



Tuesday, 08 November 2005

RIGHTS ISSUES - Draft Guidance Note for Comment

The Takeovers Panel has today released a draft Guidance Note seeking public comment on the circumstances in which the Panel may consider whether or not unacceptable circumstances exist in relation to a rights issue which has the potential to have an effect on control of a company¹. The purpose of the draft Guidance Note is to facilitate discussion among, and obtain feedback from, market participants and investors who may be affected by any guidance which the Panel publishes on rights issues, or otherwise have an interest in such guidance.

The draft Guidance Note follows an Issues Paper on rights issues which the Panel released for comment on in July this year ([TP05/55](#)).

The Panel noted that the submissions on the Issues Paper generally were that:

- the Panel is correct in seeking to ensure that its guidance does not inappropriately narrow the scope of the rights issue and underwriting exceptions in section 611 of the Corporations Act;
- the majority of rights issues have very little potential effect on control, and cause no problems;
- where problems arise in relation to rights issues, it is generally in the smaller capitalization end of the market; and
- small cap companies frequently have greater problems raising capital than large cap companies and the Panel should be sensitive in considering rights issues in such companies.

The draft Guidance Note follows the form and content of the Issues Paper fairly closely.

There were a number of requests for the Panel to create a bright line test, or a form of safe-harbour for companies proposing rights issues. The respondents argued that the Panel's approach of setting out in its Guidance Notes the issues which it would take into account in proceedings before it did not give companies sufficient certainty that a rights issue would not constitute unacceptable circumstances. The Panel considered this, but does not consider that it could, or should, seek to define such a safe-harbour, especially given its requirement to review the circumstances of each application before it.

¹ In this Media Release and in the draft Guidance Note, the Panel generally refers to companies and managed investment schemes collectively simply as "companies".

The Panel has decided to remove the “check-list” of issues which the Panel may consider in relation to rights issues set out in an annexure to the Issues Paper. The Panel advised that it considered that the issues are adequately discussed in the body of the draft Guidance Note. The Panel considered that it was more appropriate for companies and their advisers to read the Panel’s discussion of the issues rather than take away a bald list of the issues.

The issues which generated most comments were:

- reasons for proposing a rights issue;
- related party underwriting;
- pricing; and
- renounceability.

The Panel thanked the persons and organizations from whom it received submissions on the Issues Paper:

- Australian Shareholders Association
- Blake Dawson Waldron
- Deacons
- Hartleys Limited
- Law Council of Australia
(Corporations Committee of the Business Law Section)
- Minter Ellison
- Mr. David Rothery

The Director of the Panel noted the Panel’s gratitude to the members of the sub-committee who had contributed to the development of the draft Guidance Note. The Panel’s sub-committees include both Panel members and members of the takeovers and investment markets. Mr Morris said that the Panel very much appreciated the sub-committee members who give their time generously, and their organisations who support them², to assist the Panel produce better quality documents.

² Sub-committee members contribute in their personal capacities and the draft Guidance Note, while being a formal document of the Panel, does not, and should not be taken to, represent the views of the firms with whom individual sub-committee members are associated.

External Members

Brendan O’Hara Australian Stock Exchange Ltd

Panel Members

Kathleen Farrell Freehills (consultant)

Kevin McCann Company Director

Simon Mordant Caliburn Partnership

Peter Scott UBS Warburg

Nerolie Withnall Company Director

The draft Guidance Note is available on the Panel’s website on the [Consultation page](#). The Panel is seeking comments on the draft Guidance Note by **Friday 16 December 2005**.

It is the Panel's policy to publish or otherwise make available all responses to formal consultation, unless respondents indicate that they do not consent. It is also the Panel’s policy to publish a “Consultation Response” document after the consultation period setting out the main comments that the Panel has received and the reasons why the Panel has taken up, or not taken up, the comments or suggestions received.

Comments should be addressed to the Panel’s Director, Mr Nigel Morris at the address below.

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