



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 105

# Facilitating equity capital raising

February 2009

## About this paper

This consultation paper:

- sets out ASIC's proposal to facilitate equity capital raisings during difficult times; and
- seeks the views of stakeholders, including entities, industry associations, retail investors and their professional advisers.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 24 February 2009 and is based on the Corporations Act as at 24 February 2009.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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## The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- whether the proposals are likely to be of wide commercial benefit in the current market environment;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on equity capital raisings. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see [Section F Regulatory and financial impact](#), p. 25.

### Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 30 March 2009 to:

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## What will happen next?

<b>Stage 1</b>	24 February	ASIC consultation paper released
<b>Stage 2</b>	30 March	Comments due on the consultation paper
	May 2009	Drafting of class orders and explanatory materials
<b>Stage 3</b>	May 2009	Class orders and explanatory materials released

## A Current market conditions: Restricted access to debt financing and ASIC proposals

### Key points

Current market conditions have restricted access to debt financing. This has meant that many listed entities are having difficulty securing and managing debt finance and so are likely to undertake equity capital raisings.

ASIC is considering exercising its powers under the *Corporations Act 2001* (Corporations Act) to remove certain regulatory impediments to equity capital raisings.

In exercising its powers, ASIC's overriding concern will be that there is adequate disclosure to the market and that investor protections will not be unduly compromised.

We also want to increase the access that retail investors have to capital raising opportunities that would otherwise likely occur via institutional placements.

This paper sets out ASIC's proposals and invites comments on them.

### Equity capital raisings and current market conditions

- 1 Equity capital raisings in Australia can take a variety of forms. The most common forms are set out and described in Table 1.
- 2 Current market conditions have restricted access to debt financing. This has meant that many listed entities are having difficulty securing and managing debt finance and so are likely to undertake equity capital raisings, including in the forms outlined in Table 1.
- 3 The proposals set out in this paper aim to facilitate equity capital raising and increase the access that retail investors have to upcoming equity capital raising opportunities that otherwise would likely occur via institutional placements. We want to achieve this objective by removing certain regulatory impediments to rights issues, dividend reinvestment plans and placements while, at the same time, not unduly compromising investor protection.
- 4 We consider it necessary that consultation on, and implementation of, these proposals occur within a relatively short time frame so that we may adequately respond to the prevailing market conditions.

**Table 1: Common forms of equity capital raising**

<b>Offer open to all investors</b>	An offer of securities or interests in a managed investment scheme open to all investors, made in accordance with the fundraising provisions in Ch 6D or Pt 7.9 of the Corporations Act.
<b>Rights issue</b>	In a traditional rights issue, an entity offers existing holders the opportunity to subscribe for new securities or interests in proportion to their holding of securities or interests in that class. The terms of the offer are the same for each holder, including the timing of the offers.
<b>Accelerated rights issue</b>	In an accelerated rights issue, institutional holders are required to deal with their rights before other holders and are generally allotted their securities first. The offer proceeds in two tranches: institutional and retail. This allows issuers to receive a significant proportion of the offer proceeds from their institutional holders in a very short time frame. Forms of accelerated rights issues include RAPIDS and Jumbos.
<b>Dividend reinvestment plan</b>	Under a dividend reinvestment plan, holders are permitted to reinvest their dividends in new shares.
<b>Placement</b>	An offer of a body's securities to an institutional or sophisticated investor, and not to all shareholders.
<b>Share purchase plan</b>	A share purchase plan is a plan for the offer to existing investors of shares by a corporation listed on the ASX. Relief from the disclosure requirements of the Corporations Act is provided for these offers where the amount that may be invested by each investor in a 12-month period under the plan is restricted. ASIC has issued a separate paper (Consultation Paper 103 <i>Review of share purchase plan threshold</i> ) on whether the current \$5,000 limitation regarding these offers should be increased.

## Regulatory requirements for equity capital raisings

- 5 In conducting equity capital raisings, listed entities and their members need to comply with:
  - (a) the fundraising provisions in Ch 6D or Part 7.9 of the Corporations Act;
  - (b) the takeover provisions in Ch 6 of the Corporations Act;
  - (c) the ASX Listing Rules; and
  - (d) the provisions in Ch 5C of the Corporations Act if the listed entity is a registered managed investment scheme.
- 6 These regulatory requirements are discussed further in Sections B–E of this paper. They are designed to promote market transparency and broad investor participation and protection. However, they involve time and expense and as a result they may operate as a barrier to equity capital raisings.

