Law Council
OF AUSTRALIA

Business Law Section

17 August 2022

Ms Fiona Laidlaw
Australian Securities and Investments Commission
Level 5
100 Market Street
SYDNEY NSW 2000

By email: Fiona.Laidlaw@asic.gov.au

Dear Fiona

Consultation on ESS transitional arrangements

1. The Corporations Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to provide feedback on the Australian Securities and Investments Commission's (**ASIC**'s) proposed transitional arrangements for employee share scheme (**ESS**) regulation outlined in an email dated 25 July 2022 from ASIC to the Chair of the Committee. The Committee's submissions on the proposed arrangements are set out in the final column of the table in **Appendix A**.

2. In addition, the Committee makes the following comments:

   On-sale

   (a) The Committee notes that there are problems with the on-sale relief contained in the proposed new Division 1A of Part 7.12 which will deprive entities of the ability to apply for quotation of ordinary securities without taking some additional step (such as issuing a cleansing notice), which will have a negative impact on the utilisation of Division 1A of Part 7.12 by all issuers. Specifically, the new s1100ZD of Div 1A of Pt 7.12 only permits participants to sell interests without disclosure if they reasonably believe:

      (i) they received that interest under an ESS; and

      (ii) they are only selling their interest to another participant in the same ESS.

      In the Committee's view, the second condition is far too limiting as it would not permit the underlying security to be freely on-sold on the market and appears inconsistent with the legislative intention of assisting smaller enterprises to reward and attract talent, as it could impact the liquidity (and pricing) of interests under ESS for unlisted entities (that are unable to utilise the cleansing notice route). The Committee is mindful that this may be beyond the scope of an instrument designed to grandfather the existing class orders. However, the Committee would appreciate the opportunity to discuss this with ASIC to explore the potential for an instrument to be put in place with effect from 1 October 2022 to address this issue, until such time as it is resolved by the legislature.

Design and Distribution Obligations

(b) Paragraph 994B(3)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**), which disapplies the design and distribution regime from offers of securities that have been, or will be, issued under an ESS, will be repealed with effect from 1 October 2022. Consistently with the intent of this grandfathering instrument, the Committee submits that the application of paragraph 994B(3)(c) should also continue to apply with respect to offers made under an ESS (whether utilising the class order or not) before 1 October 2022. It would be inappropriate for the benefit of that provision to be lost to any issuer who has relied on either class order relief or other provisions of the Corporations Act (for example, subsection 708(1) or use of an offer information statement for an offer) purely because offers remain open on 1 October 2022.

3. The Committee would welcome the opportunity to discuss this submission with ASIC.

4. If you require further information or clarification, please contact Robert Sultan, Chair of the Corporations Committee at robert.sultan@nortonrosefulbright.com or (03) 8686 6571, Adam D'Andreti at adandreti@gtlaw.com.au or (02) 9263 4375 or Tony Sparks at Tony.Sparks@AllenOvery.com or (02) 9373 7879.

Yours sincerely,

Philip Argy
Chairman
Business Law Section

Appendix A

Proposal	Effect on class orders	Comment	Committee response
From 1 October 2022, new ESS offers should rely on the new ESS regime in Pt 7.12.	Remove the ability to make new offers under CO 14/1000 and CO 14/1001 from 1 October 2022.		The Committee agrees with the proposed approach on the basis that any changes that need to be made to existing plans to obtain the benefit of this relief would be beneficial to participants, and so should be able to be made without needing to go through any administratively difficult consent process (and the Committee's view is that it is likely that the sorts of changes needed would not be material).
Some offers that are made before 1 October 2022 may be capable of acceptance after that date.	We plan to amend the class orders so that offers must be first made before 1 October but may remain open for acceptance until 1 November 2023. Terminate the hawking relief on 30 September 2022. Continue to provide some incidental licensing / dealing relief until 1 November 2023.		The Committee recommends, for the sake of simplicity, that the class orders continue to operate in their totality for offers made prior to 1 October 2022 which are accepted before 1 November 2023 (that is, do not turn off some of the relief during the first year of operation of the new provisions, as that introduces unnecessary complexity).

