

# Australian Securities and Investments Commission Corporate Finance Liaison Meetings, November 2012 Adelaide, Brisbane, Melbourne, Perth, Sydney

## Summary of issues

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### **Fundraising**

#### ***Debentures***

There has been substantial media interest in this sector, since the collapse of Banksia in October. As discussed at the May meetings Corporations have continued to monitor the advertising and disclosure of unlisted debenture issuers, however the recent failings have highlighted that investors continue to view many of these issuers as banks, even though they are not.

This has led ASIC to consider whether we are at the limits of the disclosure regime for unlisted debentures, in particularly those whose business structure involves on-lending funds. A taskforce has been set up to consider, among other things, this issue with a view to make recommendations to Treasury. The taskforce will also work closely with the receivers and managers of Banksia to achieve the best result for Banksia investors, and to continue to impress on gatekeepers such as trustees and auditors their obligations to protect investors.

#### ***Complex products***

The trend of an increase in subordinated debt and hybrid offerings has continued in the latter half of 2012. ASIC continues to seek prominent disclosure of the features and risks which distinguish these products from 'vanilla bonds' and we pressed this concern with investors in Media Release 12-207. We are continuing to monitor the sales channels for these products in coming few months, with our surveillance focus moving from affiliates of joint lead managers to further down in the distribution network.

#### ***Vanilla bonds***

Treasury continues to support the development of commercial 'vanilla bond' market in Australia. As consultation is continuing ASIC further extended the \$50 million minimum subscription size for 'vanilla bonds' under class order 10/321. This relief is now due to expire on 12 May 2013.

In addition, the Commonwealth Government Securities Legislation (Retail Trading) Act 2012 which facilitates the retail trading of Commonwealth Government Securities has now commenced.

#### ***Underwriting***

ASIC has concerns about the description of offers as being underwritten when the arrangements do not constitute underwriting as understood at common law. Where an offer is described as being underwritten and an underwriter has included unreasonable termination clauses ASIC will generally consider the disclosure to be misleading. ASIC expects offer documents to clearly set out the terms of an underwriting agreement including termination rights, the identity of underwriters and sub-underwriters particularly where they are related parties or there will be a control effect, and any fees or other benefits they will receive for their underwriting services.

We expect an issuer to offer withdrawal rights where an underwriter terminates an underwriting agreement prior to the issuance of shares, or where they have the right to terminate the agreement but have not exercised this right and refuse to waive it.

### ***Electronic disclosure***

ASIC is 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. These risks will generally mean in practice that ASIC will allocate resources to reviewing these kind of transactions.

### ***Mid-cap companies utilising ASX increased placement capacity***

ASIC has a current project reviewing a small number of placements which have occurred under these new rules, to assess the adequacy of disclosure of potential control implications and / or placements to related parties.

## **Corporate Governance**

### ***Operating and financial review***

Section 299A of the Corporations Act provides that this section of the director's report should provide analysis and narrative to supplement information in a financial report. Our review of these reports indicates there is scope for improvement in the way a company discusses its operations, financial positions, business strategies and prospects for the future. Accordingly has ASIC has released for consultation, guidance which promotes better communication of useful, meaningful information to investors, and assists directors in complying with their disclosure obligations.

Comments on consultation paper 187 and associated proposed guidance closed on 23 November 2012.

### ***Executive remuneration***

This meeting season has seen a number of companies facing a 'second strike' in relation to their remuneration reports. ASIC has corresponded with a number of companies in relation to their obligations under the Act, and to advise our intention to attend a small number of annual general meetings to observe proceedings. We are reviewing the meeting materials of these companies to assess the adequacy of their disclosure. Should we identify systemic deficiencies ASIC will consider whether we should provide some guidance on disclosure relating to second strikes going forward.

Further we are planning to consult on and republish our policy on employee share schemes. While at the preliminary planning stages we expect we will consult on issues such ASIC's view that employee share schemes do not extend to non-executive directors, when a performance rights will be characterised as a derivative, and offers to ineligible employees.

### ***ASX consultation on Guidance Note 8***

The ASX is presently consulting on Guidance Note 8: Continuous disclosure. Matters of particular note for consultation related to when to disclose including the meaning of 'immediately' and the use of trading halts.

