The Mining Law Review

Fifth Edition

Editor
Erik Richer La Flèche

Law Business Research

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EDITOR'S PREFACE

I am pleased to have participated in the preparation of the fifth edition of *The Mining Law Review*. The *Review* is designed to be a practical, business-focused 'year in review' analysis of recent changes and developments, their effects and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 21 country chapters, each dealing with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book includes six country chapters focused on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

The mining sector continues to face challenging and uncertain times. The current down-cycle is longer than most and shows no sign of abating for most minerals. Stockpiles are high and production capacity has yet to be curtailed in a meaningful manner. Projections are for prices to remain generally soft until such time as supply and demand is rebalanced.

While times are tough, we know that mining is cyclical and that continued world population and economic growth as well as the depletion of current resources mean that growth in the mining sector will resume. The question is when.

To compound matters, when growth resumes it is likely to be uneven. Firstly, recovery is unlikely for some minerals. For example, the market for thermal coal is flat or declining as coal is being phased out in many plants and is being replaced by natural gas or renewable energy. Second, the use of rare earths and other 'high-tech metals' will continue to grow at a faster rate as the use of high technology and energy storage products becomes more generalised. Third, demand growth will be more diffused. China is the world's largest consumer of commodities but it will no longer be sufficient to look only at China to understand the market. China is moving away from mineral intensive infrastructure and export-led growth and moving to a slower, domestic service-led economy. The Indian subcontinent, despite impressive economic and demographic growth and sizeable infrastructure and other needs, is unlikely to replace China. As a result, it will be necessary to look at a selection of markets to understand future demand growth.

The mining world is thus condemned to adapt. To survive, miners must be lean, innovative, able to scale production according to demand and unafraid to close higher-cost facilities. This state of affairs has become the new normal.

As you consult this book you will find more on topics apposite to jurisdictions of specific interest to you, and I hope that you will find this book useful and responsive.

Erik Richer La Flèche
Stikeman Elliott LLP
Montreal
September 2016

Chapter 22

AUSTRALIA

Simon Rear, Chris Rosario and Chanelle Tong[1]

I INTRODUCTION

The Australian mining industry is extremely diverse in size, geographical focus, type of commodity and stage of development. It comprises several of the world's largest (and generally highly profitable) diversified resource companies, including BHP Billiton and Rio Tinto, together with a significant number of mid-tier producers, junior explorers, and mining service providers, operating globally while maintaining an Australian base.

This vast diversity within a capital-intensive industry has generated the need for funds to be raised through many sources and structures. Many junior to mid-tier exploration companies, who produce little in the way of consistent revenue, are generally considered unsuitable for traditional debt financing, and consequently seek to satisfy their capital requirements through equity (or hybrid equity) funding. Larger producing mining companies generally have a number of options as, in addition to being able to fund activities through operating revenue, they can more readily obtain funding through debt sources.

The metals and mining sector is, at the time of writing, by number of companies, the largest industry sector on the Australian Securities Exchange (ASX) with more than 700 companies involved in mineral exploration, development and production across 100 countries. The diversified investor base and market liquidity provided by an ASX listing is generally considered complementary to the capital-intensive nature of resource exploration and development, and has provided access to funding for numerous companies in recent years.

This chapter discusses the regulation of equity capital markets in Australia, specifically focusing on mining companies listed on the ASX. While the mining industry also relies heavily on debt and bond markets, discussion of such markets are beyond the scope of this chapter.

1 Simon Rear is a partner, Chris Rosario is a senior associate and Chanelle Tong is an associate at Squire Patton Boggs.

II CAPITAL RAISING

i General overview of the legal framework

Australia has an extensive legal and regulatory framework governing equity fundraising activities.

Equity fundraising in Australia is principally governed by the Corporations Act 2001 (Cth) (Corporations Act) (in particular, Chapter 6D) and, additionally for companies listed on the ASX, the listing rules of the ASX (Listing Rules).

The Australian Securities and Investments Commission (ASIC), an independent Commonwealth government body responsible for the supervision of Australian financial markets, plays a vital role in scrutinising fundraising activities.

Corporations Act – fundraising provisions

Companies seeking to raise equity capital from investors in Australia must comply with Chapter 6D of the Corporations Act. This applies, subject to certain exceptions (detailed below), to all offers of securities that are received in Australia, regardless of where any resulting issue, sale or transfer occurs.

