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Australia: Beyond COVID-19

Mitigating the control effects of entitlement offers during a time of uncertainty

Introduction

The securities market in Australia, like many other global stock markets, has experienced high levels of volatility and general uncertainty in light of the economic disruptions caused by COVID-19. Given the unprecedented nature of the coronavirus pandemic and its impact on global economies, it is difficult to predict with any certainty how long COVID-19 will continue to affect financial markets.

This provides challenges for many listed companies that need to raise equity capital in the short to medium term, particularly those that require funding on an urgent basis in order to meet upcoming debt or other contractual commitments or to simply satisfy ongoing working capital requirements.

The impacts of an uncertain market on the capital raising initiatives of listed companies include:

- **Depressed share prices**: Firstly, many ASX listed companies have experienced significant declines in share prices due to issues arising from COVID-19 or its economic impacts. While ASX has responded to increase the 15% limit on placements to 25% in certain circumstances as part of a suite of temporary measures to facilitate capital raising in response COVID-19, for some listed companies, an institutional placement (whether accompanied by a share purchase plan offer or not) may not be sufficient to deliver the required amount of capital without shareholder approval. Accordingly, a pro rata entitlement offer (or rights issue) may be the only viable capital raising structure for companies needing to raise a significant amount of capital.

- **Limited access to professional underwriting**: Secondly, uncertain trading conditions make it very difficult for some listed companies to access professional underwriting on commercially acceptable terms (or at all). This is particularly the case for capital raisings involving a retail offer component such as an entitlement offer, which may require the underwriter to be on risk for up to several weeks. This leaves many companies with no viable alternatives but to seek the support of their major shareholders, or other private investors willing to acquire a substantial interest in the company, to backstop their capital raising activities. This support is often provided through commitments to underwrite or sub-underwrite a capital raising involving an entitlement offer.

Accordingly, it will be particularly important in these circumstances for listed companies and their directors to ensure that any underwriting of an entitlement offer, particularly by a major shareholder or other private investor, is appropriately structured having regard to the guidance on control provided by the Takeovers Panel and ASIC. As the Panel has indicated on a number of occasions, including most recently in *Energy Resources of Australia Limited* [2019] ATP 25, the need for funds is not a safe harbour. However, it is likely to be a highly relevant consideration in the current environment.

About this guide

This guide provides a summary of the relevant regulatory framework and key rights issue exceptions. It provides a summary of the considerations that listed companies and their directors should consider when structuring a rights issue (particularly one that is underwritten) to mitigate potential control effects. A number of these considerations are also relevant to non-underwritten rights issues.

For simplicity, the balance of this guide refers to the term “rights issue” (rather than entitlement offer) to describe a pro rata offer of new shares to existing shareholders, as this is the term commonly used to describe such offers under the *Corporations Act 2001* (Cth) (**Corporations Act**) and related regulatory guidance and policy.

This guide has been prepared for general information purposes and should not be relied on as a substitute for obtaining legal or other professional advice in individual cases. If you require specific advice, please contact us.

This guide is current as at May 2020.

Regulatory framework and rights issue exceptions

Broadly, section 606 of the Corporations Act prohibits a person from acquiring shares in a listed company that results in increasing their voting power in the company to more than 20%, or if already more than 20% (but less than 90%), above that level. Section 611 of the Corporations Act contains a number of exceptions to this prohibition. These include exceptions permitting acquisitions made under pro rata rights issues that are offered to all shareholders (referred to in this guide as "the rights issue exceptions").[1]

The rights issue exceptions expressly extend to acquisitions by a person as an underwriter or sub-underwriter. This allows for the possibility that there may be a substantial shortfall of subscriptions under a rights issue.

The practical effect of the rights issue exceptions is that they allow:

- a shareholder to acquire shares by taking up their entitlements under a rights issue; and
- a shareholder or other third party (for example, a private investor) to acquire shares under a rights issue through an underwriting or sub-underwriting arrangement,

in circumstances where such acquisitions would otherwise be prohibited by section 606 of the Corporations Act.

