

GOVERNMENT RESPONSE TO SHARED ENDEAVOURS: AN INQUIRY INTO EMPLOYEE SHARE OWNERSHIP IN AUSTRALIA (THE NELSON REPORT)

	RECOMMENDATION	GOVERNMENT RESPONSE
Chapter 2: ESOPs antipodean fables: nature and rationale		
1	<p>The Committee recommends that the Government direct the Australian Taxation Office to conduct a study to determine:</p> <ul style="list-style-type: none"> • the number and type of employee share plans operating in Australia; • the types of enterprise in which they operate; • the number of employees in such plans; • the value of holdings in those plans; • the amount of revenue provided to the Commonwealth each year from the sale of employee share plan equities; • revenue foregone by the Commonwealth through the operation of employee share plans; and • the performance of these plans in attaining the public policy objectives set for them and in doing so, identify and report upon problem areas in plans operating both inside and outside Division 13A. <p>The Committee recommends that the Australian Taxation Office collect such information annually. The Government should consider the merit of making such information publicly available and, if so, on an annual basis.</p>	<p>The Government does not consider that the information specified in the recommendation should be collected by the Australian Taxation Office. The Employee Share Ownership Development Unit will be able to collect information about the barriers to further participation in employee share ownership.</p>
2	<p>The Committee recommends that the Government fund, on a contestable basis, independent, university-based research into best practice management in relation to employee share plans.</p>	<p>The Government supports the establishment of a development unit within DEWR. The Unit will have capacity to support research of this nature.</p>

3	<p>The Committee recommends that the Government develop, in conjunction with educational institutions and private sector industry groups, educational programs designed to make information about contemporary management practices available to small and medium unlisted companies, and companies in sunrise industries.</p>	<p>Noted. The Government supports measures to improve the skill development of the small business sector. There are a number of government programmes that provide practical assistance and encouragement to small businesses in adopting contemporary management practices. One example is the Small Business Assistance Programme part of which provides funding to service providers, such as industry groups and educational institutions, for projects that provide contemporary business skills training, mentoring and practical support for women in small businesses.</p>
4	<p>The Committee recommends that legislative measures should ensure that employee share plans are not used as an alternative to mandatory superannuation for general employees.</p>	<p>The Government supports the recommendation that the status quo is maintained in regard to compulsory superannuation and that employee share plans are not used as an alternative to this.</p>
5	<p>The Committee recommends that public policy should be formulated so as to promote employee share plans for the following purposes:</p> <ul style="list-style-type: none"> • to better align the interests of employees and employers; • to develop national savings; • to facilitate the development of sunrise enterprises; and • to facilitate employee buyouts and succession planning. 	<p>The Government broadly supports the development of policy on employee share ownership to better align the interests of employers and employees.</p>
6	<p>The Committee recommends that the Government introduce a concessional taxation rate on up to 50 per cent of the proceeds of the sale of any equities acquired under an employee share plan that operates under Division 13A of the Income Tax Assessment Act 1936, and which is open to 75 per cent of a company's employees, where the taxpayer:</p> <ul style="list-style-type: none"> • invests as a preserved 	<p>This recommendation is not supported.</p> <p>Given the scale of tax concessions currently attached to superannuation and employee share acquisition schemes, the Government believes that further concessions along the lines proposed by this recommendation are not warranted.</p>

	<p>contribution, up to 50 per cent of the proceeds of the sale of any equities acquired under such a plan in an approved superannuation fund in the participant's name; or</p> <ul style="list-style-type: none"> • invests in an approved trust structure established to provide income for a dependant, for the term of their legal dependency; or • has reached retirement age or after, and uses the proceeds to fund retirement. <p>The Committee recommends that a maximum allowable limit should be applied in any one tax year. That limit should be set to advantage general employee share plans. The concessional tax treatment will apply only to that qualifying portion of the proceeds invested in the terms described. The nature and level of taxation concessions provided should be determined by the Government after consultation with appropriate industry bodies, the Employee Share Plan Advisory Board (see recommendation 9) and the Australian Taxation Office.</p>	
7	<p>The Committee recommends that a national review be conducted on the possible investment options, that could be encouraged in addition to compulsory superannuation, that would:</p> <ul style="list-style-type: none"> • increase national savings, and in the longer term, • promote greater self-reliance in retirement. 	<p>Noted. The Government continues to monitor the operation of Australia's superannuation system with a view to ensuring that it continues to meet the needs of an ageing society, including the promotion of greater self-reliance in retirement. Superannuation remains a tax-preferred investment for all taxpayers. A number of the measures introduced by the Government in A Better Superannuation System provide further incentives for voluntary contributions to superannuation.</p>
Chapter 3: Aligning interests: employee share plans and public policy		
8	<p>The Committee recommends that Parliament enact a single piece of legislation, bringing under one Act all laws governing employee share plans</p>	<p>Advice from the Australian Government Solicitor has indicated that, for constitutional and practical reasons, it would be unwise to enact</p>

