



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 129

Business introduction or matching services

Chapter 7 — Securities

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From 5 July 2007, this document may be referred to as Regulatory Guide 129 (RG 129) or Policy Statement 129 (PS 129). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 129.1) or their policy statement number (e.g. PS 129.1).

Headnotes

Business introduction services; [CO 97/2329]; exemptive relief from Div 2,3A,4, 5 and 6 of Pt 7.12 of the Corporations Law (Law) and Corporations Regulations (Regulations), conditions applying, application of the stock market provisions in Pt 7.2 and licensing provisions in Pt 7.3.

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Purpose

RG 129.1 In this guide the ASC sets out its policy on regulating business introduction services or matching services which involve the offer of, or invitation to subscribe for or buy, securities. These services advertise entities which are seeking to raise funds. This guide reflects the development of a class order following the provision of individual relief to a number of introduction service operators and their users. The guide explains the effect of the class order relief from Div 2, 3A, 4, 5 and 6 of Pt 7.12 of the Corporations Law (the “Law”) on those persons involved with introduction services. For full details of the extent of the relief and the conditions attaching to it reference should be made to Class Order [CO 97/2329].

Business introduction services and the law

RG 129.2 Introduction services identify potential investors and issuers or sellers of securities by circulating information about investment opportunities. This may be done by various means, such as brochures, bulletin boards (including the Internet) and conducting meetings between potential investors and fundraisers. Some services operate by circulating information generally, while others circulate material only to subscribers to the introduction service. The services

are also described as “matching services”. For the purposes of this guide, the term “introduction services” will be used.

RG 129.3 The material about an investment that is circulated by an introduction service may constitute an offer or invitation of securities. “Offer” when used in the Law is not limited to a technical or contractual meaning, it includes distribution of material that would encourage a member of the public to enter into a course of negotiations calculated to result in the issue or sale of securities: *Attorney-General for New South Wales v Australian Fixed Trusts Limited* [1974] 1 NSWLR 110.

RG 129.4 Those involved in making the offer or invitation, which includes the introduction service operator, the person issuing or selling the security, persons providing an endorsement or verification, and the publisher of the relevant publication must comply with Div 2, 3A, 4, 5 and 6 of Pt 7.12 and Pt 7.3 of the Law unless the Law does not apply to the offer or invitation made through the service, for example, because it is excluded through s66 of the Law.

RG 129.5 In general terms, these provisions require a prospectus to be registered in relation to the offer. If the securities are debentures or prescribed interests, the issuer must enter into a deed appointing a trustee for the holders of the securities. If the securities are prescribed interests, the issuer must also hold a dealer’s licence.

Sales of issued securities

RG 129.6 If an offer involves the sale of issued but unquoted securities, Div 3A of Pt 7.12 will apply. This requires that there be a secondary trading notice prepared for the sale of the securities. The content of that document is determined by whether more than 30% of the voting shares in a company are being sold: s1043C and 1043D. The general approach that the ASC takes to secondary trading of unquoted securities is discussed in Superseded Policy Statement 105, *Secondary trading of unquoted securities* [SPS 105].

Advertising provisions

RG 129.7 The operator of the introduction service also needs to consider the application of the advertising provisions of the Law. Advertising of securities is primarily regulated by s995, 1025 and 1026 of the Law.

RG 129.8 Persons must not engage in misleading or deceptive conduct, or conduct which is likely to mislead or deceive, in

connection with a prospectus, notice or other dealing in securities: s995. This provision applies to all advertising of securities published at any time and relating to all offers. No relief from s995 is available.

RG 129.9 Nobody may publish a notice of a kind referred to in s1025(3) of the Law or a report referred to in s1026(3). Neither section restricts the publication of a prospectus, or a notice or report permitted by s1025(2) or 1026(2). A notice or report under s1025(2) can only be used after registration of a prospectus.

RG 129.10 The expression “publish” in relation to notices is defined as “publish by any means, including in a newspaper or periodical, by broadcasting or televising or in a cinematographic film”: s9.

RG 129.11 In Superseded Policy Statement 54 *Pre-prospectus advertising* [SPS 54], the ASC outlines the approach it takes to the regulation of advertising.

Share hawking

RG 129.12 Persons must not engage in share hawking — offering securities by “going from place to place” or by communicating with persons at different places by the use of the post, the telephone or a similar service: s1078. This provision restricts the manner in which securities may be discussed.

Licensing

RG 129.13 Introduction services may lead to the issue of securities to persons with whom they deal. This raises the question whether the persons providing the introduction service are conducting a securities dealing or investment advice business and are required to be licensed under Pt 7.3 of the Law.

