



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 9

Takeover bids

June 2013

About this guide

This guide is for listed and unlisted entities, their advisers, and investors involved in a takeover bid. It:

- discusses ASIC's regulatory role in relation to takeover bids and how we interpret and administer the requirements of the takeover provisions in Ch 6 of the *Corporations Act 2001* (Corporations Act); and
- explains how we exercise our discretionary powers in relation to takeover bids, including the power to exempt from, or modify, the takeover provisions.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in June 2013 and is based on legislation and regulations as at the date of issue.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

Chapter 6 of the *Corporations Act 2001* (Corporations Act) sets out the rules and procedures applying to a takeover bid which are designed to promote the principles underlying the takeover provisions set out in s602.

ASIC regularly reviews takeover documents and monitors conduct in relation to takeover bids.

We also provide exemptions from and modifications to the provisions on takeover bids, and have a role in Takeovers Panel proceedings.

Purpose of the takeover bid provisions

- RG 9.1 A takeover bid involves an offer made to each holder of a particular class of securities in a company or listed registered managed investment scheme to purchase all, or a specified proportion, of their holding in accordance with Ch 6 of the Corporations Act. Offers may be made under a market bid (an offer to buy all bid class securities through the financial market on which they are listed) or an off-market bid.
- RG 9.2 A bid is one of the ways an interested party may acquire securities that increase their voting power to more than 20%, or from a point above 20%, in a listed company, body or registered managed investment scheme, or an unlisted body with more than 50 members, without breaching the general prohibition in s606: item 1 of s611.
- RG 9.3 Parts 6.3–6.9 of the Corporations Act set out detailed rules and procedures governing the conduct and terms of takeover bids. These rules reflect the purposes of Ch 6, set out in s602, which seek to ensure that:
- (a) the acquisition of control takes place in an efficient, competitive and informed market;
 - (b) the holders of shares or interests, and the directors of the company, body or responsible entity:
 - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme;
 - (ii) have a reasonable time to consider the proposal; and
 - (iii) are given enough information to enable to them to assess the merits of the proposal;

- (c) as far as practicable, the holders of shares and interests each have a reasonable and equal opportunity to participate in any benefits accruing to the holders through the takeover bid; and
- (d) an appropriate procedure is followed as a preliminary to compulsory acquisition under Pt 6A.1.

RG 9.4 If certain rules and procedures in Ch 6 are contravened in the course of carrying out a takeover bid, in addition to breaching the relevant provision, the bidder may also breach the general prohibition in s606: s612.

ASIC's role in takeover bids

RG 9.5 ASIC has general administration of the Corporations Act, including the takeover provisions in Ch 6.

RG 9.6 Our regulatory role in the administration and conduct of takeover bids primarily involves:

- (a) the review and monitoring of documentation, disclosures and conduct in relation to bids to ensure compliance with the takeover provisions and the purposes underlying Ch 6;
- (b) providing regulatory guidance and relief that improve commercial certainty and balance the protections of Ch 6 with the objective of facilitating takeover transactions; and
- (c) in appropriate cases, taking enforcement action to protect the interests of investors and promote their confident and informed participation in the takeover process and financial markets generally.

RG 9.7 ASIC's regulatory surveillance, relief, and day-to-day administration and enforcement role, with respect to takeovers, is complemented by the role of the Takeovers Panel as the main forum for resolving disputes concerning a bid.

RG 9.8 We also have a corresponding regulatory role in schemes of arrangement that enable acquisitions similar in effect to those under a bid. The coordination of our approach across both roles seeks to ensure that, as far as practicable, similar principles and protections are applied regardless of whether a control transaction is structured as a scheme or a bid.

Note: As with takeover bids, we apply Ch 6 principles to acquisition schemes as part of our role in examining the terms of the proposed scheme and the draft explanatory statement for the scheme: see Regulatory Guide 60 *Schemes of arrangement* (RG 60).

Review and inquiry

RG 9.9 Under the takeover bid procedure, a series of documents must be lodged with ASIC. We conduct regular reviews of these documents, together with other available information about a takeover bid, to ensure compliance with

Ch 6. Our review may consider the terms, conditions and structure of the bid as well as the disclosures made in the documents. ASIC has a general power to refuse to register or receive a document submitted for lodgement that does not comply with relevant requirements: s1274(8).

Note: We do not accept takeover documents for lodgement by way of email or facsimile. A document is not lodged unless and until it is received for lodgement by ASIC: see for example *Blaze Asset Pty Ltd v Target Energy Ltd* [2009] FCA 698. Documents lodged with ASIC must be signed: s351.

- RG 9.10 In addition to a review, we may make inquiries in relation to a takeover to ensure that relevant parties are complying with their obligations. We may initiate inquiries if we become aware of a potential issue as a result of our ongoing monitoring of the takeover or a complaint made to us by an interested party.
- RG 9.11 Our inquiries may relate to conduct occurring at any point in the takeover process. For example, we may raise concerns about public announcements or comments made to the media after a bid is publicly announced but before any takeover documents are lodged.

Our approach

- RG 9.12 When conducting a review or making inquiries, in addition to considering contraventions of the Corporations Act, we also consider whether the relevant document or conduct may tend to undermine or detract from the purposes of Ch 6 set out in s602.
- RG 9.13 If our review or inquiries identify matters of concern, we may take further action to correct the issue. We will often seek to resolve issues through discussions with the relevant party and by requesting that appropriate corrective action is taken. In the interests of facilitating a timely and effective outcome, our initial approaches may be informal. We may also use our compulsory powers to obtain information.
- RG 9.14 If we are unable to resolve our concerns, we may take other action, including applying to the Takeovers Panel for a declaration of unacceptable circumstances or to the court for orders under s1324 or 1325A.
- RG 9.15 Although we aim to act as soon as we become aware of a possible issue, it is the responsibility of each participant in the takeover process to comply with the relevant requirements of Ch 6 and the principles in s602. The fact that we have not commented on documents lodged with us, or conduct known to us, does not indicate approval of the documents or conduct. As a regulatory body, we may take action in relation to contraventions of Ch 6 or other matters of concern at any point before, during or after a transaction.
- RG 9.16 Where we do take action, including making inquiries in response to issues raised with us by interested parties, we do so having formed an independent

view on relevant matters from a regulatory perspective, even if this means that, on occasion, our views on a particular matter may coincide with one or more parties in dispute.

Exemptions and declarations

- RG 9.17 ASIC has a discretionary power under s655A(1) to grant relief from the requirements of Ch 6. This power enables us to exempt a person, or a class of persons, from the takeover provisions or to declare that the takeover provisions apply as if specified provisions were omitted, modified or varied.
- RG 9.18 We consider individual requests to exercise our power to grant relief in particular cases. In deciding whether to grant relief, we consider the purposes of Ch 6 set out in s602: s655A(2).
- RG 9.19 We have also issued a number of class orders which modify the operation of Ch 6 in relation to all takeover bids. The terms and underlying rationale of our class orders are further discussed in this regulatory guide.
- RG 9.20 In addition to our general exemption and modification power, we have a number of more specific approval and consent powers in relation to takeovers: s619(3)(a), item 14(b) of 611, and 652B.

Note: The exercise of other discretionary powers by ASIC may also be relevant to a takeover bid—for example, when the consideration offered under a bid includes listed securities and we have made a determination under s713(6). We also make market integrity rules under s798G which govern matters such as the conduct of market bids and trading during a bid: see for example the ASIC Market Integrity Rules (ASX Market) 2010.

Applications to the Takeovers Panel

- RG 9.21 ASIC has standing to apply to the Takeovers Panel for a declaration of unacceptable circumstances in relation to the affairs of any company or listed registered managed investment scheme. Where an application is made by another party, we must be invited to make submissions on the matter and on any orders that the Panel proposes to make: s657A(4) and 657D(1).
- RG 9.22 We may make an application to the Takeovers Panel seeking appropriate orders if we consider that unacceptable circumstances exist in relation to a takeover bid. Where possible, we will often attempt to have our concerns addressed by the relevant party before making an application.
- RG 9.23 The matters on which we may choose to make submissions in proceedings brought by third parties will vary depending on the circumstances and issues raised by the application. We consider the matters raised in each case and, in determining whether to make submissions, we will often (but not exclusively) have regard to:

- (a) the interests of parties affected by the relevant circumstances who are not represented in the proceedings—in particular, retail or minority investors;
- (b) whether the issues raise matters of policy or interpretation which may have wider implications for the conduct of takeovers generally;
- (c) whether we have had any previous involvement or engagement with the matter or dispute at hand (e.g. we may have privately raised issues with the relevant parties that are similar to those before the Takeovers Panel); and
- (d) whether we are in a position to provide any factual information that may assist the Takeovers Panel.

RG 9.24 The Takeovers Panel and ASIC have entered into a memorandum of understanding (MOU) to enhance cooperation in our respective roles in takeovers. The MOU addresses information sharing, consultation on policy development, and regular liaison between ASIC and the Takeovers Panel.

Note: See Media Release (01-293MR) *ASIC signs MOU with Takeovers Panel* (20 August 2001).

Summary of this guide

- RG 9.25 This guide aims to assist persons involved in, or advising on, a takeover bid by improving understanding of ASIC's expectations and approach, and providing greater commercial and regulatory certainty to all participants in the takeover bid process. In this guide:
- (a) we explain how ASIC interprets various requirements of the takeover bid procedure, and the principles underlying the requirements, as part of our role in administering Ch 6 (including our review and monitoring role);
 - (b) we discuss a number of circumstances in which we will consider requests to exercise our discretionary power to grant relief for particular takeover bids or proposals; and
 - (c) we outline how we have modified, and provided general exemptions from, the takeover provisions to address issues and anomalies in Ch 6 that have arisen over time in our experience administering the provisions.
- RG 9.26 Table 1 summarises the issues we have addressed in this guide by reference to common stages of a takeover bid.
- RG 9.27 Unless otherwise indicated, our guidance applies to takeover bids for listed registered managed investment schemes. Adjustments that take account of the different features of managed investment schemes are set out in s604.
- RG 9.28 Our guide consolidates and updates a number of pre-existing policies relating to takeover bids. The policies that are replaced by this guide, and have therefore been withdrawn, are listed in the appendix.

Table 1: Summary of our guidance on takeover bids

Topic	What our guidance covers	Reference
Formulating takeover offers		
Takeover offers	We discuss a number of matters relevant to a bidder in structuring its bid and formulating the terms of its offers, including: <ul style="list-style-type: none"> determining classes of securities in the target and which securities the offer may relate to; and dealing with small holdings, foreign holders, and holders who do not provide transfer documents. 	Section B
Bids for multiple classes	We discuss the relief we may provide when a bidder wants to bid for more than one class of target securities, including convertible securities.	Section C
Conditional offers	We discuss some of the issues raised by conditional offers: the notification requirements, our approach to maximum acceptance conditions and the technical relief we have given for the 'prescribed' and 'statutory' conditions.	Section D
Collateral benefits	We discuss our approach to the prohibition on collateral benefits that are likely to induce holders to accept the bid, and the circumstances in which we may give relief.	Section E
Joint bids and schemes	We discuss the relief we may provide to facilitate bids and schemes of arrangement that are proposed jointly.	Section L
Disclosure to target holders		
Bidder's statement	We discuss some of the information that should be included in the bidder's statement and the disclosure relief that may be available. We also discuss our relief: <ul style="list-style-type: none"> to use a replacement bidder's statement; and extending the time for dispatching the bidder's statement to holders. 	Section F
Target's statement	We discuss the relief we may give to extend the time for dispatching the target's statement to holders, and to allow receivers and managers to assume the directors' obligations.	Section G
Consents	We discuss our relief from the consent requirement when quoting in the bidder's and target's statements: <ul style="list-style-type: none"> books and journals; public officials; previous geological reports; trading data; and statements made by others in documents given to a securities exchange or lodged with ASIC. 	Section H
Supplementary statements	We discuss when sending, or not sending, supplementary statements may be misleading.	Section I

Topic	What our guidance covers	Reference
Conduct of the bid during the offer period		
Variation of offers	<p>We discuss our approach to administering the provisions regulating the variation of takeover offers, including when a conditional bid can be extended and withdrawal rights must be offered.</p> <p>We also discuss the relief we provide, or have provided, for automatic extensions, accelerated payment, conditional increases in consideration, adding scrip consideration, varying offers before dispatch and approving notices of variation.</p>	Section J
Acceptances	We discuss our class order modification in relation to the timing of acceptances for holdings registered in a clearing and settlement facility such as the Clearing House Electronic Subregister System (CHES). We also discuss the terms and requirements of our class order relief for acceptance facilities and automatic extensions when acceptances are released from a facility during the final seven days of a bid.	Section K
Non-compliant bids	We discuss the relief we may provide when the provisions disqualifying the bidder from the takeover bid and other exceptions in items 1–4 of s611 are breached.	Section M

Other guidance you may need to consider

- RG 9.29 This guide focuses on a number of aspects of the takeover bid procedure.
- RG 9.30 You may also need to consider the guidance that we have published on other specific aspects of takeover bids, as listed in Table 2. These guides are referred to throughout this guide, where relevant.
- RG 9.31 You should also consider whether the Takeovers Panel has issued any guidance on the relevant matter.

