Equity capital raising in Australia during 2008 and 2009

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1. Key Findings

- **Areas for reform:** To make capital raisings with preemptive rights more attractive all requirements to produce prospectuses for entitlement offers should be abandoned given Australia's continuous disclosure regime.
- Disclosure of security allocations on a non-pro rata basis (for example under a placement) would preserve the flexibility of Australia's capital raising regime while allowing market participants greater confidence through observing how boards use this flexibility.
- Requiring prior approval of placements representing more than 9.9 percent of securities on issue a single investor would reduce the capacity for placements to be used as an entrenchment device.
- Increased disclosure of fees associated with raising capital and exploration of alternatives to investment banks, especially for entitlement offers, could reduce capital raising costs.
- **Amount raised:** Between 1 January 2008 and 31 December 2009, entities in the S&P/ASX 200 raised $98.94 billion in new equity capital through placements, renounceable and non-renounceable entitlement offers (REOs and NREOs) and security purchase plans. The table on page 4 below provides an overview of how capital was raised during this period.
- **Fees:** Investors paid just under 2 percent of all capital raised - $1.89 billion - to investment banks and other advisors for underwriting and advice. Investment banks were required to subscribe for only 2.77 percent of all securities that they underwrote.
- **Use of funds:** Just over half of all the money raised – 54 percent – went to repay debt with another 10 percent used to fund working capital or strengthen balance sheets. Banks improving their capital ratios accounted for another 20 percent of all funds raised.
- **Pricing:** The average discount to the prevailing security price for capital raisings to reduce debt was 24.6 percent. In many cases there was minimal information on how prices were set.
- **Fairness:** The right of existing investors to maintain their ownership position in a company was abandoned in many cases as listed entities sought to raise funds speedily. Placements, under which only selected investors are able to participate, accounted for 45 percent of all money raised during the period. NREOs, where existing investors receive no compensation for dilution if they do not take up their rights, and where shortfalls are allocated on a discretionary basis, accounted for another 31 percent of all money raised in 2008 and 2009.
- **Transparency:** Capital raisings in 2008 and 2009 exposed a lack of transparency over who participates in capital raisings and how pricing is determined. This lack of transparency is concerning given the ability Australian listed entities have to raise capital without inviting all existing investors to participate on a pro rata basis.

Form	*Pros*	*Cons*	*Statistics*
Placement	Fast to complete	Dilutionary Little disclosure No preemptive rights / only selected investors can participate	140 placements - $44.8 billion raised Average dilution - 19.08% Discount - 12.29% Fees of $789 million (1.74%)
REO	Preemptive rights protected All securityholders entitled to participate. In accelerated REOs, institutional investors without ready cash may not be able to participate. Non participating securityholders may be compensated for dilution	Can be time consuming Costly fees	21 REOs - $15.2 billion raised Average expansion - 69.63% Discount - 36.81% Fees of $365 million (2.40%)
NREO	Preemptive rights protected All securityholders entitled to participate. See above on accelerated entitlement offers.	Can be time consuming Costly fees No compensation to non participating securityholders for dilution suffered	57 NREOs - $31 billion raised Average expansion - 47.09% Discount - 25.16% Fees of $719 million (2.32%)
SPP	Cheap fees All securityholders entitled to participate	Time consuming Least certainty of success Potentially dilutive to large securityholders	61 SPPs - $8 billion raised Average expansion - 6.86% Discount - 11.11% Fees of $23 million (0.29%)

2. Introduction

During 2008 and 2009 Australian listed entities raised large amounts of equity capital as the global financial crisis led to a significant tightening in credit markets. Over these two years listed entity after listed entity recapitalised, seeking additional equity to replace debt as lenders, unwilling to roll-over debt on pre-crisis terms, sharply curtailed the amount they were willing to lend. Adding to the need for equity raisings were the broader economic impacts of the crisis which reduced earnings and asset values leading to threats to banking covenants. Still more listed entities raised capital to address new-found equity market concern with high levels of debt, a far cry from the environment of 2006 and 2007 when listed entities were being criticised for their 'lazy' balance sheets as the private equity boom peaked.

The focus of this paper is how that new equity capital was raised in Australia among S&P/ASX 200 entities in 2008 and 2009, the formal capital raising regime, the growth of a substantial 'informal' regime through the ASX waivers process and the resulting implication for investors. Listed entities in 2008 and 2009 sought capital from new and existing securityholders and in many cases at substantial discounts which were arrived at through unclear means. At many entities, the lack of any formal protection for preemptive rights for existing investors under the Australian regime meant that many investors, retail and institutional, were powerless to prevent the dilution of their ownership interest.

Just under $100 billion was raised by S&P/ASX 200 entities in 2008 and 2009 through 279 separate capital raisings. The capital raisings of Australian listed entities also made a meaningful contribution towards shoring up the balance sheets of investment banks as $1.89 billion in fees flowed from investors to investment banks - often in cases where it was not clear why such high fees were paid.

This report also proposes some changes to the Australian capital raising regime designed to make it more efficient and transparent while preserving the flexibility that served many entities well during the financial crisis.

3. The Australian capital raising regime in brief

This section provides a brief overview of types of capital raisings in Australia and the relevant statutory and Listing Rule requirements that govern these raisings. A more detailed overview of Australia's capital raising regulatory regime is set out in Appendix 1.

Type of raising	Characteristics	Regulatory requirements
Placement	- Participation at the discretion of the board and management. - Open to 'sophisticated' or 'professional' investors. - No requirement for a prospectus.	- ASX Listing Rules impose cap of 15 percent of issued capital without preemptive rights or prior approval over a 12 month period. - The Corporations Act permits placements without disclosure so long as a 'cleansing notice' is issued to the market.[1]
Renounceable entitlement offer (REO)	- Participation is on the basis of each investor's existing interest in the company. - A prospectus may need to be produced. - Investors are able to sell their right to participate in the entitlement offer.	- The timetable for entitlement offers is prescribed by the Listing Rules. - The disclosure requirements are set out in the Corporations Act.
Non-renounceable entitlement offer (NREO)	- Participation is on the basis of each investor's existing interest in the company. - A prospectus may need to be produced. - Investors are not able to sell the right to participate. Any rights not taken up may be placed at the discretion of the board.	- The timetable for entitlement offers is prescribed by the Listing Rules. - The Listing Rules impose a maximum cap of 1 for 1 on the size of a NREO. - The disclosure requirements are set out in the Corporations Act.
Security purchase plan (SPP)	- Participation is open to existing securityholders. - There is no requirement for a prospectus so long as a cleansing notice is produced, offers are limited to $15,000 per securityholder (formerly $5,000) and the securities are issued at a discount.	- The SPP mechanism is stipulated in the Listing Rules. - ASIC has provided the disclosure regime in a series of regulatory guides and class orders.

[1] A cleansing notice is a statement to the ASX that shares have been offered in reliance on specified exemptions under the Corporations Act from prospectus requirements that also require any financial information conveyed to participants in the capital raising to be disclosed. Without the notice shares issued outside of the prospectus requirements cannot be traded within 12 months of issue.

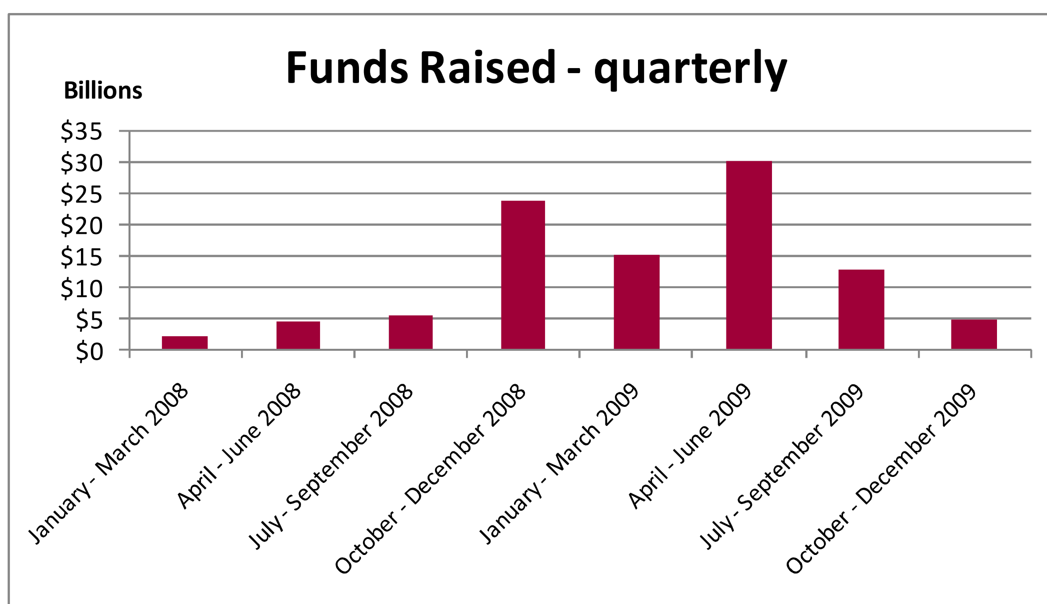
In certain cases the formal rules are subject to modification either by ASIC providing relief or through an ASX waiver. The ASX has issued extensive waivers in recent years to facilitate capital raisings, especially waivers from the Listing Rules' entitlement offer timetable, in order to allow 'accelerated' offers - where the institutional component of an offer is conducted before the retail component - and to facilitate the sale of entitlements through a book build rather than a formal market trading process.

4. Capital raised by the S&P/ASX200 during 2008 and 2009

4.1 How much was raised?

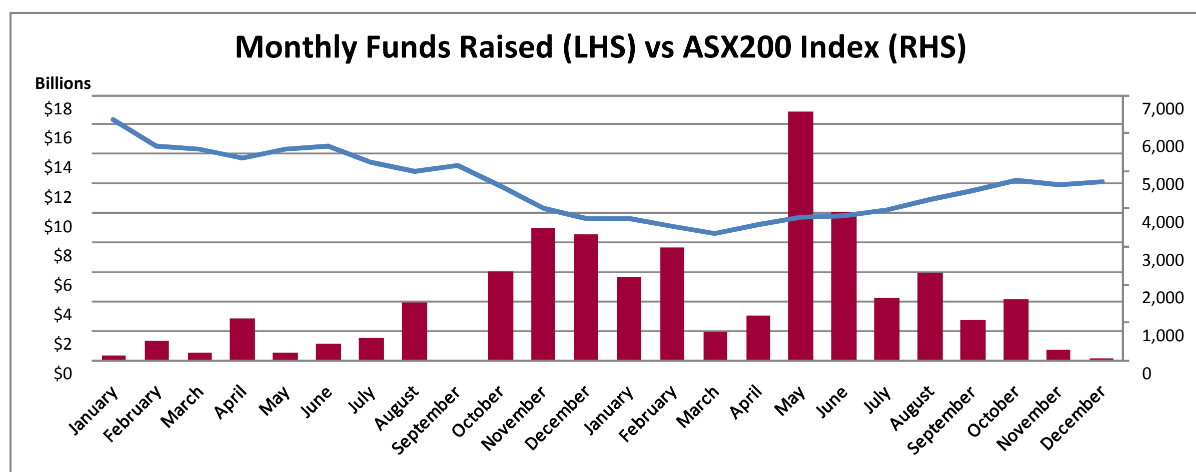
During calendar years 2008 and 2009 a total of $98.94 billion in new equity capital was raised by entities comprising the S&P/ASX 200.[2] In 2008 $35.86 billion (36.24 percent) was raised which increased to $63.08 billion in 2009 (63.76 percent) reflecting the increased demand for new capital after the global financial crisis deepened in the last quarter of 2008.[3]

The heaviest quarter for capital raisings over these two years was the three months between April and June 2009 (during which 30 percent of all funds were raised) while the lightest quarter was January to March 2008 (2 percent of funds raised).[4] The capital raised during each quarter was as follows:



[2] The relevant group comprises entities in the S&P/ASX 200 as at December 2009.
[3] These amounts exclude funds raised through distribution reinvestment plans.
[4] The date of the capital raising used in this paper is the date the capital raising was announced to the market.

