

# EXPOSURE DRAFT

EXPOSURE DRAFT
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Inserts for  
**Treasury Laws Amendment (Measures  
for Consultation) Bill 2022: Employee  
Share Schemes**

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**Commencement information**

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<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Schedule 1	The day after the end of the period of 3 months beginning on the day this Act receives the Royal Assent.	

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## Schedule 1—Employee Share Schemes

### *Corporations Act 2001*

#### **1 Section 9 (paragraph (a) of the definition of *contribution plan*)**

Repeal the paragraph, substitute:

- (a) regular deductions are made from the wages or salary of an employee or director (the *contributor*) to acquire financial products that are offered for issue or sale to the contributor under a scheme for employees or directors of a company to acquire any of the following financial products of the company:
  - (i) fully paid ordinary shares;
  - (ii) options, offered for no more than nominal consideration, for the issue or transfer of fully paid ordinary shares;
  - (iii) units in fully paid ordinary shares;

#### **2 Section 9 (definition of *eligible employee share scheme*)**

Repeal the definition.

#### **3 Section 9**

Insert:

*employee share buy-back* means a buy-back under a scheme that:

- (a) has as its purpose the acquisition of shares in a company by, or on behalf of:
  - (i) employees of the company, or of a related body corporate; or
  - (ii) directors of the company, or a related body corporate, who hold a salaried employment or office in the company or in a related body corporate; and
- (b) has been approved by the company in general meeting.

#### **4 Section 9 (definition of *employee share scheme*)**

Repeal the definition, substitute:

*employee share scheme*: see subsection 1100M(1).

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1 **5 Section 9 (definition of *employee share scheme buy-back*)**

2 Repeal the definition.

3 **6 Section 9**

4 Insert:

5 *ESS contribution plan*: see subsection 1100Q(4).

6 *ESS interest*: see section 1100N.

7 *ESS participant*: see subsection 1100M(2).

8 *incentive right*: see subsection 1100N(4).

9 **7 Section 9 (after paragraph (ma) of the definition of**  
10 ***managed investment scheme*)**

11 Insert:

12 (maa) an ESS contribution plan for an offer of ESS interests that is  
13 eligible for regulatory relief under section 1100Y;

14 **8 Section 9 (paragraph (d) of the definition of *selective***  
15 ***buy-back*)**

16 Repeal the paragraph, substitute:

17 (d) an employee share buy-back.

18 **9 Subsection 257B(1) (table)**

19 Omit “employee share scheme”, substitute “employee share”.

20 **10 Subsection 257B(1) (note)**

21 Omit “*employee share scheme buy-back*”, substitute “*employee share*  
22 *buy-back*”.

23 **11 Section 703B (note)**

24 Omit “Note”, substitute “Note 1”.

25 **12 At the end of section 703B**

26 Add:

27 Note 2: Division 1A of Part 7.12 (Employee share schemes) contains a  
28 separate regime for the making of offers in connection with employee  
29 share schemes. The provisions of this Part do not apply in relation to

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1 offers that are eligible for regulatory relief under that Division: see  
2 subsection 1100Y(2) and section 1100ZC.

3 **13 Subsection 708(5) (note)**

4 Omit “Note”, substitute “Note 1”.

5 **14 At the end of subsection 708(5)**

6 Add:

7 Note 2: Issues and sales that result from offers that are eligible for regulatory  
8 relief under Division 1A of Part 7.12 (Employee share schemes) are  
9 also disregarded for the purposes of subsection (1): see subsection  
10 1100Y(4).

11 **15 Subsection 709(5)**

12 Omit “eligible”.

13 **16 Section 725A (note)**

14 Omit “Note”, substitute “Note 1”.

15 **17 At the end of section 725A**

16 Add:

17 Note 2: Division 1A of Part 7.12 (Employee share schemes) contains a  
18 separate regime for the making of offers under employee share  
19 schemes. The provisions of this Part do not apply in relation to offers  
20 that are eligible for regulatory relief under that Division: see  
21 subsection 1100Y(2) and section 1100ZC.

22 **18 Paragraphs 911A(2)(ed), (ee), (ef) and (eg)**

23 Repeal the paragraphs.

24 **19 Subsection 911A(2) (note)**

25 Omit “Note”, substitute “Note 1”.

26 **20 At the end of subsection 911A(2)**

27 Add:

28 Note 2: A person is also exempt from the requirement to hold an Australian  
29 financial services licence in relation to certain services connected with  
30 offers that are eligible for regulatory relief under Division 1A of  
31 Part 7.12 (Employee share schemes): see subsection 1100Y(7).

32 **21 Subsection 992A(2) (note)**

33 Omit “Note”, substitute “Note 1”.

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## 22 At the end of subsection 992A(2)

Add:

Note 3: Subsection (1) also does not apply in relation to an offer that is eligible for regulatory relief under Division 1A of Part 7.12 (Employee share schemes): see subsection 1100Y(8).

## 23 Paragraph 994B(3)(c)

Repeal the paragraph.

## 24 At the end of subsection 994B(3)

Add:

Note: Division 1A of Part 7.12 (Employee share schemes) contains a separate regime for the making of offers in connection with employee share schemes. Subsections (1) and (2) of this section do not apply in relation to securities that are issued, sold or transferred under an offer that is eligible for regulatory relief under that Division: see subsection 1100Y(6).

## 25 Subsection 1010A(1) (note)

Omit “Note”, substitute “Note 1”.

## 26 At the end of subsection 1010A(1)

Add:

Note 2: Division 1A of Part 7.12 (Employee share schemes) contains a separate regime for the making of offers in connection with employee share schemes. The provisions of this Part do not apply in relation to offers that are eligible for regulatory relief under that Division (see subsection 1100Y(3)) and certain sale offers of ESS interests (see section 1100ZC).

## 27 Section 1010BA (heading)

Repeal the heading, substitute:

### **1010BA Part does not apply to contribution plans and ESS contribution plans**

## 28 At the end of section 1010BA

Add “or ESS contribution plans for offers of ESS interests that are eligible for regulatory relief under section 1100Y”.

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## 29 Subsection 1012E(8) (note)

Omit “Note”, substitute “Note 1”.

## 30 At the end of subsection 1012E(8)

Add:

Note 2: Issues and sales that result from offers that are eligible for regulatory relief under Division 1A of Part 7.12 (Employee share schemes) are also disregarded for the purposes of subsection (2): see subsection 1100Y(4).

## 31 After Division 1 of Part 7.12

Insert:

### Division 1A—Employee share schemes

#### Subdivision A—Introduction

##### 1100E Simplified outline of this Division

This Division provides for regulatory relief for offers of interests (*ESS interests*) under an employee share scheme of:

- (a) a body corporate; or
- (b) a registered scheme that meets certain listing requirements.

Offers may be made to:

- (a) directors or employees of the body corporate or the responsible entity of the registered scheme; and
- (b) persons that provide services to the body corporate or responsible entity of the registered scheme.

Offers may also be made to certain related persons of directors, employees and service providers.

The regulatory relief consists of exemptions from the following requirements of this Act:

- (a) the disclosure requirements for the issue, sale and transfer of securities (Parts 6D.2 and 6D.3) and financial products (Part 7.9);

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- (b) the restrictions on advertising of offers for the issue, sale and transfer of securities (section 734) or financial products (section 1018A);
- (c) the requirement to make a target market determination for a financial product and distribute financial products in accordance with a target market determination (Part 7.8A);
- (d) the requirement to hold an Australian financial services licence for a financial service provided in relation to the employee share scheme (section 911A);
- (e) the prohibition on the hawking of financial products (section 992A).

