

GRG Remuneration Insight 139

Employee Share Scheme Corporations Act New Provisions

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Introduction

On 30 March 2022 the Government passed amendments to the Corporations Act and has since received Royal Assent with the amendments coming into effect on 30 September 2022. The amendments create a new regime within the Corporations Act to govern Employee Share Schemes (ESSs). They are intended to remedy many of the impediments that previously existed for both listed and unlisted companies trying to introduce an ESS.

This paper outlines the new ESS regime in the Corporations Act.

Key Points to Note

Key aspects to note about the new Corporations Act provisions include:

1. Offers that do not involve payments by participants are not subject to limits and involve minimal compliance. This should improve the ability of companies to offer:
 - a. long term variable remuneration equity grants,
 - b. equity grants that are compulsory parts of fixed pay or deferred short term variable remuneration, or
 - c. equity grants to employees as an additional benefit,
2. Salary sacrifice offers of equity by listed companies need to comply with an issues limit and meet specified compliance requirements that are not onerous,
3. Offers of equity by unlisted companies with payments by participants have been provided with additional scope but are subject to limits and significant compliance requirements,
4. The 12 months on-sale relief applicable to securities issued without a disclosure document that was included in Class Orders 14/1000 (listed companies) and 14/1001 (unlisted companies) has not been replicated in the new ESS provisions of the Corporations Act. ASIC has indicated to us that they do not intend to replicate the previous relief.

Relief Provided

For many years ESSs have had to deal with various obligations in relation to:

- Disclosure (Prospectus or Offer Information Statement for securities and Product Disclosure Statement (PDS) for financial products,
- Licensing via an Australian Financial Services Licence (AFSL),
- Advertising, and
- Hawking.

The most often faced challenges related to disclosure but limited relief was available under the Class Orders (14/1000 for listed companies and 14/1001 for unlisted companies) and s708 of the Corporations Act for securities in relation to small scale offerings, senior managers and sophisticated investors etc.

The new regime provides broad relief in relation to these obligations.

This relief applies similarly to both securities and financial products (derivatives). Prior to the new regime coming into operation securities and financial products were subject to different provisions which did not exactly mirror each other.

As many equity plans in Australia use financial products which convert into securities, it is important that similar provisions apply to securities and financial products.

It should also be noted that for the new provisions to apply to an offer, the offer must specify that it is being made under Part 7.12 Division 1A (the new provisions). Otherwise, the old laws will apply to the offer.

Broad Categories of ESS

The Categories

There are three main categories that need to be recognised being:

- ESSs involving no payments by participants,
- ESSs involving payments by participants in listed companies, and
- ESSs involving payments by participants in unlisted companies.

ESSs Involving No Payments by Participants

This category has been provided with relief without the need to comply with various obligations that apply to the other two categories.

The main three conditions to qualify for regulatory relief are:

- Offers of eligible interests are made to eligible participants,
- The offer must acknowledge that is made under Division 1A, and
- If a **trust** is involved then certain requirements related to the trust need to be fulfilled.

ESSs Involving Payments by Participants In Listed Companies

For listed companies, offers that involve payment to participate need to meet the following conditions to qualify for regulatory relief:

- The three conditions related to offers with no payments by participants (see above),
- If a **contribution plan** is involved then certain requirements related to the contribution plan need to be fulfilled,
- If **loans** are involved then certain requirements related to the loans need to be fulfilled,
- **Disclosure requirements** need to be fulfilled, and
- Offers must fall within an **issues cap**, which is 5% of issued shares over a rolling 3-year period for listed companies.

ESSs Involving Payments by Participants In Unlisted Companies

For unlisted companies, offers that involve payment to participate need to meet the following conditions to qualify for regulatory relief:

- The conditions (other than the issues cap which is replaced below) related to listed companies' offers with payments by participants (see above),
- Offers must fall within an **issues cap** which is 20% of issued shares over a rolling 3-year period for unlisted companies,
- Offers must comply with an annual **monetary cap** for each participant of:
 - \$30,000, +
 - 70% of distribution (dividends) from an ESS, +
 - 70% of cash incentive remuneration received.

There is scope to roll up the unused part of the \$30,000 up to a maximum of \$150,000 to fund the exercise of options and incentive rights.