The busiest month was May 2009 during which $16.9 billion (17 percent) was raised with the next busiest being June 2009 when $10 billion was raised (10 percent). No equity capital was raised by S&P/ASX200 entities in September 2008 which was the month in which Lehman Brothers collapsed.



4.2 The form of capital raisings chosen

When an issuer is seeking to raise capital it will balance certain objectives in light of prevailing market conditions. Considerations that an issuer will need to weigh up when raising capital include:

- time - how long will it take to raise the capital needed?
- cost - how much will it cost to raise the capital?
- certainty – how certain is the success of the capital raising?
- fairness – how equitable is the capital raising for securityholders?

A placement, for example, is normally the fastest means of raising capital, however, it is also the least equitable due to the dilution of existing securityholders not invited to participate in the placement. A renounceable entitlement offer, by contrast, is the most equitable form of capital raising because each securityholder has the right to participate to maintain their existing proportional interest and also has the right to receive a benefit for waiving their entitlement to participate through selling this entitlement. However, because of the period required for trading entitlements and the potentially greater disclosure requirements due to retail investor participation it will generally take longer to complete a renounceable entitlement offer than a placement (provided that the placement does not require securityholder approval).

The likely success of a capital raising may also depend on the extent to which the capital raising has been underwritten and the price at which the new securities will be issued. The cost of a capital raising, both in terms of discount and fees paid to advisors, will differ depending on how the capital is raised and the extent to which existing investors are able to participate: For example, in an entitlement offer, the 'cost' of a substantial discount to all securityholders is less relevant than

in a placement as all securityholders are able to maintain their pro rata interest in the issuer at the lower price.

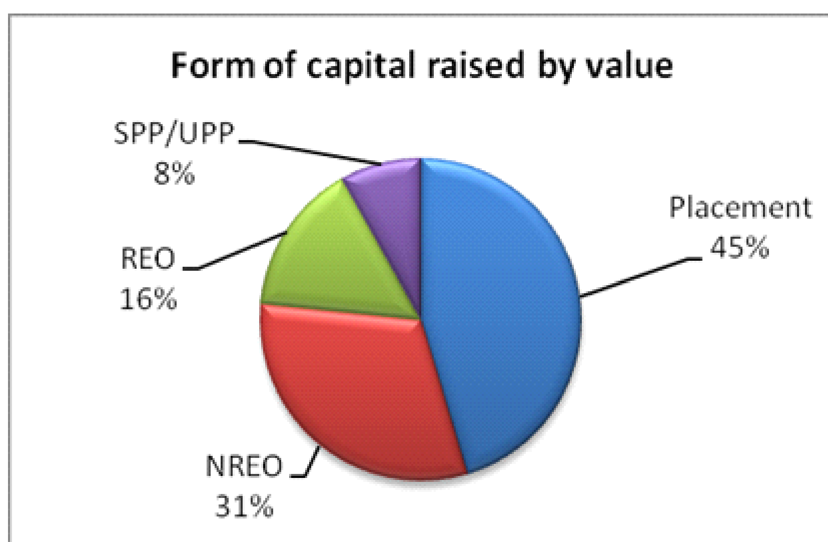
In its information paper dated 29 January 2010[5] the ASX noted that boards are in the best position to make an assessment about the appropriate capital raising strategy for their listed entity. The ASX noted that boards are ideally placed to appreciate and manage a range of, often conflicting, considerations, which include the:

- amount of capital needed and the urgency with which it is needed;
- environment within which the company is seeking to raise capital, particularly prevailing market conditions/risks and the impact this has on the demand for securities;
- company's size and the industry sector within which it is operating;
- purpose to which the capital raised is to be used (eg to fund an acquisition, reduce gearing etc);
- current structure of its share register (spread and distribution of holdings amongst retail and institutional segments), the likely interests or ability of existing shareholders to contribute more capital, the need to restructure the ownership register by attracting new investors, and the desired post-raising share register structure;
- impact on existing shareholders of the option chosen (eg dilution of shareholders not taking part in the offer); and
- expected cost of raising under different capital raising mechanisms (eg the discount to current market price), including the desire to secure (at an acceptable cost as well as the duration of) underwriting support, which is directly related to the risk of there being a shortfall in demand.

This range of considerations, and the role of the board in assessing them, is broadly non-controversial with one exception. It is not clear how securityholder interests are served, in a regime giving boards substantial discretion over pricing and issuing of new securities, by the ASX explicitly stating boards should play an active role in determining "the desired post-raising share register structure". Electing directors is the fundamental right possessed by securityholders and allowing directors to hand pick their constituents through determining participation in non-pro rata capital raisings such as placements creates the potential for underperforming boards to attempt to preserve their positions through 'sweetheart' offers to friendly – or apathetic – securityholders.

By value, most capital raised in 2008 and 2009 was through private placements to institutional and sophisticated investors (45 percent of total capital raised under 140 placements). Non renounceable entitlement offers contributed 32 percent of total capital raised over the two years from 57 separate entitlement offers), followed by renounceable entitlement offers (15 percent by value from 20 separate offers). Finally, SPPs were the least popular means of raising capital in terms of value, comprising only 8 percent of capital raised through 61 separate plans.

[5] ASX, *Capital Raisings in Australia: Experiences and Lessons from the Global Crisis*, 29 January 2010.



4.2.1 Placements

Given the ease and speed with which companies can issue securities through a placement in Australia, it is unsurprising that placements were the most common form of capital raising by value especially during the global financial crisis when access to capital was limited. It should however be noted that placements, while forming a valuable part of Australia's capital raisings regime, entail costs in the form of dilution for securityholders (both institutional and retail) not invited to participate. These costs were exacerbated in 2008 and 2009 because placements at a discount to the market price increase the dilution suffered by non-participating securityholders.

On average placements during 2008 and 2009 diluted securityholders by 19.08 percent (based on the securities on issue at the time the placement was announced) and on a weighted average basis the placements were made at a discount of 12.29 percent.

The following table summarises the placements made in 2008 and 2009:

Placement Funds Raised	$44.84 billion
Percentage of all funds raised	45.32 percent
Number of placements	140
Fees paid to advisors/underwriters	$787.51 million
Weighted Average discount[6]	12.29 percent
Fees as a percentage of funds raised	1.76 percent
Average time taken	17.17 days
Average Size	$320.29 million

[6] For the purposes of this report discounts have been calculated based on the 10 day average closing price prior to the announcement of the capital raising.

Many, but not all, issuers undertook entitlement offers or SPPs alongside the placements in order to ease the dilutive burden of the placements. Some issuers, however, did not. We identified 38 placements that were made by issuers who did not undertake entitlement offers or SPPs alongside those placements. These 38 placements raised, in aggregate, $9.07 billion which was 9.17 percent of all capital raised and 20.2 percent of all funds raised through placements.

The following table notes the 10 largest placements in dollar terms undertaken in 2008 and 2009 where the entity did not undertake a rights issue or SPP alongside the placement.

Company	Date	Placement size	Dilution	Discount	To whom?
Westfield[7]	February 2009	$2.90 billion	14.06%	13.54%	Institutional and professional investors.
Commonwealth Bank	October 2008	$2.00 billion	3.92%	14.34%	Existing institutional securityholders and new securityholders.
Fortescue Metals	April 2009	$644.80 million	9.20%	7.70%	One investor, Hunan Valin Iron and Steel.
Paladin Energy	September 2009	$429.87 million	14.98%	0.26%	Institutional investors.
Lend Lease[8]	February 2009	$302.50 million	12.38%	10.44%	Existing and new institutional and sophisticated investors
Mirvac	February 2008	$299.99 million	5.61%	(0.33%)	One investor, Nakheel.
Stockland[9]	October 2008	$300 million	3.82%	6.38%	Institutional investors.
Aquila Resources	November 2009	$285.65 million	17.85%	2.93%	One investor, Baosteel.
Gindalbie Metals[10]	July 2009	$162.06 million	37.06%	N/A	One investor, AnSteel.
Energy World	May 2008	$156.00 million	9.08%	9.19%	Institutional and sophisticated investors.

[7] Westfield announced an SPP on 26 February 2009 but made no mention of its intent to conduct an SPP in the 3 February 2009 announcement of the placement.

[8] Lend Lease originally intended to conduct a SPP, however, did not do so "due to the current market value of its securities remaining below the $6.05 institutional placement price and a deterioration in equity market conditions".

[9] Stockland originally intended to conduct a SPP, however did not do so "due to the current market value of its securities remaining below the $5.30 offer price. This has arisen due to the extreme global market turmoil experienced in recent months".

[10] The Gindalbie placement to AnSteel was announced in November 2008 but only occurred in July 2009 following regulatory and shareholder approval. For the purpose of this table the discount was calculated with reference to the average closing price of Gindalbie shares on the 10 days prior to the announcement of the placement. The placement shares were issued at a premium of 129.73 percent to the November 2008 average price which is why the discount in the table above is specified as N/A.

In Australia there is no requirement for issuers to disclose the identity of the recipients of a placement so it is virtually impossible to provide a breakdown of the extent to which the placements were made to new investors rather than to investors who were already on the issuer's register. In most cases issuers announce, in fairly general terms, that the securities are placed to "institutional and sophisticated investors".

Placements on an expanded capital base

As noted above, the ASX Listing Rules – specifically Rule 7.1 - impose a 15 percent cap on the placement of securities during a rolling 12 month period. Any offer without preemptive rights outside of specified exceptions in excess of this limit is subject to prior securityholder approval.

The ASX, however, has been prepared to waive this requirement if certain specific features are present. There were 12 instances (11 of which took place in 2009) where the ASX granted waivers to S&P/ASX 200 entities allowing issuers to make placements of greater than 15 percent of securities on issue ahead of underwritten entitlement offers, allowing them to base the 15 percent limit on the entities' expanded securities on issue following the entitlement offer.[11]

The waiver register in its description of the ASX policy with regards to this type of waiver refers to it as a "timing waiver" and that underwriting of the entitlement offer provides certainty that securities on issue will actually double (they are granted in connection with an entitlement offer conducted on a one-for-one basis).[12] The ASX's willingness to grant this kind of waiver appears based on the confidence that securities on issue will increase through the presence of an underwriter: DUET Group, for example, for its capital raising announced on 31 March 2009 was granted a waiver to go above the 15 percent cap only to the extent of the underwritten institutional entitlement offer as the retail offer was not underwritten.[13] In the case of a fully underwritten one-for-one entitlement offer the ASX allows a listed entity to make a placement of 30 percent of its securities on issue ahead of the entitlement offer.

