



Australian Government
Takeovers Panel

Guidance Note 17 – Rights issues

Background.....	1
Exception for rights issues.....	2
Unacceptable circumstances.....	2
Mitigating potential control effects	4
Unacceptability – factors.....	6
Disclosure.....	9
Managed investment schemes	10
Applications.....	10
Remedies	10
Publication History.....	11
Appendix A: Items 10, 10A and 13 of section 611.....	12

Background

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to rights issues¹ which have, or are likely to have, an effect on control or the acquisition of a substantial interest in the company.²
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.

¹ An issue by the company of new shares offered to shareholders in proportion to their existing holdings, which may be renounceable (ie tradeable) or non-renounceable, and may be underwritten (ie to take up any shares not taken up by shareholders) or non-underwritten

² This note applies also to listed managed investment schemes

Exception for rights issues

3. Section 611³ provides exceptions to the prohibition on persons acquiring control of a company in s606. The relevant exceptions are item 10, item 10A⁴ and item 13 (see Appendix A).⁵ An alternative to relying on items 10, 10A or 13 is for the company to seek informed approval by non-associated shareholders of acquisitions in accordance with item 7 of s611.⁶
4. The Panel does not seek to narrow the exceptions. Many rights issues will not affect control. Moreover, the fact that control is affected by a rights issue does not of itself give rise to unacceptable circumstances, bearing in mind:
 - (a) the legislation recognises an exception from s606 for rights issues
 - (b) shareholders invest in the knowledge they may be diluted if they do not participate in capital raisings⁷ and
 - (c) companies are entitled to manage their capital as they see fit.
5. However, if there is potential for a rights issue to affect control, the directors should carefully consider all reasonably available options to mitigate that effect. The Panel considers, among other things, whether the control effect exceeds what is reasonably necessary for the fundraising purpose.⁸

Unacceptable circumstances

6. In considering whether a rights issue gives rise to unacceptable circumstances, the Panel looks at the effect of the rights issue against the principles in s602. In doing so, it considers the following factors:
 - (a) the company's situation

³ All statutory references are to the *Corporations Act 2001* (Cth) (as modified by ASIC) unless otherwise indicated

⁴ Inserted by [ASIC Corporations \(Takeovers - Accelerated Rights Issues\) Instrument 2015/1069](#)

⁵ For ASIC's policy in relation to the Chapter 6 implications of rights issues, see [ASIC Regulatory Guide 6: Takeovers: Exceptions to the general prohibition](#) (RG 6) at [6.68]-[6.177]

⁶ Companies seeking approval should ensure that non-associated shareholders are given sufficient information about the proposed fundraising to make an informed decision: see RG 6 at [6.99] and *Regal Resources Limited* [2016] ATP 17

⁷ *Yancoal Australia Limited 04R & 05R* [2017] ATP 16 at [34]

⁸ *Bisalloy Steel Group Limited* [2008] ATP 29 at [21]; *Dromana Estate Limited 01R* [2006] ATP 8 at [43]

- what methods of raising funds are available to the company
 - whether the company has explored other capital-raising alternatives
 - the financial situation and solvency of the company, including the reasons for raising the funds. How much the company needs funds may influence what is reasonable for it to accept as a potential control effect
 - market factors leading up to the rights issue and those reasonably likely to occur during the rights issue. Market factors have a significant bearing on the structure of a rights issue⁹
 - whether the company received, and followed, advice from financial advisers
- (b) the structure of the rights issue¹⁰
- size, price, discount to market, timing, underwriting and renounceability
 - whether the rights issue is underwritten by professional underwriters or sub-underwriters or a related party or major shareholder
 - whether there is a dispersion strategy¹¹
- (c) the effect of the rights issue
- any effect on control or the acquisition of a substantial interest
 - the purposes of Chapter 6 as set out in s602
 - the steps the board has taken to minimise potential control effects
 - disclosure of potential control effects

⁹ See paragraph 13

¹⁰ *InvestorInfo Ltd* [2004] ATP 6 at [38] lists factors relevant to assessing whether a rights issue is genuinely accessible to shareholders

¹¹ *Multiplex Prime Property Fund 03* [2009] ATP 22. On review, [2009] ATP 23, the review Panel declined to conduct proceedings

- the response, or likely response, of the shareholders (and particularly any substantial shareholders) to the rights issue.