Table 2: Other ASIC guidance that may be relevant

Regulatory guide	How our guidance may assist
When formulating takeover offers	
RG 7 <i>Calculating time periods</i>	We discuss how ASIC interprets the law when determining time periods—including the time periods applying for the purposes of the takeover bid procedure.
RG 59 <i>Announcing and withdrawing takeover bids (s653 and s746)</i>	We explain our policy on when a bid should be announced and the circumstances that trigger the requirement to make a bid. We also discuss when we consider a breach has occurred, what defences may be available to a potential bidder, and when we may consent to a bidder withdrawing its offer.

Regulatory guide	How our guidance may assist
RG 71 <i>Downstream acquisitions</i>	We outline our policy on item 14 of s611 and upstream acquisition relief, including when we may require a bid for the downstream company.
RG 74 <i>Acquisitions approved by members</i>	We discuss some of our concerns with bids made at or around the same time as acquisitions under item 7 of s611: RG 74.97–RG 74.108.
RG 161 <i>Share and interest sale facilities</i>	We discuss our relief for sale and related purchase facilities which are sometimes offered in connection with scrip bids.
RG 163 <i>Takeovers: Minimum bid price principle—s621</i>	We consider the issues involved in determining the minimum bid price that a bidder must offer and the factors affecting that determination.
When preparing a bidder's statement, target's statement or making other disclosures	
RG 25 <i>Takeovers: False and misleading statements</i>	<p>This guide explains our 'truth in takeovers' policy, which seeks to ensure that relevant parties in a bid do not mislead target holders and the market by acting inconsistently with the statements they make.</p> <p>It also discusses:</p> <ul style="list-style-type: none"> • when and how relevant persons should provide corrective or updated disclosure in a bid; and • the action we may take where a disclosure is misleading, ambiguous or confusing.
RG 55 <i>Statements in disclosure documents and PDSs: Consent to quote</i>	We discuss the requirement to obtain a person's consent for statements made in prospectuses and PDSs, which is similar to the requirements for bidder's and target's statements. The guide discusses the kinds of statements for which consent is required, what to do to comply with the consent requirement, and the relief that is available (including case-by-case relief). See also Section H of this guide.
RG 111 <i>Content of expert reports</i>	An independent expert report on the offer may be required (s640) or commissioned voluntarily. Our guides discuss the approach to the analysis in the report, what should be included to ensure that recipients are fully informed and the requirement for an expert to be independent.
RG 112 <i>Independence of experts</i>	
RG 170 <i>Prospective financial information</i>	<p>We outline our policy on issuers' obligations when disclosing prospective financial information, such as:</p> <ul style="list-style-type: none"> • when and how such information can or should be disclosed; and • what constitutes reasonable grounds for disclosing prospective financial information.

Regulatory guide	How our guidance may assist
RG 228 <i>Prospectuses: Effective disclosure for retail investors</i>	<p>This guide discusses how you can present disclosure documents, such as a bidder's statement or target's statement, in a clear, concise and effective manner to assist in ensuring they are not misleading: s670A.</p> <p>It also explains:</p> <ul style="list-style-type: none"> • what information investors generally require and expect to find in a s710 prospectus; and • the requirements of s711–712, <p>which may be relevant to the bidder's disclosure in a scrip bid: s636(1)(g). See also Regulatory Guide 66 <i>Transaction-specific disclosure</i> (RG 66), which discusses the requirements under s713 in relation to quoted scrip or options over quoted scrip, and Regulatory Guide 168 <i>Disclosure: Product Disclosure Statements (and other disclosure obligations)</i> (RG 168), which gives guidance on disclosure where managed investment products are offered: s636(1)(ga).</p>
RG 230 <i>Disclosing non-IFRS financial information</i>	<p>We discuss how you can use financial information in documents, such as a bidder's statement or target's statement, where that information is presented other than in accordance with accounting standards.</p>
When applying to us for relief or approval	
RG 51 <i>Applications for relief</i>	<p>We explain how to make an application to ASIC under the Corporations Act (including applications under s619(3), 655A and 652B), and outline some of the general considerations that we take into account.</p>
RG 92 <i>Procedural fairness to third parties</i>	<p>We discuss how we will generally afford third parties procedural fairness when considering requests to exercise our discretionary powers.</p>

B The takeover offers

Key points

A takeover bid may only be made for a class of securities. It must relate to securities in existence on a specified date. We may grant relief to extend the bid to bid class securities issued during the course of the bid.

We may approve the appointment of a person to act as a nominee for specified foreign holders under a scrip bid: s619(3).

We have also modified Ch 6 to:

- allow bidders to offer cash to holders who would otherwise receive a small parcel of securities under their takeover offers;
- restrict the application of s618(2) to address the potential abuse of the provision in a proportional bid; and
- ensure that, if the necessary transfer documents are not provided with an acceptance of a conditional offer, the time for payment under the terms of the bid also takes into account whether the bid is declared unconditional.

General requirements for takeover offers

- RG 9.32 Although a bidder is generally free to devise the terms of its offers, Div 1 of Pt 6.4 sets out some general requirements that a bidder must adhere to in formulating its bid.
- RG 9.33 These requirements establish, among other things, that:
- (a) an off-market bid must be either full or proportional; and
 - (b) all offers must be the same and remain open until the end of a specified offer period, unless withdrawn.
- RG 9.34 We discuss some of the issues associated with the conditions that may attach to a takeover offer in Section D.

Classes of securities

- RG 9.35 A takeover bid may only be made for securities within a particular class: s605(1) and 617. Compulsory acquisition and buyout rights also operate in relation to securities within a particular class: s605(1).
- RG 9.36 A bidder who wishes to bid for two (or more) classes of securities in the target may simultaneously undertake separate bids in relation to each of those classes. If simultaneous bids are made for both convertible and

underlying securities in the target, we may provide relief to allow the bidder to exercise the convertible securities: see RG 9.120–RG 9.146.

Note: The prohibition on collateral benefits does not prevent simultaneous bids being made for different classes of securities in the target: s623(3)(c). However, simultaneous offers may still give rise to unacceptable circumstances in some cases: see RG 9.201–RG 9.203.

RG 9.37 In some cases, the bidder may also apply for relief to allow multiple classes of target securities to be treated as a single class for the purposes of the takeover and compulsory acquisition provisions. The circumstances in which we may grant this relief are discussed at RG 9.105–RG 9.119.

Classes and the equality principle

RG 9.38 The ‘equality principle’ set out in s602(c) is one of the principles underpinning the regulation of takeovers. It aims to ensure that holders, as far as practicable, have a reasonable and equal opportunity to participate in any benefits arising from a proposal to acquire a substantial interest in a company, body or scheme.

RG 9.39 Under the statutory framework of Ch 6, equality is achieved by requiring holders to be dealt with in a similar way to the extent that they hold similar securities. Accordingly, s602(c) refers to equality between the holders of the ‘relevant class’ of voting shares or interests.

Note: Although the focus of the equality principle is equality within a class, this does not mean that circumstances involving differential treatment of classes cannot give rise to unacceptable circumstances (including on the basis of other purposes set out in s602).

RG 9.40 The significance of class distinction in the equality principle is reflected in a number of the specific requirements applying to takeover bids that are designed to reinforce the principle, including:

- (a) s619—all offers must be the same, subject to minor exceptions or matters attributable to differing amounts paid up, or different accrued dividend or distribution entitlements;
- (b) s621—minimum bid price principle; and
- (c) s651A—increase in bid consideration following purchases outside the bid.

RG 9.41 These provisions promote equality on the assumption that the offers and purchases to which they refer relate to shares with similar value. If the relevant securities these provisions seek to equate have materially different rights and obligations, then requiring, for example, that the same price is offered for those securities (s621) would not ensure equal treatment.

Note: See RG 163.5–RG 163.9 for further discussion of provisions reflecting the equality principle.

Determining classes

- RG 9.42 The Corporations Act does not exclusively define when securities are in a class for the purposes of Ch 6.
- RG 9.43 Neasey J, considering the earlier takeovers regime in *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 6 ACLC 389 at 393, stated:
- The expression ‘class of shares’ has no special meaning in s16(2) of the Code. It is a simple English expression, commonly used by text writers in company law. It refers to a category of shares which differs sufficiently in respect of rights, benefits, disabilities, or other incidents, as to make it distinguishable from any other category of shares, if there are any, in the capital structure of the company.
- RG 9.44 This passage was applied in a different context by Jacobs J in *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 7 ACLC 309 at 318.
- RG 9.45 Some provisions in Ch 6 indicate that certain transient differences in rights and obligations may be disregarded in delineating classes. These provisions suggest, for instance, that the identity of a class is not necessarily lost because a dividend is paid or a call made on the securities included in the class. Under s619(2)(b) and (c), offers under an off-market bid for a class of securities may differ to the extent that the difference is attributable to different accrued dividend or distribution entitlements, or different amounts paid up or remaining unpaid. Differences in consideration are ‘attributable to’ amounts paid up or dividends accrued if they correlate or are commensurate with those factors: see *Taipan Resources NL (No 11)* [2001] ATP 5.
- Note: See also s621(3A), inserted by Class Order [CO 00/2338] *Relief from the minimum bid price principle—s621(3)*, which allows for adjustments to the minimum bid price rule to account for transient differences arising from the declaration of dividends and share splits in the four months before making a bid. In the context of compulsory acquisition, see s664B(2).
- RG 9.46 Accordingly, we administer the Corporations Act on the basis that two or more securities are in the same class only where they are effectively interchangeable—that is, where:
- (a) precisely the same rights, obligations and other incidents are attached to each of them; or
 - (b) any difference in rights, obligations or other incidents is temporary and can be compensated for by a simple and certain adjustment in cash.
- RG 9.47 Classes in this context are distinguished only by differences in the rights and obligations attached to the securities rather than by differences in how particular persons can use the rights when the securities come into their hands. Differences in the rights exercisable by particular shareholders are not differences between classes of securities, even if, for some purposes, they distinguish classes of shareholders. Such differences include the inability to

vote shares that are held in escrow or shares in a holding company that are held by a subsidiary.

Partly paid securities

RG 9.48 Section 605(2) provides that:

securities are not to be taken to be different classes merely because:

- (a) some of the securities are fully paid and others are partly paid; or
- (b) different amounts are paid up or remain unpaid on the securities.

RG 9.49 This means that fully paid and partly paid securities are in the same class, at least where voting and dividend rights attaching to partly paid securities are full or proportional to the amounts paid up.

Note: Partly paid securities quoted on ASX must have proportional voting rights: see ASX Listing Rule 6.9.

RG 9.50 However, where there are other differences between fully paid and partly paid securities (e.g. the partly paid securities have reduced rights that are not proportional to the amount paid up), they may still form separate classes for the purposes of the takeover and compulsory acquisition provisions.

Note: See Legal Committee of the Companies and Securities Advisory Committee, *Anomalies in the takeovers provisions of the Corporations Law*, March 1994 (Anomalies Report), p. 38.

Bid class securities issued after the s633(2) date

RG 9.51 Under s617(1), off-market bids must relate to securities that exist, or will exist, as at the date set by the bidder under s633(2). This is the date for determining to whom offers will be sent. It must be between the date that the bidder gives the bidder's statement (or a separate written notice) to the target and the date of the first offer (inclusive): s633(3).

RG 9.52 Section 617(2) allows a bid to extend to securities that come to be in the bid class during the offer period because of the conversion or exercise of rights attached to 'other securities'. These other securities must be securities that exist, or will exist, as at the date set by the bidder under s633(2). If the bid extends to securities issued during the course of the bid under s617(2), the bidder's statement must include a statement to this effect: s636(1)(j).

RG 9.53 These provisions were introduced to better facilitate the acquisition of securities under a takeover bid, including securities that come into existence on the conversion of convertible securities.

ASIC modification: Exercise or conversion before the offer period begins

- RG 9.54 Although a bid may extend to any bid class securities issued on the conversion of, or the exercise of rights attached to, other securities existing *as at the date set by the bidder under s633(2)*, the bid will only extend to the newly issued bid class securities if they come to be in the bid class *during the offer period*.
- RG 9.55 Class Order [CO 13/521] *Takeover bids* modifies s617(2) so that the bid extends to bid class securities issued on conversion or exercise from the date set by the bidder under s633(2) until the end of the offer period. In effect, this extends the operation of s617(2) to bid class securities that come into existence *before* the beginning of the offer period. We have also made a corresponding modification to s636(1)(j).

