



ASIC

Australian Securities & Investments Commission

REPORT 438

Response to submissions on CP 228 Collective action by investors: Update to RG 128

June 2015

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 228 *Collective action by investors: Update to RG 128* (CP 228) and details our responses in relation 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 128 *Collective action by investors* (RG 128)).

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A Overview/Consultation process

- 1 In Consultation Paper 228 *Collective action by investors: Update to RG 128* (CP 228), we consulted on proposals to:
- provide updated guidance in Regulatory Guide 128 *Collective action by investors* (RG 128) on:
 - how the takeovers and substantial holding notice provisions under the *Corporations Act 2001* (Corporations Act) apply to collective action by investors;
 - our approach to enforcement of those provisions in the context of collective action by investors; and
 - other important legal considerations relevant to investor engagement; and
 - discontinue the relief in Class Order [CO 00/455] *Collective action by institutional investors*.
- 2 This report highlights the key issues that arose out of the submissions received on CP 228 and our responses to those issues.
- 3 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 228. We have limited this report to the key issues.
- 4 For a list of the non-confidential respondents to CP 228, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 228.

Responses to consultation

- 5 We received seven responses to CP 228 from a variety of stakeholders, including industry bodies, law firms and other interested parties. We are grateful to respondents for taking the time to send us their comments.
- 6 The majority of respondents were supportive of our proposals to update the guidance in RG 128 and discontinue the relief in [CO 00/455]. However, some respondents raised issues in relation to certain aspects of the proposed guidance. In Section B we discuss the key issues raised by respondents, which relate to:
- our proposal to revoke [CO 00/455] and not replace it with another class order;
 - the examples we proposed to provide in Tables 1 and 2 of RG 128, of conduct that is unlikely or more likely to give rise to an association or relevant interest; and

- our proposed approach to enforcement of the takeover and substantial holding provisions in the context of collective action by investors.
- 7 We discuss other issues respondents raised, such as our proposed guidance in relation to other legal considerations relevant to investor engagement, in Section C.
- 8 We have made some further amendments to RG 128 to take into account the feedback received from respondents. These amendments include:
- clarifying our analysis of the examples relating to investors making joint representations to the board and jointly signing a s249D, s249N, s252B or s252L notice (see Tables 1 and 2 of RG 128); and
 - expanding the guidance on our enforcement approach.
- 9 We have revoked [CO 00/455] and decided not to replace it with a new class order at this time.

B Key issues

Key points

Responses were generally supportive of our proposals to update the guidance in RG 128 and discontinue the class order relief in [CO 00/455].

We received some feedback that we should issue a new class order to replace [CO 00/455] in order to facilitate and encourage collective action by investors for purposes that would not undermine the policy behind Ch 6 of the Corporations Act. We carefully considered this feedback but decided not to issue a new class order at this time.

We also received feedback suggesting we give further consideration to some of our proposed examples of types of collective action that are unlikely or more likely to give rise to an association or relevant interest. We have taken this feedback into account and expanded on our guidance in Tables 1 and 2 of RG 128.

Class order relief

- 10 We proposed to discontinue the class order relief in [CO 00/455] as it was very rarely being used. We also proposed to not replace [CO 00/455] with another class order.
- 11 The feedback received suggested that [CO 00/455] was rarely relied on due to the conditions to which it was subject being unpalatable to investors. Respondents generally agreed with our proposal to revoke [CO 00/455].
- 12 Some respondents suggested that a new class order should be issued to replace [CO 00/455] to facilitate collective action for the purposes of good corporate governance, but without the conditions like those in [CO 00/455].
- 13 One respondent suggested class order relief to modify s53 of the Corporations Act (as applied to s12(2) by reg 1.0.18 of Corporations Regulations 2001), to make the definition of ‘affairs’ more tailored and relevant or to introduce exceptions. However, they acknowledged that such a class order would be difficult to draft given that the definition of ‘corporate governance’ would be problematic.
- 14 Another respondent suggested class order relief to permit investors to act collectively when trying to coordinate shareholder opposition or support for a particular shareholder resolution.
- 15 Another respondent suggested class order relief from the definition of ‘associate’ and ‘relevant agreement’. The respondent suggested that the class order could be subject to a condition that investors proposing to rely on the

relief notify ASIC of their intention to do so and explain why they are relying on the relief. The respondent submitted that such a condition would provide ASIC with the opportunity to consider whether the relief is being used appropriately and to take regulatory action if concerns arise.

