



**ASIC**

Australian Securities & Investments Commission

## REPORT 160

# Response to submissions on CP 105 Facilitating equity capital raising

June 2009

### **About this report**

This report highlights the key issues that arose out of the submissions received in response to Consultation Paper 105 *Facilitating equity capital raising* (CP 105) and details our responses to those issues.

### 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.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173), Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189) and Regulatory Guide 199 *Broadening the rights issue and dividend reinvestment plan exceptions for takeovers* (RG 199).

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## A Overview/Consultation process

- 1 In Consultation Paper 105 *Facilitating equity capital raising* (CP 105), we consulted on four proposals designed to facilitate efficient equity capital raisings by listed entities.
- 2 The four proposals were:
  - (a) removing the 10% discount limit on placements for listed managed investment schemes (see Section B);
  - (b) increasing the maximum 5-day suspension period for rights issues and secondary sales without a full prospectus (e.g. following a placement) (see Section C);
  - (c) broadening the takeovers exception for rights issues (see Section D); and
  - (d) broadening the takeovers exception for dividend reinvestment plans (see Section E).
- 3 The proposals were designed to allow listed entities to raise equity capital in a timely way to ensure they have sufficient resources to operate effectively while still maintaining market integrity and investor protection.
- 4 This report highlights the key issues that arose out of the submissions received in response to CP 105 and our responses to those issues.
- 5 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 105. We have limited this report to the key issues.
- 6 For a list of the non-confidential respondents to CP 105, see the Appendix. Copies of the non-confidential submissions are on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 105.

### Responses to consultation

- 7 We received 23 responses to CP 105 from a wide variety of sources, including relevant industry bodies, consumer groups, legal bodies and law firms and stock exchanges. We are grateful to respondents for taking the time to send us their comments.
- 8 There was general support for our four proposals to facilitate equity capital raising. We have therefore decided to proceed to implement those proposals, although not in all cases on the exact terms proposed in CP 105. For more detail, see the remainder of this report.

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

### Key points

Should we grant class order relief to remove the 10% discount limit on placements without member approval for certain managed investment schemes?

Should we grant class order relief to allow responsible entities to amend a scheme's constitution without the need for a special resolution?

### Relief to remove the 10% discount limit on placements without member approval

- 9 In CP 105 we invited submissions as to whether the 10% discount limit on placements without member approval for certain managed investment schemes should be removed.
- 10 The majority of respondents were in favour of the change. A number of respondents noted that removing the limit would enhance the ability of responsible entities to raise capital. Some mentioned that the 10% cap is arbitrary, that it circumscribed the business judgement of responsible entities and that there is no legitimate reason in this instance to treat registered schemes and publicly-listed companies differently (where no equivalent limit applies).
- 11 There was concern that removing the discount limit would cause control and dilution impacts and may be abused to increase holdings at a significant discount.
- 12 Some responses noted that placements are unfair and lack transparency because they are offered only to institutional investors.

#### *ASIC's response*

We believe that removing the 10% discount limit on placements without member approval would facilitate equity capital raising. Current market volatility has highlighted the need for this flexibility because a number of placements could not occur within a 10% discount, and holding a members meeting (to obtain approval) is impractical in circumstances where the need for funding is urgent.

The concern that unrestricted placements will lead to dilution and control abuse needs to be considered in light of applicable laws. Responsible entities have a statutory and fiduciary duty to act in the best interests of members and with care and diligence. They also have a duty to have adequate arrangements to manage conflicts of interest. We believe that these obligations offer sufficient investor protection.

Placements are often used for quick capital injections. This tailors their use to institutional investors because retail investors cannot be called on to invest within the short lead times frequently demanded. Many placements are used to secure institutional participation and determine pricing, with interests later being offered in 'jumbo' issues to retail investors under rights issues or interest purchase plans.

## Relief to allow responsible entities to amend a schemes' constitution without member approval

- 13 Some constitutions specifically prohibit placements at a discount of more than 10% of current market price without member approval rather than referring to the terms of ASIC relief. A number of respondents requested that we provide class order relief so that in these contexts, a responsible entity may amend a scheme's constitution without member approval.

### *ASIC's response*

We do not consider that this relief is appropriate. Under paragraph 601GC(1)(b) of the *Corporations Act 2001* (Cth) (Corporations Act), a responsible entity may amend a scheme's constitution if it reasonably considers that the change will not 'adversely affect members' rights'. This provision is intended to safeguard members' rights. Where a proposed constitutional amendment is reasonably considered to adversely affect members' rights, we believe that ASIC should not ordinarily exclude members' rights to vote on the change. We do not assume that member approval would ordinarily be required for amendments necessary to enable use of placements under our revised relief.

