



ASIC

Australian Securities & Investments Commission

## REGULATORY GUIDE 48

# Takeovers aspects of options over shares

Chapter 1 — Introductory and general topics

Chapter 6 — Acquisition of shares

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*From 5 July 2007, this document may be referred to as Regulatory Guide 48 (RG 48) or Practice Note 48 (PN 48). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 48.1) or their practice note number (e.g. PN 48.1).*

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### Purpose

RG 48.1 This guide sets out the ASIC's view on certain takeovers aspects of options over issued and unissued shares. In particular, it sets out when a person who takes a call option (call taker) or writes a put option (put writer) (referred to collectively as "the person in the bought position") acquire and become entitled to shares to which

options over issued and unissued shares relate (in each case, the underlying shares) (s615 and Pt 6.7 of the Corporations Law (Law)).

RG 48.2 It discusses the position of the writer of a call option (call writer) and the taker of a put option (put taker) (collectively referred to as “the person in the sold position”).

RG 48.3 It also indicates how identifiable the underlying shares must be before the person in the bought position acquires or becomes entitled to those shares.

RG 48.4 This guide supersedes NCSC Releases 303 and 304.

RG 48.5 All sections, subsections and paragraphs in this guide refer to the Law unless otherwise stated.

## **Options over issued shares**

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RG 48.6 A person “acquires” shares in a body corporate for the purposes of the prohibition in s615 if they acquire a relevant interest in those shares (s51).

RG 48.7 The person in the bought position is unlikely to have a relevant interest in the underlying shares which derives from control over the voting or disposal of those shares (s31). They may be deemed to have this control under s33, but only if they are associated with the person who has both actual control over the underlying shares and at least 20% of the shares in the issuing company.

RG 48.8 The person in the bought position is associated with the person in the sold position under s12(1)(g) if the person who takes the options has the power to require the writer to dispose of the shares to which the options relate (call option) or to acquire the shares (put option).

RG 48.9 The persons in the bought position and the sold position may also be associated if the person in the sold position has a relevant interest in the underlying shares (s12(1)(f)).

RG 48.10 A call taker has the right to purchase the number of shares covered by the option agreement from the call writer. Upon performance of the agreement, enforcement of the right or exercise of the option, the call taker would have a relevant interest in the underlying shares.

RG 48.11 If the call writer has an existing relevant interest in the shares to which the options relate, the call taker is deemed to acquire a

relevant interest in the underlying shares before the options are exercised (s34(a)-(c)). Section 34 brings back to the earliest possible point in time (ie when the option itself is acquired) the moment at which a person is treated as having a relevant interest in the underlying shares (*Re Adelaide Holdings Ltd and the Companies Act* [1982] 1 NSWLR 167 at 170).

RG 48.12 A put taker has the right to require the put writer to purchase the number of securities covered by the agreement. The put writer acquires a relevant interest in the underlying shares if the put taker has an existing relevant interest in those shares (s34(a) or 34(c)).

RG 48.13 There was doubt about whether s9(6)(c) of the *Companies (Acquisition of Shares) Act 1980* (CASA) (the predecessor to s34(c)) applied to put options. This doubt has been removed by the addition of the italicised words to s34(c): “Where a person ... *has granted to another person an option*, with respect to an issued share in which the other person has a relevant interest ...”

## Entitlement to shares to which options relate

RG 48.14 If the person in the bought position acquires a relevant interest in the underlying shares, they become entitled to those shares for the purposes of s615 and Pt 6.7 (s609(1)(a)).

RG 48.15 The person in the bought position is also entitled to the underlying shares in the circumstances which create an association under s12(1)(f) or 12(1)(g) (s609(2)(b) and 609(2)(c)). They are not entitled to any other shares in which the person in the sold position has a relevant interest (whether or not in the same class) unless they are associated because of a provision besides s12(1)(d), 12(1)(f) or 12(1)(g) (s609(1)(b)). This was not the case under s7(3) of CASA.

## Identification of the underlying shares

RG 48.16 When determining whether a person in the bought position acquires a relevant interest in or becomes entitled to the underlying shares, the question of how identifiable the underlying shares must be with the options held needs to be considered.

RG 48.17 The argument that s9(6) of CASA should be confined in its operation to agreements with respect to designated shares or parcels of shares was rejected by de Jersey J in *Yaramin Pty Ltd v Augold NL* [1987] 11 ACLR 439.

RG 48.18 Having regard to the statements made by the court in the *Yaramin* case and the policy underlying s36(1)(c) of the Law, the ASC's view is that shares will be sufficiently identifiable with options for the purpose of s34 and 609(2) if the person in the sold position has a relevant interest in shares which are equivalent in number and class to the shares to which the options relate.