Rights issues and unacceptable circumstances

A rights issue or underwriting arrangement that falls within the legal requirements of the Corporations Act may nevertheless give rise to unacceptable circumstances if the arrangements are inconsistent with the principles underlying the takeover provisions. For example, this would include a rights issue that has been structured to enable a shareholder (or other investor that has agreed to underwrite or sub-underwrite the offer) to obtain control of the company through the capital raising in reliance on the rights issue exceptions.

Rights issues or underwriting arrangements that do not comply with these principles may give rise to complaints by the Australian Securities and Investments Commission (**ASIC**) or other third parties (such as aggrieved shareholders), who could bring an application to the Takeovers Panel (**Panel**) seeking a declaration of unacceptable circumstances and appropriate remedial orders to address any offensive conduct.

The Panel's remedial orders in rights issue cases are generally focused on ensuring (as far as possible) that the rights issue proceeds as if the unacceptable circumstances had not occurred. This is done by making orders (or accepting undertakings) that adequately address the relevant control concerns (for example, by altering the way that shortfall under the offer is allocated), rather than preventing the rights issue from proceeding altogether.

At the very least, regulatory action can result in delay to the right issue, which of itself can be commercially detrimental to the company, particularly where there is an urgent need for funds. Regulatory action can also result in the rights issue not proceeding for other reasons (for example, by triggering a termination right in favour of the underwriter under the underwriting agreement).

[1] See item 10 (for acquisitions under traditional rights issues), item 10A (for acquisitions under accelerated rights issues) and item 13 (for acquisitions by underwriters of issues under a disclosure document where the effect of the acquisition on voting power is disclosed).

Takeovers Panel guidance

The Panel's guidance on rights issues is set out in Guidance Note 17: *Rights Issues*. While the Panel does not seek to narrow the rights issue exceptions, if there is potential for a rights issue to affect control in a manner that is inconsistent with the takeover provisions, then the directors need to carefully consider all reasonably available options to mitigate that effect. The key consideration for the Panel in this context is whether the control effect exceeds what is “reasonably necessary” for the fundraising purpose.

ASIC guidance

In addition to the Panel's guidance, listed companies considering undertaking a rights issue should also consult ASIC's guidance in Regulatory Guide 6. ASIC has a broad regulatory role in relation to takeovers generally. In particular, ASIC will usually examine a rights issue and any related underwriting arrangements closely in the context of approving a foreign holder nominee, and will generally withhold its approval if it considers that the arrangements are designed to avoid the takeover provisions of the Corporations Act or otherwise give rise to unacceptable circumstances.[2] If any ASIC concerns regarding control are not adequately addressed, it can make an application to the Panel for a declaration of unacceptable circumstances and appropriate orders.

Mitigating control effects – relevant considerations

The following provides a summary of factors that listed companies and their directors should consider when structuring a rights issue (particularly one that is underwritten) to mitigate potential control effects.

These factors are listed below under the following broad categories:

1. Terms and structure of the rights issue
2. Underwriting and sub-underwriting arrangements
3. Company circumstances and fundraising purpose

These factors are not exhaustive. Both the Panel and ASIC will generally take into account the overall circumstances relating to the rights issue and underwriting arrangements in determining whether regulatory intervention is warranted in any particular case.

[2] The appointment of a nominee is sometimes required to facilitate the sale of shares, or rights to acquire shares, that would otherwise be offered to ineligible foreign shareholders, and to distribute to each of those foreign holders their proportion of the net proceeds of the sale (after expenses). This procedure is required to comply with section 615 of the Corporations Act.

TERMS AND STRUCTURE OF THE RIGHTS ISSUE

1 Ensure that the size (offer ratio) of the rights issue is appropriate having regard to the funds required

The size (offer ratio) of the rights issue should be appropriate having regard to the funds required. Generally, the larger the number of new shares for old, the more dilutive the rights issue and therefore the more likely it is to have an unacceptable control effect. Even if priced at a large discount, shareholders may not have the financial resources (particularly in times of economic uncertainty) to pay for all the new shares to which they are entitled. This means that a company undertaking a large rights issue may need to more clearly demonstrate its need for funds.