The following entities made use of expanded capital base placements:

Entity	Date	Placement size	Dilution	Discount
Macquarie Office Trust	December 2008	$100,000,000	24.48%	-23.08%
Transfield Services Ltd	January 2009	$58,894,190	23.79%	-68.51%
Duet Group	April 2009	$131,879,214	15.78%	-21.62%
Charter Hall Group	June 2009	$26,972,662	15.19%	-13.27%
Asciano Group	June 2009	$230,609,717	30.00%	-28.85%

[11] This excludes a placement of exchangeable securities to a single investor at GPT in late 2008 under a waiver from Listing Rule 7.1 ahead of an entitlement offer. On the initial exchange price the dilution from the issue of exchangeable securities was below 15 percent.
[12] See, for example, ASX, 'Register of ASX Listing Rule Waivers', 1-15 June 2009, Waiver WLC090274-003.
[13] ASX, 'Register of ASX Listing Rule Waivers', 16-31 March 2009, Waiver WLC090129-002.

Entity	Date	Placement size	Dilution	Discount
Hastings Diversified Utilities Fund	July 2009	$57,630,378	30.00%	-12.20%
Goodman Group	August 2009	$170,562,673	15.34%	-15.07%
Boart Longyear Limited	August 2009	$120,366,987	29.66%	-25.00%
PanAust Ltd	September 2009	$180,432,763	24.83%	-1.62%
AWB Ltd	October 2009	$100,000,000	27.88%	-28.14%
Graincorp Ltd	October 2009	$111,023,619	16.39%	-18.56%
ING Industrial Fund	November 2009	$155,720,170	28.61%	-22.14%

The principle issue with the ASX's preparedness to waive Listing Rule 7.1 in the circumstances noted above is not dilution, as a listed entity would be able to simply place 15 percent of its securities on issue ahead of an entitlement offer and then place another 15 percent immediately after the offer was completed within the existing rules. At issue is the apparent willingness of the ASX to waive the application of a publicly disclosed rule where in many cases there appears to be no reason to permit the waiver. The ASX does not appear to have released any specific guidance in relation to how it considers applications from issuers seeking such a waiver beyond the discussion of the policy reasons underpinning such waivers in the waiver register.

Of the 12 waivers granted by the ASX to S&P/ASX 200 entities during 2008 and 2009 from Rule 7.1 for a placement ahead of an entitlement offer, in only one case, that of Transfield, was the entity in serious danger of breaching debt covenants (based on disclosure provided to the market).[14] In two other cases the placements were made with debt refinances looming. In one case, that of GrainCorp, the ASX allowed a waiver for a placement to fund an acquisition that was not due for completion until more than a month after it was announced.[15] In no case were the additional funds raised from the accelerated placement material in the context of the total funds raised from the combined placement and entitlement offer (as an example, the funds raised by Asciano under its 'frontloaded' placement capacity amounted to approximately 5 percent of all funds raised in the capital raising and were being used to repay debt maturing in 11 months).[16]

Performance of placements

We examined the performance of the 140 placements made during 2008 and 2009, looking at security price performance on a six month basis (that is the six month period immediately following the placement) and the performance as at 30 June 2010 (assuming that the securities were held to

[14] Transfield Services, 'ASX Announcement: Transfield Services Capital Management Initiatives', 1 December 2008.

[15] Graincorp announced the acquisition and capital raising on 6 October 2009 and announced its completion on 13 November 2009.

[16] Asciano, 'ASX Release: $2 billion Underwritten Equity Raising, Trading Update and Outlook', 15 June 2009 and 'ASX Release: Successful institutional equity raising; Underwritten issue size increased by $350 million', 17 June 2009.

that date). On average, if an investor had been invited to participate in all 140 placements, then funds invested at the placement price would have yielded a 19.96 percent return if the investor held the securities for six months. If this fortunate investor had then held the placement securities until 30 June 2010 they would have received a return of 21.61 percent on their investment. Both of these returns exclude any dividends that the investor may have received in the interim.

4.2.2 Non-renounceable entitlement offers

Non-renounceable entitlement offers are rights issues where investors are entitled to participate in the offer in proportion to their existing interest in the issuer. The entitlements of securityholders in a non-renounceable entitlement offer cannot, however, be transferred or sold and so investors will not be compensated for dilution to the extent they do not participate in the offer.

A NREO is more equitable for existing securityholders than a placement because all securityholders are given the opportunity to participate to the extent of their existing interest in the company. NREOs are less equitable than renounceable entitlement offers because non-participating securityholders do not receive compensation for dilution to their securityholding. Entitlements that are not taken up are often offered to institutional investors by way of a placement with retail investors often having the ability to apply for additional securities (in one example, Wesfarmers' placement and entitlement offer in 2009 undertaken to reduce debt, the company received the $1.50 per share premium paid by institutional investors for the shares not taken up by existing investors in the institutional component of the offer).[17] No disclosure is required of the institutional investors selected to participate in the placement of the NREO shortfall. Many non-renounceable entitlement offers were either fully or partially underwritten.

The table below summarises non-renounceable entitlement offers made in 2008 and 2009:

NREO Funds Raised	$30.95 billion
Percentage of all funds raised	31.29 percent
Number of NREOs	57
Fees paid to advisors/underwriters	$719.50 million
Weighted Average discount	25.16 percent
Fees as a percentage of funds raised	2.32 percent
Average time taken	34.23 days
Average Size	$543.10 million

4.2.3 Renounceable entitlement offers

Renounceable entitlement offers are widely considered to be the most fair and equitable form of raising capital because securityholders electing not to participate have the ability to realise some

[17] Wesfarmers, 'Wesfarmers Receives Strong Institutional Support for Equity Raising', 23 January 2009.

value for the dilution that they may suffer through their non-participation. Any value they may realise by selling their right to participate will depend on market appetite for the renounceable rights which will in turn depend on, among other things, the price to be paid for securities under the REO. The formal mechanism for a REO allows holders of entitlements to trade their entitlements either on- or off-market but most of the REOs that took place in 2008 and 2009 were structured so that the entitlements were not tradeable on the ASX under to the 'accelerated offer' structure.[18] What instead occurs is that any entitlements not taken up by securityholders are held over and placed into a shortfall book build where institutional investors bid for the entitlements and any premium derived from the book build is distributed to securityholders not taking up their entitlements. In 2008 and 2009, 17 of the 21 REOs conducted by S&P/ASX 200 entities took this approach.

Accelerated renounceable (and non-renounceable) entitlement offers also create inequity between institutional securityholders as the rapid timeframe in which the institutional component is completed disadvantages existing institutional investors who lack the available funds necessary to participate on short notice. As noted above in section 4.2.1, in many cases it is not clear why the speed provided by an accelerated entitlement offer was necessary given how few listed companies disclosed covenant breaches or potential covenant problems to the market at the time capital raisings were conducted. Accelerated entitlement offers do, however, provide clear benefits to underwriters.

The table below summarises REOs made in 2008 and 2009. Care should be taken in interpreting this data as one heavily discounted REO – that undertaken by Rio Tinto Limited in 2009 – accounted for 28 percent of all funds raised through REOs and 32 percent of all fees paid:[19]

REO Funds Raised	$15.18 billion
Percentage of all funds raised	15.34%
Number of REOs	21
Fees paid to advisors/underwriters	$365.06 million
Weighted Average discount	36.81%
Fees as a percentage of funds raised	2.40%
Average time taken	42.81 days
Average Size	$722.87 million

Under the accelerated REOs used until October 2009, most issuers conducted separate book builds for the institutional and retail components of the offers. Under this mechanism the entity places

[18] Of the 21 renounceable entitlement offers only four were structured such that the rights were tradable on-market.

[19] Rio Tinto is a dual listed company, with Rio Tinto plc trading on the LSE and Rio Tinto Limited on ASX. Only funds raised by Rio Tinto Limited are included in this report.

any entitlements not taken up by institutional securityholders into a book build into which institutional investors are able to bid for the entitlements, then (normally three or four weeks later) any entitlements not taken up by retail investors are cleared through another book build in which institutional investors are able to bid for those remaining rights.

This structure has some inequities, especially in the pricing of entitlements not taken up by securityholders. Because the institutional and retail book builds are conducted separately, renouncing institutional securityholders and renouncing retail securityholders may not get the same consideration per security for renouncing their entitlements. For example, in October/November 2009 GrainCorp undertook a nine for ten REO at $5.65. The institutional component of the entitlement offer closed on 6 October with a book build process undertaken on 7 October to sell the entitlements that were not taken up by institutional securityholders. The institutional book build clearing price was $7.05 per share so institutional securityholders who did not take up their entitlements received $1.40 per entitlement. The retail component of the entitlement offer closed on 30 October with a book build undertaken soon thereafter. The retail book build clearing price was $6.50 per share so retail securityholders who did not take up all of their entitlements received $0.85 per entitlement. The table below notes that where separate retail and institutional book builds were conducted in all but two case institutional investors received a higher price for not taking up their entitlements than retail investors (with the exceptions being Wesfarmers' and Iluka's 2008 entitlement offers). Late in 2009 a distinct form of REO emerged under which retail and institutional entitlements not taken up are auctioned in the same book build process. This approach was adopted by CSR and what was then Macquarie Media Group for raisings announced in October 2009.

The renounceable entitlement offers and book build prices achieved were as follows:

Company	Offer price	Retail book build price	Retail premium	Institutional book build price	Institutional premium
AWC	$3.00	$3.35	11.67 percent	$3.70	23.33 percent
SGX	$4.00	$4.90	22.50 percent	$5.40	35.00 percent
PRY	$5.40	$5.50	1.85 percent	$6.60	22.22 percent
HST	$3.10	$3.10	Nil	$3.30	6.45 percent
ILU	$2.55	$4.00	56.86 percent	$3.25	27.45 percent
WES	$29.00	$38.75	33.62 percent	$37.25	28.45 percent
SBM	$0.40	Nil (underwriter required to subscribe)	Nil	$0.40	Nil
ORI	$22.50	$22.60	0.44 percent	$22.75	1.11 percent
ALZ	$0.60	$0.60	Nil	$0.60	Nil

Company	Offer price	Retail book build price	Retail premium	Institutional book build price	Institutional premium
LEI	$35.35	$38.00	7.50 percent	$41.00	15.98 percent
MMG	$1.55	$1.65	6.45 percent	Single institutional and retail book build	
MRE	$0.30	Market traded entitlements, no book build	N/A	Market traded entitlements, no book build	N/A
MGX	$0.60	Market traded entitlements, no book build	N/A	Market traded entitlements, no book build	N/A
ABP	$0.25	Market traded entitlements, no book build	N/A	Market traded entitlements, no book build	N/A
RIO	$28.29	Market traded entitlements and book build $48.50	71.43 percent	Single shortfall	
TPI	$1.20	$1.20	Nil	$1.20	Nil
FKP	$0.40	$0.40	Nil	$0.46	15 percent
CEU	$0.33	$0.335	1.52 percent	$0.365	10.60 percent
SIP	$1.02	$1.02	Nil	$1.07	4.90 percent
GNC	$5.65	$6.50	15.04 percent	$7.05	24.78 percent
CSR	$1.66	$1.75	5.42	Single institutional and retail book build	

4.2.4 Security purchase plans

SPPs involve the offer of securities to existing investors up to a maximum dollar value. The securities are not issued on a pro rata basis but are typically offered in parcels where the securityholder is invited to subscribe for securities (for example) worth $1,000, $2,500, $5,000, $7,500, or $10,000 in value (subject to scaleback and rounding).