## ASIC proposals

- 7 We are considering using our powers under the Corporations Act to put in place a number of proposals designed to facilitate efficient equity capital raisings by listed entities.

Note: ASIC has the power under s741 and 1020F to modify the fundraising provisions and under s655A to modify the takeover provisions. We also have the power under to modify the managed investment scheme provisions under s601QA.

- 8 Our proposals for relief largely facilitate equity capital raisings that do not require a prospectus or PDS. These capital raisings can offer significant advantages in terms of timing, cost and certainty.
- 9 A summary of our proposals is set out in Table 2. The proposals are set out in more detail in Sections B–E of this paper.

**Table 2: Summary of proposals**

Proposal	Description	Reference
Removing the 10% discount limit on placements for listed managed investment schemes.	We propose to remove the requirement that the issue price for interests in a managed investment scheme issued under a placement is not more than a 10% discount to the current market price of interests in the same class without member approval.	Section B
Modifying the maximum 5-day suspension period for rights issues and secondary sales without a full prospectus (e.g. following a placement)	We propose case-by-case relief to permit rights issues and secondary sales without a full prospectus even though the entity has been suspended from trading for more than 5 days in the past 12 months.	Section C
Broadening the takeovers exception for rights issues	We propose to grant class order relief to enable listed entity members to be able to take up any shortfall in rights that other members have not accepted under a rights issue using a shortfall facility. The relief would allow members to exceed the takeover threshold as a result of participating in the shortfall facility.  We also propose to grant class order relief from the takeover provisions for accelerated rights issues.	Section D
Broadening the takeovers exception for dividend reinvestment plans	We propose to grant class order relief to enable an underwriter of a dividend reinvestment plan to take up any shortfall under that dividend reinvestment plan, even if by doing so it exceeds the takeover threshold.	Section E

- 10 Our proposals are intended to build confidence in the integrity of Australia's capital markets and help manage the domestic and international implications of global financial turmoil.
- 11 The overriding factors we will have regard to in the implementation of these proposals will be that:



- (a) the market is fully informed at all relevant times;
- (b) investors are fully informed before they agree to buy securities;
- (c) retail investors are able to participate in the equity capital raising to the extent it is possible and at a fair price; and
- (d) there is minimal risk of any unacceptable transfer of control resulting from the equity capital raising.

## Impact of proposals on current market practices

- 12 We are seeking to achieve a balance between helping listed entities raise capital in a timely way and the need to avoid an equity capital raising that:
- (a) is conducted in a manner that does not make all relevant information available to the market and potential investors;
  - (b) inappropriately dilutes the holdings of non-participating investors; or
  - (c) inappropriately prices the offer at too much of a discount to market.
- 13 Section 674 of the Corporations Act requires listed entities to comply with the continuous disclosure requirements in ASX Listing Rule 3.1 except in situations where all of the exceptions to disclosure (commonly referred to as ‘carve outs’) apply. In addition, offers of shares or interests in a managed investment scheme usually require the preparation of a prospectus or PDS. However, the Corporations Act grants certain exemptions from providing these documents.
- 14 For example, the Corporations Act permits some rights issues and placements without a prospectus or PDS, but the issuer must instead issue a notice under s708A or 708AA, commonly referred to as a ‘cleansing notice’. Importantly, cleansing notice disclosure is required of information that otherwise has been excluded from continuous disclosure by the listing rules of the relevant market operator.
- 15 Excluded information needs to be contained in a cleansing notice if it is information that investors and their professional advisors would reasonably require for the purpose of making an informed assessment of:
- (a) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; or
  - (b) the rights and liabilities attaching to the relevant securities.
- 16 It is timely for ASIC to enunciate our expectations regarding market practices in effecting placements and other capital raisings, particularly when utilising the ‘cleansing notice’ exemption. Paragraphs 17–21 below set out these expectations and we invite comment about them.