	<p>their structure, taxation treatment, reporting and disclosure requirements. This legislation should apply to those plans presently operating under Division 13A as well as those plans that do not. The advice of relevant regulatory, industry and accounting bodies should be sought in undertaking this significant reform.</p>	<p>one central piece of legislation for Employee Share Schemes.</p>
9	<p>The Committee recommends that an Employee Share Plan Advisory Board be established:</p> <ul style="list-style-type: none"> • consisting of all relevant interests, including but not limited to: the Australian Taxation Office, the Australian Securities and Investment Commission and representatives of employers and employees; and • to provide advice on the policies to be implemented in order to foster the widespread development of employee share plans amongst general employees and in sectors where uptake has been poorer, such as in small and medium companies and sunrise enterprises. 	<p>The Government does not accept the need for the establishment of a further body to provide advice on ESS.</p>
10	<p>The Committee recommends that the Department of Employment, Workplace Relations and Small Business establish an Employee Share Plan Promotional Unit. Its purpose would be to actively promote employee share plans, including assistance with design, implementation and the provision of information to both employers and employees.</p>	<p>The Government supports the establishment of such a unit within DEWR.</p>
11	<p>The Committee recommends that the Employee Share Plan Promotional Unit should aim, in cooperation with a proposed Employee Share Plan Regulatory Agency in the Australian Taxation Office, to develop and make</p>	<p>The Government supports the provision of information about schemes. This will be one of the roles undertaken by the Development Unit.</p>

	<p>available to employers and employees, <i>model</i> or off-the-shelf plans. This would reduce costs to smaller businesses while facilitating the uptake of employee share plans already approved by the ATO as being consistent with taxation provisions.</p>	
12	<p>The Committee recommends that a minimum information list for employees be developed and specified in legislation for all employee share plans.</p>	<p>The Government supports this recommendation; however, legislative provisions for minimum information requirements are already contained in the <i>Corporations Act 2001</i>. The Development Unit will prepare a plain English minimum information list, in consultation with other relevant agencies.</p>
13	<p>The Committee recommends that the Australian Taxation Office receive an additional, specific appropriation to fund investigation of the promoters of aggressive tax schemes. Further consideration should be given to appropriations in support of ATO-initiated legal action should this be supported by the outcome of systematic inquiry.</p>	<p>The ATO currently has resources allocated to examining the affairs of promoters of aggressive tax schemes, including employee benefit arrangements. The level of resources allocated to examining promoters has been determined in accordance with the ATO's risk assessment process having regard to the relative priorities of all areas of risk. The level of resources allocated to this function will continue to be assessed annually, on the basis of those relative priorities.</p>
14	<p>The Committee recommends that the Government consider that a cap be applied to salary sacrifice arrangements when foregone salary is contributed to an employee share plan qualifying under Division 13A. Further concessional arrangements should apply to sunrise industries, small and medium businesses where the Share Plan Regulatory Agency recommended elsewhere in this report is satisfied that the employee share plan is a bona fide employee buyout. This arrangement would apply for a defined period of time to be negotiated between the Government, the regulatory agency and</p>	<p>The recommendation is not supported.</p> <p>The Government considers that issues relating to the amount and composition of employee remuneration are matters which are more appropriately left to employers and employees to determine.</p>

	<p>relevant industry bodies.</p> <p>The Committee further recommends that the Government give consideration to requiring all sacrificed salary in executive-only or non-13A plans be assessable in the income tax year in which the sacrificed salary was earned, having conducted first an analysis of its impact on corporations, especially their ability to attract and retain key personnel.</p> <p>Any substantial changes to the taxation treatment of executive remuneration packages should be phased in and prospective.</p>	
15	<p>The Committee recommends that the Government establish an independent inquiry to examine:</p> <ul style="list-style-type: none"> • the extent to which FBT exemptions are being used to develop and underwrite executive salary packaging, the cost to revenue and the economic benefits, including the attraction and retention of key personnel; • the merit of plans, open to executives only, which operate on a salary sacrifice basis or on low or no interest loans, or which use various FBT exemptions, to continue to operate as they stand; • whether limits should be placed on the amount of salary that may be sacrificed, the size of a low or no interest loan that may be accepted, or the amount of FBT exemption that may be allowable, without the value of the benefit being treated in the same way as cash income; and • whether sunrise enterprises should be given access to concessional taxation treatment in respect of the FBT liability or the taxation treatment of salary sacrifice and company provided 	<p>The Government believes that the current tax arrangements are appropriate.</p> <p>The fringe benefits tax (FBT) system is designed to ensure that salary packaging results in no overall loss to Commonwealth revenue, with employees being subject to income tax on the wage or salary component of their remuneration package and employers paying FBT at the top marginal personal tax rate on the non-salary component. The major forms of non-salary remuneration not dealt with under FBT are given treatment under alternative taxation regimes, such as those which apply to superannuation and to employee share discounts.</p>