An offer of ESS interests for no consideration is eligible for regulatory relief.

An offer of ESS interests for monetary consideration is eligible for regulatory relief if:

- (a) the proportion of shares covered by ESS interests that are offered complies with an issue cap; and
- (b) the terms of the offer include certain essential terms; and
- (c) streamlined disclosure requirements are met.

An offer of ESS interests by an unlisted body corporate must also generally comply with a monetary cap (\$30,000 per employee per year, plus 70% of any dividends and cash bonuses received in that year).

Regulatory relief is revoked if:

- (a) an offer ceases to meet these requirements; or
- (b) the body corporate or responsible entity of the scheme does not comply with an essential term of the offer.

ASIC has powers to exempt, or modify the operation of this Division in relation to, particular employee share schemes.

ASIC also has the power to issue stop orders to prevent an offer if that offer would not comply with this Division.

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## 1 1100F Geographical coverage of Division

2 This Division applies to offers of ESS interests that are received in  
3 this jurisdiction, regardless of where any resulting issue, sale or  
4 transfer occurs.

## 5 1100G Offers and invitations both covered

6 For the purposes of this Division:

- 7 (a) offering ESS interests for issue includes inviting applications  
8 for the issue of the ESS interests; and  
9 (b) offering ESS interests for sale includes inviting offers to  
10 purchase the ESS interests.

## 11 1100H Person offering interests

12 For the purposes of this Division, the person who offers ESS  
13 interests is the person who has the capacity, or who agrees, to issue  
14 or transfer the ESS interests if the offer is accepted.

## 15 1100J Offers may also be made in reliance on section 708 or 1012D

- 16 (1) The fact that a body corporate makes an offer of securities that is  
17 eligible for regulatory relief under section 1100Y does not prevent  
18 the body corporate from also making an offer, in reliance on a  
19 provision of section 708, of securities that are of the same class as  
20 those offered under the first-mentioned offer.
- 21 (2) The fact that a body corporate or responsible entity of a registered  
22 scheme makes an offer of financial products that is eligible for  
23 regulatory relief under section 1100Y does not prevent the body  
24 corporate or responsible entity from also making an offer, in  
25 reliance on a provision of section 1012D, of financial products that  
26 are of the same kind as those offered under the first-mentioned  
27 offer.

## 28 1100K Division does not apply to registered schemes that are not 29 listed

30 This Division does not apply to a registered scheme that is not  
31 included in the official list of a financial market covered by section  
32 1100L.

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## 1100L Financial markets recognised under this Division

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- 2 (1) For the purposes of this Division, the following financial markets
- 3 are covered by this section:
- 4 (a) a financial market operated by a market licensee;
- 5 (b) a foreign financial market determined by ASIC under
- 6 subsection (2).
- 7 (2) ASIC may, by legislative instrument, determine one or more
- 8 foreign financial markets for the purposes of this section.

## 9 Subdivision B—Key concepts

### 10 1100M Meaning of *employee share scheme*

#### 11 *Meaning of employee share scheme*

- 12 (1) An *employee share scheme* of a body corporate or registered
- 13 scheme means a scheme under which an ESS interest of the body
- 14 corporate or registered scheme may be issued, sold or transferred
- 15 to:
- 16 (a) a person (a *primary participant*) who is:
- 17 (i) an employee or director of, or an individual who
- 18 provides services to, the body corporate or the
- 19 responsible entity of the registered scheme; or
- 20 (ii) an employee or director of, or an individual who
- 21 provides services to, an associated entity of the body
- 22 corporate or of the responsible entity of the registered
- 23 scheme, where that associated entity is a body
- 24 corporate; or
- 25 (iii) a prospective person to whom subparagraph (i) or (ii)
- 26 may apply; or
- 27 (iv) a person prescribed by the regulations for the purposes
- 28 of this subparagraph; or
- 29 (b) another person (a *related person*) on behalf of a primary
- 30 participant, where the related person is:
- 31 (i) a spouse, parent, child or sibling of the primary
- 32 participant; or
- 33 (ii) another body corporate controlled by the primary
- 34 participant or a person mentioned in subparagraph (i); or
- 35 (iii) a body corporate that is the trustee of a self managed
- 36 superannuation fund (within the meaning of the

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1 *Superannuation Industry (Supervision) Act 1993* where  
2 the primary participant is a director of the body  
3 corporate; or

4 (iv) a person prescribed in relation to the primary participant  
5 by the regulations for the purposes of this subparagraph.

6 Note: An ESS participant who is an employee may be entitled to certain  
7 protections, conditions and minimum wages under the *Fair Work Act*  
8 *2009*, and protections under other laws of the Commonwealth,  
9 including section 31 of Schedule 2 to the *Competition and Consumer*  
10 *Act 2010* (misleading conduct relating to employment).

## 11 *Meaning of ESS participant*

12 (2) A person is an **ESS participant** in an employee share scheme if the  
13 person is:

14 (a) a primary participant mentioned in paragraph (1)(a) in  
15 relation to the scheme; or

16 (b) a related person mentioned in paragraph (1)(b) in relation to  
17 the scheme.

## 18 **1100N Meaning of ESS interest**

19 *Bodies corporate included in the official list of a financial market*

20 (1) An **ESS interest**, in a body corporate that is included in the official  
21 list of a financial market covered by section 1100L, means any of  
22 the following:

23 (a) a fully paid share in the body corporate that is in a class of  
24 shares that is able to be traded on the financial market;

25 (b) a beneficial interest in a fully paid share in the body  
26 corporate where that share is in a class of shares that is able  
27 to be traded on the financial market;

28 (c) a fully paid share in the body corporate that is convertible  
29 into an interest referred to in paragraph (b), where the  
30 conversion can be made without charge or for a nominal fee;

31 (d) a beneficial interest in a fully paid share in the body  
32 corporate that is convertible into an interest referred to in  
33 paragraph (a), where the conversion can be made without  
34 charge or for a nominal fee;

35 (e) a unit in an interest mentioned in any of paragraphs (a), (b),  
36 (c) or (d);

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- 1 (f) a fully paid stapled security that is in a class of stapled  
2 securities that is able to be traded on the financial market,  
3 that consists of 2 or more interests, each of which would  
4 separately be:  
5 (i) an ESS interest under any of paragraphs (a) to (e) of the  
6 body corporate, or of an associated entity of the body  
7 corporate; or  
8 (ii) an ESS interest under paragraph (3)(a) or (b) in a  
9 registered scheme, where the responsible entity of the  
10 scheme is an associated entity of the body corporate;  
11 (g) a unit in a stapled security mentioned in paragraph (f);  
12 (h) an incentive right granted in relation to, or an option to  
13 acquire, an interest mentioned in any of paragraphs (a), (b),  
14 (c), (d) or (f) (the *underlying ESS interest*);  
15 (i) any other interest in the body corporate prescribed by the  
16 regulations for the purposes of this paragraph.

17 *Meaning of ESS interest in other bodies corporate*

- 18 (2) An *ESS interest*, in a body corporate to which subsection (1) does  
19 not apply, means:  
20 (a) a fully paid ordinary share in the body corporate; or  
21 (b) a unit in an interest mentioned in paragraph (a);  
22 (c) an incentive right granted in relation to, or an option to  
23 acquire, an interest mentioned in paragraph (a) (the  
24 *underlying ESS interest*); or  
25 (d) any other interest in the body corporate prescribed by the  
26 regulations for the purposes of this paragraph.