Proposal	Effect on class orders	Comment	Committee response
Existing financial products (such as options or incentive rights) may result in the Issue of further financial products in future.	We do not consider any specific amendment is required to accommodate future issues because entities primarily need Relief for the offer of the existing financial product and should be able to rely on the self-dealing exception in s766C(4) for the issue of future products.	Is this approach sufficient or do you consider that some entities will require ongoing relief to issue financial products in future?	The Committee disagrees with ASIC that the self-dealing exception in subsection 766C(4) provides the requisite comfort. Whilst that assists for any suggestion the issue of shares (etc.) is a dealing requiring a financial services licence, there cannot be any doubt that the relief currently contained in paragraphs 5 and 6 of ASIC Class Order 14/1000 and Class Order 14/1001 continues to apply with respect to any future issues of financial products upon vesting or exercise of any financial products offered in reliance on those class orders. The Committee is unsure whether this is the intent behind the proposed new paragraph 6A (which is '[f]or the purposes of paragraphs 5 and 6, if an offer is made on a continuing basis, the date that the offer is made is the date that the offer is first made.'). If that is the intention, it would be better to add 'or the issue of any financial products in the future by reason of the exercise or vesting of an eligible product issued or otherwise granted' will continue to get the benefit of the relief in paragraphs 5 and 6.

Proposal	Effect on class orders	Comment	Committee response
Existing ESS plans need to continue to operate to a certain extent post 1 October – for e.g., custodial arrangements and contribution plans. New contributions should not be made to contribution plans under the class orders after 1 October 2022 (unless contribution is for a product already acquired by or on behalf of an eligible participant).	Retain relief for custodial arrangements and contribution plans* – however require contributions to be made before 1 October 2022 (unless in respect of an eligible product acquired before 1 October 2022).	If eligible products are to be acquired after 1 October 2022 pursuant to a contribution plan, this acquisition needs to be made using existing contributions. Will this cause difficulties? For example, is there any reason we should permit new contributions to be made up until 1 November 2023?	A time limit should not be imposed on making contributions to contribution plans for already issued financial products. To do otherwise would create an unnecessary administrative burden for issuers in this position to manage. The Committee is not clear what the concern here would be.
Employees will continue to require on-sale relief for financial products issued as a result of the class orders.	Retain relief for secondary sales.*		The Committee agrees with the proposed approach but recommends that ASIC remove any doubt that could be created by the words 'the person has no reason to believe the employee incentive scheme is not covered by this instrument' which appear in subparagraphs 7(b) and 8(b) of the class orders and are conditions to the on-sale relief. It would be best simply to delete those paragraphs as it is unclear what purpose they serve. Additionally, for the reasons set out above the table in paragraph 2(a), the Law Council recommends that ASIC provide the market with comfort that

Proposal	Effect on class orders	Comment	Committee response
			either this new instrument, or a separate additional instrument, will modify the new section 1100ZD of Division 1A of Part 7.12 to ensure the same on-sale position as exists under the class orders is adopted for offers made under Division 1A of Part 7.12 (so as to provide the market with certainty that this problem is being addressed).
Entities that have individual relief based on CO 14/1000 should rely on Div 1A of Pt 7.12. Individual relief for French employee share schemes needs to continue beyond 1 October 2022 because they will be unable to rely on Div 1A, Pt 7.12.	Terminate paragraphs 28A, 28B and 28D in CO 14/1000 on 1 November 2023 (other than for French employee share scheme). However, preserve the effect of the relief via these paragraphs for French employee share schemes until CO 14/1000 sunsets [1 April 2025]	Based on your experience, are there large numbers of entities who will be unable to rely on Div 1A of Pt 7.12? If so, why will they be unable to rely on the new ESS regime and are they able to be categorised (in the way we have proposed to cover French schemes).	The Committee does not anticipate that there would be large numbers of entities who will be unable to rely upon Division 1A of Pt 7.12. However, beyond French companies, the Committee understands that there may also be issues experienced by certain unlisted North American companies which do not prepare financial accounts in compliance with the international financial reporting standards (**IFRS**) (which would not be able to meet the requirements of subsection 1100X(2)). This issue will also arise for any other unlisted foreign company who does not prepare accounts in accordance with IFRS (as you would not expect such entities to be registered foreign companies

Proposal	Effect on class orders	Comment	Committee response
			required to lodge documents with ASIC under section 601CK). Whilst applications for individual relief can be made where this issue is encountered in the future, it would reduce the administrative burden if ASIC were to extend to foreign unlisted entities who report in accordance with their local accounting standards (but which are not consistent with IFRS) the same relief afforded to French entities. The Committee submits that this is not problematic from a policy perspective given that registered foreign companies are only required to prepare accounts 'in such form and containing such particulars and including copies of such documents as the company is required to prepare by the law for the time being applicable to that company in its place of origin' (that is, non-IFRS accounting standards if the relevant jurisdiction's accounting standards are not in compliance with IFRS).