ASIC's response

Given the absence of individual relief applications showing a need for such a class order, and the difficulty in setting appropriate parameters to such relief without affecting its usefulness to investors, we have decided not to issue a new class order at this time.

We requested that any submissions in support of a replacement class order specify the possible scope and terms of such relief. This is because concepts such as 'corporate governance' and 'control purpose' are too broad to include in a class order. Unfortunately, we did not receive any submissions that could practicably be converted into a class order that would give sufficient comfort to investors without undermining the underlying principles of Ch 6.

We consider that the suggested approach of imposing a notification requirement in a replacement class order, to allow ASIC to examine whether the relief is being used appropriately, is akin to the case-by-case approach we undertake in assessing individual relief applications. However, while the individual relief approach would provide ASIC with the ability to consider each application on its merits and simply refuse relief in cases where it would not be appropriate, the notification requirement approach would require ASIC to take reactive action in cases where the class order relief was not being used appropriately. We consider that the individual relief approach would be preferable in these types of circumstances.

We consider that we can facilitate greater investor engagement by specifying in RG 128 that:

- we are not likely to focus enforcement action on collective action that is purely for the purpose of corporate governance; and
- we wish to encourage collective action by investors to promote governance improvements in entities.

Illustrative examples of conduct

- 16 We proposed to update RG 128 to provide illustrative examples of types of collective action that are unlikely (Table 1) or more likely (Table 2) to trigger an associate relationship or constitute entering into a relevant agreement, resulting in the acquisition of a relevant interest.

- 17 Generally, respondents were supportive of the proposed guidance and thought that Tables 1 and 2 provided a useful framework for investors to navigate the complex association and relevant interest provisions when acting collectively with other investors.
- 18 One respondent was opposed to our proposal to provide illustrative examples. The respondent submitted that the examples created further uncertainty and could be used to inappropriately influence the outcome of Takeovers Panel proceedings.

ASIC's response

Given that all but one of the responses received were supportive of our proposal to provide illustrative examples of the types of collective action that are unlikely or more likely to give rise to an association or relevant interest, we have retained the examples in Tables 1 and 2 of RG 128.

We disagree with the submission that the provision of illustrative examples would interfere with or influence the conduct of Takeovers Panel proceedings. The guidance makes it clear that the examples in Table 1 and 2 are illustrative only and whether an association is created or a relevant interest is acquired in any given case will depend on the particular facts and circumstances of that case.

While we would expect that ASIC guidance is one of a number of factors that the Takeovers Panel might consider when making a determination, we note that the Takeovers Panel is a body independent of ASIC. Retention of the illustrative examples also provides investors with guidance about how ASIC will administer the law.

Analysis of illustrative examples

- 19 We also received specific feedback on our analysis of issues relevant to the following types of conduct listed in Tables 1 and 2 of RG 128:
- investors jointly signing:
 - a s249D or s252B notice to requisition a meeting of an entity to put forward a resolution relating to the composition of the board or the entity's affairs; or
 - a s249N or s252L notice to request a resolution relating to the composition of the board or the entity's affairs be considered at a meeting of the entity; and
 - investors making joint representations to the company's board about the company's policies or practices or particular actions that the company might consider taking.

Jointly signing a s249D, s249N, s252B or s252L notice

- 20 A number of respondents queried whether we were correct when we said that jointly signing a s249D, s249N, s252B or s252L notice is ‘likely to be accompanied by an understanding about the exercise of voting rights that will amount to the acquisition of a relevant interest’. They submitted that investors could be willing to support proposing the consideration of an issue at a general meeting without finally deciding, or reaching an understanding with each other, as to how to vote. For example, they could be seeking to ‘clear the air’ over a contentious director appointment.
- 21 One respondent also submitted that the guidance was likely to discourage large security holders from signing such notices and limit the percentage of members willing to sign a notice to less than 20% for fear of breaching the takeovers threshold. The respondent submitted that this may impede investors seeking to rejuvenate a board to get as many other investors as possible to sign a requisition notice to show the incumbent board the level of investor support for a change on the board.