ASIC modification: Definition of ‘convertible securities’

- RG 9.56 Section 617(2)(a) refers to securities that ‘will convert, or may be converted, to securities in the bid class’. The definition of ‘convertible securities’ in s9 defines when securities are convertible into another class of securities. This definition may be limited to securities providing a right for the *issue* of securities in another class. It may exclude securities that *transform* into securities in another class on exercise.
- RG 9.57 Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition* modifies the definition of ‘convertible securities’ in s9 to include a security, the rights attaching to which may change so that the security transforms into a security of another class. We have modified this definition because the mechanism for conversion is not relevant to the policy on convertible securities.

When s617(2) does not apply

- RG 9.58 Section 617(2), as modified, does not apply to bid class securities issued after the date set by the bidder under s633(2):
- (a) on the conversion of, or exercise of rights attached to, other securities where those other securities are issued after the date set by the bidder under s633(2); or
 - (b) otherwise—for example, under a dividend or distribution reinvestment plan, bonus share plan or employee share scheme.
- RG 9.59 In these circumstances, s617(2) does not apply because the bid class securities are not issued on the conversion of, or the exercise of rights attached to, other securities that exist, or will exist, as at the date set by the bidder under s633(2).

ASIC relief: Extending the bid to newly issued securities

- RG 9.60 We may give relief to allow an off-market bid to extend to bid class securities that are issued after the date set under s633(2) in circumstances that are not within s617(2). This relief is consistent with the application of the compulsory acquisition provisions to securities issued up until the end of the offer period.
- RG 9.61 Our relief will require that the bidder discloses that the bid has been extended in this way in the bidder's statement or by way of supplementary disclosure.
- RG 9.62 We will also require that a bidder seeking this relief does not rely on any defeating conditions of its bid that are triggered only because of circumstances relating to the issue of the target securities to which the bidder extends its bid. This is because:
- (a) an offer for the newly issued securities from the outset which is subject to a defeating condition triggered by the prior creation of the securities would be contrary to the prohibition on self-defeating conditions in s629 and the policy and principles underlying the prohibition; and
 - (b) the bidder has a choice whether to extend its bid to the newly issued securities, having regard to the circumstances prevailing at the time.
- RG 9.63 This also ensures that the issue of the bid class securities is excluded from the conditions permitted in:
- (a) item 2(d)(ii) of s611 (i.e. the happening of events prescribed in s652C(1) or (2) relating to on-market acquisitions made during the bid period); and
 - (b) s650F(1)(a) (i.e. freeing off-market bids from defeating conditions relating to events prescribed in s652C(1) or (2)).

Note: For example, if a bidder seeking relief before the dispatch of offers wishes its bid to be subject to a 'prescribed occurrence condition' of the kind referred to in s652C(1)(d), we may require that the condition is worded or varied so that it is not triggered merely by the issue of the target securities to which the bid will subsequently be extended.

Offers to foreign holders

- RG 9.64 As far as practicable, all offers under a takeover bid must be the same because holders should have an equal opportunity to participate in the benefits of the bid: s619(1) and 602(c).
- RG 9.65 However, where the bid consideration includes scrip, the bidder may be constrained by foreign laws and regulations from making an offer of securities to a foreign holder. Alternatively, it may be highly impractical to comply with foreign regulations.

RG 9.66 Section 619(3) allows the bidder to include terms in its bid that establish a ‘nominee procedure’ so that foreign holders can receive cash instead of the securities offered under the bid. A foreign holder for this purpose is a holder whose address on the register is a place outside Australia and the external territories: s9.

RG 9.67 Under the nominee procedure, the bidder must appoint a nominee, approved by us, to sell the securities or rights that would otherwise be transferred to accepting foreign holders, and to distribute the proceeds to those holders net of expenses.

Note: Class Order [CO 13/525] *On-sale disclosure relief for scrip bids and schemes of arrangement* provides on-sale relief for the securities transferred to the nominee.

ASIC modification: Specifying foreign holders to which the procedure applies

RG 9.68 Section 619(3) may be read to require that, if a bidder uses the nominee procedure, it must use it for *all* foreign holders.

RG 9.69 [CO 13/521] modifies s619(3) to clarify that the bidder does not have to use the nominee procedure for all foreign holders of target securities. The modification provides that the issuer may specify in the bidder’s statement the foreign holders to whom the nominee procedure applies—for example, by reference to the place of the foreign holder’s registered address.

RG 9.70 The nominee procedure is an exception to the usual rule that all the offers under a takeover bid must be the same. Its premise is that the takeover bid should be considered compliant even if foreign holders do not receive an offer of securities, but instead receive cash realised from the sale of the securities. The policy behind s619(1) requires the issuer to offer the securities to each foreign holder where it is not constrained by regulation from doing so.

RG 9.71 Accordingly, the bidder may risk an application to the Takeovers Panel for a declaration of unacceptable circumstances where the nominee procedure is used for a foreign holder, and the bidder is not legally or practically constrained from making the offer to the holder.

ASIC approval of nominees

RG 9.72 We may approve nominees for foreign holders under s619(3) in relation to scrip bids.

RG 9.73 Because the function of these nominees is to sell securities for the benefit of foreign holders and to distribute the proceeds of sale to the holders, it is our view that nominees should operate with an appropriate standard of professionalism to protect the interests of foreign holders.

- RG 9.74 We consider that a person will generally only be suitable as a nominee under s619(3) if that person is:
- (a) an Australian financial services (AFS) licensee authorised to provide financial services in relation to the relevant class of securities; or
 - (b) a nominee subsidiary of a person referred to in RG 9.74(a).
- RG 9.75 This is because the obligations of an AFS licensee in Pts 7.6–7.8 will usually provide sufficient protection for foreign holders for the purposes of s619(3). These obligations also mean that the nominee does not necessarily have to be independent of the issuing company.
- RG 9.76 Before approving a person as a nominee, we will also consider whether they are in a position to fulfil their responsibilities under s619(3). For example, we will not approve a person’s appointment as a nominee if we are:
- (a) investigating the person; or
 - (b) taking enforcement action against the person.

Small parcels

- RG 9.77 The rules of some prescribed financial markets define a ‘marketable parcel’ or ‘minimum parcel’ of securities (or similar term) for the purpose of regulating dealings through the relevant market and/or associated clearing and settlement facilities. Where a holding of securities does not meet the definition of ‘marketable parcel’ or ‘minimum parcel’, we refer to it in this section as a ‘small parcel’.
- Note: Under the current definition of ‘marketable parcel’ in the ASX Operating Rules, a ‘small parcel’ of quoted ordinary shares is a parcel of less than \$500 in value based on the daily closing price of the shares.
- RG 9.78 In some cases, the rules restrict dealings that result in a small parcel holding: see for example ASX Settlement Operating Rule 8.10.2. See also ASX Listing Rule 8.10.1(h), which contemplates that a listed entity may act in certain circumstances to prevent a transfer of its securities that results in a small parcel holding.
- RG 9.79 Restrictions of this kind aim to reduce the number of small parcel holdings on a listed entity’s register created through securities trading. This is because of the disproportionate administrative costs to the entity associated with maintaining a register with a large number of small parcel holders relative to the prevailing value of the capital contributed by these holders.

ASIC modification: Small parcels offered as consideration under a bid

- RG 9.80 When a bidder offers quoted scrip as consideration in an off-market bid, the number of securities they are required to provide to some target holders may be a small parcel. The takeover may therefore increase the number of small parcel holdings on the bidder's register.
- RG 9.81 [CO 13/521] allows a bidder to deal with offers of small parcels of securities in the following two ways:
- (a) if a nominee is appointed under s619(3)—the nominee may sell the small parcel of securities offered as consideration and distribute the proceeds to the holders in accordance with s619; or
 - (b) in other circumstances—the bidder may offer cash (based on the highest closing price of the securities on any prescribed financial market on which the securities are quoted during a specified reference period) to the holders.
- RG 9.82 Given the costs associated with appointing a nominee, our class order does not require a bidder to appoint a nominee to sell the small parcel of securities and forward the cash proceeds to the holder. However, if a bidder intends to appoint a nominee and use the procedure in s619(3), this procedure must also be used when dealing with small parcels.
- RG 9.83 Under the class order, the number of quoted securities that constitute a small parcel is determined by applying, where applicable, the definition in the rules of the relevant prescribed financial market (e.g. the definition of a 'marketable parcel' in the ASX Operating Rules) but using the highest closing price published by the operator of any prescribed financial market on which the securities are quoted during the period beginning on the first day of the bid period, and ending on the earlier of:
- (a) five trading days before the first date on which the bidder must pay or provide bid consideration to a target holder under the terms of the offers; and
 - (b) the end of the bid period.
- RG 9.84 If the securities are quoted on more than one prescribed financial market containing a relevant definition of a 'marketable' or 'minimum' parcel then the bidder can elect which definition applies by specifying this in its bidder's statement. If the securities are quoted on one or more prescribed financial markets, the rules of which do not contain a definition, then the relevant definition is a parcel of \$500 value.

ASIC modification: Acceptances of a proportional takeover bid leaving a small parcel

- RG 9.85 If accepting a proportional takeover bid would leave a shareholder with a small parcel, s618(2) provides that the offer extends to the whole parcel.
- RG 9.86 This provision is an exception to the equality principle in s602(c). It prevents target security holders from being left with a parcel of shares that is disproportionately costly to dispose of compared with its value. While this benefits the target holders, it may also benefit the target because, although no new holdings are created by the acceptance of a proportional bid, it removes from the target's register holders who may otherwise be left with small parcel holdings and retain those holdings due to the relative cost of disposal. This may reduce the overall administrative operating costs of the target.
- RG 9.87 There is, however, potential for security holders in a proportional bid to abuse s618(2)—for example, by:
- (a) splitting large holdings into smaller parcels and then seeking to accept the bid for all of their securities; or
 - (b) repeatedly purchasing and accepting into the bid holdings of a sufficiently small size that they attract the operation of s618(2).
- RG 9.88 These practices create uncertainty for the bidder and the market, undermine the proportional bid mechanism and are contrary to the efficient market and equality principles set out in s602(a) and (c).
- Note: In *Goldlink IncomePlus Limited 04* [2009] ATP 2, the Takeovers Panel made a declaration of unacceptable circumstances in relation to share splitting in a proportional bid. The Panel's reasons for its decision further discuss our concerns with this practice.
- RG 9.89 [CO 13/521] modifies s618(2) so that it does not apply to parcels of securities (whether held beneficially or otherwise) that have come into existence, or increased in size, because of a transaction (including the creation of one or more trusts) entered into after the proportional bid was publicly proposed.
- RG 9.90 The modification ensures that the small parcel exception is available only to holders who will not benefit from any transaction or modification to their holding effected at a time when the potential advantage of reliance on s618(2) may be apparent. It thereby prevents target security holders from abusing the provision, while preserving its operation in the case of holders who have not modified their holdings in response to the bid.
- RG 9.91 Our modification also clarifies that the small parcel exception applies where the residual parcel is not a 'marketable' or 'minimum' parcel (or, if neither term is defined in the rules of the relevant prescribed financial market, a parcel of at least \$500 in value) using:

- (a) if, on the most recent day before the date of acceptance that bid class securities were traded on a prescribed financial market, the securities were only traded on one prescribed financial market—the closing price of the securities on that prescribed financial market on that day; or
- (b) if bid class securities were traded on more than one prescribed financial market on that day—the closing price of the securities on any of the prescribed financial markets on that day.

Note: In some circumstances, relief from the equal treatment obligation of a responsible entity of a listed registered managed investment scheme under s601FC(1)(d) may also be required.

Acceptances by trustees and nominees

RG 9.92 In some cases, an acceptance for a parcel of target securities by a person as trustee, nominee or otherwise on account of another person under s653B(1)(b) may attract the operation of s618(2). An acceptance of this kind will relate to a parcel of securities forming part of a larger registered holding.

Note: If a trustee or nominee's entire holding in the target is held on behalf of a single beneficiary, there will generally be no need to rely on s653B(1)(b) to accept in respect of the beneficiary's interest.

RG 9.93 Our class order modification also applies to restrict reliance on s618(2) when there is a change to a parcel for which an offer is deemed to have been made under s653B(1)(b)—for example, increases or transfers of a person's beneficial interests in securities that form part of a larger registered holding. In this way, our class order also seeks to deter target holders from taking advantage of s618(2) by splitting holdings through the creation of trusts or similar arrangements.

RG 9.94 To provide bidders with sufficient information to determine whether the requirements of [CO 13/521] have been met, a trustee or nominee who wishes to have the benefit of the s618(2) exception in respect of a parcel accepted into the bid out of a larger holding under s653B(1)(b) must provide the bidder with a notice, stating:

- (a) either that the parcel is held by the holder in their own right or, if the parcel is held by the holder for a beneficiary, the name and address of each beneficiary;
- (b) if the parcel is held by the holder in their own right, the date of the transaction through which the holder acquired a legal interest in the parcel; and
- (c) if the parcel is held for one or more beneficiaries, the date on which each beneficiary acquired a beneficial interest in that parcel (or, if unknown, the date that the beneficiary is reasonably believed to have acquired a beneficial interest in that parcel).

