



12 December 2013

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Australian Securities and Investments Commission
Level 24
120 Collins Street
Melbourne VIC 3000

Employee Incentive Schemes Consultation Paper 218
Submission Regarding Disclosure Relief for Offer of Securities to Non-executive Directors

Dear Peng,

This submission relates to proposal C3 concerning relief for offers of securities to non-executive directors (NEDs).

Questions	Submissions
C3Q1 Do you agree with our proposal to only provide limited conditional relief for non-executive directors? If not why not?	<ol style="list-style-type: none"> 1. S708(12) of the Corporations Act provides blanket disclosure relief for offers to senior managers and their spouses, parents and children. NEDs would have a better knowledge of a company’s circumstances than most senior managers and therefore should be treated equally from the perspective of the Company not needing to make disclosures. NEDs do not need any more protection than senior managers. Rather than restrict the relief for offers to NEDs it is our submission that such offers should be granted blanket relief. 2. Due to insider trading restrictions and company share trading policies it can be difficult for NEDs to acquire shares once they have become NEDs. A NEDs securities plan is one way of enabling NEDs to acquire shares and to demonstrate to other shareholders that they have belief in the future prospects of the company. Disclosure relief should be provided so as to not impede the acquisition of securities by NEDs. The accumulation by NEDs of a meaningful stake in the company would be seen by most stakeholders as a highly desirable practice which should be supported rather than impeded by ASIC. 3. Independence is not a prerequisite for a person to become a NED. Further ownership of shares in the company of which the NED is a director is generally accepted as not affecting the independence of a NED unless the shareholding is very substantial. Such independence may be affected by offers of securities that have in-built performance conditions (options) or attached performance conditions (other securities). It is common practice for NED securities plans to be based on Rights* (not options) which do not have performance based vesting conditions. Vesting relates to service and a vesting condition (real risk of forfeiture) is required to defer the taxing point. Shareholding is probably the least common occurrence affecting independence and does not warrant specific focus relative to other factors – see attachment.

Questions	Submissions
C3Q1 Do you agree with our proposal to only provide limited conditional relief for non-executive directors? If not why not?	4. Forcing offers to NEDs to need to qualify under the small-scale offerings disclosure exemption in s708(1) is likely to lead to the winding up of general employee securities plans. The cost/benefit of general employee securities plans is often questioned and if offers to employees are not covered by a disclosure document and are not exempted under one of the provisions of s708 then they will make it impossible to use the small-scale offerings disclosure exemption – more than 20 employees would often receive offers under general employee securities schemes. Accordingly, boards may choose to replace their general employee securities plans with a NED securities plan. Thus the proposed approach may lead to unintended consequences.

Questions	Proposed Condition	Submission
C3Q2 Do you agree with the proposed specific conditions in Table 3 for offers to non-executive directors? If not why not?	(a) The offer is only for quoted shares, depository interests or stapled securities;	Offers of Rights* often represent an entitlement to a cash payment and a number of shares when Rights* vest. This break up is often designed to delay the taxing point until the Rights* vest even if it follows a cessation of the person holding the office of director. Also the cash payment may reduce pressure to sell shares to recover sufficient funds to cover the tax liability on the value of shares that vest. The shares will generally not be quoted at the time of the offer even though quotation may be sought following an issue of shares. Given the foregoing it is submitted that limiting the relief to quoted shares is unnecessarily restrictive as many stakeholders prefer that Rights be used.
	(b) The acquisition of these products is not subject to a condition linked to the performance of the body;	Agree.
	(c) Directors must contribute their own funds to acquire these products;	It is usual for offers of securities to NEDs to be part of their remuneration with no financial contribution from the NEDs towards the acquisition. This may be either on a fee sacrifice basis or as a compulsory element of remuneration. In these circumstances there is no need for the NED to contribute their own funds towards the acquisition. Requiring NEDs to contribute funds may act as an impediment to NEDs accumulating a meaningful stake in the company which many stakeholders would see as a desirable outcome.