Under the ASX Listing Rules, the ratio of a non-renounceable rights issue must not ordinarily be greater than 1 for 1. However, ASX has recently provided a class waiver from this 1 for 1 cap as part of a package of temporary capital raising measures aimed at assisting listed companies affected by COVID-19 to raise urgently needed capital.[3] Accordingly, companies seeking to rely on this waiver to conduct a large raising that exceeds the 1 for 1 cap in circumstances where the rights issue has potential control effects should exercise caution (see also item 3 below).

2 Price the rights issue at a discount to encourage participation

Pricing the rights issue at a large discount to market can encourage shareholder participation. This may reduce the shortfall arising from the rights issue and in turn decrease the likelihood of control passing to the underwriter or any sub-underwriters.

A small discount to market (or no discount or a premium to market) provides less incentive for shareholders to participate in the rights issue. It also undermines the effectiveness of renounceability in mitigating the likelihood of control passing to the underwriter parties (see also item 3 below).

3 Make the rights issue renounceable if rights trading likely

Consider making the rights issue renounceable where there is likely to be an active market for the rights. A renounceable offer provides shareholders the opportunity to recoup some value by selling their rights on market. The third party buyer of the rights is likely to take up the offer to take advantage of the discount, which has the effect of reducing the shortfall and therefore the likelihood of control passing to the underwriter and any sub-underwriters.

This structuring consideration needs to be balanced against other commercial objectives. Non-renounceable structures are sometimes preferred for commercial reasons, particularly during periods of high volatility as was experienced in the Australian market during the Global Financial Crisis. This is because:

- non-renounceable structures can provide an incentive for existing shareholders to take-up their entitlements, or otherwise risk suffering a loss of value through the lapsing of entitlements that cannot be transferred (particularly if the discount is large) as well as dilution; and
- in the case of accelerated pro rata offers, non-renounceable structures have a slightly shorter standard ASX timetable, making them potentially more advantageous from a professional underwriting perspective as the underwriter is on risk for a shorter period.

However, if rights trading is not likely (for example, where trading in the company's shares is generally illiquid, or where there is a very small discount), then renounceability is less likely to be a relevant factor.

3 In order to rely on this waiver, the company must first notify ASX that it intends to do so, and must give certain information to ASX to explain the relevant circumstances. The waiver is due to expire on 31 July 2020, unless ASX determines otherwise.

4 Offer a shortfall facility that includes an equitable allocation policy

Shareholders should be offered the ability to participate in a shortfall facility (sometimes referred to as a top-up facility) under which they can apply for additional shares in advance of determining the shortfall available to the underwriter and any sub-underwriters.

The company should adopt an equitable policy for allocating shortfall under the facility. Features of an effective allocation policy include:

- if applications under the shortfall facility exceed the number of shares available, shares should be allocated to applicants for additional shares on a pro rata basis having regard to their existing shareholding interests;
- shareholder participation under the shortfall facility should preferably not be restricted by a cap. However, if a cap on participation is included, it should not materially restrict the ability of shareholders to participate (for example, it should not materially disadvantage retail shareholders on a proportionate basis); and
- the directors should generally not be permitted to allocate shortfall or reject applications at their discretion, except to the extent necessary to prevent an issue of shares in contravention of the Corporations Act or other regulatory requirement (for example, because it would breach section 606 of the Corporations Act).

The allocation policy needs must be clearly disclosed in the offer documents.

Set out below is an example shortfall allocation policy, which is based on formulations previously adopted or approved in Panel decisions. This is merely an example, and it is possible to have an alternative policy which is determined by the directors to be appropriate having regard to the various principles and the factual circumstances.

