LANDER & ROGERS

31 October 2022

Corporations Team
Australian Securities and
Investments Commission
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Brisbane QLD 4001

By email only: ess@asic.gov.au

Dear ASIC

Consultation Paper 364

Lander & Rogers welcomes the opportunity to comment on the proposed modifications to the employee share scheme regime.

This submission specifically addresses the following questions asked in Consultation Paper 364:

Secondary Sale Exemption		
B1Q1	Do you agree with the proposed modification to s1100ZD to expand the secondary sale exemption for quoted products?	Yes, we agree with this proposal.
B1Q2	What costs are you likely to incur if ASIC does not expand the on-sale exemption in s1100ZD in the way proposed? Are there additional costs associated with ASIC's proposal to grant relief? Please specify in both cases how such costs are likely to be incurred.	Without the proposed amendment, listed companies would be required to issue a "cleansing notice" every time a performance right or an option is converted into an ordinary share, which will result in increased regulatory compliance costs for the listed company. In addition, the requirement to issue a cleansing notice raises broader concerns for listed companies in the context of Listing Rule 3.1A (namely that a listed company cannot withhold information from the market in reliance on this Listing Rule where it issues a cleansing notice). As a result, listed companies may consider restricting the ability of employee share scheme participants to exercise options to limited time periods, which may be to the disadvantage of option holders.

		More generally, without this amendment, listed companies would be in a worse position than they currently are under [CO14/1000], which we believe would be inconsistent with the purpose of the new ESS regime.
B1Q3	Are there any requirements in our proposed modification that will cause difficulties?	We are comfortable with the current proposed drafting.
Financial Information		
B2Q1	Do you agree with the proposed relief?	While we agree with the proposal in concept, we believe the terms of the relief should be more expansive. In our view, companies that comply with the ESS requirements should be able to take advantage of the relief even if they do not comply with IFRS provided that their accounts are prepared in compliance with the standards/rules to which they are subject in their home jurisdiction. We are concerned that there may be limited advantages obtained by requiring special purpose accounts to be provided to Australian employees when the company is operating under, and is valued in accordance with, different accounting rules.
B2Q2	What are the financial or cost implications if ASIC does not modify s1100X(2) by legislative instrument to permit information prepared under foreign accounting standards? For example, please specify the costs associated with a foreign company providing financial information that complies with s1100X(2)(c) and the costs associated with a foreign company providing the information we have proposed (including the confirmation as to no material difference or a reconciliation of the material differences).	Our main concern with the current provision is that foreign companies would be required to have their accounts restated under IFRS, which will be expensive and time consuming to produce. This may result in Australian employees not being offered employee share scheme interests in the relevant company due to the compliance costs involved.

B2Q3	Should our relief require a reconciliation of net assets and profit after tax rather than the condition proposed (i.e. that the company either confirms there is no material difference between information prepared under the applicable foreign standard and Australian accounting standards or a reconciliation of the material differences)?	In our view, the reconciliation may be unnecessary and in any event difficult to achieve. In addition, entities would need to obtain expert advice across various jurisdictions, which again may be costly and take significant time.
Valuation of Financial Products that are not Ordinary Shares		
B3Q1	Do you agree with our proposal to permit valuations prepared by an independent expert?	Yes, we agree with this proposal in concept, however, we believe there needs to be clarification provided as to who can perform the valuation and what rules apply (for example, under the current wording it is unclear as to whether the person conducting the valuation needs to satisfy the requirements of RG 111 and RG 112).
B3Q2	If another valuation method was specified, what valuation method would you recommend and why do you consider it a reliable alternative?	The valuation should be able to be performed by someone with appropriate financial credentials, but should not need to be an independent expert as required under RG 112.
Contribution Plans and Salary Sacrifice Arrangements		
B4Q1	Do you agree with the changes proposed above in relation to salary sacrifice arrangements—so that they can comply with the s1100T requirements for contribution plans? If not, please explain why, including any difficulties and costs associated with salary sacrifice arrangements complying with s1100T as modified.	Yes, we agree with this proposal and note that it is consistent with the current class order relief under [CO14/1000].
B4Q2	Section 1100T refers to 'payments' and 'deductions'. Do you agree that salary sacrifice	In our view a pre-tax salary sacrifice arrangement should not be considered to be a "deduction" since the employee is not paying for the relevant ESS interests out of

	arrangements are a 'payment'?	remuneration that they have received. Rather, the employee is electing to receive part of their future remuneration as ESS interests prior to earning that remuneration. On this basis, we would consider a salary sacrifice arrangement to be more appropriately classified as a "payment" as opposed to a "deduction".
B4Q3	Do you agree that salary sacrifice payments should be exempt from the repayment requirement in s1100T(d)?	Yes, we agree with this proposal and note that it is consistent with the current class order relief under [CO 14/1000].
B4Q4	Section 1100T(d)(i) refers to deductions ceasing and being repaid after an election to discontinue. Do you agree that s1100T(d)(i) should also refer to payments ceasing and being repaid after an election to discontinue? If not, please explain why.	Yes.
Other Technical Relief		
B5Q1	Are you encountering any technical difficulties that are not covered in this paper as you apply Div 1A of Pt 7.12 to your employee share scheme? If so, please provide feedback.	(**Issue Cap - Section 1100V**) Presently, it is not clear whether the issue cap applies to all employee share schemes that a company may have implemented over time (including those prior to the enactment of Division 1A) or each single employee share scheme under the new laws, as the drafting in the explanatory memorandum appears to be in conflict with the drafting set out Section 1100V. In this regard, we note: • The explanatory memorandum uses "an" employee share scheme, "*the number of interests that have been issued, or could be issued as a result of previous offers, in connection with an employee share scheme made during the previous three years*.";

		• However, in Section 1100V(1)(b) the language that is used refers to "*the employee share scheme*". In our view, the drafting is not clear as to whether the issue cap relates to (i) all issues of interests under any employee share scheme whatsoever; or (ii) issues of interests only under employee share schemes that fall within Division 1A; or (iii) issues of interests only under a particular employee share scheme that falls within Division 1A.

We would be pleased to discuss any of the above comments with you if required.

Yours sincerely,

[redacted] | Partner

[redacted] | Partner