	<p>(d) The employee incentive scheme for non-executive directors must not involve a loan or other financial assistance to the directors.</p>	<p>It is usual for the shares that need to be provided when Rights* vest to be provided via a trust. The company contributes funds to the trustee and the trustee applies the funds to acquire shares by on-market purchase or subscription to a new issue. This approach is used so as to generate a tax deduction for the company for the cost of the shares.</p> <p>The contributions to the trust would constitute financial assistance. If it is intended that such financial assistance not be allowed then this would be an unnecessary condition to impose. If it is not intended that such financial assistance be excluded then this should be made clear.</p>
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Questions	Submissions
<p>C3Q3 Do you agree with our proposal to impose four general conditions of our new class order relief (set out in Table 3) on offers to non-executive directors? If not why not?</p>	<p>Agree.</p>
<p>C3Q4 To what extent is the small-scale offerings disclosure exemption in s708(1) or 1012E relief relied upon for offers to non-executive directors? Is this exemption useful for such offers? Please give reasons. Are any other exemptions relied on?</p>	<p>The other provision that is relied upon is s708(8)(c). However, it presents an administrative burden and intrudes into the personal lives of directors, therefore, to our knowledge, it is rarely used.</p> <p>The small-scale offerings disclosure is used particularly by small companies which do not have general employee securities plans. It has limited application as many larger companies make offers to employees who are not senior managers and such offers preclude the use of this exemption.</p>

*NB: The foregoing submission focuses on Rights as opposed to other forms of securities as they are the most frequently used in relation to NEDs. Rights represent entitlements on vesting to shares, cash to the value of the Rights or a combination of cash and shares. The value of vested Rights is calculated by multiplying the number of vested Rights by the then market value of a share.

In summary it is our view that the relief provisions that are to apply to employees should also apply to NEDs with two possible restrictions being:

- a) That NEDs participate in a separate securities plan to that used for offers to employees, and**
- b) Vesting of grants to NEDs should not be subject to performance conditions.**

If more information or clarification is required in relation to the foregoing we will be pleased to assist.

Yours sincerely,

Denis Godfrey
Managing Director

Attachment – Considerations impacting Independence of Non-executive Directors

Independence of a Non-executive Director (NED) means that the NED is free of any interest, association or relationship that might influence or reasonably be perceived to influence the NED's capacity to bring an independent judgment to bear on issues before the board and to act in the best interests of the entity and its security holders generally. Factors to consider include:

1. Whether the NED has been an **executive of the entity** or its related entities and was there at least a three (3) year gap between cessation of the employment and commencement of the role of NED,
2. During the prior three (3) years has the NED been a partner, shareholder, director or senior employee of a **professional advisor or consultant to the entity** or its related entities,
3. During the prior three (3) years has the NED been a **material customer or supplier** of the entity or of any of its related entities or an officer of or otherwise associated directly or indirectly with such supplier or customer, (\$100,000 test for materiality),
4. During the prior three (3) years has the NED received any income from the company other than in the capacity as a director or shareholder, (\$100,000 test for materiality),
5. Whether the NED has a **material contractual relationship** with the entity or its related entities other than as a director,
6. Whether the NED is a **substantial security holder of the entity** or its related entities or otherwise associated directly or indirectly with a substantial security holder of the entity,
7. Whether the NED has **close personal or professional ties** with any person who falls within the above categories,
8. Whether the NED has been a **director of the entity for more than 9 years**,
9. Whether the NED has any **cross-directorships** that overlap with other executives, officers or directors of the company,
10. Whether director is able to exert any influence over any property of the company other than in the capacity of a director,
11. Whether the NED is aligned with a **special interest group** which opposes any aspect of the activities of the entity or its related entities or has objectives that may or could be reasonable be perceived to be not aligned with the interest of the entity or its related entities or their security holders, and
12. Whether there is any other reason the NED may not be considered independent from management by a reasonable person.