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19 April 2018

Mr Allan Bulman
Director
Takeovers Panel
Level 10, 63 Exhibition Street
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***By email**: takeovers@takeovers.gov.au*

Dear Mr Bulman

Takeovers Panel Consultation Paper – Guidance Note 17 — Rights issues

ASIC appreciates the opportunity to provide comments on the Takeovers Panel's proposed revisions to Guidance Note 17—*Rights issues* (**GN 17**). This letter sets out ASIC's comments on the draft revisions to GN 17 and the questions raised in the Panel consultation paper.

1. Overview

1.1. It has long been recognised that there is potential for the purposes of the takeover provisions to be undermined by inappropriate reliance on concessions allowed for acquisitions permitted under certain rights issues and underwriting arrangements.[1] The overlay of the principles in s602 of the *Corporations Act 2001* (**Act**) to such acquisitions,[2] together with the Panel's power to declare unacceptable circumstances in relation to them, are crucial in ensuring trust and confidence in both the integrity of the takeover provisions and the protections they provide to those investing in public markets.

1.2. A number of core principles have been reflected the various published policies concerning when a particular rights issue or underwriting arrangement may give rise to concerns of unacceptable circumstances over time.[3] These include the following:

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[1] Underwriting of rights issue shortfalls was one of the first areas of concern prompting specific guidance by the National Companies and Securities Commission (NCSC): see NCSC Policy Statement 112 *Companies (Acquisition of Shares) Act and Codes: Section 60 — Arrangements Contrary to the Purpose of the Legislation* (NCSC PS 112) (1 November 1982) paras 4-9. See also the Panel's Superseded *Guidance Note 17 – Rights issues* (10 January 2006) at p1.

[2] Including the application of s602 principles in connection with determining requests for relief and approval under s655A and s615 of the Act: see RG 6 at RG 6.104, RG 6.123 and RG 6.131 and s655A(2).

[3] See NCSC PS 112 as revised 7 November 1986. See also ASIC Consultation Paper 43 *Finalising IPS 159 Takeovers: Discretionary powers* (20 February 2003) Section I and ASIC Superseded Policy Statement 159 *Takeovers, compulsory acquisitions and substantial holding notices* (reissued 23 September 2003) Section R.

(a) It is a necessary consequence of the express inclusion of the exceptions themselves that rights issues and underwriting arrangements complying with the exceptions will in some cases result in acquisitions that affect control of an issuer.[4] Any policy must permit the provisions to operate in a way that acknowledges the control effect arising from these fundraising activities from time to time;

(b) Like all exceptions to the general takeover prohibition, the rights issue and underwriting exceptions were included for a discernible purpose and should be relied upon for that purpose—that is to ensure that the takeover provisions do not overly inhibit an entity's ability to raise capital under a pro-rata offer to its shareholders or unduly prevent an issuer from managing the risk of a shortfall in a fundraising via underwriting arrangements;[5]

(c) The existence of a 'black letter' exception for rights issues and underwriting in s611 of the Act allows for the possibility that persons with an intent to acquire control may seek to do so in reliance on these exceptions in circumstances that amount to an avoidance of the takeover provisions or are inconsistent with the underlying purposes for which the takeover restrictions were intended to yield to the fundraising needs of an issuer; and

(d) Both:

(i) the impact and significance of the control effect of any rights issue or underwriting arrangement; and

(ii) the inferences that may be drawn as to the purposes of parties who may be seeking to avoid Chapter 6;

will often depend, at least in part, on an assessment of whether the parties involved have taken reasonable steps to mitigate the relevant control effect in the circumstances.

1.3. The importance of those involved in structuring rights issues and underwriting arrangements incorporating effective mitigation strategies is reflected in the Panel's current guidance in GN 17.[6] It is also referred to in ASIC Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (**RG 6**).[7]

1.4. ASIC welcomes the opportunity to enhance the focus of the Panel's existing policy on control mitigation strategies—and in particular the effectiveness of those strategies having regard to the circumstances of the relevant fundraising overall. In ASIC's view a meaningful and effective mitigation strategy goes a long way to addressing any concern that the ultimate control effect of a rights issue or underwriting arrangement was unwarranted, consistent with an avoidance purpose or otherwise unacceptable. In ASIC's experience, where it has raised concerns regarding reliance on the relevant exceptions, the implementation of an effective mitigation strategy has addressed these concerns.

1.5. However, in refocusing its policy ASIC would encourage the Panel to ensure that its policy is not interpreted so as to:

(a) unnecessarily restrict the flexibility of the Panel to consider factors that suggest an avoidance of the takeover provisions in connection with inappropriate reliance on the rights issue and underwriting exemptions; or

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[4] See also GN 17, para 4(a).

[5] See RG 6.69 and RG 6.137. See also *InvestorInfo Limited* [2004] ATP 6 at [35]-[36].

[6] GN 17 at paragraph 5.

[7] RG 6 at RG 6.85.

(b) inadvertently encourage those seeking to undertake transactions with a control impact that would be more appropriately addressed by seeking shareholder approval, to seek to do so instead on the basis of the fundraising exceptions.

1.6. In particular ASIC considers that it is important that those involved in propounding and structuring control transactions do not consider that the refocused guidance reintroduces a new 'black letter' alternative to achieving a control outcome—that is that complying with items 10, 10A and 13 of the Act, having a cogent need for funds and incorporating a shortfall facility or renounceability will provide complete protection from a charge that a likely or actual acquisition of control under a fundraising is unacceptable.

1.7. Having regard to the above, ASIC sets out some suggestions and comments in response to the specific questions in the consultation paper below.

2. Response to Consultation Paper questions

Are proposed paragraphs 7 to 10 useful? Please identify any amendments you think should be made to proposed paragraphs 7 to 10.

2.1. Ineffective mitigation strategies—and in particular shortfall facilities—are one of the most common issues raised by ASIC in connection with its reviews of rights issues and underwriting arrangements.[8]

2.2. Subject to the comments outlined below, ASIC agrees that the Panel's expanded and more prominent guidance on mitigation strategies in paragraphs 7 to 10 is helpful. We believe the updated guidance is particularly useful in highlighting:

(a) that it is not just the existence of a mitigation strategy that must be considered but the adequacy and effectiveness of that strategy in all the circumstances; and[9]

(b) some of the common terms of shortfall facilities that give rise to concerns that they are not as effective as they should be.

Mitigation strategies as a 'safeharbour' – Paragraph 10

2.3. As noted above, ASIC agrees that an appropriate and effective mitigation strategy is central to ensuring that a rights issue or underwriting arrangement does not give rise to unacceptable circumstances. ASIC supports the heightened focus of the draft guidance note on mitigation strategies in this regard.