RG 48.19 If, while the options are current, the person in the sold position has a relevant interest in fewer shares than are required to satisfy the exercise of all the options, the person in the bought position only has a relevant interest in the lesser number of shares. Every time the number of shares in which the person in the sold position has a relevant interest changes, the number of shares in which the person in the bought position has a relevant interest also changes accordingly.

### **Compliance with Pt 6.7**

RG 48.20 If a call or put option is traded on an exchange, the person in the bought position may be unable to comply with the obligation under Pt 6.7 to notify details of the relevant interests that the person in the sold position has in the underlying shares. This would be the case where the person in the bought position does not know the identity of the person in the sold position.

RG 48.21 In this case, the ASC will accept that the person in the bought position discharges their obligation if they:

- (a) assess their entitlements; and
- (b) where appropriate, lodge notices under Pt 6.7,

on the basis that the person in the sold position has relevant interests in enough shares to satisfy its obligations under the options, without specifying the nature of the relevant interests of the person in the sold position. If a person were to contravene s709, 710 or 711 in such circumstances, they would not be liable to pay damages to a person who suffers loss or damage as a result of the contravention (s716).

### **Position upon exercise of options**

RG 48.22 A person in the bought position may have already acquired a relevant interest in and become entitled to the underlying shares as a result of entering into an option agreement. In this situation their relevant interest and entitlement, for the purposes of s 615 and Pt 6.7, does not change only because the person purchases the underlying shares on exercise of the call or put option. However, this

is subject to a possible change in the level of relevant interest or entitlement during the life of the option (see para 19 above).

## Person in the sold position

RG 48.23 The person in the bought position acquires the shares when the option is written (if the person in the sold position has a relevant interest in the underlying shares at the time). However, the person in the sold position does not necessarily dispose of the shares until the option is exercised. Although the matter is not free from doubt, the ASC believes that writing the option does not change the nature of the relevant interest of the person in the sold position for the purpose of s710 and 711.

RG 48.24 Before the person in the sold position enters into the option agreement, they have a relevant interest in the underlying shares for the purposes of Div 5 of Pt 1.2.

RG 48.25 The degree or nature of control that the person in the sold position has over voting and disposal of the shares does not become subject to the operation of s710 and 711 of the Law by entering into an agreement under which another person may acquire the underlying shares. When the options are exercised, a notifiable change will of course occur for the purposes of s710 and 711.

## Options over unissued shares

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RG 48.26 In addition to the circumstances specified in para 6 above, a person “acquires” shares in a body corporate for the purposes of s615 if they acquire any legal or equitable interest in securities of that body corporate (s51).

RG 48.27 Options over issued shares may be issued by the company which issues the underlying shares (company issued options) or by another person in respect of specified but unissued shares (third party options or equity warrants). In both cases, the earliest time that the person in the bought position can acquire a legal or equitable interest in the underlying shares is when the shares are allotted (see *Green v Crusader Oil NL* (1986) 4 ACLC 118 at 122 per Young J).

RG 48.28 When the shares to which the options relate are allotted, the person to whom they are allotted will acquire those shares. As a result, they become entitled to the shares for the purposes of s615 and Pt 6.7 of the Law.

## Section 627 exception

RG 48.29 The prohibition in s615 does not apply to certain acquisitions of shares resulting from the exercise by a person of renounceable options or rights conferred by convertible notes (s627). These acquisitions of shares are in respect of shares which, if they had been acquired when the options or notes were acquired, would not have contravened s615 by virtue of the operation of s620(1) or 620(2).

RG 48.30 For these purposes, a renounceable option means an assignable option to have an allotment of shares in a body corporate made to the person who holds the option (s603). The term “convertible note” is defined in the Law more broadly to include an option or right to have a share transferred (by reference to the definition in Div 3A of Pt III of the *Income Tax Assessment Act 1936*).

RG 48.31 Section 627 has the effect that s615 does not apply to the acquisition of shares as a result of the exercise of renounceable options or convertible notes if the options or notes were acquired:

- (a) at an official meeting of a stock exchange in the ordinary course of trading on the stock market of that exchange;
- (b) from the time the Part A statement was served (if the offers to which the Part A statement relates are full offers and not subject to a defeating condition other than a condition that a prescribed occurrence in relation to the company does not occur or a condition approved by the ASC) or a takeover announcement was made to the time the subsequent offer period expired; and
- (c) by the offeror.