If there are special circumstances warranting relief, having regard to the general principles set out in Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes*, an application for relief may be submitted to request a particular amendment for a particular scheme.

## C Increasing the maximum 5-day suspension period for rights issues and secondary sales without a full prospectus

### Key points

Should we grant relief to increase the maximum 5-day suspension period for rights issues and secondary sales where the shares are initially issued without disclosure?

### Relief to increase the maximum 5-day suspension period for rights issues and secondary sales

- 14 In CP 105 we asked whether we should grant case-by-case relief to increase the maximum 5-day suspension period for rights issues and secondary sales and permit such offers without a prospectus under s708AA and 708A provided a cleansing notice is lodged with the ASX.
- 15 The respondents were generally supportive of this proposal. This is because relief would mean that entities will save on the time and expense of preparing a prospectus, and it would assist in capital raising under current market conditions when debt refinancing is difficult. This is important as voluntary suspensions are becoming increasingly common, especially where negotiations with banking syndicates are taking place. At the same time, the market will remain fully informed because companies are still subject to the continuous disclosure regime and need to issue a cleansing notice prior to the offer. Some also viewed the current 5-day suspension limit as arbitrary and suggested it may not be the most appropriate way to determine if the market is fully informed or securities are properly priced.
- 16 The respondents were generally supportive of granting relief on a case-by-case basis. However, an argument was put forward that case-by-case relief does not give sufficient certainty when short commercial time frames are involved.

#### *ASIC's response*

We agree that case-by-case relief is appropriate and we intend to implement this proposal. We will include guidance in Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* and Regulatory Guide 189 *Disclosure relief for rights issues* about the factors we will take into account when assessing relief applications (see paragraph 18 below).

## What factors should we take into account when granting case-by-case relief?

- 17 The 5-day requirement in both s708AA and s708A is intended to ensure that securities are adequately priced by the market and that the market is fully informed.
- 18 In CP 105, we proposed some factors we would consider in deciding whether these purposes are met despite a suspension of more than 5 days and therefore whether it is appropriate to grant individual relief. These were:
- (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.
- 19 Respondents were generally supportive of these factors. They also raised further factors which could be taken into consideration, including whether or not the suspension was voluntary and an entity's history of disclosure (such as any pattern of contraventions of its continuous disclosure obligations).

### *ASIC's response*

We will consider granting case-by-case relief to increase the maximum 5-day suspension period where despite the suspension it appears that the securities are adequately priced and the market is fully informed.

In assessing whether relief is appropriate we will take into account the factors proposed in CP 105 (see paragraph 18 above) as well as whether or not the suspensions is voluntary and an entity's recent history of disclosure and any other relevant considerations.



## D Broadening the takeovers exception for rights issues

### Key points

Should we grant class order relief from the takeovers provisions to enable members to take up any shortfall under a rights issue through a shortfall facility?

Should we grant class order relief from the takeover provisions for accelerated rights issues?

Should we grant relief from the takeovers provisions for non-renounceable rights issues where foreign holders are excluded and the nominee process in s615 is not complied with?

### Relief from the takeovers provisions to enable members to take up any shortfall under a rights issue through a shortfall facility

- 20 In CP 105 we asked whether we should grant class order relief to enable members of listed entities 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.
- 21 The responses were mixed as to whether class order relief was appropriate. Some were in favour because class order relief would increase the flexibility for companies to raise funds and enable a more equal spread of any shortfall compared to say a placement or an underwriter. However, others were concerned that the relief could be abused for control purposes.

#### *ASIC's response*

In designing this proposal, we felt that control concerns might be adequately dealt with by both the proposed conditions to the relief and our ability to apply to the Takeovers Panel for a declaration of unacceptable circumstances. However following feedback, a key condition of our relief may not always be practical and without it, we are not comfortable granting class order relief.

Instead we will consider granting case-by-case relief. The case-by-case relief would not be conditional on pro-rata participation; instead we would assess any control concerns on a case-by-case basis.

When granting case-by-case relief, we would consider applications from listed companies and unlisted companies with more than 50 members as well as listed managed investment schemes.