2.4. However ASIC believes it is important that the new guidance does not unnecessarily convey a message to the market that:

(a) merely incorporating renounceable rights, a shortfall facility or a back-end bookbuild provides in itself an effective 'safeharbour' from unacceptable circumstances (where a need for funds is shown); or

(b) the Panel will not look at all the factors that may give rise to unacceptable circumstances in assessing the acceptability of a rights issue or underwriting arrangement in any particular case.

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[8] See eg ASIC Report 489 ASIC *Regulation of corporate finance: January to June 2016* at para 195-200.

[9] For example, paragraph 7(b)(iii) and (c). See also RG 6, Table 4 ('Shortfall dispersion').

2.5. There are a number of circumstances other than the lack of an appropriate dispersion strategy or need for funds that may mean a rights issue or underwriting arrangement is unacceptable. These include for example:

(a) disclosure deficiencies—which may themselves exacerbate the control effect by discouraging participation;[10]

(b) structuring, terms or arrangements that contravene, or will lead to a contravention of, the Act (for example if the underwriting is not a genuine one[11] or the terms of the rights issue do not meet the requirements of the exceptions in items 10, 10A and 13[12]);

(c) factors making the rights issue or fundraising (let alone any shortfall facility) generally unattractive to a large number of holders—eg pricing at a small or no discount or a large offer ratio requiring a significant commitment relative to existing holdings;[13] and

(d) unequal treatment such as underwriters receiving fees in respect of shares the issue of which they don't in fact underwrite (eg their direct entitlements) with the result that they effectively receive an additional discount under the offer.[14]

2.6. In addition to these practical grounds, there are also grounds more directly associated with the purpose and intent of the fundraising that may give rise to unacceptable circumstances. It is these grounds that the draft guidance appears to seek to address in paragraph 10 when it refers to a need for funds not being 'caused or induced by a person who may benefit from any potential control effect'.

2.7. ASIC believes that it is important that the Panel retain the flexibility to declare unacceptable circumstances not only in cases where insufficient mitigation strategies have been put in place, but also where it is apparent in the circumstances that there is avoidance of the takeover provisions or otherwise inappropriate reliance being placed on the exceptions: see also RG 6.83-RG 6.84.[15] While there will be many cases where is apparent that a rights issue or underwriting is unacceptable on these grounds having regard to a link between the need for funds and the potential acquirer of control (including the debt for equity conversion example cited in the draft revised GN 17),[16] ASIC notes that this may not always be the case.

2.8. Other examples may include:

(a) where the conduct of the issuer is consistent with an intent to engineer a particular control outcome—such as where:

(i) a buyback is followed in short succession by a fundraising;[17]

(ii) a rights issue follows a large placement to an underwriter as a mechanism to ultimately deliver what will most likely be in the circumstances a holding significantly greater than 20%; or

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[10] See RG 6.95 and GN 17 at paras 25-32.
[11] See eg *ABM Resources NL 01R* [2016] ATP 7 at [39]-[43] and RG 6, Section E.
[12] See eg *Avalon Minerals Limited* [2013] ATP 11 at [36]-[44].
[13] As noted in the draft updated guidance at footnote 20. See also *Gladstone Pacific Nickel Limited 02* [2011] ATP 16 at [19]-[26]; *Yancoal Australia Limited* [2014] ATP 24 at [95] and *Coppermoly Limited* [2013] ATP 8 at [21]-[25].
[14] See *ABM Resources NL* [2016] ATP 5 at [66] and *Celamin Holdings NL* [2014] ATP 22 at [42] (upheld on appeal).
[15] See also *Coppermoly Limited [2013]* ATP 8 at [34].
[16] See footnote 19. See also ASIC Report 512 *ASIC regulation of Corporate Finance: July to December 2016* paras 190-194.
[17] See eg *Phosphate Resources Limited* [2003] ATP 3.

(iii) an underwriter or its associates buys shares after the announcement of the fundraising or participates in the shortfall facility;[18] or

(b) where an unacceptable control purpose is manifest from prior conduct or other evidence.

2.9. Given the various instances where a fundraising may still be unacceptable irrespective of whether an appropriate dispersion strategy has been put in place ASIC suggests that paragraph 10 of the draft guidance is amended to clarify that:

(a) a rights issue (or underwriting arrangement) will generally not be unacceptable *for want of efforts to mitigate the control effect* if an appropriate dispersion strategy in the circumstances[19] has been put in place;

(b) this is not necessarily a safeharbour and the Panel will consider other factors – including need for funds, the overall effectiveness of the dispersion strategy having regard to structural matters such as pricing and size and whether there's any apparent avoidance of the takeovers provisions or inappropriate reliance on the exceptions in the circumstances; and

(c) the Panel may be more likely to make enquiries into whether inappropriate reliance has been placed on the exceptions where the need for funds is caused or induced by, or the funds will be used in connection with a transaction involving, a person who may benefit from the potential control effect.[20]

2.10. As an alternative, ASIC suggests a similar emphasis on the importance of employing appropriate and effective mitigation strategies could be maintained by recasting paragraph 10 to simply state that it is likely that unacceptable circumstances will arise in relation to most rights issues and underwriting arrangements that may have control implications where an appropriate dispersion strategy is not put in place.

Mitigation strategies

2.11. ASIC's reading of the reference to an 'appropriate dispersion strategy' in paragraph 10 is that Panel will consider the overall strategy adopted taking into account all of the options to mitigate control effects included in proposed paragraphs 7(a), (b), (c) and 8.

2.12. This means that an issuer should consider more than just one of the options in formulating their dispersion strategy. For example, in an underwritten offer, merely because an issuer has implemented a shortfall facility should not mean that the issuer should not also seek (via offers made on non-discriminatory terms)[21] to ensure as wide a spread of underwriters and sub-underwriters as possible.[22]

2.13. The Panel may wish to make this clearer in its guidance, perhaps in a footnote.

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[18] See eg *Coppermoly Limited [2013]* ATP 8 at [28]-[34].

[19] See comments at paragraphs 2.11-2.13.

[20] This is particularly so given the Panel's proposal to expressly acknowledge that a 'need for funds' includes a commitment to use funds for a certain purpose (see draft fn 21). ASIC considers there are particular risks of inappropriate reliance, for example, in circumstances where an underwriter or substantial holder is the vendor or an associate of a vendor of an asset to the issuer and the funds raised will be used to purchase the asset.

[21] *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7 at [34]-[35].