	loans.	
16	<p>The Committee recommends that the Attorney General prepare a discussion paper for public consideration, on the issues surrounding the clarification of the powers of the Commissioner for Taxation in relation to the discovery of information concerning aggressive tax planning schemes. This would include information held by legal practitioners. Particular consideration should be given to ensuring that information collected is used only for the detection and prevention of aggressive tax planning.</p>	<p>The Treasurer and the Commissioner of Taxation have confirmed that aggressive tax planning schemes are being dealt with effectively under the Part IVA anti-avoidance provision of the ITAA36.</p>
17	<p>The Committee recommends that any legislation providing for employee share plans contain a preamble that clearly articulates the public policy goals intended by Parliament.</p> <p>The Committee recommends that the Commissioner for Taxation and any other regulatory authority be required to take notice of, and give effect to, this preamble in their rulings in respect of employee share plans legislation.</p>	<p>The recommendation refers to the proposed standalone legislation for employee share plans which, based on AGS advice, cannot be enacted.</p>
18	<p>The Committee recommends that:</p> <ul style="list-style-type: none"> • an Employee Share Plan Regulatory Agency be established, by legislation and operate under the aegis of the Australian Taxation Office; • the agency should be established as an element of any consolidated employee share plan legislation; and • the agency's responsibilities should be to: <ol style="list-style-type: none"> 1. administer any employee share plan legislation; 2. monitor the operation of employee share plans; 3. advise appropriate regulatory 	<p>The Government does not accept the need for a separate regulatory agency.</p>

	<p>authorities so that the intent of the legislation can be attained;</p> <p>4. advise government of improvements to legislation that would facilitate the creation of employee share plans while at the same time reducing opportunities for their use other than for purposes intended by Parliament. This would include, but not be limited to, defining small, medium and sunrise enterprises and establishing criteria for determining what constitutes an aggressive tax planning scheme; and</p> <p>5. develop, in consultation with stakeholders, a number of model plans with known taxation consequences, and provide these to the Employee Share Plan Promotional Unit in the Department of Employment Workplace Relations and Small Business, recommended elsewhere in this report.</p>	
19	<p>The Committee recommends that:</p> <ul style="list-style-type: none"> • all employee share plans operating in Australia be registered with the regulatory agency and be given a unique identifying number, whether or not they operate under Division 13A or some other arrangement; • registration of employee share plans involve providing to the regulatory authority the following information: <ul style="list-style-type: none"> ○ the names of participants; ○ the type, number and value of equities provided; ○ the method of valuing equities; ○ the rules of the plan and 	<p>The Government does not accept the need for a separate regulatory agency.</p> <p>In addition, the Government does not consider that participation in employee share schemes should be reported in individuals income tax returns as this would add significantly to the complexity of individual return arrangements for reasons that are not related to the effective collection of revenue. In addition, as the data would be provided by taxpayers, information on the characteristics of the firms offering ESS and the type and nature of those schemes would not be known</p> <p>The Employee Share Ownership Development Unit will be able to collect information about the barriers</p>

	<p>how it operates and is administered;</p> <ul style="list-style-type: none"> ○ the duration of the plan; ○ any concessions provided to the plan; and ○ the number of times equities have been issued under the plan; <ul style="list-style-type: none"> • taxpayers be required to disclose on their tax returns their participation in employee share plans; and • data be collected, on an annual basis, as to the number and types of membership, size of employee share plan and other operational details. 	<p>to further participation in employee share ownership.</p>
20	<p>The Committee recommends that the regulatory agency be empowered to declare that a certain share plan has a primary purpose beyond that intended by Parliament. The agency should be empowered to make an assessment in respect of the income and/or equities in the plan.</p>	<p>As above.</p>
21	<p>The Committee recommends that:</p> <ul style="list-style-type: none"> • the Government re-examine the underlying policy of private binding rulings, and consider options for increasing the transparency of such rulings; and • the feasibility of posting rulings issued in respect of employee share plans on the Australian Taxation Office internet site should be examined, provided that no taxpayer identifying information is provided. 	<p>The Government notes that the Commissioner of Taxation commissioned a review by Mr Tom Sherman AO of the systems and procedures relating to the issue of private rulings by the ATO.</p> <p>As a result of one of the recommendations of the Sherman Report the ATO now publishes edited versions of all written binding advice it issues on the Register of Private Binding Advice that is available on the ATO website. This register deals with all applications for binding advice received after 31 March 2001 (except for GST specific private rulings for which relate to applications received after 30 June 2001).</p> <p>The advice is edited to protect the secrecy and privacy of the person or entity to which it was given. The ATO</p>