Broadly, Chapter 6D provides that, unless a prescribed exception applies (discussed further below), an offer of securities requires disclosure to investors.

Where an offer of securities requires disclosure under Chapter 6D, the offeror must prepare and lodge with ASIC a disclosure document that complies with Chapter 6D and subsequently provide the document to potential investors. Depending on the circumstances of the offer, the disclosure document may take the form of:

a a 'full-form' prospectus;
b a 'short-form' prospectus (being a prospectus that refers to material previously lodged with ASIC instead of setting out the information in its entirety);
c a 'transaction-specific' prospectus (being a prospectus for continuously quoted securities[2] that is subject to special content rules);
d a profile statement; or
e an offer information statement.

Full-form and transaction-specific prospectuses are the most commonly used disclosure documents.

Prospectus

A prospectus must include all the information that investors and their professional advisers would reasonably require to make an informed assessment of, among other things:

a the rights and liabilities attached to the securities offered; and
b the assets and liabilities, financial position and performance, profits and losses, and prospects of the issuer.

This disclosure obligation is, however, limited to information that investors and their professional advisers would 'expect to find' in a disclosure document, and is only required to

2 Continuously quoted securities are, broadly, securities in a class of securities that have been quoted on the ASX in the three months prior to the date of the disclosure document.

be disclosed if a person whose knowledge is relevant (broadly being the issuer, its directors and certain persons or entities associated with the offer such as an underwriter) actually knew of the information or ought reasonably to have obtained the information by making enquiries.

Full-form prospectus

A full-form prospectus is most commonly used when raising capital as part of an initial public offering (IPO) and associated listing on the ASX. The company must (among other requirements for an IPO and listing) prepare a full-form prospectus containing extensive information, including:

a information regarding the company's business, board, management, material projects, strategic objectives and growth prospects;
b audited financial statements for the past two or three financial years;
c an investigating accountant's report commenting on the company's financial information;
d a technical expert's report (which, for mining entities, consists of a geological report);
e a summary of the material contracts to which the company is a party; and
f various statutory compliance information (for example, information about fees paid to various advisers in relation to the listing).

Transaction-specific prospectus

Once listed on the ASX, a public company whose securities are 'continuously quoted securities' may, subject to meeting certain requirements, issue a 'transaction-specific prospectus' to raise equity capital.

The Australian regulatory regime recognises that when a company issues continuously quoted securities, the market should generally already have all information necessary to reach an informed view about such securities, based on previous disclosures the entity has made to the market about its activities, financial standing and prospects. Theoretically, the market's view will already be reflected in the price of those continuously quoted securities. The regime provides that, in respect of companies who satisfy certain criteria, the prospectus content rules discussed in the 'prospectus' section above will be satisfied if the offeror lodges a 'transaction-specific prospectus' containing certain limited prescribed content.

Accordingly, issuers who are subject to ongoing continuous and periodic disclosure obligations (i.e., entities listed on the ASX) are not required to reproduce that information in a prospectus which offers continuously quoted securities (or options to acquire such securities). Instead, the entity must disclose the effect that the particular offer of securities will have on the issuer, and disclose material information about the issuer that is required by the prospectus disclosure laws, but which has been excluded from the issuer's continuous disclosure notices until that point. This differs to a number of overseas regimes (such as the United Kingdom) which require a full-form prospectus for secondary raisings from its shareholders.

Corporations Act – takeover provisions

General prohibition

Companies seeking to raise equity capital must also comply with the takeover provisions in Chapter 6 of the Corporations Act.

Broadly, unless a prescribed exception applies, Chapter 6 prohibits the acquisition of shares in a listed company (or unlisted company with more than 50 members) as a result of which a person's voting power in the company increases from 20 per cent or below to more than 20 per cent, or from a point that is above 20 per cent and below 90 per cent.

Exceptions to the takeover prohibition

Two exceptions to the prohibition in Chapter 6 relevant to this discussion are acquisitions of voting shares resulting from:

a an issue of shares pursuant to a 'rights issue' (being a *pro rata* offer of shares to existing shareholders) (the rights issue exception). This rights issue exception extends to an issue of shares to an underwriter of a rights issue; and

b an issue of shares to an underwriter or sub-underwriter of a fundraising undertaken under a disclosure document (the underwriter exception).