[22] See eg *Avalon Minerals Limited* [2013] ATP 11 at [25]-[35]. See also Table 4 of RG 6 ('Choice and spread of underwriters and sub-underwriters'). See also *Real Estate Capital USA Property Trust* [2012] ATP 6 at [31]-[35] with respect to renounceability alone as a mitigation strategy.

Caps and allocations under shortfall facilities — Paragraph 7(b)(ii)

2.14. ASIC agrees with the Panel's focus in the updated guidance on the handling of shortfall applications as part of a shortfall facility. How directors allocate shortfall in practice is key to assessing the effectiveness of a shortfall facility as a mitigation strategy.

2.15. However ASIC suggests that two aspects of the Panel's guidance in paragraph 7(b)(ii) may benefit from further clarification—that is:

(a) the appropriate allocation of the shortfall when there are oversubscriptions; and

(b) the position regarding caps on participation in shortfall facilities.

2.16. In ASIC's view where there are oversubscriptions under a shortfall facility, and that facility has accordingly fully mitigated the control effect that would otherwise arise under a rights issue or underwriting arrangement, the allocation policy should not[23] then intervene to deny certain applicants some or all of their subscription with the result that a shortfall is created that flows through to the underwriter or major shareholder.

2.17. As the Panel alludes to at paragraph 7(b)(iii) of the draft guidance, the exercise of discretions should not unnecessarily exacerbate a potential unacceptable control effect. Unnecessarily denying applications under a shortfall facility with a result that the shares are taken up by an underwriter who has voting power above 20% has this effect. It does not matter whether the subscriptions are denied as a result of directors exercising discretions on a case by case basis, or as part of a policy the directors have set or agreed from the outset that caps participation under the facility to the benefit of the underwriters or a major shareholder.

2.18. The singular result that shortfall shares end up in the hands of a controlling shareholder rather than a non-controlling shareholder[24] is the reason that ASIC generally opposes the use of caps in shortfall facilities: see ASIC Report 489 *ASIC Regulation of corporate finance: January to June 2016* at paras 195—200.

2.19. Whatever view a company may take about appropriate limits around participation and director discretion in a fundraising that does not engage the rights issue and underwriting exceptions and will not have an effect on control of the issuer, where a fundraising does have a control effect, in ASIC's view it is difficult to justify exacerbating that control effect over allocating shares to a shortfall applicant (whether via a cap or otherwise).

2.20. This is particularly so in the case of underwriters given they are generally paid a fee for their services precisely because they are taking the risk of not knowing what holding they will ultimately be required to acquire. An underwriter that insists on receiving a guaranteed minimum allocation through the imposition of a cap is arguably more akin to a placee than underwriter—at the very least in relation to that minimum allocation and most likely overall. This may raise a query as to the basis on which they should receive a fee for that allocation and whether any such fee would mean that the rights issue offer was in effect made on the same terms for all shareholders.[25]

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[23] Other than to the extent it's necessary to prevent a breach of the law or listing rules.

[24] As generally a person taking up under a shortfall facility can't increase their voting power above 20% by doing so.

[25] s611 item 10(e).

2.21. In light of the above, ASIC suggests that:

(a) while taking into account existing holdings in assessing any scale-back may help to ensure fairness in dealing with oversubscriptions and encourage participation in the first place, the most important point from a control mitigation perspective is that all shares available under the facility that can be issued are issued to applicants despite the scale-back;[26] and

(b) in view of the extremely limited circumstances in which it is likely that caps and other restrictions on participation could be said not to unnecessarily undermine the effectiveness of a shortfall facility, it would be preferable for the Panel's guidance to more clearly indicate that caps and other restrictions are problematic and should be avoided.

2.22. As such, ASIC recommends that the Panel slightly amend the proposed guidance at paragraph 7(b)(ii) to address the above. ASIC suggests wording to the following or similar effect:

"*Where shortfall applications exceed the number of shares available under the facility, oversubscriptions will be scaled back in accordance with an allocation policy that takes into account the existing holding of each applicant and ensures that, if not all, as many shares as possible are issued under the facility [14]. Caps and other restrictions on the ability of shareholders to participate in a shortfall facility should be avoided as they reduce the effectiveness of the facility to mitigate any control effect [15].*"

Shareholder approval — Paragraph 7(d)

2.23. Seeking fully informed shareholder approval for acquisitions by shareholders or underwriters above the 20% threshold in s606 of the Act is generally an acceptable alternative to relying on the rights issue and underwriting exceptions: see RG 6.97—RG 6.99.

2.24. Any acquisitions pursuant to the approval should take place both within the limits of the approval and in accordance with the reasonable expectations of the approving shareholders based on the disclosures made to them: see *Regal Resources Limited* [2016] ATP 17.

2.25. While shareholder approval may be considered by those structuring an offer as an alternative to, say, including a shortfall facility in a rights issue, it is arguably not itself a strategy concerned with 'mitigating potential control effects' in the way the mechanisms listed in paragraphs 7(a), (b) and (c) seek to do. Shareholder approval does not mitigate the control effect of a particular fundraising structure but rather, in practical terms, addresses the unacceptability of failing to mitigate the control effect.

2.26. Additionally, the effect of obtaining shareholder approval is not limited to dealing with unacceptable circumstances arising from a failure to include an effective mitigation strategy. Shareholder approval under item 7 of s611 is one of the principal methods by which those who intentionally seek control may choose to proceed. If obtained on a fully informed basis it is often an answer to issues associated with most of the unacceptability factors set out in GN 17 at paragraphs 11 to 25 (for example if there is a question around the need for funds, or a control purpose suggested from structuring or pricing or the transaction is essentially a debt for equity swap).

[26] Also, as the Panel suggests at paragraph 7(b)(i), it may be that persons other than shareholders are able to apply under the facility.

2.27. As such, while acknowledging that paragraph 7(d) reflects current paragraph 24 of GN 17, given the particular focus of the proposed new guidance note ASIC suggests that the reference to shareholder approval should be removed from paragraph 7. If the Panel is minded to retain a reference to shareholder approval as an alternative to addressing unacceptable circumstances arising from a particular rights issue or underwriting generally then an appropriate place to do so may be in a separate section at the end of the guidance note or by way of a cross reference to RG 6.

Legal limits on participation in shortfall facilities — Paragraph 9

2.28. ASIC notes that the Panel may also wish to include a cross reference at the end of footnote 17 to RG 6.101 which sets out ASIC's position on the legal restrictions applying to applications under shortfall facilities and the relief available in RG 6.102—RG 6.109.

2.29. ASIC does not consider that underwriters of a rights issue that seek to participate in a shortfall facility will generally have the protection of items 10, 10A and 13 of s611 for acquisitions arising from their participation in that facility.