This type of capital raising is not equitable as it is not based on pro rata entitlements but does allow issuers to offer securities to existing investors in a relatively cost effective manner. Many issuers have undertaken SPPs alongside placements (at the same issue price as the placement) to lessen the dilutive impact of the placement, especially for retail securityholders excluded from participating in placements available only to institutional and sophisticated investors. This can result in larger securityholders being unable to maintain their interest due to their SPP entitlement being insufficient; one S&P/ASX 200 entity, Seek, recognised this inequity by conducting a placement, an SPP and a top up offer for investors unable to maintain their equity ownership at pre-capital raising levels simply by participating in the SPP.

The table below summarises SPPs conducted in 2008 and 2009:

SPP Funds Raised	$7.96 billion
Percentage of all funds raised	8.05 percent
Number of SPPs	61
Fees paid to advisors/underwriters	$23.10 million
Weighted Average discount	11.11 percent
Fees as a percentage of funds raised	0.29 percent
Average time taken	45.41 days
Average Size	$130.57 million

The largest SPP undertaken was by ANZ between May and July 2009.[20] ANZ originally announced on 27 May 2009 that it was seeking to raise $350 million under the SPP and that if applications for new shares under the SPP exceeded $350 million it had the ability, in its absolute discretion, to allocate less than the number of shares applied for by shareholders (to scale back). ANZ shareholders had the ability to apply for up to $15,000 of new shares in increments of $1,000. The SPP was announced on the same day ANZ announced it was undertaking a $2.5 billion fully underwritten placement to institutions "to further strengthen the group's capital position".[21] The placement occurred on 2 June 2009 at $14.40 per share. On 9 July 2009 ANZ announced that "following outstanding support for its SPP, it will accept all applications which comply with the SPP rules and issue $2.2 billion of ordinary equity at $14.40" as the bank decided that it was prepared to carry additional capital in view of the uncertain economic environment and the potential for acquisitions.[22] The benefits of SPPs to listed entities in terms of cost were also apparent at ANZ, with the combined cost to the company of raising $4.661 billion in new capital being $25 million or 0.54 percent (compared with the average cost for a placement of 1.76 percent). The low cost of SPPs in terms of advisory fees relative to other forms of capital raisings – the most obvious explanation of which appears to be because SPPs are facilitated not by investment banks but (usually) by share registries – however must be balanced against their obvious shortcomings in terms of speed, certainty and capacity. The median SPP in 2008 and 2009 was just $35.6 million and SPPs were the most time consuming way of raising capital.

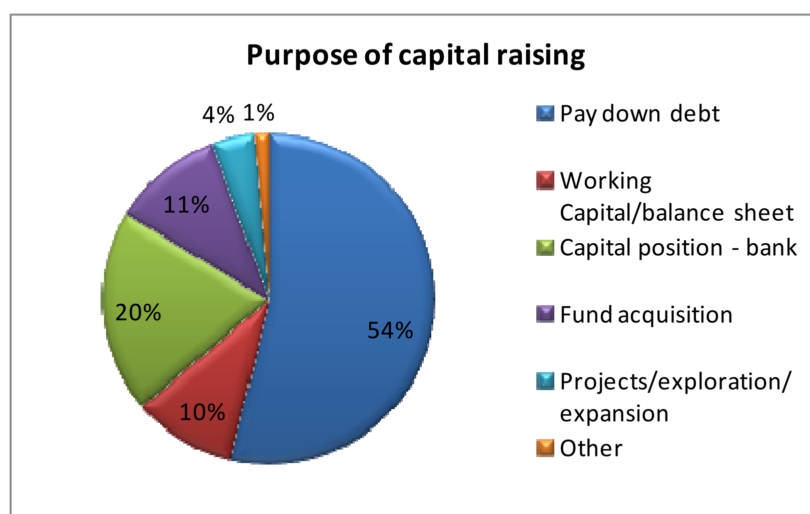
4.3 What were the funds raised for?

In the Appendix 3B filing made by listed entities whenever a new issue of securities is made, the purpose for the issue of new securities must be disclosed. For comparison purposes, we categorised the various explanations provided by issuers in the table below. Where more than one explanation was provided, a judgment was made as to the dominant purpose in light of the disclosure provided

[20] The second largest SPP was conducted by another bank, the Commonwealth Bank, and raised $866 million.
[21] ANZ, 'Media Release: ANZ announces fully underwritten $2.5 billion share placement', 27 May 2009.
[22] ANZ, 'Media Release: ANZ completes $2.2 billion Share Purchase Plan', 9 July 2009.

in the Appendix 3B filing as well as in other announcements made in connection with the capital raising.

Explanation for raising capital	Fund raised	Number of raisings	Weighted average discount
Pay down debt	$53,154,264,681	140	-24.61%
Enhance capital position - bank	$19,693,634,051	23	-11.96%
Fund acquisition	$10,612,430,722	24	-17.16%
Working capital/strengthen balance sheet	$9,943,998,968	52	-21.61%
Fund projects/exploration/expansion	$4,139,194,769	33	-10.83%
Other[23]	$1,399,982,437	7	5.98%[24]



Most of the capital raised – 64 percent or $63.1 billion - went to banks and financial institutions either through entities paying down debt owed to banks or through Australian banks raising capital to improve their own capital ratios. This amount excludes the $1.9 billion in transaction fees paid to financial institutions to raise the capital.

4.4 Issue price discounts under capital raisings

There was a clear variation in discounts which were applied depending on the form of the capital raising. On a weighted average basis the largest discounts were for renounceable entitlement offers

[23] Includes explanations such as closing out gold hedges, funding equity contribution to a joint venture, funding management internalisation and facilitation of a demerger.
[24] This is largely due to the Gindalbie placement of $162 million to AnSteel announced in November 2008 (the time at which the discount was calculated) but completed following regulatory and shareholder approval in July 2009.

(36.81 percent, although this was heavily influenced by Rio Tinto as noted above), followed by non-renounceable entitlement offers (25.16 percent), placements (12.29 percent) and SPPs (11.11 percent).

Care should be taken in attributing the differential pricing of offers solely to the type of mechanism used. Supporters of regimes that maximise board discretion often argue that the form of capital raising chosen has a significant influence on price, with more equitable forms leading to downward price pressures. For many entities however the capital raising mechanism reflected the need to maximise funds in order to solve balance sheet problems and so entities with serious balance sheet problems were those most likely to select entitlement offers (often in conjunction with a placement) in order to raise the maximum possible level of funds. This need for capital would therefore have been a major factor in determining issue pricing.

This is borne out by the fact that the discount applicable to capital raisings varied considerably depending on the purpose for which the capital was being raised. For example, where an issuer was raising capital to pay down debt, the capital was raised at a discount of 24.1 percent (on an average weighted basis) whereas the discount applicable where an issuer was raising capital to fund projects, exploration or expansion was only 10.8 percent.

Some market participants defend 'flexible' approaches to capital raising as minimising price discounts for equity offers and minimising losses for existing securityholders through a capital raising reducing the security price. This ignores the fact that in a discounted entitlement offer all investors have the opportunity to maintain their equity interest at the discounted price while in a placement (or in accelerated NREOs) only certain investors get access to the discounted securities and are then (so long as the entity issues a cleansing notice) free to sell these securities, giving them a quick windfall gain which is not available to non-participating securityholders.[25] From discussions with various participants in capital raisings in Australia in 2008 and 2009 there is suspicion among both institutional investors and listed entity management of the motives of some investment banking advisors in selecting participants for equity issued without preemptive rights such as placements. Multiple persons responsible for reviewing allocations of securities issued on a non-pro rata basis have indicated draft allocations frequently include allocations to investors unknown to management who they thought had sizeable business links to investment banking advisors (such as hedge funds) and some institutional investors have commented that they consider it likely that where such oversight from management has been lacking allocations have been given to short-term traders when existing investors were seeking additional equity allocations.

The potential agency problems confronting companies using investment banks as advisors and underwriters in capital raisings are exacerbated by the potential conflicts facing these banks: Conflicting interests between advising on pricing and providing underwriting; the conflicting

[25] Research into placements in New Zealand suggested volumes increased immediately following private placements at a discount suggesting participants were selling their shares for a quickfire gain. See Hamish D Anderson, Lawrence C Rose & Steven Cahan, *Differential Shareholder Wealth Effects of Private Equity Placements in New Zealand*, Working Paper, March 2004, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=519143

interests of existing investors in the company conducting the raising and the trading opportunities available to bank clients from participating in a discounted offering. In the absence of transparency to the market around pricing and allocations under placements (and NREO shortfalls) such conflicts are potentially able to flourish and may even drive the choice of raising: Placements, with their non-transparent allocations and speed, provide a much better return to investment banks than entitlement offers, and accelerated NREOs again provide a much better return than a full blown entitlement offer. It is clear many directors and management are aware of these potential conflicts on the part of their advisors although in an environment where underwriting is seen as critical and where all potential advisors face similar conflicts, directors and management may find overcoming the problems created by these conflicts of interest difficult. The only recourse open to institutional investors dealing with conflicted investment banks is to threaten to withhold brokerage from that bank's trading arm, a threat that is meaningful only if made by a large institution. The sanction itself illustrates the conflicts inherent in the role of the investment bank in capital raisings.