Critically, these two exceptions enable companies to raise equity capital without breaching the Chapter 6 prohibition, while also ensuring appropriate protections for shareholders. The policy basis for the rights issue exception is that each shareholder has an opportunity to participate in the fundraising on a *pro rata* basis and thereby avoid dilution of their existing holding. The policy basis for the underwriter exception is that the takeovers provisions should not unduly prevent an issuer from using underwriting arrangements to manage the risk of a shortfall in a fundraising. Investors should be afforded adequate disclosure about the potential control effect of any underwriting arrangements.

In recent times, due to the volatile nature of the equity market for mining companies, issuers have increasingly structured rights issues to be underwritten or sub-underwritten by major shareholders, and those shareholders have been able to rely on either the rights issue exception or underwriter exception in the event their underwriting results in an acquisition of voting power that would otherwise breach the takeover provisions.

Anti-avoidance measures

Despite the rights issue exception and the underwriter exception, issuers need to be mindful of structuring fundraisings that could be considered as being designed to avoid the takeover prohibition in Chapter 6. Issuers who undertake an underwritten rights issue but have failed to take sufficient steps to minimise the effect of the issue or underwriting arrangements on the control of the issuer may risk intervention by ASIC or an application by a disgruntled shareholder to the Australian Takeovers Panel.[3] ASIC and the Takeovers Panel have broad powers to require the issuer to amend the terms of, or seek prior shareholder approval for, the fundraising if it is seen as being structured to avoid the takeover prohibition.

ASX Listing Rules

In addition to the Corporations Act, companies that are listed on the ASX must also comply with the Listing Rules.

3 The Takeovers Panel was established under the Australian Securities and Investments Commission Act 1989 (Cth) and is a peer review body that regulates disputes in corporate control transactions.

The key Listing Rule relevant to equity fundraisings is Listing Rule 7.1. It provides that a listed entity may not, in any 12-month period, issue new equity securities equal to more than 15 per cent of the entity's issued share capital at the commencement of the 12-month period without the approval of its shareholders. Listing Rule 7.1 is subject to certain prescribed exceptions detailed in Listing Rule 7.2, which include *pro rata* issues and issues made in connection with regulated schemes of arrangement and takeovers under the Corporations Act.

The Listing Rules also restrict the issue of equity securities by an entity to its related parties (which include directors), subject to certain exceptions detailed in Listing Rule 10.12 (which are similar to the exceptions in Listing Rule 7.2). Issuers also need to be cognisant of the application of Listing Rule 10.1 to security arrangements as part of a convertible debt security issue (discussed below) and seek shareholder approval or a waiver from the ASX for such an arrangement.

The ASX recognises the importance of the mining industry in Australia and is cognisant of the recent challenges faced by companies (including global market conditions and declining commodity prices) in raising sufficient capital to maintain operations, particularly in the junior exploration space. The ASX has put in place measures to facilitate access to equity capital, including by:

a 'accelerated entitlement offers', which are *pro rata* offers, conducted in a two-stage process. It allows companies to raise capital quickly in the first stage (generally in one or two days) from institutional shareholders (who typically do not require disclosure in relation to a fundraising). The second stage then involves raising funds from retail shareholders (with disclosure) on substantially similar terms, but according to a lengthier standard *pro rata* offer timetable;

b reducing the minimum time frame for a standard *pro rata* offer timetable, to improve the timeliness of raising capital but is also available to all shareholders; and

c a facility for smaller companies that obtain shareholder approval at their annual general meetings and meet certain criteria (namely having a market capitalisation of A$300 million or less and not being included in the S&P/ASX 300 Index at the time of the annual general meeting) to raise capital by the issue of up to 10 per cent of their issued share capital in a 12-month period in addition to the 15 per cent capacity in Listing Rule 7.1 mentioned above (a facility that has been popularly utilised by eligible mining companies).

Australian Securities and Investments Commission

As the primary supervisor of the Australian securities and financial markets, ASIC plays an important role in fundraisings by scrutinising disclosure documents. If ASIC considers there is a 'defect' in a disclosure document (a misleading or deceptive statement or an omission of information required to be provided under the Corporations Act), ASIC may issue a 'stop order' preventing the offeror from offering, issuing, selling or transferring its securities while that order is in force.[4]

4 Practically, before a stop order is imposed, the offeror company will usually have the opportunity to discuss its concerns with ASIC and rectify any defects in the disclosure document by issuing a supplementary or replacement disclosure document.