Example of shortfall allocation policy

1. *Each shareholder who has applied for additional shares under the shortfall facility will be allocated their pro rata share of the shortfall having regard to their holding at the record date (if a shareholder has made a shortfall application for an amount less than the amount of shares that the shareholder would otherwise be allocated under this process, the shareholder will be allocated the amount applied for).*
2. *If, following allocation of the shortfall in the first round, there remains any shortfall, the above allocation process will be repeated in rounds until either all the shortfall has been allocated or all shortfall applications have been satisfied in full.*
3. *If, following the above process, there remains any shortfall, such shares will be allocated by the underwriter to any sub-underwriters.*

For the avoidance of doubt, the Corporations Act and ASX Listing Rules limits apply to the acquisition of additional shares under the shortfall facility.

The rights issue exceptions do not extend to acquisitions under shortfall facilities offered in connection with a rights issue.[4] This is because shortfall offers are generally not made on a pro rata basis or on the same terms as the rights issue offer, and will therefore not comply with the specific requirements of the rights issue exceptions.

In a different capital raising context, as part of its package of COVID-19 capital raising reforms, ASX issued a temporary class waiver that increases the 15% limit on placements in ASX Listing Rule 7.1 to 25%.[5] This waiver was subsequently amended (following consultation with ASIC) to introduce enhanced disclosure requirements for placement allocations. These disclosure requirements reflect ASIC's expectations that directors must provide transparent disclosure to the market about decisions made in equity raising transactions. This development suggests that allocation policies are generally likely to be the subject of increased scrutiny by regulators.

[4] However, ASIC case-by-case relief is available in certain limited circumstances.

[5] Provided the placement is undertaken in conjunction with a pro rata entitlement offer or share purchase plan offer at the same or a lower price.

5 Ensure there are other effective dispersion measures in place

In addition to a shortfall facility as described above, other dispersion measures to be considered include:

- **Spread of sub-underwriters**: the use of several sub-underwriters, which are not associated with the underwriter or each other. If there is excess demand, shortfall should be allocated amongst the sub-underwriters to reduce the likelihood of control being concentrated in one (or a small number of) sub-underwriters.
- **Priority sub-underwriting arrangements**: priority sub-underwriting arrangements (which are arrangements that give certain sub-underwriters priority allocation to any shortfall over other sub-underwriters) increase the likelihood of control being concentrated in the sub-underwriters within the "priority pool" and accordingly should be implemented with caution if the rights issues is expected to give rise to potential control effects.
- **External investor participation**: if practicable, external investors should be invited to take up any shortfall (for example, pursuant to a back-end book-build conducted after the offer has closed) in advance of determining the shortfall available to the underwriter and any sub-underwriters.
- **Underwriting parties should be last in line to take up any shortfall**: an underwriter and any sub-underwriters should generally only take up shortfall after all other requests (including applications under the shortfall facility and/or applications under any back-end book-build process) have been satisfied.

The failure to employ effective dispersion measures (in addition to a shortfall facility) may suggest that the control effect of the rights issue may exceed what is reasonably necessary for the fundraising purpose.

UNDERWRITING AND SUB-UNDERWRITING ARRANGEMENTS

6 Make genuine attempts to engage with a wide range of underwriting parties, including professional underwriters

Genuine attempts should be made to engage with a wide range of potential underwriting and sub-underwriting parties. This should include both professional underwriters and other investors. This process should occur well in advance of appointing a major shareholder or other private investor to underwrite the offer.

The benefit of engaging a professional underwriter is they are generally unlikely to have any interest in obtaining control of the company by holding shares, rather their key motivation is likely to seek to earn an underwriting fee.

The failure by directors (and their advisers) to make genuine attempts to procure or facilitate alternative underwriting or sub-underwriting, including by refusing or failing to respond to reasonable due diligence or other requests made by potential interested parties (such as the company's other major shareholders) may increase the likelihood that the arrangements will have an unnecessary or intentional control effect.

Companies and their directors should therefore exercise caution if they intend to exclude genuinely interested parties from the process (for example, shareholders or other bona fide investors interested in providing underwriting or sub-underwriting support). These parties are often the ones that will make complaints or bring Panel proceedings if they feel that their expressions of interest have been ignored or have otherwise been treated unfairly.

Approaches made to potentially interested underwriting and sub-underwriting parties should be made in good faith and not just by way of a "box ticking" exercise to comply with regulatory guidance in this regard. ASIC and the Panel will often scrutinise the scope, terms and circumstances of those approaches.

