

RESEARCH REPORT

**EMPLOYEE SHARE OWNERSHIP
SCHEMES IN AUSTRALIA:
A SURVEY OF KEY ISSUES AND
THEMES**

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Employee Share Ownership Schemes in Australia:
A Survey of Key Issues and Themes

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Abstract

Employee share ownership ('ESO') schemes have recently been the subject of public policy interest in Australia. Employees owning shares in the company for which they work potentially has a number of ramifications, not least of which is the prospect that these schemes might circumvent the problematic of employees as 'outsiders' in corporate governance.

This paper surveys key issues and themes surrounding ESO schemes in Australia. It explores the varied policy rationales for these schemes, noting both broad bipartisan support and a generally limited conception of their fundamental purpose. The paper also outlines the current state of empirical research on their incidence and effects. It is suggested that available information on ESO schemes is patchy and there is no clear picture of Australian practices. In light of an overview of the present regulation of ESO schemes, the paper concludes by highlighting further research questions.

1 Introduction

Employee share ownership ('ESO') schemes have recently been the subject of public policy interest in Australia. The central point of reference for debate about these schemes has been the work of the House of Representatives Standing Committee on Employment, Education and Workplace Relations' inquiry into ESO ('*Shared Endeavours*'). Chaired by Dr Brendan Nelson, this Committee examined the extent to which ESO schemes had been established in Australian enterprises and their effects on workplace relations, productivity, and the economy as a whole.¹ In September 2000 the Committee produced two reports (a Majority Report and a Dissenting Report from the Australian Labor Party committee members). The *Shared Endeavours* Majority Report made a number of detailed recommendations, particularly regarding the present regime for ESO tax concessions, the bulk of which were not supported by the Federal Government.² Instead, the major government response has been the establishment in 2003 of one of the two agencies recommended in the *Shared Endeavours* Majority Report; a promotional 'Employee Share Ownership Development Unit' (or 'ESODU') based in the Department of Employment and Workplace Relations.³ The second recommended agency was to have had a more traditional regulatory role, with oversight responsibilities for a unified ESO regulatory regime, established by a single piece of legislation. While the need for this second agency and unified legislation was not accepted by the government, in February 2004 the Minister for Employment and Workplace Relations, Kevin Andrews, announced a target of doubling the ESO schemes in workplaces from 5.5% of employees to 11% by 2009.⁴

This paper presents a survey of key issues and themes surrounding ESO schemes in Australia. It is comprised of five major parts. The first part considers how, and to what extent ESO schemes differ from other mechanisms of employee participation in corporate governance. This section examines some of the important but often under-appreciated assumptions involved in the idea of employees becoming 'insiders' in corporate decision-making through owning shares in the company for which they work. The second part traces the contours of the public policy debate on ESO schemes in Australia. While there is a considerable breadth of arguments for and against ESO schemes, it is suggested that the present debate is underpinned both by broad bipartisan support for these schemes and a limited conception of their fundamental purpose. The third part surveys existing data on ESO practices, incidence and characteristics. It is suggested that available information on ESO schemes is patchy and that consequently there is no clear picture of the nature and incidence of Australian ESO practices. The fourth part presents an overview of the present regulation of ESO schemes and also outlines the work of the Federal Government's promotional ESO Development Unit. The paper concludes by highlighting further research questions, with particular reference to the role of law and regulation and ESO schemes in small proprietary companies.

¹ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 1[1.2].

² Commonwealth of Australia, *Government Response to Shared Endeavours: An Inquiry into Employee Share Ownership in Australia* (2003).

³ Federal Government, *Fact Sheet - Employee Share Ownership* (2003).

⁴ Kevin Andrews, MP, *Media Release 04104 - Promoting Employee Ownership* (2004).

2 Employee Share Ownership Schemes - A Unique Form of Employee Participation in Corporate Governance?

Employee share ownership schemes might be thought of as simply another instance of employers rewarding employees with non-wage financial entitlements, a labour management practice that stretches back well over one hundred years. While the receipt of wages gives every employee a direct stake in the ongoing financial success of their employer, the literature suggests that forms of additional, non-wage financial participation in the employer enterprise, such as profit-sharing, have been in existence since at least the mid-eighteenth century.⁵ Other forms of employee non-wage financial entitlements and incentive schemes, such as sales commissions, 'payment by results' and bonus payments, have an equally long history.⁶ In addition to this long history of deliberate attempts to focus employees' minds and efforts on the financial success of the business in which they work, Wright has noted significant evidence in Australia of cyclical levels of interest in different forms of employee involvement,⁷ while Lansbury and Davis suggest in a similar vein that the broad linkage between employee participation and workforce performance is in a state of continual rediscovery.⁸ It should be noted that there are two distinct – though not unrelated – notions at work here. The first concerns providing employees with non-wage financial *incentives*, while the second emphasises institutional mechanisms for employee *participation* in company-level decision-making processes.

In this paper we are concerned with one particular form of employee non-wage financial participation – broad-based company-approved schemes that promote employee share ownership – and the relationship between this mechanism of employee participation and the processes and systems by which companies are led, managed, and monitored i.e. corporate governance. Generally speaking, ESO schemes involve board sponsored direct or indirect ownership by employees of equity (shares) in the company in which they work.⁹ They have three common elements: (1) the transfer of equity to employees; (2) often on favourable terms to both employer and employee (though this element would seem contingent rather than necessary); (3) where the equity recipient is an employee of the equity provider.¹⁰

What makes this mechanism of employee participation interesting is that it involves allowing employees to also become shareholders. In addition to their employment relations with the company – (a contractual relationship shaped variously by labour

⁵ Michael J. Aitken and Robert E. Wood, 'Employee Stock Ownership Plans: Issues and Evidence' (1989) 31 *Journal of Industrial Relations* 147, 147; Ben Fine, 'Esop's Fable - Golden Egg or Sour Grapes?' in Toporowski (ed.) *Political Economy and the New Capitalism* (Routledge, London, 2000), 181; Virginie Perotin and Andrew Robinson, *Employee Participation in Profit and Ownership: A Review of the Issues and Evidence* (2002), 8.

⁶ For instances of the use of the later two labour management techniques in Australia, see Christopher Wright, *The Management of Labour* (1995), 214.

⁷ Ibid.

⁸ Russell D. Lansbury and Edward M. Davis, 'Introduction' in *Managing Together: Consultation and Participation in the Workplace* (Longman, Melbourne, 1996), 1.

⁹ Adam Reynolds, 'Do Esops Strengthen Employee Stakeholder Interests?' (2001) 13 *Bond Law Review* 95, 102.

¹⁰ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000).

law and relevant industrial and workplace relations and practices) – in becoming a shareholder in the company, employees do more than gain access to financial incentives linked to the company’s performance, its dividend stream and increases in its share price. What sets ESO schemes apart from other non-wage forms of financial participation, and other mechanisms by which employee voice is heard in decision-making, is the means of securing this financial motivation. Employee share ownership schemes involve a board-approved process of transforming employees into shareholders – the people to whom a company’s directors are primarily accountable.

Before examining the current policy, empirical evidence and regulatory context of ESO schemes in Australia, it is important to clarify how ESO intersects with the widely recognised picture of employees and shareholders occupying fundamentally different positions in corporate governance. In both law and practice, it is usually said that the position of employees is in stark contrast to that of shareholders. While employees generally join a company on the basis of their contribution to its underlying business, shareholders have an important role in corporate decision-making. They own and, through the appointment and removal of directors at general meetings, ultimately control the company. The emphasis here is on the notion of ‘ultimate’ control; for as long as directors legitimately hold their position and act within the law, day-to-day management and much strategic policy setting is effectively within their control.

There are two important points to be made concerning the potential role of ESO schemes. Firstly, from a traditional corporate governance perspective and despite suggestions that they constitute the ‘most important asset’ of a company, employees are not a central concern of corporate governance.¹¹ They appear in literature on financial structure and corporate governance as an issue with which management must deal, either as an unavoidable cost or a hard to maximise productive asset.¹² With reference to the contractual basis of their relationship with the company, employees are often regarded as ‘outsiders’.¹³ Secondly, corporate governance debates are typically organised around principal/agent issues, particularly the concern with strengthening the accountability of management to shareholders. Viewed in light of these two points, not only do employees not have a ‘seat at the table’ of corporate decision-making, but the primary accountability of the board of directors to shareholders would seem to overshadow and subordinate their employment, workplace or industrial concerns.

Debates about ‘shareholder value’ and ‘stakeholder interest’ conceptions of the proper ambit of corporate decision-making have a long history. As part of this broader discussion about who should be considered a relevant party to the concerns of corporate governance, there have been signs of sustained interest in how employees might become ‘insiders’ in the process of corporate decision-making. Employee share ownership schemes are one of at least three possible models for re-positioning

¹¹ Margaret M. Blair and Mark J. Roe, ‘Introduction’, in Margaret M. Blair (ed), *Employees and Corporate Governance* (1999), 1.

¹² Howard Gospel and Andrew Pendleton, *Financial Structure, Corporate Governance and the Management of Labour* (2001).

¹³ For a recent overview of Australian literature, see Andrew Clarke, ‘The Relative Position of Employees in the Corporate Governance Context: An International Comparison’ (2004) 32 *Australian Business Law Review* 111.

employees as insiders in corporate governance.¹⁴ Through consideration of the other two, the implications of ESO for employee participation in corporate governance become apparent.