ASIC guidance – disclosure documents

ASIC has published several regulatory guides detailing its policy regarding information that should be included in a disclosure document. While these regulatory guides are not law, ASIC may take enforcement action (such as issuing a stop order) if an issuer does not comply with its guidance.

ASIC has clearly articulated that disclosure documents must be worded and presented in a 'clear, concise and effective' manner and has provided extensive guidance on how this can be achieved.

ASIC also expects a prospectus to set out information about the risks associated with the offer, the securities offered and the issuer (including risks associated with the issuer's business model).

Given the inherent speculative nature of the mining industry (particularly during the exploration phase), and the often critical short-term capital requirements of mining companies, the risks section of a disclosure document for a mining company is typically extensive. It should identify specific company and industry-related risks, including commodity price and exchange rate volatility risks, resource or reserve estimation risks, exploration risks, funding risks and sovereign risks. In recent times, ASIC has placed particular emphasis on 'forward-looking statements' relating to production targets and the forecasting of financial information disclosed by mining companies. ASIC has made clear that there must be objectively reasonable grounds for companies to make such predictive statements.

Liability

If there is a defect in a disclosure document, certain persons involved in the offer including the directors of the offeror company and underwriters (the relevant persons) may be liable for any losses suffered as a result of the defect.

In this regard, the Corporations Act contains a 'due diligence defence' to liability in respect of a defect in a disclosure document where the relevant person made reasonable inquiries to ensure, and after doing so believed on reasonable grounds that, the disclosure document did not contain any defects. Accordingly, it is customary for directors of the offeror company and certain other persons involved in the offer to be included in a robust due diligence process to ensure that the offeror has complied with its obligations under the Corporations Act.

Exceptions to requirement to issue a disclosure document

As previously mentioned, there are a number of exceptions to the requirement to issue a disclosure document when raising equity capital. These include:

a offers to 'sophisticated' or 'professional' investors (typically high net worth or institutional investors);

b small-scale offers (being personal offers to not more than 20 investors where the amount raised is not more than A$2 million in a 12-month period); and

c offers to certain investors through holders of an Australian financial services licence.

There is also an option for listed entities who satisfy certain conditions (including the offer being a 'rights issue', and the shares in the offeror have not been suspended from trading for more than five days in a 12-month period), to offer securities to existing shareholders (including retail shareholders) without lodging a disclosure document. Broadly, the provisions operate on the basis that the combination of an IPO prospectus, as well as periodic and continuous disclosure up until the date of the offer, is sufficient in ensuring that information is adequately disclosed to the market. Companies typically undertake these offers without a disclosure document by issuing an 'offer document', which contains limited information about the offer and process of applying for the offered securities. Importantly, however, the 'due diligence defence' (mentioned above) does not apply to a rights issue without disclosure under this regime.

ii Foreign investment

Australia's mining industry typically requires speculative or risk capital to finance mineral exploration and development and has historically relied heavily upon foreign direct investment. The relatively small population of Australia and its limited accumulated wealth has presented problems in raising adequate finance for mining ventures locally, the consequence being that foreign investment has been, and remains crucial, to development of the industry.

Generally, the Australian government encourages and welcomes foreign investment, with almost all proposals for foreign investment in recent years having been approved, subject to some notable (often politically sensitive) exceptions.

In the financial year ending 30 June 2015, mineral exploration and development ranked third by industry for levels of foreign investment. In 2014–2015 there were 182 foreign investment approvals in the mineral exploration and development sector for a total proposed investment of A$26.65 billion (representing a A$4.24 billion increase from the 2013–2014 financial year).

Regulatory regime

Foreign investment in Australia, which has been the subject of recent reform, is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA). The FATA is supplemented by the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) and is guided by the federal government's Foreign Investment Policy (the Policy). The Foreign Investment Review Board administers the Policy, and the Australian Federal Treasurer (the Treasurer) is the Minister responsible for making decisions under the regime.