## What should the conditions to the relief be?

- 22 In CP 105 we asked whether it was appropriate to make the above class order relief for shortfall facilities conditional on:
- (a) all members being able to participate in the shortfall facility on a pro rata basis and on equal terms;
  - (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.
- 23 We received a number of submissions suggesting that pro-rata participation in a shortfall facility is not always appropriate or practical. Some indicated that issuers may want to customise allocation in certain ways for legitimate reasons (e.g. minimum amounts for administrative reasons) and that allocation under the shortfall facility should be determined at the discretion of the directors. One respondent indicated that shortfall facilities are usually managed through institutional bookbuilds and that it is not practical to restructure these to allow retail participation.
- 24 Respondents were generally supportive of relief being made conditional on the proposed disclosure, however some noted that it may be difficult to provide meaningful disclosure regarding the effect of the offer on control because the entity will not usually know the intended or actual take up under the rights issue offer or shortfall offer.
- 25 Respondents were not supportive of any additional conditions (such as voting restrictions) being imposed on relief.

### *ASIC's response*

The rationale for making relief conditional on pro-rata participation was that it would give members who chose to participate in the shortfall facility an equal opportunity to avoid dilution of their existing holding. This would avoid control concerns with the proposed relief.

We note the apparent practical difficulty in making relief conditional on pro rata participation in the shortfall facility. Without this condition we are not satisfied that the proposed class order would adequately avoid any control concerns. Accordingly, we feel that it is more appropriate that we grant case-by-case relief to broaden the rights issues takeovers exception to extend to acquisitions under a shortfall facility rather than class order relief. This would enable us to assess the likely control implications of granting relief.

Relief would generally be conditional on the proposed disclosure being made at the time of the offer. In addition, as case-by-case relief would involve assessing the relevant circumstances at the time, additional conditions may be appropriate in some cases.

## Relief from the takeover provisions for accelerated rights issues

- 26 In CP 105 we asked whether class order relief from the takeovers provisions should be granted to accelerated rights issues consistent with the disclosure relief in [CO 08/35].
- 27 The respondents generally agreed with the proposal. It was recognised that an accelerated rights issue has minimal differences with a standard rights issue, being the timing difference between institutional and retail investors for the offer and allocation of securities, and does not of itself offend the equal opportunity principle of Chapter 6 where there are appropriate controls.

### *ASIC's response*

We propose to grant class order relief from the takeovers provision for accelerated rights issues on the condition that the retail allotment occurs within two months after the allotment to institutional investors.

We also expect that entities will not schedule a general meeting during this period, if the early allotment to institutional investors would distort voting. We would consider making an application to the Takeovers Panel if we had any control concerns.

The proposed class order and proposed conditions will further harmonise the takeovers treatment of accelerated rights issue with the disclosure relief given to accelerated rights issues under [CO 08/35].

## Relief from the takeovers provisions for non-renounceable rights issues where foreign holders are excluded without complying with the nominee process in s615

- 28 In CP 105 we noted that we have 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 in limited circumstances. This was where:
- (a) the company had demonstrated an urgent need for capital;
  - (b) there were changes in the market price only after the rights issue was announced;
  - (c) the rights issue was 'out of the money'; and
  - (d) there were only a small number of foreign holders.
- 29 We did not put forward a proposal in CP 105 in relation to the nominee process in s615 for non-renounceable rights issues. Nonetheless, we received a substantial number of submissions that the nominee process is not appropriate for non-renounceable rights issues whether documented or undocumented or whether accelerated or traditional.

30 The purpose underlying s615 is that foreign holders should have the opportunity to participate in the benefits flowing from a rights issue. The key policy argument advanced by respondents for granting relief from s615 for non-renounceable rights issues is that the terms of these offers will not be the same for all holders because foreign holders will get a benefit not available to domestic holders. This benefit is the possibility of sale proceeds being paid to them without having to commit to any investment in the securities.

*ASIC's response*

We intend to give guidance about the limited situations in which we will grant case-by-case relief from s615 for non-renounceable rights issues. This will reflect the previous case-by-case relief referred to in CP 105. However, we do not intend to grant relief from s615 for all non-renounceable rights issues as this would be contrary to the principle that foreign holders have the opportunity to participate in any benefits flowing from a rights issue.

We are not convinced by the argument that complying with s615 for non-renounceable rights issues has unintended consequences in that it unfairly gives a benefit to foreign holders. The procedure in s615 gives foreign holders the opportunity to participate in the benefits of a rights issue that has control implications and reduce the control effect of the rights issue.

The treatment of foreign holders under s615 is not identical to the treatment of domestic holders but nor is it intended to be. Also the extent to which s615 is problematic for non-renounceable rights issues is unclear. It seems to us that issues generally arise where the non-renounceable rights issue price is close to or exceeds the market price.

## E Broadening the takeovers exception for dividend reinvestment plans

### Key points

Should we grant class order relief to broaden the takeovers exception for dividend reinvestment plans to acquisitions by an underwriter?

