GRG Remuneration Insight 143

Alert Update for Equity: Corporations Act Compliance

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Refresh/Summary of the Issues (and Additional Issues Identified)

New employee share scheme (ESS) provisions in the Corporations Act came into effect on 1 October 2022, with implications for almost all equity plans operated in Australia. The changes were intended to replace Class Order (CO) 14/1000 and CO 14/1001, which are relied upon by most companies in relation to grants of equity to employees and directors. However, substantial problems emerged in relation to the amendments to the Corporations Act:

1. The COs provide various forms of relief from Corporations Act requirements. One of these is relief from s707, which requires a prospectus or other relevant disclosure documentation to be provided by employees who wish to sell ("on-sale"), within 12 months, shares which were newly issued to settle exercised rights or options. As the new ESS provisions do not contain equivalent on-sale relief, there is potential for:
    a. inadvertent breaches of the law by employees, or
    b. employees being, in effect, compelled to retain shares for 12 months after issue and thereby possibly becoming:
        i. liable for tax before shares may be sold, and
        ii. exposed to possible loss of benefit should the share price fall.
2. Because the COs are due to “sunset” on 1 April 2025, the relief provided under the COs will cease to apply unless the COs are renewed, or similar relief is provided otherwise. This will apply to all offers made in reliance on the COs prior to 1 January 2023 but exercised after 1 April 2025, noting that many Rights have a life of up to 15 years. It is important to note that this 2025 sunset date does not allow for new grants to rely on the CO up to this date, only that the relief provided in the CO will apply to grants made before 1 January 2023, up to this date. This mainly relates to the 12-month-on-sale requirements relief.
3. COs could be relied upon to provide 12-month-on-sale relief in respect of newly issued shares provided to foreign participants. It appears that will not be possible under the new ESS arrangements as they stand.
4. The new framework requires that the Company “did not issue the financial product with the purpose of the recipient selling the product” – however, participants need to be able to sell the equity to pay their tax liabilities due on the equity, and companies facilitate that, which is likely to mean that this requirement can never be satisfied.

GRG, our associated legal advisors, and other law firms that have since identified these problems have spent several months raising the issues for the attention of ASIC.

What Changed Since Our Last Alert

ASIC has responded to the concerns raised by:

1. Announcing a consultation process, and

2. Not terminating the ability to rely on the COs on 1 October 2022,
3. Effectively extending CO relief till the 1st of January 2023.

As a result, it appears that the COs remain the optimal method of relief for ASX listed companies issuing equity, up until 1 January 2023. GRG is hopeful that ASIC will offer appropriate resolutions to the highlighted problems, so that companies can continue to grant equity in January. For unlisted companies, careful consideration needs to be given to whether or not the CO or the new framework present fewer problems, for grants between 1 October 2022, and 1 January 2023 (which will vary by plan).

Note: While it is still possible to issue shares to Directors, the CEO and other senior executives in Australia under s708 relief, this form of relief does not address the 12-month-on-sale problem for them, and other types of participants, including foreign executives and directors, will still suffer from the problems outlined above.

Key Takeaways

1. You can continue to rely on the CO until 1 January 2023,
2. ASIC's proposed response to the problem will not, as it stands, be sufficient to resolve all the problems identified,
3. While item 1 outlined in the summary at the start of this Insight is likely to be adequately addressed, items 2 to 4 do not appear to be addressed, and it will be important that ASIC hears from a wide range of impacted entities if these problems are to be resolved. If your organisation operates an equity plan, you should consider making a submission to ASIC in order to minimise the likelihood of future problems you will need to deal with.
4. ASIC has indicated that they anticipate issuing a legislative instrument before the end of calendar year 2022, following consideration of submissions.

Making a Submission to ASIC is Easy

You can find information regarding the consultation process on ASIC's website – search for ASIC Consultation Papers on your preferred search engine, and look for Consultation Paper 364, Modifications to the ESS regime.

Comments should be sent to ASIC by 31 October 2022 to:

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