Firstly, it has been suggested that directors' duties could be altered by explicitly empowering directors to consider parties other than shareholders when determining and assessing the interests of the company. This has been done in some jurisdictions through legislation commonly referred to as 'stakeholder statutes'.¹⁵ Such an approach provides the board of directors with an explicit legal warrant to take into account the interests of those with a 'stake' in the company, without having to rely on 'enlightened shareholder value' arguments. Employees are not formally involved - the board of directors remains in control - but their interests (however they are determined by the board) can be taken into account more explicitly. Secondly, employee representation on the board of directors is an oft-cited alternative structure.¹⁶ Such board representation systems rely on the expression of employee interests by their appointed intermediaries on the board, whose position may be complicated by potential conflicts of interest.¹⁷

In contrast, ESO schemes can be considered as a possible mechanism for circumventing the 'outsider' problematic without fundamentally altering basic corporate governance structures. In theory, becoming a shareholder not only creates an extra financial interest in the success of the company, but also makes an employee a direct decision-maker (equal to their level of ownership). It theoretically gives them a direct say, at a company level, in how that success is defined.

3 Contours of the Policy Debate on Employee Share Ownership Schemes

In turning now to the policy debate on ESO schemes, it is worth noting that ESO schemes have operated in Australia since at least the 1950s, despite only having been specially targeted in federal legislation since 1974.¹⁸ The only public regulation that applies directly to ESO schemes is of a concessional nature in the area of tax liability, and the procedural requirements of corporate law. The notion of employees owning

¹⁴ Although not a model, for completeness it should be noted that the potential role of other institutional mechanisms such as employee pension funds, institutional investors or organised labour might be re-examined, with a view to bringing them more directly into corporate decision-making processes. Importantly, the use of employee capital in pursuit of presumed stakeholder interests is complicated where that capital represents crucial life-savings: see Jennifer Hill, 'At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees' (1995) 23 *Federal Law Review* 204, 225.

¹⁵ Shelley Marshall, *The Stakeholding Theory of Corporate Governance: Can It Deliver Upon Its Promises?* (Centre for Employment and Labour Relations Law, University of Melbourne, 2000), 23.

¹⁶ For a recent analysis, see Raymond Markey, 'A Stakeholder Approach to Corporate Governance: Employee Representatives on Boards of Management' in Gollan and Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy* (Pluto Press, Melbourne, 2003) .

¹⁷ *Ibid*, 126-127.

¹⁸ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 9 [2.1].

shares in the company for which they work has enjoyed bipartisan (if not always sustained) support in Australia for nearly 30 years.¹⁹

The current tax concession regime was introduced in 1995 by the then Labor Government, while the Coalition Government came to office in 1996 with a policy of doubling the concession offered by that regime.²⁰ Encouraging ESO programs remains part of the Labor Party platform,²¹ while in February 2004, the Minister for Employment and Workplace Relations, Kevin Andrews, announced a target of doubling the ESO schemes in workplaces from 5.5% of employees to 11% by 2009.²²

It is difficult to determine precisely which policy justifications underpin the contemporary discussion about ESO schemes. While the arguments for ESO may not have varied substantially for many years,²³ there is a considerable variety of forms that these arguments take. For example, there are ‘big picture’ social policy ideas – beyond the scope of this paper – which could be pursued through promoting ESO schemes. It has been suggested that they might serve as a public policy response to concerns about national savings, or as part of a project for the ‘democratisation of wealth’²⁴ by dispersing ownership within capitalist societies.²⁵

The *Shared Endeavours* Majority Report settled on four key policy objectives for employee share ownership:

“To align more closely the interests of employers and employees so that shareholding employees appreciate more directly the impact of management and work practices on efficiency, productivity and profitability;

to provide a net contribution to national savings;

to facilitate the development of sunrise industries where equity in the company is as crucial to key personnel as salary; and

to facilitate succession planning and, in some cases, employee buyouts.”²⁶

Other arguments for ESO schemes include their potential contribution to ‘raising governance standards’ by increasing information flow and feedback between

¹⁹ On breadth, see *ibid* 9 [2.1] and 12-15 [2.15-2.23]; with regard to the fragility of this support, see Michael J. Aitken and Robert E. Wood, ‘Employee Stock Ownership Plans: Issues and Evidence (1989) 31 *Journal of Industrial Relations* 147, 148.

²⁰ For a detailed discussion of recent ESO regulatory history, see House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 12 [2.15] to 15 [2.23].

²¹ Australian Labor Party, *National Platform: Chapter Three - Income, Job and Social Security* (31 January 2004). Available <http://www.alp.org.au/policy/platform2004/chapter_03.html> Accessed 30 July 2004.

²² Kevin Andrews, MP, Minister for Employment and Workplace Relations, *Media Release 04104 - Promoting Employee Ownership* (2004).

²³ Rayna Brown and Cheung Wah Lau, ‘The Extent and Industrial Pattern of Employee Share Ownership Plans in Australia: Preliminary Evidence’ (1997) 10 *Accounting Research Journal* 34, 34.

²⁴ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives 1 March 2004, 24948 (Greg Hunt, MP).

²⁵ Famously, the central USA proponent of ESO, Louis Kelso, quoted in Aitken and Wood 1989.

²⁶ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), vii.

stakeholders,²⁷ and using them as a tool for encouraging increased peer and self-monitoring. Employee share ownership schemes can also be used to increase employee understanding of the operations of companies. The leading corporate governance figure Adrian Cadbury has suggested, in the context of ESO, that ‘becoming a shareholder is possibly the most effective way of absorbing the principles on which the economy of the country is run’.²⁸ One author explicitly adopts this educational theme, when suggesting one benefit of ESO schemes is that they make employees aware of the ‘modest returns’ of most shareholders.²⁹ While a company may primarily institute an ESO scheme as an incentive tool, it might also do so partially with the hope of increasing employees’ sense of connection to their company, particularly in a large organisation spread over multiple sites. This ‘bonding rationale’ is similar to the use of ESO schemes as an incentive device, as it may contribute to the creation of the kind of cooperative culture required for group-based incentives to be effective.³⁰

Most of the arguments for ESO schemes take their cue from notions of employee/employer alignment of interests as a driver for increased employee productivity and industrial harmony. The *Shared Endeavours* Majority Report cites ‘two driving ambitions’ behind the establishment of ESO schemes: (1) the provision of an additional, tax effective, remuneration form; and (2) cultural change leading to higher productivity.³¹ The central argument here appeals to a mix of ideas: stakeholder alignment, employee incentives, industrial harmony and workplace productivity.

On the other hand, concerns with ESO schemes should also be noted. While ‘union attitudes’ are obviously not fixed or unitary across time and industries, unions have traditionally been suspicious of ESO because it potentially undermines their traditional collective bargaining relationships with management. Employee share ownership schemes may emphasise either common or aligned employee/employer interests rather than any idea of their fundamental divergence, and consequently threaten the unions’ main ‘reason to exist’.³² However, some ESO research notes that the wide range of workplace and employment issues often creates sufficient employee demand for a continuing, undiminished role for collective industrial relations structures and organisations.³³ Indeed, the expansion of employee share ownership may have the potential to increase union voice through shareholder activism, both in drawing attention to particular employee issues or even pursuing representation on the board of directors.

²⁷ Richard Stradwick, *Employee Share Plans - Equity Participation for Employee Commitment* (2nd ed., Pitman Publishing, South Melbourne, 1996), x.

²⁸ Adrian Cadbury, ‘Foreword’, in *Ibid*, ix.

²⁹ *Ibid*, 23.

³⁰ Andrew Robinson and Nicholas Wilson, ‘Esops and Corporate Performance’ in Wilson (ed.) *Esops - Their Role in Corporate Finance and Performance* (Macmillan, New York, 1992), 259; James Sesil, et al., ‘Broad-based employee stock options in US “New Economy” firms’ (2002) 40 *British Journal of Industrial Relations* 273, 276.

³¹ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000) 40 [2.101].

³² Nigel Mason, ‘Esops and the Co-Operative Enterprise: The Employee Common Ownership Plan’ in Wilson (ed.) *Esops - Their Role in Corporate Finance* (Macmillan, New York, 1992), 228.

³³ Erik Poutsma, *Employee Share Ownership and Profit-Sharing in the EU* (2001).

Arguments for ESO schemes based on their potential as a mechanism for increasing employee incentives and productivity strike a number of practical difficulties. Clearly, the financial entitlements derived from holding a small bundle of shares are marginal, uncertain and disconnected from day-to-day working life. The employee's share in profits through dividends is proportional (and thus small), while stock prices may bear little relation to employee performance. There is also potential for any individual employee shareholder to 'free-ride' on the improved performance of the company as a whole.³⁴ As a participation mechanism, the impact of a small holding on corporate decision-making is invariably context-dependent. It is precisely because individual holdings are likely to be relatively inconsequential that the use of a trust structure – to gather and control a block of votes – is of interest to those seeking to use ESO schemes to democratise corporate decision-making.³⁵ By controlling a block of shares and seeking to represent the collective interests of employee owners, a trustee could be in a better position to engage in shareholder activism, whether through formal resolutions at an annual general meeting or by building a relationship with the board of directors.