27 *Meaning of ESS interest in a registered scheme*

- 28 (3) An *ESS interest*, in a registered scheme, means:  
29 (a) an interest in the scheme that is of the same kind as an  
30 interest in the scheme that is able to be traded on a financial  
31 market covered by section 1100L; or  
32 (b) a unit in an interest mentioned in paragraph (a); or  
33 (c) an incentive right granted in relation to, or an option to  
34 acquire, an interest mentioned in paragraph (a) (the  
35 *underlying ESS interest*); or  
36 (d) any other interest in the scheme prescribed by the regulations  
37 for the purposes of this paragraph.

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*Meaning of incentive right*

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2 (4) ***Incentive right*** means:

3 (a) a conditional right to acquire a security or financial product;  
4 or

5 (b) a conditional right to be paid a cash amount where the  
6 amount is determined (wholly or in part) with reference to  
7 any of the following:

8 (i) the price or value of a security or financial product at a  
9 particular time;

10 (ii) the change in the price or value of a security or financial  
11 product over a particular period;

12 (iii) the amount of dividends or distributions paid in respect  
13 of a security or financial product at a particular time;

14 (iv) the change in the amount of dividends or distributions  
15 paid in respect of a security or financial product over a  
16 particular period; or

17 (c) a conditional right to:

18 (i) acquire a security or financial product; and

19 (ii) be paid a cash amount where the amount is determined  
20 (wholly or in part) with reference to any of the matters  
21 mentioned in subparagraphs (b)(i) to (iv).

22 **Subdivision C—Offers that are eligible for regulatory relief**

23 **1100P Offers for no consideration**

24 (1) An offer for the issue or transfer of ESS interests of a body  
25 corporate or registered scheme to ESS participants in connection  
26 with an employee share scheme is eligible for regulatory relief  
27 under section 1100Y if:

28 (a) no monetary consideration is to be provided for the issue or  
29 transfer of the interests; and

30 (b) if the offer is of options or incentive rights—no monetary  
31 consideration is to be provided for the underlying ESS  
32 interests on the exercise of the options or rights; and

33 (c) for an offer under which ESS interests of the body corporate  
34 or registered scheme may be issued or transferred by a trustee  
35 of a trust—the trust meets the requirements in subsection (2);  
36 and

37 (d) the offer is expressed to be made under this Division; and

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- 1 (e) the offer meets any requirements prescribed in the  
2 regulations for the purposes of this paragraph.

3 *Trust requirements*

- 4 (2) For paragraphs (1)(c) and 1100Q(1)(d), a trust meets the  
5 requirements in this subsection if:  
6 (a) the trust is covered by subsection (3); and  
7 (b) either:  
8 (i) the trustee acquires the ESS interest in connection with  
9 the employee share scheme for the purposes of the  
10 trustee transferring the ESS interest to a primary  
11 participant or a related person; or  
12 (ii) if the ESS interest is a unit in another ESS interest—the  
13 trustee acquires the other ESS interest in connection  
14 with the employee share scheme for the purposes of the  
15 trustee issuing or transferring the unit to a primary  
16 participant or a related person.
- 17 (3) A trust is covered by this subsection if the trust deed of the trust:  
18 (a) provides that, in its capacity as trustee of the trust, the  
19 activities of the trustee are limited to managing the employee  
20 share scheme of the body corporate or registered scheme  
21 referred to in subsection (1); and  
22 (b) requires the trustee of the trust to keep written records on the  
23 administration of the trust; and  
24 (c) prevents the trustee of the trust charging any fees or charges  
25 for administering the trust, other than reasonable  
26 disbursements charged to the body corporate or responsible  
27 entity of the registered scheme; and  
28 (d) if the trustee of the trust is an associated entity of the body  
29 corporate or the responsible entity of the registered scheme  
30 referred to in subsection (1)—provides that the trustee may  
31 only exercise voting rights associated with the ESS interests  
32 in accordance with the instructions of the holder of the  
33 interests or consistent with the trustee's fiduciary duties; and  
34 (e) prevents the trustee of the trust, either alone or together with  
35 any other trustee of a trust, from holding more than:  
36 (i) for a body corporate or registered scheme that is  
37 included in the official list of a financial market covered  
38 by section 1100L—5% of the fully paid ordinary shares

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- 1 of the body corporate or interests in the registered  
2 scheme; or  
3 (ii) otherwise—20% of the fully paid ordinary shares of the  
4 body corporate; and  
5 (f) contains terms that meet any requirements prescribed in the  
6 regulations for the purposes of this paragraph.

## 7 **1100Q Offers for consideration—general rules**

- 8 (1) An offer for the issue, sale or transfer of ESS interests to ESS  
9 participants in connection with an employee share scheme of a  
10 body corporate or registered scheme is eligible for regulatory relief  
11 under section 1100Y if:
- 12 (a) either or both of the following apply:
    - 13 (i) the interests are offered for issue or sale in return for  
14 monetary consideration, and the interests will be  
15 acquired by the ESS participant who pays for the  
16 interests;
    - 17 (ii) the interests are options or incentive rights and  
18 monetary consideration is to be provided for the  
19 underlying ESS interest on the exercise of the options or  
20 rights; and
  - 21 (b) the offer complies with section 1100T (about disclosure); and
  - 22 (c) the offer complies with the issue cap (see subsection (2)); and
  - 23 (d) if, under the scheme, an ESS interest of the body corporate or  
24 registered scheme may be issued or transferred by the trustee  
25 of a trust—the trust meets the requirements in  
26 subsection 1100P(2); and
  - 27 (e) if there is a plan under which an ESS participant may acquire  
28 ESS interests by making regular payments, or having regular  
29 deductions made from the participant's salary or wages—the  
30 plan is an ESS contribution plan for the offer (see  
31 subsection (4)); and
  - 32 (f) if a loan is offered by the body corporate or relevant  
33 responsible entity in connection with the scheme—the loan  
34 complies with subsection (5) of this section; and
  - 35 (g) if the offer is of ESS interests in a body corporate that is not  
36 included in the official list of a financial market covered by  
37 section 1100L—the offer meets the additional requirements  
38 in section 1100R; and
  - 39 (h) the terms of the offer comply with section 1100V; and
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- 1 (i) the offer is expressed to be made under this Division; and  
2 (j) the offer meets any additional requirements prescribed in the  
3 regulations for the purposes of this paragraph.

4 *Issue cap*

- 5 (2) For the purposes of paragraph (1)(c), an offer of ESS interests in a  
6 body corporate or registered scheme complies with the issue cap if,  
7 at the time the offer is made the body corporate or responsible  
8 entity of the registered scheme reasonably believes:

9 (a) the total number of fully paid shares in the body corporate or  
10 interests in the registered scheme that are, or are covered by,  
11 the ESS interests of the body corporate or scheme that may  
12 be issued under the offer; and

13 (b) the total number of fully paid shares in the body corporate or  
14 interests in the registered scheme that are, or are covered by,  
15 the ESS interests that have been issued, or could have been  
16 issued, under offers made in connection with the employee  
17 share scheme at any time during the 3 year period ending on  
18 the day the offer is made;

19 does not exceed the percentage referred to in subsection (3) of the  
20 number of those fully paid shares or interests actually issued by the  
21 body corporate or scheme (whether in connection with the  
22 employee share scheme or otherwise) as at the start of the day the  
23 offer is made.

- 24 (3) The percentage is:

25 (a) for a body corporate or registered scheme that is included in  
26 the official list of a financial market covered by section

27 1100L—5%; or

28 (b) otherwise—20%.