If there is a clear need for funds and an appropriate dispersion strategy has been put in place, are structural issues, such as the pricing and size of the rights issue, still relevant in determining whether the rights issue is unacceptable?

Is footnote 20 appropriate?

2.30. Yes. As discussed above the objective and effectiveness of a dispersion strategy can be wholly negated by the inappropriate sizing and pricing of a fundraising.

2.31. In ASIC's view the value of a dispersion strategy cannot be considered in isolation from these (and other) factors set out in the Panel's guidance note and RG 6.

2.32. Structural issues are also relevant in determining whether it is likely that, irrespective of any dispersion strategy that is put in place, the rights issue or underwriting is unacceptable on the grounds that it seeks to avoid the takeover provisions or reliance on the exceptions is inappropriate.

Do you agree with proposed footnote 30, which states that unacceptable circumstances may arise if an underwriter is interested in control, rather than merely laying off the risk of holding shares? Please explain.

2.33. Yes. As noted above ASIC considers that it is important that the Panel continue to consider whether reliance on the exceptions is inappropriate or designed to avoid the takeover provisions.

2.34. Central to consideration of whether there is likely inappropriate reliance in an underwritten offer is any apparent control purpose of the underwriter.[27]

Do you agree with the minor amendments made to the Guidance Note? Please identify any other amendments you think should be made.

2.35. ASIC agrees with the proposed addition of paragraph 29 in the draft guidance note.

[27] See Table 4 in RG 6 ('Underwriting arrangements').

2.36. ASIC recently reiterated its view that the same level of disclosure regarding the potential control effect of a fundraising is required regardless of whether a prospectus or a cleansing notice is used.[28] This should include clear disclosure, preferably in a table, setting out the identities of each major security holder, underwriter or sub-underwriter who post-offer may have voting power of greater than 20% in the entity, as well as the outcome at various other levels of take up of the offer (for example 25%, 50% and 75% of shares taken up by other holders).[29] Where there will be no effect on control of the issuer because items 10, 10A and 13 are not available in relation to the offer this should also be clearly disclosed.

2.37. ASIC also agrees that in addition to disclosure regarding the effects on control, a similar level of disclosure should be made regarding other matters of the kind set out in paragraph 31 of the draft guidance having regard to the principles in s602: see also RG 6.95—RG 6.96.

3. Contact

3.1. ASIC would be happy to discuss the contents of this submission and any queries the Panel may have regarding the suggestions raised.

3.2. Please feel free to contact me at a convenient time if you would like to do so.

Yours sincerely

Kim Demarte
Senior Specialist – Mergers & Acquisitions
Corporations
Australian Securities & Investments Commission

[28] ASIC Report 512 *ASIC Regulation of corporate finance: July to December 2016*, paras 185-189.
[29] This includes the principal underwriter even when there are sub-underwriting arrangements in place: see *Freshtel Holdings Limited* [2016] ATP 15 at [22]-[25].

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3 April 2018

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Dear Sir/Madam

Guidance Note 17 Rights issues

The Corporations Law Committee of the Business Law Section of the Law Council of Australia (**CC**) welcomes the opportunity to provide this submission to the Takeovers Panel (**Panel**) on the Consultation Paper on Guidance Note 17 – Rights issues (**Guidance Notes**).

Introductory and general comments

In summary, the CC considers that the proposed amendments to the Guidance Notes are useful and improve the quality of the guidance provided.

However, the Panel should avoid being too prescriptive in relation to statements about the exercise of its discretion to make declarations of unacceptable circumstances in relation to rights issues. The Panel should have regard to the circumstances of each case and the *actual* effect on control, or (when considering circumstances in advance) that there is a *real and substantial risk* of an effect on control that is *unwarranted* in the circumstances.

Indeed, the Panel should be positively disposed to adopting a "wait and see" approach to rights issues – if there is in fact no effect on control, there is no warrant for the Panel to intervene. Even if there is an actual effect on control, that effect might not warrant Panel intervention.

The Panel should only intervene in advance when the circumstance clearly warrant intervention and by analogy to a court's approach to injunctions, where the balance of convenience favours a restraining order and another subsequent order of the Panel would not be able to address the circumstances – but this would rarely be the case because any effect on control could readily be addressed by orders in relation to voting of shares or disposal of shares.

If a company has a genuine need for funds (and the Panel should not second guess the genuine and reasonable views of the board of the company) there should be a high threshold before the Panel should intervene at all. The relevant exceptions in section 611 should be given their full effect, subject only to intervention when the exceptions are being

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exploited or gamed - that is, where an exception is being used for a purpose outside the spirit of the provision.

There will be cases where a related party underwriter is the only available source of equity funds and, if all other shareholders have been given a reasonable and equal opportunity to participate in the capital raising, it is not presumptively unacceptable that a related party's interest increases because they take up their entitlement and others do not, or that a related party is prepared to underwrite and no one else is prepared to do so.

Recognising that the Panel's jurisdiction is such that each case must be decided on its own facts, it would be presumptively unacceptable if a related party manufactured a situation and used that opportunity to unfairly obtain control. It is also conceivable that a related party exploiting the financial weakness of an issuer to obtain control would be unacceptable. However, if a related party obtaining control is merely an *incidental* outcome of a genuinely required capital raising, that is not inherently unacceptable.

Against this backdrop, the Panel's guidance should not be, or be understood by the market as, a prescriptive set of requirements that must be complied with in all cases.

Rather, the taking of reasonable steps to mitigate any control effect, including implementing a dispersion strategy that is appropriate to the circumstances, should be regarded as prophylactic or creating a safe harbour – if these elements are present, unacceptable circumstances are unlikely to arise, but their absence does not imply that unacceptable circumstances will arise or are likely to arise.

It follows that the amendments to the Guidance Notes should make this clear. This objective could be achieved by adding to the opening words of new paragraph 7.

Specific responses

1. ***Are proposed paragraphs 7 to 10 useful?***

   Generally, yes, subject to the above comments. Paragraphs 7 to 10 provide some additional guidance, albeit largely reflecting the decided cases. Paragraph 8(c) does not add much to the prescribed timetables under the ASX Listing Rules and mandatory content requirements under the *Corporation Act* (Cth).

   Please identify any amendments you think should be made to proposed paragraphs 7 to 10.

   Paragraph 7(b)(ii) should be amended to make it clear that allocation in proportion to shareholdings is not required, merely one acceptable measure. Other methods of allocation may also be acceptable. Likewise, paragraph 7(b)(iii) should be amended to make clear that a discretion on the part of directors is not inherently evil; rather it is the exercise of that discretion that could be problematic. The absence of a discretion is therefore prophylactic but its mere presence is not fatal.