RG 129.14 The ASC in Superseded Policy Statement 120 *Investment advisory services: Mere referrals and other excluded activities* at [SPS 120.28]–[SPS 120.29], considers the application of the licensing provisions to these arrangements and notes that a person who is in the business of providing business introductory services (which may involve the issuing of securities at some future stage of negotiations) is not conducting a securities or an investment advice business if they:

- (a) do not provide any investment advice on securities that may be issued as part of any negotiations between the parties who are to be brought together. For example, mere references to a possible equity ownership being offered by a party seeking capital would

not be considered by the ASC as providing advisory services on securities; and

- (b) do not receive any fee or other benefit from any securities transactions resulting from the negotiations.

Licensing of other persons involved in introduction services

RG 129.15 A person associated with either an investor or a person issuing or selling securities, who may be involved in the subsequent negotiation between the parties, will need to consider whether they should be licensed as a securities dealer or investment adviser as their conduct may involve securities dealing or the provision of investment advice.

RG 129.16 Some services allow professionals to provide an opinion or endorsement of the information that is provided by a business. People providing these opinions and endorsements should ensure that they are appropriately licensed to engage in this activity. In particular, these people may need a securities advisers licence if their activity constitutes part of the business of advising on securities.

RG 129.17 Where a corporation is advertising its own shares or debentures through introduction services it will usually be able to rely upon the exemption from the licensing provisions contained in reg 7.3.12.

RG 129.18 In some limited cases the publisher of the publication may be able to rely on s77(6) of the Law, which provides a specific exclusion for investment advice provided through the media. This exemption is specifically limited by s77(7) of the Law.

Conduct of a stock market

RG 129.19 In some cases the introduction service operator may circulate information about the price of issued securities that are being sold through the service. In this situation the operator will need to ensure that they do not contravene the stock market provisions in Pt 7.2 of the Law. The key factual issue is whether the system provides potential buyers or sellers with a reasonable expectation that they can regularly execute orders at the prices quoted on the system. Superseded Policy Statement 100 *Exempt stock markets* at [SPS 100.98]–[SPS 100.106], provides a discussion about the application of the stock market provisions of the Law for bulletin boards. The stock market provisions of the Law should be considered where issued securities are being transferred using an introduction service.

Policy considerations

Offers by introduction services

RG 129.20 The ASC recognises that there are barriers for small and medium sized enterprises which prevent potential investors and people issuing or selling securities from being able to locate each other. The Law restricts the circulation of offers or invitations for securities. The ASC is prepared to allow some types of offers or invitations to be circulated by an introduction service, subject to limits on the material that may be circulated about the offer and warnings about the use to which such information may be put. The ASC sees the regulatory burden for such services and those using such services is too great and imposes significant costs on the fundraising process. To the extent that investor protection is not significantly diminished the ASC is prepared to allow these services to operate without complying fully with the Law.

RG 129.21 The provision of relief to assist introduction services accords with the objectives of the ASC detailed in s1(2) of the ASC Law of:

- (a) providing commercial certainty;
- (b) reducing business costs; and
- (c) assisting the efficiency and development of the economy.

These services seek to lessen major market inefficiencies that arise from the disjointed market for finance for small and medium sized enterprises. The services perform an important role in bringing information to the market place.¹

RG 129.22 In other countries, such as the UK, USA and Canada, measures have also been taken to facilitate the activities of introduction services, so that it is not necessary that they comply with all the fundraising provisions of the relevant law.

RG 129.23 By granting this relief the ASC is also providing certainty for the operators and users of these services about the extent to which the Law regulates these activities.

RG 129.24 Although the ASC is prepared to facilitate the activities of introduction services it has concerns about the operation of these services. There is the possibility that investment decisions may be

¹ Productivity Commission, *Informal Equity Investment*, Small Business Research Program Information Paper, April 1997

made solely on the information provided by these services, without investors making further enquiries. In addition, the protections provided by mandatory disclosure and the liability regime for prospectuses would not be fully available in respect of offers made through introduction services. There is also concern about pressure selling techniques being employed. The ASC considers that these services should continue to operate but they should adhere to conditions which afford protection to investors who use them.

Nature and conditions of relief

RG 129.25 The ASC considers that by allowing what are in effect “preliminary” offers or invitations without the need for a prospectus, investors will not be unduly prejudiced. The relief prohibits a contract from being formed solely on the basis of a “preliminary” offer made in a publication or at a meeting. The relief requires that, as a prerequisite to entering into a contract with a person who has received a publication or attended a meeting referring to the relevant securities, an application form (in the case of an issuer) or a written offer (in the case of a seller) must be issued to that person.

RG 129.26 The issue of application forms and written offers are acts that are controlled by the Law. Therefore unless an exclusion from the Law applies, a prospectus (in the case of an issuer) or a secondary sales notice (in the case of a seller) must be provided with the application form or written offer. In addition, the issue of an application form or a written offer does not prevent the parties from engaging in further negotiations before finalising a contract for the subscription or sale of securities.