4.5 Fees paid to raise capital

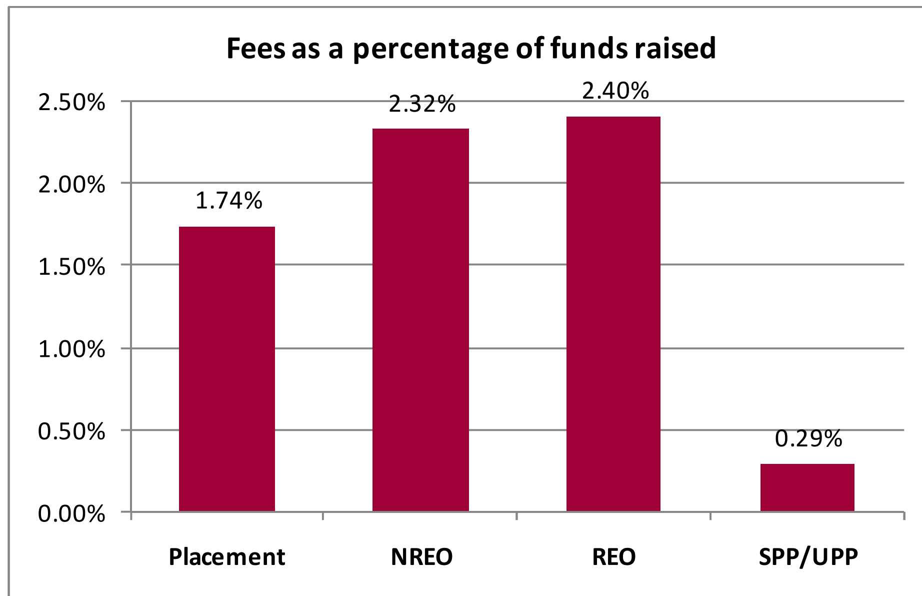
The 2008 and 2009 calendar years were bountiful for investment banks in Australia. Over that period approximately $1.9 billion in fees were paid to investment banks and other advisors for advising and underwriting capital raisings undertaken by the S&P/ASX200. Fees paid by issuers to their advisors represent 1.92 percent of total funds raised during the period.

Australian issuers are required to disclose, in their Appendix 3B filings to the ASX, fees associated with capital raisings only where the capital raising is a pro-rata issue and the only disclosure that is required to be made in that filing is the fee paid to underwrite (often issuers disclose advisory and success fees alongside the underwriting fees in the Appendix 3B filing). It is curious that the ASX does not require that underwriting fees and other advisory and transaction fees be disclosed in the Appendix 3B filing where the issuer is raising capital other than through a pro-rata entitlement offer, for example, where an issuer makes a placement. Listed entities are, however, required to disclose in the issued capital note to their interim and annual accounts, securities issued during the relevant period as well as the cost associated with such issue (some issuers disclose the net amount raised). For the purposes of this study where the fees were not disclosed in the Appendix 3B filing the fees were ascertained by reference to the interim or annual accounts and so in some cases include fees paid to other advisors such as law firms. From a review of prospectus information on fees payable to other advisors compared with those paid to investment banks it appears reasonable to attribute the vast majority of capital raising costs to investment banking fees.

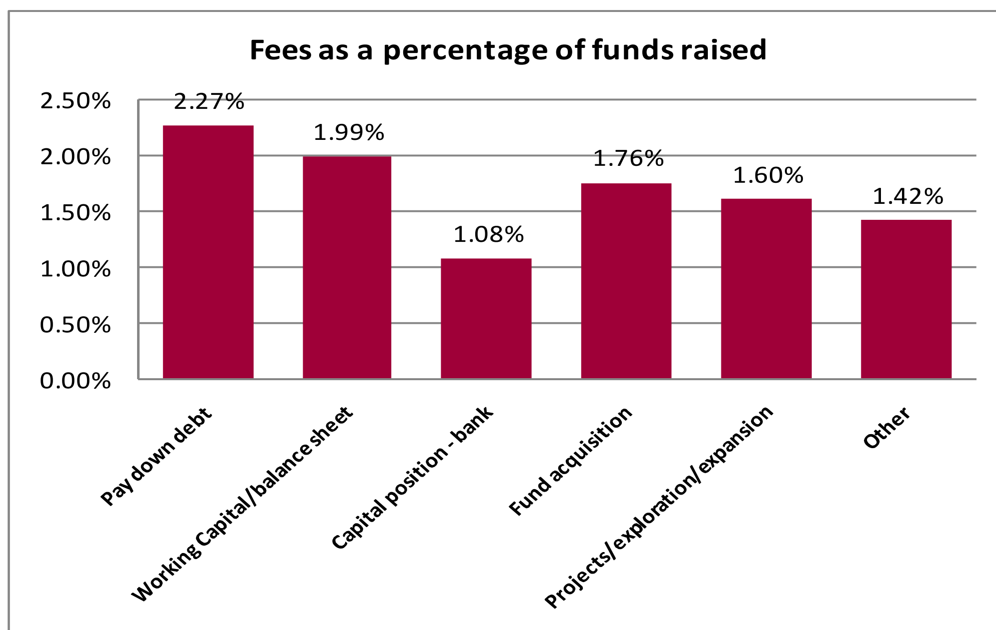
Underwriting and advisory fees differed considerably depending on the form the capital raising took and the fees payable also differed by the reason for the capital raising. Renounceable entitlement offers were the most expensive means of raising capital, costing issuers 2.41 percent of funds raised (Rio Tinto's REO with fees of 2.75 percent heavily influencing the average fee level)[26] with

[26] Rio Tinto Limited, *Offer Booklet*, 16 June 2009, p. 69.

NREOs costing 2.33 percent and placements costing 1.76 percent. SPPs were the cheapest means of raising capital costing only 0.29 percent presumably largely attributable to administrative costs.



As noted above the cost of raising capital differed depending on the reason why the capital was being raised. Capital raisings for the purpose of paying down debt were the most costly with fees representing 2.26 percent of funds raised, followed by strengthen balance sheet/working capital which cost 1.99 percent, funding projects/expansion/exploration which cost 1.81 percent and funding acquisitions which cost 1.76 percent.



Some of the fees of note paid to raise capital during the period included:

- For its REO announced in June 2009 at a 57.18 percent discount, Rio Tinto paid its underwriters 2.75 percent of funds raised.[27] This was despite the rights issue following significant public opposition by shareholders to Rio's plans to raise funds to reduce debt by placing convertible notes to Chinese company Chinalco in preference to a rights issue.
- In its 2008 entitlement offer Gunns' incurred an underwriting fee of 4 percent of the institutional component (which was "settlement" underwritten), it also paid a fee of 2.25 percent on the retail component which was not underwritten.[28]
- In April/May 2009 Duet Group paid Macquarie (the company is externally managed by an entity co-owned by Macquarie and AMP Capital) underwriting fees of 2.75 percent in respect of the institutional placement and the institutional component of its entitlement offer and a "management fee" of 2.25 percent on the non-underwritten retail component of the entitlement offer. An advisory fee of 0.75 percent was payable on the institutional placement and the entitlement offer. The placement and entitlement offer was completed at a 21.62 percent discount.[29]
- SP AusNet paid external advisors Macquarie and UBS 0.75 percent of the funds contributed to an entitlement offer by controlling securityholder Singapore Power.[30]
- Between June and August 2009 Transpacific Industries made a placement to a new cornerstone investor, Warburg Pincus, and undertook an accelerated REO in which Warburg Pincus was able to participate. Among the approximately $19 million in fees paid to the joint lead managers Macquarie and Deutsche were 'underwriting fees' of 1.8 percent of the gross amount of the retail entitlement offer despite Warburg Pincus sub-underwriting the entire retail component of the entitlement offer in advance and despite the lead managers only committing to underwrite 50 percent of any shortfall of the retail component.[31]
- Linc Energy announced a SPP underwritten to $20 million in August 2009. The SPP was announced with a $57 million placement. In September 2009 Linc Energy announced it would not be calling on underwriter BBY Limited to pick up the $13.3 million shortfall after it raised $7.7 million under the SPP. Linc Energy paid $2.57 million in fees associated with the placement (which appears not to have been underwritten) and the SPP, representing 3.97 percent of capital raised. It is unclear if Linc Energy received a rebate of underwriting fees after not calling on the underwriter to take up the $12.3 million shortfall.[32]

[27] See n. 26.
[28] Gunns, *Gunns Entitlement Offer Prospectus*, 4 September 2008, p. 44.
[29] DUET Group, 'Appendix 3B', 31 March 2009, p. 4.
[30] SP AusNet Group, 'Appendix 3B', 12 May 2009, p. 4.
[31] Transpacific Industries, *1.77 for 1 accelerated renounceable entitlement offer*, 20 July 2009, pp. 28 & 91.
[32] Linc Energy, *Linc Energy Announces successful $77.4M capital raising*, 3 August 2009, p1, Linc Energy, *Linc Energy Share Purchase Plan Results*, 16 September 2009, p1, and Linc Energy, 'Appendix 5B', 30 October 2009, p. 2.

5. Issues from the capital raising experience 2008 and 2009

The difficult market conditions confronting boards, management teams and investors meant that many capital raisings that occurred in 2008 and 2009 have little relevance for future capital raisings in 'normal' market conditions. Listed entities such as Transfield Services, which at the end of 2008 was in breach of a debt covenant, were faced with the prospect of either raising funds at whatever price they could obtain, or being unable to repay or refinance debt.

From the review of capital raisings by S&P/ASX 200 entities in 2008 and 2009 it appears that a majority of entities were not in such dire positions. The way in which capital was raised, however, does have implications for future raisings with key areas of concern including the apparent reliance on placements rather than accelerated rights issues in cases where listed entities appeared not to need to raise capital so urgently as to dispense with preemptive rights; the inherent conflict of interest of the role of investment banks acting as underwriter and price advisor on raisings; the rationale for the high fees paid to investment banks which, with a handful of exceptions, were not required to actually take up material levels of securities under underwriting agreements and the general lack of transparency of non-preemptive rights issues. These are considered in turn below.

5.1 Placements

Much of the debate over preemptive rights on capital raisings has been focused on the potential for dilution for retail securityholders who by definition are excluded from placements. The debate over preemptive rights is, however, much broader than simply institutional versus retail investors given that institutional investors themselves have no formal protection against being diluted by a placement. Discussions with market participants indicate that it is common for placements to be conducted as de facto entitlement offers confined to institutional investors, with the real benefit for participants being able to be allocated 'overs' – those securities representing the notional entitlement of retail investors, as well as the notional entitlements of institutions not participating in placements either through being unable to participate or being domiciled in a jurisdiction such as the US whose securities laws make offering a placement in such a market onerous.

There are, however, no formal limits on the discretion of the board to allocate securities outside of entitlement offers – outside of the duties of directors and to related parties - and this creates the potential for abuse especially in the absence of transparency of allocations (similar potentials for abuse exist in the allocation of shortfalls in NREOs). From discussions with institutional investors, it appears some institutions proactively seek to protect their investors from dilution through non-pro rata offers by forthright communication with boards, management teams and investment banking advisors. Smaller institutions, however, may not have the capacity to protect their interests to this extent and certain types of institutions, such as passive investors whose investment strategy compels them to own a certain proportion of a listed entity's securities, are also vulnerable to abuse of the discretion wielded by boards, management teams and their investment banking advisors. As a related point it is not clear to what extent decisions over final allocations are made by advisors or listed entity management and boards – formally, the right lies with boards but it is

not clear how many boards proactively oversee the allocation process. From ISS' discussions it is clear some directors and executives are vigilant in overseeing the allocations process. In the absence of meaningful disclosure of allocations under non-pro rata offers this potential for abuse will remain.

5.2 Infrastructure problems

Accuracy of the owners' registry: Entitlement offers, or even the desire by a company to offer a placement to existing investors, are predicated on the ability of a company to have accurate information on who are the beneficial holders of its securities. This process is made difficult by institutional investors' practice of holding shares through custodians for administrative efficacy which means the legal owners of most securities held by institutions are custodians. In attempting to identify beneficial owners, listed entities often rely on beneficial holder information generated from so-called tracing notices that are updated periodically. In cases where capital raisings are announced with a view to being completed rapidly it is likely that an up to date beneficial holders list will not be available which makes determining the entitlements of investors difficult if not impossible.