29 *Meaning of ESS contribution plan*

- 30 (4) An **ESS contribution plan**, for an offer for the issue or sale of ESS  
31 interests, means a plan with terms that:

32 (a) allow an ESS participant to make regular payments, or elect  
33 to have regular deductions made from their wages or salary,  
34 for the purpose of acquiring the ESS interests under the offer;  
35 and

36 (b) provide that, before the participant acquires the ESS interests  
37 under the offer, the payments or deductions are held on trust

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- 1 in an account with an Australian ADI that is kept solely for  
2 that purpose; and
- 3 (c) allow the participant to elect to discontinue the deductions or  
4 payments at any time; and
- 5 (d) provide that, if the participant so elects:
- 6 (i) any deductions from the participant's wages or salary  
7 will cease, and any deductions made after the election  
8 will be repaid to the participant, within 45 days of the  
9 election; and
- 10 (ii) the amount of the deductions or payments standing, at  
11 the time when the election is made, to the credit of the  
12 account for the participant, and any interest on that  
13 amount, will be repaid to the participant within 45 days  
14 of the election; and
- 15 (e) require the participant to agree in writing to the terms of the  
16 plan before participating in the plan; and
- 17 (f) meet any requirements prescribed in the regulations for the  
18 purposes of this paragraph.

19 *Requirements for connected loans*

- 20 (5) A loan offered by a body corporate or responsible entity in  
21 connection with an employee share scheme complies with this  
22 section if:
- 23 (a) the loan is offered on the following terms:
- 24 (i) that the loan has no interest or fees payable;
- 25 (ii) that the rights of the body corporate or responsible  
26 entity as against the ESS participant, in the event of  
27 default in payment of the loan, are wholly limited to  
28 forfeiture of the ESS interests acquired using the loan;  
29 and
- 30 (b) the borrower is the ESS participant who will acquire ESS  
31 interests offered under the employee share scheme; and
- 32 (c) the terms of the loan meet any requirements prescribed in the  
33 regulations for the purposes of this paragraph.

34 Note: There is an additional requirement for unlisted bodies corporate: see  
35 paragraph 1100R(e).

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## 1100R Offers for consideration—additional rules for unlisted bodies corporate

For the purposes of paragraph 1100Q(1)(g), the offer meets the additional requirements in this section if:

- (a) the ESS offer document required by subsection 1100T(1) also includes a statement that the ESS interests may not have any value and that the value of the ESS interests will depend on future events that may not occur; and
- (b) if the interests are offered for issue or sale in return for monetary consideration—the offer is accompanied by the supporting information required by section 1100U; and
- (c) the offer complies with the additional requirements in section 1100W (about additional essential terms); and
- (d) the offer complies with section 1100X (about the monetary cap); and
- (e) if a loan is offered by the body corporate in connection with the scheme, the loan is not offered to any ESS participant who, at the time the loan is offered, is a shareholder of the body corporate; and
- (f) the offer meets any additional requirements prescribed in the regulations for the purposes of this paragraph.

Note: This section only applies to offers by unlisted bodies corporate: see paragraph 1100Q(1)(g).

## 1100S Offers that would not need disclosure etc. eligible for regulatory relief

An offer for the issue, sale or transfer of ESS interests to ESS participants in connection with an employee share scheme of a body corporate or registered scheme is eligible for regulatory relief under section 1100Y if:

- (a) the offer would not require disclosure to any investor under Part 6D.2 (if that Part otherwise applied to the offer) because of section 708 or 708AA; or
- (b) the offer would not require any person to be given a Product Disclosure Statement under Part 7.9 (if that Part otherwise applied to the offer) because of section 1012D, 1012DAA, 1012DA or 1012E.

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## 1100T Disclosure—general requirement for ESS offer document

- 1  
2 (1) For the purposes of paragraph 1100Q(1)(b), an offer of ESS  
3 interests in connection with an employee share scheme complies  
4 with this section if the offer is made in, or accompanied by, a  
5 document that meets the requirements of subsection (2).

### *ESS offer document*

- 6  
7 (2) A document (an *ESS offer document*) meets the requirements of  
8 this subsection for an offer of ESS interests in connection with an  
9 employee share scheme if the document:
- 10 (a) includes the terms of the offer, or a summary of the terms of  
11 the offer with a statement that, on request, a copy of the full  
12 terms of the offer will be provided to the ESS participant; and
  - 13 (b) provides general information about the risks of acquiring and  
14 holding the ESS interests being offered; and
  - 15 (c) states that advice given in relation to the offer does not take  
16 into account the ESS participant's objectives, financial  
17 situation and needs; and
  - 18 (d) suggests that the ESS participant obtain personal advice in  
19 relation to the offer; and
  - 20 (e) explains how the ESS participant may, from time to time,  
21 calculate the value of the ESS interests; and
  - 22 (f) states the period (the *application period*) during which the  
23 ESS participant may accept the offer; and
  - 24 (g) if ESS interests may be acquired under the offer using a loan  
25 or ESS contribution plan—includes:
    - 26 (i) the terms of the loan or plan; or
    - 27 (ii) a summary of the terms of the loan or plan and a  
28 statement that, on request, a copy of the terms of the  
29 plan or loan will be provided to the ESS participant; and
  - 30 (h) if ESS interests will be held on trust for ESS participants  
31 (other than by a body corporate of the kind mentioned in  
32 subparagraph 1100M(1)(b)(iii) (which is about self managed  
33 superannuation funds))—includes:
    - 34 (i) the trust deed; or
    - 35 (ii) a summary of the trust deed and a statement that, on  
36 request, a copy of the full deed will be provided to the  
37 ESS participant; and
-

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- 
- 1 (i) includes, or directs the participant to, any of the following  
2 documents (if they exist) that relate to the same class of ESS  
3 interest as those being offered:  
4 (i) a disclosure document prepared under Part 6D.2 in  
5 relation to an offer of securities, where that offer was  
6 made in the 12 months before the start of the application  
7 period;  
8 (ii) a Product Disclosure Statement prepared under Part 7.9  
9 in relation to an offer of financial products for issue or  
10 sale, where that offer was made in the 12 months before  
11 the start of the application period; and  
12 (j) includes any other information prescribed by the regulations  
13 for the purposes of this paragraph.

14 Note: There is an additional requirement for unlisted bodies corporate: see  
15 paragraph 1100R(a).

16 *Regulations may provide other ways of complying with this section*

- 17 (3) An offer also complies with this section if the offer is of a kind  
18 prescribed by the regulations for the purposes of this subsection.

## 19 **1100U Disclosure—supporting information for offers by unlisted** 20 **bodies corporate**

21 *Supporting information for offers by unlisted bodies corporate*

- 22 (1) For the purposes of paragraph 1100R(b), the supporting  
23 information required by this subsection is:  
24 (a) the financial information mentioned in subsection (2),  
25 accompanied by a statement as to whether that financial  
26 information has been audited; and  
27 (b) a document covered by subsection (3) (about valuations) in  
28 relation to the ESS interests being offered; and  
29 (c) a statement that the body corporate is solvent; and  
30 (d) any other financial information prescribed by the regulations  
31 for the purposes of this paragraph.

32 Note: The supporting information is only required for offers by unlisted  
33 bodies corporate and only if monetary consideration is to be provided  
34 for the issue or sale of the interests: see paragraph 1100R(b).

# EXPOSURE DRAFT

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*Financial information*

- 1
- 2 (2) The financial information is:
- 3 (a) if the body corporate must lodge a report for a financial year
- 4 with ASIC under section 319—a copy of the most recent
- 5 report lodged with ASIC; or
- 6 (b) if the body corporate is a registered foreign company—a
- 7 copy of the most recent documents lodged with ASIC under
- 8 section 601CK; or
- 9 (c) otherwise—a balance sheet and profit and loss statement
- 10 prepared in compliance with either the accounting standards
- 11 or the international accounting standards (within the meaning
- 12 of the *Australian Securities and Investments Commission Act*
- 13 *2001*).

