



ASIC

Australian Securities & Investments Commission

REPORT 128

Report on submissions to CP 91 Non-traditional rights issues

May 2008

About this report

This report highlights the key issues that arose out of the submissions received in response to Consultation Paper 91 *Non-traditional rights issues* (CP 91) and details our responses to those issues and the relief we have given in Class Order (CO 08/35) *Disclosure relief for rights 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 189 *Disclosure relief for rights issues* (RG 189).

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A Overview/consultation process

Overview

- 1 We released Consultation Paper 91 *Non-traditional rights issues* (CP 91) on 28 September 2007 to consult on proposals for relief to allow non-traditional rights issues to use the disclosure exemption for rights issues.
- 2 On 28 June 2007 the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007* amended the *Corporations Act 2001* to allow listed entities to raise funds under a rights issue without a prospectus or PDS (the ‘disclosure exemption’). The disclosure exemption was intended to benefit retail holders by encouraging listed entities to make greater use of rights issues, rather than other forms of fundraising that exclude retail holders and do not require a prospectus or PDS.
- 3 The consultation paper set out some specific circumstances in which we considered it might be appropriate to give relief to extend the disclosure exemption to non-traditional rights issues. The most important element of the disclosure exemption is that a rights issue must give holders an equal opportunity to participate (the ‘equal opportunity principle’). Where features of a non-traditional rights issue do not offend the spirit of the equal opportunity principle and investor protection is not compromised, issuers should be allowed to use the disclosure exemption.
- 4 This report highlights the key issues that arose out of the submissions received in response to CP 91, our responses to those issues and the relief we have given in CO 08/35. For a summary of the changes we have made in our final policy to the proposals in CP 91, see the Appendix. Our final policy is in Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189).
- 5 This report is not meant to be a comprehensive summary of all submissions received. It is also not meant to be a detailed report on every question from CP 91. We have limited this report to the key issues. RG 189 contains a more detailed explanation of the relief given in CO 08/35.

Responses to consultation

- 6 In addition to publishing CP 91 on our website, we sought comments from several major law firms that had acted for clients in relief applications relating to non-traditional rights issues, the ASX, the Australian Shareholders Association and the Law Council of Australia. A number of respondents indicated that they were generally happy with the relief

proposed in CP 91 and therefore did not feel it necessary to make a formal written submission.

- 7 We received a joint submission from two major Australian law firms that consulted with their investment banking clients who deal with issuers of non-traditional rights issues. The Law Council of Australia supported this submission. We also received comments from the Property Council of Australia and Chartered Secretaries Australia.
- 8 Responses to our consultation paper were generally positive and suggested that the proposed relief would be likely to facilitate retail participation in capital raisings. It was also noted that the relief would make the legislative provisions more accommodating to market adaptations of traditional rights issues.
- 9 The main issues raised in CP 91 and responded to in the submissions related to:
 - the timing of the offer and allotment;
 - multiple cleansing notices;
 - disposing of the shortfall;
 - offers to convertible noteholders;
 - offers of options; and
 - the application of the takeovers provisions.

B Proposed relief for non-traditional rights issues

Key points

In CP 91, we sought feedback on some specific circumstances in which it might be appropriate for us to provide relief to allow non-traditional rights issues to use the disclosure exemption. This section discusses the submissions received in response to those specific circumstances.

Timing of offer and allotment

- 10 In CP 91, we proposed to give relief to:
- (a) facilitate accelerated rights issues of securities and interests under the disclosure exemption by disregarding mere differences in timing of when the offer opens and closes (i.e. so that institutional holders have a shorter offer period than retail holders); and
 - (b) allow institutional holders to be allotted securities or interests before retail holders, provided that retail holders are given the option of being allotted their securities or interests at the same time (retail holders may also have the option to have their securities or interests allotted at a later date).
- 11 Our proposal was consistent with the relief given for managed investment schemes in Class Order (CO 05/26) *Constitutional provisions about the consideration to acquire interests*. We were concerned that early allotment could provide institutional holders with an unfair advantage over retail holders, e.g. by allowing institutional holders to dispose of their interests for a higher price.
- 12 The proposal that retail holders should have a right to be allocated their securities or interests at the same time as institutional holders was a main area of concern expressed in the submissions. Submissions stated that:
- (a) Whether retail investors have the opportunity to participate early is significantly less important than the key issues of price and pro rata entitlement to invest.
 - (b) Requiring retail holders to have the same opportunity to participate would delay the rights issue. The key attraction of accelerated rights issues is the ability for issuers to receive a significant proportion of the offer proceeds upfront and within a short time frame. Therefore imposing this condition on relief would reduce the attractiveness of accelerated rights issues, with the likely result that these offers will be made under a prospectus rather than under the disclosure exemption, or that retail investors will be excluded altogether.