Other concerns with ESO schemes include their potential abuse as a device for taxation avoidance, or their misuse by an entrenched management to thwart a takeover.³⁶ In the takeover context, this may involve extending ESO to make a takeover unattractive, or simply consolidating and redistributing control among management.³⁷ Another, employee-centred, issue is the argument that employee shares should not be a substitute for wages but instead supplement the employee's income, particularly given that owning shares in the employer company increases the employee's financial exposure to risk. The *Shared Endeavours* Majority Report recommended an elaborate set of conditions for assessing when trading wages and conditions for participation in an ESO scheme would be appropriate.³⁸ In response, the Federal Government argued that the existing mechanism of the 'no disadvantage test' contained in Australian labour law statutes provided sufficient flexibility for addressing such trade-offs, while recording government support for ESO 'as an addition to, rather than a substitute for, award wage entitlements'.³⁹

Additional concerns include the business costs incurred by a company that establishes an ESO, such as implementation costs, and the issue of existing shareholders having their interest in, and control of, the company diluted.⁴⁰ These issues are important in determining whether ESO schemes will be implemented.⁴¹

³⁴ James Sesil, et al., 'Broad-based employee stock options in US "New Economy" firms' (2002) 40 *British Journal of Industrial Relations* 273, 276.

³⁵ See, for example, the work of Employees Direct, a UK lobby group: <<http://www.employees-direct.org/>> Accessed 30 August 2004.

³⁶ Robin Blagburn, 'Financing ESOPs: the company's wider perspective' in Nicholas Wilson (ed), *ESOPs – their role in corporate finance and performance* (New York: Macmillan, 1992), 123.

³⁷ Ben Fine, 'Esop's Fable - Golden Egg or Sour Grapes?' in Toporowski (ed.) *Political Economy and the New Capitalism* (Routledge, London, 2000), 187.

³⁸ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 115 – 120 [3.200-3.216] and recommendation #25.

³⁹ Commonwealth of Australia, *Government Response to Shared Endeavours: An Inquiry into Employee Share Ownership in Australia* (2003), #25.

⁴⁰ Richard Stradwick, *Employee Share Plans - Equity Participation for Employee Commitment* (2nd ed., Pitman Publishing, South Melbourne, 1996), 30.

⁴¹ KPMG, *Employee Share and Option Schemes Survey Report* (2003), 1 and 10.

4 Key Data on ESO Practices, Incidence and Characteristics

We now examine existing data on ESO schemes in Australia and draw some international comparisons. This section explores how these schemes are structured, what is known about their incidence (both in terms of the prevalence of different types of ESO schemes, the rate of employee participation in them and the companies that have them), and their supposed impact on corporate performance and workplace relations. Importantly, while a great deal is known about ESO schemes in general, data on Australian practices in particular is somewhat patchier. The *Shared Endeavours* Majority goes so far as to say that ‘very little of substance is known about employee share plans in Australia at all’.⁴²

ESO Scheme Formats

Up to this point in the paper, ESO schemes have only been described very generally, as board sponsored direct or indirect equity participation by employees in the company in which they work. While obviously shaped by the taxation concessions and the regulatory requirements currently in force, ESO schemes can take a variety of forms.

Consider the following list of ‘broad types of ESO schemes’ used in Australia, drawn from the *Shared Endeavours* Majority Report, in reliance on the submissions of remuneration consultants:⁴³

- fully paid shares funded by employer company loan (a ‘loan plan’);
- fully paid shares funded by profits, remuneration sacrifice or bonus (‘subscription plan’); (it is ESO schemes of this form that are supported by the tax concession regime);⁴⁴
- partly paid share plans;
- option plans;⁴⁵ and
- replicator share plans (employer company offers shares in other company to employee).

There are some common characteristics among these types of schemes, such that we might be tempted to suggest they are no more than different means of institutionalising employee access to corporate equity. Clearly, the implementation of ESO schemes is a relatively fluid area, a point highlighted by some overseas

⁴² House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 42 [2.105].

⁴³ As outlined in the *Shared Endeavours* Majority Report and in reliance on the submission of Remuneration Planning Corporation.

⁴⁴ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 19 [2.38].

⁴⁵ Though this format is most often associated with executive schemes, some companies use options for general employees because of their lower exposure to market risk: for an example, see the submission by Brambles Industries Limited to the *Shared Endeavours* Committee, <<http://www.aph.gov.au/house/committee/edt/eso/subs/sub32.pdf>> Accessed 30 August 2004. Note also, however, high profile moves away from option formats: Sarah Kerhsaw, ‘Microsoft takes stock with a new kind of reward’, *The Age* (Melbourne), 11 July 2003, (Business) 4.

comparisons. Louis Kelso is credited with the popularisation of the idea of ESO in the USA and the development of the first ESO plan in the 1960s.⁴⁶ A key element of his proposals was the principle of scheme self-financing, through a trust taking a line of credit from an external financial institution.⁴⁷ Another relatively distinct ESO format is the UK 'save-as-you-earn' ('SAYE') model. Under an Inland Revenue approved SAYE scheme, the employee gives a certain amount to a bank or building society each month, and at specified intervals receives tax free bonuses. These funds are then used to purchase shares in a manner similar to an options scheme.⁴⁸

The way that schemes are structured raises questions about their ESO credentials. Consider that the SAYE model combines cash savings with tax advantages and an option scheme, rather than necessarily involving ordinary shares. Similarly, the replicator share plans might also be thought of as ESO 'at a distance'. These schemes are used where the employer company cannot issue ordinary shares (such as in a business run through a partnership structure).⁴⁹ Also known as 'phantom', 'synthetic' or 'shadow' share plans, replicator plans may be organised along the same lines as the ESO types outlined above, but use some other device (shares in a related company, or a cash bonus based on some other agreed company value metric) in place of an ordinary share.⁵⁰

Aitken and Wood identify four characteristic differences in ESO schemes: the role of the employer company; the form of contributions made by the company; eligibility requirements for participation; and vesting rules.⁵¹ We would suggest a more broadly conceived set of key factors when examining an ESO scheme.

- *the rights and status attached to the type of equity issued* – this includes issues related to the mechanics of a scheme (such as its vesting rules) but would specifically focus on what it is the employee receives through their participation (such as ordinary shares with voting rights, or something more limited);⁵²
- *the scope of the scheme* – this requires consideration of which strata of employees is able to participate (its *breadth*) and the relative volume of shares they hold (its *depth*). For example, executive, key employee or select working group schemes are clearly distinct from more inclusive or broadly based models, while even a 'general employee' scheme may have specific qualifying rules for full-time, part-

⁴⁶ Richard Stradwick, 'The Concepts Behind Employee Share Ownership' in *Employee Share Plans - Equity Participation for Employee Commitment* (2nd ed., Pitman Publishing, South Melbourne, 1996) 12.

⁴⁷ Michael J. Aitken and Robert E. Wood, 'Employee Stock Ownership Plans: Issues and Evidence' (1989) 31 *Journal of Industrial Relations* 147, 147 and 150.

⁴⁸ UK Inland Revenue, *Approved SAYE Share Option Schemes* (1998); RM2 Partnership, *Fact Sheet - Approved Save-as-You-Earn Share Option Schemes* (2004).

⁴⁹ Mark Fenton-Jones, 'Nice Little Sweetener for the Stockpot', *Australian Financial Review* 23 March 2004, 49.

⁵⁰ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 20 [2.38].

⁵¹ Michael J. Aitken and Robert E. Wood, 'Employee Stock Ownership Plans: Issues and Evidence' (1989) 31 *Journal of Industrial Relations* 147, 149.

⁵² It is worth noting that in its submission to the *Shared Endeavours* Committee, the Australian Taxation Office emphasised that it was a deliberate policy choice to limit qualification for the tax concession regime to schemes involving ordinary shares, a policy reinforced in a 2003 ATO interpretative decision (ATO ID 2003/1067), which refused the concession to shares that did not have voting rights attached.

- time and casual employees and a cap on the number of ESO scheme shares that can be issued;
- *the source of finance and the taxation implications of the scheme* – such matters will determine the accessibility, cost and other implications of a scheme; and
- *the ongoing management and control of the scheme* – are the shares held individually by employees or is a trust structure used and, if so, who exercises the voting rights of the shares and how is the trustee appointed?

These factors have been identified because, in the absence of a legally mandated and distinct ESO scheme format, there is inevitably a risk of collapsing distinct practices when referring generally to ESO schemes. As will be demonstrated in the subsequent section, there is a need for clarity on each of these factors when considering the extent and effects of ESO schemes.

The Incidence of ESO Schemes

Having outlined the underlying ideas, primary policy arguments and possible forms of ESO schemes, we now consider their current prevalence in Australia, the characteristics of companies that have them, and review the available research on their effects. As will become apparent, the available data on the *incidence* and *characteristics* of ESO schemes provide for considerably more stable conclusions than the two major streams of research on the *effects* of ESO schemes: ie, research that attempts to capture a ‘corporate performance’ link or determine the impact of ESO on employees’ attitudes and behaviour.