- RG 9.95 If a legal or beneficial interest in a parcel is acquired on the same date that the proportional bid is publicly proposed, the notice must specify the time of day that the interest was acquired.
- RG 9.96 The notice requirement will only apply in very limited circumstances—that is, where:
- (a) the acceptance relies on s653B(1)(b) (i.e. the notification requirements do not apply to acceptances in respect of a person’s entire registered holding);
 - (b) the acceptance relates to a parcel that is sufficiently small that the remainder of the parcel is a small parcel; and
 - (c) the accepting holder seeks to rely on s618(2) to have the bid extended to the entire parcel to which the acceptance relates.
- RG 9.97 A trustee or nominee who is content to accept only in respect of the bid proportion may accept in the usual way without giving the notice.

Consideration payable subject to providing documentation

- RG 9.98 Section 620(2) requires the offer under an off-market bid to provide that the bidder must pay the consideration under the bid within a specified period. Different periods apply if the bidder is not given, with the acceptance, documentation that is sufficient to enable the bidder to become the holder of the relevant securities:
- (a) When a bidder is given the necessary transfer documents after the acceptance of the offer but *before* the offer period ends, s620(2)(b) requires the bidder to pay the consideration within one month of receiving the documents.
 - (b) When a bidder is given the necessary transfer documents after the acceptance of the offer and *after* the offer period ends, s620(2)(c) requires the bidder to pay the consideration within 21 days of receiving the necessary transfer documents.
- RG 9.99 The periods specified in s620(2)(b) and (c) run from the time that the bidder receives the transfer documents, even if the bid remains subject to a defeating condition. This is in contrast to s620(2)(a)(i).

ASIC modification: Timing of payment in conditional offers

- RG 9.100 As reflected in s620(2), the period for a bidder to pay consideration should run from the time that the necessary transfer documents are given to the bidder. The ‘necessary transfer documents’ constitute the consideration provided by the holder under the takeover contract: s9.

- RG 9.101 However, for an offer that is subject to a defeating condition, the period for a bidder to pay consideration should also be referable to the time that the takeover contract becomes unconditional. At this time, the contract is binding and will not be rescinded: see the definition of ‘defeating condition’ in s9. This is consistent with s620(2)(a)(i).
- RG 9.102 [CO 13/521] modifies s620(2)(b) so that the bidder must provide in its offer that, if the bidder is given the necessary transfer documents after acceptance by the holder and before the end of the bid period, the bidder is to pay the consideration:
- (a) if the offer is subject to a defeating condition when the bidder is given the necessary transfer documents—by the earlier of one month after the takeover contract becomes unconditional or 21 days after the end of the offer period; and
 - (b) if the offer is unconditional—by the earlier of one month after the bidder is given the necessary transfer documents or 21 days after the end of the offer period.
- RG 9.103 [CO 13/521] also modifies s620(2)(c) so that the bidder is to pay the consideration within 21 days after the takeover contract becomes unconditional if:
- (a) the bidder is given the necessary transfer documents after both the acceptance of the offer and the end of the offer period; and
 - (b) when the bidder is given the necessary transfer documents, the offer is subject to a condition that relates to the occurrence of an event referred to in s652C(1) or (2).
- RG 9.104 We have modified s620(2)(c) because a bidder may free its offer from a condition relating to the events referred to in s652C(1) or (2) not later than three business days after the end of the offer period: s650F(1)(a), and see RG 9.190–RG 9.193 on s650G. We discuss the quotation condition imposed by s625(3) at RG 9.163–RG 9.168.

C Bids for multiple classes

Key points

We may provide relief to allow a bidder to treat two or more classes of securities as being in the same class if the securities are sufficiently similar that the holders have a community of interest, and the terms of the offers are equitable between the two (or more) classes.

We may give case-by-case relief to a bidder from the general prohibition in s606 to allow the exercise of convertible securities acquired under an off-market bid conducted simultaneously with a bid for the underlying securities.

Treating multiple classes as a single class

RG 9.105 Multiple small classes of securities on issue in a company (e.g. different tranches of options) may create practical problems for a takeover bid or compulsory acquisition and may have a defensive effect.

ASIC relief: Bids for multiple classes

RG 9.106 In appropriate cases, we may give relief to allow two or more classes of securities to be treated as being in the same class in a takeover bid or compulsory acquisition. This relief allows the bidder to make a single bid for two or more classes at different prices.

RG 9.107 We will only give relief to treat multiple classes as a single class if:

- (a) the terms of the offers are equitable between the relevant classes, having regard to the rights and obligations attaching to the classes (see RG 9.110–RG 9.114); and
- (b) the relevant classes of security are sufficiently similar that the holders have a community of interest. For example, we will not give this relief if the differences between the classes of securities are such that the holders of the securities would not be characterised as being in the same class for the purposes of a scheme of arrangement.

Note: For class distinction in a scheme of arrangement, see *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573.

RG 9.108 The following are some examples of the relief that may be available.

Example 1: Options

We may give case-by-case relief so that different series of options are not treated as different classes despite having different exercise prices and different exercise dates. However, we will carefully consider the

effect of our relief if the relevant series of options are not all ‘out of the money’ or ‘in the money’, given the potential for acceptances of one class to affect rights in relation to another.

We will not give relief to treat options as being in the same class as shares: see RG 9.107(b).

Note: See the ‘Key terms’ for an explanation of ‘in the money’ and ‘out of the money’.

Example 2: Dividend entitlements

We may give relief where securities have different dividend or distribution entitlements: see s619(2)(b).

Example 3: Partly paid securities

We may give relief so that partly paid securities with no dividend or voting rights can be treated as if they are in the same class as fully paid securities when they are otherwise in different classes despite s605(2).

RG 9.109 In deciding whether to give relief, we may consult with the target: RG 92.

Offers must be equitable between the classes

RG 9.110 Although we will not require the bidder to treat holders of securities in the two (or more) classes identically under the bid (see *Re Hills Motorway Ltd* (2002) 43 ACSR 101 at 104 concerning a scheme of arrangement), our relief instrument will require that the bidder’s offers are equitable between the classes, having regard to the rights and obligations attaching to the securities in each class.

RG 9.111 We impose this requirement because the effect of treating the two (or more) classes as a single class is that:

- (a) the bidder may compulsorily acquire the holder’s securities as a single class on the basis of acceptances for both (or all) classes; and
- (b) the terms of the bidder’s offers may require the holder to accept for all their securities in both (or all) classes, or none.

RG 9.112 Assessing whether the offers are equitable will mostly involve a valuation of securities in the different classes and any scrip consideration. The question is not whether the bidder offers a fair value for each class (as in s667C), but whether, for example, the premium (if any) that the bidder offers for one class is similar to the premium offered for each other class.

Note: In valuing options for the purposes of the equitable treatment requirement, a bidder may derive useful guidance from Australian Accounting Standard AASB 2 *Share-based payment*.

RG 9.113 The bidder’s relief application should provide evidence that it has assessed whether the offers are equitable between the relevant classes—for example,

by providing a worked-out explanation by its financial adviser. This is so that we know the bidder has made the assessment, and not necessarily so that we can pre-vet whether the bidder has met the requirement.

- RG 9.114 It is the bidder's responsibility to ensure that the equitable treatment requirement is met. The bidder risks a breach of the Corporations Act (because our relief will not apply), or an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances, if its offers are not equitable between the relevant classes.

Partly paid securities

- RG 9.115 Where dividend and voting rights attaching to partly paid securities are full or proportional to the amounts paid up, we do not need to give relief for these securities to be in the same class as fully paid securities with otherwise similar rights: see RG 9.48–RG 9.50.
- RG 9.116 We may grant relief on a case-by-case basis, allowing a partly paid security with no dividend or voting rights to be treated as being in the same class as a fully paid security.

Note: In some circumstances, relief from the equal treatment obligation of a responsible entity of a listed registered managed investment scheme under s601FC(1)(d) may also be required.

Equitable consideration

- RG 9.117 As with other cases where we give relief, offers must be equitable between the partly paid and fully paid securities, having regard to the rights and obligations attaching to each class: see RG 9.110–RG 9.114.
- RG 9.118 Section 619(2)(c) allows differences between the offers if these are attributable to the fact that the offers relate to securities on which different amounts are paid up or remain unpaid. If partly paid securities are in the same class as fully paid securities, a bidder can offer a type of consideration for partly paid securities that is different from that offered for fully paid securities (e.g. options instead of shares). The offers will only be equitable if the type of consideration reflects the commercial characteristics of the partly paid securities.

Note: In *Taipan Resources NL (No 10)* [2001] ATP 5 and *Taipan Resources NL (No 11)* [2001] ATP 16, the Takeovers Panel considered that the options reflected the value and commercial characteristics of the partly paid shares and could be offered to the holders of partly paid shares in that case.

- RG 9.119 If a partly paid security should be valued as if it includes an option over the corresponding fully paid security, we consider that the bidder should take this option component into account in assessing whether its offers are equitable between the partly paid securities and the fully paid securities. For

example, in certain circumstances, a partly paid security may be ‘out of the money’ and could initially be considered a liability. However, the bidder’s valuation of the partly paid securities may still determine that they have a positive value.

Exercising convertible securities acquired under a bid

RG 9.120 In appropriate cases, a bidder making a full, unconditional bid for voting shares should be allowed to acquire all other securities in a company. This is reflected in the exception in item 3 of s611 for acquisitions of voting shares resulting directly from the exercise of convertible securities bought on-market during the bid period. In the circumstances where this exemption applies, the bidder has fully committed to completing its bid for every voting share or interest in the bid class, and control of the company will not pass through the exercise of the convertible securities without holders of voting shares or interests having had the opportunity to dispose of all their shares or interests to the bidder.

RG 9.121 Consistent with the exception in item 3 of s611, if a bidder acquires convertible securities under a takeover bid conducted simultaneously with a bid for the underlying securities, it should not be prevented by s606 from converting or exercising the convertible securities and acquiring the underlying voting shares or interests. The Corporations Act expressly recognises that a bidder may make simultaneous takeover bids for different classes of securities in the target, and acquisitions of convertible securities under a simultaneous takeover bid are at least as well regulated, transparent and equitable as on-market acquisitions: *Re Pinnacle VRB Ltd (No 3)* [2001] ATP 2 at [28].

Note: The Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 (CLERP Bill) indicated that a purpose of the reforms was to better facilitate the acquisition of securities convertible into the bid class: paragraphs 7.68–7.69.

RG 9.122 A prohibition on exercise may also be a disincentive for bidders to bid for convertible securities. If bidders are discouraged from making a bid for convertible securities, holders seeking to access the benefits of the bid will be forced to pay the exercise price, wait for issue of the shares and accept the takeover bid.

ASIC relief: Converting or exercising convertible securities acquired under an off-market bid

RG 9.123 We may give case-by-case relief from the general prohibition in s606 for an acquisition of voting shares by the bidder that results directly from the exercise of convertible securities acquired under an off-market bid for the convertible securities.

- RG 9.124 However, we will only give this relief if the bidder applies for it in good time before it sends its offers to holders.
- RG 9.125 The following requirements will apply to our relief:
- (a) the bidder makes a takeover bid for all voting shares in the bid class (a full bid);
 - (b) the bid for the convertible securities is subject to a non-waivable defeating condition that the bid for the shares is:
 - (i) unconditional; or
 - (ii) subject only to conditions relating to the prescribed circumstances in s652C(1) or (2), and/or the statutory quotation condition in s625(3);
 - (c) the bidder's offer for the convertibles securities is equitable compared with the offer for the voting shares or interests;
 - (d) the bidder discloses in the bidder's statement that it sends to holders that it has received our relief, together with a brief description of the terms of the relief;
 - (e) the bidder discloses in the bidder's statement its intentions concerning the exercise of convertible securities; and
 - (f) the bidder sends its first offers to holders under the bids for the convertible securities and the voting shares or interests on the same day.
- RG 9.126 These requirements are discussed further below: see RG 9.128–RG 9.143.
- RG 9.127 We may also give similar relief where the bidder seeks to acquire renounceable rights: see RG 9.145–RG 9.146.

Full and unconditional bid for voting shares

- RG 9.128 Our relief will require that the bidder has made a takeover bid for all the voting shares in the bid class (i.e. a full bid). This requirement is consistent with item 3(c) of s611.
- RG 9.129 Our relief will also require that the bid for the convertible securities is subject to a non-waivable defeating condition that the bid for the shares is:
- (a) unconditional; or
 - (b) subject only to conditions relating to the prescribed circumstances in s652C(1) or (2), and/or the statutory quotation condition in s625(3) (see [CO 13/520]).
- RG 9.130 To satisfy RG 9.129, if the bid for the shares is not unconditional from the outset (except for the prescribed circumstances conditions and the statutory quotation condition), the bid for the shares must be declared to be

unconditional (except for the prescribed circumstances and statutory quotation conditions).