- (c) There is often very little advantage for retail holders to participate in the first tranche of an accelerated rights issue. Participating later has the benefit of allowing more time to pay and consider whether to take up the offer based on market developments. The advantage of earlier participation is the ability to trade the securities earlier, but this is only an advantage where the holder wishes to sell more than their existing holding because otherwise they could sell their existing securities.
- 13 Submissions also suggested that it is not necessary for our relief to be consistent with our position on rights issues for managed investment schemes. The condition is imposed in CO 05/26 to reflect the requirement in s601FC(1)(d) that all members in a class be treated equally, which is a stricter requirement than for rights issues of securities that offers be made on the same terms.

ASIC's response

CO 08/35 modifies s9A to permit different offer periods and dates of allotment for retail holders and 'exempt investors'. In this context, 'exempt investors' means members who would come within s708(8)–(12) or who would be wholesale clients as defined in s761G.

We were persuaded by the submissions not to impose a condition on relief that retail holders have the option of being issued their securities at the same time as exempt investors. We consider that different considerations apply to managed investment schemes due to the requirement in s601FC(1)(d) that all members in a class be treated equally.

It is a condition of our relief that the allotment to exempt investors occurs no earlier than two months before the allotment to retail investors. This requirement ensures that exempt investors do not have a disproportionate holding for an extended period.

Providing relief for accelerated allotment of securities to institutional and other exempt holders will achieve the aim of encouraging rights issues over other forms of fundraising.

Multiple cleansing notices

- 14 Due to the structure of accelerated rights issues and the obligations in the on-sale provisions in s708A and 1012DA, it is possible that without our relief, an issuer would have to lodge a number of cleansing notices with the market operator within a short period of time. In CP 91, we proposed giving relief so that if a cleansing notice has been lodged at the commencement of rights trading, then it is not necessary to lodge a subsequent cleansing notice unless new information emerges that is required to be disclosed.
- 15 Submissions agreed with this proposal. Submissions considered that the burden of lodging a subsequent notice was not substantial; however,

requiring the lodgement of multiple notices in all cases could be confusing to the market.

ASIC's response

CO 08/35 modifies the disclosure exemption (s708AA and 1012DAA) and the on-sale provisions (s708A and 1012DA) so that only one cleansing notice will be required, unless new information emerges or a defect in the notice is discovered.

Under the modified provisions, the obligation to update or correct the cleansing notice begins from the time the first notice is given and continues up until the last issue of securities or interests under the rights issue (including any related shortfall issue).

Disposing of shortfall

- 16 Not all securities or interests may be taken up under the initial pro rata offer. Disposal of the resulting shortfall may fall outside the disclosure exemption for technical reasons because the offers are not pro rata and not on the same terms as the initial offer. In CP 91, we proposed to give relief to enable an issuer to deal with the shortfall in a rights issue as a means of giving full effect to the disclosure exemption.
- 17 Submissions were non-committal on this issue. Some submissions acknowledged that even if ASIC did not extend the relief to retail non-shareholders, the shortfall could be offered to institutional investors without a prospectus.
- 18 One respondent submitted that ASIC relief should be extended to all capital raisings that do not have significant or material differences in the offers to holders.

ASIC's response

CO 08/35 modifies s708AA and 1012DAA so that issuers may offer the shortfall to original offerees (persons to whom the rights issue was first offered). The shortfall offer must be made no later than two months after the first offer made under the rights issue.

Our relief does not prevent entities from offering the shortfall to investors under s708 or 1012D. However, it does not permit the shortfall to be offered to retail investors who were not original offerees. This is on the basis that Parliament restricted the disclosure exemption to rights issues to existing members and retained the prospectus / PDS requirements for other offers to retail investors.

Offers to convertible noteholders

- 19 In CP 91, we proposed that where the terms of convertible securities that convert into the class of securities offered under the rights issue entitle the holder to participate in a rights issue, we would grant relief to allow such rights issues to take advantage of the disclosure exemption.
- 20 Submissions agreed with our proposal. One submission suggested that this relief need not be extended to allow an issuer to extend a rights issue to convertible noteholders more generally as this would go beyond a pro rata issue and potentially benefit noteholders over other holders. Another submission considered that this relief should be widened to allow the issuer to extend the issue to noteholders generally.