		<p>publishes edited versions of this advice to improve the integrity and transparency of the private ruling system. However, only the person to which the private ruling relates can rely on the advice that is contained within it.</p> <p>All written binding advice issued by the ATO is required to be based on an ATO precedential decision. Those precedential decisions are contained on the ATO Legal database that is available on the above ATO website. Taxpayers who are seeking an indication of the Commissioner's view on the application of the law in particular circumstances can search this database. Should they wish to do so they, of course, can apply for a private ruling.</p>
22	<p>The Committee recommends that the Employee Share Plan Regulatory Agency, or failing the creation of such an agency, the Commissioner for Taxation, be provided with a discretionary power to waive sections 139CD(3) and 139 DD(3) of the Income Tax Assessment Act 1936, provided that:</p> <ul style="list-style-type: none"> • the plan in question would otherwise satisfy Division 13A; • the Commissioner is satisfied that the plan is not being used and will not be used for aggressive tax planning; and • there is another plan operating under Division 13A, but open to 75 per cent of employees, with an uptake rate of more than 50 per cent and no disincentive conditions, that is offered at the same time and in respect of which the same exemption is sought. <p>[139CD(3) & 139DD(3) - the qualifying condition that the company is the employer of the taxpayer or a</p>	<p>This recommendation is not supported. The Government considers that allowing individuals other than employees to benefit from ESS tax concessions would be inconsistent with the broader policy objectives of aligning the interests of employees and employers.</p>

	holding company of the employer of the taxpayer.]	
23	<p>The Committee commends the draft Registered Organisations Bill 2000 to Parliament and recommends that any legislation dealing with employee associations, provide explicitly:</p> <ul style="list-style-type: none"> • for membership of employee share plans; • that when the members of a plan are also members of an employee association, the eligibility for registration of that association; and • for the protection of the freedom of choice of employees who participate in enterprise associations and also participate in an employee share plan. 	<p>The Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002 was passed by the Senate on 16 October 2002 and amends a number of provisions of the Workplace Relations Act 1996 (WR Act) relating to registered organisations. Amendments in relation to enterprise unions and employee share plans had been included in the relevant Bill as introduced but were not included in the Bill as passed; if such amendments proceed it is expected that this will occur through separate single issue legislation.</p>
24	<p>The Committee recommends that the Government refer to the Employee Share Plan Advisory Board the question of whether taxation concessions available to employers for establishing qualifying employee share plans be conditional upon there being a non-interference clause inserted in the qualifying conditions in Division 13A. The intention would be to provide explicit guarantees for the freedom of choice and association of employers and employees.</p>	<p>The Government supports this recommendation; however, further response is not required as it is already covered by the freedom of association elements of the WR Act.</p>
25	<p>The Committee recommends that employees and employers be permitted to reach an agreement to trade wages and conditions (but not superannuation entitlements) for participation in an employee share plan so long as the following conditions are met:</p> <ol style="list-style-type: none"> 1. the agreement is part of a reasonable strategy to deal with a business crisis; 2. the agreement is not contrary to the public interest; 	<p>The WR Act already provides sufficient flexibility to allow employers to develop agreements to assist in addressing a business crisis, while maintaining appropriate protections through the No Disadvantage Test (NDT). This is applied to all agreements made under the WR Act and ensures that the agreement does not reduce the overall terms and conditions for employees. Where employee shares form part of the remuneration package for an</p>

	<ol style="list-style-type: none"> 3. the agreement involves full disclosure of the company's situation and risks that can reasonably be known; 4. the negotiations leading to the agreement involve an independent assessment that the strategy is soundly based; 5. the participants negotiate free of duress; and 6. any agreement struck should be ratified by an independent arbiter, such as the Australian Industrial Relations Commission or the Office of the Employment Advocate. 	<p>employee or employees, those shares could be taken into account by the AIRC or Employment Advocate (EA) in applying the NDT, the assessment of the value of employee shares in such a situation would be a matter for the AIRC or EA. However, an agreement may be approved even if it fails the NDT if the AIRC is satisfied that the agreement is part of a reasonable strategy to deal with a business crisis and is not contrary to the public interest. For example, the Greyhound Pioneer 1998 agreement, which contained an ESS, was approved under the public interest test.</p> <p>Whilst ESS would allow for some fluctuation in earnings (as with normal performance bonus arrangements), their use would be supported as an addition to, rather than a substitute for award wage entitlements.</p>
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Chapter 4: Administration and Taxation Arrangements