   Paragraph 7(b)(iii) should also be amended to recognise that a cap may be appropriate for other reasons, for example to avoid a breach of other legislation such as the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

Paragraph 7(d) is out of context – informed approval will not "mitigate potential control effects" and is an alternative to such mitigation.

Paragraph 8(a) could be clarified – are the sub-underwriters not to be associated with each other, the issuer, the underwriter, or someone else? Or all of the foregoing? We assume that the terms "associate" and "related party" are used in their *Corporations Act 2001* (Cth) senses, but there could be value in avoiding uncertainty that could exist in the minds of some readers.

Paragraph 10 should be amended to clarify that a shareholder causing or inducing a need for funds is not of itself problematic and that a shareholder exercising a right to be repaid or declining to further extend credit should not of itself be problematic. The manufacture or contrivance of a need for funds in order to obtain control is, however, problematic but this is an important distinction and the guidance needs to be clearer in this regard. At present, the paragraph perhaps will prejudice issuers with a genuine need for funds but without access to professional underwriting.

2. ***If there is a clear need for funds and an appropriate dispersion strategy has been put in place, are structural issues, such as the pricing and size of the rights issue, still relevant in determining whether the rights issue is unacceptable?***

Yes, in principle, structural issues remain relevant. For example, a patently unattractive price may be problematic.

Is footnote 20 appropriate?

Yes, but we suggest that the comment should be elevated to the text.

3. ***Do you agree with proposed footnote 30, which states that unacceptable circumstances may arise if an underwriter is interested in control, rather than merely laying off the risk of holding shares?***

No.

Please explain.

The footnote should be amended to be clearer, such that the point that it makes is that an underwriter whose *principal objective* is obtaining control may give rise to unacceptable circumstances, or more correctly a transaction which has the apparent principal objective of securing control to an underwriter may give rise to unacceptable circumstances.

The possibility of the underwriter obtaining an investment, even a large investment, could be a motivation even for a professional underwriter. Indeed a professional underwriter may in particular circumstances be indifferent to that outcome and have the balance sheet capacity to assume that risk. In other words, no inference should necessarily be drawn from a lack of full sub-underwriting of an issue. However, the footnote suggests that any rights issue where the underwriter is not "laying off the risk of holding shares" will give rise to

unacceptable circumstances and that suggestion is not correct – the question is whether there is an unacceptable effect on control or an unacceptable risk of an effect on control and this question cannot be answered solely by reference to whether or not the issue is sub-underwritten.

We also reiterate that there will be some situations where the only available underwriter may well be interested in control and/or be a related party. If a company in financial distress has a demonstrable need for funds and no alternative source of funds, the risk that a shareholder may obtain or increase control does not necessarily lead to a conclusion that unacceptable circumstances will arise. The village should not be burnt in order to save it.

4. ***Do you agree with the minor amendments made to the Guidance Note?***

Yes.

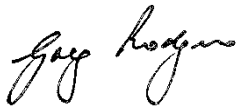
Please identify any other amendments you think should be made.

Paragraph 22(c) could be amended to remove the words in brackets, given that in relation to accelerated offers at least, the timing difference is not material.

I trust these observations are of assistance.

Please contact Shannon Finch, Chair of the Corporations Committee at Shannon.finch@au.kwm.com on 02 9296 2497 in the first instance, if you require further information or clarification.

Yours faithfully



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By email

Takeovers Panel
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Dear Sir / Madam

Submission on Takeovers Panel Consultation Paper on Guidance Note 17: Rights Issues

Thank you for the opportunity to make comments in response to the Takeovers Panel (the **Panel**) Consultation Paper on Guidance Note 17 *Rights Issues* (**GN 17**).

Introductory and general comments

1 In summary, we recognise the difficulty of delineating a safe harbour. We consider that the proposed amendments to GN17 should be revisited to ask whether the Panel might provide a safe harbour on the basis suggested below, and if that is not possible whether the additional guidance provided could be tailored or added to in order to further assist market participants.

2 If the Panel is prepared to delineate a more certain safe harbour, we believe that this would be helpful in creating greater certainty for market participants and ultimately in reducing the volume of applications made to the Takeovers Panel concerning control issues in a fundraising context (which must be the goal of any change to the Guidance Note). For the reasons set out in a bit more detail below, we do not think that what has been proposed in the consultation will provide the requisite degree of certainty because it leaves open the question of what constitutes an "appropriate dispersion strategy" which is an element in falling within the safe harbour (at Paragraph 10 of the revised Guidance Note).

3 In order to provide the market with a greater degree of certainty, a safe harbour along the following lines might be considered:

"Unacceptable circumstances do not exist where:

(a) there is a genuine need for funds; and

(b) there have been bona fide attempts made by the issuer to mitigate the control impact,

unless there is direct or indirect evidence that, either: (1) there is a viable commercial alternative with a lower impact on control that is available to the issuer; or (2) uncommercial actions have been undertaken by the issuer or the proposed underwriter or sub-underwriter in structuring or executing the offer or in the period leading up to a decision to undertake the offer."

4 The current consultation takes some steps toward more high level guidance, which seems to include some assumptions which we have concerns with. For example, notwithstanding footnote 30, there may be cases where a related party underwriter is the only available source of equity funds and the only person prepared to underwrite and, if all other shareholders have been given a reasonable and equal opportunity to participate in the capital raising, it ought not

take the issuer outside the safe harbour or realms of acceptability if a related party is prepared to underwrite and no one else is prepared to do so; it does not necessarily follow that the shareholder is interested in control. In the recent resources downturn, many major shareholders found themselves in such a position with no intention or desire for control. It is clear in Paragraph 25 that shareholder control as a result of a rights issue is not generally unacceptable, in the presence of reasonable dispersion strategies and the absence of other factors.

5 We consider that it would be presumptively unacceptable if a related party used a situation to unfairly obtain control. It is also conceivable that a related party exploiting the financial weakness of an issuer to obtain control would be unacceptable. Both of those circumstances would fall outside the scope of the safe harbour we have proposed as they would constitute uncommercial actions undertaken by a proposed underwriter. However, if a related party obtaining control is merely an incidental outcome of a required capital raising that is genuinely required, and the issuer has sought better terms and a structure less likely to impact control, that should not deprive the issuer of the benefit of the safe harbour.

6 By way of further example, paragraph 7(b)(iii) of the revised guidance seems to suggest that a discretion on the part of directors in the disposal of shortfall is inherently unacceptable, which we disagree with since it should be how that discretion is exercised in the circumstances that is the relevant factor in determining whether unacceptable circumstances exist (or whether the issuer continues to enjoy the benefit of the safe harbour).