## Conducting placements and other capital raisings

- 17 The issuer of securities must take steps to ensure:
- (a) robust due diligence is conducted regarding compliance with the continuous disclosure rules and identification of all excluded information to be contained in the ‘cleansing notice’;
  - (b) there has been a timely issue of the ‘cleansing notice’;
  - (c) the cleansing notice clearly sets out the excluded information;
  - (d) there has otherwise been timely disclosure of information by the issuer under its continuous disclosure obligations (e.g. material information is disclosed immediately an entity becomes aware of it, unless there is a relevant carve out);
  - (e) that prospective investors are fully informed before they take up any offer; and
  - (f) the pricing and availability of any capital raising offer is fair for all shareholders and in the best interests of the company.
- 18 Communicating information regarding equity capital raisings to potential investors before it is provided to the market generally can raise concerns about breaches of continuous disclosure or insider trading laws. In this regard, it is important that the listed entity maintains confidentiality when sounding out equity capital raising proposals. Potential investors must give confidentiality and ‘no-trade’ undertakings (e.g. establish information barriers within their organisation).
- 19 We intend to generally monitor the effectiveness of these information barriers around price-sensitive information, both in relation to listed entities that are conducting equity capital raisings and their advisers and prospective investors. There should be a complete list of all parties (within and outside the entity) provided with confidential information about the listed entity and records setting out what they were told.
- 20 Announcements on a particular topic can give rise to a market expectation that they will be updated. If an announcement is made updating an earlier market announcement, the fact that it is an update should be highlighted. Material information in the announcement should be given appropriate prominence and be clear as to its possible implications.
- 21 If market practices indicate ongoing risks in this area, we will need to consider whether the relief we have proposed is still appropriate and whether further regulatory guidance or changes regarding non-prospectus and non-PDS equity capital raising are needed.

## B Removing the 10% discount limit on placements for certain managed investment schemes

### Key points

We propose to use our modification powers to relax some of the conditions within Class Order (CO 05/26) *Constitutional provisions about the consideration to acquire interests* regarding listed, registered managed investment schemes making placements.

The proposal is to remove the requirement that the issue price for the interests issued under a placement is not discounted by more than 10% of the current market price of interests in the same class without member approval (see s601GAA(2)(c)(i)(B) as notionally inserted by CO 05/26).

The proposal would allow the responsible entity of a listed registered scheme to set the issue price for interests issued under a placement taking into account the prevailing market conditions. However, in doing so, responsible entities must ensure that they act in the best interests of members.

### The 10% discount limit for interests issued under a placement

- 22 Section 601GA(1)(a) provides that the constitution of a registered scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. ASIC considers that adequate provision has been made when a constitution provides for an independently verifiable price. ASIC has provided relief from the effect of s601GA(1)(a) in circumstances where:
- (a) for commercial reasons, the consideration to acquire interests in the scheme cannot be determined independently; and
  - (b) investor protection would not be reduced.

ASIC recognises that relief from s601GA(1)(a) is appropriate for placements of quoted interests in registered schemes.

- 23 The existing relief provides that the constitution of a registered scheme does not have to make adequate provision for the consideration that is to be paid to acquire an interest in the scheme in various circumstances. These circumstances include managed investment schemes making placements. The relief only applies to registered schemes whose interests are in a class of interests quoted on the ASX or an approved foreign market. Unless the placement has member approval, the relief is only available where the following conditions are met:
- (a) any issue under a placement over the last 12 months does not comprise more than 15% of the interests in that class of interests; and

- (b) the issue price for the interests issued under the placement does not exceed a discount of more than 10% of the current market price of interests in the same class.
- 24 Under the proposal, a responsible entity of a listed registered scheme could set the issue price of interests issued under a placement at any discount to the current market price of interests in the same class. This provides the responsible entity with greater flexibility to raise capital taking in to account prevailing market conditions including the supply of capital. However, fundamental to this proposal is that the responsible entity must ensure that it complies with its duty to act in the best interest of members under s601FC(1)(d).
- 25 The proposal requires responsible entities to balance the adverse dilutionary effect of a placement on existing members with the positive impact of the injection of new capital into the registered scheme. This subjective test is one best determined by the officers of the responsible entity of a registered scheme. The test is particularly important because scheme property is managed by a responsible entity for the benefit of members.
- 26 The proposal also takes into account that the market will efficiently and fairly price interests issued under a placement. Setting a discount cap of 10% may not provide sufficient scope for the market to efficiently set the issue price of interests in listed registered schemes in volatile economic periods.
- 27 If market practices indicate ongoing risks in this area ASIC will consider whether further regulatory guidance or changes are needed.
- 28 Under s657A of the Corporations Act, we may make an application to the Takeovers Panel for a declaration of unacceptable circumstances where we consider that the proposed relief is being abused for control purposes. While the proposed relief may potentially increase the risk of members being unfairly diluted, we have the power to seek such a declaration of unacceptable circumstances from the Takeovers Panel if we see fit.

Note: See RG 159 *Takeovers, compulsory acquisitions and substantial holdings* (RG 159) for guidance on when a rights issue may constitute unacceptable circumstances.

## Proposal

- B1** We propose to use our modification powers to relax some of the conditions within CO 05/26 for listed registered schemes for placements. The proposal is to remove the discount limit of 10% of current market price of interests in the same class from the issue price of interests issued under a placement.

