

# Australian Securities and Investments Commission Corporate Finance Liaison Meetings, November 2010 Adelaide, Brisbane, Melbourne, Perth, Sydney

## Summary of issues

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### Schemes

#### *Schemes of Arrangement, an update on RG 60*

At the June 2010 meeting we discussed a number of revisions to Regulatory Guide 60 *Schemes of Arrangement* [RG 60]. As foreshadowed at the June meeting ASIC has further considered our position in respect of the following items:

- Proposed amendments to the Income Tax Assessment Act 1997 provide the potential for shareholders to obtain CGT scrip for scrip rollover relief for schemes where it is approved by the court at the second hearing. These amendments further provide that there will be no separate requirement for participating on 'substantially the same' terms for all shareholders. Consequently, this poses the question whether different consideration can be offered to different shareholders under a scheme. Consistent with our policy in RG 60, ASIC would be concerned if shareholders are adversely affected by the takeover being implemented by a scheme rather than takeover bid. ASIC will closely examine schemes that offer unequal consideration, and will consider objecting to a scheme in these circumstances.
- ASIC will consider objections prior to granting our no objection letter under subsection 411(17) of the Corporations Act 2001 (the Act), but if the objection does not go to the principles of section 602 not being satisfied, we are unlikely to withhold our consent merely because of the objection. However in some circumstances ASIC may not be able to give a no-objection letter prior to the second court date.

Further we advise ASIC is intending to revise Pro Forma 193, our standing indication of intent letter which is issued prior to the first Court date, to better reflect the requirement of subsection 411(2).

#### *Requirement for JORC and VALMIN compliant statements*

ASIC requires compliance with JORC and VALMIN codes in scheme documentation in order to satisfy subsection 412(1)(a)(ii) of the Act.

### Takeovers

#### *Revision of Regulatory Guides*

ASIC is presently updating the following regulatory guides:

- a) Regulatory Guide 71: *Downstream acquisitions* [RG 71]; and
- b) Regulatory Guide 74: *Acquisitions agreed to by shareholders* [RG 74]

These guides presently do not reflect the current provisions of the Act. The revisions will largely reflect amendments to the legislation since publication of the Regulatory Guides. It is expected these consultation papers, with accompanying draft regulatory guides, will be released by early 2011.

In addition ASIC has embarked on a project to update and consolidate RG 159: *Takeovers, compulsory acquisitions and substantial holding notices* [RG 159] and RG 171: *Anomalies and issues in the takeover provisions* [RG 171] and other short guides on takeover topics. We propose to consolidate the 17 existing regulatory guides applying to takeovers into 4 new guides which are likely to be segmented as follows:

- a) Relevant interests;
- b) Exceptions from section 606 prohibitions;
- c) Takeovers; and
- d) Compulsory acquisitions.

#### *Use of supplementary bidder and target statements*

Sections 643 and 644 of the Act and Regulatory Guide 25: *Takeovers: false and misleading statements* [RG 25] require all material information pertinent to a bid to be provided by way of supplementary bidder's and target' statements. The release of material information in media announcements or on the ASX platform will not discharge this obligation. Parties in doubt should err on the side of caution and include the information in a supplementary statement.

## **Fundraising**

#### *Future prospectus guidance*

ASIC proposes to release a consultation paper in early 2011 which is to provide guidance on a number of recurring issues in prospectuses identified by ASIC, and set out ASIC's approach towards satisfying the 'clear, concise and effective' principles.

#### *Unlisted, unrated debentures*

Pursuant to Regulatory Guide 69: *Debentures and unsecured notes – improving disclosure for retail investors* [RG 69], issuers are expected to engage their auditor to report on the benchmark disclosures. In October ASIC published a new Pro Forma 223 which sets out information that an auditor's report should contain and provides guidance for auditors preparing reports.

#### *Prospectuses for continuously quoted securities*

When reviewing prospectuses issued pursuant to section 713, ASIC may consider not only the information contained in the offer document, but also other disclosures made by the company that we consider investors may rely on. This is interpreted broadly and includes ASX announcements, presentation materials and interview transcripts. Where ASIC has identified potentially misleading information available outside of the prospectus, we expect the company to withdraw that information from the public domain.

#### *Use of photographs in fundraising documents*

When including photographs in prospectuses ensure that:

- They do not have the potential to mislead investors as to the activities of the company. Photographs should correlate to the maturity and operations of the company; and
- They are clearly and meaningfully labelled.

## **Experts reports and related party transactions**

### *Consultation papers*

ASIC has released two Consultation Papers for comment:

- a) CP 142 – *Related Party Transactions* [Updates to RG 76]; and
- b) CP 143 – *Expert reports and independence of experts: Updates to RG 111: Content of expert reports and RG 112: Independence of experts.*

These Consultation Papers are presently open for comment with submissions on the proposals due by 17 December 2010. It is proposed, subject to comments received, that ASIC will publish revised guidance in March 2011.

## **Self-acquisition relief**

### *Consultation Paper 137 – Indirect self-acquisition by investment funds: Further consultation [CP 137]*

In response to CP 137, ASIC received a number of submissions which generally supported the proposed relief from the self-acquisition prohibition in section 259C of the Act. One proposal however, relating to limiting interests held by controlling entities in managed investment schemes that have a controlled responsible entity, did not receive support and it is unlikely this proposal will be implemented in the form set out in CP 137. ASIC anticipates publishing a regulatory guide on self-acquisition in early 2011.

## **Corporations Amendment (Corporate Reporting Reform) Act 2010 (CACRRA)**

### *Revisions to Regulatory Guides and associated Class Orders*

Corporations Amendment (Corporate Reporting Reform) Act 2010 (CACRRA) came into effect on 28 June 2010. Among other things the CACRRA amended the following:

- a) Parent entity financial statements – entities presenting consolidated financial statements no longer are required to present parent entity financials. See:
  - CO 10/654; and
  - CO 10/655; and
  - Advisory 10-165
- b) Changing reporting period – section 323D(2A) affords entities the discretion in certain circumstances to change their financial year without making application to ASIC. Minor changes are proposed to:
  - Regulatory Guide 43: Financial reports and audit relief [RG 43]; and
  - Regulatory Guide 58: Reporting requirements [RG 58].

In addition to the amendments arising from the CACRRA, ASIC proposes to amend commentary in RG 43 relating to unreasonable burden and competitive disadvantage. On two separate occasions this year, the Federal Court has upheld ASIC's decision to refuse to grant relief on the basis of competitive disadvantage, and reaffirms the high threshold for establishing that a financial reporting requirement imposes an unreasonable burden on an entity. See Advisory 10-186 for further information.

## **Additional note - "Unmarketable Parcels" warning**

ASIC has received a number of complaints regarding the use of the term "unmarketable parcels" by companies to describe small holdings of shares. This is particularly in relation to the sale of small holdings as contemplated by ASX Listing Rule 15.13.

Use of the term "unmarketable parcels" can be misleading and deceptive to the extent it suggests that a shareholder will be unable to sell the shareholder's small holding other than via the arrangement offered by the company. Listing Rule 15.13 does refer to "less than a marketable parcel of shares" (currently, \$500 worth of shares) but this amount does not correspond to the minimum amount of shares that may be traded on ASX (currently one share). While in practice it can be difficult to engage a broker to sell a small holding companies should be careful not to suggest that participation in the arrangement offered by the company is the only way a shareholder may trade the shareholder's shares. For this reason, ASIC would strongly encourage companies to use in correspondence with shareholders an alternative term than "unmarketable parcel" to describe small holdings of shares.