- RG 9.131 Under s650F(1)(b), the bidder may waive a condition of the bid for the shares only if it does so not less than seven days before the end of the offer period. This means that, if the bidder waives conditions of the share bid so that the bid for the convertible securities proceeds, shareholders will have at least a week to accept the offer for the shares.
- RG 9.132 This corresponds with item 3(d) of s611, which requires that the share bid is unconditional (except for the prescribed circumstances conditions and the statutory quotation condition) at the time that the bidder acquires the convertible securities on-market. We equate the time that the bid for the convertible securities becomes unconditional with the time that a bidder ‘acquires’ convertible securities on-market under item 3.
- RG 9.133 These requirements follow from the policy discussed at RG 9.120 that a bidder who has made a full, unconditional bid for the voting shares should be allowed to acquire all other securities in the company.

Equitable offers

- RG 9.134 Our relief instrument will also require that the bidder’s offer for the convertible securities is equitable compared with the offer for the voting shares or interests, taking into account the rights and obligations attaching to the two classes—that is, the bidder must not make an offer at a premium for the convertible securities and an offer at market or at a discount for the shares or interests.
- RG 9.135 If the offers for the convertible securities and the shares or interests are not equitable:
- (a) there is a risk that the bidder is targeting shareholders who are also convertible security holders with a collateral benefit (s623); and
 - (b) the bidder may acquire a key parcel of voting shares or interests on exercise of the convertible securities, having paid a significant premium for the convertible securities and a discount for the shares or interests.
- RG 9.136 The requirement that the offers are equitable between the convertible securities and the shares or interests is analogous to the requirement in item 3(b) of s611 that the convertible securities are acquired through an ‘on-market transaction’. Item 3(b) ensures that the bidder acquires the convertible securities at a price that reflects the open market and not any prearrangement. It limits the risk that the bidder can direct the benefit of the on-market offer to certain convertible security holders who are also shareholders: s623 and RG 9.198–RG 9.200.

- RG 9.137 Section 623(3)(c) provides an exception to the collateral benefit prohibition for simultaneous takeover bids for different classes of securities in the target. This means a bidder does not breach s623 because of the mere fact that it bids for a different class. It does not mean that it is necessarily acceptable for a bidder to make any offer for convertible securities that is likely to induce target share or interest holders, who are also convertible security holders, to accept the offer for their shares or interests: see Section E.
- RG 9.138 It is the bidder's responsibility to ensure that the offers are equitable between the convertible securities and the voting shares or interests. Assessing whether the offers are equitable will involve a valuation of the convertible securities and the shares or interests: see RG 9.110–RG 9.114.
- RG 9.139 The bidder's relief application should provide evidence that it has assessed whether the offers are equitable between the convertible securities and the voting shares or interests. The bidder should provide a worked-out explanation by its financial adviser. This is so that we know the bidder has made the assessment, and not so that we can pre-vet whether the bidder has met the requirement.

Disclosure about our relief and the bidder's intentions

- RG 9.140 Holders and the market should be informed about the treatment of convertible securities under the bid and the bidder's intentions concerning exercise: s602(a) and (b).
- RG 9.141 Our relief will require the bidder to disclose in the bidder's statement it sends to holders that it has received our relief, together with a brief description of the terms of the relief.
- RG 9.142 We will also require the bidder to disclose in the bidder's statement its intentions concerning the exercise of convertible securities. The bidder should set out its intentions in the case of particular contingencies—for example, various levels of acceptances for the convertible securities and the shares or interests. RG 25 deals with statements of intention during the course of a bid.
- RG 9.143 We will only give relief if the bidder applies within a reasonable amount of time before the date that it makes its offers. Other than in exceptional circumstances, we will not give this relief after the bidder has sent its offers to holders. In determining whether exceptional circumstances exist, we will consider the circumstances of the bid as a whole. Mere oversight of the fact that relief may be required would not generally be sufficient to constitute exceptional circumstances.

Note: The bidder should not publicly announce its bid on the basis of a defeating condition or precondition that we give this relief unless it has first discussed the relief and disclosure with us.

Simultaneous offers

- RG 9.144 Our relief will require that the bidder sends its first offers to holders under the bids for the convertible securities and the voting shares or interests on the same day. This is similar to the requirement in item 3(b) of s611 that the shares or interests are acquired during the bid period.

Renounceable rights

- RG 9.145 We will also consider applications for relief from s606 so that a bidder may subscribe for target securities pursuant to renounceable rights acquired under an offer to all rights holders. It is doubtful that rights are ‘securities’ to which Chs 6–6C apply under s92(3). Our relief would require that the offer for the rights complies as far as practicable with Chs 6 and 6C as if the offer were a takeover bid.
- RG 9.146 Issues raised in *Re Anaconda Nickel Ltd (No 8)* [2003] ATP 7, *Re Anaconda Nickel Ltd (No 9)* [2003] ATP 8 and *Re Anaconda Nickel Ltd (Nos 2, 3, 4 & 5)* [2003] ATP 4 may be relevant to such an application, including whether the relief sought will adversely affect the market, and competition, for control of the target.

D Conditional offers

Key points

Offers under an off-market takeover bid may be subject to conditions—other than those prohibited under s626–629: s625(2). The bidder may free offers from conditions at certain times during the course of the bid: s650F. When conditional offers are made, the bidder must provide a notice on the status of conditions near the end of the offer period.

We have modified s625(3) to ensure that the statutory quotation condition is not taken to be a defeating condition.

Maximum acceptance conditions and discriminatory conditions are prohibited to reduce uncertainty for target holders and prevent excessively generous and ‘first come, first served’ bids.

We have modified Ch 6 to clarify that defeating conditions do not permit bidders to withdraw unaccepted offers, and to clarify the time by which a bidder can free an offer from a defeating condition.

Notices relating to conditions in an off-market bid

- RG 9.147 Offers under an off-market takeover bid may be conditional: s625(2). When offers are subject to defeating conditions, the bidder is required to give various notices relating to the status of these conditions throughout the offer period. The notices must be given to the relevant market operator if securities in the bid class are quoted, or lodged with us if the securities are unquoted. The notices must also be given to the target.

Notice of status of conditions

- RG 9.148 Offers under a takeover bid may only be made subject to a defeating condition if the offers specify a date (no more than 14 days and no less than seven days before the close of the offer) on which the bidder is to give a notice on the status of the conditions: s630(1).

Note: RG 7 provides further guidance on how to apply provisions of this kind referring to time periods.

- RG 9.149 Section 630(3) requires the bidder to give the notice of status of conditions on that date or the date determined under s630(2). Under s630(2)(a), if the offer period is extended, the date for giving the notice of status of conditions is taken to be postponed for the same period.
- RG 9.150 Because s650C(2) prevents the extension of a conditional offer, other than in limited circumstances after the notice is given, the specification of a date for

giving the notice of status of conditions provides for a period at the end of the offer during which undecided holders are able to respond to the offer with the benefit of current information about the status of any conditions and the bidder's voting power in the target. The purpose of s630(2)(a) is to ensure that, if the offer period is extended, holders are still given a final opportunity to accept on the basis of the latest information available.

Notice of postponement of status notice

- RG 9.151 If the date for giving a notice of status of conditions is postponed under s630(2)(a), the bidder must, as soon as practicable, give a notice that states the new date for giving the notice of status of conditions and provides an update on the status of conditions at that time.

Notices of fulfilment or freeing of conditions

- RG 9.152 Additionally, throughout the bid period—but before the date for giving the notice of status of conditions—the bidder must give notice of the fulfilment of any conditions: s630(4). The bidder must also give a notice to declare offers free of a defeating condition: s650F(1).
- RG 9.153 The bidder must give the notice of status of conditions on the relevant date regardless of whether the conditions have previously been fulfilled or the offers declared free of the conditions: s630(3). This is because some holders may not have seen any of the notices confirming that the conditions have been fulfilled, or declaring the offers to be free of the relevant conditions.

Note: [CO 13/521] incorporates a minor and technical modification which replaces the word 'publish' with 'give' in s630(4) and 650C(2).

The operation of s630(2)

- RG 9.154 Section 630(2) provides that, whenever an offer period is extended:
- (a) the date for giving the notice of status of conditions is postponed; and
 - (b) the bidder must give a notice that states the new date and provides an update on the status of conditions at the time.
- RG 9.155 The continued operation of s630(2) and (3), after a date determined under s630(1) or (2) has been reached and a status notice given, is not expressly addressed in the provision.
- RG 9.156 We administer the Corporations Act on the basis that s630(3) requires a notice to be given once on a single fixed date, and that the function of s630(2), to the extent that the s630(3) requirement has not yet been met, is to:
- (a) postpone the date on which the s630(3) requirement must be met; and

- (b) ensure that target holders are advised of the new date and the status of defeating conditions at the time.

RG 9.157 Accordingly, if the offer period is extended after the bidder has already complied with s630(3), the operation of both that provision and s630(2) is exhausted.

Extension of a conditional bid after the notice of status of conditions has been given

RG 9.158 Given the prohibition in s650C(2), in most cases, a bid will only be extended after the s630(3) notice has been given if it is unconditional. Holders do not generally need further information about the status of a bid's conditions after they have been notified that it is unconditional.

RG 9.159 However, in contrast with the provisions relating to the extension of takeover schemes before the enactment of the *Corporate Law Economic Reform Program Act 1999* (CLERP Act), it is now possible for the offer period for a conditional bid to be extended after the date for giving the notice of status of conditions has already passed: s624(2) (automatic extension) and 650C(2)(a)–(d) (extension permitted due to a rival bid).

RG 9.160 It is consistent with the underlying policy of s630(2) that ongoing disclosure about the status of the bid's conditions should be provided if a conditional bid is extended, even if the status notice has previously been given: see RG 9.150. It is also consistent with the principles underlying Ch 6 set out in s602(a) and (b)—that is, that the takeover takes place in an efficient, competitive and informed market, and that security holders are given enough information to enable them to assess the merits of the takeover offer.

RG 9.161 Equivalent disclosure of the status of conditions should therefore be given on the date that a notice would have been required if s630(2) had continued to apply at all relevant times, where:

- (a) a bid is extended after a notice of status of conditions has been given on a date determined under s630(3); and
- (b) the offers are conditional at the time of the extension.

RG 9.162 We may seek a declaration of unacceptable circumstances if we are concerned that target holders have not been given sufficient information about the status of bid conditions.

The statutory quotation condition

RG 9.163 Where a bidder offers consideration that is, or includes, securities, and the bidder's statement or offer states or implies that the securities are to be quoted on a financial market, s625(3) imposes a condition on the offer that:

- (a) the bidder makes the application for admission to quotation within seven days of the start of the bid period; and
- (b) permission for admission to quotation is granted no later than seven days after the end of the bid period.

Note: Securities are admitted to quotation when the relevant market operator has given unconditional permission for quotation: definition of 'admit to quotation' in s9. See also RG 228.151–RG 228.155 for further discussion of statements that may give an indication of listing.

RG 9.164 The quotation condition is a statutory condition imposed by s625(3) and differs in this respect from other conditions that a bidder may choose to include in its offer.

ASIC modification: Statutory quotation condition not a defeating condition

RG 9.165 [CO 13/521] modifies s625(3) to clarify that the statutory quotation condition under s625(3)(c)(ii) is not a defeating condition. Without this relief, it is possible that the quotation condition may fall within the definition of 'defeating condition' in s9.

RG 9.166 The statutory quotation condition should not be treated as a defeating condition because, unlike other conditions:

- (a) the bidder cannot choose whether its offer is subject to the condition under s625(3);
- (b) s625(3) expressly contemplates that the condition may be satisfied after the bid period has ended (e.g. because the bidder may meet holder spread requirements only at the end of the bid);
- (c) the bidder cannot free the offer from the condition (s625(3)(d));
- (d) the condition in s625(3) is for the protection of holders who accept on the basis that the consideration will be quoted securities (a bidder uses other conditions to protect itself from having to proceed with the bid in specified circumstances); and
- (e) the court has an express power to make orders if a bidder fails to apply for, and obtain, quotation within the time required by the condition: s1325A(2). A bidder can apply to the court for remedial orders under this provision during the bid period despite s659B (*Re Venturex Resources Ltd* (2009) 177 FCR 391).