Voting to ratify or approve placements: Where an issuer has made a placement it will often put a resolution to securityholders seeking to ratify that placement and to "refresh" its placement capacity so that the placement will not be counted towards the 15 percent cap for future issues of securities. Occasionally an issuer will put a resolution to securityholders seeking approval (rather than ratification) of a placement in advance so that the placement will not count towards the 15 percent cap. In both cases, the issuer is required to specifically exclude the securityholders who participated or will participate in the placement from voting on the resolution to ratify or approve the placement. It may be easy to identify the participants when the company is seeking to ratify the placement (because that placement has already been made), however, the issuer may not be in a position to identify the securityholders who may participate in a future placement which is being proposed. In such a circumstance that issuer will typically note, in the voting exclusion statement contained in the notice of meeting, that it will "disregard votes cast by any person who may participate in the proposed placement". Given that it is unclear how issuers select placement participants so too is it unclear how an issuer would disregard any votes cast on a resolution approving a placement by persons who may participate in a placement that is yet to be made (although placements are often completed subject to securityholder approval).

We examined the voting results at annual general meetings and other general meetings where the issuer put a resolution to securityholders seeking ratification of a placement. There were many meetings where the particular resolution seeking approval to ratify the placement had a lower securityholder voting turnout which indicates that the placees refrained from voting on that particular resolution or that the issuer disregarded any votes cast by the placee. However, there were instances where the number of securities voted on all of the resolutions put to a meeting

were the same, including the placement ratification resolution, indicating that placement participants may not have been excluded from voting.

5.3 Pricing tension and the role of advisors

Pricing a capital raising during 2008 and 2009, especially in the last quarter of 2008 and first half of 2009, posed an enormous challenge for boards and management teams. Some entities were clearly 'price takers' during this period and needed to obtain capital at whatever price investors were willing to pay. As the global economic situation worsened pricing also became difficult for investors and this may explain why book builds for pricing capital raisings were largely abandoned between November 2008 and July 2009. From discussions with directors it appears many boards were chiefly concerned with ensuring they had sufficient capital to meet the concerns of their banks and to address the heightened concern of the broader equity market over debt levels rather than pricing equity at the least possible discount. Avoiding substantially discounted equity raisings may have been one factor behind the increased reliance on placements which as noted above, were generally done at a lesser discount to market than entitlement offers (although this may also reflect the fact that entities with serious funding difficulties were likely to have to conduct a placement as well as an entitlement offer to raise sufficient capital).

Most concerning in terms of equity were placements at substantial discounts, given not all securityholders are afforded the opportunity to participate at the discounted price and may see the value of their own holdings adversely affected by the issue of substantial amounts of new securities at a substantial discount. Of the 10 largest placements in dollar terms conducted during 2008 and 2009 where there was no accompanying entitlement or SPP offer, five occurred in the period between the collapse of Lehman Brothers in September 2008 and the end of March 2009, the period during which the situation in capital markets was at its worst. In three of these five placements – by Westfield, Commonwealth Bank, Fortescue, Lend Lease and Stockland – no indication was given how the securities allocated were priced. In the case of the Commonwealth Bank's October 2008 placement to fund the acquisition of HBOS' Australian businesses it appears the pricing was set following a book build.[33] Stockland announced its placement after it had been completed and disclosed that the underwriter, UBS, also conducted the book build.[34] In the other three cases no information was given on how the price was determined although in one case, that of Fortescue, the placement was to a single investor. For the other two placements the price to be paid per security was announced prior to the placement being undertaken and the placements were

[33] In its 8 October 2008 announcement of the placement CBA stated it was seeking to raise $2 billion but did not disclose a price per security; the price per security was announced in the same release announcing the successful completion of the placement on 9 October 2008. The advisor on the placement was not disclosed.
[34] Stockland Property Group, 'Stockland raises $300 million in share placement', 8 October 2008.

described as being underwritten in the initial announcement.[35] The identity of the underwriter in these cases was not disclosed.

In certain cases it appears boards and management placed significant reliance on their investment banking advisors in setting prices for equity raisings. These advisors were also often acting as underwriters of these equity issues and had a clear interest in ensuring the price was set not only low enough to ensure sufficient investor participation to meet the entity's needs for capital but also low enough to ensure that the underwriter would entail minimal risk. The success of underwriters at pricing their own risk during 2008 and 2009 is apparent from the small minority of cases where underwriters were forced to take up material shortfalls. In few cases were underwriters forced to subscribe for a material part of a capital raising (see the table below). Of the 279 capital raisings 118 were not underwritten. Of the 161 capital raisings that were underwritten only 32 required the underwriters to subscribe for shortfall securities and of these seven were underwritten by 'strategic' securityholders. In total the investment banks who underwrote the capital raisings during 2008 and 2009 were required to subscribe for $1.89 billion of securities (this figure excludes underwriting by strategic securityholders, they were required to subscribe for $424 million worth of securities) which represents only 2.77 percent of the total underwriting commitment of $68.15 billion.

The following table notes the largest 10 underwriting requirements where underwriters were required to subscribe for shortfall securities:

Issuer	Type of raising	Date	Underwriting requirement	Capital raised	Percentage of capital raised
STO	NREO	May/June 09	$312 million	$2.97 billion	10.54%
IIF	NREO	Oct/Dec 09	$206 million	$544 million	37.85%
GPT	NREO	Oct/Nov 08	$131 million	$1.33 billion	9.83%
BLY	NREO	Aug/Sep 09	$128 million	$406 million	31.64%
SGP	NREO	May/June 09	$125 million	$1.78 billion	10.54%
AWB	NREO	Sep/Oct 09	$106 million	$359 million	29.56%
HDF	NREO	July/Aug 09	$104 million	$192 million	54.35%
BSL	NREO	May/June 09	$91 million	$1.40 billion	6.47%
IPL	NREO	Nov/Dec 08	$82 million	$902 million	9.08%
AIO	SPP	Aug/Sep 08	$79 million	$104 million	76.55%

In the majority of cases (129 in all) underwriters were able to receive substantial fees for underwriting without being required to subscribe for any portion. Some listed entities allowed underwriters to expand the proportion of a capital raising they were prepared to underwrite (and therefore the fees they would receive) after already receiving commitments from investors:

- **Asciano:** At Asciano, underwriters RBS and UBS increased the underwritten component of the institutional conditional placement from $1 billion to $1.35 billion after the board decided to increase the total placement size following strong investor demand for the

[35] Westfield Group, 'Westfield Group to raise $2.9 billion in underwritten share placement', 3 February 2009; Lend Lease Corporation, 'Institutional placement to raise $302.5 million to replenish balance sheet', 4 February 2009.

capital raising.[36] The underwriters received the same fee for underwriting this additional component **which they agreed to underwrite after demand exceeded supply for the initial placement**. This amounted to estimated additional fees for the underwriters of $7.88 million despite the minimal risk posed by the additional underwriting.[37]

- **PanAust:** On 29 May 2009, three days after announcing an institutional placement and entitlement offer (in addition to a new investment from a cornerstone shareholder), PanAust announced that its underwriters ABN Amro Morgans Corporate had agreed to underwrite the retail component of the entitlement offer "following strong institutional shareholder support".[38] This increased their underwriting commitment from $110 million to $142 million but only **after** it had received commitments for $110 million and presumably had been aware there was likely to be strong institutional interest in any shares not taken up by retail investors under the retail component (which closed "heavily oversubscribed" on 25 June 2010). ABN Amro Morgans received fees of 3 percent for underwriting the entitlement offer and by extending its underwriting increased its underwriting fees from $3.3 million to $4.26 million.[39]

The underwriters of ING Office Fund's placement and entitlement offer announced on 17 June 2009 also agreed to extend their underwriting after initially agreeing to underwrite only the institutional component. The expanded underwriting, from $330 million to $415 million followed the "high level of demand from institutional investors".[40] In this rare case the underwriters, Citigroup, Goldman Sachs and JP Morgan appear to have misjudged the level of institutional demand, with the underwriters being forced to subscribe for approximately $60 million, or 71 percent of the retail entitlement offer (18 percent of the total entitlement offer).[41]

The fact underwriters are able to lay-off their risk to institutional investors through sub-underwriting arrangements also calls into question the fees being received by investment banking advisors. From discussions with institutional investors it appears sub-underwriting fees are usually one-half to one-third the average fee of approximately 200 basis points across the S&P/ASX 200 meaning underwriters are able to receive half to two-thirds of the headline fee without incurring meaningful risk to effectively fulfill the administrative function of indentifying investors interested in participating in a capital raising.

[36] Asciano, 'ASX Release: Successful institutional equity raising; Underwritten issue size increased by $350 million', 17 June 2009.
[37] Estimated fees calculated based on underwriting fees for the conditional placement as disclosed in Asciano's pro forma Appendix 3B released to the market on 17 June 2009.
[38] PanAust, 'ASX Announcement: A$142 million Equity Offer Fully Underwritten Institutional Component of the Equity Offer Significantly Oversubscribed', 29 May 2009.
[39] Estimated fees calculated based on underwriting fees for the capital raising as disclosed in PanAust's pro forma Appendix 3B released to the market on 28 May 2009.
[40] ING Office Fund, 'ASX Announcement: IOF completes institutional equity raising and underwrites retail offer to raise $415 million', 19 June 2009.
[41] ING Office Fund, 'ASX Announcement: IOF retail entitlement offer', 15 July 2009. The estimated additional fees received by the underwriters from the retail component were $2.73 million estimated from the revised Appendix 3B filed by ING Office Fund on 7 July 2009.

The issue of fees paid to investment bankers for work on capital raisings has attracted international attention including from competition regulators. The UK's Office of Fair Trading recently announced an inquiry into fees paid for equity underwriting and associated services.[42]

5.4 Lack of regulatory transparency

The flexible capital raising arrangements advocated by the ASX also require regulatory transparency to provide certainty to market participants. The need for transparent regulatory settings underpinned formal changes to capital raising rules in New Zealand, effective April 2009, Singapore and Malaysia (among other jurisdictions). The ASX, however, appears to have adopted a strategy of having formal Listing Rules and then a substantial body of informal or precedent rules around capital raisings that are embodied in the ASX's waiver policies. These exhibit a high degree of consistency and are disclosed retrospectively and in two week blocks in the ASX's waiver register. For example, the accelerated entitlement offer is a creature of the waiver regime, as is the ability to 'frontload' a placement by expanding the placement capacity ahead of an entitlement offer to the extent the offer is underwritten (although in many cases it is not clear why the ASX felt it necessary to grant waivers necessary to facilitate frontloaded placements).[43] Given the consistency with which the ASX has been prepared to grant these types of routine waivers to facilitate capital raisings there appears no compelling reasons why the Listing Rules should not simply be updated to reflect market reality.

