

Australian Securities and Investments Commission Corporate Finance Liaison Meetings, May 2013 Adelaide, Brisbane, Melbourne, Perth, Sydney

Summary of issues

Fundraising

Hybrid securities

There have been over \$16 billion in ASX-listed hybrids issued since January 2012.

ASIC continues to work with issuers and their lawyers prior to a prospectus being lodged. This is to help ensure the features and risks of the product are prominently disclosed in an easy to read 'Investment Overview' at the start of the document. We may also raise disclosure issues after lodgement of any prospectus if warranted. We are continuing to monitor the sales channels for these products, with our surveillance focus moving from affiliates of joint lead managers to a small number of syndicate brokers to confirm that selling messages are consistent with the prospectus and to identify who is buying hybrids, in what volumes, and whether they are receiving advice.

Vanilla bonds

On 20 March 2013, the Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013 was introduced to Parliament. The Bill contemplates the use of a two part disclosure document for offers for listed, high-quality "simple corporate bonds", which have similar features to "vanilla bonds" under the current ASIC Class Order [CO 10/321].

ASIC continues to work with Treasury on the regulations which will prescribe the content of the base and offer-specific prospectus.

While this proposal is being finalised, ASIC has further extended the relief under class order 10/321 which permits a s713 prospectus for vanilla bonds with a minimum subscription of \$50 million. This relief is now due to expire 12 November 2013.

Australian government Bonds

We noted that retail trading of Commonwealth Government Securities on ASX (branded 'Australian Government Bonds') commenced on 21 May 2013.

Debentures

ASIC set up a taskforce in October 2012 in response to the failure of Banksia Securities. Since then the taskforce has:

- continued to work closely with the receivers and managers of Banksia to achieve the best result for Banksia investors;
- has publicly consulted on potential law reform, following a request from the Government in late December 2012, through the release of ASIC Consultation Paper 199 '*Debentures: Reform to strengthen regulation*'; and
- continued to impress upon gatekeepers such as trustees and auditors their obligations to protect investors.

ASIC has been conducting a review of the market involving unlisted debentures for some time. The focus has been on ensuring that investors in this market are provided high quality and timely disclosure in relation to their investment.

Charities

In May 2013, ASIC released a consultation paper concerning charitable fundraising (CP 207 *Charitable Investment Fundraisers*), which considers whether an exemption given to charities (CO 02/184), to allow them to take in investment funds in the form of debentures or interests in a managed investment scheme, should be discontinued or whether the conditions to the exemption should be tightened.

Electronic disclosure

ASIC will shortly consult on refreshing our policy in regards to using electronic disclosure and application forms under Chapter 6D. The intention is to update our policy to reflect the current law and latest technological advances. This project does not include proposals to facilitate electronic lodgement of documents with ASIC.

Emerging market issuers project

We are undertaking a project to review disclosure of ASX listed entities with significant exposure to foreign jurisdictions. This has arisen from concerns about the potential for fraud instigated offshore, where the structure of the entity and its disclosure controls mean there is an increased risk of investor loss. Due to the risks involved for these issuers, we have focused on reviewing transactions by these entities and will shortly release a public report setting out our findings and observations.

Mid-cap companies utilising ASX increased placement capacity

Since the new listing rules came into effect, a large number of small to mid cap companies have sought shareholder approval to use the additional placement capacity over the next 12 months. A much smaller number of entities have conducted placements using the additional capacity under the new listing rule.

ASIC will continue to monitor placements conducted under the new listing rules in the coming year to ensure that the market is fully informed, and that the transactions comply with the Corporations Act (particularly chapters 2E and 6).

Corporate Governance

Operating and financial review

ASIC published Regulatory Guide 247 *Effective disclosure in an operating and financial review* in March 2013. This guide was released after public consultation in September 2012, from which we received significant industry contributions. The majority of respondents were supportive of ASIC issuing guidance on OFRs.

The focus of the guide is on quality and not quantity of information. In producing this guide our aim is to provide greater certainty to directors on how to satisfy their legislative requirements and to ensure that shareholders are being presented with high quality information in the OFR.

Executive remuneration

In 2011, the "two strikes rule" was introduced into the Corporations Act. This provides that a company that receives a "no" vote of 25% or more on its remuneration report, in two successive years will receive a "second strike" and a spill resolution will need to be proposed, which if supported, will require a "spill meeting" to take place within 90 days of the AGM.

ASIC is aware of 23 companies receiving a second strike to date, with 5 of those companies going to a spill meeting. Spill meetings were convened for 4 of the 5 companies. The fifth did not occur because all directors that would have been up for re-election resigned prior to the spill meeting, removing the requirement to hold one. Of the other 4, all directors put up for re-election were re-elected

We note there has been mixed views as to the impact that the "two strikes" rule is having. It has come under criticism from some quarters, but we have also seen many reports of increased shareholder engagement by companies which has been attributed to the existence of the two strikes rule.

