



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 199

# Broadening the rights issue and dividend reinvestment plan exceptions for takeovers

June 2009

### **About this guide**

This is a guide for persons who may contravene the takeovers provisions of the *Corporations Act 2001* as a result of participating in a rights issue or dividend reinvestment plan by a listed company or unlisted company with more than 50 members, or a listed managed investment scheme.

This guide sets out the circumstances in which ASIC may provide relief from the takeovers provisions to those persons.

## 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 version was issued on 18 June 2009 and is based on legislation and regulations as at 18 June 2009.

## Disclaimer

This guide 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.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

Some equity capital raisings can result in a person contravening the takeovers prohibition in s606 of the Corporations Act unless an exception applies.

This regulatory guide explains when we will give relief to broaden:

- the rights issue exception; and
- the dividend reinvestment plan exception.

### The prohibition in s606

- RG 199.1 Under the *Corporations Act 2001* (Corporations Act), a person is prohibited from acquiring a relevant interest in more than 20% of the securities in an entity unless one of the exceptions in s611 applies: see s606. Some equity capital raisings can result in a person exceeding this takeovers threshold and so that person will need to consider whether they fall within the terms of an exception. Unless an exception is available the person will be prohibited from participating in the capital raising.

#### The rights issues exception

- RG 199.2 Item 10 of s611 provides an exception for persons who will exceed the takeovers threshold where they participate in a rights issue that satisfies a number of conditions, including that:
- offers are made to every person who holds securities on a pro rata basis; and
  - the terms of all the offers are the same.

#### The dividend reinvestment plan exception

- RG 199.3 Item 11 of s611 provides an exception for persons who will exceed the takeovers threshold as a result of participating in a dividend reinvestment plan (or a distribution reinvestment plan) on the condition that the plan is available to all members (disregarding any unavailability to foreign holders).

## Our relief for equity capital raisings

- RG 199.4 A key principle underlying the rights issue exception and the dividend reinvestment plan exception 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.
- RG 199.5 We have decided to grant relief to broaden the rights issue exception and the dividend reinvestment plan by:
- (a) executing class order relief to broaden the rights issue exception to extend to accelerated rights issues (see Section B); and
  - (b) considering case-by-case relief:
    - (i) to broaden the rights issue exception to extend to acquisitions through a shortfall facility in certain circumstances (see Section C);
    - (ii) from the nominee procedure for foreign holders for non-renounceable rights issues in limited circumstances (see Section D);
    - (iii) to broaden the dividend reinvestment plan exception to extend to acquisitions by an underwriter in certain circumstances (see Section E).
- RG 199.6 Each of these relief proposals is designed to facilitate equity capital raisings while still maintaining overall investor protection and the principle that all holders should have an equal opportunity to participate.

## B Class order relief for accelerated rights issues

### Key points

We have granted class order relief under [CO 09/459] *Takeovers relief for accelerated rights issues* which provides a new exception for persons who will exceed the takeovers threshold as a result of participating in an accelerated rights issue.

- RG 199.7 In an accelerated rights issue the offer proceeds in two tranches: institutional and retail. Institutional holders are required to deal with their rights before other holders and are generally allotted their securities first. This allows issuers to receive a significant proportion of the offer proceeds from their institutional holders in a very short timeframe.
- RG 199.8 For a member to rely on the rights issue exception in item 10 of s611, agreements to issue must not be entered into until a specified time for acceptances of offers has closed and the terms of all the offers must be the same.
- RG 199.9 An accelerated rights issue falls outside the exception in item 10 of s611 because the different offer periods and dates of allotment for institutional and retail members mean the offers are not made on the same terms to each relevant holder and allotments for the institutional offer may occur before the retail offer has closed.

### Our class order relief for accelerated rights issues

- RG 199.10 Class Order [CO 09/459] *Takeovers relief for accelerated rights issues* gives relief by providing a new exception for persons who will exceed the takeovers threshold as a result of participating in an accelerated rights issue.
- RG 199.11 Relief is given on the condition that the retail allotment must occur 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.