5.5 Abandonment of preemptive rights

The ASX's discussion paper, released in January 2010 reviewing capital raising during the financial crisis, notes it, as the frontline market supervisor, does not see any value in protecting existing investors' preemptive rights. The ASX explicitly states its capital raising regime is not 'merit-based' in favour of any particular form of capital raising and cites the Australian system's 'flexibility' as a key factor in the ability of Australian listed entities to survive the financial crisis.[44]

As noted by the ASX, Australia's current regime for capital raisings is based on board flexibility to allocate capital within reasonably generous parameters – up to 15 percent of securities at a discount determined by the board to any persons who are not related parties over any 12 month period. This flexibility and the considerable discretion it provides a board and its advisors - to reward friends, punish critics or invite a major new investor onto the register with a blocking stake to a takeover - should, the ASX argues, be balanced by disclosure that enables the market to

[42] Office of Fair Trading UK, 'OFT seeks views ahead of equity underwriting market study', 10 June 2010 at http://www.oft.gov.uk/news-and-updates/press/2010/61-10. On the figures quoted by the UK regulator it appears capital raising fees in 2009 were higher in the UK than in Australia, with average fees across the market of 2.86 percent.

[43] For an example of the ASX's waiver policy with regards to accelerated rights issues and frontloaded placements see ASX, 'Register of ASX Listing Rule Waivers', 1-15 June 2009, Waivers WLC090274-001 and WLC090274-003.

[44] See n. 5, p. 4 for a discussion of the flexibility of the Australian regime and pp. 16 and 17 for a discussion of the ASX's rejection of merit-based approaches.

consider how well the board is using its flexibility.[45] There is, however, minimal disclosure required under the existing placement regime:

- Listed entities are not required to disclose the identity of placement participants, even in cases where a participant is not a preexisting securityholder or where a securityholder has seen their voting rights increase materially. When seeking ratification or approval of a placement, companies typically describe the participants as "new and existing institutional investors".
- Boards are not required to disclose how the new issue's price was determined (see above for a lengthier discussion of pricing of equity offers during 2008 and 2009).
- There is no requirement to disclose the number of entities participating in the placement. Some listed entities do provide additional information not required by the ASX. Bank of Queensland, for example, disclosed 42 entities participated in its February 2009 placement when it sought ratification for the securities issued; Westfield disclosed that approximately 80 percent of its 2009 placement went to existing investors and that over 230 institutions participated and OneSteel, in seeking ratification of its April 2009 placement, offered to provide a full list of participants upon request to the company.[46]
- There is also no requirement for a company to disclose the advisors it used in conducting a placement nor the fees paid to those advisors. As noted above, this disclosure is required where companies conduct preemptive rights issues despite the risks to existing securityholders of such issues – and therefore the importance of the role of the advisor - being much less than that posed by placements.

This absence of disclosure makes it difficult for investors to review how boards are using the flexibility available to them under the ASX's capital raising regime. The other concerning aspect of a capital raising regime which emphasises flexibility and board primacy, even with adequate disclosure, is that boards are able to blunt the effectiveness of investors' primary means of holding directors accountable by allocating securities in non-preemptive rights issues to new investors inclined to be well-disposed to the board or existing investors supportive of the board. This can allow boards to entrench their positions despite pursuing strategies that left their company needing to raise capital urgently.[47]

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[45] See n. 5, pages above.
[46] Bank of Queensland, 'Notice of Annual General Meeting and Explanatory Statement', 6 November 2009, p. 4; Westfield, '$2.9 billion Institutional Placement' 4 February 2009, p. 1; OneSteel, 'Notice of Annual General Meeting', 30 September 2009, p. 5.
[47] The capacity of management teams to use private placements to protect their positions by allocating equity to friendly investors has received academic attention. For a US perspective, see Michael J Barclay, Clifford G Holderness & Dennis P Sheehan, *Private Placements and Managerial Entrenchment*, December 2006, working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=471720.

6. Possible Reforms

This paper concludes with suggested potential reforms to Australia's capital raising regime designed to preserve the flexibility that offers investors and listed entities clear advantages – including the current capacity to place up to 15 percent of securities on issue over any 12 month period. These reforms focus on improving disclosure:

- **Abandon prospectuses requirements:** In a continuous disclosure market there should be no protection afforded through the preparation and publication of a prospectus (and an entity that is in breach of disclosure obligations is unlikely to correct this breach through a prospectus). Instead, entities should be able to conduct a capital raising for all securityholders, retail and institutional, by having all directors, the CEO and CFO (if not directors) sign a statement released to the market that all material and relevant information has been disclosed to market and whether or not the entity is currently relying on an exemption to the continuous disclosure rules. Exemptions from the requirement to produce a prospectus already exist under the Corporations Act; requiring prospectuses for any new issue of securities by a listed entity draws an artificial distinction between retail securityholders who purchase newly issued securities (often at a discount) and those who purchase securities of the same entity on market (at no discount).
- **Disclosure of placement participants:** The ASX Listing Rules should require the disclosure to the market following a placement of the identity (and allocation) of any participant in a placement (or allocation of shortfalls following a NREO) who was not previously a securityholder in the entity or the identity (and allocation) of any existing securityholder whose interest in the entity increased as a result of their participation in the placement.
- **Disclosure of advisors/fees:** The ASX Listing Rules should be updated to require the disclosure of the identity of financial advisors on capital raisings and the fees payable to these advisors (and the fees paid to any sub-underwriters) for all forms of capital raisings. They should also be amended to require disclosure of sub-underwriting arrangements with institutional investors, including fees paid, to provide increased transparency of underwriting fee arrangements and potentially put downward pressure on headline underwriting fees (given it would clarify the extent to which the underwriter was actually bearing risk).
- **Update regulatory regime:** The Listing Rules should be updated to formally incorporate accelerated entitlement offers and the waivers for placement capacity ahead of an underwritten entitlement offer.
- **Explore alternative mechanisms for conducting capital raisings:** Many of the functions carried out by investment banking advisors on capital raisings are largely administrative – soliciting participation in capital raisings by new and existing investors and determining prices. It is not clear if such services justify the high fees presently received for these

functions and why these services could not be carried out through computerised platforms and/or by share registries (who already effectively conduct SPPs).

- **Requirement for approval of placement allocations:** One potential reform to prevent management teams from introducing friendly securityholders via placements who can frustrate takeovers or attempts to change the board would be to require any placement of more than 9.9 percent of issued capital to a single securityholder or a group of securityholders acting in concert to be conditional on securityholder approval.
- **Knowledge of securityholdings:** The present system for determining beneficial ownership of securities should be reviewed with a view to providing a more accurate assessment of securityholdings. This would assist in determining allocations and in excluding securityholders not entitled to vote on the ratification or approval of placements.
- **Institutional investor guidance:** Groups representing institutional investors should develop public standards on how capital raisings by Australian companies should be conducted which make specific reference to the protection of existing investors' preemptive rights. This process should include input from listed company management. A possible model is the work of the UK's Pre-emption Group.

Appendix 1: The capital raising regime in detail

This appendix provides a detailed overview of the regulatory framework under which equity capital raisings – including entitlement offers, private placements and security purchase plans – by entities listed[48] on the Australian Securities Exchange are conducted. The two key elements of this framework directed specifically at equity capital raisings are:

- Any offer of securities by the listed company needs to be disclosed to investors under Part 6D.2 of the *Corporations Act 2001* (Cth) unless section 708 or section 708AA says otherwise; and
- An offer of securities will need securityholder approval under Chapter 7 of the ASX Listing Rules if it involves a breach of the 15 percent cap unless one of the exceptions in Listing Rule 7.2 applies.

In addition, the offer of securities must not contravene the 20 percent takeovers prohibition contained in Chapter 6 of the Corporations Act. In contrast to private placements, which, by their very nature, are dilutive of the investors who do not participate in the placement, Chapter 6 contains a safe harbour designed specifically to facilitate capital raisings through security purchase plans and rights issues.[49] In summary, an offer of securities will be exempt from the application of that prohibition where the offer is made to all securityholders (who hold securities in the same class as the securities being offered) in proportion to their securityholdings and on the same terms. This safe harbour also extends to the underwriters and sub-underwriters of the offer.[50]

More generally, the directors of the listed company must also ensure that, in exercising the company's power to issue securities, they have complied with their duties under general law and the Corporations Act; in particular, that power must exercised only for a proper purpose and in good faith in the best interests of the company. While it is not intended in this section to explain the legal duties of the directors of listed companies, it suffices to make two observations: first, the issue of securities, if it has the effect of changing the voting structure of the company by depriving an existing majority securityholder of control or is otherwise pursued with the intention of

[48] This appendix does not consider initial public offerings.

[49] Corporations Act, s 611, item 10. Both the Australian Securities and Investments Commission (see Regulatory Guide 159, Part R) and the Takeovers Panel (Guidance Note 17, paras 46 and 50) have recognised the potential for this safe harbour to be abused. A major shareholder or related party of the company – either by acting as the underwriter to the rights offer or by participating in a shortfall facility – could acquire or entrench its control of the company, by subscribing for any shortfall flowing from the rights offer. It is also quite possible for that major shareholder or related party (together with the company) to contrive such a shortfall deliberately by making the terms of the rights issue unattractive to the other shareholders of the company. The major shareholder or related party is, in these circumstances, able to effect a takeover by stealth without having to pay the other shareholders a takeover premium for control of the company. See also R Philip, "Rights Issues and Control Party Underwritings – Be afraid, be very afraid …" (2005) *Company and Securities Law Journal* 426.

[50] The concerns expressed in the above footnote must be read subject to ASIC's Regulatory Guide 199. ASIC has stated it will grant relief from the 20% prohibition to persons who exceed that threshold through participation in accelerated rights issues (as the offers in respect of the institutional and retail tranches may not be on the same terms; also, renounceable accelerated rights issues often involve separate institutional and retail book-builds) and on a case-by-case basis to rights issues that are accompanied by a short-fall facility (as offers made under a short-fall facility may not be pro-rata or on the same terms as the other offers). See also ASIC, Class Orders 08/35 and 09/459 and ASIC, "Facilitating Equity Capital Raising" (Consultation Paper 105, Feb. 2009), Part D.

maintaining the directors' control of the company, may expose the directors to civil and possibly also criminal liability for breach of duty; and, secondly, those securityholders whose interests in the company have been diluted as the result of an improper exercise of power by the directors may be able to bring a personal action against the directors.

A1.1 Disclosure under the Corporations Act

There are a number of statutory safe-harbours from the requirement to produce a prospectus that Australian listed companies can take advantage of when raising capital, in particular those that apply to offers of securities:

- to sophisticated investors. This safe-harbour encompasses: (a) investors who must pay a minimum of $500,000 on acceptance of the offer;[51] (b) investors who, on acceptance of the offer, will have paid a minimum of $500,000 when the amount payable for the secuities being offered is aggregated with the amounts previously paid by the investor for the company's securities of the same class;[52] (c) investors who are certified by a qualified accountant within 6 months before the offer is made as having net assets of at least $2.5 million or a gross income for each of the last two financial years of at least $250,000 per year;[53] and (d) investors to whom the offer is made through the holder of a financial service licence and where the latter is reasonably satisfied that the investor has experience in investing in securities to enable the investor to evaluate the offer.[54]

  It is arguable that the last of these categories renders the others redundant, since the broker or other licensee can readily form the requisite opinion in respect of an investor with significantly less than $500,000 to invest or with assets or an income far short of the above-stated minimum amounts.