Australian Bureau of Statistics data suggests that ‘over 5 per cent of the Australian workforce ... hold equities under employee share plans’.⁵³ As a rough point of international comparison, ESO is broadly in the range of 7% in the UK, 10% in the USA and 23% in France.⁵⁴

The primary source of more finely-grained data on ESO schemes in Australia is the 1995 Australian Workplace Industrial Relations Survey (‘AWIRS 95’). This survey (of workplaces with 20 or more employees) identified an aggregate increase between 1990 and 1995 in ESO schemes open to any employees from 16% to 22%.⁵⁵ In terms of actual employee ownership, in only 28% of these workplaces did more than half of

⁵³ Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership* (1999) catalogue 6310.0, 36, cited in House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 23 and 26, [2.53].

⁵⁴ Adam Reynolds, ‘Do Esops Strengthen Employee Stakeholder Interests?’ (2001) 13 *Bond Law Review* 95, 103. This figure for the USA should be treated with caution. In some sources it refers explicitly to 10.3% of the 350 largest public companies (James Sesil, Douglas Kruse and Joseph Blasi, *Discussion Paper No 2001/25 – Sharing Ownership Via Employee Ownership* (2001), 9-10), while another source quotes estimates of ‘as much as 10% of the US stock exchange’ being employee-owned (‘The Shared Ground’ (2003) *Human Capital Australia*). Data published by the USA ESO research/lobby group, the National Center for Employee Ownership, puts the general employee participation rate in the for-profit sector at nearly 24% (NCEO, ‘New Data Show Employee Ownership to be Widespread’ (2004) <http://www.nceo.org/library/widespread.html>> Accessed 5 July 2004.

⁵⁵ Alison Morehead, et al., *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* (1997), 222 and Table A10.14b, 533.

the employees hold shares.⁵⁶ AWIRS 95 also provides statistics on workplace variables such as industry type.⁵⁷ Employee share ownership schemes are mostly commonly found in retail trade, finance and insurance, and least likely to be found in health and community services, cultural and recreational services, and construction.⁵⁸

Aside from the ABS and AWIRS data, other sources on the incidence of ESO schemes in Australia include surveys conducted by private firms, such as the Mercer Human Resource Consulting survey of 2002⁵⁹ and the KPMG *Employee Share and Option Schemes Survey Report* of 2003.⁶⁰ The KPMG survey is significantly the larger of the two (it surveys 800 Australian companies as opposed to the Mercer study's 167 web based respondents). The KPMG survey revealed two interesting trends in the types of ESO adopted by Australian companies. Firstly, among the companies in the survey, option plans were equally available to employees and executives. Secondly, only 12% of the companies with ESO schemes employed the It is suggested in the survey report that this reduction is tax-exempt structure provided by the current regulatory regime,⁶¹ down from 22% in a previous survey.⁶² It is suggested in the survey report that this reduction is consistent with the depressed share market and profit performance in 2002 and early 2003.⁶³

A common feature across a number of studies is the assumption that larger, listed public companies have structural advantages in offering shares to their employees, due to their greater capacity to absorb associated business costs and their ability to issue shares that can be traded on an open, liquid market. According to the AWIRS 95 data, 29% of private sector workplaces that were part of a larger organisation had an ESO scheme, as opposed to 3% of single workplace organisations.⁶⁴ One Australian study by a private consultancy firm in 1997 claimed that 18.5% of the top 350 listed public companies had "substantial" ESO schemes.⁶⁵ More recently, it has been claimed that over 90% of Australia's top 150 companies have at least one employee share plan that is offered to all employees.⁶⁶ In the 2003 KPMG survey, 80% of

⁵⁶ Ibid, 222.

⁵⁷ Ibid, 533, Table A10.14b.

⁵⁸ Ibid, 222.

⁵⁹ Mercer, *Employee Share and Option Plans in Australia* (2002), cited by ESODU, *Employee Share Ownership in Australia* (2004),

Australian Workplace <<http://www.workplace.gov.au/eso>> Accessed 10 November 2004.

⁶⁰ KPMG, *Employee Share and Option Schemes Survey Report* (2003), 6.

⁶¹ Ibid, 6.

⁶² Ibid, 5-6.

⁶³ Ibid, 6.

⁶⁴ Alison Morehead, et al., *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* (1997), 222 and Table A10.14b, 533.

⁶⁵ Australian Employee Ownership Association, *Submission on Employee Share Ownership*, 15 April 1999 (Submission No. 5), 5, cited in House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 25 [2.49]. "Substantial" refers to a plan with greater than 50 employee participants and/or holding more than 2% of the company's capital. This data would seem to originate from the Remuneration Planning Corporation, *The Employee Share Plan Handbook* (1997), 21, cited in House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 24 [2.48].

⁶⁶ Geoff Price, 'Employee Ownership: Reform Opportunity Lost?' (2003) 55 *Keeping Good Companies* 330, 331.

public listed company respondents had at least one ESO scheme, although it should be noted that it is not clear from this survey how many of these schemes were open to general employees.⁶⁷ The breakdown, by industry, of Australian Stock Exchange ('ASX') listed public companies with ESO schemes revealed that more than half in any industry had an ESO scheme.⁶⁸ Importantly, this general picture of higher ESO scheme incidence in listed public companies is complicated somewhat by reported growth in the number of ESO schemes in Australian unlisted public companies, a phenomenon attributed in the KPMG study to foreign companies implementing 'home country' plans in Australia.⁶⁹

In the course of the research for this paper, a study of 513 annual reports of ASX-listed public companies for the financial year ending 2001 was conducted, using a searchable electronic database. Although only a preliminary survey of a specific subset of Australian businesses, certain trends can be noted. Importantly, disclosure practices varied significantly. Some annual reports provided significant detail on the company's various ESO schemes, while for others, such basic details as the scope of the scheme were not provided. Generally, where detail was provided many schemes adopted a 'loan plan' structure and a cap on employee share issues as a proportion of capital. ESO schemes often employed a controlled entity trustee, imposed short-term trading restrictions and involve 'non-recourse' loans from the company to the employee.⁷⁰ The language used in the annual reports to describe ESO schemes overwhelmingly emphasises the 'alignment' of employer/employee interests.

On the question of the relationship between company type, size and the incidence of different types of ESO schemes, a major European study found a strong correlation between the presence of broad-based ESO and overall company size and stock market listing.⁷¹ Importantly, country-specific factors (such as legislation and tax concessions) appeared to influence the incidence of broad-based schemes, but not narrow-based (typically executive-only) schemes. This contrast 'support[s] the argument that narrow-based and broad-based financial participation are distinct and separate phenomena'.⁷²

The overall patchiness of this data was recognised in the *Shared Endeavours* Majority Report, and one of the key roles of its proposed regulatory agency was to gather information to address this issue. It remains an open question whether the promotional ESODU will fill this gap. As of late 2004, ESODU had published on its website the existing *Shared Endeavours*, ABS, Department of Employment and Workplace Relations 'Workplace Agreements Database' and ASX 'Share Ownership Survey' data. It has also commissioned a 'major research project to investigate the barriers to ESO take-up, and determine the types and incidence of plans used by Australian businesses'.⁷³ Initial findings of this research have also been published on the ESODU website. These findings are broadly consistent with the findings presented in this

⁶⁷ KPMG, *Employee Share and Option Schemes Survey Report* (2003), 3.

⁶⁸ Ibid.

⁶⁹ Ibid, 4. Noted also in Geoff Price, 'Employee Ownership: Reform Opportunity Lost?' (2003) 55 *Keeping Good Companies* 330, 331.

⁷⁰ The debt on a 'non-recourse' loan is normally repaid through the dividend stream; in the case of default, the company cannot recover the difference from the employee.

⁷¹ Erik Poutsma, *Employee share ownership and profit-sharing in the EU* (European Foundation, 2001), 3.

⁷² Ibid.

⁷³ ESODU, *Employee Share Ownership in Australia* (2004) Australia Workplace

paper; there is conflicting and limited Australian data on ESO schemes, much of which fails to adequately differentiate between types of schemes and the impact of company size and structure on the implementation of ESO schemes.

Corporate Performance and Employee Attitudes and Behaviour

Empirical research into the *effects* of ESO schemes has primarily focussed on two distinct but related issues: the effect on corporate performance and on employee attitudes and behaviour.

Though the potential for a positive relationship between ESO and concerns such as productivity and workplace harmony is widely accepted intuitively, repeated attempts to 'prove' such relationships are invariably thwarted by causal uncertainty; good business performance may be a cause of, rather than an effect of, the adoption of ESO, or both may be dependent on other factors.⁷⁴ Does the business perform well on these fronts because its employees own shares, or can it afford to offer shares to its employees because it is already successful?

Almost every study of ESO emphasises that its effectiveness as a tool for improving organisational productivity depends on the workplace environment. The 'positive but small relationship' between ESO and better than average company performance and improved employee attitudes is 'difficult to distinguish ... from related HRM practices'.⁷⁵ Some research indicates that companies with ESO that are comparatively more profitable usually implemented it as part of an organisational philosophy based on increased employee participation in decision-making.⁷⁶ Importantly, this would suggest that work re-organisation is a crucial co-variable in any attempt to use ESO as a management tool for pursuing improved corporate performance.