26	<p>The Committee recommends that the Government clarify the taxation treatment of trust arrangements that are used to operate bona fide employee share plans established under Division 13A, and legislate specifically to exempt such trusts from proposed entity taxation provisions.</p>	<p>The Exposure Draft to the New Business Tax System (Entity Taxation) Bill 2000 was withdrawn on 27 February 2001. The Government has since indicated that the entity tax treatment of trusts will not be proceeding.</p>
27	<p>The Committee recommends that the Government amend those sections of Division 13A of the <i>Income Tax Assessment Act 1936</i> providing for taxation of equities in tax deferral elections, currently 139B(3) and 139CC(3) and 139CC(4), to give effect to the following taxation treatment of the gain in capital value:</p> <ol style="list-style-type: none"> 1. that income tax be levied on: the value of the discount on the equity when originally allocated, inflated by the application of compound interest, for the 	<p>The recommendation is not supported. The Government is concerned that the proposed method of calculating the taxation liability on share discounts under the deferral option would add significantly to the complexity of the taxation provisions covering employee share schemes and result in increased taxpayer compliance costs.</p> <p>As a general point, the Government considers that discounts on shares acquired under employee share schemes are in the nature of employee remuneration and are more</p>

	<p>period of time the equity has been held and at an interest rate as determined from time to time;</p> <ol style="list-style-type: none"> 2. that if income tax or FBT has not otherwise been paid on sacrificed salary, then the amount of salary sacrifice that has funded the purchase of an equity, be liable to income tax calculated as the value of the sacrificed salary inflated by the application of compound interest for the period of time the equity has been held, at an interest rate as determined from time to time; and 3. that capital gains tax be levied on: the value of the gain in capital value less the inflated value of the discount and, if applicable, the inflated value of any salary sacrificed. In considering this recommendation, the advice of the Australian Taxation Office should be sought to ensure that it is satisfied with the integrity measures and that the amendment is made in the knowledge of its revenue implications. 	<p>appropriately taxed as income of the employee (subject to the concessional treatment under Division 13A) rather than as capital gains.</p>
28	<p>The Committee recommends that:</p> <ul style="list-style-type: none"> • the Government direct the Australian Taxation Office and the Australian Securities and Investment Commission, in consultation with interested stakeholders, to develop appropriate and simplified valuation processes; • the anomalies and uncertainties in the present valuation system be addressed and where possible removed; and • model plans should be devised by the ATO, in consultation with stakeholders, and that these model plans specify appropriate, simplified and ATO-endorsed valuation 	<p>The Government supports the removal of anomalies and uncertainties in valuation processes but considers these should generally continue to be remedied through AASB processes. The Government notes that the AASB has released a draft accounting standard that prescribes a method of valuation of share options granted to employees for financial reporting required under the <i>Corporations Act 2001</i>. Valuation methods are generally determined by the Australian Accounting Standards Board, which has its own processes for public consultation.</p> <p>The Government notes that the</p>

	processes.	valuation arrangements set out in Division 13A for valuing options over shares in unlisted companies use an accepted methodology for valuing options which has been modified to make them easier to use. The Government also notes that the variable factors underlying the tables are generally concessional.
29	The Committee recommends that the Australian Taxation Office and the Australian Securities and Investment Commission, in consultation with interested stakeholders, develop appropriate and simplified processes for valuing the discount on shares and the value of untraded shares or options.	As above.
30	<p>The Committee recommends that the Government move to amend the relevant sections of Division 13A of the <i>Income Tax Assessment Act 1936</i>, so that when:</p> <p>(a) shares or options, in an enterprise which is subject to a corporate restructure, merger, takeover, or acquisition have to be exchanged for other shares or options; and</p> <p>(b) the original shares or options are qualifying shares or rights, held under a Division 13A plan; and</p> <p>(c) a tax deferral election had been made in relation to those shares or options; and</p> <p>(d) the new shares or options are qualifying shares or rights, offered under a Division 13A plan; then:</p> <p>any income tax liability from the proceeds of the compulsory disposal of the original shares or options should become payable when a cessation event for the new shares or options takes place; or the employee be given the opportunity to transfer the entire</p>	<p>The recommendation is partly supported. Generally, as the concessions are made available in the context of the employer-employee relationship, it is not unreasonable for a taxing point to arise when that relationship is severed.</p> <p>However, the Government does consider that it is appropriate to provide rollover for employees in the event of a corporate restructure where both their employment and the schemes in which they participate remain substantially the same.</p>

