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Corporations team

Australian Securities and Investments Commission  
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Dear Corporations team

### **ASIC Consultation Paper 364: Modifications to the ESS regime**

This submission is made by HWL Ebsworth Lawyers (**HWLE**) in response to the *ASIC Consultation Paper 364: Modifications to the ESS regime* dated 29 September 2022 (**Consultation Paper**), in relation to the technical relief that ASIC proposes to provide to facilitate the employee share scheme (**ESS**) provisions in Division 1A of Part 7.12 of the *Corporations Act 2001* (Cth) (**Act**).

Proposal B5 of the Consultation Paper provides that ASIC are open to considering other technical relief if stakeholders have identified unintended difficulties with the way the ESS provisions apply to standard employee share schemes.

HWLE wishes to alert ASIC to an inconsistency between the requirements for the relief provided by ASIC Class Order 14/1000 and the relief provided by the Act that has not been considered in the Consultation Paper, and which creates another unintended difficulty.

HWLE regularly advises employee share plan service providers and both listed and unlisted entities who make ESS offers to employees in Australia. The following submission is made on behalf of these entities.

#### **Contribution Plan - ADI Accounts**

Clause 21(c) of ASIC Class Order 14/1000 provides that, as a condition that needs to be satisfied in order to obtain the benefit of the relief, contributions under the terms of the contribution plan need to be held in an account with an Australian ADI that is **used solely in connection with employee incentive schemes of a listed body**.

This condition has resulted in entities relying on the relief by establishing a single account with an ADI that is used for the employee incentive scheme generally. These accounts are used to not only receive contributions under contribution plans, but also to hold contributions made by the employer more generally, dividends paid and interest received (out of which certain expense payments can be made).

Contrastingly, section 1100T(b) of the new Division 1A of Part 7.12 provides that in order for an ESS contribution plan to obtain the relief provided, the plan must provide that, before the participant acquires the ESS interests under the offer, the payments or deductions provided by the

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participant are held on trust in an account with an Australian ADI **that is kept solely for that purpose.**

We are of the view that this requirement provides that an ADI account established to receive contributions under an employee share scheme contribution arrangement can no longer be used for any purpose other than to receive such payments or deductions.

Our clients are concerned that they will be required to establish and operate multiple ADI accounts for the one employee share plan - being one in order to meet the requirements of section 1100T and another to deal with other monies associated with the management of an employee share plan as referred to above.

### **Our Submission**

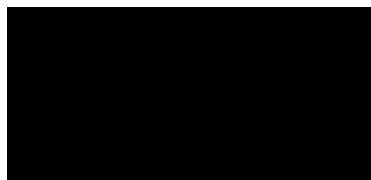
This new contribution plan requirement will place an unreasonable and unnecessary requirement on the administrative components of operating ESS contribution plans.

We request that ASIC provide technical relief in relation to section 1100T(b) by replacing the wording in s1100T(b) "kept solely for that purpose" with the drafting of clause 21(c) of ASIC Class Order 14/1000 "used solely in connection with employee incentive schemes of a listed body or an associated body corporate".

We are of the view that clause 21(c) of ASIC Class Order 14/1000 sufficiently protects employees. In providing the technical relief suggested above, employees will not be disadvantaged. All monies which have been contributed under a contribution plan to an account with an ADI (and any additional contributions made by the employer more generally) will still be used for the sole purpose of acquiring ESS interests for employees.

Please do not hesitate to contact the writers if you have any queries in relation to the above.

Yours sincerely



Partner

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Law Graduate

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