- Loans do not meet the loan requirements if the loans are to shareholders of unlisted companies. This has the effect of loans becoming a one-off opportunity that cannot be reused until an employee sells all shares in the company.

Aspects with Specified Requirements

Trusts

For taxing purposes, it is necessary that employee share trusts (ESTs) satisfy the "sole activities" test. The Australian Taxation Office (ATO) has indicated the 'sole activities' of an EST broadly include obtaining shares or rights in a company and ensuring that the shares or rights are provided under an ESS to employees of that company or subsidiary thereof. Activities that are 'merely incidental' to these activities are also permissible.

Similar provisions are contained in the new Corporations Act provisions which requires that:

- a) the trustee acquires ESS interests in connection with the employee share scheme for the purposes of the trustee transferring the ESS interest to an ESS participant; or
- b) if the ESS interest is a unit in another ESS interest—the trustee acquires the other ESS interest in connection with the employee share scheme for the purposes of the trustee issuing or transferring the unit to an ESS participant, and
- c) the trust provides that, in its capacity as trustee of the trust, the activities of the trustee are limited to managing employee share schemes of the body corporate or registered scheme referred, and
- d) the deed requires the trustee of the trust to:

- a. keep written records on the administration of the trust; and
- b. not levy any fees or charges for administering the trust, other than:
 - i. reasonable disbursements charged to the trust; or
 - ii. amounts charged to the body corporate or responsible entity of the registered scheme; and
- e) if the trustee of the trust is an associated entity of the body corporate or the relevant responsible entity— provides that the trustee may only exercise voting rights associated with the ESS interests in accordance with the instructions of the holder of the interests or consistent with the trustee’s fiduciary duties; and
- f) contains terms that meet any requirements prescribed in the regulations.

Contribution Plans

An ESS contribution plan, for an offer for the issue or sale of ESS interests, means a plan with terms that:

- a) allow an ESS participant to make regular payments, or elect to have regular deductions made from their wages or salary, for the purpose of acquiring the ESS interests under the offer; and
- b) provide that, before the participant acquires the ESS interests under the offer, the payments or deductions are held on trust in an account with an Australian ADI that is kept solely for that purpose; and
- c) allow the participant to elect to discontinue the deductions or payments at any time; and
- d) provide that, if the participant so elects:
 - i. any deductions from the participant’s wages or salary will cease, and any deductions made after the election will be repaid to the participant, within 45 days of the election; and
 - ii. the amount of the deductions or payments standing, at the time when the election is made, to the credit of the account for the participant, and any interest on that amount, will be repaid to the participant within 45 days of the election; and
- e) require the participant to agree in writing to the terms of the plan before participating in the plan; and
- f) meet any requirements prescribed in the regulations.

Loans

Loans in connection with an ESS need to comply with the following requirements:

- a) the loan is offered on the following terms:
 - i. that the loan has no interest or fees payable;
 - ii. that the rights of the company against the ESS participant, in the event of default in payment of the loan, are wholly limited to forfeiture of the ESS interests acquired using the loan; and
- b) the borrower is the ESS participant who will acquire ESS interests offered under the employee share scheme; and
- c) the terms of the loan meet any requirements prescribed in the regulations.

Additional requirement for unlisted bodies corporate

- d) However, if the offer is of ESS interests in a body corporate that is not included in the official list of a financial market covered by section 1100K, a loan does not comply with this section if it is offered or made by the body corporate to any ESS participant who, at the time the loan is offered or made (as the case may be), is a shareholder of the body corporate.

Issues Caps

The issues cap will be satisfied if, at the time the offer is made, the company reasonably believes:

- a) the total number of fully paid shares in the company that may be issued under the offer; and
- b) the total number of fully paid shares that have been issued, or could have been issued, under offers made in connection with the employee share scheme at any time during the 3-year period ending on the day the offer is made;

does not exceed

- for a listed company 5% of issued shares, or
- for an unlisted company 20% of issued shares, or
- in either case any limit prescribed in the company’s constitution.

Similar limits apply to stapled securities.

Monetary Cap

The monetary cap applies to successive (not rolling) 12-month periods commencing on the day an offer is accepted by the participant.