Employee share schemes

We are planning to consult on and republish our policy on employee share schemes shortly. We are at an advanced stage in the process and have been fine tuning our thoughts in conjunction with experienced market practitioners. We expect to consult on issues such as:

- expanding the classes of financial products covered under a revised class order to include listed managed investment schemes, CDIs and certain types of performance rights;
- applying our class order to casual employees or contractors; changing the conditions relating to the periods of quotation and suspension;
- amending the requirements which apply to trusts, contribution plans and loan arrangements; and
- removing the obligation to lodge the employee share scheme documentation with us.

Related party transactions – Notice of meeting content and abridgements of time

With the shareholder meeting season fast approaching, we remind directors and their advisers of the requirements when lodging notices for member approval of related party transactions with us. In particular, we request that close attention be paid to the value of the related party benefit being provided and the importance of disclosing existing interests and for the directors to provide recommendations and explain potential alternatives to the transaction.

We noted that by their nature, applications for abridgement of time involve requests for consideration within specific and short timeframes. When applying for an abridgement of time, we asked for applicants to clearly outline why the need for urgency has arisen.

ASX update to Guidance Note 8

In March this year, the ASX released an update of its Guidance Note 8 concerning continuous disclosure, as well as some related amendments to the Listing Rules. These took effect on 1 May.

ASX and ASIC share responsibility for continuous disclosure and ASIC worked with the ASX to produce the updated guidance.

In relation to continuous disclosure breaches, ASIC can pursue a variety of enforcement remedies and issue infringement notices. ASIC will take into account the nature and seriousness of the conduct of the company that contributed to the potential breach including the compliance approach of the company (refer: [Information Sheet 151 ASIC's approach to enforcement](#)).

Companies that carefully consider the updated guidance and adopt appropriate processes with the benefit of that guidance can minimise the risk that ASIC will seek to take continuous disclosure enforcement action against them.

Reporting of mineral and oil and gas resources and reserves

The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves that is commonly known as the JORC Code was recently updated. The changes, along with corresponding changes to the ASX listing rules, are subject to a transition period until 30 November 2013. Until then, the minimum requirement is compliance with the earlier JORC Code 2004 Edition and the previous version of the ASX listing rules.

It is open to competent persons and companies to adopt the new rules before 1 December 2013 although early adopters should confirm which rules they are following and ensure that they fully comply with the JORC Code 2012 edition rather than "cherry-pick" requirements from both the old and new versions of the code.

The JORC requirements apply to any public report. This should be kept in mind when drafting any public documents for a mining company.

Also, incorporated into the ASX listing rules was the SPE PRMS code for oil and gas reporting and obligations about disclosures concerning oil and gas reserves and resources.

Takeovers

Takeovers policy update

We are looking to finalise the regulatory guides and associated class orders we consulted on through ASIC Consultation Paper 193. We appreciate the submissions received from the market in response to our draft guides relating to a range of topics, including: relevant interests and substantial holding notices; exceptions to the general prohibition in section 606; takeover bids; and compulsory acquisitions and buyouts.

We are aiming to release the guides, class orders and new compulsory acquisition forms by the end of June.

Independent expert's reports in control transactions

ASIC has recently reviewed a number of documents and independent expert reports seeking member approval for a change of control in reliance on Item 7 of section 611. These have been provided to ASIC for review consistent with our stated preference in RG 74: *Acquisitions approved by members*.

In some of these reports, the experts have approached the task in a manner that is inconsistent with our guidance in RG 111, particularly when assessing if the transaction is 'fair'.

We emphasised that we consider the appropriate approach is to view the transaction from the perspective of non-associated shareholders by comparing the fair market value of the company shares pre-transaction on a control basis, with the fair market value of company shares post-transaction on a minority basis.

Further policy update

Enforcement outcomes report

In April 2013 ASIC published our third enforcement outcomes report, which covers the period 1 July 2012 to 31 December 2012.

The report summarises ASIC's actions against a range of gatekeepers in the Australian financial system, such as financial advisers, auditors and directors. It highlights ASIC's focus on four key attributes of gatekeepers: competence, diligence, honesty and independence when considering enforcement matters.

The report is available on ASIC's website.

High frequency trading (HFT) and dark liquidity

ASIC established separate taskforces to review the impact of dark liquidity and HFT on market quality and market integrity.

ASIC released Report 331 *Dark liquidity and high-frequency trading* and CP 202 *Dark liquidity and high-frequency trading: Proposals* on 18 March, which examines the impact of dark liquidity and HFT on Australia's financial markets (the consultation period ended on 10 May).

The focus of our study is market quality and market integrity. The proposals focus on the quality of the market for capital raising and long term investment, and thus Australia's competitiveness as a regional financial centre.

We are reviewing the submissions received so as to finalise our regulatory position.

Content requirements of registered managed investment scheme constitutions

In September 2012, ASIC released Consultation Paper 188 that proposed to update our policy in Regulatory Guide 134: *Managed investments: Constitutions*. This regulatory guide sets out guidance on how we assess a scheme's constitution for registration and decide whether or not a scheme's constitution meets the content requirements of the Corporations Act.

The consultation period ended in November and we have been considering the submissions and are looking to release a final update to RG134 by the end of June 2013.