### Why we have given this class order relief

- RG 199.12 Accelerated rights issues only differ from traditional rights issues in the timing of the offers and allotment of securities to institutional and retail investors. These timing differences of themselves do not offend the equal

opportunity principle (in s602(c)) as long as the differences are not abused for control purposes.

- RG 199.13 We will closely examine any rights issue that falls within the terms of [CO 09/459] that appears to be abusing the relief for control purposes. For example, as mentioned above, we would have concerns if an entity schedules a general meeting during the period between allotment to institutional investors and allotment to other investors, if the early allotment to institutional investors would distort voting. We may make an application to the Takeovers Panel if we have control concerns.

Note: Our policy in Regulatory Guide 159 *Takeovers, compulsory acquisitions and substantial holdings* (RG 159) at RG 159.152–RG 159.187 may also provide guidance in this context.

### **Other class order relief for accelerated rights offers**

- RG 199.14 Class Order [CO 08/35] *Disclosure relief for rights issues* modifies s708AA and s1012DAA so that shortfall offers will not generally require a prospectus. Also s9A does not require issuers to adopt a nominee process for foreign holders for non-renounceable rights issues in order to rely on s708AA and s1012DAA: see Regulatory Guide 189 *Disclosure relief for rights issues*.
- RG 199.15 In contrast [CO 09/459] creates a new takeovers exception for accelerated rights offers only in respect of the timing differences between the offer periods and dates of allotment for retail and institutional holders to allow for accelerated rights offers. [CO 09/459] does not extend the new accelerated rights issue exception to shortfall offers or mean that an offeror does not have to comply with the nominee process in s615. However, we will consider applications for relief relating to these matters on a case-by-case basis: see Sections C and D of this guide.

## C Case-by-case relief for acquisitions through a rights issue shortfall facility

### Key points

We may grant case-by-case relief to broaden the rights issue exception to extend to acquisitions under a shortfall facility.

- RG 199.16 Some rights issues are under-subscribed by holders, resulting in a shortfall. In those circumstances, issuers often want to dispose of the shortfall to raise the full amount sought under the rights issue.
- RG 199.17 The rights issue exception in item 10 of s611 does not provide for acquisitions under shortfall facilities. This is because offers under a shortfall facility may not be pro rata or not on the same terms as the initial offer.
- RG 199.18 In contrast, we have provided disclosure relief for rights issue shortfall offers. [CO 08/35] modifies s708AA and 1012DAA so that shortfall offers will generally not require a prospectus.

### Our case-by-case relief for acquisition through a shortfall facility

- RG 199.19 We may grant case-by-case relief to broaden the rights issue exception to enable existing members of the entity to participate in a shortfall facility allowing them to take up any rights that other members have not exercised, even if by doing so they exceed the takeovers threshold.
- RG 199.20 We will not grant relief if we are concerned that the rights issue exception may be being used for control purposes. For example, we would have concerns if one or more of the following occurs:
- (a) the shortfall offer price is less than the initial rights offer price; or
  - (b) members do not have an opportunity to participate in the shortfall facility; or
  - (c) the ability to participate in the shortfall facility is somehow restricted; or
  - (d) the allocation method unfairly favours some participants over others.
- Note: Our policy in RG 159.152–RG 159.187 may also provide guidance in this context.
- RG 199.21 We will generally grant case-by-case relief on the condition that members have received adequate information concerning:

- (a) the terms of the shortfall facility (including the timing of the shortfall offer, the price of the shortfall offer, who will be entitled to participate in the shortfall offer, and how the shortfall will be allocated); and
- (b) the potential effect the shortfall facility will have on the control of the entity.

RG 199.22 If the entity is relying on s708AA in relation to the rights issue offer, this information must be given to the relevant market operator in the cleansing notice within the 24-hour period before the offer is made. If the entity is preparing a prospectus in relation to the rights issue offer, this information must be included in the prospectus.

RG 199.23 We may consider other conditions appropriate in certain circumstances.

RG 199.24 We will consider applications from listed companies and unlisted companies with more than 50 members as well as listed managed investment schemes.

RG 199.25 Before the offer period for the shortfall starts, entities should consider whether their cleansing notice disclosure needs updating. For example, the effect on control is likely to be different from that originally contemplated if the first offer was significantly under-subscribed by smaller holders and large holders have indicated they will take up the shortfall.

