the ESS regime do so as well.

We would be pleased to discuss these points further if that would be useful for you.

Yours sincerely

████████████████████
Partner
Arnold Bloch Leibler

████████████████████
Lawyer
Arnold Bloch Leibler