7 Ensure that the underwriting arrangements are properly characterised as "underwriting"

The rights issue exceptions only protect parties to the extent that the underwriting arrangement is properly characterised as underwriting. To comply with this requirement, the underwriting arrangement needs to involve (in substance) assumption of risk by the underwriter.

Underwriting arrangements that include terms to the following effect may not be considered to involve the assumption of this risk by the underwriter (and consequently may not be properly characterised as underwriting):

- provisions giving the underwriter a general discretion to terminate. For example, by allowing the underwriter to terminate in relation to the occurrence of events over which the underwriter has effective control; or
- provisions allowing the underwriter to terminate in circumstances that mean that the underwriter does not bear the risk of the shortfall. For example, following a default by a sub-underwriter; or
- provisions allowing the underwriter to terminate on the basis of a "hair trigger" event that is certain, or near certain, to occur (such as a token fall in a relevant market index). This could be particularly relevant for offers conducted during a period of high market volatility.

ASIC will often carefully scrutinise the terms of underwriting arrangements to ensure they comply with its policy.

8 Seek to avoid unusual or uncommercial underwriting terms

The inclusion of unusual or uncommercial underwriting terms could suggest that those arrangements may have an unnecessary or intentional control effect and should preferably be avoided. This could include terms that:

- confer negative control over the company's assets in favour of the underwriter; or
- impose onerous conduct of business restrictions on the company that are excessive having regard to the fundraising purpose.

ASIC and the Panel will often scrutinise any unusual or uncommercial underwriting terms.

The Panel has also recently observed that underwriting arrangements that include terms that are not consistent with commercial underwriting could be interpreted as a "lock-up device" (having regard to the Panel's guidance in Guidance Note 7: *Lock-up devices*) and potentially unacceptable.

9 Consider recent dealings in the company's shares by underwriting parties

Any dealings by underwriting or sub-underwriting parties in connection with the company's shares before or during the rights issue should be considered as this may suggest that the underwriter is seeking control (for example, if the underwriter has previously participated in a placement of the company's shares).

ASIC and the Panel will often scrutinise any such dealings.

COMPANY CIRCUMSTANCES AND FUNDRAISING PURPOSE

10 Ensure there is a proper fundraising purpose and genuine need for funds

There should be a legitimate fundraising purpose. This should be clearly disclosed in the offer documents on a consistent basis. If a company cannot clearly identify a need for the capital to be raised in a rights issue with potential control effects, this could suggest a misuse of the rights issue exceptions.

When considering the company's need for funds, the Panel will generally take into account the company's financial situation (including any solvency or liquidity issues), the amount of funds proposed to be raised and the suitability of the rights issue as a means of raising the capital required.

Market factors leading up to the rights issue and those reasonably likely to occur during the offer period will also be a relevant factor. Given the current reasonably high levels of uncertainly, these factors may be particularly important for companies seeking to raise capital to address issues arising from COVID-19 or its economic impacts.

In the absence of other issues, the Panel is generally likely to accept the directors' decision on issues relating to the fundraising purpose if the decision appears to be reasonable and supported by rational reasons.

11 Carefully explore and consider all alternative funding options

The company should carefully consider what funding alternatives are open to it (if any), and how those alternatives compare with the benefit of independent financial and legal advice.

It would also be prudent for the various funding options considered by the directors to be appropriately recorded in minutes of meetings of the directors or other board materials, including the reasons why the rights issue was determined to be preferable to other funding options.

The Panel and ASIC will generally enquire whether the company has explored and considered other capital raising alternatives before proceeding with the rights issue, particularly if it has potential control effects.

12 Obtain independent financial and legal advice in connection with the offer

The company should generally receive independent financial and legal advice on the offer structure and capital raising generally, particularly if it has potential control effects. This factor is often considered by the Panel when assessing the overall circumstances relating to the rights issue.