- RG 9.167 The modification under [CO 13/521] provides certainty that the condition in s625(3) is not a defeating condition. As a result:
- (a) the quotation condition will not prevent a bidder extending the offer period after giving the s630(3) notice (s650C(2));
 - (b) the quotation condition is not relevant for determining the time by which a bidder must provide the consideration for the offer under s620(2); and
 - (c) the extension of an offer subject only to the quotation condition will not postpone for more than one month the time by which a bidder has to meet its obligations under the bid, meaning the bidder does not need to offer withdrawal rights (s650E(1)).
- RG 9.168 The restrictions and consequences discussed above apply to offers subject to a defeating condition because whether and when the bidder will pay for an accepting holder's securities is uncertain. In the absence of s650E, an accepting holder could not accept a rival offer until the end of the offer period. The restriction in s650C(2) is qualified only to allow an auction for control. These concerns do not arise with respect to the quotation condition because:
- (a) the bidder does not impose and cannot waive the condition; and
 - (b) the condition is for the protection of holders (see RG 9.166(d)).

Maximum acceptance and discriminatory conditions

- RG 9.169 Under s626(1), an off-market bid must not be made subject to a 'maximum acceptance condition'. A maximum acceptance condition is one that allows a bidder to generally avoid its obligations under the offer, or reduce the maximum consideration payable under the bid, if acceptances (or the bidder's interests in the target generally) exceed a certain level.
- RG 9.170 Section 627 prohibits 'discriminatory conditions' in off-market bids that allow the bidder to acquire, or may result in the bidder acquiring, securities from some but not all of the people who accept the offer.

Policy underlying the prohibitions

- RG 9.171 The origin of the prohibitions on maximum acceptance conditions and discriminatory conditions can be found in s16(2)(h) and (j) of the *Companies (Acquisition of Shares) Act 1980*, which were inserted in accordance with the recommendations of the Companies and Securities Law Review Committee in its *Report to the Ministerial Council on partial takeover bids* (1985) (CSLRC Report).

- RG 9.172 The underlying policy of the prohibitions is related to the abolition of ‘pro rata’ offers—a type of takeover offer under which the bidder could acquire a set proportion of the total shares in the bid class (as opposed to a set proportion of each shareholder’s holding) with acceptances for excess shares scaled back at the end of the bid on a pro rata basis. In confining partial bids to proportional offers, the *Companies and Securities Legislation Amendment Act 1986* amendments were largely designed to address:
- (a) concerns that shareholders in pro rata bids accept not on the merits of the offer but under coercion for fear of becoming a locked-in minority; and
 - (b) the uncertainty that target holders face in not knowing, until the end of the offer period, how many of their securities will be acquired.
- RG 9.173 As discussed in the Explanatory Memorandum to the Companies and Securities Legislation Amendment Bill 1986, the prohibitions on maximum acceptance and discriminatory conditions are designed to:
- (a) address the concerns identified in the CSLRC Report that the use of such conditions may reintroduce uncertainties for target holders, and enable bidders to avoid honouring bids that prove to be more generous than required; and
 - (b) ensure that a bidder cannot achieve what is, in effect, a pro rata bid by use of these conditions.
- RG 9.174 Accordingly, the prohibitions have been widely drafted to ensure that bid terms and conditions that have the same effect as a maximum acceptance condition (in combination or otherwise) are prohibited, including conditions enabling the bidder to acquire shares from some but not all accepting shareholders. The provision on which s627 is based was specifically directed at preventing conditions allowing a bid to be structured to achieve a ‘first come, first served’ outcome.

Note: See the CSLRC Report and the Explanatory Memorandum to the Companies and Securities Legislation Amendment Bill 1986.

Minimum acceptance conditions

- RG 9.175 A minimum acceptance condition is a condition that, in effect, requires the bidder to achieve a minimum level of acceptances under the bid.
- RG 9.176 A correctly expressed minimum acceptance condition will not breach s626 or 627, or offend the policy underlying those provisions, because it will not facilitate prorating or coerce acceptances.
- RG 9.177 A bidder may free its offers from a minimum acceptance condition under s650F(1). However, a bidder may not vary the level of acceptances to which the condition relates. A minimum acceptance condition must also not be

expressed in a way that allows the bidder or its associates to determine the relevant level of acceptances at a future time: s629 and Div 2 of Pt 6.6.

Note: A bidder may state that it will declare its bid free of a minimum acceptance condition in certain circumstances (including the bidder obtaining a lower level of acceptances) and may be bound to that commitment in accordance with our 'truth in takeovers' policy in RG 25. However, the condition will not be formally freed unless and until the procedure in s650F is followed.

Minimum acceptance conditions that relate to only one form of consideration

- RG 9.178 Where alternative forms of consideration are offered under an off-market bid, the offers must not include a defeating condition to the effect that the offers will fail unless at least a certain amount or proportion of one of the alternatives is the subject of acceptances. This is the case even if the condition is expressed as a minimum acceptance condition relating to one of the alternative forms of consideration.
- RG 9.179 An example is where holders may choose between scrip or cash consideration and offers are subject to a condition that holders who accept for not less than 50% of the shares elect to receive the cash consideration.
- RG 9.180 One effect of this condition is that the offer need not proceed if the bidder receives acceptances for more than 50% of the shares from persons who elect to receive scrip.
- RG 9.181 Accordingly, as with a maximum acceptance condition, this condition provides that the offers will terminate if the number of securities for which the bidder receives acceptances reaches or exceeds a particular number. The particular number will depend on the number of shares in respect of which acceptances are eventually received for both forms of consideration. This exposes holders to uncertainty and allows a bidder to resile from an over-generous bid.

Note: Under the prohibition, it does not matter how the particular number is determined, whether it is specified in the condition or how the condition is expressed: s626(2).

Maximum consideration conditions

- RG 9.182 The prohibition on maximum acceptance conditions includes conditions that have the effect that the maximum consideration offered under the bid will be reduced if the bidder receives more than a certain number of acceptances or otherwise acquires interests in the target exceeding a certain level.
- RG 9.183 This provision ensures that a bidder is not able to avoid the policy underlying the prohibition on maximum acceptance conditions by providing that the consideration payable will reduce as an alternative to the bidder being able to terminate the bid.

Note: Bidders sometimes seek to structure their offers so that target holders are able to elect to receive a particular form of consideration which the bidder may substitute with an alternative form of consideration if a 'cap' on the holder's desired form is reached. We may consider the application of, and the principles underlying, the prohibition on maximum acceptance conditions discussed in this section when assessing offer structures of this kind (including in the context of an application for relief). For example, we may closely examine the value of the alternative forms of consideration, the setting of the cap, and the disclosures surrounding the structure.

Conditions relating to prescribed events in s652C

RG 9.184 Offers may be freed from a defeating condition using the process set out in s650F. For conditions relating to events of the kind referred to in s652C(1) or (2), the bidder must give the target a notice declaring that the offers are free from the condition no later than three business days after the end of the offer period: s650F(1)(a). For other conditions, the notice must be provided no less than seven days before the end of the offer period: s650F(1)(b).

ASIC modification: Defeating condition does not allow withdrawal of offers

RG 9.185 [CO 13/521] modifies s650F(1)(a) to correct a drafting error, which suggests that a defeating condition relating to the events listed in s652C allows a bidder to *withdraw* unaccepted offers.

RG 9.186 Under s9, a defeating condition is a condition that:

- (a) in the circumstances referred to in the condition, will result in the rescission of, or entitle the bidder to rescind, a takeover contract; or
- (b) prevents a binding takeover contract from resulting from an acceptance of the offer unless or until the condition is fulfilled.

RG 9.187 A defeating condition does not allow the bidder to withdraw unaccepted offers. Offers may be withdrawn only with ASIC's written consent: s652B. Without our consent to withdraw offers, a bid should run its full course.

Note: Unfulfilled defeating conditions are important factors in determining whether we will give our consent: see RG 59.

RG 9.188 The reference to withdrawing unaccepted offers in s650F(1)(a) is also inconsistent with the rest of the paragraph that provides for the condition to be freed up to three business days after the end of the offer period. Withdrawing unaccepted offers brings forward the end of the offer period. This accelerates the operation of s650G, rendering takeover contracts and acceptances in a conditional bid void. There is therefore no need to withdraw unaccepted offers after the end of the offer period because unaccepted offers will have lapsed by this time.

- RG 9.189 Our modification ensures that s650F(1)(a):
- (a) is consistent with the definition of ‘defeating condition’ under s9; and
 - (b) no longer implies that defeating conditions allow bidders to withdraw unaccepted offers.

Section 652C conditions at the close of the offer

- RG 9.190 Under s650G, takeover contracts and acceptances are void if a defeating condition is not fulfilled at the end of the offer period and the bidder has not declared the offers to be free from that condition.
- RG 9.191 Section 650G(b) refers to the date applicable under s630(1) or (2) as the date by which the bidder must declare offers to be free from the condition—however, the paragraph is concerned with the notice under s650F(1) rather than s630.

ASIC modification: Applicable timing for freeing defeating conditions

- RG 9.192 [CO 13/521] modifies s650G(b) to refer to the applicable date for giving a notice under s650F(1) when freeing offers from a defeating condition, rather than the notice of status of conditions under s630(1) or (2).
- RG 9.193 Without our relief, a bidder would have to free offers from a defeating condition not less than seven days before the end of the offer period. This is inconsistent with s650F(1)(a), which allows a bidder to free offers from a defeating condition relating to circumstances in s652C(1) or (2) up to three business days after the end of the offer period. This three-day period allows a bidder sufficient time to consider all the circumstances up to the end of the offer period to decide whether to free offers from the defeating condition.

Note: See Anomalies Report, pp. 46–47.

E Collateral benefits

Key points

Offering or giving collateral benefits to some target holders to induce them to accept a takeover offer or otherwise dispose of bid class securities is prohibited: s623. This prohibition is a key application of the equality principle in s602(c). It also promotes the purposes in s602(a) and (d).

Any benefit that is likely to induce the acceptance of a takeover offer is prohibited. We look at the overall circumstances of the benefit when considering whether the benefit is likely to induce acceptance or disposal.

We have modified s623 so that the prohibition applies during the bid period rather than the offer period in a market bid.

We may grant relief in limited circumstances to allow particular arrangements that may otherwise contravene s623.

The prohibition on collateral benefits

RG 9.194 Section 623(1) prohibits certain collateral benefits from being offered or given to target holders outside the bid process. In particular, it prevents a bidder or an associate of the bidder giving, offering to give, or agreeing to give a benefit to a person if:

- (a) the benefit is likely to induce the person or an associate to:
 - (i) accept an offer under the bid; or
 - (ii) dispose of securities in the bid class; and
- (b) the benefit is not offered to all holders of securities in the bid class under the bid.

RG 9.195 Section 623(1) is one of the linchpins of the takeover bid procedure in Ch 6. It gives effect to the policy stated in s602(c) that holders should have equal access to the benefits passing under a bid. It does so by reinforcing a primary expression of the equal opportunity principle—that is, the requirement that all offers under a bid are the same and, as such, the benefits of the bid are shared equally: see s619(1). This requirement would be undermined if a bidder or its associates were able to offer or give to only some holders a collateral benefit outside the bid.

Note: Section 623 is one of a number of provisions applying the equality principle. In particular, s623 is complemented by s621(3)–(5) and 622, which extend the principle into the pre-bid period: see RG 163.5–RG 163.9.

RG 9.196 The prohibition on collateral benefits also underpins the efficiency and integrity of the takeover bid procedure as a preliminary to post-bid

compulsory acquisition under Pt 6A.1: s602(d). This is because the right to compulsorily acquire, on the same terms as those offered under the bid, is premised on the overwhelming level of acceptance of those terms—which may be distorted if some parties receive benefits outside the bid: see Regulatory Guide 10 *Compulsory acquisitions and buyouts* (RG 10) at RG 10.28–RG 10.31.

RG 9.197 For similar reasons, s623(1) helps to ensure that the acquisition of control through the takeover bid process occurs in an efficient, competitive and informed market: s602(a).

Exceptions to the prohibition

RG 9.198 The prohibition on collateral benefits does not prevent:

- (a) the variation of a takeover offer under s649A–650D;
- (b) an acquisition of securities through an on-market transaction; or
- (c) simultaneous takeover bids for different classes of securities in the target: s623(3).

RG 9.199 With respect to RG 9.198(b), a transaction takes place on-market if it is effected on a prescribed financial market in a way defined as ‘on-market’ in the rules governing the operation of the relevant market: s9. For trading on ASX and Chi-X, the relevant definition of an ‘on-market’ transaction is contained in Rule 1.4.3 of the ASIC Market Integrity Rules (ASX Market) 2010 and Rule 1.4.3 of the ASIC Market Integrity Rules (Chi-X Australia Market) 2011, respectively.

Note: For markets where there is no definition, a transaction is on-market if it is effected in the ordinary course of trading on the market: s9.

RG 9.200 The policy underlying the exception to s623(1) for on-market purchases is that the competitive market process should afford holders equal access and opportunity to participate in any benefits, and limit the risk that the bidder is able to selectively direct the benefits flowing from its purchases to particular target holders: see also item 2 of s611. Accordingly, the definition of ‘on-market’ generally excludes transactions that are prearranged between the parties (including special crossings).