### *Your feedback*

- B1Q1 Do you agree with our proposal to relax the condition that imposes a discount limit of 10% for placements by listed registered schemes? Why?

- B1Q2 What conditions do you consider appropriate were we to remove the 10% discount limit? For example, do you consider it appropriate that we impose a requirement that the scheme has not been suspended for a defined period of time?
- B1Q3 Do you perceive any difficulties that entities may face in relying on relief? For example, where the issue price has already been stipulated in the scheme's constitution?
- B1Q4 Do you consider that the proposed relief will be of wide commercial benefit, particularly in relation to facilitating equity capital raisings? Why?
- B1Q5 Is the ability to refer concerns about control transactions to the Takeover Panel sufficient or are conditions of relief required to deal with those concerns? Why?

### Rationale for removing the 10% discount limit

- 29 During the course of 2008 and early 2009 many listed registered schemes (or stapled securities) in the property and infrastructure sectors experienced difficult operating environments and non-performing assets. Some registered schemes have needed to quickly raise capital for general working capital purposes, to repay debts, to reduce gearing and to fund committed developments. Negative economic conditions have contributed to this situation.
- 30 The recent experience has seen capital raising typically having two parts:
- (a) a placement; and
  - (b) a rights issue whereby the rights issue is accelerated to institutional clients prior to the offer to retail clients.
- 31 For the placements, responsible entities of registered schemes have had to price interests at a deep discount to current market prices to attract capital investment. These discounts have been beyond the 10% limit for which relief is available in s601GAA(2)(c)(i)(B) (as notionally inserted by CO 05/26). As a consequence, responsible entities have not been able to conduct placements with the benefit of relief described in paragraph 23 of this paper. That means that responsible entities have had to make adequate provision for the consideration that is to be paid to acquire an interest in the scheme, in the scheme's constitution.
- 32 Some responsible entities have responded to this issue by amending the scheme's constitutions to specify an issue price for interests issued under a placement. Without member approval, a responsible entity may only amend a scheme's constitution if it reasonably considers the change will not adversely affect members' rights. Questions have been raised in the market about the validity of such amendments, but the issue is untested in the courts.
- 33 The current economic climate has caused us to revisit the objective of limiting the 10% discount limit for placements. The 10% limit is designed to control the effects of dilution on the interests of existing members of registered schemes.

We believe that the proposals in this paper provide responsible entities with greater flexibility to raise capital and to take into account prevailing market sentiment. Recent experience has suggested that placements have been conducted at discounts greater than 10%. While heavily discounted placements may dilute existing members' interests initially, an urgent capital injection may be in members' best interest over a longer period of time. For example, the capital may be used to avoid disposing of scheme assets under duress in a difficult market.

- 34 The greater flexibility afforded under the proposal comes with a heightened responsibility. Responsible entities must ensure that any decision undertaken (including by its officers) is made with the obligations of s601FC in mind.
- 35 The proposal also relies on the fact that competitive and efficient markets will ultimately set the issue price of interests issued under a placement. The responsible entity can only practically set an issue price for a placement that an investor is prepared to pay. The proposal draws justification from the fact that a robust and informed market will support pricing efficiencies.

## C Increasing the maximum 5-day suspension period

### Key points

Some rights issues and secondary sales of securities do not require a prospectus as long as trading in those securities has not been suspended for more than 5 days in the previous 12 months.

We propose to use our modification powers so that this maximum suspension period for rights issues and secondary sales is permitted to be a period of greater than 5 days.

It is proposed that relief be granted on a case-by-case basis.

### The maximum 5-day suspension period

- 36 Generally an offer of securities requires a disclosure document under Ch 6D of the Corporations Act, often in the form of a prospectus. The rationale for this requirement is to ensure that investors have access to all the information required to make an informed investment decision.

Note: Similarly, an offer of interests in a registered managed investment scheme usually requires a PDS.

- 37 The Corporations Act provides exceptions from the requirement for a prospectus in certain circumstances.

- 38 Section 708AA sets out a prospectus exemption for a rights issue that is offered to all registered holders on a pro rata basis and on the same terms. In order to qualify for the exemption, the issuer must lodge a cleansing notice with the ASX. In addition, the trading of the securities of the issuer must not have been suspended for more than 5 days during the shorter of the period during which the class of securities is quoted and the period of 12 months before the day on which the offer is made.

Note 1: Similar exceptions exist from the requirement for a PDS: see s1012DAA.