14 *Valuation information*

- 15 (3) This subsection covers the following documents:
- 16 (a) a copy of a valuation of the ESS interest that has been
- 17 prepared consistently with an applicable method approved by
- 18 the Commissioner of Taxation under section 960-412 of the
- 19 *Income Tax Assessment Act 1997*;
- 20 (b) if securities in the same class as the ESS interests are on offer
- 21 at the same time as the ESS interests—a disclosure document
- 22 for that offer that has been lodged with ASIC as mentioned in
- 23 section 727;
- 24 (c) if financial products in the same class as the ESS interests are
- 25 on offer at the same time as the ESS interests—a disclosure
- 26 document or statement (within the meaning of section 952B)
- 27 in relation to those financial products;
- 28 (d) a copy of an executed agreement under which ESS interests
- 29 in the same class as the ESS interests are to be acquired on
- 30 arm's length terms by a third party who is not an associate of
- 31 the person making the offer if the agreement specifies the
- 32 amount of monetary consideration to be paid for an ESS
- 33 interest in that class;
- 34 (e) a copy of a draft agreement under which ESS interests in the
- 35 same class as the ESS interests are to be acquired on arm's
- 36 length terms by a third party who is not an associate of the
- 37 person making the offer if the agreement specifies the
- 38 amount of monetary consideration to be paid for an ESS
- 39 interest in that class.

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## 1100V Essential terms of the offer—general rules

- 1
- 2 (1) For the purposes of paragraph 1100Q(1)(h), the terms of an offer of
- 3 ESS interests in connection with an employee share scheme
- 4 comply with this subsection if, under those terms:
- 5 (a) an ESS participant cannot acquire an ESS interest under the
- 6 offer until at least 14 days after receiving the ESS offer
- 7 document and any supporting information required under
- 8 section 1100U (if applicable) for the offer; and
- 9 (b) the body corporate or relevant responsible entity is required
- 10 to provide each ESS participant with an updated ESS offer
- 11 document within 60 days of becoming aware that the
- 12 document that was provided has become out of date, or is
- 13 otherwise not correct, in a material respect; and
- 14 (c) the ESS offer document, any supporting information required
- 15 under section 1100U (if applicable) and the terms of the
- 16 offer:
- 17 (i) must not include a misleading or deceptive statement;
- 18 and
- 19 (ii) must not omit any information that would result in the
- 20 ESS offer document, supporting information or terms of
- 21 the offer being misleading or deceptive; and
- 22 (d) each person mentioned in items 2, 3 and 4 of the table in
- 23 subsection (2) must notify, in writing, the body corporate or
- 24 responsible entity of the scheme making the offer as soon as
- 25 practicable if, during the application period for the offer
- 26 mentioned in paragraph 1100T(2)(f), the person becomes
- 27 aware that:
- 28 (i) a material statement in the documents mentioned in
- 29 paragraph (c) is misleading or deceptive; or
- 30 (ii) information was omitted from any of those documents
- 31 that has resulted in one or more of those documents
- 32 being misleading or deceptive; or
- 33 (iii) a new circumstance has arisen during the application
- 34 period which means the ESS offer document is out of
- 35 date, or otherwise not correct, in a material respect; and
- 36 (e) an ESS participant who suffers loss or damage because of a
- 37 contravention of a term of the offer covered by paragraph (b),
- 38 (c) or (d) can recover the amount of loss or damage in
- 39 accordance with the table in subsection (2); and

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- 1 (f) if the ESS offer document included only a summary of the  
2 terms of the offer—the body corporate or relevant  
3 responsible entity is required to provide an ESS participant  
4 with a copy of the full terms of the offer within 10 business  
5 days of the ESS participant requesting a copy of those full  
6 terms; and
- 7 (g) if the ESS offer document included only a summary of the  
8 terms of a loan or ESS contribution plan—the body corporate  
9 or relevant responsible entity is required to provide an ESS  
10 participant with a copy of the full terms of the loan or plan  
11 within 10 business days of the ESS participant requesting a  
12 copy of those full terms; and
- 13 (h) if the ESS offer document included only a summary of a trust  
14 deed—the body corporate or relevant responsible entity is  
15 required to provide an ESS participant with a copy of the full  
16 trust deed within 10 business days of the ESS participant  
17 requesting a copy of the full trust deed; and
- 18 (i) if the offer is made by a trustee of a trust that meets the  
19 requirements of subsection 1100P(2)—the trustee must  
20 comply with the trust deed.
- 21 (2) For the purposes of paragraph (1)(e), an ESS participant must be  
22 able to recover loss or damage in accordance with the following  
23 table:  
24

<b>Item</b>	<b>An ESS participant may recover loss or damage suffered as a result of a contravention of...</b>	<b>from these people...</b>
1	a term of the offer covered by paragraph (1)(b) (out of date ESS offer document) or (c) (misleading or deceptive statements and omissions)	the body corporate or responsible entity making the offer
2	a term of the offer covered by paragraph (1)(b) (out of date ESS offer document) or (c) (misleading or deceptive statements and omissions)	each director of the body corporate or responsible entity making the offer
3	a term of the offer covered by paragraph (1)(b) (out of date ESS offer document) or (c)	a person named, with their consent, in an ESS offer document, any supporting information required under section

# EXPOSURE DRAFT

Item	An ESS participant may recover loss or damage suffered as a result of a contravention of...	from these people...
	(misleading or deceptive statements and omissions)	1100U (if applicable) or the terms of the offer as a proposed director of the body corporate or responsible entity of a registered scheme whose ESS interests are being offered
4	a term of the offer covered by paragraph (1)(c) (misleading or deceptive statements and omissions)	a person named, with their consent, in the ESS offer document, any supporting information required under section 1100U (if applicable) or the terms of the offer as having made: (a) the misleading or deceptive statement; or (b) a statement on which the misleading or deceptive statement is based
5	a term of the offer covered by paragraph (1)(d) (failure to notify body corporate or responsible entity of misleading or deceptive statement and omissions or new circumstances)	the person mentioned in item 2, 3 or 4 of this table who failed to notify the body corporate or responsible entity in accordance with the term covered by paragraph (1)(d)

1 Note: Item 2—**director** includes a shadow director (see section 9).

2 *Additional essential terms of the offer—no liability terms*

3 (3) The terms of the offer must also include terms to the effect that a  
4 person mentioned in the table in subsection (2) is not liable for any  
5 loss or damage suffered by an ESS participant because of a  
6 contravention of a term of the offer covered by paragraph (1)(c) or  
7 (d) if:

8 (a) the person:

9 (i) made all inquiries (if any) that were reasonable in the  
10 circumstances; and

11 (ii) after doing so, believed on reasonable grounds that the  
12 statement was not misleading or deceptive; or

13 (b) the person did not know that the statement was misleading or  
14 deceptive; or

15 (c) the person placed reasonable reliance on information given to  
16 the person by:

# EXPOSURE DRAFT

- 
- 1 (i) if the person is a body corporate or a responsible entity  
2 of a registered scheme—someone other than a director,  
3 employee or agent of the body corporate or responsible  
4 entity; or  
5 (ii) if the person is an individual—someone other than an  
6 employee or agent of the individual.
- 7 (4) The terms of the offer must not limit liability of a person  
8 mentioned in the table in subsection (2) in any way other than as  
9 required by subsection (3).

