Employee Share Schemes
Issue cap: ESS offers for consideration

The issue cap (section 1100Q) limits the extent to which businesses can raise capital from employees relative to other shareholders, and thereby limits the extent to which shareholder value can be diluted and voting power can be concentrated in the hands of employees.

Corporate governance arrangements - that is, company constitutions, and in the case of listed companies, market rules – provide a degree of protection to existing shareholders. For example, where the total number of shares in a company can only be modified by changes to the constitution or market rules limit new issuances over a period of time.

The issue cap makes it more difficult to implement an employee ownership model - where a business is fully owned by employees. Where it imposes a real constraint on new issuance, it can also result in offers being made to senior employees in preference to junior and mid-ranked employees, contrary to the intent of these reforms.

There is a separate question regarding the extent to which it is appropriate for employers to raise capital from staff. In allowing employees to pay to participate in employee share schemes, it follows that a degree of capital raising from employees is acceptable.

Is there a need to restrict the extent of capital raising from employees? If so, on what basis?

What, if any, are the expected harms to employees from unrestricted capital raising? For example, is it possible some employers may pressure employees into contributing capital in the absence of anti-hawking regulation? Alternatively, could employee funds be used inappropriately such that employees may need protection (beyond the monetary cap that applies to offers by unlisted companies)?

If capital raising from employees should be restricted, is the issue cap the appropriate regulatory tool for doing so?

An issue cap is likely to provide less protection to employees of companies with a large number of shares already issued compared with employees of companies with few shares issued. Is this an appropriate outcome (do employees of companies with fewer shares already issued face lower risks of harm from unrestricted capital raising)?

Should an alternative regulatory tool be considered instead?