RG 199.26 We understand that in some cases entities may choose to supplement the shortfall facility with underwriting arrangements. These arrangements would need to fall within another takeover exception if they could result in the underwriter acquiring more than 20% in the issuer, and would not come within the case-by-case relief described in this section: see s611.

### **Why we consider relief for shortfall facilities appropriate**

RG 199.27 We consider that our relief for shortfall facilities would harmonise the treatment of rights issues from a disclosure and takeovers perspective. The relief enables a rights issue to incorporate a shortfall facility which may achieve a more equal spread than an underwriting arrangement. This is consistent with the takeovers principle of giving all holders an equal opportunity to participate in any benefits. The proposed disclosure would ensure that members understand the dilutionary implications of not participating in the rights issue and the shortfall facility.

## D Case-by-case relief from the nominee procedure for foreign holders

### Key points

We may grant case-by-case relief to broaden the rights issue exception by giving relief from the nominee procedure for foreign holders for non-renounceable rights issues.

- RG 199.28 Section 615 extends the rights issue exception in item 10 of s611 so that it applies even though the conditions are not satisfied in respect of foreign holders if, under the terms of the offers:
- (a) the company must appoint a nominee for foreign holders who is approved by ASIC;
  - (b) the company must issue to the nominee the securities that would otherwise be issued to the foreign holders who accept the offer or the right to acquire those securities; and
  - (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the net proceeds of the sale (after expenses).
- RG 199.29 The policy underlying s615 is that all holders should have the opportunity to participate equally in the benefits flowing from a rights issue. It provides a procedure for allowing foreign holders to participate in the benefits flowing from a rights issue that has control implications and seeks to minimise those control effects. The treatment is not the same as that for domestic holders but nor is it intended to be.
- RG 199.30 In contrast, the disclosure exemption for rights issues does not require that the issuer adopt a nominee process for foreign holders in non-renounceable rights issues: see s9A.

### How we think s615 works for non-renounceable rights issues

- RG 199.31 It seems that where a rights offer is non-renounceable, complying with s615 in practice generally involves:
- (a) the nominee subscribing for securities that would have been taken up by the foreign holders at the subscription price;
  - (b) the nominee selling those securities; and
  - (c) the nominee then distributing the proceeds of sale (less the subscription price and other costs) to foreign holders.

RG 199.32 The application of s615 to non-renounceable rights issues may be problematic where the non-renounceable rights issue price is close to or exceeds the market price. This is because the nominee may suffer a loss in relation to the securities and no proceeds will flow to the foreign holders.

## Our case-by-case relief from the nominee procedure

RG 199.33 ASIC has the power under s655A to grant relief from s615. We may grant relief from s615 for non-renounceable issues in limited circumstances. We will generally only grant relief where:

- (a) the company has demonstrated an urgent need for capital;
- (b) there are only a very small number of foreign holders and they hold only a very small number of shares; and
- (c) it is unlikely that any proceeds from the sale of securities will be remitted to the foreign holders.

RG 199.34 Examples of situations where it may be unlikely that any proceeds will be remitted to the foreign holders are where:

- (a) there are changes in the market price after the rights issue is announced so that the sale price of the securities will be less than the subscription price; and
- (b) the value of shares held by foreign holders is very small and will be exceeded by the costs of engaging a nominee.

RG 199.35 Any application for relief would need to address the criteria above and include monetary estimates supporting why it is unlikely that any proceeds will be remitted to the foreign holders.

RG 199.36 An alternative solution to the nominee subscribing for securities under s615 is for the entity to structure the rights issue as a renounceable rights issue. Any application for relief would also need to address why it is not possible or appropriate to do so. This may be because of the time and expense involved or the illiquidity of the entity's shares.

RG 199.37 We will not grant relief if we are concerned that the rights issue exception may be being used for control purposes.

Note: Our policy in RG 159.152–RG 159.187 may provide guidance in this context.

RG 199.38 When granting case-by-case relief, we will consider applications from listed companies and unlisted companies with more than 50 members as well as listed managed investment schemes.