7 If the safe harbour approach suggested above is not able to be achieved, the Panel might consider as an alternative to the current consultation, to add:

(i) **Impact on control:** further guidance about what would be considered to be an "impact on control" – what is now paragraph 30 of the revised guidance note starts to do this but isn't comprehensive. For example, would the Takeovers Panel be open to stating that an increase of voting power of no more than a shareholder's "creep" capacity is unlikely to give rise to unacceptable circumstances (unless the increase took them through a significant threshold such as 10%/ 50%/ 90%)?;

(ii) **Shareholder loans:** we suggest that Paragraph 10 of the revised guidance should be amended to clarify that a shareholder causing or inducing a need for funds is not of itself problematic and that a shareholder exercising an existing right to be repaid or declining to further extend credit should not of itself be problematic. The manufacture or contrivance of a need **for** funds in order to obtain control is, however, problematic but this is an important distinction and the guidance needs to be clearer in this regard.

(iii) **Preventing dispersion mechanisms:** specific guidance that the Panel will be concerned about the potential for unacceptable circumstances where it can be demonstrated a major shareholder or related party, underwriter (or sub-underwriter) sought to prevent reasonable dispersion mechanisms from being put in place in circumstances where the structure ultimately adopted created an opportunity for that person to acquire control or a substantial interest. This guidance is something which would in practice assist issuer Boards in discussing these matters with other stakeholders when they find themselves in this situation; and

(iv) **Some relevant factors:** a more detailed list of all the factors the Panel has considered as relevant to date in the context of rights issues, with a cross reference to the relevant paragraphs of the decisions considering each factor. We consider that while the existing guidance is fulsome, the continued applications in this area suggest some companies are struggling with of the volume and sources of the existing guidance and such a list may be of practical assistance to them, especially where timing is tight. We consider a starting point for the list may be:

- *An independent Board committee*
- *Alternate funding options considered*
- *Substantial holder views*
- *Why shareholder approval has not been sought*
- *Use of funds*
- *Implications of not raising those funds*
- *Renounceability*
- *Ratio*
- *Share price*
- *their assumption of risk*
- *Relevant requirements for shareholder approval before issue or exercise of securities*
- *Independent advice*
- *Discussions with other potential underwriters*
- *Principles in Section 602 of the Corporations Act*
- *Need for funds*
- *Any repayment to related parties*
- *Terms of securities*
- *Discount or premium*
- *Top up facility and limits and discretions in respect of applications and scaleback of the same*
- *Underwriter or subunderwriters dealing in securities or rights and any influence re offer*
- *The potential percentage increase in voting power*
- *Disclosure (control scenarios and implications, including post conversion and creep, identities, reasons of supporters, underwriters and their business and intentions, and subunderwriters, of potential controllers, future shareholding patterns an effect of proposed dispersion strategies, details of litigation, reasons for recent capital variations, compulsory acquisition rights and intentions)*

Additional comments

Further comments below, assuming the revised guidance note remains largely as it stands. The heading numbers correspond to the questions in the Takeover Panel's consultation paper:

1 Are proposed paragraphs 7 to 10 useful?

(a) Paragraphs 7 to 10 provide some useful additional guidance albeit largely reflecting the decided cases. Paragraph 8(c) does not add much to the prescribed timetables under the ASX Listing Rules and mandatory content requirements under the Corporation Act. See our comment above in paragraph 8 about updating the guidance note to include a comprehensive list of all factors that have previously been considered relevant in various decisions of the Takeovers Panel.

Please identify any amendments you think should be made to proposed paragraphs 7 to 10.

(b) Paragraph 7(b)(ii) should be amended to make it clear that allocation in proportion to shareholdings is not required in order to have the safeharbour, merely one acceptable measure. Other methods of allocation may also be acceptable. Likewise Paragraph 7(b)(iii) should be amended to make clear that a discretion on the part of directors is not inherently of concern; rather it is the exercise of that discretion that could be problematic.

(c) Paragraph 7(b)(iii) should also be amended to recognise that a cap may be appropriate for other reasons, for example to avoid a breach of other legislation such as the Foreign Acquisitions and Takeovers Act.

(d) Paragraph 8(a) could be clarified –the sub-underwriters should not be associated with each other, the issuer or the underwriter. "Non-associated" shareholders and "related parties" are not defined. Is this paragraph intended to capture existing shareholders or only Corporations Act defined "associates"?

(e) Paragraph 10 should be amended to clarify that a shareholder causing or inducing a need for funds is not of itself problematic and that a shareholder exercising a right to be repaid or declining to further extend credit should not of itself be problematic (see above regarding shareholder loans). The manufacture or contrivance of a need for funds in order to obtain control (for example by triggering a repayment not otherwise due, or mischaracterising a discretionary expenditure as a requirement for funds) is, however, problematic but this an important distinction and the guidance needs to be clearer in this regard. At the moment, it arguably prejudices situations where there is a clear need for funds and the company doesn't have access to professional underwriting.

(f) It would be helpful to include an express statement that an issuer does not need to demonstrate all of the things in paragraphs 7 to 10 in order to demonstrate that they have put in place a reasonable mitigation strategy.

2 If there is a clear need for funds and an appropriate dispersion strategy has been put in place, are structural issues, such as the pricing and size of the rights issue, still relevant in determining whether the rights issue is unacceptable?

(a) See proposed approach to drafting the safe harbour above*.* We consider that if there are commercial viable ways of structuring the offer whilst having a lower potential impact on control, then this is relevant to the availability of the safe harbour.

Is footnote 20 appropriate?

(b) Yes.

3 Do you agree with proposed footnote 30, which states that unacceptable circumstances may arise if an underwriter is interested in control, rather than merely laying off the risk of holding shares?

(a) We are concerned there is an assumption a shareholder underwriter is interested in control. We agree there is the potential for unacceptable circumstances to exist if an underwriter is using the exception as a means of consolidating control, but we do not see how this would be established other than by the absence of reasonable dispersion strategies

Please explain.

(b) The footnote should amended to be clearer, such that the point that it makes is that an underwriter whose *main objective* is obtaining control may give rise to unacceptable circumstances, or more correctly a transaction which has the apparent main objective of securing control to an underwriter may give rise to unacceptable circumstances. The possibility of obtaining an investment, even a large investment, may be a motivation for a professional underwriter or indeed a professional underwriter may be indifferent to that outcome and have the balance sheet capacity to assume that risk, especially in the smaller/resources end of the market. However, the footnote suggests that any underwriter who is not "laying off the risk of holding shares" may give rise to unacceptable circumstances and that is not correct.

