



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 88

Trustee and nominee companies

Chapter 6 — Acquisition of shares

Issued 21/11/1994

From 5 July 2007, this document may be referred to as Regulatory Guide 88 (RG 88) or Policy Statement 88 (PS 88). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 88.1) or their policy statement number (e.g. PS 88.1).

Editor's note: See RG 136.30–RG 136.66 for information about how this guide applies to managed investment schemes.

Headnotes

Sections 30(4), 39, 609, 615, 728, 730; Sch 9 of the Corporations Regulations — Authorised trustee corporations; entitlement to shares under trust; substantial shareholding provisions; prescribed interests; management companies; nominee companies; holding companies.

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Purpose

RG 88.1 In this guide the ASC sets out its policy on the exercise of its power under s728 of the Corporations Law (Law). The ASC will consider giving an exemption from s615 to a prescribed authorised trustee corporation (trustee) in relation to shares acquired in the trustee's capacity as trustee of an approved deed. If a trustee holds an exemption it will not breach s615 if it acquires more than 20% of voting shares in a company in its capacity as a trustee under more than one approved deed.

RG 88.2 The guide also sets out the ASC's view on a nominee company's (nominee) entitlements and when it will provide relief for a holding company of a trustee or nominee.

Trustees

Background

RG 88.3 When a trustee and its subsidiaries act as trustee for two or more unit trusts, its relevant interests in, and entitlements to, shares held under the different trusts must be added together under the Law. If the management companies of the different trusts invest funds in the same company the trustee may be instructed to acquire more than 20% of the shares in that company in its capacity as trustee. To acquire the shares would breach s615.

RG 88.4 A trustee potentially has broad statutory powers to control the voting rights attached to shares it holds as trustee for a unit trust.

However, in practical terms, it has no real power over voting and disposal of the shares except in unusual circumstances when management companies breach their obligations or retire. Usually, the trustee of a unit trust is instructed by the management company to invest the funds of the trusts in authorised investments according to the trust deed.

Trustees and the Law

Trusts and trustees

RG 88.5 In general, prescribed interests cannot be issued without an approved deed (s1065). A trustee, approved by the ASC, must be appointed (s1067(4)).

RG 88.6 The trust deed of a public unit trust must contain a number of prescribed covenants binding the trustee and management company (s1069). The trustee holds investments on behalf of the beneficiaries of the trust (that is, the unit holders). The management company of a prescribed interest scheme is appointed under the trust deed and manages the investment on behalf of the unit holders. Occasionally the management company becomes insolvent or is removed by the unit holders. The trustee may then have to manage the trust and vote on, or dispose of, the shares held under the trust.

RG 88.7 The Law already gives relief to some trustees for legitimate commercial relationships. It does this if the broad definition of the terms “relevant interests” and “entitlements” might produce unintended results; for example, bare trustees (s39(b)) and nominee bodies corporate (s609(3)).

Section 615

RG 88.8 A person may not acquire a share in a company if, immediately after the acquisition, any person who is not already entitled to 90% or more of the company’s voting shares becomes entitled to more than 20% of those shares (s615).

Entitlements and relevant interests

RG 88.9 A person has a relevant interest in a share if they have the power to vote or dispose of the share. The relevant interest provisions make it clear that the extent of voting or disposal power is immaterial. The provisions also make it clear that they apply to a power which can be exercised jointly or is exercisable by means of, in breach of or by revocation of, trusts or agreements (s30(4)).

RG 88.10 Relevant interests held by trustees in shares subject to a trust can be disregarded in certain circumstances (s39). However, they cannot be disregarded in most prescribed interest schemes. A trustee will not have its relevant interest in shares held as trustee disregarded under s39 because its unit holders do not have a current exercisable and enforceable right over those shares. The trustee is not a bare

trustee because it has the power to remove the manager and vote and dispose of the shares in certain circumstances.

RG 88.11 A person is entitled under s609 to shares which:

- (a) they have a relevant interest in;
- (b) an associate (other than under s12(1)(d), 12(1)(f) or 12(1)(g)) has a relevant interest in; or
- (c) are the subject of certain agreements.

The policy of these provisions is to aggregate shares under the same or co-ordinated controllers for the purposes of Ch 6 in order to prevent avoidance of s615 by artificial arrangements.

RG 88.12 The trustee and management company therefore each have a relevant interest in the shares purchased for and on behalf of the trust.

Section 615 relief

RG 88.13 Trustees and their associates may have commercial difficulties complying with s615. If the trustee does not obtain relief, it may have to advise the management companies for which it acts as trustee that no further acquisitions in a particular company can be made. This is because the shares held by the trustee under a number of trusts may exceed 20%, even if the shares under the control of one management company are less than 20%.

RG 88.14 The ASC considers that it is an unintended effect of the Law that the aggregation of interests held by one trustee under several different approved deeds may breach s615. The likelihood of a trustee simultaneously exercising its power over parcels held under different trusts is remote. For example, it is unlikely that a number of unrelated managers would be removed or retire at the same time.

RG 88.15 The ASC considers that there will be no detriment to the market if relief from s615 is granted to trustees holding shares under the trusts of approved deeds. However, the ASC will only grant relief if the market is promptly and fully informed of a trustee or a management company's entitlements to shares in a company, including the aggregate entitlements of the trustee. Relief will not be given for shares:

- (a) managed by the trustee, for example, shares held in common funds (whether or not under approved deeds);
- (b) held in particular estates; or

(c) held under trusts of which the trustee or an associate is manager.

RG 88.16 The decisions to acquire and to exercise control over shares are made by the management company. The ASC will not give management companies relief from s615 under this guide. These companies must lodge substantial shareholding notices when their entitlements reach 5% (Pt 6.7) and comply with s615.