13 Consider the likely response of shareholders to the rights issue

The company should consider the likely response of shareholders to the rights issue. For example, if market soundings conducted before the launch of the offer suggest that the rights issue is unlikely to be supported by a number of key shareholders, then this indicative response should be taken into account in structuring the offer to mitigate potential control effects, particularly if a large shortfall is expected as a result.

The composition of the company's register should also be considered as this may affect the overall control impact of the rights issue. For example, in the case of a company whose register includes only one major shareholder (say +30%) and no other substantial shareholders, the major shareholder could end up acquiring control even if the amount of shortfall is relatively small.

14 Avoid undertaking inconsistent corporate actions

The company's previous corporate actions should be considered in the context of the proposed fundraising, particularly if those actions are inconsistent with conducting a rights issue (such as a recently completed share buyback). This could indicate the lack of a legitimate purpose for the capital raising.

15 Establish an independent board committee where insiders are likely to be involved

The Panel has recently confirmed that Guidance Note 19: *Insider Participation in Control Transactions* (**GN 19**) is likely to be relevant where participating insiders are involved with the rights issue.

GN 19 provides guidance on situations where there is involvement (or potential involvement) in a takeover or other change of control proposal by insiders (being management, directors and external advisers of the target) with a bidder. The objective of this policy is to ensure that consideration of the control proposal by the target board is undertaken free from any actual influence, or appearance of influence, from participating insiders.

Accordingly, in circumstances where participating insiders are likely to be involved (for example, where the company's board includes nominee directors appointed by the controlling shareholder which is proposing to underwrite the rights issue) any actual or potential conflicts of interest should be appropriately managed.

The measures that should be implemented to properly manage such conflicts in any individual case will vary depending on the particular circumstances. However, such measures could include:

- establishing an independent board committee (**IBC**) that is represented by independent financial and legal advisers;
- putting in place protocols in respect of the IBC's consideration of any funding proposal by the controlling shareholder; and
- ensuring that minutes of meetings of the IBC are produced in a timely fashion to properly record relevant deliberations.

16 Ensure there is adequate disclosure of the potential control effects

The offer documents should provide sufficient disclosure to allow investors to assess the offer (including any potential control effects) and decide whether to take up their entitlements and/or subscribe for additional shares.

Disclosure is required regardless of the form which the offer takes (for example, whether the offer is made under a prospectus or pursuant to the "low doc" regime).

More disclosure is generally expected for rights issues that have more potential control effects (for example, where a person's interest increases from 10% to 40%, compared to an increase from 51% to 55%).

In this context, such disclosure should normally include details of:

- the possible control scenarios;
- details of the persons who may end up owning any material shortfall;
- the reasons behind the choice and roles of any supporting shareholders, underwriters and sub-underwriters;
- the future ownership structure of the company; and
- the intentions for the company of persons who may obtain control.

ASIC and the Panel will often scrutinise the adequacy of such disclosure.

Is a need for funds or financial distress a safe harbour?

The Panel has indicated on a number of occasions, including most recently in *Energy Resources of Australia Limited* [2019] ATP 25, that the need for funds is not a safe harbour. However, we think that need for funds will be a highly relevant consideration for companies seeking to raise capital to address issues arising from COVID-19 or its economic impacts.

The urgency of a company's need for funds is particularly relevant in this context. Where the company has been able to establish a clear urgent need for capital, the Panel has previously shown a willingness to allow rights issues with control effects to proceed in circumstances where intervening could "spell the end of the company". Where the urgency of the need for funds is less clear, the Panel may regard other competing factors (such as dilution) as more important.

As a general principle, the Panel cases involving financially distressed companies seem to suggest that provided there is a clear and genuine need for funds, a rights issue resulting in a control effect will not be unacceptable (in the absence of other issues) provided the rights issue is structured appropriately and suitable dispersion measures have been put in place.

Nevertheless, some public and academic debate exists as to whether an urgent need for funds in the context of a distressed situation should in fact serve as a "safe harbour". Given the challenges likely to be faced by a number of listed companies as a result of COVID-19 or its economic impacts, it will be interesting to see whether the current environment will cause this policy setting to be tested.

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