The Treasurer has extensive powers to block, impose conditions on or unwind an investment (in addition to imposing penalties) if the FATA is breached or if the Treasurer considers the investment to be contrary to the national interest. The regime broadly covers two types of actions:

a 'significant actions' – acquisitions concerning an Australian business or land where there is a change in control that meets certain threshold requirements. Foreign persons may, but are not obliged to, inform the Treasurer of such actions; and

b 'notifiable actions' – acquisitions regarded as both 'significant' and 'notifiable' actions that meet certain thresholds require notification to the Treasurer. Such actions (subject to applicable exemptions) broadly include acquisitions of direct interests in agribusiness, substantial interests in Australian entities, certain interests in Australian land and media businesses and acquisitions by foreign government investors.

Whether a transaction requires notification will depend on various factors including the type of investor, the type of investment, the industry sector in which the investment will be made and the value of the proposed investment. Proposals likely to require prior approval by the Treasurer include:

a acquisitions concerning Australian land (being residential real estate, agricultural land, vacant non-residential land or shares in land corporations or trust estates) with the following specific rules:
- foreign persons need approval from the Treasurer to buy or take an interest in prospecting, mining or production tenements where:
- they provide the right to occupy Australian land and the term of the lease or licence (including extensions) is likely to exceed five years; or
- they provide an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian land; or
- where a mining tenement is developed to an operational mine, it will then be considered developed commercial property. In which case, there is a monetary threshold of A$55 million (or A$1.094 billion for US, New Zealand, China, Chilean, Japanese and Korean investors) before approval is required;

b acquisitions of 'direct interests'[5] by foreign governments (or their associates or separate government entities). Foreign government investors must also seek prior approval to start a new business or acquire an interest in land, including any interest in a prospecting, exploration, mining or production tenement;

c acquisitions of direct interests in agribusiness of A$55 million or more, or acquisitions in agricultural land of A$15 million or more;

d acquisitions of 'substantial interests'[6] in existing Australian corporations or businesses with total assets over A$252 million (or A$1.094 billion for private US, New Zealand, China, Chilean, Japanese and Korean investors in non-sensitive sectors);

e takeovers of offshore companies whose Australian subsidiaries or assets are A$252 million or more (or A$1.094 billion for private US, New Zealand, China, Chilean, Japanese and Korean investors in non-sensitive sectors); and

f investments in 'sensitive' sectors (such as banking, transport, media, telecommunications, military applications and nuclear operations).

iii Market overview

The mining sector attracts a broad range of investors with varying investment objectives.

In the junior mining and exploration sector, the inherent speculative nature often renders it unattractive to debt financiers and the bond market. This has resulted in the junior sector being predominantly supported by equity investors with high-risk and high-return investment objectives.

5 An interest of 10 per cent or more of an Australian business or corporation (regardless of value) or gross assets of that business or corporation, or an interest of less than 10 per cent where the foreign government or state-owned-enterprise has entered into a legal arrangement relating to the business or corporation, or the foreign government or state-owned-enterprise obtains special influence or control over the target business or corporation.

6 A foreign person acquires a 'substantial interest' in the ownership of a corporation or business if that person (and any associates) acquires 20 per cent or more of the ownership of the entity, or that person together with other foreign persons and each of their associates acquire 40 per cent or more in aggregate of the ownership. This 'substantial interest' threshold also applies to foreign government investors (and any associates or separate government entities).

There has also been a recent trend of junior mining companies who are facing financial difficulty, entering into convertible debt securities (being a type of hybrid debt-equity security). These securities typically provide short-term secured or unsecured loans, often on terms considerably favourable to the lender and with an option to convert the debt to equity at either a fixed or variable conversion rate at the election of the investor. This rewards the investor should the issuer experience growth in share price, but protects their investment via the security over the company's assets and any interest rate return.

In contrast, larger mining production companies with consistent, significant earnings attract a wider range of investors, including investors in the bond market.

There has been recent increased activity from notable private equity funds investing heavily in the mining sector, and in a number of instances taking strategic cornerstone positions in companies.