A leading empirical source on the question of whether ESO positively contributes to a company's performance is the 'Rutgers study', a meta-analysis that has been subsequently described by the International Labour Organisation as presenting an 'impressive, wide ranging body of evidence for a positive association between profit-sharing and productivity'.⁷⁷ The KPMG report describes this work as 'significant ...[with] no equivalent study in Australia'.⁷⁸ On the relationship between ESO and corporate performance, it presents a general picture of neutral-to-favourable findings,

<<http://www.workplace.gov.au/eso>> Accessed 10 November 2004. This research would seem to be framed in terms of a focus on barriers to implementation, and interestingly it notes that the 'widespread acceptance' of ESO in the USA 'has been broadly explained as a direct result of tax-incentives.'

⁷⁴ James Sesil, Douglas Kruse and Joseph Blasi, *Discussion Paper No. 2001/25 - Sharing Ownership Via Employee Stock Ownership* (2001), 11. See also Chris Doucouliagos, 'Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis' (1995) 49 *Industrial and Labor Relations Review* 58, 74.

⁷⁵ James Sesil, et al., 'Broad-Based Employee Stock Options in US 'New Economy' Firms' (2002) 40 *British Journal of Industrial Relations* 273, 277.

⁷⁶ Adam Reynolds, 'Do Esops Strengthen Employee Stakeholder Interests?' (2001) 13 *Bond Law Review* 95, 104.

⁷⁷ Cited in Australian Council of Trade Unions, *Employee share ownership inquiry submission*, May 1999, 4.

⁷⁸ KPMG, *Employee Share and Option Schemes Survey Report* (2003), 4.

with employee ownership linked to a 4-5% higher productivity on average.⁷⁹ Though worse performance is rare, the authors emphasise that an equity stake ‘do [es] not magically and automatically improve employee attitudes, behaviour, and firm performance.’⁸⁰ Much research on the ESO/corporate performance link concludes that some ‘combination of ownership and participative management’ is critical for any link.⁸¹

While these meta-analyses point to a potential productivity gain from combining employee ownership and participation in corporate decision-making, not all the research in this area is as positive. One USA study highlights the problems of ESO block-holding, in creating an entrenched workforce with corporate governance power.⁸² The authors claim a number of negative consequences befall publicly-traded companies with widely dispersed ownership and in which as little as 5% employee equity votes as a block.⁸³ Specifically, the authors claim such companies tend to invest less, take fewer risks, grow more slowly, create fewer jobs, have worse free cash flow problems, and exhibit lower labour and total factor productivity relative to otherwise similar companies. The authors emphasise the potential for employees’ perceived interests to conflict with the company’s, arguing that employee equity blocks face the same temptation as an entrenched management to engage in short term ‘rent-seeking’.⁸⁴

On the relationship between ESO and employees’ attitudes and behaviour, survey results ‘almost always’ show better attitudes and behaviour (broadly defined), with higher levels of organisational commitment and identification under employee ownership, and mixed neutral and favourable results for studies of satisfaction and motivation.⁸⁵ These effects are again ‘not automatic’; while some studies link improved attitudes to the status of being an ‘employee owner’, it has also been found that opportunities for participation in decision-making were more important than ownership *per se* in generating feelings of ownership.⁸⁶ Australian data, drawn from AWIRS 95, shows a positive correlation between ESO (particularly with broader participation practices) and lower rates of absenteeism⁸⁷ and higher productivity.⁸⁸

The *Shared Endeavours* Majority Report also noted a correlation between ESO and higher rates of industrial action – a finding that starkly contrasts with the supposed ‘industrial harmony’ benefits of ESO. The Majority Report sought to downplay the significance of this correlation, on the basis that it ‘reflect[s] the fact that while

⁷⁹ James Sesil, Douglas Kruse and Joseph Blasi, *Discussion Paper No. 2001/25 - Sharing Ownership Via Employee Stock Ownership* (2001), 12.

⁸⁰ *Ibid.*, 17.

⁸¹ NCEO, ‘Employee ownership and corporate performance’ <<http://www.nceo.org/library/corpperf.html>> Accessed 30 August 2004.

⁸² Olubunmi Faleye, Vikas Mehrotra and Randall Morck, *When Labor Has a Voice in Corporate Governance* (2004), 2.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ James Sesil, Douglas Kruse and Joseph Blasi, *Discussion Paper No. 2001/25 - Sharing Ownership Via Employee Stock Ownership* (2001), 15.

⁸⁶ *Ibid.*, 16.

⁸⁷ House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 41, figure 3, [2.102].

⁸⁸ *Ibid.*, 40, figure 2, [2.102].

penetration [of ESO] ... is limited it tends to be confined to large, unionised workplaces'.⁸⁹

Across the research on the organisational effects of ESO one point would seem clear; any benefits this mechanism might provide cannot be obtained by simply adding a scheme to an existing workplace environment.⁹⁰ Thus, in addition to an ESO scheme being part of a wider strategy of employee participation in corporate decision-making, an important question arising from the supposed corporate performance and workplace harmony effects of an ESO scheme is precisely *how* this form of employee ownership triggers changes in organisational and employee behaviour. Consider that it is argued in the survey by KPMG that the benefits of ESO schemes derive from the extent to which they involve *regular* share grants and are supported by appropriate communication strategies.⁹¹ Such a thesis can be contrasted with the claim that incentive effects operate more strongly for an *initial* holding, suggesting that an alignment/incentive argument for ESO schemes is more valid when 'widening' the scope of a scheme rather than when 'deepening' employee financial participation.⁹²

This contrast demonstrates the importance of keeping clearly in mind the kind of distinctions suggested by the earlier discussion of key factors in the format of an ESO scheme. A better appreciation of *how* ESO schemes change employee behaviour is crucial if changes to the present ESO regulatory framework are sought to be justified by reference to such arguments.

5 The Regulation of Employee Share Ownership Schemes in Australia

There is no mandated form for ESO schemes in Australia. This is consistent with a broad history of government reluctance to interfere with internal business management issues by formally mandating systems of employee involvement.⁹³ As ESO schemes involve transactions relating to the distribution of corporate equity, the general starting points for their legal regulation are the related provisions of the *Corporations Act 2001* (Cth) and, for publicly listed companies, the rules of the ASX.⁹⁴ In terms of targeted regulation, however, there are two key sources of note:

⁸⁹ Ibid, 42, [2.109].

⁹⁰ Ben Fine, 'Esop's Fable - Golden Egg or Sour Grapes?' in Toporowski (ed.) *Political Economy and the New Capitalism* (Routledge, London, 2000), 185.

⁹¹ KPMG, *Employee Share and Option Schemes Survey Report* (2003), 11

⁹² Sheila Mong, 'Employee Share Ownership Plans - Reform or Rethink?' (1999/2000) 15 *Australian Tax Forum* 413, 419.

⁹³ This is seen particularly clearly in the doctrine of managerial prerogatives in conciliation and arbitration: Christopher Wright, *The Management of Labour* (1995), 31. See more generally Russell D. Lansbury and Edward M. Davis, 'Introduction' in *Managing Together: Consultation and Participation in the Workplace* (Longman, Melbourne, 1996), 5; see also Richard Naughton, 'Employee involvement at the workplace: does the law provide sufficient incentive for change?' (Working Paper No. 11, Centre for Employment and Labour Relations Law, University of Melbourne 1996), 11-12 and Michelle Brown and Susan Ainsworth, 'A review and integration of research on employee participation in Australia 1983-1999' (Working Paper No. 18, Centre for Employment and Labour Relations Law, University of Melbourne 1999), 5.

⁹⁴ A small number of ASX listing rules particularly address the regulation of 'employee incentive schemes', but only with regard to providing exceptions for the issues of shares under such schemes from share issue and acquisition requirements, if certain prerequisites are met (often shareholder approval): see Listing Rule 7.2, Exception Nine (rules on issue of 5% of new capital), and Listing Rules 10.11, 10.12 and 10.14 (which relate to participation of directors in employee incentive schemes).

facilitative regulation through the Australian Securities and Investments Commission ('ASIC') Class Order 184 and its Policy Statement 49, and taxation concessions under Division 13A of the *Income Tax Assessment Act 1936* (Cth). It is also important to note some other legal influences and, for completeness, to consider the work of the Federal Government's promotional ESO Development Unit.

Corporate Law and Securities Regulation

General rules of corporate law relating to the issuing of share capital are clearly relevant sources of legal regulation of ESO schemes. Consider, for example, the general application of directors' duties in ensuring that a decision by directors to issue shares is taken in good faith and in the best interests of the company; and the s 260A ESO scheme exemption in the *Corporations Act 2001* (Cth) from restrictions on a company financially assisting a person to acquire its shares. One author has explored the potential application of other specific corporate laws, such as minority oppression, derivative litigation and class rights, to the operation of ESO schemes.⁹⁵

The Australian Securities and Investments Commission (ASIC) is the relevant regulatory agency in terms of the application of corporate law to ESO schemes,⁹⁶ and it is granted wide powers of investigation and regulatory enforcement under the *Australian Securities and Investments Commission Act 2001* (Cth).⁹⁷ It also balances investor protection and financial market facilitation roles, and it is in this context that the primary corporate law source of ESO scheme regulation is the conditional relief from the disclosure and licensing provisions of the *Corporations Act* provided by ASIC. These provisions are consolidated in a Class Order (03/184). The underlying concern of ASIC in this area is balancing the promotion of employee-employer long-term benefit with ensuring both adequate protection of employees and that the purpose of the offer of shares is participation not fundraising [PS 49.3 – PS49.5].