	<p>interest to a preserved superannuation fund, at the taxation rate applicable to contributions to superannuation contributions.</p>	
31	<p>The Committee recommends that the Government move to amend the <i>Income Tax Assessment Act 1936</i> so that for shares or rights allocated under a Division 13A deferred election plan, liability for taxation occur at the time of disposal, provided that:</p> <ul style="list-style-type: none"> • The plan is one open to 75 per cent of an employer's employees; or • If the plan is open to a lesser number of employees (i.e. it is a restricted plan), then there was offered in that tax year or concurrently with the restricted plan, another plan that is open to 75 per cent of employees and meets the qualifying conditions in Division 13A; or • If such a plan is not offered, reasons must be provided to the Employee Share Plan Regulatory Agency by the employer, explaining why either of the first two conditions have not been met. 	<p>This recommendation is not supported. The Government considers that the ten year deferral period available under the current arrangements is already generous and offers adequate scope for encouraging long-term participation in employee share schemes.</p>
32	<p>The Committee recommends that the \$1,000 concession available to share plans operating under Division 13A be increased.</p>	<p>This recommendation is not supported. The Government considers that existing concessional taxation arrangements provide an appropriate balance between encouraging ESS and limiting overuse.</p>
33	<p>The Committee recommends that three years from the commencement of its operation, the Share Plan Regulatory Agency examine the operation of employee share plans and supporting legislation, and report to Parliament. In particular the agency should examine:</p> <ul style="list-style-type: none"> • the cost to revenue of employee share plans, whether they operate under Division 13A or 	<p>The Government does not accept the need for a separate regulatory agency. However, as noted in the response to recommendation 1 the employee share ownership development unit would be able to collect information about the barriers to further participation in employee share ownership.</p>

	<p>not;</p> <ul style="list-style-type: none"> • participation rates; • whether the legislation is achieving the public policy outcomes intended when it was enacted; and • any possible improvements to the legislative arrangements that would promote the further spread of plans amongst general employees. 	
34	<p>The Committee recommends that the 5 per cent limit on the number of qualifying shares or rights described in section 139C13(6) and (7) of the <i>Income Tax Assessment Act 1936</i> be removed and replaced with a rule that:</p> <p>(a) stipulates that any allocation under an employee share plan that will result in an employee holding more than 5 per cent of the shares or controlling more than 5 per cent of the votes at a general meeting be advised to, and approved by,</p> <ul style="list-style-type: none"> • a general meeting of owners; and • the Share Plan Regulatory Agency on the basis that it is a genuine employee share plan established for a recognised purpose, such as: <ul style="list-style-type: none"> ○ an employee buyout; ○ spreading equity ownership throughout a small or medium enterprise; or ○ facilitating the creation and growth of a 'sunrise' enterprise. <p>(b) allows an employee to hold as many shares as any other member in a particular share scheme, up to a maximum of 25 per cent for each employee in that scheme, provided that:</p> <p>(c) if the scheme in (b) is restricted to a small number of employees rather than</p>	<p>This recommendation is not supported. The Government considers that existing arrangements provide an appropriate balance between encouraging ESS and limiting overuse. However, the Development Unit will be able to collect information about the barriers to further participation in ESS and the scope for current ESS to encourage start-up activity.</p>

	<p>provided to all employees, then there is at the same time another 'general' scheme open to at least 75 per cent of employees, which:</p> <ul style="list-style-type: none"> • is not structured in any way so as to deter employees from participating; and • provides for each member of that scheme to be allocated equities, the value of the discount of which must exceed the level of the discount allowable as a tax exemption under a tax exempt scheme operating under Division 13A. This is currently \$1,000. 	
35	<p>The Committee recommends that:</p> <ul style="list-style-type: none"> • the intent of section 139CE(2) of the Income Tax Assessment Act 1936 be clarified, so as to remove doubt about its meaning; and • unlisted enterprises be permitted to require employee share plan participants to sell any equities acquired through an employee share plan to the plan manager when they choose to dispose of the equities. The valuation method used should be determined by the Employee Share Plan Regulatory Agency. <p>[Section 139 CE(2) of the Income Tax Assessment Act 1936, requires that a share plan not contain any condition that would result in the forfeiture of the shares or rights acquired.]</p>	<p>The recommendation is not supported. The Government considers the current Division 13A qualifying conditions are appropriate.</p> <p>Further, the Government does not consider that it would be appropriate to require employees to dispose of ESS equities to a single buyer.</p>
36	<p>The Committee recommends that Division 13A be amended to allow stapled securities as qualifying equities in addition to ordinary shares or options to ordinary shares, provided that any plans that do use such equities have the approval of the Share Plan Regulatory Agency.</p>	<p>This recommendation is not supported. The Government considers that the provisions that restrict Division 13A qualifying equities to ordinary shares or options to ordinary shares is appropriate to achieve the policy objectives of more closely aligning the interests of employees and employers.</p>