## 10 **1100W Essential terms of the offer—additional rules for unlisted** 11 **bodies corporate**

- 12 (1) For the purposes of paragraph 1100R(c), the offer complies with  
13 this section if it is made on terms that satisfy subsections (2) and  
14 (3).

15 Note: The terms of an offer of ESS interests in a body corporate that is not  
16 included in the official list of a financial market covered by section  
17 1100L must also contain terms about the monetary cap for the offer:  
18 see section 1100X.

19 *Additional term required if draft sale agreement used as valuation*

- 20 (2) The terms of the offer must provide that, if the ESS participant is  
21 given a draft sale agreement in satisfaction of paragraph  
22 1100U(3)(e) (about valuations), the ESS participant cannot acquire  
23 an ESS interest until a sale agreement that is not materially  
24 different from the draft sale agreement has been executed.

25 *Additional terms required for options and incentive rights*

- 26 (3) If the offer is of options or incentive rights and monetary  
27 consideration is to be provided for the underlying ESS interest on  
28 the exercise of the option or incentive right, the terms of the offer  
29 must be such that:
- 30 (a) the options cannot be exercised, or the incentive rights cannot  
31 vest, unless the following information is provided to the ESS  
32 participant 14 days before the exercise of the option or  
33 vesting of the incentive right:
- 34 (i) a document covered by subsection 1100U(3) (about  
35 valuations) in relation to the underlying ESS interest

# EXPOSURE DRAFT

- 
- 1 (other than a document mentioned in paragraph (c) of  
2 that subsection);
- 3 (ii) the financial information mentioned in subsection  
4 1100U(2), accompanied by a statement as to whether  
5 that financial information has been audited;
- 6 (iii) a statement that the body corporate is solvent; and
- 7 (b) the ESS participant may request the information mentioned  
8 in paragraph (a) at any time before the options or incentive  
9 rights expire; and
- 10 (c) the body corporate is required to provide the ESS participant  
11 with the information mentioned in paragraph (a) within 30  
12 business days of the ESS participant requesting the  
13 information; and
- 14 (d) if the ESS participant is given a draft sale agreement in  
15 satisfaction of subparagraph (a)(i)—the ESS participant  
16 cannot exercise the option or right until a sale agreement that  
17 is not materially different from the draft sale agreement has  
18 been executed.

19 *Regulations may provide other ways of complying with this section*

- 20 (4) An offer also complies with this section if the offer is of a kind  
21 prescribed by the regulations for the purposes of this subsection.

## 22 **1100X Other terms of the offer—monetary cap for offers by unlisted** 23 **bodies corporate**

- 24 (1) For the purposes of paragraph 1100R(d), the offer complies with  
25 this section if it is made on terms that could not result in a breach  
26 of the monetary cap for any primary participant in relation to the  
27 scheme for:
- 28 (a) the 12-month period starting on the day that an offer was first  
29 accepted by the participant or a related person of the  
30 participant in connection with the scheme; or
- 31 (b) any subsequent 12-month period starting immediately after  
32 the end of the previous 12-month period.

33 Note 1: For who is a primary participant in an employee share scheme, see  
34 paragraph 1100M(1)(a).

35 Note 2: For who is a related person of a primary participant, see paragraph  
36 1100M(1)(b).

# EXPOSURE DRAFT

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- 1 (2) The offer breaches the monetary cap for a 12-month period if the  
2 amount worked out under subsection (3) for the participant for the  
3 period exceeds the monetary cap worked out under subsection (5)  
4 for the participant for the period.

5 *Amounts that use up the cap*

- 6 (3) The amount worked out under this subsection for a 12-month  
7 period is the sum of the following amounts, worked out in  
8 accordance with subsection (4):
- 9 (a) the maximum amount the participant could pay in the  
10 12-month period under the terms of any offer made in  
11 connection with any employee share scheme operated by the  
12 body corporate;
  - 13 (b) the maximum amount that could be paid by related persons  
14 of the participant in the 12-month period under the terms of  
15 any offer made in connection with any employee share  
16 scheme operated by the body corporate.
- 17 (4) In working out amounts under subsection (3):
- 18 (a) subject to paragraphs (c) and (d) of this subsection, include  
19 amounts payable on the exercise of options and incentive  
20 rights, and amounts payable under any related contribution  
21 plan; and
  - 22 (b) do not include any amount payable by a participant or related  
23 person for the issue or sale of ESS interests to the extent that,  
24 under the terms of the offer, the amount can only become  
25 payable at a time when:
    - 26 (i) the ESS interests are in a class of interests that is able to  
27 be traded on the official list of a financial market  
28 covered by section 1100L; or
    - 29 (ii) an executed sale agreement constituting an offer to  
30 acquire ESS interests in the same class as the ESS  
31 interests is open for acceptance by the participant or  
32 related person; and
  - 33 (c) do not include any amount payable on the exercise of options  
34 or incentive rights to the extent that, under the terms of the  
35 offer, the amount can only become payable at a time when:
    - 36 (i) the underlying ESS interests are in a class of interests  
37 that is able to be traded on the official list of a financial  
38 market covered by section 1100L; or

# EXPOSURE DRAFT

- 
- 1 (ii) an executed sale agreement constituting an offer to  
2 acquire ESS interests in the same class as the underlying  
3 ESS interests is open for acceptance by the participant  
4 or related person; and  
5 (d) do not include any amount prescribed in the regulations for  
6 the purposes of this paragraph.

7 *Amount of the monetary cap*

- 8 (5) The monetary cap for a primary participant for a 12-month period  
9 (the **current period**) is the sum of:  
10 (a) the amount referred to in subsection (6); and  
11 (b) 70 per cent of the amount of any distributions received in the  
12 current period by the participant or a related person on an  
13 ESS interest acquired under the scheme (whether under the  
14 offer mentioned in subsection (1) or under another offer); and  
15 (c) 70 per cent of the amount of any cash remuneration received  
16 in the current period by the participant, to the extent the  
17 remuneration was conditional on the achievement of  
18 objectives; and  
19 (d) if the current period is not the first 12-month period—the  
20 sum of any amount carried forward under subsection (7) for  
21 each previous 12-month period that started:  
22 (i) at or after the start of the first 12-month period; and  
23 (ii) not earlier than 5 years before the start of the current  
24 period.
- 25 (6) The amount (the **basic cap amount**) is:  
26 (a) unless paragraph (b) applies—\$30,000; or  
27 (b) if an amount is prescribed in the regulations for the purposes  
28 of this paragraph—that amount.

29 *Carry-forward of unused cap*

- 30 (7) If the amount worked out for a 12-month period by:  
31 (a) starting with the lesser of:  
32 (i) the basic cap amount; and  
33 (ii) the amount that would be worked out under  
34 subsection (3) and in accordance with subsection (4), if  
35 the only amounts included were amounts payable on the  
36 exercise of options and incentive rights; and

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1 (b) subtracting the total amount paid in the 12-month period by  
2 the participant and each related person under the terms of any  
3 offer made in connection with any employee share scheme  
4 operated by the body corporate on the exercise of options and  
5 incentive rights;  
6 is greater than nil, then that amount is carried forward for the  
7 purposes of paragraph (5)(d).

8 *Regulations may provide other ways of complying with this section*

9 (8) An offer also complies with this section if the offer is of a kind  
10 prescribed by the regulations for the purposes of this subsection.