RG 129.27 The two most useful categories of excluded offer for issuers and sellers are the 20 offers or invitations in 12 months in relation to offers and invitations of shares and debentures and offers of greater than \$500,000 for all offers and invitations of all types of securities: see s66(3)(a), 66(3)(ba) and 66(3)(d) of the Law.

RG 129.28 However, the exclusion under s66(3)(d) of the Law for 20 offers or invitations in 12 months cannot operate where an introduction service is used to make offers or invitations of those securities. This is because each person to whom an offer is made must be counted and general offers made in a publication are considered to be made to an unlimited number of people. As a result, [CO 97/2329] gives relief to permit a further 20 offers to be made (in addition to the preliminary offers made in a publication or at a meeting). The relief does not require other categories of excluded offers to be counted

towards the twenty. This is consistent with the ASC's policy in respect of s66(3)(d): see Regulatory Guide 56 *Prospectuses* at RG 56.93.

RG 129.29 The conditions of [CO 97/2329] allow an introduction service to publicise offers and invitations by an issuer or seller up to a maximum of \$5 million. The \$5 million limitation continues to apply to securities issued or sold for 12 months after using the introduction service and relying on the class order. This accords with the period for which s66(3)(d) will be unavailable after using the introduction service. It is important to note that this will not be unduly onerous because the \$5 million limitation does not apply to securities issued pursuant to a prospectus (or secondary sales notice) which is distributed after the use of the introduction service or to most excluded issues.

RG 129.30 This limitation reflects the \$5 million gross assets test for small proprietary companies in s45A(2) of the Law. It also reflects the extent of the perceived "equity funding gap" which has been identified as a problem for small and medium sized enterprises. The ASC has also adopted for the purposes of the relief, a broad definition of small and medium sized enterprises. These enterprises comprise up to 250 employees. This definition is purposely broad to allow the widest possible group of organisations that may be thought of as small and medium sized enterprises to have the benefit of the relief.

RG 129.31 In general, s116(4) of the Law prohibits proprietary companies from engaging in any activity that would require the lodgment of a prospectus under Pt 7.12 of the Law. Accordingly, these types of companies may be able to raise funds under this exemption, without being required to convert to a public company if they do not need to issue a prospectus.

RG 129.32 The ASC is of the view that if introduction services are allowed to circulate information about investments, investors need to be alerted about the significant limitations of the information provided by the introduction service.

RG 129.33 Under the terms of the class order relief, every publication must contain warnings that:

- (a) the information is not complete, for example accounts, business plans, details of ownership of intellectual or industrial property, or experts opinions including valuations or auditor's reports are not required to be provided;
- (b) advice should be sought before investing;
- (c) the investment has high risk.

RG 129.34 The relief distinguishes between services which permit access to the service by subscription and those that do not. For subscription based services, provided the subscriber to the service acknowledges the limits of information circulated by the service, the name of the issuer or seller may be included in the publication. In all other cases the relief prohibits disclosure of the name of the issuer or seller of securities in the publication. This is to ensure that people are given warnings about the limits of the information at the time they first get information and again when they show interest in a particular investment and obtain the name of the issuer or seller of the securities.

RG 129.35 Under [CO 97/2329], the exemption for the introduction service operator requires the operator to be independent of the introduction process. The ASC considers it is important that the introduction service operator not be in a position to actively promote or influence the outcome of an introduction of a particular business opportunity that is published in the relevant service. To reinforce this position a condition is imposed in the relief on the service operator that neither the operator nor any associate of the operator have any pecuniary interest in the outcome of the decisions by users of the introduction service, other than a fee for providing the introduction service.

Issuers and sellers using introduction service

RG 129.36 As the issuer or seller of the securities is involved in making an offer or invitation, as well as the introduction service operator, they must comply with Pt 7.12 of Law, unless they are provided with relief from the same provisions of the Law as the introduction service operator.

RG 129.37 The issuer or seller is required, as a condition, to take all reasonable steps to ensure that no material about the relevant securities contained in the publication issued by the introduction service operator contains any false, misleading or deceptive statement.

RG 129.38 Similar conditions are imposed on the issuer or seller to those imposed on the introduction service operator:

- (a) not making offers or invitations or issuing securities for more than \$5 million in total in relation to any one corporation, business or scheme;
- (b) restricting disclosure of the fundraiser's name, except for subscription based services;
- (c) not entering into a contract for the issue or sale of securities before issuing an application form or written offer to the

prospective investor in compliance with the applicable requirements (if any) of the Law; and

- (d) additional conditions, in respect of information which is sponsored (see RG 129.39–RG 129.41).