The Policy Statement (PS 49) provided by ASIC states that there are three key conditions that must be met for this conditional relief to be granted (in addition to other conditions regulating the use of a trust structure):

- The aim of an ESO offer is not to be one of fundraising [PS 49.32] – this policy is given effect by a limit of 5% on the number of shares that can be issued under an employee share scheme;
- There must be mutual interdependence [PS 49.37] – the nature of the employee-employer relationship, rather than the coverage of the ESO scheme, will be considered on a case-by-case basis; and
- There must be adequate disclosure [PS 49.41] – the shares must be listed (or soon to be listed) on an approved stock exchange, and the offer document must include the rules of the plan [49.46].

⁹⁵ Adam Reynolds, 'Do Esops Strengthen Employee Stakeholder Interests?' (2001) 13 *Bond Law Review* 95, 103-108.

⁹⁶ *Corporations Act 2001* (Cth), s 5B; see also *ASIC Act 2001* (Cth), s 261. For discussion of corporate law issues for Australian Stock Exchange listed companies with ESO schemes, see John Sartori, 'Employee share ownership plans – issues confronting ASX listed companies' (2005) 23 *Company and Securities Law Journal* 71.

⁹⁷ *ASIC Act 2001* (Cth), s 13.

The relief from the prospectus, product disclosure and some licensing requirements (such as the prohibition on making unsolicited offers of shares) of the *Corporations Act* is justified by ASIC with reference to issues of commercial benefit, the absence of a net regulatory detriment and the promotion of the employee/employer relationship [PS 49.4]. The 2003 amendments to this Class Order extended it from covering only ordinary shares to also including options over unissued shares, both of which ‘allow for a more complete alignment of employer and employee interests than with other financial products’ [PS 49.24].

Taxation Concessions

The taxation concession regime is the focus of most attention surrounding the regulation of ESO schemes in Australia. On the one hand, tax-based financial incentives would seem a powerful tool for promoting the spread of such schemes. On the other hand, there is a widespread recognition of the potential costs of tax relief for private equity ownership, both in terms of the efficiency of this regulatory strategy and with regard to concerns for abuse.

“General employee”-targeted subscription plans currently receive conditional concessions under Division 13A of the *Income Tax Assessment Act 1936* (Cth).⁹⁸ To meet the definition of a ‘qualifying plan’, an ESO must involve:

- The acquisition of options or ordinary shares in the employer company;
- The employee must not (directly or indirectly) hold or control more than 5% of the shares in the employer company; and
- The scheme must be offered to at least 75% of permanent employees.⁹⁹

If a plan qualifies, then the employee may elect to obtain either a \$1,000 assessable income tax reduction or to defer tax liability on the shares/options for up to 10 years.¹⁰⁰ A particular point of contention has been payment of income (rather than capital gains) tax on the difference between the purchase price and the market value of shares awarded under an ESO.¹⁰¹ There have been repeated calls, including from the authors of the *Shared Endeavours* Majority Report,¹⁰² for any increases in the value of shares obtained under a deferred tax liability plan to be taxed as capital gains (as occurs with tax exempt plan shares) and not income.¹⁰³ As there is no limit on the amount of shares that can be obtained through the deferred tax liability concession, this differential treatment arguably favours the plan that is *less* likely to facilitate

⁹⁸ The history of this Division is outlined in House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 12-15 [2.15-2.23]. See also Chapter Four, ‘Administration and Taxation Arrangements’.

⁹⁹ *Income Tax Assessment Act 1936* (Cth), s 139CD and related provisions; see also discussion in *Ibid* 144 [4.131].

¹⁰⁰ *Income Tax Assessment Act 1936* (Cth), s139CD(5); for further analysis, see Sheila Mong, ‘Employee Share Ownership Plans - Reform or Rethink?’ (1999/2000) 15 *Australian Tax Forum* 413, 415-416.

¹⁰¹ Employee Ownership Group, *Employee Share Ownership in Australia: The Future* (2003), 2.

¹⁰² For the Federal Government’s response, see Commonwealth of Australia, *Government Response to Shared Endeavours: An Inquiry into Employee Share Ownership in Australia* (2003), # 27.

¹⁰³ Geoff Price, ‘Employee Ownership: Reform Opportunity Lost?’ (2003) 55 *Keeping Good Companies* 330, 330; see also Employee Ownership Group, *Employee Share Ownership in Australia: The Future* (2003), 2.

individual employees' owning more shares.¹⁰⁴ The counter-argument, however, is that these changes would only increase the complexity of the relevant taxation provisions,¹⁰⁵ and potential complexity raises the prospect of some new form of tax avoidance. Importantly, the ATO claims that the introduction of the Division 13A rules has not completely eliminated tax avoidance in the context of ESO.¹⁰⁶

Interaction with Employment and Labour Relations Law

At the time of the Shared Endeavours inquiry, the Department of Employment, Workplace Relations and Small Business advised that the number of ESO schemes in workplace agreements was very low (only 42 out of around 250,000 enterprise agreements, and a mere 10 of 1,500 Australian Workplace Agreements). The highest concentration of these was in the finance and insurance sector.¹⁰⁷

More recent data posted on the ESODU website continues to suggest that the number of federal private enterprise bargaining agreements with ESO provisions is low and concentrated in the manufacturing, finance and transport sectors.¹⁰⁸ Other recent independent studies of both collective and individualised workplace agreements have confirmed these findings.¹⁰⁹

During the *Shared Endeavours* inquiry, it was suggested to the Committee that most employers regarded participation in ESO schemes as a separate matter from enterprise bargaining.¹¹⁰ That this is the case seems to be borne out by the fact that even where workplace agreements *do* contain references to ESO schemes, the details of such schemes are generally set out in separate agreements rather than detailed in the enterprise agreements themselves. On the other hand there is no *a priori* reason why potential gains to the employee from participation in an ESO scheme might not be considered part of enterprise bargaining although there would inevitably be complications arising in this context concerning the application of various labour law provisions. For example, at the Federal level, under the terms of the *Workplace Relations Act 1996* (Cth.), workplace agreements may only be formalised (that is, certified or approved) if they do not disadvantage employees covered by them in

¹⁰⁴ Geoff Price, 'Employee Ownership: Reform Opportunity Lost?' (2003) 55 *Keeping Good Companies* 330, 311.

¹⁰⁵ Commonwealth of Australia, *Government Response to Shared Endeavours: An Inquiry into Employee Share Ownership in Australia* (2003), # 27.

¹⁰⁶ Australian Taxation Office, *Submission to the House of Representatives Standing Committee on Employment, Education and Workplace Relations* (1999), 4.

¹⁰⁷ See House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 115-120 [3.200-3.216].

¹⁰⁸ Department of Employment and Workplace Relations, 'Workplace Agreements Database', cited by ESODU, *Employee Share Ownership in Australia* (2004), Australian Workplace <<http://www.workplace.gov.au/eso>> Accessed 10 November 2004.

¹⁰⁹ R. Mitchell and J. Fetter, *The Individualisation of Employment Relationships and the Adoption of High Performance Work Practices: Final Report*, Workplace Innovation Unit, Industrial Relations Victoria, 2003; P. Gahan *et al.*, 'Regulating for Performance? Certified Agreements and the Diffusion of High Performance Work Practices', Paper presented at the Australian Labour Law Association 2nd National Conference, The University of Sydney, 2004.

¹¹⁰ See House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours - an Inquiry into Employee Share Ownership in Australia (Majority Report)* (2000), 115-120 [3.200-3.216].

relation to their terms and conditions of employment (the ‘no disadvantage test’).¹¹¹ Problems would almost certainly arise in the application of this test because of the contingent nature of the benefits associated with ESO schemes. For that reason it is most likely that ESO schemes would always be ‘add ons’ to employee conditions rather than forming the whole or part of an exchange for other important concessions made by the employees as part of the bargaining process.¹¹²

Important legal concerns may arise even where provision for employee financial participation is made not through enterprise agreements but through quite separate and private contractual arrangements, giving rise to uncertainty as to their operation and subsequent litigation (see, eg, *Bredel v Moore Business Systems Australia* [2003] NSWCA 117; *Lau v Bob Jane T-Marts* [2004] VSC 69). Thwarted expectations of performance-based remuneration have given rise to substantial litigation under the NSW Industrial Relations Commission jurisdiction to review unfair contracts (see, eg, *Canizales v Microsoft Corporation* [2000] NSWIRComm 118; *O’Donnell v GIO Australia Ltd* [1996] NSWIRComm 1).

Further, the general trend of employment law doctrine in the UK suggests that, even where management and boards retain wide discretion as to the calculation of performance-based remuneration, there is an implied obligation not to exercise that discretion irrationally or capriciously (*Mallone v BPB Industries Ltd* [2002] ICR 1045). It seems likely that Australian courts will follow this lead.¹¹³

Other Influences

Other areas of law (such as trade practices, equity and property) are potential influences in ESO scheme transactions. Further, a corporation’s own governance rules and scheme provisions will be relevant.