Note 2: For accelerated rights issues such as RAPIDS and Jumbos, where there is a difference in timing between offers to institutional holders and offers to retail holders, disclosure relief has been granted under Class Order (CO 08/35) *Disclosure relief for rights issues* to facilitate retail participation in such capital raisings.

- 39 Section 708A(5) sets out a prospectus exemption that allows the secondary offer of securities to retail investors where those securities were first issued without a prospectus (e.g. under a placement to institutional investors). In order to qualify for the exemption, the issuer must lodge a cleansing notice with the ASX. In addition, trading of the securities of the issuer must not have been suspended for

more than 5 days during the shorter of the period during which the class of securities is quoted and the period of 12 months before the day on which the securities were issued.

Note: Similar exceptions exist from the requirement for a PDS: see s1012DA.

40 We consider that the purpose of the 5-day requirement in both cases is to ensure that securities are adequately priced by the market and that the market is fully informed.

41 In light of current market conditions, we think there are now good reasons to permit a period of greater than 5 days for rights issues and secondary sales in certain circumstances.

### Previous applications for relief

42 We take the view in relation to both s708AA and 708A(5) that '5 days' should be read as '5 trading days' and that trading halt periods are not included in calculating whether or not an issuer has been suspended for more than 5 days. ASIC relief is not required for these purposes.

43 To date, we have only given relief from the 5-day requirement in very limited circumstances.

### Proposal

**c1** We propose to use our modification powers to increase the maximum 5-day suspension period on a case-by-case basis for rights issues and secondary sales where the shares are initially issued without disclosure (e.g. under a placement). Factors that we would consider in deciding whether to grant individual relief include:

- (a) the length of any suspension;
- (b) the reason for the suspension;
- (c) the period of time that has elapsed since the suspension; and
- (d) the announcements made to the market since the suspension.

#### *Your feedback*

C1Q1 Do you agree that we should increase the maximum 5-day suspension period for rights issues? Why?

C1Q2 Do you agree that we should increase the maximum 5-day suspension period for secondary sales where the shares are initially issued without disclosure (e.g. under a placement)? Why?

C1Q3 Do you agree with the factors that we propose to take into account when granting case-by-case relief? Are there any other factors that are relevant?

C1Q4 Are there any factors that should disqualify an entity from relief if it has been suspended for more than 5 days? What are those factors and why are they relevant?



C1Q5 Do you consider it appropriate that relief, to permit a suspension period of greater than 5 days, be limited to entities that have lodged audited accounts for the relevant financial year after that suspension period? Why?

C1Q6 Do you consider that the proposed relief will be of wide commercial benefit, particularly in relation to facilitating equity capital raisings? Why?

## Proposal

c2 We also propose to extend this relief to offers for the issue and sale of interests in a listed managed investment scheme, where relevant.

### *Your feedback*

C2Q1 Is there any reason why the relief should not be extended in this way?

## Rationale for increasing the maximum 5-day suspension period

- 44 We consider that the relief proposed would not detract from the policy considerations outlined in paragraph 40 of this paper.
- 45 While relief would mean that a prospectus is not required, the entity would have to provide information to the market in the form of a cleansing notice in lieu of a prospectus. This will ensure the market is fully informed.
- 46 The rationale for case-by-case relief instead of class order relief is that it will give us an opportunity to assess the individual circumstances of each case in deciding whether or not to grant relief—including the length and reason for the suspension, the period of time that has elapsed since the suspension and any market announcements since that date. Each of these factors is relevant in helping us to determine whether the securities would be adequately priced by the market and whether the market would be fully informed despite a suspension of more than 5 days.
- 47 Parliament has considered that an entity must not have been suspended for more than a 5-day period in order for it to conduct a rights issue or for an investor to make a secondary sale without a prospectus. Applicants need to establish why a longer period is appropriate in all the circumstances. We will not take an approach that simply adopts a longer period than 5 days without critical consideration of why the period set out in the legislation should be changed. Generally speaking, the longer the suspension period the greater the level of scrutiny we will apply in granting any relief.
- 48 In terms of rights issues, relief will increase the access that retail investors have to upcoming equity capital raising opportunities and give retail investors the opportunity to avoid their interests being diluted. It also maintains various investor protections. This is consistent with the policy objective underpinning s708AA.

## D Broadening the takeovers exception for rights issues

### Key points

We propose to use our modification powers to grant class order relief to listed entities from takeover provisions triggered by rights issues. The relief would enable their members to be able to take up any shortfall in rights that other members have not accepted under a rights issue using a shortfall facility, even if by doing so they exceed the takeover threshold.