## **Reporting of mineral and oil and gas resources and reserves**

### ***Revised ASX Rules and JORC 2012***

In November the ASX released the reissued Chapter 5 of the Listing Rules incorporating recent changes to the reporting of mineral and oil and gas resources and reserves. This will be complemented by the JORC Code 2012 which is expected to be launched by the Joint Ore Reserves Committee in December. These releases follow extensive

cooperation between ASX, ASIC and JORC and public consultation regarding the proposed amendments.

Some particular points of interest include:

- The adoption into Chapter 5 of the Petroleum Resources Management System, sponsored by the Society of Petroleum Engineers and others, for the reporting of oil and gas resources and reserves;
- the codification of ASIC's policy in Regulatory Guide 170, that companies must have a reasonable basis before making forward looking statements such as production targets;
- defining the term 'production target' in the Listing Rules to generally only include sufficiently confident JORC resource categories such as Indicated and Measured, and Ore Reserves, with other key terms defined in the JORC Code;
- requiring the improved reporting on an "if not why not" basis for JORC Table 1 of the technical basis underpinning announcements which restore some balance between the core principles of the JORC code being transparency, materiality and competence.

There is a 12 month transitional period for the adoption of the revised listing rules and the JORC Code 2012.

## **Takeovers**

### ***Takeovers policy update***

Earlier in November ASIC released Consultation Paper 193 and the associated draft regulatory guides for public comment. The policy primarily has been updated to reflect market practice and our current views pertaining to Chapters 6 to 6C. Our existing policy has been consolidated into 4 new guides:

- Relevant interests and substantial holding notices;
- Exceptions to the prohibition in section 606;
- Takeover bids; and
- Compulsory acquisitions and buyouts

In addition to the consolidation and update there are some discrete policy issues we are seeking public comment on. These include rights issues with control implications, collateral benefits, the use of acceptance facilities, when a person acquires a relevant interest in securities, share splitting in proportional bids and simultaneous compulsory acquisition and buyout rights. These issues and others are explained more fully in our consultation paper. ASIC is also seeking comment on what other areas or emerging issues in the takeovers space the market would benefit receiving guidance on or may warrant class order modification. We encourage you to comment prior to the close of consultation on 22 February 2013.

### ***Consultation on law reform***

While ASIC considers the current takeovers framework has for the most part operated effectively in achieving the goals of the Eggleston Principles we consider it is appropriate that the law be revisited to ensure it continues to operate effectively in response to market developments. Accordingly, earlier in the year ASIC identified 4 topics for potential consideration which were discussed in a takeovers issues scoping paper released by Treasury in early October.

These have been discussed in further detail at a series of roundtables around Australia convened by Treasury and attended by market participants, ASIC and the Takeovers Panel. These roundtables raised some interesting matters and will assist Treasury in considering these proposals going forward.

## **Further policy update**

### ***Enforcement outcomes report***

In September 2012 ASIC published our second enforcement outcomes report, which covers the first half of 2012. The report highlights the kinds of behaviours we believe breach the Act and is available from our website.

### ***Surveillance snapshot***

We have released a summary of the surveillance work of ASIC in 2011-2012. The chart shows the size of our regulated population and the number of years it would theoretically take to cover those entities. In practice we adopt a risk based approach to surveillance which means that some entities may never be touched, and others will be visited multiple times.

### ***RG 174: Externally administered companies: Financial reporting and AGMs***

In September 2012 ASIC published an information sheet on financial reporting compliance by registered liquidators regarding their administration of insolvent public companies. This is an area where there has been historical non-compliance. ASIC corresponded with registered liquidators to assess their internal compliance systems and to remind them of their obligations regarding financial reporting. Following this work ASIC has notified the market we will be imposing conditions on financial reporting relief, and will be revisiting our guidance in RG 174 in early 2013 to reflect this.

### ***Pro-forma Financial Information***

Companies should carefully consider whether they can provide pro-forma historical information down to a net profit after tax level. Where this can be done any adjustments that have been made to account for changes to the capital structure should be clearly stated along with the reasons why those adjustments are warranted. Further we consider where notes disclosure is considered appropriate by a company in the circumstances that the key information should not be buried in those notes, but it afforded sufficient prominence.