Disclosure of holdings

RG 88.17 If the ASC grants relief from s615 to a trustee it becomes even more important that the trustee's holding is properly disclosed. The ASC will not relieve a trustee from compliance with the substantial shareholding provisions (Pt 6.7). These provisions require the trustee to lodge notices with the relevant companies and stock exchange when it becomes entitled to not less than 5% of the voting shares of a company or when there is a notifiable change. In particular, the ASC will not extend the time for lodgement of notices.

Conditions for relief

RG 88.18 The ASC may give an exemption from s615 to an authorised trustee corporation named in Sch 9 of the Corporations Regulations or to a wholly-owned subsidiary of an authorised trustee corporation in relation to shares acquired in the trustee's capacity as trustee of an approved deed of which the trustee is not the management company. Relief will be given on condition that the trustee:

- (a) maintains a system which records promptly and accurately the numbers and percentages of shares held by the trustee:
 - (i) in its capacity as a trustee of an approved deed; and
 - (ii) in any other right; and
- (b) lodges with the appropriate ASC Regional Office a copy of every substantial shareholding notice relating to the trustee's entitlement in a company in excess of 10%.

RG 88.19 The ASC will require proof that these conditions can be met and will require an applicant to have an effective system operating to record all its share transactions.

The system must record:

- (a) all entitlements the trustee holds under an approved deed;

- (b) shares held on trust for particular estates;
- (c) shares included in common funds; and
- (d) shares held in its own right as an investor.

The system must be able to record accurately and in a timely manner the numbers and relevant percentages of the trustee's entitlements. This means that the trustee will be able to lodge substantial shareholding notices and respond to beneficial shareholding notices within the time limits in the Law.

RG 88.20 The ASC will not grant an exemption from s615 until it is satisfied that:

- (a) the trustee has established a system which meets the criteria in para 18(a) above;
- (b) the trustee has demonstrated that share transactions are being recorded; and
- (c) substantial shareholding notices are being generated.

RG 88.21 In other words, it will be a pre-condition of relief that the trustee has a satisfactory system and it will be a condition of relief that the trustee maintains that system. Relief will be granted in the form of Pro Forma 98 which says that the exemption continues only while the trustee complies with the conditions.

Surveillance

RG 88.22 The ASC will monitor the holders of the exemption as part of its ongoing surveillance activities of trustees. In addition to ensuring compliance with the conditions of the exemption, the ASC will monitor the trustee's compliance with the provisions of Pt 6.7 and 6.8.

Applications

RG 88.23 Applications for relief and the appropriate fee can be lodged at any ASC Regional Office and may be processed at the most geographically convenient Regional Office. Applications must contain a detailed description of the system to be used to record share transactions. As part of the assessment of the application, an ASC officer will visit the applicant's office to see a practical demonstration of how it will comply with the conditions outlined in para 18(a) and 20 above.

Nominees

Associates of nominees under s 609(1)(b)

RG 88.24 A nominee is entitled to shares in which it has a relevant interest (s609(1)(a)). In most cases, the relevant interest of a nominee in the shares of its client will be disregarded under s39.

RG 88.25 If a client of a nominee was an associate of the nominee, then s609(1)(b) would give the nominee an entitlement to its client's shares even though the nominee had no relevant interest in those shares. The ASC believes that because a nominee and client usually deal at arms-length, the client will not be an associate of the nominee for the purposes of s609(1)(b).

RG 88.26 The ASC's view is based on the decision in *Heine Management Ltd v ASC* (1994) 12 ACLC 138 at 153. In Hayne J's opinion, the nominee was acting on behalf of another. It was doing so "in the proper performance of the functions attaching to the business relationship formed between the nominee company and either or both of the two banks concerned". Hayne J said that it followed that s16 excludes the conclusion that the nominee was an associate of the client.

RG 88.27 On this basis, if the nominee is properly performing the functions expected in a relationship between a nominee and its client, s16(1)(a) means that a nominee is not an associate of a person for whom it holds shares. The effect of this decision is that when a nominee is calculating its relevant interests, it excludes shares in which its clients have a relevant interest but it does not. Therefore it will not have to lodge substantial shareholding notices and may not need relief from s609(1)(b) or need to hold a s609(3) certificate in respect of those shares.

Section 609(2) modification

RG 88.28 A nominee which is a bare trustee may be entitled to its clients' shares under s609(1)(c) because of s609(2). This is possible even though the relevant interest in those shares has arisen in the same circumstances which are disregarded under s39. The ASC has already indicated that it will give relief in such circumstances (Superseded Policy Statement 69, Pro Forma 81).

Relief for holding companies of trustees and nominees

RG 88.29 The holding company of a trustee or nominee may find that because its subsidiaries are associates under s11, it is entitled to shares held by the trustee or nominee (s609(1)(b)). It is entitled to the shares even though the relevant interest of the trustee or nominee in those shares is disregarded under s39. Alternatively, the holding company may be deemed to have a relevant interest under s33 even though the relevant interest of the trustee or nominee in those shares is disregarded under s39.

RG 88.30 The ASC agrees with the Companies and Securities Advisory Committee's view¹ that a person's relevant interest should be disregarded if the relevant interest of the person through whom it was derived would be disregarded. A holding company may have a relevant interest in shares in companies in which its subsidiary which is a trustee or nominee holds shares in the ordinary course of a business of a trustee or nominee. The ASC may grant relief to a holding company so that it can disregard its relevant interests in shares in which its subsidiary's relevant interests would be disregarded under the Law (see Pro Forma 99).

Applications

RG 88.31 Applications for relief may be lodged at any ASC Regional Office with the appropriate fee.

¹ Companies and Securities Advisory Committee, Legal Committee, "Report on anomalies in the takeovers provisions of the Corporations Law" March 1994 at p 5.