The Australian mining industry is also a favoured destination for foreign investors, recently being ranked as the best country for mining investment globally, including being ranked among the highest for economic system, social issues, currency stability, corruption and tax regime. China, in particular, has invested a significant A$9.85 billion in the Australian mineral exploration and development sector in the financial year ending 30 June 2015 (representing a A$4.2 billion increase from the financial year ending 30 June 2014).

iv Structural considerations

The predominant methods used by mining companies to raise equity capital are via:

a a placement to sophisticated and professional investors (which may or may not include existing shareholders);

b a *pro rata* offer or rights issue (both in standard and accelerated form) to existing shareholders; or

c a share purchase plan to existing shareholders (being a type of offer of securities designed primarily for retail shareholder participation as it limits each shareholder's participation to a maximum of A$15,000 in a 12-month period).

As noted above, in recent times, there has also been an increasing trend towards mining companies (particularly junior to mid-level) raising capital through the issue of hybrid debt-equity securities.

Each structure has its advantages, disadvantages and prescribed procedures, and accordingly, a company will need to consider various factors when selecting the most suitable capital-raising structure, some of which are discussed below.

Issue price

The issue price of securities, along with the number of securities to be issued, will determine the quantum of the raising.

An issuer undertaking a placement or a rights issue will generally have the flexibility to commercially agree, or set on its own, the issue price of securities. The issue price will typically be driven by factors such as market demand, urgency of the need for funding, and market perception. By contrast, a share purchase plan has issue price limitations prescribed under the Corporations Act and the Listing Rules, which offers the issuer less flexibility.

Number of securities

Another critical consideration is the number of securities the company should issue.

As detailed above, other than where a number of specified exceptions apply, the Listing Rules restrict listed entities from issuing new equity exceeding 15 per cent of their share capital in a 12-month period without shareholder approval. As discussed in Section II.i, 'ASX Listing Rules', *supra*, companies that meet certain criteria may issue new securities comprising an additional 10 per cent of their share capital.

Relevantly, there are exceptions to the 15 per cent restriction in respect of an issue of shares under a *pro rata* offer or 'rights issue', an issue of shares to an underwriter of a rights issue, and an issue of shares under a share purchase plan. A company can rely on these exceptions when structuring a capital raising to obtain greater flexibility in the number of securities they can issue (noting that certain exceptions have their own conditions, for example, a share purchase plan is broadly restricted to issues of securities equal to 30 per cent of a company's issued share capital).

A placement to sophisticated and professional investors will typically be undertaken utilising a company's 15 per cent (and if applicable, the additional 10 per cent) placement capacity meaning that the number of securities issued will be dictated by these limitations.

When undertaking an offer of convertible debt securities, each security will generally be counted as the maximum number of equity securities into which it can be converted.

The takeover prohibition in Chapter 6 will also have bearing on the number of securities being offered. Relevantly, the two exceptions to the takeover prohibition (discussed above) are similar to the exceptions under the Listing Rules for a rights issue, and an issue of shares to an underwriter of a rights issue.

Timing

The timing for completion of a capital raising may vary significantly depending on the structure.

A placement to sophisticated and professional investors can be completed in one or two business days. A standard form rights issue will, on average, take 20 business days (in addition to the time taken to prepare a prospectus, if applicable). As discussed above, ASIC and the ASX allow for an 'accelerated rights issue' truncated timetable so that companies can offer securities to institutional shareholders at an earlier stage.

While share purchase plans generally have greater flexibility with respect to timing, they, on average, take 20 business days to complete. Share purchase plans are commonly conducted following an institutional placement to allow retail shareholder participation on a non-*pro rata* basis.

Market perception

Market perception is another relevant consideration particularly where, for example, a placement (whether to existing shareholders or otherwise) may be seen to have a dilutionary effect (and therefore may be viewed unfavourably by shareholders who cannot participate). Companies often provide justification to the market for conducting a placement instead of a *pro rata* offer, or ensure that an offer, such as a share purchase plan, is conducted in conjunction with the placement.

Hybrid capital

These securities can be attractive to investors because they offer downside protection (as there is no obligation to convert and investors receive a defined interest income) and provide an upside 'equity kicker' (as there is the ability to convert into equity to benefit from any capital growth in the underlying shares). Convertible debt securities are also attractive to issuers who can access significant funds quickly by structuring the security as a debt instrument until the equity component is approved by shareholders, without being constrained by the issuer's 15 per cent placement capacity. However, convertible debt securities can be an expensive way of raising capital, particularly for financially troubled (and therefore riskier) issuers.

v Tax considerations

Australia has a complex tax regime with taxes levied by both the Commonwealth and state governments including income taxes, import duties, fringe benefits tax, withholding taxes goods and services tax (GST), stamp duties, payroll tax, land tax and resource royalties.

