



Submission 54  
OWK Inquiry

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**At:** House of Representatives  
Standing Committee on  
Employment, Education and  
Workplace Relations

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Dear Andrew,

**1. Complexity of Legislation**

At the present time, the corporate law relating to the design, implementation and communication is found in the Corporations Law and Regulations, ASIC Policy Statements, Class Orders and other instruments. While ASIC does have the task of fine-tuning the law, to simplify the process of designing and implementing and communicating employee share plans, I am sure it would be a great help to and cheaper for companies to develop plans if ASIC rulings on fundamental issues were taken out of the broad discursive context of Policy Statements and Class Orders, and incorporated in the Corporations Law or Regulations. This would bring greater clarity and simplicity to the understanding and development of plans.

**2. Tax Treatment of Share Plans**

You will be aware that, following Ralph there is concern that gains in shares acquired with *pre-tax* income (eg. salary sacrifice plans) would be taxed at the full marginal income tax rate, but gains on shares bought with *post-tax* money would be taxed on half the gain under the new capital gains tax regime.

There is also concern that if a plan participant exercises options and sells the resulting shares within a year, the proceeds will be taxed at the full income tax rate rather than capital gains tax. If the shares are held for more than a year, they would become subject to the capital gains tax regime instead.

Australian companies have invested heavily in setting up plans to reward, motivate and retain employees. Tax laws should not operate to force the implementation of less than optimal plan design.

### 3. Disclosure Requirements

#### Meaning of "consideration provided" for shares

While the recent amendments to the Corporations Law provide much more flexibility in regard to disclosure requirements for fundraising, there is some uncertainty in relation to the operation of section 708(15) (the former section 66(3)). This section provides that there is no need for disclosure if no consideration is to be provided for the issue or transfer of securities (other than options).

Some legal advisers take the view that if employees receive free shares up to \$1,000 in value, even though they pay nothing for the shares, they are providing consideration through their employment services.

The other school of thought is that the grant of free shares is not compensatory as such. Irrespective of an employee's position in the company's hierarchy, that employee will receive the same number of shares as people below or above him/her in the hierarchy.

Thus, the latter view is that, the shares are granted to qualifying employees for reasons other than compensation for services rendered. They are, for example, intended to encourage employees to "think and act like owners"; to develop the mindset of outside shareholders in the company, and so on.

FASB has taken a similar view in another situation as to what is or is not compensatory.

#### Meaning of "consideration provided" for options

Another aspect of this issue is brought up by section 708(16) which provides that disclosure is not required in regard to options where no consideration is provided for the issue or transfer of the options or on the exercise of the options.

Over the last three years long-term incentive plans that utilise "nil-cost options", also known as performance shares, have been implemented by a number of leading Australian companies.

In 1998, out of the 150 companies we reviewed, 15 companies implemented performance share plans. In the prior year only a handful of these plans were adopted. In 1999 there were 4 companies that adopted performance shares. In my view they are here to stay and will be widely utilised.

Like traditional options, performance shares are "rights to acquire shares", but unlike traditional options no money is paid by way of "exercise price".

The view that many take with executive plans involving rights to acquire shares is that they represent the long-term portion of an executive or management salary package. This view is thus different from the "non-compensatory" argument in relation to shares referred to in the previous item in this memorandum.

Normally performance shares are restricted to senior people who would fall within the "executive" exemption in section 708(12), so that section 708(16) would not be relevant. However some companies are considering offering awards of performance shares (or options) further down the management hierarchy. The question thus arises as to

whether s708(16) would apply or would the view that the award is the long-term portion of the total salary package require specific disclosure?

I thought I should raise these issues, even at this late stage.

Kind regards,

Yours sincerely,

**EDWARD J WRIGHT**  
Director