We propose to make the relief conditional on all members being able to participate in the shortfall facility on a pro rata basis and on equal terms. We also propose to make the relief conditional on the provision of adequate information to members concerning:

- the terms of the shortfall facility; and
- the potential effect the shortfall facility will have on the control of the entity.

We also propose to grant class order relief from the takeover provisions for accelerated rights issues that meet the conditions of Class Order (CO 08/35) *Disclosure relief for rights issues*.

### The rights issue exception to takeover provisions

- 49 Some equity capital raisings can trigger the takeover provisions of the Corporations Act where they result in a person acquiring a relevant interest in more than 20% of the securities in the entity in breach of s606 unless one of the exceptions in s611 applies.
- 50 Item 10 of s611 provides an exception for persons who will exceed the 20% threshold where they participate in a rights issue that satisfies a number of conditions, including that:
- (a) offers are made to every person who holds securities on a pro rata basis; and
  - (b) the terms of all the offers are the same.

### Broadening the rights issue exception for takeovers

- 51 The fundamental principle underlying the rights issue exception for takeovers is that the regulatory framework governing control transactions should not overly inhibit the ability of an entity to raise capital, where each member of that entity

has an equal opportunity to avoid dilution of their existing holding by participating in the offer.

- 52 Although there may be consequential control effects on an entity as a result of a rights issue, the rights issue exception for takeovers recognises that informed, rational members who have had reasonable and equal opportunities to participate in any benefits that flow from a rights issue may choose not to participate in a rights issue despite the control implications.
- 53 While the takeovers exception in item 10 of s611 for rights issues covers acquisitions by an underwriter, it does not provide for acquisitions under shortfall facilities. This is because offers through a shortfall facility may not be pro rata or not on the same terms as the initial offer. Similarly, the takeovers exception does not allow for accelerated rights issues because these offers are not technically on the same terms. There is a difference in timing between offers to institutional holders and offers to retail holders.
- 54 In contrast, CO 08/35 modifies s708AA and 1012DAA so that shortfall offers will generally not require a prospectus. CO 08/35 also provides a disclosure exemption for accelerated rights issues.
- 55 Although we have provided some case-by-case takeovers relief so that accelerated rights issues do have the benefit of the takeovers exception we are considering broadening that relief and granting it by way of class order.

Note: We have also previously granted case-by-case relief to broaden the rights issue exception for takeovers so that foreign holders could be excluded from the procedure in s615. This was where the company had demonstrated an urgent need for capital, there were changes in the market price only after the rights issue was announced, the rights issue was 'out of the money' and where there were only a small number of foreign holders.

## Proposal

- D1** We propose to grant class order relief in relation to listed entities. The relief would enable members to take up any shortfall in rights that other members have not accepted under a rights issue through a shortfall facility, even if by doing so they exceed the takeover threshold. We propose to make this relief conditional on:
- (a) all members being able to participate in the shortfall facility on a pro rata basis and on equal terms; and
  - (b) the provision of adequate information to members concerning the terms of the shortfall facility; and
  - (c) the provision of adequate information to members concerning the potential effect the shortfall facility will have on the control of the entity.
- D2** We also propose to grant class order relief from the takeover provisions for accelerated rights issues that meet the conditions of CO 08/35.

*Your feedback*

- D2Q1 Do you agree that we should grant class order relief to enable members to take up any shortfall in rights that other members have not accepted under a rights issue (through a shortfall facility), even if in doing so they exceed the takeover threshold? Why?
- D2Q2 If so, do you agree that relief should be conditional on all members being able to participate in the shortfall facility on a pro rata basis, on equal terms? Why?
- D2Q3 If so, do you agree that relief should be conditional on the proposed disclosure? Why?
- D2Q4 Are there other conditions you consider appropriate (e.g. voting restrictions, or a requirement to sell shareholdings exceeding a certain threshold over a period of time, or conditions to stop abuse of the proposal for control purposes)? Why?
- D2Q5 Do you consider that the proposed relief will be of wide commercial benefit, particularly in relation to facilitating equity capital raisings? Why?
- D2Q6 Should class order relief from the takeover provisions be granted for accelerated rights issues that meet the conditions of CO 08/35? Why?
- D2Q7 Should our proposed relief be extended to entities which are not listed but have more than 50 members? Why?

**Proposal**

- D3 We propose to extend this relief to offers for the issue of interests in a listed managed investment scheme.

*Your feedback*

- D3Q1 Is there any reason why the relief should not be extended to managed investment schemes? Why?