The amount of the monetary cap for a primary participant (employee, not related party) for a 12-month period (the **current period**) is the sum of:

- a) \$30,000 (basic cap amount), and
- b) 70% of the amount of any distributions received in the current period by the participant or a related person on an ESS interest acquired under the scheme; and
- c) 70% of the amount of any cash variable remuneration received in the current period by the participant; and
- d) the sum of any amount carried forward for each previous 12-month period that started not earlier than 4 years before the start of the current period.

The amount that may be carried forward in respect of a 12-month period is calculated by deducting from the lower of:

- a) basic cap amount of \$30,000, and
- b) the amounts payable on the exercise of options and incentive rights,

the amount paid during the 12-month period to exercise options and incentive rights (includes amounts paid from a contribution plan).

Amounts paid or payable during the 12-month period including from contribution plans count towards use of the monetary cap.

Liquidity event related payments are excluded from the monetary cap as follows:

- a) An amount payable by a participant or related person for the issue or sale of ESS interests to the extent that, under the terms of the offer, the amount can only become payable during a liquidity period for the ESS interests, or
- b) An amount payable on the exercise of options or incentive rights to the extent that, under the terms of the offer, the amount can only become payable during a liquidity period for the underlying ESS interests.
- c) An amount payable by an ESS participant for the issue or sale of ESS interests to the extent that, under the terms of the offer:
 - i. the amount can only become payable no longer than 7 days before the start of a liquidity period for the ESS interests; and
 - ii. all application money received from ESS participants before the start of a liquidity period must be held on trust for the ESS participants until:
 - A. the start of the liquidity period; or
 - B. the money is returned to the ESS participants; and
 - C. if application money needs to be returned to an ESS participant, it must be returned as soon as practicable.
- d) An amount payable by an ESS participant on the exercise of options or incentive rights to the extent that, under the terms of the offer:
 - i. the amount can only become payable no longer than 7 days before the start of a liquidity period for the underlying ESS interests; and
 - ii. all application money received from ESS participants before the start of a liquidity period must be held in trust for the ESS participants until:
 - A. the start of the liquidity period; or
 - B. the money is returned to the ESS participants; and
 - C. if application money needs to be returned to an ESS participant, it must be returned as soon as practicable.

A **liquidity period** for an ESS interest is a period during which:

- a) the ESS interest is in a class of interests that is able to be traded on the official list of a financial market covered by section 1100K; or
- b) an executed sale agreement constituting an offer to acquire ESS interests in the same class as the ESS interest is open for acceptance; or
- c) a circumstance prescribed by the regulations.

Disclosure Requirements

There are detailed requirements in relation to offers involving consideration and penalties for failure to comply. Accordingly, before proceeding with an offer involving consideration professional advice should be sought on these requirements.

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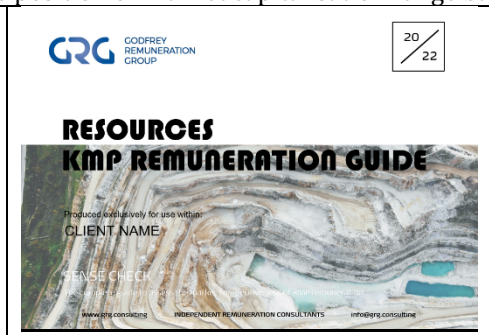
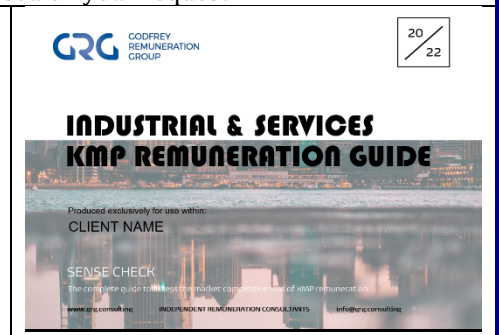
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GRG KMP REMUNERATION GUIDE DATA OVERVIEW

Chair & Non-executive Directors

- Main Board Packages
- Aggregate Fee Limits
- Fee Movements
- Committee Fees
- Per Diem Rates
- NED Equity Plans

Top Executives

- Fixed Pay
- Short Term Incentives
- Long Term Incentives
- Total Remuneration Packages
- Market Movements

Data tables show actual, forecasted, and projected data at key statistical data points **P25, P50, P62.5 & P75.**

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