### Relief to broaden the takeovers exception for dividend reinvestment plans to acquisitions by an underwriter

- 31 In CP 105 we asked whether we should 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.
- 32 Responses were varied. Some respondents were supportive of the proposal as a means of providing certainty to listed entities regarding the amount of equity raised via dividend reinvestment plans. However, others were concerned that the relief could be abused for control purposes. One respondent also made the point that if an entity cannot comfortably pay a dividend without an underwritten dividend reinvestment plan, the entity should reconsider the amount of dividend it declares.
- 33 A number of respondents also indicated that the proposed relief was likely to be of limited benefit because underwriting of dividend reinvestment plans is unlikely to result in a person exceeding the takeover threshold unless the underwriter has significant pre-existing holdings.

#### *ASIC's response*

As it seems that the relief is not likely to be of wide benefit and is most likely to benefit underwriters with significant pre-existing stakes, we feel that it is more appropriate that we grant case-by-case relief to broaden the dividend reinvestment plan to underwriters rather than class order relief.

We would only grant relief where the underwriting was bona fide. Case-by-case relief would enable us to assess the control implications of granting relief.

We would consider applications from listed companies and unlisted companies with more than 50 members as well as listed managed investment schemes. In addition, we would consider granting relief for acquisitions by underwriters of dividend reinvestment plans, bonus share plans, distribution reinvestment plans and switching facilities.

## What should the conditions to the relief be?

- 34 In CP 105 we asked whether it was appropriate to make class order relief conditional on the provision at the time the dividend reinvestment plan is announced of adequate information about:
- (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.
- 35 Most respondents were supportive of relief being conditional on the proposed disclosure being made. However one respondent was of the view that relief should instead be tied to our unacceptable circumstances policy to control rights issues in Regulatory Guide 159 *Takeovers, compulsory acquisitions and substantial holdings*.
- 36 Beyond requiring disclosure, respondents were not in favour of any additional conditions (e.g. voting restrictions) being imposed on relief.

### *ASIC's response*

As mentioned above, we intend to grant case-by-case relief rather than class order relief extending the dividend reinvestment plan exception to acquisitions by an underwriter. We believe that it is appropriate that such case-by-case relief generally be made conditional on the proposed disclosure being made.

In assessing case-by-case relief, we will carefully consider any control concerns. Case-by-case relief involves assessing the relevant circumstances at the time and so additional conditions may be appropriate in some cases.

## F Other comments

### Key points

Should there be a sunset date on any relief granted following CP 105?

What are ASIC's expectations regarding market practices?

### Sunset date

- 37 A number of respondents suggested that because the proposals in CP 105 are designed to facilitate equity capital raising having regard to the current economic environment and specifically the lack of access to debt finance, that there should be a sunset date imposed on any relief granted. This would enable the relief to be reassessed at a certain time in the future to determine whether it is still appropriate.

#### *ASIC's response*

While we agree that the proposals in CP 105 were designed having regard to the current economic environment and specifically the lack of access to debt finance, they have a sound policy basis generally and so we do not intend to make the relief granted subject to a sunset date.

### Our expectations regarding market practices

- 38 In CP 105 we set out our expectations regarding market practices in effecting placements and other capital raisings (see paragraphs 17–21 of CP 105). This includes that we expect issuers of securities to take steps to ensure 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'.
- 39 One respondent expressed concerns that this may be read by issuers as requiring a separate due diligence exercise or audit on the adequacy of the issuer's disclosure previously made to the market as a pre-requisite to undertaking fundraising using a cleansing notice and that this would be counter productive to the purpose of facilitating equity capital raising.

#### *ASIC's response*

Our expectations regarding market practices are ongoing. We expect issuers to conduct robust due diligence regarding compliance with the continuous disclosure rules and identification of 'excluded information' on an ongoing basis.

## Appendix: List of non-confidential respondents

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1. Arnold Bloch Leibler lawyers and advisers
  2. Australian Bankers' Association Inc.
  3. Australian Custodial Services Association
  4. Australian Financial Markets Association
  5. Australian Institute of Company Directors
  6. Australian Securities Exchange
  7. Australian Shareholders' Association
  8. Baker & McKenzie
  9. BBY Limited
  10. Chartered Secretaries Australia
  11. DLA Phillips Fox
  12. FIIG Securities Limited
  13. Gadens Lawyers
  14. Group of 100
  15. Growthwire
  16. Law Council of Australia
  17. Macquarie Capital Funds Limited
  18. McCullough Robertson - Lawyers
  19. PricewaterhouseCoopers
  20. Property Council of Australia
  21. RiskMetrics Group
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