**Previous applications for relief**

- 56 We have not previously granted relief similar to that proposed in D1–D3.

**Rationale for broadening the rights issue exemption for takeovers**

- 57 In the absence of relief, those persons who would exceed the 20% threshold by virtue of participating in a rights issue that incorporates a shortfall facility or an accelerated rights issue would not be able to take advantage of the rights issue exception. Practically, this means that such persons would not be able to participate in a rights issue and, thus, the ability of the issuer to raise capital is hampered.

- 58 Member approval of such an acquisition would generally be required under item 7 of s611. This would involve the preparation and distribution to members of information material to the resolution and the holding of a general meeting. Accordingly, the proposed relief would significantly reduce an entity's transaction timetable and costs where existing Ch 6 provisions provide an impediment to fundraising.
- 59 CO 08/35 modifies s708AA and 1012DAA so that shortfall offers will come within the disclosure exemption provided that the initial rights issue itself complied with the disclosure exemption. CO 08/35 also provides a disclosure exemption for accelerated rights issues. The proposed relief would further harmonise the treatment of rights issues from a fundraising and takeovers point of view.
- 60 Shortfall offers are made to existing members who were offered securities or interests under the initial rights issue, rather than to selected individuals. Accordingly, enabling a rights issue to incorporate a shortfall facility may achieve a more equal spread of securities than through the rights issue being underwritten.
- 61 However, in the event that there are only a small number of participating members and a large shortfall, entities relying on the proposed relief may choose to supplement the shortfall facility with underwriting arrangements. The existence of a shortfall facility may also make it easier to obtain underwriting as the number of shares that might need to be taken up by the underwriter could be reduced.
- 62 Our proposals may have change of control implications. While the proposed relief may potentially increase the risk of members' interests being unfairly diluted in a rights issue context, we have the power to seek a declaration of unacceptable circumstances from the Takeovers Panel if we see fit. We could do so, if it appears the proposed relief is being abused for control purposes.
- Note: See RG 159 for guidance on when a rights issue may constitute unacceptable circumstances.
- 63 We consider it appropriate that the proposed relief be implemented by class order rather than on a case-by-case basis. If all the conditions of the class order are met, we do not perceive any compelling reason to distinguish between individual cases based on factual differences.

## E Broadening the takeovers exception for dividend reinvestment plans

### Key points

We propose to use our modification powers to grant class order relief to listed entities from takeover provisions triggered by dividend reinvestment plans. The relief would enable an underwriter of a dividend reinvestment plan to take up any shortfall under that dividend reinvestment plan, even if by doing so they exceed the takeover threshold.

We propose to make the relief conditional on the provision of adequate information to members of:

- the key terms of the underwriting,
- the identities of any sub-underwriters, and
- any associations between the underwriter or sub-underwriter and a controller or one or more substantial shareholders.

We would require this information be given to the market at the time the dividend reinvestment plan is announced.

### The dividend reinvestment plan exception to takeover provisions

- 64 Some equity capital raisings can trigger the takeover provisions of the Corporations Act where they result in a person acquiring a relevant interest in more than 20% of the securities in the entity in breach of s606, unless one of the exceptions in s611 applies.
- 65 Item 11 of s611 provides an exception for such persons who will exceed the 20% threshold for dividend reinvestment plans (as well as distribution reinvestment plans or switching facilities) on the condition that the plan is available to all members (disregarding any unavailability to foreign holders).
- 66 Unlike the rights issue exception in item 10 of s611, the dividend reinvestment plan exception does not extend to acquisitions by persons as underwriters.

### Broadening the dividend reinvestment plan exception

- 67 The fundamental principle underlying the dividend reinvestment exception (under Ch 6 of the Corporations Act) is that the regulatory framework governing control transactions should not overly inhibit the ability of an entity

to raise capital, where each holder has an equal opportunity to avoid dilution of their existing holding by participating in the offer.

- 68 In light of restrictions on debt financing and the possible increase in reliance by entities on dividend reinvestment plans as a source of funds, we consider that Ch 6 relief for underwriters of dividend reinvestment plans may facilitate equity capital raising in the current economic environment. It may also increase the access that retail investors have to upcoming fundraising opportunities that otherwise would likely occur via institutional placements while, at the same time, not unduly compromising investor protection.

### Proposal

- E1 We propose to grant class order relief to enable an underwriter of a dividend reinvestment plan to take up any shortfall under that dividend reinvestment plan, even if by doing so they exceed the takeover threshold. We propose to make this relief conditional on the provision of adequate information to members of:
- (a) the key terms of the underwriting;
  - (b) the identities of any sub-underwriters; and
  - (c) any associations between the underwriter or sub-underwriter and a controller or one or more substantial shareholders.