Mitigating potential control effects

7. To mitigate potential control effects of a rights issue, a company may consider one or more of the following:
- (a) Making a rights issue renounceable where an active market for the rights is likely.¹²
 - (b) Offering a shortfall facility¹³ as follows:
 - (i) Shareholders or others can apply to take extra shares in advance of determining the shortfall available to the underwriter¹⁴ and its associates.
 - (ii) Where shortfall applications exceed the number of shares available under the facility, shortfall shares are allocated to shareholder applicants in proportion to their respective shareholdings.¹⁵ Any cap on shareholders' participation in a shortfall facility should not materially restrict the ability of shareholders to participate or the effectiveness of the facility to mitigate any control effect.¹⁶
 - (iii) Directors do not otherwise exercise any discretion¹⁷ regarding the shortfall in a manner likely to exacerbate a potential unacceptable control effect, except to the extent they consider necessary (acting reasonably) to prevent the issue of shares contrary to law¹⁸ or the ASX Listing Rules.¹⁹

¹² See paragraphs 19 to 22. Including a book-build of unexercised rights may also mitigate any control effect

¹³ See, for example, *Data & Commerce Ltd* [2004] ATP 7

¹⁴ See *MacarthurCook Property Securities Fund 01 and 02* [2012] ATP 7 at [48]-[50]. If an underwriter is a related party or a major shareholder, the Panel may consider whether directors have sufficiently explored other alternatives, including canvassing professional underwriters or unassociated sub-underwriters. See paragraphs 24 to 25

¹⁵ See *Powerlan Limited* [2010] ATP 2 at [43].

¹⁶ In *Dromana Estate Ltd 01R* [2006] ATP 8, the Panel considered a cap on shortfall allocations was likely to interfere inappropriately with the acquisition of control of shares in Dromana in an efficient, competitive and informed market. In *Virgin Australia Holdings Limited* [2013] ATP 15 at [34]-[42], the Panel considered the imposition of the retail cap and sub-underwriting arrangements would maintain the relative positions of each of the three largest shareholders and would not disadvantage retail shareholders on a proportionate basis

¹⁷ Such as a right reserved to satisfy ASX Listing Rule 7.2 Exception 3.

¹⁸ For example, because it would result in a contravention of s606

- (c) Some other, similarly effective, dispersion strategy for dealing with the shortfall rather than it flowing through to the underwriter (sub-underwriter).
8. Features which may help a dispersion strategy mitigate potential control effects include:
- (a) using several sub-underwriters²⁰
 - (b) an underwriter (sub-underwriter) receiving entitlements under the dispersion facility after all other requests have been satisfied
 - (c) sufficient time and disclosure being given to shareholders and other investors to assess the rights or shares being offered and
 - (d) external investors being able to take up shares offered under the dispersion strategy.
9. The item 10, 10A or 13 exceptions may not protect an acquisition under a dispersion strategy, whether by existing shareholders or other persons, if the acquisition is not by a person in the capacity of underwriter or sub-underwriter (ie, one who facilitates a capital raising by contracting to subscribe for the shortfall before the offer is made).²¹
10. In the Panel's experience, where there is a clear need for funds²² that has not been contrived,²³ a rights issue resulting in a control effect will generally not be unacceptable (in the absence of other issues) provided the rights issue is structured appropriately²⁴ and an appropriate dispersion strategy has been put in place.