## 11 **Subdivision D—Regulatory relief**

### 12 **1100Y Regulatory relief for offers of ESS interests**

13 (1) This section applies (subject to sections 1100Z and 1100ZA) in  
14 relation to an offer for the issue, sale or transfer of ESS interests in  
15 connection with an employee share scheme if the offer is eligible  
16 for regulatory relief under this section (see Subdivision C).

17 *Relief relating to disclosure*

18 (2) Parts 6D.2 and 6D.3 do not apply in relation to the offer.

19 (3) Part 7.9 does not apply in relation to the offer, or any issue or sale  
20 of the interest to an ESS participant under the offer.

21 (4) Issues and sales of securities or financial products that result from  
22 the offer are to be disregarded when counting issues and sales, and  
23 the amount raised from issues and sales, for the purposes of  
24 subsection 708(1) (for securities) and 1012E(2) (for financial  
25 products).

26 (5) Section 1012A (about disclosure in relation to personal advice)  
27 does not apply in relation to financial product advice relating to the  
28 offer.

29 (6) Part 7.8A (about the design and distribution requirements relating  
30 to financial products for retail clients) does not apply in relation to  
31 the issue, sale or transfer of a security that is an ESS interest under  
32 the offer.

# EXPOSURE DRAFT

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*Relief relating to Australian financial services licensing*

- 1
- 2 (7) A person is exempt from the requirement under
- 3 subsection 911A(1) to hold an Australian financial services licence
- 4 for a financial service they provide if:
- 5 (a) the service:
- 6 (i) is the provision of general advice by the person in
- 7 connection with the offer; or
- 8 (ii) is, or is provided incidentally to, a custodial or
- 9 depository service that is provided by the person in
- 10 connection with the offer; or
- 11 (iii) the service is issuing or dealing in a financial product by
- 12 the person in connection with the offer; or
- 13 (iv) is dealing in an interest in an ESS contribution plan for
- 14 the offer; and
- 15 (b) the person is:
- 16 (i) the body corporate or the responsible entity of the
- 17 registered scheme to which the offer relates; or
- 18 (ii) an associated entity of that body corporate or
- 19 responsible entity.

20 *Relief relating to hawking of financial products*

- 21 (8) Subsection 992A(1) does not apply in relation to the offer.

22 **1100Z Dealing with money received before ESS interest is issued**

- 23 (1) If a person offers ESS interests for issue or sale to an ESS
- 24 participant in connection with an employee share scheme, the
- 25 person must hold:
- 26 (a) all application money received from ESS participants
- 27 applying for ESS interests in connection with the employee
- 28 share scheme; and
- 29 (b) all other money paid by them on account of the ESS interests
- 30 before they are issued or transferred;
- 31 in trust under this section for the ESS participants until:
- 32 (c) the ESS interests are issued or transferred; or
- 33 (d) the money is returned to the ESS participants.
- 34 (2) If the application money needs to be returned to an ESS
- 35 participant, the person must return the money as soon as
- 36 practicable.

# EXPOSURE DRAFT

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- 1 (3) An offence based on subsection (1) or (2) is an offence of strict  
2 liability.

## 3 **1100ZA Revocation of regulatory relief in certain circumstances**

### 4 *Revocation of regulatory relief—general case*

- 5 (1) Section 1100Y does not apply, and is taken never to have applied,  
6 to an offer for the issue or sale of ESS interests in connection with  
7 an employee share scheme of a body corporate or registered  
8 scheme if:
- 9 (a) at the time the offer was made, it was eligible for regulatory  
10 relief under section 1100Y because of the operation of  
11 section 1100Q (offers for consideration); and
  - 12 (b) at any time after the offer is made, an ESS participant makes  
13 a payment to acquire ESS interests under the offer, or makes  
14 a payment to exercise options or incentive rights that were  
15 acquired under the offer; and
  - 16 (c) at any time after the offer is made, any of the following  
17 occur:
    - 18 (i) for an offer under which an ESS interest of the body  
19 corporate or registered scheme may be issued or  
20 transferred by the trustee of a trust—the trust ceases to  
21 meet the requirements in subsection 1100P(2) or the  
22 trustee of the trust does not comply with a term of the  
23 trust deed;
    - 24 (ii) the offer results in a breach of the issue cap (see  
25 subsection 1100Q(2));
    - 26 (iii) the offer results in a breach of the monetary cap (if  
27 applicable) for a primary participant (see section  
28 1100X);
    - 29 (iv) any plan under which an ESS participant may acquire  
30 the ESS interests by making regular payments, or  
31 having regular deductions made from the participant's  
32 salary or wages, ceases to be an ESS contribution plan  
33 for the offer (see subsection 1100Q(4));
    - 34 (v) any loan offered by the body corporate or relevant  
35 responsible entity in connection with the scheme ceases  
36 to comply with subsection 1100Q(5) and paragraph  
37 1100R(e) (if applicable);

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- 1 (vi) the body corporate or the responsible entity of the  
2 scheme contravenes a term of the offer mentioned in  
3 section 1100V (essential terms of the offer);  
4 (vii) if the offer complied with section 1100W (about  
5 additional terms for unlisted bodies corporate)—the  
6 body corporate contravenes a term of the offer  
7 mentioned in that section.

8 Note: The terms of an offer for the issue or sale of ESS interests for  
9 consideration (or a summary of those terms) must be set out in the  
10 offer document for the offer: see section 1100T.

## 11 *Revocation of regulatory relief—unlisted options and incentive* 12 *rights*

- 13 (2) Section 1100Y does not apply, and is taken never to have applied,  
14 to an offer for the issue or sale of ESS interests in connection with  
15 an employee share scheme of a body corporate that is not included  
16 in the official list of a financial market covered by section 1100L  
17 if:  
18 (a) the ESS interests issued or sold are options or incentive  
19 rights; and  
20 (b) at the time the offer was made, it was eligible for regulatory  
21 relief under section 1100Y because of the operation of  
22 section 1100Q (offers for consideration); and  
23 (c) at any time after the offer is made, an ESS participant  
24 requests that the information mentioned in  
25 paragraph 1100W(3)(a) (about additional terms relating to  
26 disclosure requirements for exercise of unlisted options etc.)  
27 be provided by the body corporate; and  
28 (d) the body corporate does not provide that information within  
29 the 30 business day period mentioned in paragraph  
30 1100W(3)(c).

## 31 **1100ZB Requirement to notify ASIC of intent to offer ESS interests**

- 32 (1) If:  
33 (a) a body corporate or responsible entity of a registered scheme  
34 establishes an employee share scheme; and  
35 (b) the body corporate or responsible entity intends to make one  
36 or more offers of ESS interests in connection with the  
37 employee share scheme, where those offers will be expressed  
38 to be made under this Division; and

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- 1 (c) either:  
2 (i) the offers are offers for issue or sale in return for  
3 monetary consideration; or  
4 (ii) the offers are of options or incentive rights and  
5 monetary consideration is to be provided for the  
6 underlying ESS interest on the exercise of the option or  
7 right;  
8 the body corporate or responsible entity must lodge notice of that  
9 establishment and intent with ASIC, in the prescribed form.
- 10 (2) The notice must be lodged before any offers are made in  
11 connection with the employee share scheme.

## *Offence*

- 13 (3) A person commits an offence if the person fails to comply with this  
14 section.

## **1100ZC Regulatory relief for certain subsequent sale offers of ESS interests**

- 17 The provisions of Part 6D.2, 6D.3 and 7.9 do not apply in relation  
18 to an offer of ESS interests in a body corporate or registered  
19 scheme for sale if:  
20 (a) the body corporate or scheme operates an employee share  
21 scheme; and  
22 (b) the person making the offer reasonably believes that:  
23 (i) the person acquired the interests under the employee  
24 share scheme; and  
25 (ii) the person is making the offer only to persons who are  
26 ESS participants in relation to the body corporate or  
27 registered scheme.