Income tax

The Australian company income tax rate is currently 30 per cent (for medium-sized to large entities) of taxable income. Australian companies can elect to form a tax-consolidated group with wholly owned subsidiaries to treat the group as a single entity for Australian income tax purposes. This allows intragroup transactions to be ignored for income tax purposes. Companies involved in exploration and development activities can receive an immediate deduction for certain exploration and prospecting expenditure, as well as deductions for activities relating to environmental protection and there are incentives for research and development expenditure.

Exploration Development Incentive Scheme

The Exploration Development Incentive (EDI) scheme came into effect on 1 July 2014 to encourage investment in small exploration companies undertaking greenfields mineral exploration in Australia.

The EDI will allow eligible companies to convert tax losses into refundable tax credits, which can be distributed to their shareholders. The EDI applies to greenfields exploration expenditure incurred from 1 July 2014 to 30 June 2017.

The EDI is limited to companies who have no taxable income and have not, and are not connected or affiliated with an entity that has, commenced resources production.

Australian resident shareholders are entitled to refundable tax offsets equal to the exploration credits they receive, claimable in their tax returns for that year.

Tax implications for foreign investors

Australian tax implications for a non-resident investor may be different depending upon whether they conduct business in Australia using an Australian subsidiary or an Australian branch of a foreign company. Both are taxed at the corporate tax rate with the Australian company taxed on its worldwide income, and the branch being taxed only on its Australian sourced income.

There are double tax agreements that exist between Australia and a number of other countries seeking to reduce or eliminate the double taxation of income. Taxation relief may be available under a relevant double tax agreement for a foreign resident entity if the activities do not constitute a permanent establishment in Australia.

Foreign entities deriving Australian income will need to consider tax provisions relating to repatriation of income, transfer pricing, and deductions available for operations in Australia that go beyond the scope of this chapter.

III DEVELOPMENTS

As discussed in this chapter, the most common ways of raising equity capital by mining companies in Australia in recent times have been by way of placements to sophisticated and professional investors, 'rights issues' to existing shareholders and share purchase plans. Recent declines in commodity prices have made accessing new funding and meeting the needs of existing financiers increasingly challenging. As a result, companies have been forced to pursue alternative funding options, such as by way of corporate consolidation with other companies that hold excess capital.

In light of the challenging economic environment and in recognition of emerging growth industries (such as technology and innovation), the ASX has recently proposed a number of changes to the eligibility criteria for a company to list on the ASX. This includes a proposal to lift the financial threshold to list on the ASX (based on the company's profits or assets), the introduction of a minimum 'free float' requirement (i.e., securities held by non-related parties of the listing entity that can freely trade on the ASX without restrictions) and an increase in the minimum shareholding by investors in the listing entity. The ASX has also increased scrutiny on backdoor listings (i.e., where a company seeks to access capital by selling its business into an entity that is already listed on the ASX). Such measures are aimed at enhancing the integrity and reputation of the ASX, but also demonstrate the need to strike a balance between supporting liquidity in the secondary market and supporting innovation and emerging growth industries.

Finally, there have been discussions around exploring alternative capital-raising methods such as crowd-sourced equity funding, which, while at an early stage, are likely to be developed, and may become more applicable to the mining industry in the future.

Appendix 1

ABOUT THE AUTHORS

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Simon Rear is a partner in the corporate practice group of Squire Patton Boggs in Perth. He has broad experience in private and public M&A, equity capital markets and general corporate advisory work in both Australia and the United Kingdom. He has advised in connection with takeovers, schemes of arrangement and private M&A transactions. He has also advised on a number of fundraisings including IPOs, rights issues and placements acting for both issuers and underwriters.

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Chanelle Tong is an associate in the corporate practice group of Squire Patton Boggs in Perth. She advises clients on range of corporate transactions, including both private and public mergers and acquisitions, equity capital markets and general corporate advisory matters. She has broad experience advising global clients on domestic and cross-border M&A, and equity fundraisings including IPOs, rights issues, placings and share purchase plans.

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