



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 5

Relevant interests in unissued share capital

Chapter 6 — Acquisition of shares (Part 6.1)

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From 5 July 2007, this document may be referred to as Regulatory Guide 5 (RG 5) or Practice Note 5 (PN 5). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 5.1) or their practice note number (e.g. PN 5.1).

Purpose

This guide is issued for the guidance of persons involved in share acquisitions and their advisers. It corresponds with and replaces NCSC Release 310.

RG 5.1 **Question:**

- (a) Does an option to subscribe for an unissued share constitute a relevant interest in that share?
- (b) If not, does the exercise of such an option or exercise of the right to convert a convertible note constitute an acquisition of the share then allotted?

Example:

A company issues options to a person to take up shares which upon allotment will represent more than 20% of issued share capital, and that option is exercised.

Answer:

(a) no and (b) yes, for the following reasons.

RG 5.2 Under s30 and 31 of the Corporations Law, where a person has power to exercise or to control the exercise of the right to vote, or power to dispose or to exercise control over the disposal of, a share whether or not it is a voting share, then that person has a relevant interest in the share. “Voting share” is defined by s9 as “an issued share”. While an option to have a share allotted could be described as a power to control the future disposal of that share, this definition and the references in s34 to options over and rights in respect of issued shares clearly indicate that a relevant interest for the purposes of the legislation cannot exist in an unissued share.

RG 5.3 It is also inconsistent with Ch 6 as a whole to apply the concept of “relevant interest” to unissued shares: s615 restricts acquisitions of shares only to the extent that entitlements to voting shares are affected, and the acquisition of options over unissued shares and other rights in relation to unissued shares, such as convertible notes, appears to be regulated solely by s703 and disclosure in accordance with cl 8 in Part A of s750.

RG 5.4 References to “unissued shares” are a convenient and pardonable abuse of language, but it should not be supposed that unissued shares exist, any more than do void contracts, repealed Acts or mares’ nests. Shares are created at the time they are issued: *Re VGM Holdings Ltd* [1942] 1 All ER 224.

RG 5.5 Where a person is allotted shares in a company by reason of his exercising an option or converting a note, the person has entered into a transaction within the meaning of s64(b). He accordingly acquires a relevant interest in those shares within the meaning of s51 at the time of the allotment. In the example given, the acquisition would contravene s615.

RG 5.6 Section 627 provides a limited exception from the application of s615 to the exercise of rights to have shares allotted. An offeror who acquires options on market during the course of a takeover scheme or takeover announcement may exercise those options without contravention of s615 if s620(1) or 620(2) would have applied to an acquisition of the shares at the time of the acquisition of the options.