ASIC's response

CO 08/35 enables an issuer to extend an offer to holders of convertible securities where the terms of the convertible securities require. If the rights issue is extended in this way, then the entity must make the offer to all convertible holders whose securities entitle them to participate in a rights issue (other than holders with a registered address outside Australia or New Zealand).

We consider that convertible security holders will have sufficient information about the quoted securities offered to them under the rights issue partly because they are existing holders. The entity's continuous disclosure and cleansing notice and the market price for the underlying quoted securities also provide convertible holders with relevant information.

Our relief should not prejudice the holders of ordinary securities because convertible holders are only able to participate in the rights issue to the extent necessary to prevent their holdings from being diluted.

Offers of options

- 21 Some rights issues for quoted securities include an offer of unquoted options. In CP 91 we proposed not to extend the disclosure exemption to cover these concurrent offers of unquoted options.
- 22 We received an oral submission from one law firm that such relief should be given because the price of the options is set with direct reference to the price of the underlying securities. Other respondents agreed with our proposal to refuse relief or did not have strong views on this issue.

ASIC's response

We consider that the terms of the options generally have an impact on the pricing of the options and that investors need adequate information on these terms. We consider that the disclosure exemption is limited to rights issues of quoted securities and products for investor protection. Therefore, consistent with our position in CP 91, we will not give relief to extend the disclosure exemption to cover offers of unquoted options.

Application of the takeovers provisions

- 23 In CP 91 we proposed to give relief so that an issuer who wishes to follow the procedure in s615 for foreign holders as an alternative to the procedure in s9A is able to rely on the disclosure exemption.
- 24 One submission suggested that we should provide relief along the lines of ASX Listing Rule 7.7 or give relief so that any ASX waiver from Listing Rule 7.7 applies for the determination of the requirements under the disclosure exemption.

ASIC's response

CO 08/35 modifies s9A(3)(c) to give entities wide discretion on the treatment of foreign holders' entitlements—provided foreign holders are given information about the process and receive any net proceeds. This gives entities the flexibility to use a bookbuild process if required. Alternatively, entities may wish to follow the procedure in s615 if reliance on the takeovers exemption is required.

Section 9A(3)(c) only applies to renounceable rights issues; it does not prescribe the process to be followed in a non-renounceable rights issue.

Appendix: Changes to our final policy

25 This table sets out the proposals in CP 91 that have not been retained in our final policy in RG 189. The table does not cover proposals that have been retained in the final policy.

Table 1: Summary of changes to the proposals in CP 91

Proposal in the CP	Policy in RG 189
Proposal B1 Timing and offer of allotment	
We proposed a condition of relief that retail holders be given the option of being allotted their securities or interests at the same time as institutional holders.	CO 08/35 does not impose this condition. However, the modified provisions do require issuers to allot securities to exempt investors no earlier than 2 months before the allotment to retail holders: see RG 189.31–RG 189.33.
Proposal B3 Disposing of shortfall	
We proposed to give relief to enable an issuer to deal with the shortfall in a rights issue.	CO 08/35 enables issuers to dispose of the shortfall to existing holders. However, this relief does not allow an offering of the shortfall to retail investors who were not original offerees under the rights issue: see RG 189.47–RG 189.52.
Proposal B6 Application of takeovers provisions	
We proposed to modify s708AA and 1012DAA so that an issuer who wishes to follow the procedure in s615 for foreign holders is still able to rely on the disclosure exemption.	CO 08/35 modifies s9A(3)(c) so that issuers have the discretion to choose the process by which foreign holders' entitlements in a renounceable rights issue are dealt with. As s9A(3)(c) only applies to renounceable rights issues, issuers in a non-renounceable rights issue are able to follow the procedure in s615 without the need for relief.
Proposal B7 Beneficial holders	
We proposed to give relief so that beneficial holders are taken to be registered holders of securities or interests for the purpose of the disclosure exemption and an issue of securities or interests to a trustee or nominee is taken to be an issue to the beneficiary.	We considered that this relief was not justified for rights issues. We decided that it was not unduly onerous to expect entities to deal with trustees and nominees in addition to dealing directly with beneficial holders where they elect to do so.