## **Subdivision E—ASIC powers**

### **1100ZD ASIC's power to make exemptions and declare modifications etc. in relation to this Division**

#### *Application*

- 32 (1) This section applies in relation to Chapters 2L, 5, 5C, 6D and 7  
33 (the *covered Chapters*) and this Division.

# EXPOSURE DRAFT

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*Exemptions and declarations on application of this Division*

- 1
- 2 (2) ASIC may do either or both of the following:
- 3 (a) exempt an employee share scheme, and any offers in
- 4 connection with the employee share scheme, from all or
- 5 specified provisions of the covered Chapters or this Division;
- 6 (b) declare that the covered Chapters or this Division apply in
- 7 relation to an employee share scheme, and any offers in
- 8 connection with the employee share scheme, as if specified
- 9 provisions were omitted, modified or varied as specified in
- 10 the declaration.

- 11 (3) The exemption or declaration may:
- 12 (a) relate to all employee share schemes, a specified class of
- 13 employee share schemes or a specified employee share
- 14 scheme; and
- 15 (b) relate to any other matter generally or as specified.

16 *Imposition of conditions on exemption*

- 17 (4) An exemption may apply unconditionally or subject to specified
- 18 conditions.
- 19 (5) An entity to whom a condition specified in an exemption applies
- 20 must comply with the condition.
- 21 (6) The Court may order the entity to comply with the condition in a
- 22 specified way. Only ASIC may apply to the Court for the order.

23 *Exemptions and declarations relating to all or a class of employee*

24 *share schemes*

- 25 (7) An exemption or declaration that relates to all employee share
- 26 schemes, or a specified class of employee share schemes, must be
- 27 made by legislative instrument.

28 *Exemptions and declarations relating to specified employee share*

29 *schemes*

- 30 (8) An exemption or declaration that relates to a specified employee
- 31 share scheme must be made by notifiable instrument.
- 32 (9) ASIC must give a copy of an exemption or declaration that relates
- 33 to a specified employee share scheme of a body corporate or
- 34 registered scheme to the body corporate or the responsible entity of

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1 the registered scheme as soon as is reasonably practicable after the  
2 exemption or declaration is made.

## 3 **1100ZE ASIC stop orders**

- 4 (1) This section applies if, in relation to an offer of ESS interests that  
5 is purportedly made under this Division, ASIC is satisfied that:
- 6 (a) information in any of the following is not worded and  
7 presented in a clear, concise and effective manner:
    - 8 (i) an application form for the offer;
    - 9 (ii) a document that purports to be an ESS offer document  
10 for the offer;
    - 11 (iii) a document that purports to be supporting information  
12 required under section 1100U for the offer;
    - 13 (iv) if the offer is not in a document mentioned in  
14 subparagraph (i) or (ii)—the document that contains the  
15 offer; or
  - 16 (b) a document that purports to be an ESS offer document for the  
17 offer does not meet the requirements of subsection 1100T(2);  
18 or
  - 19 (c) the terms of the offer do not comply with subsections  
20 1100V(1) and (3) or section 1100W (if applicable); or
  - 21 (d) a document that purports to be supporting information  
22 required under section 1100U for the offer does not meet the  
23 relevant requirements under that section for that document;  
24 or
  - 25 (e) the ESS offer document, any supporting information required  
26 under section 1100U or the terms of the offer:
    - 27 (i) include a misleading or deceptive statement; or
    - 28 (ii) omit information in such a way that results in any of  
29 those documents being misleading or deceptive; or
  - 30 (f) a person has contravened, or is likely to contravene, a term of  
31 the offer covered by section 1100V or 1100W (if applicable).
- 32 (2) ASIC may order that no offers, issues, sales or transfers of the ESS  
33 interests be made while the order is in force.
- 34 (3) Before making an order under subsection (2), ASIC must:
- 35 (a) hold a hearing; and

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- 1 (b) give a reasonable opportunity to any interested people to  
2 make oral or written submissions to ASIC on whether an  
3 order should be made.
- 4 (4) If ASIC considers that any delay in making an order under  
5 subsection (2) pending the holding of a hearing would be  
6 prejudicial to the public interest, ASIC may make an interim order  
7 that no offers, issues, sales or transfers of the ESS interests be  
8 made while the interim order is in force. The interim order may be  
9 made without holding a hearing and lasts for 21 days after the day  
10 on which it is made unless revoked before then.
- 11 (5) At any time during the hearing, ASIC may make an interim order  
12 that no offers, issues, sales or transfers of the ESS interests be  
13 made while the interim order is in force. The interim order lasts  
14 until:
- 15 (a) ASIC makes an order under subsection (2) after the  
16 conclusion of the hearing; or  
17 (b) the interim order is revoked;  
18 whichever happens first.
- 19 (6) An order under subsection (2), (4) or (5) must be in writing and  
20 must be served on the person who is ordered not to offer, issue, sell  
21 or transfer ESS interests.

## 32 At the end of Chapter 10

22 Add:

### 24 **Part 10.66—Transitional provisions relating to** 25 **Schedule 1 of the Treasury Laws** 26 **Amendment (Measures for Consultation)** 27 **Bill 2022** 28

#### 29 **1696 Employee share schemes—recognised foreign markets**

- 30 (1) If, immediately after the commencement of this section, there is no  
31 legislative instrument in force under subsection 1100L(2), then an  
32 approved foreign market, within the meaning of the *ASIC*  
33 *Corporations (Definition of Approved Foreign Market) Instrument*

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1                   2017/669, is taken to be a foreign market determined by ASIC for  
2                   the purposes of that section.

3                   (2) This section ceases to apply when ASIC determines a foreign  
4                   market under subsection 1100L(2).

## 5                   **33 In the appropriate position in Schedule 3**

6                   Insert:

Subsection 1100Z(1)	60 penalty units
Subsection 1100Z(2)	20 penalty units
Subsection 1100ZB(3)	5 years imprisonment

## 7                   **34 Subparagraph 1274(2)(a)(iva)**

8                   Repeal the subparagraph, substitute:

9                   (iva) an ESS offer document, an application form or any  
10                  supporting information required under section 1100U  
11                  lodged with ASIC in relation to an offer of ESS interests  
12                  in a body corporate (the *issuing body corporate*), if the  
13                  conditions set out in subsection (2AA) are satisfied; or

## 14                  **35 Subsection 1274(2AA)**

15                  Repeal the subsection, substitute:

16                  (2AA) For the purposes of subparagraph (2)(a)(iva), the conditions are the  
17                  following:

- 18                  (a) no equity interests in any of the following companies are  
19                  listed for quotation in the official list of any approved stock  
20                  exchange at the end of the issuing body corporate's most  
21                  recent income year (the *pre-lodgement year*) before the  
22                  income year in which the relevant document mentioned in  
23                  subparagraph (2)(a)(iva) is lodged with ASIC:
- 24                  (i) the issuing body corporate;
  - 25                  (ii) any subsidiary of the issuing body corporate at the end  
26                  of the pre-lodgement year;
  - 27                  (iii) any holding company of the issuing body corporate at  
28                  the end of the pre-lodgement year;
  - 29                  (iv) any subsidiary of a holding company of the issuing  
30                  body corporate at the end of the pre-lodgement year;  
31                  and
- 32                  (b) the issuing body corporate had an aggregated turnover not  
33                  exceeding \$50 million for the pre-lodgement year.