¹⁹ *Lachlan Farming Ltd* [2004] ATP 31 at [46], *Celamin Holdings NL* [2014] ATP 22 at [49] and *Regal Resources Limited* [2016] ATP 17 at [27]-[28]

²⁰ This may not help where the Panel considers that a sub-underwriter is associated (under s12) with another sub-underwriter, underwriter or a major shareholder

²¹ ASIC may give case by case relief in certain circumstances, see RG 6 at [6.101]-[6.109]

²² See paragraph 11

²³ For example if there is direct or indirect evidence that there is a viable commercial alternative with a lower impact on control that is available to the issuer or 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. See *Laneway Resources Limited* [2013] ATP 7, where a 16 for 1 renounceable rights issue (with shortfall facility) was proposed to facilitate conversion of a loan to entities associated with the Chairman into equity. The Panel considered that this should be approved by shareholders

²⁴ See paragraphs 13 to 25

Unacceptability – factors

Need for funds

11. When considering the company's need for funds, the Panel will look at the company's financial situation, the amount sought to be raised and the suitability of raising capital by the rights issue. The Panel is likely to accept the directors' decision on these issues if the decision appears to be reasonable and supported by rational reasons unless the applicant can point to something that suggests deeper inquiry may be warranted.²⁵
12. However, need for funds is not a safe harbour. Notwithstanding a company's need for funds, the Panel may still declare the circumstances unacceptable.

Structure overall

13. Structural matters (such as price, number of shares offered, renounceability, underwriting) cannot be considered in isolation from each other and the market conditions at the time of the rights issue.²⁶ The Panel will look at the structure of the rights issue as a whole, and the market, in deciding whether the rights issue gives rise to unacceptable circumstances. In practice, if the rights issue is underwritten, the underwriter will usually influence the structure (and may in some cases decide on it).²⁷

Pricing

14. Price influences the decision of shareholders whether to take up the rights offer.²⁸ The more shareholders take up their rights, the less potential there is for a control effect.
15. The question of pricing is more easily considered in relation to liquid, listed securities because there is a market price against which to

²⁵ In *Rey Resources Ltd* [2009] ATP 14, the Panel accepted that there was a need for funds based on the documents submitted by the company. The underwriter undertook to disperse shortfall shares to a number of sub-underwriters. A need for funds may arise otherwise than from the company being near to insolvency (e.g., if it commits to using funds for a certain purpose)

²⁶ See for example *Yancoal Australia Limited* [2014] ATP 24 at [77]-[96]

²⁷ An example of alternatives being explored, and the interaction of underwriters with the company in structuring the rights issue, is *DataDot Technology Ltd* [2009] ATP 13

²⁸ Their decision is affected also by other factors, such as the financial position or performance of the company, the size of the rights issue compared to the company's existing share capital, whether or not the rights issue is renounceable and the effect on the prospects of the company if the rights issue is fully taken up

compare the issue price for the rights. Unlisted securities, illiquid listed securities or listed securities with a volatile market price may not have a readily accessible price comparison.

16. A small discount to market (or a premium to market) provides less incentive for shareholders to take up the rights offer. It also undermines the effectiveness of renounceability in mitigating the likelihood of control becoming concentrated with an underwriter or other participating major shareholder.
17. A large discount to market is likely to be attractive to shareholders and encourage them to take up the rights offer (to gain the benefit of the discount). This reduces the shortfall and thus the likelihood of control becoming concentrated with an underwriter or other participating major shareholder. On the other hand, a large discount may have an adverse effect on shareholders who elect not to participate by transferring value to new shares and diluting those shareholders more than would otherwise be the case. This may be particularly so in a large issue.

Size

18. A large rights issue may have a potential control effect, even if priced at a large discount, because shareholders may not have the capacity to pay for all the shares to which they are entitled. A company undertaking a large rights issue may need to more clearly demonstrate its need for those funds.²⁹

Renounceability

19. In a renounceable³⁰ rights issue, a large discount is likely to facilitate an active market for the rights. This allows shareholders an opportunity to recoup some of the value transfer by selling their rights.³¹ The buyer is likely to take up the rights offer. There is no exception from s606 for buyers who exercise rights.
20. A non-renounceable rights issue may result in greater flow-through to an underwriter or sub-underwriter, so increasing the potential control effect. The effect is exacerbated if the rights issue is underwritten or sub-underwritten by a related party.

