

# Commercial Law Update

## Financial assistance in an acquisition – add it to your checklist

Frequently, parties to an acquisition overlook the Corporations Act requirements in Parts 2J.3 and 2J.4 when financial assistance is given by an entity in relation to an acquisition of shares in itself or its parent. This may involve compliance. If not considered in advance, the transaction may be delayed in proceeding to schedule or may involve additional procedures not initially contemplated by the parties. The relevant provisions are Sections 260A – 260E.

### Three conditions

A company may financially assist a person to acquire shares (or units of shares) in itself or its parent on three conditions. These are when the financial assistance:

- does not materially prejudice the company's interests or those of its shareholders or its ability to pay its creditors;
- has been approved by shareholders by special resolution at a general meeting; or
- is exempt.

### What form can financial assistance take?

- Financial assistance may include mere co-operation, paying a dividend, issuing or transferring shares (or units of shares), forgiving a debt or granting a charge or mortgage over assets in favour of a person who has financed an acquisition of the company's shares.
- It may not necessarily involve the physical movement of money or other assets or take the form of monetary assistance.
- It can be given before or after the acquisition of shares.

### Is there material prejudice? No convenient rules....

There will be no contravention of the *Corporations Act*, if there has been no actual diminution of the company's assets which is



For more information regarding financial assistance in an acquisition, please contact:

**Suzanne Harmer**  
Special Counsel  
T +61 3 9321 7854  
sharmer@rigbycooke.com.au

## Inside

<i>Three conditions</i>	Pg 1
<i>What form can financial assistance take?</i>	Pg 1
<i>Is there material prejudice? No convenient rules ....</i>	Pg 1
<i>Shareholder approval necessary</i>	Pg 2
<i>Shareholder information</i>	Pg 2
<i>ASIC to be informed</i>	Pg 2
<i>So what is exempt?</i>	Pg 2
<i>Contravention</i>	Pg 2
<i>Directors still on the hook</i>	Pg 2

### Important Notice

*This publication contains comments of a general nature only and is provided as an information service. It is not intended to be relied upon, nor is it a substitute for specific professional advice. No responsibility can be accepted by Rigby Cooke Lawyers or the authors for loss occasioned to any person doing anything as a result of any material in this publication.*

# Financial assistance in an acquisition – add it to your checklist Continued

materially prejudicial to the interests of the company, its shareholders or to its ability to pay its creditors. Unhelpfully, there are no convenient rules or guidelines for determining whether a financial assistance transaction would involve any relevant material prejudice. It is a question of considering the whole factual context in each case and the burden of proof is on the company.

## Shareholder approval necessary

Financial assistance by a company can be given if it has been approved by its shareholders. Approval must be given by:

- a special resolution passed at a general meeting of the company. No votes may be cast in favour of the resolution by the person acquiring the shares (or units of shares) or their associates; or
- a resolution agreed to by all ordinary shareholders at a general meeting. (This type of resolution will be necessary if all of the company's voting shareholders are precluded from voting in favour of a special resolution); and
- a special resolution of a listed domestic holding corporation or an unlisted domestic ultimate holding corporation (not itself a subsidiary) passed at a general meeting when the company giving financial assistance will be a subsidiary of either type of corporation immediately post-acquisition.

## Shareholder information

At a minimum, the company should explain to its shareholders the nature of the financial assistance, the reason for giving it and the effect of it. The company, therefore, must include in the notice of the meeting, a

statement setting out all the information known to the company (and not previously disclosed) that is material to the shareholder's decision whether or not to vote in favour of the resolution.

## ASIC to be informed

The company must lodge with ASIC a copy of the notice of meeting, and any document relating to the financial assistance which is to accompany the notice, before the notice is sent to members.

If the requisite approval is obtained, the company, listed domestic corporation or holding company must:

- lodge a notice with ASIC stating that the assistance has been approved at least 14 days before the assistance is given and the special resolution must be lodged with ASIC within 14 days after it is passed.

Remember, if the regulator has to be given notice before the financial assistance is given, this step must be considered in advance to ensure that completion timelines can be satisfied.

## So what is exempt?

Certain types of financial assistance transactions are exempt if given in the ordinary course of commercial dealings. These are:

- a lien on partly-paid shares
- an instalment agreement for payment of shares
- providing finance if the company's ordinary business includes providing finance (although it does not have to be its main business activity)

- security provided by a subsidiary of a debenture issuer
- financial assistance given under a shareholder approved employee share scheme
- a share capital reduction
- a share buy back
- a court order

## Contravention

Civil penalty provisions will apply to the company's officers involved in a contravention (but not the company). Where there is dishonest involvement, contravention will be a criminal offence.

The validity of the financial assistance or any contract or transaction connected with the acquisition will not be affected in the event of contravention.

## Directors still on the hook

Directors still remain subject to all normal duties (including their fiduciary duties) in connection with a financial assistance transaction even though it might not be a contravention. This also includes their duties under the insolvency provisions of the *Corporations Act*.

If a company provides a person with financial assistance in an acquisition of its shares, the directors at the time the debt was incurred could be liable if the company was then insolvent, or became insolvent as a result of incurring the debt, and there were then reasonable grounds for suspecting that the company was insolvent or would become insolvent as a result of the debt being incurred.

### To unsubscribe from this publication

If you do not wish to receive publications of this type from us in the future, please notify us by one of the following methods:

- Send an email to [marketing@rigbycooke.com.au](mailto:marketing@rigbycooke.com.au)
- Send a fax message to "Attention: Rigby Cooke Marketing" on fax number +61 3 9321 7900
- Send a letter to "Attention: Rigby Cooke Marketing", GPO Box 4767UU, Melbourne Vic 3001

Your request to remove you as a subscriber should include the word "unsubscribe" and your full email address to allow us to correctly identify your removal from our lists.

### Reprinting articles

Articles in this publication may be reproduced in whole or in part, provided that appropriate recognition is given to the author and the firm, and prior approval is obtained.

To obtain approval, please contact Rigby Cooke on +61 3 9321 7852 or email [marketing@rigbycooke.com.au](mailto:marketing@rigbycooke.com.au).

**rigbycooke** | lawyers

Level 13, 469 La Trobe Street  
Melbourne Vic 3000  
T 61 3 9321 7888  
F 61 3 9321 7900  
[www.rigbycooke.com.au](http://www.rigbycooke.com.au)