

8 November 2018

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Australian Securities and Investments Commission
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By email: policy.submissions@asic.gov.au

Dear Ms Hussein

Response to proposals in Consultation Paper 304

The Corporations Law Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to provide this submission to the Australian Securities and Investments Commission (**ASIC**) on Consultation Paper 304, *Remaking ASIC class order on share and interest purchase plans: [CO 09/425] (CP304)*.

ASIC has invited comment on the proposal to remake [CO 09/425] (the **Class Order**), including whether it is operating effectively and efficiently and whether the conditions of relief (including the A\$15,000 limit per individual existing member in any 12-month consecutive period) should remain unchanged.

The Committee is supportive of the proposal in CP304 to remake the Class Order. We generally agree with ASIC that the Class Order is operating effectively and efficiently. Share and interest purchase plans (**Purchase Plans**) are an important feature of the capital markets landscape and provide listed corporates with greater flexibility to manage their capital structure in a way which benefits a broader population of security-holders.

However, the Committee submits that in order to further promote this flexibility and additionally to seek to allow listed corporates to treat security-holders equitably, the \$15,000 monetary limit on participation in Purchase Plans should be increased. The Committee supports a higher A\$30,000 threshold. Whilst we note ASIC's observations in paragraph 15, we think there are compelling reasons supporting such an increase including:

- (a) Growth of market capitalisation in the ASX 200: The A\$15,000 limit was initially established following a review of share and interest purchase plans that closed in 2009.¹ We acknowledge that this monetary limit was appropriate in 2009, however it has failed to keep pace with the growth in

¹ ASIC's decision was informed by ASIC Consultation Paper 103, Review of share purchase plan threshold released on 18 December 2008.

Australian listed company equity valuations. As at 31 December 2009 the aggregate market capitalisation of the ASX 200 was approximately A\$1,132bn, whereas as at 30 October 2018, it was approximately A\$1,677bn, representing growth of approximately A\$544bn or ~48% since 2009. Accordingly, the ability of retail shareholders to participate in discounted equity capital raisings continues to be diluted year by year by growth in the equity value of Australian corporates whilst the monetary A\$15,000 cap remains constant.

- (b) Treating retail investors fairly: Purchase Plans are typically conducted after an institutional placement. When a listed corporate's board assesses the appropriate equity capital raising structure, they are acutely aware of the importance of assessing the fairness of the capital raising structure to the company's existing security-holders. One key consideration, which goes to the question of fairness, is the number and nature of the company's security-holders who would be treated favourably or unfavourably (as the case may be) in each of the two key types of follow-on equity capital raising structures (that is, an entitlement offer versus an institutional placement and associated Purchase Plan).

As part of the assessment of the appropriate capital structure, analysis will typically be undertaken to determine the number of security-holders whose entitlement under an equivalent entitlement offer would be greater than A\$15,000 and are therefore disadvantaged by a Purchase Plan. When this analysis is conducted, typically there are non-institutional shareholders who would have an entitlement of A\$15,000 or more that are not able to subscribe for their pro rata holding. If the maximum application size in a Purchase Plan were to be raised to A\$30,000 (aside from related parties who may be restricted from participating in any event) then the number of existing shareholders who would miss out on the opportunity to benefit from a placement is likely to be reduced. For illustrative purposes, based on analysis we have undertaken for two listed entities in the ASX 200 who have raised equity capital in 2018, if the threshold had been \$30,000 (rather than \$15,000) the following additional security-holders would have been entitled to subscribe for their full pro-rata amount in these capital raisings:

ASX listed stock	Additional number of security-holders who would have be entitled to subscribe pro-rata	Percentage of security-holder register impacted
X	140	3%
Y	78	1%

** Estimate only, based on publicly available information. Security-holder estimates based on the security-holder distribution table in the most recent annual report.*

Increasing the threshold would likely have the further benefit of providing additional flexibility for companies in terms of how to raise equity capital (that is, make the pricing, expense and efficiency benefits of an institutional

placement and Purchase Plan open to more corporates), who are otherwise reluctant to do so given the focus on fairness to existing shareholders.²

- (c) The requirement to lodge a “cleansing notice” ensure that retail investors are fully informed: In paragraph 15(c)(ii), ASIC highlights the prevalence of companies raising funds under a rights offer using a cleansing notice. The Committee agrees with this observation. We think this also means that retail investors in Australian stocks should be relatively familiar with this structure of capital raising, including the associated disclosure. In this respect, the Purchase Plan disclosure regime has the same main feature as a rights offer in that it that it requires the issuer to ensure that retail investors have available to them all information that investors and their professional advisers would reasonably require for the purpose of making an informed investment decision. In addition, similar to a rights offer, the investors eligible to participate in a Purchase Plan are existing shareholders and not being asked to make a decision about an investment in an entity unfamiliar to them. The Committee submits that whilst increasing the threshold to \$30,000 would be a meaningful increase in the context of the existing threshold, the disclosure obligations that attach to an issuance under a Purchase Plan mitigate the risk of not having full prospectus disclosure.

The Committee would be pleased to discuss this submission if that would be helpful.

Please contact Shannon Finch, Chair of the Corporations Committee at shannon.finch@au.kwm.com or 02 9296 2497 or Jeremy Williams at jeremy.williams@gs.com, if you require further information or clarification.

Yours Sincerely,



Rebecca Maslen-Stannage
Chair, Business Law Section

² For example, see Australian Shareholders' Association, "Submission to the Financial System Inquiry by Australian Shareholders Association" (31 March 2014, https://static.treasury.gov.au/uploads/sites/1/2017/06/C2014-053_Australian_Shareholders_Association.pdf).