²⁹ The company may also require shareholder approval, for example under the ASX Listing Rules

³⁰ Renounceable rights can be transferred to a third party; non-renounceable rights cannot. Listing and quotation will establish a price and on-market trading of rights can occur, but listing and quotation is not essential to renounceability

³¹ This helps meet the reasonable and equal opportunity principle in s602(c). See also *Emperor Mines Ltd 01R* [2004] ATP 27 at [26]

21. However, renounceability is not a safe harbour.
22. Non-renounceability may not be a significant factor in deciding unacceptable circumstances if:
 - (a) a market for rights is unlikely (eg, the company is not listed, the stock is illiquid or the discount is small)
 - (b) it is unreasonably costly to make the rights issue renounceable or
 - (c) the market circumstances are such that underwriters are not available for a renounceable issue.

Underwriting

23. An underwriter (or sub-underwriter) may acquire control of a company relying on:
 - the second limb of the exceptions in item 10 or item 10A of s611 or
 - if a disclosure document has been lodged in relation to the rights issue, the exception in item 13 of s611.
24. Underwriters (sub-underwriters)³² may be professional,³³ a related party, an unrelated party or a major shareholder. A professional underwriter generally seeks to earn an underwriting fee rather than hold shares, so is unlikely to have any interest in obtaining control of the company, although it may not be able to readily on-sell shares subscribed for under the underwriting agreement.³⁴
25. For many companies, a related party or major shareholder is the only realistic source of underwriting (sub-underwriting).³⁵ Underwriting (sub-underwriting) by a related party or major shareholder does not, of itself, give rise to unacceptable circumstances. However, greater care is needed to mitigate the potential control effects if a related party or major shareholder underwrites (sub-underwrites). The failure of directors to properly canvass professional underwriters or seek out alternatives to a related party or major shareholder underwriter (sub-underwriter) may increase the likelihood of unacceptable circumstances.³⁶

³² The underwriter guarantees the funds to be raised by contracting, subject to conditions, to subscribe for shares not taken up by shareholders. A sub-underwriter takes some of that risk by contracting to take some (or all) of the shares the underwriter might have taken

³³ That is, a person who underwrites in the normal course of their business such as a financial institution or stock-broker

³⁴ See *DataDot Technology Limited* [2009] ATP 13 at [35]

³⁵ *Emperor Mines Ltd 01R* [2004] ATP 27 at [28]-[30]

³⁶ *ABM Resources NL* [2016] ATP 5 at [58]-[59]

Disclosure

26. Disclosure is of increased importance when shareholders are considering the desirability of making a further investment in the company, the control implications of the rights issue and whether to take steps to protect against the dilution of their existing holding.³⁷
27. Rights issue disclosure may be made in different forms under Part 6D.2:
 - (a) a full prospectus (with or without a profile statement) under ss709(1) and (2)
 - (b) a “transaction specific” prospectus under s713
 - (c) an offer information statement under s709(4) or
 - (d) a “cleansing notice” under s708AA and any accompanying disclosure.
28. Exceptionally, a rights issue may be made without disclosure under Part 6D.2 if it meets the requirements of s708 (a small scale offering, an offering to professional investors, etc).
29. The Panel expects appropriate disclosure, as outlined below, in relation to a rights issue, irrespective of what form of disclosure (described above) is used.
30. The Panel would expect more disclosure in relation to a rights issue that has more potential control effects (eg, increase in a person’s voting power from 10% to 40%, compared to increase in a person’s voting power from 51% to 55%).
31. Shareholders will be better able to make an informed decision on participation in a rights issue and its potential control effects if the following is clearly disclosed:
 - (a) the possible control scenarios (to the extent they can be)
 - (b) the identities of those who may end up owning any shortfall
 - (c) the reasons behind the choice and roles of any supporting shareholders, underwriters and sub-underwriters
 - (d) the future shareholding pattern of the issuer

³⁷ Apart from, where relevant, an understanding of the issuer’s business, financial performance, plans and prospects

- (e) the intentions for the company of persons who may obtain control (to the extent this can be ascertained by the company)³⁸ and
 - (f) the potential effects on control of any proposed dispersion strategy.
32. The Panel is not the primary regulator of the disclosure content of rights issues and does not provide detailed guidance on the disclosure requirements for rights issues.