ASIC’s response

We acknowledge that there may be rare cases where signing a requisition notice may not be accompanied by an understanding about the exercise of voting rights—this is not inconsistent with the proposed guidance that signing such a notice is *likely* to be accompanied by an understanding about the exercise of voting rights.

We have amended RG 128 to clarify that on these rare occasions, a relevant interest may not arise. However, we expect that, in most cases where a person is publicly requesting a meeting or a resolution be put to a meeting, they are likely to have some understanding about both their own voting intentions and those of their co-signatories, particularly given the notice itself is prompting a vote.

The substantial holding provisions may be less of a concern for investors wishing to sign a s249D, s249N, s252B or s252L notice, given the ASX Listing Rules require a listed entity to notify ASX if they receive notices from security holders calling, requesting the calling of, or proposing to move a resolution at a general meeting: see ASX Listing Rule 3.17A. The identity of the requisitioning investors would be disclosed through this process.

Making representations to the board

- 22 We proposed to provide guidance in Table 1 of RG 128 that if the conduct comprises merely raising the same general issues of concern raised by other shareholders, either in one-one-one or joint meetings with the company, then this is unlikely to result in the investors being associates.

- 23 We received feedback from respondents requesting the guidance cover the capacity for investors to attend meetings with representatives of investee companies on substantive commercial or strategic matters without triggering the associate or relevant interest provisions.
- 24 One respondent also queried why we included the qualification ‘usually in one-on-one or joint meetings’ when describing the conduct in our analysis, given the example is concerned with investors collectively making representations and the issue would therefore be whether they have a relevant agreement to act together in doing so.

ASIC’s response

We have expanded the guidance in relation to this example to explicitly refer to representations about long-term strategic or commercial issues facing the company.

We have retained our description of this conduct as occurring in either ‘one-on-one or joint meetings with the company’, as it was intended to cover the scenario where investors, separately meeting one-on-one with the company, raise the same general issues of concern raised by other investors.

ASIC’s approach to enforcement

- 25 We proposed to outline our approach to enforcement of the takeover and substantial holding provisions in RG 128, including specifying that we would be less likely to closely examine collective action involving matters that are about good corporate governance only.
- 26 Most respondents welcomed the guidance in relation to our enforcement approach and thought it would be likely to assist investors and advisors.
- 27 One respondent queried the basis of our proposed approach to ‘relax’ the takeover and substantial holding laws in the case of collective action taken for the purposes of good corporate governance. The respondent submitted that such an approach may encourage persons seeking to increase control of an entity to do so under the guise of a corporate governance issue, and suggested alternative criteria that would warrant lesser scrutiny by ASIC.
- 28 The respondent also suggested that additional discussion of ‘control transaction’ and ‘board control’ in Table 3 of RG 128 (conduct that may attract ASIC scrutiny) would be useful.

ASIC's response

We have expanded on the guidance provided on our approach to enforcement to incorporate the additional criteria suggested by the respondent, which relate to whether the collective action:

- relates to issues that can properly be determined at a general meeting;
- is temporary and purely related to the resolution of that issue; and
- is concerned with the acquisition of a substantial interest or the exercise of control, and whether there is any ongoing undisclosed association between the investors involved.

We have retained the question of whether the collective action relates purely to the improvement of the entity's corporate governance as a key consideration, in addition to the above criteria, as a key policy objective of this guidance is to encourage investors to actively participate in the corporate governance of entities.

This approach allows ASIC to focus enforcement action on types of collective action that are more likely to undermine the underlying purposes of the takeovers and substantial holding provisions.

We have also expanded on our guidance in relation to the concepts of 'control transaction' and 'board control' as conduct that may attract ASIC scrutiny.

C Other issues

Key points

This section outlines our response to other issues raised by respondents in relation to our proposed update to RG 128. These include issues raised in relation to:

- the overview of other legal considerations in Section C of RG 128;
- use of the term 'institutional investors' in RG 128;
- our guidance in relation to individual relief; and
- whether RG 128 should be reissued at all.