Unacceptable circumstances

RG 9.201 Even if offering or giving a collateral benefit does not contravene the prohibition in s623, the collateral benefit may still give rise to unacceptable circumstances—for example, because it offends the equality principle in s602(c). The application of the equality and other principles in s602 is not limited to any particular stage of the bid. A collateral benefit may therefore

be unacceptable even if it is offered or given outside the periods during which s623(1) applies.

- RG 9.202 In considering a collateral arrangement or transaction in the context of a bid, we will take into account both whether there is a contravention of s623 and whether there may otherwise be unacceptable circumstances, having regard to the principles in s602.
- RG 9.203 The Takeovers Panel has published guidance on when collateral benefits may give rise to unacceptable circumstances: Takeovers Panel Guidance Note 21 *Collateral benefits* (GN 21). In addition to the equality principle, the Takeovers Panel notes that circumstances involving the giving of a collateral benefit may also offend the efficient market principle in s602(a)—for example, if the arrangement involving the collateral benefit has the effect of deterring alternative bidders or buyers: see GN 21, paragraph 28.

Prohibited benefits

- RG 9.204 The scope of collateral benefits that may be prohibited under s623 is broad. As well as collateral benefits passing from the bidder to a target holder, benefits passing from an associate of the bidder to an associate of the holder are also prohibited.
- RG 9.205 A benefit of any nature may fall within the prohibition: s9. A benefit may involve any kind of advantage or value accruing to a holder. Cases on the antecedent provisions have confirmed the broad variety of advantages constituting a benefit, including:
- (a) the advantage of an unconditional off-market purchase of target securities where offers under the bid are conditional (*Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 28 ACSR 1 and *Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 187 (*Aberfoyle*));
 Note: See also *Citect Corporation Ltd* [2006] ATP 6.
 - (b) the advantage of selling other assets to the holder at a premium in connection with the sale of the target securities or selling an entire holding in the context of a proportional bid (see *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Pty Ltd* (1993) 177 CLR 508 and *Albert v Votaint No 320 Pty Ltd* (1987) 13 ACLR 336); and
 - (c) the ability to acquire a large parcel of shares all at once, participate in an attractive investment opportunity or acquire shares without brokerage (*Aberfoyle*).
- RG 9.206 The broad construction of benefit for this purpose is underscored by the express exclusions in s623(3).

Benefits likely to induce acceptance or disposal

- RG 9.207 Under s623(1), only benefits that are ‘likely to induce’ acceptance of the offer, or the disposal of target securities, are prohibited.
- RG 9.208 This limitation was introduced by the CLERP Act to address the potential that transactions outside the scope of the underlying policy of the prohibition may have been caught under the predecessor provisions. In particular, this requirement was designed to exclude benefits, such as payments made by the bidder in the ordinary course of its business, that may not be commercially connected with the bidder’s acquisition of target securities under the bid.
- Note: See Anomalies Report, pp. 49–50, and Corporations Law Simplification Program Task Force, *Takeovers—Proposal for simplification*, January 1996.
- RG 9.209 In *Aberfoyle*, Finkelstein J considered a similar limitation to that now found in s623(1) was implied in the pre-CLERP provision, stating at 221:
- There is good reason for confining the operation of s698 to the provision of benefits that are connected with or have the potential to influence or induce a decision to sell shares in the target company. If the section is not confined in that way then there will be a very real risk of a contravention of s698 as a consequence of dealings between companies that have no possible relationship to the acquisition of shares in one of them.
- RG 9.210 The current test brings the focus of the prohibition into line with its underlying objective of prohibiting benefits that induce a holder to sell their securities.
- Note: This underlying objective was also recognised in the policies of ASIC’s predecessor relating to relief from the provision: see National Companies and Securities Commission (NCSC) Policy Statement 160 *Offers for securities not included in relevant class of shares*, paragraph 13.

Factors taken into account in considering inducement

- RG 9.211 Table 3 discusses a number of factors that we will commonly consider when examining collateral arrangements and transactions that may involve a benefit prohibited under s623(1).
- RG 9.212 These factors do not represent a complete list of the matters that may be relevant, and each case will differ on its facts. In considering whether a benefit is likely to induce acceptance or disposal, we look at the overall circumstances of the arrangement or transaction giving rise to the benefit and the nature of the benefit. As such, no particular factor should be considered a ‘safe harbour’.
- Note: See also GN 21.
- RG 9.213 The factors listed in Table 3 may also be relevant in determining whether benefits given in the four-month period before the date of the bid may need to be disclosed in the bidder’s statement: s636(1)(i).

Table 3: Factors that may suggest a benefit is likely to induce acceptance or disposal

Matter	Details
Link to acceptance or disposal	<p>When a benefit outside a bid is provided to a target holder in exchange for, or conditional on, the holder's acceptance of the bid or disposal of the securities, the benefit will generally amount to an inducement. It does not matter whether a link of this kind is implied, informal or arises from an undocumented understanding between the parties.</p> <p>Less direct links may also suggest inducement in the circumstances—for example:</p> <ul style="list-style-type: none"> • if the benefit is linked in a commercial sense with the holder's acceptance or disposal (<i>Aberfoyle</i>); or • if the holder's acceptance or disposal will guarantee, or materially increase the likelihood, that a precondition to receiving the benefit will be satisfied. <p style="padding-left: 40px;">Note: In some cases, even when an offer or benefit is not linked to the bid legally or commercially, the overall circumstances or presentation of the offer or benefit may still give rise to a connection capable of inducement: see for example <i>Skywest Limited 04</i> [2004] ATP 26.</p> <p>The timing of the offering or giving of a benefit, or the acceptance or disposal, may also be indicative of a link.</p>
Materiality	<p>A benefit that is material and connected to a bid will be more likely to induce a holder.</p> <p>In considering materiality, we will generally consider the likely effect on the target holder of the benefit in the overall circumstances of the bid. If a benefit conferred outside a bid is material (in absolute or relative terms), compared with the benefits that will accrue to a holder under the bid, the benefit may have a strong tendency to induce acceptance.</p> <p>Conversely, a benefit that is of small value, or uncertain to materialise, may not be sufficient to induce.</p>
Context of the transaction or arrangement associated with the benefit	<p>We are likely to examine more closely the potential inducement effect of a benefit that cannot be explained by reference to normal commercial matters that are independent of the recipient's holding in the target.</p> <p>When an arrangement goes further than necessary to address the effect of a successful bid on the pre-existing interest, we consider the benefit will generally be more likely to constitute an inducement. In particular, we would be concerned with an arrangement entered into on uncommercial terms or that may involve a level of transfer pricing (e.g. the purchase of an asset from a target holder at an inflated value). It is not an answer to a potential contravention of s623 to suggest that a bid would not have been made, or would have been made at a lower price, but for the beneficial arrangements: see GN 21, paragraph 14.</p> <p>When the benefit in question arises from a transaction involving the sale of an asset to a target holder, this may give rise to particular concerns. Even if sold at fair value, an asset may have particular value to the target holder which may indicate an inducement.</p>
Objective effect and circumstances of the benefit	<p>Objective indications of the purpose and effect of the transaction involving a benefit may also give rise to concern that the benefit is likely to induce acceptance or disposal, including:</p> <ul style="list-style-type: none"> • where the parties have entered into unnecessarily complex or circuitous arrangements or transactions—this may suggest a greater likelihood that a value transfer or other inducement inherent in the benefit has been masked; • where the overall arrangements are inconsistent with the stated purpose; and • where the bidder appears to have selectively entered into beneficial arrangements with certain holders, unnecessarily favouring those with larger holdings.

RG 9.214 The test of ‘inducement’ is wider in scope than the *prima facie* ‘net benefits’ test referred to in GN 21, which the Takeovers Panel may take into account in the context of considering whether to make a declaration of unacceptable circumstances: see paragraph 32 of GN 21. In our view, similar considerations to those taken into account when applying the ‘net benefits’ test may be relevant when considering whether there is inducement (e.g. in considering the materiality of the potential inducement). However, a collateral benefit that constitutes an inducement to accept a bid or dispose of bid class securities may be contrary to s623(1), even if it is not a net benefit or involves ‘arm’s length’ dealing.

Broker handling fees

RG 9.215 In some cases, a bidder will seek to offer incentives to a broker in the form of handling fees to solicit acceptances of its bid. Offering or giving a fee of this kind may involve a contravention of s623 if:

- (a) the broker or an associate of the broker receives the fee in respect of holdings in which they have an interest; or
- (b) the fee is split with, or passed on to, accepting holders by the broker.

RG 9.216 In particular, excessive broker handling fees may create significant pressure and incentives for some or all of the fee to be passed on—increasing the likelihood of inducement: see *AurionGold Ltd* [2002] ATP 13, [61]. Bidders intending to put in place handling fee arrangements should consider Takeovers Panel Guidance Note 13 *Broker handling fees* (GN 13), which discusses the circumstances where a fee may give rise to unacceptable circumstances.

When the prohibition applies

RG 9.217 The relevant period during which the prohibition on collateral benefits operates depends on whether the bid is a market bid or an off-market bid.

ASIC modification: Market bids

RG 9.218 [CO 13/521] modifies s623 so that, for a market bid, the prohibition applies during the ‘bid period’ rather than the ‘offer period’.

RG 9.219 We have made this modification because, without it, there would be a gap between the time at which the minimum bid price principle in s621(3)–(5) stops applying and the time that the prohibition on collateral benefits starts applying.

RG 9.220 The offer period for a bid is defined to mean the period for which offers under the takeover bid remain open: s9. For a market bid, the bidder’s offer

does not start until 15 days after the bidder announces the bid: item 14 of s635(1). However, the reference period for the minimum bid price principle ends at the date of the announcement: s621(3).

Note: Under s621, the bid consideration must at least equal the consideration for the purchases of bid class securities made by a bidder during the four months before the 'date of the bid'. For a market bid, this is the date of the announcement: s9. We discuss s621(3)–(5) further in RG 163.

- RG 9.221 The gap between the operation of s621(3)–(5) and 623 for a market bid means that, in theory, the bidder could offer more consideration in the interim than it offers under the takeover bid. There would be no automatic increase in the bid consideration under s651A, which is limited to off-market bids.
- RG 9.222 This gap is filled if the prohibition on collateral benefits applies during the bid period rather than the offer period because, for a market bid, the bid period starts when the bid is announced to the securities exchange and ends at the end of the offer period: s9.
- RG 9.223 We consider that this extension is appropriate because the collateral benefits prohibition in s623 is intended to pick up where the minimum bid price principle in s621(3)–(5) leaves off. Both extend the equality principle in s602(c) beyond the consideration that the bidder offers under the takeover bid.

Off-market bids

- RG 9.224 Our class order does not affect the operation of the collateral benefits prohibition in off-market bids. Section 623(1) applies during the offer period in an off-market bid.

Relief from the collateral benefits prohibition

- RG 9.225 The CLERP amendments narrowed the scope of the collateral benefits prohibition so that:
- (a) only benefits that are likely to induce acceptance or disposal are prohibited (RG 9.207–RG 9.210);
 - (b) offers under simultaneous takeover bids are excluded from the operation of the prohibition (s623(3)(c)); and
 - (c) the prohibition no longer applies to benefits offered or given pre-bid (see s698(2) and (4) of the old Corporations Law).
- RG 9.226 Commensurate with the more focused settings of the post-CLERP provisions, we will generally be very cautious in providing relief from s623(1). This is because a benefit that is likely to induce an acceptance, but

which is not offered to all holders, will be likely to fall within the mischief of the prohibition and offend the equality principle in s602(c).

RG 9.227 Occasionally, an arrangement or transaction involving a collateral benefit that may technically induce one or more holders to accept a bid, but which is not available to all holders under the bid, may nonetheless justify relief from the prohibition. This may include:

- (a) transactions that:
 - (i) are necessary to allow a bid to be completed;
 - (ii) do not offend the equality principle; and
 - (iii) benefit the target holder in a capacity other than as a share or interest holder: see RG 9.230–RG 9.245; and
- (b) cases where an overwhelming majority of the entity’s membership are linked by collateral interests that may not be made the subject of a takeover bid (e.g. a company operating under cooperative principles).

Note: See *S.A. Liquor Distributors Ltd* [2002] ATP 22 at [43].

RG 9.228 In each case, however, we will only consider granting relief if we are satisfied that the relief would not undermine the principles in s602 and, in particular, the equality principle in s602(c).

RG 9.229 Our consideration of any requests for relief will often necessitate commercial evaluations of the benefits involved. However, it is not our function to make judgements of this nature. As such, applicants will generally need to provide quantitative assessments, including independent expert advice.

Note: In some circumstances, relief from the equal treatment obligation of a responsible entity of a listed registered managed investment scheme under s601FC(1)(d) may also be required.