### **Why we consider relief from the nominee procedure appropriate**

- RG 199.39 The purpose of s615 is that all holders should have the opportunity to participate equally in the benefits flowing from a rights issue. If no proceeds will be distributed to foreign holders, compliance with s615 would mean that the entity will incur costs at a time when it is seeking to raise equity capital and the foreign holders will still not benefit. We think that relief is appropriate in these circumstances.
- RG 199.40 We will continue to monitor the use of the nominee process in s615 for non-renounceable rights issues to determine if further relief is required.

## E Case-by-case relief for acquisitions by an underwriter under a dividend reinvestment plan

### Key points

We may grant case-by-case relief to broaden the dividend reinvestment plan exception to extend to acquisitions by an underwriter.

- RG 199.41 Unlike the rights issue exception in item 10 of s611, the dividend reinvestment plan exception (in item 11 of s611) does not extend to acquisitions by persons as underwriters.

### Our case-by-case relief for acquisitions by an underwriter

- RG 199.42 We may grant case-by-case relief to broaden the dividend reinvestment plan exception to enable an underwriter of a dividend reinvestment plan to take up any shortfall under the dividend reinvestment plan even if by doing so they exceed the takeovers threshold.

- RG 199.43 We will only grant relief where a person is acting as a bona fide underwriter. We will not grant relief if we are concerned that the rights issue exception may be being used for control purposes. For example, due to the small amounts usually raised under a dividend reinvestment plan, we understand that it is more likely that an underwriter will need to rely on this relief where it has a significant pre-existing stake in the entity. Accordingly, we would scrutinise the circumstances closely.

Note: Our policy in RG 159.152–RG 159.187 may provide guidance in this context.

- RG 199.44 We will generally grant case-by-case relief on the condition that, at the time the dividend reinvestment plan is announced, members have received 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 holders.

- RG 199.45 We may also consider other conditions appropriate in certain individual circumstances.

- RG 199.46 When granting case-by-case relief, we will consider applications from listed companies and unlisted companies with more than 50 members as well as listed managed investment schemes. In addition, we will consider granting

relief for acquisitions by underwriters of dividend reinvestment plans, bonus share plans, distribution reinvestment plans and switching facilities.

### **Why we consider relief for acquisitions by underwriters appropriate**

RG 199.47 We consider that this relief is analogous to the rights issue exemption which extends to underwriting. Our relief for acquisitions by underwriters will give certainty to an entity seeking to raise equity capital. The proposed disclosure would ensure that members understand the control implications of not participating.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
[CO 08/35] (for example)	An ASIC class order (in this example numbered 08/35)
Corporations Act	The <i>Corporations Act 2001</i> including any regulations made for the purposes of the Act
disclosure exemption	Exemption under s708AA and 1012DAA of the Corporations Act from the requirement to provide a prospectus or PDS for 'rights issues' of quoted securities and quoted interests (as defined in s9A), which was introduced by the SRS Act
dividend reinvestment plan exception	The exception provided in item 11 of s611 to the prohibition in s606
RG 159 (for example)	An ASIC regulatory guide (in this example numbered 159)
rights issue exception	The exception provided in item 10 of s611 to the prohibition in s606
s611 (for example)	A section of the Corporations Act (in this example numbered 611)
takeovers threshold	The threshold in s606

## Related information

### Headnotes

accelerated rights issue, disclosure exemption, equal opportunity principle, managed investment scheme, prospectus, retail holders, rights issue, shortfall, takeovers

### Class orders and pro formas

[CO 08/35] *Disclosure relief for rights issues*

[CO 09/459] *Takeovers relief for accelerated rights issues*

### Regulatory guides

RG 159 *Takeovers, compulsory acquisitions and substantial holding notices*

RG 189 *Disclosure relief for rights issues*

### Legislation

*Corporations Act 2001* Ch 6, Ch6D, s9A, 606, 611, 615, 708AA, 1012DAA

### Consultation papers and reports

CP105 *Facilitating equity capital raising*

REP 160 *Response to submissions on CP 105 Facilitating equity capital raising*

### Media and information releases

AD09-26 *ASIC seeks comment on proposals to facilitate equity capital raising and participation by retail investors*