Overview of other legal considerations

- 29 We proposed to provide an overview of other legal considerations relevant to investor engagement that both investors and entities should consider. Respondents were generally supportive of our proposed overview. However, some respondents raised issues in relation to certain aspects of the overview.
- 30 Our proposed guidance on the handling of confidential information by entities when engaging with investors noted that selective engagement with particular institutional investors can lead to perceptions of unfairness.
- 31 One respondent suggested that any guidance regarding confidential discussions by a company with investors should be removed from RG 128. Another respondent noted that it would be impractical for an entity to meet with all of its investors on a regular basis, and therefore a listed entity must prioritise its engagement program with investors on the basis of voting influence.
- 32 Other respondents suggested we include:
- a cross-reference to Regulatory Guide 25 *Takeovers: False and misleading statements* (RG 25);
 - a note that investors should also consider whether their proposed collective action would breach the *Competition and Consumer Act 2010*; and
 - reference to the two-strikes rule, including worked examples of the use of the two-strikes rule to seek control of an entity and how we would deal with such circumstances.

ASIC's response

We have amended our guidance in relation to the handling of confidential information by entities when engaging with investors

to direct readers to Report 393 *Handling of confidential information: Briefings and unannounced transactions* (REP 393), which sets out our recommendations in relation to handling of confidential information.

We have also inserted a specific statement in RG 128 that we have not included in the guide any additional considerations arising out of legislation other than the Corporations Act and ASIC Act (for instance, the *Competition and Consumer Act 2010*).

We have not included a discussion of the two-strikes rule in RG 128. The guidance in RG 128 applies to any collective action by investors, including collective action in the context of the two-strikes rule. This would include, for example, entering into voting agreements in relation to the approval of remuneration reports. As such we did not consider that a separate discussion in relation to the two-strikes rule was necessary.

Use of terms

- 33 We referred to ‘institutional investors’ throughout our proposed updated guidance. This term was used in the previous RG 128 and we proposed to retain it in recognition that institutional investors are more likely to engage more actively in relation to the corporate governance of entities in which they invest than other types of investors.
- 34 One respondent suggested that the term ‘investors’ would be more appropriate and less confusing.

ASIC’s response

In light of the feedback received, we amended RG 128 to refer to ‘investors’ rather than ‘institutional investors’ throughout. We considered this amendment was appropriate as the guide was intended to apply to the actions of all investors.

Individual relief

- 35 We proposed to indicate in RG 128 that we may grant individual relief where the nature of the conduct is not concerned with the acquisition of a substantial interest in or control over an entity, and that any relief is likely to require disclosure to the market.
- 36 We also proposed to indicate that we will generally be reluctant to provide relief simply because there is residual uncertainty about the legal position of collective action. This is because the exhaustive analysis required of the facts in such cases, and the need to cast relief by reference to these facts, is unlikely to result in timely or useful relief.

- 37 One respondent submitted that our position that we will generally be reluctant to provide relief simply because there is residual uncertainty was unnecessarily restrictive and should be removed from the guidance in RG 128.

ASIC's response

We have retained the statement in RG 128 regarding our position in relation to granting relief. We consider that drawing attention to issues that we anticipate may arise in relation to individual relief applications, and their likely outcome, provides useful guidance to investors who may be contemplating making such an application. The guidance does not prevent investors from proceeding to make an application if they wish to do so and does not necessarily mean that such an application will be refused. ASIC will consider any application for relief on a case-by-case basis on its own merits.

Withdrawal of RG 128

- 38 One respondent submitted that if [CO 00/455] was not remade, RG 128 should not be reissued. The respondent submitted that the operation of the 'associate', 'relevant interest' and 'voting power' concepts are discussed extensively in case law, Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5) and decisions of the Takeovers Panel, and are already well understood in the market, particularly by institutional investors.

ASIC's response

Given the broad support for the proposed guidance and general recognition in the submissions received that the law in this area is complex and difficult to navigate, we consider the updated guidance in RG 128 will be of assistance to investors.

Appendix: List of non-confidential respondents

- Australian Council of Superannuation Investors
 - Australian Institute of Company Directors
 - AustralianSuper
 - Gagens Lawyers
 - Global Proxy Solicitation
 - Governance Institute of Australia
 - Law Council of Australia
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