In practice, particularly with regard to executive and option schemes, Australian and International Accounting Standards Board approved methods on valuing share options can be broadly encompassed within ‘regulatory’ factors. Other relevant influences include recommendations contained in the Investment & Financial Services Association guidelines,¹¹⁴ international reference points such as the Organisation for Economic Cooperation Development recommendations on the tax treatment of executive stock-options¹¹⁵ and formal regulatory developments in other legal jurisdictions for companies with international operations.

There are other important non-government actors, such as pro-ESO lobbies like the Australian Employee Ownership Association,¹¹⁶ remuneration consultants with an

¹¹¹ *Workplace Relations Act 1996* (Cth), s. 170XA.

¹¹² For a discussion of the application of the ‘no disadvantage test’ see R. Mitchell *et. al.* ‘What’s Going on with the “Non Disadvantage Test”? An Analysis of Outcomes and Processes Under the *Workplace Relations Act 1996* (Cth)’, Working Paper No. 33, Centre for Employment and Labour Relations Law, The University of Melbourne, 2005.

¹¹³ B. Creighton and A. Stewart, *Labour Law*, Federation Press, Sydney, 4th ed. 2005, pp. 366-368.

¹¹⁴ Investment & Financial Services Association, ‘Employee share schemes guidelines’ (IFSA Guidance Note No. 13, May 2000).

¹¹⁵ OECD, *Recommendations on the Treatment of Tax Treaties* (2004), <<http://www.oecd.org/dataoecd/35/53/33700277.pdf>> Accessed 24 November 2004.

¹¹⁶ For more information: <<http://www.aeo.org.au/>> Accessed 30 August 2004.

interest in providing ESO scheme services,¹¹⁷ traditional labour organisations, as well as professional, academic and policy groups such as the UK's Employees Direct.¹¹⁸ The latter is of particular note given its active promotion in the UK of a trust structure for ESO, a move overtly directed at securing a pro-active role for that trustee in corporate governance.

Employee Share Ownership Development Unit (ESODU) Activities

Acting on the belief that 'a major barrier to boosting ESO schemes is a lack of knowledge about what they are and how they help employers and employees', the primary work of the ESODU has been of a promotional nature. In addition to awareness raising through information pamphlets and 'case study' examples, the ESODU has also been recruiting businesses for the 'testing' of different ESO plans.¹¹⁹

After advertising in December 2003 for 'suitably qualified organisations' to develop a suite of templates and for companies willing to act as case study businesses,¹²⁰ four trial businesses were announced in April 2004 in addition to the naming of the Remuneration Strategies Group as consultant to the trial.¹²¹

In light of the earlier overview of existing data on ESO schemes Australia, it could be argued that the ESODU should be more actively engaged in independently collating Australian data on ESO practices. This has been one of its contemplated roles, but current indications suggest a preference for promotional work. Data gathering by the ESODU could have the goal of more fully developing the Australian picture of prevailing mechanisms, incidence and characteristics of ESO schemes. The ESODU could take a leadership role in facilitating ATO and ASIC data collection, and explore options for obligatory self-disclosure by companies of ESO scheme details as part of the general requirements of corporate law. ASX listing rules could also require some consistent disclosure on ESO scheme practices. Whichever approach is taken, it would seem clear that without a systematic, reliably independent source of data on contemporary ESO scheme practices, it is hard to test whether public policy, law and regulation are appropriately tailored to the reality of business practice.

There is clearly some consensus on the positive effects of ESO schemes on productivity and workplace relations being the primary policy objectives in Australia. Yet there is research indicating that, in order to be effective, ESO schemes would need to be combined with other factors such as enhanced employee participation in corporate decision-making. In addition to promoting templates and researching structural and business-cost barriers to ESO schemes, the ESODU has a potential role in exploring ways in which these other factors can also be supported. There is some international experience in supporting education and training of employees in

¹¹⁷ One such business would seem to be the Remuneration Planning Corporation, whose submissions to the Nelson Committee were heavily cited in the Majority Report.

¹¹⁸ For more information see: <<http://www.employees-direct.org/>> Accessed 30 August 2004.

¹¹⁹ Kevin Andrews, MP, Minister for Employment and Workplace Relations, 'Promoting Employee Share Ownership', (Media Release 04104, 25 February 2004).

¹²⁰ Employee Share Ownership Development Unit, *Template Plans Project* <<http://www.workplace.gov.au/eso>> at 11 December 2003.

¹²¹ Kevin Andrews, MP, Minister for Employment and Workplace Relations, 'Companies Trial Employee Share Ownership Plans', (Media Release KA93/04, 8 April 2004).

companies that promote an ‘ownership culture’ and employees active engagement in workplace decisions.¹²² It should be noted here that creating an ownership culture at the workplace level is a different project to that of opening up company-level strategic decision-making to significant employee participation and influence.

6 Further Research Questions

ESO as an idea challenges us to clarify what is meant by employees being outsiders in corporate governance, and to consider how participation in ownership might relate to involvement in company-level decision-making. Despite this potentially broad canvas, public policy debate in Australia has tended to conceive of ESO schemes narrowly, as company-specific, board-sponsored means of providing ownership-based incentives that accentuate the alignment of employee/employer interests. Available data would tend to suggest that about 5-6% of Australian employees own employer equity through such schemes, that their existence varies by company size, type and sector, and that they take many forms.

There is empirical support for ESO schemes correlating positively with corporate performance and indicators of employee attitude and behaviour, but research indicates that such correlations may be highly contingent on ESO schemes being combined with enhanced employee participation in corporate decision-making.

A number of unresolved issues arise in connection with ESO schemes. The final part of this paper highlights some of these issues and further research questions. In particular, the role of law and regulation and the use of ESO schemes in small proprietary companies are considered.

The Role of Law and Regulation

In reflecting on the discussion of ESO schemes in this paper, a number of further research questions arise regarding the role of law and regulation. Several are raised here as points for further research and analysis.

Firstly, the law can support organisational innovation, by giving employees confidence that there is some sort of governmental oversight of a new process or system, and that it is not simply a ‘managerial whim’.¹²³ From this perspective, stronger government backing and monitoring of ESO schemes might result in ESO growth.

Secondly, much of the Australian policy debate on ESO scheme regulation focuses on the tax concession regime, and demonstrates some of the dilemmas of using tax concessions as a regulatory instrument. It is sometimes argued with regard to such

¹²² Consider, for example, the Ohio Employee Ownership Center’s ‘Employee Ownership Training & Development’ program:
<<http://dept.kent.edu/oeoc/EOTrainingDevelopment/EOTrainingDevelopment.htm>> Accessed 2 December 2004.

¹²³ Paul G. Gollan, Raymond Markey and Iain Ross, *ACIRRT Working Paper No 64 - Additional Forms of Employee Representation in Australia* (2001), 20.

measures that they may narrow the tax base for doubtful public policy advantage.¹²⁴ Tax concessions may also only benefit those already inclined to saving, particularly if employee ownership is largely dominated by higher income earners.¹²⁵

As we noted in the introduction to this paper, the present regime of taxation concessions was introduced by the Labor Government in 1995 and was subsequently extended by the Coalition Government. Despite these regulatory interventions, ABS data on the total number of employees who own shares as a benefit of employment would seem to show only a modest consequential increase in the rate at which ESO has been taken up.¹²⁶ Between 1989 and 1994, the percentage of total employees who received shares as a benefit of employment rose from 2.39% to 3.90%. By 1999, in the five years after the introduction of taxation concessions, this percentage was 5.54%. In relation to non-managerial employees, in 1989, 1.96% of these employees received shares, which increased to 3.42% in 1994 and 5.15% in 1999. Though ESO did grow more quickly in the 1995-1999 period, this would seem to be a marginal increase on an existing trend. These statistics may suggest that the regulatory effectiveness of the present taxation concession regime is an open question. They cannot, however, indicate whether what is required to broaden the scope of ESO scheme involvement is a larger incentive or a different approach altogether.

As noted in section V of this paper, the existing income tax regime for ESO schemes provides two forms of tax concession. One is a tax exemption of up to \$1,000 per annum per employee for ESO benefits which are provided under plans established to provide relatively minor share incentive remuneration for the employers' general workforce of permanent employees. The other is a tax deferral option for ESO benefits provided to permanent employees on terms which require them to continue in employment and meet other work performance obligations for prescribed periods, before they are vested with unconditional entitlement to the ESO benefits; the concession is an option to defer taxation of the benefit until it so vests.

Both concessions are restricted to ESO benefits provided under plans that meet various prescribed requirements. These include:

- a cap on the type and number of shares or options which can be held (5 per cent of shares) and (in the case of the exemption concession) the value of the annual benefits which can be provided (\$1000);
- a restriction on the type of worker to whom the benefits can be offered (generally a permanent employee of at least 3 years service);
- a restriction on the type of labour relationship within which benefits can be offered (generally a traditional common law contract of employment);
- restrictions as to the terms of the plans (particularly as to vesting and forfeiture of benefits); and
- (in the case of the deferral concession) a stipulation that full enjoyment of the ESOP benefit must be deferred, restricted and contingent.

¹²⁴ Richard Stradwick, *Employee Share Plans - Equity Participation for Employee Commitment* (2nd ed., Pitman Publishing, South Melbourne, 1996), 17.