Managed investment schemes

33. A managed investment scheme must set out in its constitution “adequate provision for the consideration that is to be paid to acquire an interest in the scheme”.³⁹ This restricts the discretion of the responsible entity to set an issue price at the time of an issue of interests, but has been modified by [ASIC Corporations \(Managed investment product consideration\) Instrument 2015/847](#) and ASIC Class Order CO 13/655.

Applications

34. An applicant is likely to have less access to relevant information than the directors of the company. The Panel will take this into account when assessing whether or not to conduct proceedings.
35. Nevertheless, an application needs to demonstrate (by evidence and reasoning) a basis for the Panel’s intervention, identifying the effect complained of. The application must be made in a timely manner to minimise potential harm and disruption to the company and shareholders.

Remedies

36. The Panel has wide powers to make orders,⁴⁰ including to:
- (a) prevent the rights issue proceeding
 - (b) reopen the rights issue
 - (c) require further disclosure

³⁸ This information should be available in relation to underwriters and sub-underwriters but not necessarily major shareholders whose voting power may increase simply by taking up their entitlement in a non-underwritten offer while other shareholders do not

³⁹ Section 601GA(1)

⁴⁰ Section 657D

- (d) divest shares acquired under the rights issue
 - (e) freeze voting power of shares acquired under the rights issue
 - (f) require shareholder approval of the rights issue or
 - (g) require different underwriting or sub-underwriting arrangements.
37. The question of motive or intention to bring about the unacceptable circumstances may be a factor in deciding whether the Panel's preferred orders would unfairly prejudice any person.

Publication History

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Appendix A: Items 10, 10A and 13 of section 611

Item 10 – Rights issues

An acquisition that results from an issue of securities that satisfies all of the following conditions:

- (a) a company offers to issue securities in a particular class;*
- (b) offers are made to every person who holds securities in that class to issue them with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the issue;*
- (c) all of those persons have a reasonable opportunity to accept the offers made to them;*
- (d) agreements to issue are not entered into until a specified time for acceptances of offers has closed;*
- (e) the terms of all the offers are the same.*

This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.

Item 10A – Accelerated rights issues

An acquisition that results from an issue of securities that satisfies all of the conditions in item 10.

For the purposes of determining whether the offers of a company's securities satisfy the conditions in paragraphs (d) and (e), disregard the following matters:

- (a) some or all persons who are offered securities as an exempt investor may:
 - (i) receive the offers before other persons to whom offers are made; or*
 - (ii) be given a period of time to accept the offers which is less than the period of time given to other persons to whom offers are made;**
- (b) the securities may be issued to a person as an exempt investor before securities are issued to other persons under the offers, provided that under the terms of the offers any such issue to an exempt investor is to occur no earlier than 2 months before the issue of securities to other persons who are not exempt investors;*
- (c) under the terms of the offers:
 - (i) offerees who are not exempt investors are able to trade rights on a prescribed financial market until a specified time for acceptances of offers has closed; and*
 - (ii) offerees who are exempt investors are not able to trade rights.**

This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.

See section 615.

For the purposes of this item:

exempt investor means a person:

- (a) *offered securities in circumstances that do not need disclosure under Part 6D.2 because of subsections 708(8) to (12); or*
- (b) *offered securities as a wholesale client (as defined in section 761G).*

rights means *rights to be issued securities under the offers.*

Item 13 – Underwriting of fundraising

An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if:

- (a) *the issue is to a person as underwriter to the issue or sub-underwriter;*
and
- (b) *the disclosure document disclosed the effect that the acquisition would have on the person's voting power in the company.*