People who endorse information in services

RG 129.39 Some introduction services operate on the basis that a relevant professional person, for example an accountant, patent attorney or lawyer will verify or endorse information which is included in the publication about a business. The intention of the endorsement or verification is to provide some professional review of the material included in the publication.

RG 129.40 Where a person provides such an endorsement, the endorser could be involved in making or drawing attention to the offer or invitation. For such persons to engage in this activity it is necessary that they obtain corresponding relief from the Law. Under [CO 97/2329], the ASC has provided such persons with relief from the Law provided the endorser indicates the enquiries it has made to provide the endorsement.

RG 129.41 Where the issuer or seller of the securities obtains an endorsement, it is a condition that the issuer or seller:

- (a) obtains the prior written consent of the endorser to the inclusion or reference to the endorsed material in the publication at the meeting;
- (b) makes a statement that the endorser has consented to the material being included in the publication or referred to at the meeting; and
- (c) makes a statement of any interest that the endorser has in the proposed offering or the entity offering the securities.

Publishers

RG 129.42 In addition to the introduction service operator, the issuer or seller of securities, and persons endorsing or verifying information, it is necessary that relief also extend to persons who are responsible for publishing the service, where the publisher is different from the introduction service operator.

RG 129.43 The group of persons to whom this relief applies is broad. This is necessary in view of the range of activity that may be caught by the application of the Law, particularly as a result of s764 of the Law.

RG 129.44 Class Order [CO 97/2329] extends to those persons who:

- (a) conduct a business of publishing information and the publication is received in the ordinary course of that business, for example a publisher of a magazine which contains an introduction service;
- (b) are involved in the promotion or encouragement of investment in small and medium sized business on a not for profit basis, for example, Chambers of Commerce and Industry Associations;
- (c) endorse or allow their name to be associated with or used in the publication, but not for a particular offer or invitation, for example an Industry Organisation or agency; or
- (d) provide to the introduction service direct financial assistance which is applied for the purpose of the preparation, publishing or distribution of the publication, for example a person who provides financial support to enable a publication to be issued,

but have no pecuniary interest in the outcome of any investment decision by the users of the introduction service.

Relief for introduction services conducting meetings

RG 129.45 Some introduction services also conduct meetings between interested investors and issuers or sellers of securities.

RG 129.46 There are particular regulatory concerns about the conduct of such meetings. The potential for pressure selling and “drip feeding” of information is significant at such meetings.

RG 129.47 The ASC recognises that meetings with potential investors are important for introduction services. Many investors in small and medium enterprises rely heavily on a personal assessment of the key personnel involved in a business and the ability to form a business relationship with the issuer. In view of the significance of meetings in the introduction process, the ASC is prepared to provide relief for meetings conducted or operated by the introduction service operator on certain conditions.

RG 129.48 The ASC regards the introduction service operator as having an important role in overseeing what occurs at such meetings and requires that the operator comply with particular conditions when such meetings are conducted.

RG 129.49 Clear warnings about the limits of the information being provided at the meeting are required. These are similar to the warnings to be included in the publication, however to add emphasis to the warnings they are required to be given orally and in writing.

RG 129.50 In addition, in view of the potential for pressure selling, the ASC considers that it is appropriate that there be some opportunity for potential investors to consider the information provided at a meeting. To facilitate this consideration, the ASC requires that there be a “cooling-off” period for any investment made shortly after such a meeting. If a contract for the subscription or sale of the advertised securities is entered into during the period of 5 business days, commencing on the date of the meeting, the contract will be able to be terminated by the investor during the period of 10 business days commencing on the date of the meeting.

RG 129.51 The cooling-off period will also be reinforced by requiring the introduction service operator to specifically bring this right to the attention of the meeting participants.

Applications

RG 129.52 Class Order [CO 97/2329] incorporates the protections that the ASC considers are appropriate where information is being circulated by an independent introduction service. The ASC is aware that introduction services operate in a number of different ways. The ASC will consider case-by-case relief in situations where the regulatory objective of investor protection by adequate disclosure is not compromised by the operation of the relevant introduction service.

RG 129.53 Applications for relief referred to in this guide may be made at any ASC Regional Office with the appropriate fee. Regulatory Guide 51 *Applications for relief* (RG 51) gives guidance on making applications. It is not necessary to make application if a person will be relying only on [CO 97/2329], but it is a condition of the class order that the operator give notice to an ASC Regional Office that it is relying on the class order.

Review of class order

RG 129.54 As this relief significantly alters the means by which offers and invitations of securities may be distributed, the ASC considers that it should review the operation of [CO 97/2329] once the fundraising reforms under the Government’s Corporate Law Economic Reform Program (CLERP) are finalised and services relying on the class order have been operating for 12 months.