¹²⁵ Sheila Mong, 'Employee Share Ownership Plans - Reform or Rethink?' (1999/2000) 15 *Australian Tax Forum* 413, 422.

¹²⁶ All figures taken from ESODU, *Employee Share Ownership in Australia* (2004), Australian Workplace <<http://www.workplace.gov.au/eso>> Accessed 10 November 2004.

In the case of a non-qualifying ESO scheme, the intention is that employees should be immediately taxed at their marginal tax rate on the market value of the ESO benefit as it is received.

Tax concessions are not a mere fiscal instrument; they are also an instrument of regulation and constraint of employee share ownership. Further, in the face of fiscal, regulatory and labour market change, the importance of the regulatory function of the tax concessions has become both more pronounced, and less benign. Some problems here include:¹²⁷

- The limits on the monetary value and type of the financial benefits which a company can offer to employees by way of ESO benefits, continue to inhibit movement away from traditional forms of cash remuneration, towards arrangements better suited to encouraging innovation, risk and entrepreneurship.
- A ‘one-size fits all’ approach to the concessions is increasingly less appropriate to meet the emerging diversity and flexibility of the workforces and work practices across the spectrum from small start-up companies in sunrise industries to large listed companies with transnational workforces.
- The limits on the concessions fail to account for the role of ESO benefits in newly emerging industries such as information technology and biotechnology, where the provision of share ownership in lieu of traditional cash salaries is now recognised not just as standard industry practice, but critical to the successful development of these key industries.
- The limits on the concessions, in many cases, operate to deny the SME sector equal access to ESO schemes. They also inhibit intergenerational transfers of wealth in the SME sector, as well as succession planning and employee payouts. Compliance with the tax law also imposes valuation obligations which are complex and costly.
- The restriction of concession benefits to ESO schemes established for permanent employees working in a traditional common law labour relationship for not less than 3 years (and the structure of a tax concession in the form of a deferral option) was, perhaps, appropriate to a rigid and static labour market which once existed, but has outlived its usefulness in the context of the labour market or markets we now have. Such a restriction will become even less appropriate as those markets continue to evolve.
- The limitations in the concessions allow little scope for employee share ownership to become an instrument of employee participation in corporate governance, or a medium for increased interaction between corporate management and labour.
- The limited terms on which ESO benefits may be provided, and the limited component of overall remuneration which they can provide, also reflect an outdated view of the appropriate taxation treatment of labour income.
- Related to the previous point, a critical issue is the extent to which ESO schemes should attract the CGT discount treatment for capital gains. The CGT concession recognises that there is a pressing need for the current generation of workers to increase its rate of savings to provide for future retirement incomes. ESO schemes can serve as an important vehicle to encourage long term savings.

Small Proprietary Companies

The *Shared Endeavours* Minority Report noted that over 60% of Australians ‘are employed by small and medium size businesses which are [in] general proprietary

¹²⁷ This paragraph, the preceding two paragraphs and the following points have been written by Professor Cameron Rider, Professor of Taxation Law, Faculty of Law, The University of Melbourne. The authors are grateful to Professor Rider for his contribution to this paper.

limited companies'.¹²⁸ Spreading ESO to these employees would seem to be a serious challenge. Issues like compliance costs are clearly relevant to an ESO scheme in a small proprietary company. Such companies face considerable transaction and other costs in overcoming their structural limitations of minimal share capital and, for unlisted companies, the absence of a liquid market on which the shares can be traded. There are some international models for developing alternative markets in this area.¹²⁹ Given the diversity of small and medium sized enterprises in Australia, the ESODU claim that ESO schemes are for 'businesses of all sizes and types' would seem somewhat optimistic.¹³⁰

Another issue is the very factor that makes ESO schemes unique as an employee participation mechanism in corporate governance. If the transformation of employees into shareholders enables employees to participate in corporate governance, then one of the potential business costs for a small proprietary company is the threat these employee shareholders may pose to a company's current owners. This potential challenge to the power of existing owners is not unique to small proprietary companies. How this issue works in practice obviously depends on a company's capital structure. In a large corporation, small bundles of employee shares would be unlikely to have much impact on corporate governance. In contrast, a small business with a large ESO scheme can potentially empower an entrenched workforce by giving employees access to shareholder voting rights and thus the processes of corporate control.

Some ESO proponents have explicitly sought to draw employees attention to this potential for increased influence over their working life. Former Executive Officer of the Australian Employee Ownership Association, Gary Scarrabelotti, has described equity ownership as a mechanism by which employees can become involved in the 'factor which controls [their] wages and conditions and that is, ultimately, ownership'.¹³¹ According to the KPMG study, this notion of employee owners being in a position to pressure management is seen by some corporate managers as a concern to other shareholders and a potential reason for not extending ESO.¹³² In a speech at the time of the *Shared Endeavours* inquiry, the Committee chair, Brendan Nelson, noted the concern of small and medium enterprise owners that they might lose control through ESO as a factor that deters those owners from implementing such schemes.¹³³

¹²⁸ The Minority Report relied on the Australian Bureau of Statistics document, *Small Business in Australia*, and its finding that of 5,701,700 people employed in the private sector, 3,119,600 were employed in workplaces of fewer than 20 people, while 1,278,900 were employed in enterprises of between 20 and 99 employees (Australian Bureau of Statistics, Canberra: 1999, catalogue number: 1321.0, 32).

¹²⁹ For an example of one model, see the London Stock Exchange's 'Alternative Investment Market'. <<http://www.londonstockexchange.com/en-gb/products/companyservices/ourmarkets/aim/>> Accessed 2 December 2004.

¹³⁰ See, for example, Employee Share Ownership Development Unit homepage, <<http://www.workplace.gov.au/eso/>> Accessed 30 August 2004.

¹³¹ Narelle Hooper, ABC Radio, 'The PM Program - Ansett staff buyout', 25 January 2000 <<http://www.abc.net.au/pm/s95428.htm>> Accessed 26 May 2004.

¹³² 47% of respondents believed shareholders had adverse perceptions: KPMG, *Employee Share and Option Schemes Survey Report* (2003), 12.

¹³³ Brendan Nelson, MP, 'Speech to the IIR/AEOA Conference and Workshop on Employee Share Ownership Plans' (23 February 2000), 10.

7 Conclusion

This paper has presented a survey of some of the key issues and themes involving ESO schemes in Australia. After introducing the suggestion that the systematic transformation of employees into shareholders might contribute to current debates about their 'outsider' status in corporate governance, the paper explored the contours of Australian ESO public policy debates. While noting the range of objectives that could be pursued through these schemes, and a number of common objections to

them, it was shown that there is a broad policy consensus around the desirability of ESO as one possible driver of increased workplace productivity and industrial harmony.

The paper then explored in more detail the various forms ESO can take, and suggested four key factors for guiding analysis of these schemes. A summary of the available data on the incidence and effects of ESO schemes followed. While it is recognised that over 5% of the Australian workforce own shares under ESO schemes, it is equally recognised that there is a need for more detailed research on ESO practices in Australia. Empirical research on the effects of ESO schemes indicates that any benefits they provide in terms of increased workplace productivity and industrial harmony are linked to some combination of employee ownership and participative management. In reviewing the regulation of ESO schemes in Australia, the paper noted an emphasis on providing regulatory incentives, through limited taxation concessions and conditional relief from corporate law obligations. The paper also considered the early work of the Federal Government's ESODU and made some suggestions for how this Unit might further contribute to the growth of ESO in Australia. Finally, the paper suggested two areas for further research: the role of law and regulation in promoting the growth of ESO in Australia and the use of ESO schemes in small proprietary companies.

There is little to suggest from the present policy debate or the available data on ESO in Australia that this mechanism is likely to spark a radical reshaping of the employee relations/corporate governance landscape. While the current mix of regulatory facilitation and promotion by the ESODU may not be particularly ambitious, the cautious approach is understandable. Consider that whenever changes to the tax and corporate law concessions have been mooted, the key regulators in the field, ATO and ASIC, quickly articulate their core concerns: protecting the integrity of the tax base and ensuring investors are adequately informed. To any suggestion that the current rules for conditional disclosure relief are too focussed on a single model, involve too much Government intervention or are too narrowly defined, the ASIC rebuttal is: 'when people are asked or induced to purchase securities they should be provided with sufficient information to make an informed decision.'¹³⁴ Equally, with regard to changing the present taxation concession regime it should be remembered that the Government's response to the *Shared Endeavours* Majority Report rejected almost 30 out of its 45 recommendations, 'mostly on the recommendations of Treasury ... for fear of tax abuse'.¹³⁵ Without a stronger political push, there would seem to be little likelihood of major policy reform.

¹³⁴ ASIC Submission, 'Inquiry into employee share ownership in Australian enterprises', 27 July 1999. Submission 16.2 <<http://www.aph.gov.au/house/committee/ewrwp/eso/subslist.htm>> Accessed 24 November 2004.

¹³⁵ Geoff Price, 'Employee Ownership: Reform Opportunity Lost?' (2003) 55 *Keeping Good Companies* 330, 331.

The current combination of regulatory concessions and institutional promotion may lead to some further expansion in the number of Australian employees who own a small parcel of shares in their employer. What should be noted, however, is the distance between the current debate on ESO and the fundamental question of employee participation in corporate governance.

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