37	<p>The Committee recommends that employee share plans operating under Division 13A and which are open to at least 75 per cent of a company's employees, not be confined to ordinary shares or options to ordinary shares. They should also be permitted to offer any other instrument or security in the employer which is able to be dealt with by an employee, provided that such an instrument or security confers no less ownership entitlements upon the employee shareholder than those usually conferred by ordinary shares in a company.</p>	As above.
38	<p>The Committee recommends that, in cases of genuine hardship, employees who are members of plans open to more than 75 per cent of the employees of an enterprise, be exempted from the three-year sale restriction limit. Exemptions would be granted only on application to the Employee Share Plan Regulatory Agency, that has been previously recommended. (Chapter 3, recommendation 17)</p>	<p>The recommendation is not supported. The three-year sale restriction is integral to preventing abuse of the exemption. For example, allowing employees who elect to have the discount included in assessable income in the year in which the shares were acquired to sell those shares in the same year would, in effect, be equivalent to allowing them to receive \$1,000 of tax-free income with no ongoing benefits in terms of the employer-employee relationship.</p> <p>Given the importance of the three year sale restriction to maintaining the integrity of Division 13A, any provisions covering exemption from the three year sale restriction condition would be both legislatively and administratively complicated and could potentially affect all employees in the plan.</p>
39	<p>The Committee recommends, subject to the Australian Taxation Office being satisfied as to the strength of the integrity measures, that:</p> <p>(a) where the tax grouping rules prevent the creation of employee share plans, case by case relief from them should be provided, so long as the plan is operated under Division 13A and it is a plan in</p>	<p>The recommendation is not supported.</p> <p>The consolidation regime for wholly-owned groups, which commenced from 1 July 2002, generally replaces the grouping rules in the tax law. The grouping rules generally cease to apply after 30 June 2003. Consolidation allows a company operating an employee share plan to be a subsidiary</p>

<p>which general employees are eligible to participate; and</p> <p>(b) where a person becomes a resident of the Commonwealth, for taxation purposes, and has acquired before becoming a resident, equities as part of an employee share plan; then</p> <ul style="list-style-type: none"> • any tax paid on those equities in a foreign jurisdiction should be taken into account in their taxation liability in respect of those equities in Australia; so that <ul style="list-style-type: none"> ○ any income derived from those equities should be taxed in such a way that the person will not pay tax on those equities at a higher rate than would be the case if the equities had been acquired by a resident of the Commonwealth. 	<p>member of a consolidated group provided the shares issued under the plan do not exceed 1 per cent of the ordinary shares in the company.</p> <p>The current Review of International Tax Arrangements has sought views on whether the double taxation of employee share options should be addressed through bilateral tax treaty negotiations and possible consequential changes to Australia's domestic tax law treatment (Option 5.2 for consultation). The Review notes the work being undertaken by the OECD on cross-border tax issues arising from employee share options.</p>
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Chapter 5: Further initiatives to facilitate the growth of employee share plans

<p>40 The Committee recommends that the Australian Securities and Investment Commission:</p> <ul style="list-style-type: none"> • monitor the operation of the provisions of <i>Corporate Law Economic Reform Program Act 1999</i> and Policy Statement 49 in respect of their effect on employee share plans and advise the Treasurer annually as to: <ul style="list-style-type: none"> ○ the number of applicants who seek to use the relevant provisions of the CLERP Act; ○ the number of applicants who seek relief under Policy Statement 49; ○ the number of applications in each class which were approved; ○ the number of 	<p>The recommendation is not supported.</p> <p>The primary purpose of issuing shares to employees is to foster the relationship between a listed company and its employees, rather than providing an alternative method to raise capital. That purpose is the basis for the limited exemption from prospectus disclosure for employee share plans offered under the Australian Securities and Investment Commission's (ASIC) Policy Statement 49.</p> <p>Normally, a company that is issuing shares must provide adequate disclosure through a prospectus. A prospectus is designed to ensure investors are fully informed and able to assess the benefits and risks of investing in a company, whilst</p>
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	<ul style="list-style-type: none"> ○ applications which were not approved; and ○ if not approved, the reasons why they were not approved. • advise the Government as to any amendments that may be required to facilitate the operation of the <i>Corporate Law Economic Reform Program Act 1999</i> in respect of employee share plans without unduly increasing investor risk; • if necessary, amend Policy Statement 49 so as to facilitate the creation and operation of employee share plans, especially in regard to unlisted, small and medium companies, and those in sunrise industries, without unduly increasing investor risk; and • advise the Treasurer on the feasibility of a specific disclosure document designed to be used by the operators of employee share plans that cannot otherwise use the disclosure exemption provisions or the Offer Information Statement provisions of the CLERP Act. 	<p>allowing companies efficient access to capital.</p> <p>To facilitate efficient fundraising whilst ensuring appropriate consumer protection, the <i>Corporate Law Economic Reform Program Act 1999</i> (CLERP Act) introduced certain exemptions from the fundraising regime, with a focus on assisting small and medium companies. The business community has supported the improved quality of information available to the market as a result of the CLERP Act reforms.</p> <p>ASIC is responsible for the administration of the <i>Corporations Act 2001</i> (the Act), which includes issuing policy statements on how it will administer the Act. ASIC is not ordinarily responsible for law reform or reporting to Government on specific policy positions. Instead of a formal reporting process to Government, ASIC has the ability to review and modify its policy statements (such as Policy Statement 49) should it consider further relief is warranted or grant individual relief on a case by case basis.</p>
41	<p>The Committee recommends that it be a requirement that the following information pertaining to employee share plans be provided in a readily understandable form in all annual reports:</p> <ul style="list-style-type: none"> • the total value and size of all employee share plans, including the value of options and other equities and number thereof; • the value and number of equities allocated in the year in respect of all plans and types of equity; • the method of valuing the equities and determining the size of allocation; 	<p>Enhancing reporting of employee share options is being addressed through the AASB process.</p> <p>In the CLERP 9 policy proposal paper, which was released by the Treasurer on 18 September 2002, the Government formalised its support for the expense recognition of share options paid to employees in company financial statements.</p> <p>The International Accounting Standards Board issued a draft standard dealing with accounting for share-based payment, which includes the payment of options to employees</p>