(c) We also reiterate that there will be some situations where the only available underwriter may well be interested in control and/or be a related party. If a company in financial distress has a demonstrable need for funds and no alternative source of funds, the risk that a shareholder may

obtain or increase control does not necessarily lead to a conclusion that unacceptable circumstances will arise. The village should not be burnt in order to save it.

4 Do you agree with the minor amendments made to the Guidance Note?

(a) Yes.

5 Please identify any other amendments you think should be made.

(a) Paragraph 22(c) could be amended to remove the words in brackets, given that in relation to accelerated offers at least, the timing difference is not material.

(b) See above, paragraphs 3 to 7.

Yours faithfully
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Response to revised Takeovers Panel Guidance Note 17 – Rights issue

We have set out bellow our response to the Takeovers Panel (**Panel**) proposed revised Guidance Note 17.

1 Summary

We appreciate the Panel's proposal to provide clearer guidance about its approach to rights issues. This is an area which occupies a lot of consideration when we are acting for potential issuers, underwriters and shareholders in relation to rights issues. In many cases, the consideration is being undertaken in a situation where the issuer is under some duress – straight forward rights issues don't give rise to the same concerns. Boards and shareholders deserve the benefit of as much clarity as possible in these circumstances.

As set out in our response to question 2, we consider that the Panel should take this opportunity to make clear that where there is a clear need for funds, a rights issue, even if it has a control effect, should not be unacceptable provided an appropriate dispersion strategy has been put in place. The Guidance Note should more clearly recognise that items 10, 10A and 13 are true exceptions from section 606 and contemplate there being a shift in control which is allowed in accordance with those exceptions – the Panel has a key role in ensuring that those exceptions are neither abused or their effect overly restricted.

2 Response to specific questions

(1) Are proposed paragraphs 7 to 10 useful? Please identify any amendments you think should be made to proposed paragraphs 7 to 10.

We agree that the proposed paragraphs 7 to 10 are useful and with moving them forward in the Guidance Note.

Footnote 11 to paragraph 7(a) is important as the detail on renounceability in paragraphs 19 to 22 are important in understanding the relevance of the offer being renounceable.

Renounceability not being a safe harbour[1] is important.

Paragraph 22(a) could be amended to add into the brackets words to the effect that a small discount also makes a market for rights unlikely.

New paragraph 7(b) is useful in providing further detail of the Panel's considerations of the key elements of an acceptable shortfall facility, reflecting the Panel's decisions and commentary on these issues. This is particularly the case given the proposed new paragraph 10.

Footnote 15 should be split and relate solely to any cap on shareholders' participation in a shortfall. The footnote should only refer to the decisions in Dromana Estate and Virgin Australia Holdings as they relate to caps and differentiate between the unacceptable cap in Dromana Estate and the

[1] Paragraph 21.

acceptable cap which was used in Virgin Australia Holdings noting that that arrangement did not disadvantage retail shareholders on a proportionate basis.

A new footnote 16 should be used in relation to the commentary on the use by directors of a discretion in relation to any shortfall.

(2) If there is a clear need for funds and an appropriate dispersion strategy has been put in place, are structural issues, such as the pricing and size of the rights issue, still relevant in determining whether the rights issue is unacceptable? Is footnote 20 appropriate?

New paragraph 10 is a good statement of the position which the Panel should be adopting in relation to rights issue. It is consistent with the most recent statements from the Panel in *Yancoal Australia Limited 02 & 03 at [22]*.

We consider that paragraph 10 would be improved if it was amended to make it clear that even if the rights issue has a control effect, the position in paragraph 10 stands. For example:

> Where there is a clear need for funds which has not been caused or induced by a person who may benefit from any potential control effect or their associates, a rights issue, even if it has a control effect, will generally not be unacceptable provided an appropriate dispersion strategy has been put in place.

We assume that the reference in the paragraph to '…generally..' is to recognise the need to consider the structural matters referred to in footnote 20. Structural matters will still be relevant, in particular, pricing and the size of the offer, as these are inherent aspects of whether the dispersion strategy is appropriate. The structural matters are part of the overall rights issue circumstances that should be considered – the need for the funds, in effect the circumstances of the issuer, are an important part of this consideration and are taken account of above.

We consider that a number of the points raised in *Yancoal Australia Limited 04R & 05R at [34]* and *Yancoal Australia Limited 02 & 03 at [22] and [24]* should also be addressed in this part of the Guidance Note – we suggest that the summary of these statements is that where there is a clear need for funds and shareholders have the opportunity to maintain their position (even without necessarily the ability to do so) then the fact that if they don't participate they will be diluted or because others don't participate there will be a control effect does not make the rights issue unacceptable.

This position is a clear reflection of item 10, 10A and 13 as true exceptions from section 606 and which contemplate there being a shift in control which is allowed.

Investorinfo [2004] ATP 6 at [25]-[37] noted that items 10 and 13 represent a policy compromise, in which the general policy of Chapter 6 is displaced to accommodate the need of a company to raise funds by issuing a number of shares which is sufficient to cause a shift in control. That policy gives preference to rights issues over placements. The general policy in Chapter 6 of reasonable and equal treatment is displaced by the requirement for pro-rata access to securities on the same terms and the general policy of sufficient information is replaced by the requirement for rights issue disclosure in accordance with Chapter 6D – whether a prospectus or a 'low doc' offer with a cleansing statement. The Panel's function in respect of that specific policy is to ensure that its requirements are not avoided and that these exceptions are not misused. The position stated in the proposed paragraph 10, ideally modified as we have suggested above, and given the context set out above reflects that position.

HERBERT SMITH FREEHILLS

Clarification of the Panel's position would provide certainty of approach to Boards considering how to appropriately raise capital having regard to their duty to act in the best interests of the company – with clarity that a clear need for funds and an appropriate dispersion strategy is required and if those elements exist then the rights issue should not be unacceptable.

(3) Do you agree with proposed footnote 30, which states that unacceptable circumstances may arise if an underwriter is interested in control, rather than merely laying off the risk of holding shares? Please explain.

We consider that footnote 30 is unnecessary and should be deleted.

We agree that if an underwriter is interested in control unacceptable circumstances may arise, however, whether unacceptable circumstances arise should be assessed against the structure of the rights issue, for example, whether there is a clear need for funds and an appropriate dispersion strategy. If there is, then as noted above, notwithstanding that there is a control effect or the underwriter wants to achieve a control effect, that control effect is a consequence of items 10, 10A and 13 and should not be unacceptable.

An underwriter which is interested in control may cause the rights issue structure to be unacceptable as a consequence of its interest, however, that should be judged on the structure not the interest.