- to professional investors.[55] This safe-harbour includes the holders of financial services licences, banks, insurance companies, superannuation funds and listed entities. It also includes persons who control at least $10 million (this is not a net figure as is the case with the safe harbour summarised in category (c) above, and it is conceivable that a person with net assets of less than $2.5 million could take advantage of this gross asset test through leverage; this loop-hole is, however, also arguably redundant given that such an investor could well be able to utilise category (d) above).

- as part of a small-scale offering involving personal offers of securities and none of the offers results in more than 20 investors being issued securities in any 12 month period nor more than $2 million being raised from the issue of securities in any 12 month period.[56]

[51] Corporations Act, s 708(8)(a).
[52] Corporations Act, s 708(8)(b).
[53] Corporations Act, s 708(8)(c).
[54] Corporations Act, s 708(10).
[55] Corporations Act, s 708(11).
[56] Corporations Act, s 708(1).

To ensure that the safe harbours from the prospectus requirement are not abused, the *Corporations Act* includes two anti-avoidance provisions designed to extend the prospectus requirement to indirect issues and indirect sales.[57] It is possible that, given the terms in which the first of these anti-avoidance provisions is framed, the prospectus requirement could nonetheless still be triggered where securities are offered to, for example, professional investors in a **private placement** and those investor sells or offer to sell any of those securities within 12 months of the securities having been issued to the investor although there must also be reasonable grounds to conclude that the securities were issued or acquired for that purpose.[58] It is recognised that the obvious way of avoiding the application of the anti-avoidance provisions – namely, for the investor to agree not to dispose of the securities for 12 months – is likely to be commercially untenable.[59] Accordingly, the Act contains three safe harbours from the anti-avoidance provisions to facilitate private placements.

Securities acquired in a **private placement** by a company (that makes use of one of the safe harbours from the prospectus requirement) can be on-sold by the investor within 12 months of their issue where:

- the securities offered in the private placement are in the same class as shares of the company that have been continuously quoted for three months before the placement securities were issued, and trading in that class of securities has not been suspended by the ASX for more than five days[60] during the 12 month period before the securities were issued. In addition, the company must provide the ASX with a "cleansing notice", within five days of the issue of the securities, stating that the securities were issued without disclosure and that the company has complied with financial reporting and continuous disclosure requirements of the Corporations Act. The notice must also set out all "excluded information" that was not required, as a result of one or more exemptions in the ASX Listing Rules, to be disclosed under the continuous disclosure requirements.[61]
- the securities offered in the private placement are in the same class as securities of the company that are quoted, and a prospectus has been produced by the company for an offer of securities of the same class as the securities being offered in the private placement.[62]
- the securities offered in the private placement are in the same class as securities of the company that are quoted, and the securities are issued to the underwriter (or its nominee) of an offer of securities of the company that is being made pursuant to a prospectus.[63]

[57] Corporations Act, s 707(3) and (5).
[58] Corporations Act, s 707(3) and (4).
[59] See *Ford's Principles of Corporation Law* (LexisNexis Australia, looseleaf edition), para [22.120].
[60] ASIC has stated that it will grant relief from this 5 day requirement on a case-by-case basis (see Regulatory Guide 173, Part B). Accordingly, longer periods of interrupted trading will not necessarily prevent the company and participants in a private placement from availing themselves of this safe harbour. See also ASIC, "Facilitating Equity Capital Raising" (Consultation Paper 105, Feb. 2009), Part C.
[61] Corporations Act, s 708A(5).
[62] Corporations Act, s 708A(11).
[63] Corporations Act, s 708A(12).

Thus, the mechanism of a cleansing notice – basically, this notice and the information provided by the company in the discharge of its financial reporting and continuous disclosure obligations operate, in aggregate, as a substitute for a prospectus – enables participants in a private placement to sell the securities acquired by them within 12 months of placement being made. However, no cleansing notice is required for the initial offer of securities under a private placement; the cleansing notice is only required for the purposes of preventing the application of the anti-avoidance provisions in the event of an on-sale within the 12 month period.

In addition, ASIC has granted relief from the prospectus requirement (and also the anti-avoidance provisions that could otherwise capture on-sales of the securities offered) to **securities purchase plans**.[64] To take advantage of this relief, the securities offered must be in the same class as securities of the company that are quoted, and the offer must be made on a non-renounceable basis and at a discount (the offer price must be less than the market price during the 30 day period before either the date of offer or issue) to all securityholders, who hold securities in the same class as the securities being offered, in proportion to their securityholdings and on the same terms. In addition, the offer must be accompanied by a "cleansing notice" and no securityholder can be issued with more than $15,000 of securities within any 12 month period. Again, the information contained in the cleansing notice and the information provided by the company in the discharge of its financial reporting and continuous disclosure obligations act as a substitute prospectus.

The *Corporations Act* also contains a safe harbour from the prospectus requirement specifically for **rights issues**.[65] This safe harbour is framed in equivalent terms to the first of the safe harbours mentioned above that are available to participants in private placements from the anti-avoidance provisions. An offer of securities under a rights issue will not need to be accompanied by a prospectus where the securities offered are in the same class as securities of the company that are quoted, and trading in that class of securities has not been suspended by the ASX for more than five days[66] during the 12 month period before the offer was made. Likewise, the company must provide the ASX with a "cleansing notice", within the 24 hour period before the offer is made, stating that the securities are being offered for issue without disclosure and that the company has complied with financial reporting and continuous disclosure requirements of the *Corporations Act*. The notice must also set out all "excluded information" that was not required, as a result of one or more exemptions in the ASX Listing Rules, to be disclosed under the continuous disclosure requirements. Again, this information in aggregate operates as a substitute for a prospectus.

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[64] See ASIC, Regulatory Guide 125, Regulatory Guide 173, Part C and Class Order 09/425.

[65] Corporations Act, s 708AA(2). ASIC has stated it will grant relief from the requirements of this safe harbour to accelerated rights issues and on a case-by-case basis to rights issues that are accompanied by a short-fall facility, to allow such rights issues to also have the benefit of this safe harbour. See ASIC, Regulatory Guide 189, Part C and Class Order 08/35.

[66] ASIC has also stated that it will grant relief from this 5 day requirement on a case-by-case basis (see Regulatory Guide 189, Part D).

Finally, ASIC will also grant **rights issues** relief from the anti-avoidance provisions as those provisions could otherwise apply to on-sales of the securities offered that take place within 12 months of the issue of the securities.[67]

A1.2 Chapter 7 of the Listing Rules

The ASX Listing Rules imposes on entities listed on the ASX a 15 percent cap on the issue of securities during a rolling 12 month period. An entity seeking to increase its ordinary security capital by more than 15 percent in a 12 month period must secure securityholder approval in advance of the increase.[68] However, in contrast to private placements, a listed entity can exceed that cap by raising equity capital via a **security purchase plan** (SPP) or a **rights issue**.

The principal requirement that SPPs and rights issues must comply with in order to avoid the restriction of the 15 percent cap is that the securities must be offered to all ordinary securityholders of the company, and, in the case of a rights issue, in proportion to their securityholdings.[69] In addition:

- the ratio of the securities offered must not be more than one ordinary security for each security held by the investor, unless the securities are being offered on a renounceable basis and at a discount (the offer price must be not more than the average market price during the last five days before the announcement of the offer on which sales of the ordinary securities were recorded).[70]
- the securityholders of the company cannot subscribe for a greater number of securities than their pro-rata entitlement, unless this is pursuant to a short-fall facility or the securities are being offered on a renounceable basis.[71]

However, non-compliance with these requirements is not an absolute bar to the availability of the exemption to the 15 percent cap. The ASX routinely issues waivers of these requirements; for example, the ASX has waived:

- the pro-rata requirement to permit listed entities, without obtaining securityholder approval, to issue up to $15,000 of securities to investors under SPPs.[72]
- the one ordinary security per ordinary security held limit, to permit listed entities, without obtaining securityholder approval, to implement **rights offers** on a non-renounceable basis of more than one ordinary security for each security held by investors.[73]

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[67] See ASIC, Regulatory Guide 189, Part D and Class Order 08/35.
[68] ASX, LR 7.1.
[69] ASX, LR 7.2, Exception 1 and 15. There are also exceptions for the under-writers of pro-rata offers and short-fall facilities accompanying such offers: ASX, LR 7.2, Exceptions 2 and 3 respectively.
[70] ASX, LR 7.11.3.
[71] ASX, LR 7.11.4.
[72] For example, see ASX, 'Register of ASX Listing Rule Waivers', 1-15 December 2009 & 16-31 December 2009, waivers WLC090653-001, WLC090656-001, WLC090658-001, WLC090659-001, WLC090665-001, WLC090666-1, WLC090669-001, WLC090673-001, WLC090677-001, WLC090679-001, WLC090684-001, WLC090689-001, WLC090690-001, WLC090691-001 and WLC090692-001.

In addition, **private placements** can also avoid the 15 percent cap, despite their dilutive nature. The ASX routinely waives the requirement for securityholder approval in respect of private placements where those placements are part of an "accelerated renounceable entitlement offer" (AREO)[74] or an "accelerated non-renounceable entitlement offer" (ANREO)[75] This particular waiver is granted on the basis that such offers are "functionally equivalent" to pro-rata entitlement offers; the latter forms the basis on which SPPs and rights issues are exempted by Listing Rule 7.2 from the 15 percent cap.[76]

Accelerated renounceable entitlement offers display the following attributes:

- Institutional investors (investors to whom offers of securities can be made without the need for a prospectus) are offered securities in proportion to their securityholdings. Securities not taken up by these investors are then offered to other institutional investors via a book-build (with the minimum price being the price at which securities were initially offered to the institutional investors).
- Retail investors are separately offered securities in proportion to their securityholdings after the release of a retail securityholder booklet. These securities are offered at the same price at which securities were initially offered to the institutional investors. Securities not taken up by retail securityholders go into a second institutional book-build. A recent innovation has been the simultaneous offer where the retail and institutional shortfall is offered through a single book-build at the conclusion of the retail offer.[77]

Accelerated non-renounceable entitlement offers only differ from their renounceable counterparts in that the offer of securities to securityholders is made on a non-renounceable basis.

In any event, the existence of these waivers begs the question as to why the relevant Listing Rules have not simply been amended (an outcome that would arguably provide greater clarity and defray transaction costs for the participants) to reflect common practice as set out in the various waivers granted. Further discussion on this point is included above in section 5.

[73] See n. 73, waiver WLC090681-001.

[74] See n. 73, waiver WLC090674-003.

[75] For example, ASX, 'Register of ASX Listing Rule Waivers', 16-30 November 2009 waiver WLC090639-003.

[76] See *Ford's Principles of Corporation Law*, para 22.151.

[77] This mechanism was used in 2009 by CSR in its entitlement offer announced in October 2009 and by Macquarie Media Group (now Southern Cross Media) in an entitlement offer also announced in October 2009.