	<ul style="list-style-type: none"> • the aggregate amount received in the year by all employees. The aggregate sum received by directors and executive employees and other employees receiving executive-level remuneration should be identified as a specific line item; • the total value and number of equities of all sorts allocated to, or exercised by, directors, executives and any other employee receiving executive-level remuneration, and the value and number of options which they allowed to lapse; • whether the equities allocated in the year in question or in previous years under an employee share plan gave rise to an expense for the enterprise and the size of that expense; and • the effects, if any, of the exercise of those options on the enterprise's financial standing. 	<p>in November 2002. A final standard is expected to be issued in the second half of 2003. Comments on the draft are due by 7 March 2003.</p> <p>The AASB will adopt the IASB standard once it is finalised by the IASB, subject to its own due process. The proposed approach to recognising options as an expense requires companies to record an expense against their retained profits. It is likely that after companies make a debit entry against their retained profits (to recognise the expense) they will make a corresponding credit entry to their share capital account resulting in a capitalisation of profits. (The AASB has indicated that the transfer of the expensed amount to the share capital account may not be mandated by the International Standard.)</p> <p>To facilitate the earliest possible adoption of a standard requiring expensing of share options, the AASB has decided to issue the IASB standard with a scope temporarily restricted (until 1 January 2005) to equity compensation for employees only. The IASB draft standard also covers other share-based transactions which cross-reference IASB standards that will not be adopted in Australia until 2005.</p>
42	<p>The Committee recommends that information about all of an enterprise's employee share plan or plans:</p> <ul style="list-style-type: none"> • be held by a designated officer of each company; • be notified to the regulatory agency or, failing the establishment of such an agency, the Australian Securities and Investment Commission. <p>The Committee further recommends that failure to disclose that information</p>	<p>The recommendation is not supported. The Government does not consider that employers should be required to maintain and disclose information regarding ESS in addition to what is already required by the Corporations Act 2001 and Accounting Standards.</p> <p>The issue of whether a company's information should be held and made available by a designated officer of a company should generally be a matter for the corporate governance arrangements of that company. If such</p>

	<p>or providing misleading information should be considered an offence.</p>	<p>an arrangement is adopted it will not remove the general responsibility imposed on the company and its officers to provide and maintain timely and accurate information required by the provisions of the Corporations Act 2001.</p> <p>The Government considers that the Corporations Act 2001 already provides a comprehensive and appropriate penalty system for failure to provide information or provide misleading information.</p>
43	<p>The Committee recommends that when a significant proportion of the equities held by an executive or director of a company is to be disposed of within a two-week period, fourteen days notification should be provided to the Australian Stock Exchange and the Australian Securities and Investment Commission, for public release. The threshold which triggers the requirement for such notification should be determined by the Government in consultation with the Employee Share Plan Advisory Board.</p>	<p>The recommendation is not supported.</p> <p>The Government considers that the existing regulatory framework is generally appropriate in addressing the investor protection concerns underlying the recommendation. In light of the existence of general obligations for the disclosure of information and prohibitions against insider trading, it is not considered appropriate to enact specific rules relating to ESS.</p>
44	<p>The Committee recommends that the Australian Taxation Office and Treasury evaluate the feasibility of requiring, through legislation, employee share plans to provide guaranteed levels of employee share ownership to different classes of employees, in listed private sector organisations that have more than twenty employees.</p>	<p>The Government does not support this recommendation as the establishment of an employee share plan should be at the discretion of the employer.</p>
45	<p>The Committee recommends that when more information is available about the operation of employee share plans, a further Parliamentary inquiry be conducted into the use and nature of employee equity arrangements, with particular emphasis on the feasibility of:</p> <ul style="list-style-type: none"> • providing equities at full cost; 	<p>The Government will consider the impact of significant changes in this area on its current policy settings.</p>

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| | <ul style="list-style-type: none">• providing equities in enterprises other than in the employer of the person receiving the equity;• further assisting share plans designed to facilitate succession and employee buyouts and buy-ins and as elements in industry assistance programs; and• allowing taxation concessions on some portion of a capital gain arising from the sale of equities into an employee share plan, so long as the proceeds are invested in another enterprise. | |
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