We would require this information be given to the market at the time the dividend reinvestment plan is announced.

#### *Your feedback*

- E1Q1 Do you agree with our proposal to grant class order relief to broaden the dividend reinvestment plan takeover exemption to extend to acquisitions by a person as underwriter? Why?
- E1Q2 If so, do you agree with our proposed conditions? Are there other conditions you consider appropriate (e.g. voting restrictions, or a requirement to sell shareholdings exceeding a certain threshold over a period of time, or conditions to stop abuse of the proposal for control purposes)? Why?
- E1Q3 Should our proposed relief limit the percentage the underwriter is able to acquire? Why?
- E1Q4 Do you consider that the proposed relief will be of wide commercial benefit, particularly in relation to facilitating equity capital raisings? Why?
- E1Q5 Does the ability of underwriters to rely on the 3% creep exemption in item 9 of s611 mean that this relief is not needed? Why?
- E1Q6 Should our proposed relief be extended to entities that are not listed but have more than 50 members? Why?
- E1Q7 Should our proposed relief be extended to underwriting of bonus share plans? Why?

## Proposal

E2 We propose to extend this relief to offers for the issue of interests in a listed managed investment scheme.

### *Your feedback*

E2Q1 Is there any reason why the relief should not be extended to managed investment schemes? Why?

## Previous applications for relief

69 We have not previously granted relief similar to that proposed in E1–E2.

## Rationale for broadening the dividend reinvestment plan exemption

70 In the absence of relief, a person who exceeds the 20% threshold as a result of underwriting a dividend reinvestment plan would not be able to take advantage of the dividend reinvestment plan exception to the takeover provisions. Rather, member approval for the acquisition would generally be required under item 7 of s611. This would involve the preparation and distribution to members of information material to the resolution and the holding of a general meeting. Accordingly, relief would significantly reduce an entity's transaction timetable and costs where existing takeover provisions provide an impediment to fundraising.

71 Feedback we have received to date has indicated some difficulties in engaging underwriters that would not exceed the 20% threshold by virtue of underwriting a dividend reinvestment plan. Relief would facilitate an entity's ability to raise equity capital via an underwritten dividend reinvestment plan.

72 In contrast to the dividend reinvestment plan exception, the rights issue exception (item 10 of s611) to the takeovers provisions provides for an exception for persons underwriting a rights issue to exceed the 20% threshold. The proposed relief can be considered to be broadly analogous to this existing rights issue exception.

73 Under s657A of the Corporations Act, we may make an application to the Takeovers Panel for a declaration of unacceptable circumstances. While the proposed relief may potentially increase the risk of members' interests being unfairly diluted by a dividend reinvestment plan, we have the power to seek such a declaration of unacceptable circumstances from the Takeovers Panel if we see fit.

Note: See RG 159 for guidance on when a rights issue may constitute unacceptable circumstances.

74 We consider it appropriate that the proposed relief be implemented by class order rather than on a case-by-case basis. If all the conditions of the class order are met, we do not perceive any reason to distinguish between individual cases based on factual differences.



## F Regulatory and financial impact

- 75 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) allowing listed entities to raise equity capital in a timely way to ensure they have sufficient resources to operate effectively; and
  - (b) maintaining market integrity and investor protection.
- 76 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
  - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
  - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
  - (d) conducting the appropriate level of regulatory analysis, that is, complete a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 77 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC Report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 78 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about:
- (a) the likely compliance costs;
  - (b) the likely effect on competition; and
  - (c) other impacts, costs and benefits,
- of our proposals or any alternative approaches: see ‘The consultation process’ p. 4.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange Limited
ASX Listing Rule 3.1	A rule in the Australian Securities Exchange Listing Rules (in this example, numbered 3.1)
Ch 6	A Chapter of the Corporations Act (in this example, numbered 6)
CO 08/35 (for example)	An ASIC class order (in this example, numbered 08/35)
Corporations Act	Corporations Act 2001, including regulations made for the purposes of the Act
Pt 7.9	A Part of the Corporations Act (in this example, numbered 7.9)
RG 159 (for example)	An ASIC regulatory guide (in this example, numbered 159)
s708A(5) (for example)	A section of the Corporations Act (in this example, numbered 708A(5))
Shortfall facility	Facility under which holders are able to take up any shortfall in rights that other holders have not accepted under the initial rights issue