This footnote may encourage too much focus on, or speculation about, the possibility of a control effect and the underwriter's intentions as opposed to the structure of the rights issue.

The footnote may also be considered to reflect an assumption that an underwriter (or sub-underwriter) should be a professional underwriter, albeit that the Panel already recognises that for many issuers a related party or major shareholder is the only realistic source of underwriting or sub-underwriting[2].

(4) Do you agree with the minor amendments made to the Guidance Note? Please identify any other amendments you think should be made.

Yes.

We have identified other amendments that we consider should be made in our response to question 2.

6 April 2018

[2] Current paragraph 21 of GN17 which is proposed to be renumbered paragraph 25.

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6 April 2018

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Dear Sir/Madam

Consultation Paper – Guidance Note 17 – Rights Issues

1 Summary

This submission is made by Johnson Winter & Slattery in response to the invitation by the Takeovers Panel (**Panel**), in its consultation paper dated 23 February 2018, for comments on the Panel's proposed revised Guidance Note on Rights Issues.

We note that some members of our firm (including at their former firms) represented one of the applicants in *Yancoal Australia Limited* [2014] ATP 24 (**Yancoal 01**), *Yancoal Australia Limited 02 & 03* [2017] ATP 15 (**Yancoal 02/03**) and *Yancoal Australia Limited 04R & 05R* [2017] ATP 16 (**Yancoal 04/05**) in respect of which comment is made in this submission.

Views expressed in this submission are the views of Johnson Winter & Slattery and may not represent the views of our clients.

2 Responses to Questions on Proposed Changes

2.1 *Are proposed paragraphs 7 to 10 useful? Please identify any amendments you think should be made to proposed paragraphs 7 to 10.*

We consider proposed paragraphs 7 to 9 to be useful and we have no comments on those paragraphs.

We consider that proposed paragraph 10 should be amended and we comment further on this in section 2.2 below.

2.2 *If there is a clear need for funds and an appropriate dispersion strategy has been put in place, are structural issues, such as the pricing and size of the rights issue, still relevant in determining whether the rights issue is unacceptable? Is footnote 20 appropriate?*

We submit that structural issues and their potential control effect can be relevant despite a clear need for funds and a dispersion strategy being in place.

We consider that proposed paragraph 10 should be amended as follows to give more prominence to the need to structure a rights issue appropriately, notwithstanding a need for funds and dispersion strategies:

> Where there is a clear need for funds[18] which has not been caused[19] or induced by a person who may benefit from any potential control effect or their associates, a rights issue will generally not be unacceptable provided the rights issue is structured appropriately[20] and an appropriate dispersion strategy has been put in place.~~20~~

Further, we consider that footnote 20 should read as follows:

> Structural matters, in particular pricing and size of a rights issue, are ~~may~~ also ~~be~~ relevant – see paragraphs 13 to 25

We consider that the above changes to proposed paragraph 10 and footnote 20 are consistent with the decision in Yancoal 01, which remains an important precedent.

In Yancoal 01 the Panel found there were unacceptable circumstances in relation to the affairs of Yancoal. Yancoal announced a pro-rata, renounceable rights offer of 2.3 Subordinated Capital Notes for every 100 Yancoal shares to raise up to approximately US $2.3 billion. The Panel held that the rights offer was (amongst other things) highly dilutive, enabled compulsory acquisition to occur more cheaply than would otherwise be the case and the steps taken to minimise the control effect were not sufficient[1]. The Panel made orders restricting the ability of Yancoal's major shareholder to convert the notes into ordinary shares without minority shareholder approval[2].

The Panel acknowledged Yancoal's need for further capital, however noted that this was not a safe harbour. The Panel considered the structure of the rights offer and noted that "The dilutive effect of a rights issue is one of the factors the Panel takes into account in determining whether a rights issue is unacceptable".[3] A discounted conversion price exacerbated the control effect because Yancoal's major shareholder was able to reach the compulsory acquisition threshold by relying on the creep exception at a greater discount to the price of the shares before the rights offer was announced[4]. Therefore, the Panel found that while the rights offer addressed some aspects of the Panel's policy on rights issues to mitigate the unacceptable control effect of the rights offer, those steps were not sufficient.[5]

In Yancoal 02/03 and Yancoal 04/05, Yancoal proposed a dilutive rights issue on a 23.6 for 1 basis. The Panel declined to commence proceedings on the applications or review applications. The Panel considered that there was no reasonable prospect it would declare the circumstances unacceptable in the relevant circumstances, absent the existence of alleged associations and in light of the dispersion strategies included.[6]

In our view Yancoal 02/03 and Yancoal 04/05 should not stand as authority that need for funds together with dispersion strategies will exhaust the relevant considerations given:

(a) the continued importance of the decision in Yancoal 01; and

(b) that the Panel declined to commence proceedings on Yancoal 02/03 and Yancoal 04/05.

As acknowledged in Yancoal 01, while the need for funds and dispersion strategies are relevant and carry weight in determining whether a rights issue is acceptable, the rights issue can still be deemed unacceptable where there is an adverse effect on control. Structural matters remain relevant in determining whether the rights issue is unacceptable and, we submit, this should be given adequate prominence in the Guidance Note.

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[1] *Yancoal Australia Limited* [2014] ATP 24 [1].
[2] Ibid.
[3] Ibid [79]-[80].
[4] Ibid [96].
[5] Ibid [96].
[6] *Yancoal Australia Limited 02 & 03* [2017] ATP 15 [17], [22]; *Yancoal Australia Limited 04R & 05R* [2017] ATP 16 [1], [27], [34].

We submit that the appropriate policy remains that articulated in *InvestorInfo Limited* [2004] ATP 6 (**InvestorInfo**) which explains the policy behind the rights issue and underwriting and considers the numerous factors which are relevant in determining whether a rights issue is acceptable. Given the Panel's decision in InvestorInfo, we submit that the proposed new paragraph 10 underweights the potential relevance of the control effect and the need for rights issues to be made genuinely accessible in order that they not be misused. We submit that the policy as stated in InvestorInfo could helpfully be more clearly articulated in the Guidance Note.

2.3 *Do you agree with proposed footnote 30, which states that unacceptable circumstances may arise if an underwriter is interested in control, rather than merely laying off the risk of holding shares? Please explain.*

Footnote 30 suggests that intent can be relevant. If someone has an intention that relates to control, this is a relevant consideration. We consider it appropriate that this footnote be included.

2.4 *Do you agree with the minor amendments made to the Guidance Note? Please identify any other amendments you think should be made.*

We have no comments on the minor amendments.

Yours faithfully