ASIC relief: Transactions with a controlling holder in connection with a bid

RG 9.230 In some situations, we may grant case-by-case relief to allow a bidder to:

- (a) substitute itself in the place of a controlling holder as guarantor of the target’s debts if the bid is successful; or
- (b) acquire or replace a loan that the target entity owes to the controlling shareholder.

RG 9.231 Arrangements of this kind may be necessary because the controlling holder may not be prepared to continue as guarantor or principal creditor after having lost control of the target.

RG 9.232 Relief may be justified in these circumstances but only if the applicant satisfies us that the terms on which it is to replace the vendor in its

relationship with the target company do not involve a value transfer to the controlling holder.

RG 9.233 This means that, if the bidder purchases a debt, the price paid by the bidder should be no more than the price a bank might have paid to take over the loan. For example, in the case of a loan to an insolvent target, to buy the loan at face value would be likely to confer an unacceptable benefit on the controlling holder. Any proposal for a bidder to take over a loan to an insolvent target will be tested against the alternative that the bidder simply makes takeover offers subject to a defeating condition that the loan be released.

Note: See also *Re iSOFT Group Ltd* [2011] FCA 680 where, in the context of a scheme of arrangement, ASIC raised concerns that full payment of a debt in the circumstances may amount to a collateral benefit.

ASIC relief: Funding a takeover

RG 9.234 A bidder seeking to raise capital in connection with the funding of a bid may offer or issue securities to a person who also holds target securities. If a bidder does this when the prohibition on collateral benefits is in operation, the bidder may contravene s623 if the associated benefit is likely to induce the holder to accept the bid: *Aberfoyle*. It is possible that a bidder entering into an underwriting arrangement with a target holder may also contravene s623. In each case, whether a benefit of this kind is likely to induce acceptance will be a question of fact.

Note: See Table 3. See also Companies and Securities Advisory Committee (CASAC), *Recommendations for reform of s621(4) and 623(2) & (3) of the Corporate Law Economic Reform Program Bill 1998*, December 1998, p. 8, which states that the question of whether a contravention occurs may rest on a link with the bid. However, a benefit given in connection with a fundraising may also give rise, more generally, to unacceptable circumstances: see RG 9.201–RG 9.203.

RG 9.235 As a result, in certain circumstances, the prohibition on collateral benefits may restrict a bidder's ability to fund a takeover by way of underwriting, placement or other equity offerings. This could have the effect of unnecessarily deterring takeover bids.

RG 9.236 We are prepared to give case-by-case relief from s623 to allow a bidder to:

- (a) offer, and enter into, agreements for underwriting and placements to sophisticated or institutional investors which are made on a bona fide fully priced basis;
- (b) raise funds for a bid by way of a rights issue; or
- (c) raise funds for a bid by making offers to retail investors under a prospectus.

RG 9.237 However, we will only give relief if target holders are not favoured in any particular way (e.g. in the allocation policy applicable to the retail offer under the prospectus).

RG 9.238 Our primary aim in providing relief in these circumstances is to ensure that, as far as practicable, no commercial benefits are selectively given to target holders which may materially influence their decision whether or not to accept the bid.

Underwriting and placements

RG 9.239 We will generally only grant relief for underwriting and placements on the basis that the requirements and conditions set out in Table 4 are satisfied.

RG 9.240 In some cases, these requirements and conditions will apply to both the bidder and the underwriter. Where our relief requires the underwriter to comply with a condition, the underwriter must provide to the bidder and us a written statement that it will comply with this condition and that it accepts the condition applies to it.

RG 9.241 Where we provide relief but the parties involved do not comply with the conditions on which our relief was granted, or subsequently act contrary to the underlying purpose of our relief, we may take further regulatory action, including applying to the Takeovers Panel for a declaration of unacceptable circumstances.

Table 4: Requirements for our relief for underwriting and placements, and conditions we may impose on any relief

Relief requirements and conditions	Explanation
For the underwriter	
<p>The underwriter must not accept the bidder's takeover bid in relation to securities in which it has a disposal relevant interest, or sell those shares if there is reason to believe that the bidder is the ultimate purchaser, unless:</p> <ul style="list-style-type: none"> the offers under the takeover bid have been open for acceptance for three weeks; and the underwriter reasonably believes that the bidder's takeover bid provides the best consideration on offer. <p>However, we may grant relief without this requirement if the bidder has reasonable grounds for believing that all underwriters have a disposal relevant interest in the target of less than 1% of the bid class securities in the target (rather than the 5% referred to below).</p>	<p>One way to reduce the risk that the outcome of the bid will be determined by target holders being offered underwriting or placements is to restrict the target holder's ability to accept the bid.</p> <p>This requirement directly reduces the likelihood that the underwriter will accept the bidder's takeover bid because of an inducement. It also removes to some extent the incentive for a bidder to offer an inducement in the form of underwriting or placements, because there is a possibility that its bid will not be accepted if a rival bid is announced. The three-week timeframe is designed to provide sufficient time for a rival bidder to announce its bid for the same class of securities.</p> <p>An underwriter will comply with this requirement if it undertakes reasonable due diligence to satisfy itself that the bidder's takeover bid represents the best consideration on offer. In assessing which consideration is best, holders are entitled to consider conditions affecting each offer and their respective likelihood of success, as well as the value or amount of the consideration. However, they must not take into account collateral transactions.</p>

Relief requirements and conditions	Explanation
For the bidder	
In selecting underwriters, the bidder must not discriminate between them by taking into account a potential underwriter's holding in the target.	This requirement will be contravened if there is evidence that the bidder or its advisers 'targeted' holders in the target to be underwriters.
Underwriting must not be offered as an inducement to accept offers under the takeover bid.	This requirement will be contravened if there is evidence that the bidder or its advisers intended to offer underwriting or placements to induce target holders to accept the bid.
Entering into agreements for underwriting or placements must be part of the underwriter's ordinary business.	If underwriting or placements are offered to persons who do not participate in these activities as part of the ordinary course of their business, the risk that the underwriting or placements may be offered as an inducement to accept the bid may increase. Therefore, relief will generally not permit underwriting or placements to be offered to those persons.
When entering into a funding agreement with an underwriter, the bidder must have reasonable grounds for believing that the underwriter has a disposal relevant interest in the target of less than 5% of the bid class securities in the target.	All things being equal, the more substantial an underwriter's holding in the target, the higher the risk that underwriting or placements may be offered to that person as an inducement. If a bidder offers underwriting or placements to a number of target holders, and the underwriting or placements have the capacity to induce those holders to accept the bid, this may affect the success of the bid.
The bidder must also have reasonable grounds for believing that the underwriters who have entered into funding agreements with the bidder do not, in aggregate, have a disposal relevant interest in the target of 20% or more of the bid class securities in the target.	<p>We consider that, generally, there needs to be an upper limit on the holding an underwriter has in the target and on the aggregate holding in the target of all underwriters who enter into funding agreements with the bidder. We consider the respective 5% and 20% requirements sufficiently limit the risk that underwriting or placements will be offered as an inducement to target holders to accept the bid.</p> <p>If a bid is for all the voting shares or interests in the target and a potential underwriter has not lodged a substantial holding notice in relation to the target, the bidder will normally be able to satisfy itself that the underwriter has a disposal relevant interest of less than 5% of securities in the bid class.</p>
<p>The bidder must not knowingly purchase any securities in the target in which the underwriter has a disposal relevant interest between the time that:</p> <ul style="list-style-type: none"> • the bidder first makes an offer to the underwriter to enter into a funding agreement; and • the bidder receives from the underwriter the written statement referred to at RG 9.240. 	We consider that it is reasonable to limit the bidder's ability to purchase an underwriter's securities in the target while a bidder's offer to the underwriter for underwriting or placements is open for acceptance. Otherwise, it would be possible for the relief to be abused.

Relief requirements and conditions	Explanation
<p>The bidder may only knowingly purchase securities in the target in which the underwriter has a disposal relevant interest if the bidder has no reason to believe that the purchase would result in the underwriter contravening the relief conditions applying to it.</p>	<p>This condition complements the requirements imposed on the underwriter.</p>
RG 9.242	<p>Under the conditions and requirements listed in Table 4, a ‘disposal relevant interest’ denotes a relevant interest sourced from a disposal power over securities—specifically, a relevant interest disregarding the operation of s608(1)(b), 608(3)(a) and 608(8). It is more likely that an underwriter will be able to direct its related companies to accept the bid for those securities over which it has control of disposal. It is also arguably unreasonable to count, for the purposes of the 5% and 20% conditions, or the restrictions on an underwriter accepting the bid, those securities over which the underwriter does not have power of disposal.</p>
<p>Rights issues</p>	
RG 9.243	<p>Our relief for rights issues will generally allow a bidder to raise funds irrespective of whether any of its shareholders are holders of bid class securities. We consider that a rights issue of securities by the bidder to its shareholders, which complies with ASX Listing Rule 7.7, would have less of a tendency to induce the bidder’s shareholders who are also target holders to accept the bid. This is because the issue is unrelated to existing holdings in the target.</p>
<p>Retail offers under a prospectus</p>	
RG 9.244	<p>Our relief for fundraising by way of offers under a prospectus (provided that target holders are not favoured in any way in the allocation policy under the prospectus) is limited to retail offers. It is not available for institutional offers or for underwriting or sub-underwriting the offer.</p>
RG 9.245	<p>An offer to subscribe for shares under a retail offer in a prospectus is open to target holders and the general public. While there is a risk that a bidder could offer a benefit to target holders through an offering under a prospectus, the risk of this happening is minimised if target holders are not favoured in the allocation policy under the prospectus. We may take regulatory action, such as applying to the Takeovers Panel, if it becomes apparent that the prospectus is a sham designed to give benefits to certain target holders.</p>

F The bidder's statement

Key points

The bidder's statement must provide target holders with sufficient information to make an informed decision about how to respond to the takeover offer.

The bidder's statement should provide meaningful disclosure about issues such as the bidder's intentions and the bidder's financing arrangements (for a cash bid). We have modified s636 to ensure that, when a bidder offers securities as consideration, even if the bidder is not the issuer, it must disclose information about the securities that would be required in a prospectus or Product Disclosure Statement (PDS).

We have provided class order relief so that a bidder can omit certain details in the lodged copy of the bidder's statement and provide up-to-date information in the copy sent to holders. We have also provided class order relief allowing a bidder to lodge a replacement bidder's statement.

We may grant case-by-case relief so that:

- the bidder does not have to disclose certain interests and dealings of foreign associates and/or externally managed superannuation funds; or
- the bidder has extra time to dispatch its bidder's statement to holders.

General principles

RG 9.246 The bidder's statement is the primary disclosure document issued by the bidder during the course of a takeover bid. In an off-market bid, it must include, or accompany, the offers: item 1 of s633(1). In a market bid, it must be made available to the market on the day the bid is announced: item 3 of s635(1).

RG 9.247 The principal purpose of both the bidder's statement and target's statement is to provide target holders with sufficient information to make an informed decision in response to the offer under a bid. Together, these documents seek to ensure that:

- (a) target holders and directors (or, for a managed investment scheme, the responsible entity):
 - (i) know the identity of each person who has proposed to acquire a substantial interest as a result of the bid; and
 - (ii) are given enough information to enable them to assess the merits of the proposal (s602(b)); and
- (b) the acquisition of control under the bid takes place in an efficient, competitive and informed market (s602(a)).

- RG 9.248 The disclosures made in the bidder's statement are underpinned by a number of provisions which reinforce the need to ensure that the information provided to target holders is effective and reliable. In particular:
- (a) the bidder's statement must be approved by a resolution of the board (s637(1));
 - (b) the bidder must lodge a copy of the bidder's statement with ASIC (item 2 of s633(1) and item 5 of s635(1));
 - (c) statements made in, or accompanied by, the bidder's statement, or based on a statement by a person, require the relevant person's consent (s636(3) and (4));
 - (d) liability attaches to the bidder, its directors, persons named with consent and others for dispatching a bidder's statement that contains a misleading or deceptive statement, or omits required information or new material circumstances arising since lodgement (s670A and 670B);
 - (e) liable parties must inform the bidder throughout the bid period if there is a misleading or deceptive statement or omission, or if a new circumstance arises (s670C);
 - (f) a person is deemed to have made a misleading statement about a future matter in the bidder's statement if they do not have reasonable grounds for making the statement (s670A(2)); and
 - (g) the bidder's statement must include an independent expert report discussing any consideration other than cash or quoted securities given by the bidder for target securities in the four months before the date of the bid (s636(2)).

Content and presentation of the bidder's statement

- RG 9.249 Sections 636(1) and (2) set out the information that a bidder's statement must contain. This includes specific matters relating to the bidder's intentions, dealings and interests in the target and the consideration offered under the bid. In particular:
- (a) where the consideration includes cash—the bidder must disclose details of its funding arrangements (s636(1)(f)); and
 - (b) where the consideration includes securities—the bidder must include the information that would be required for an offer of the securities under a prospectus or PDS (s636(1)(g) and (ga)).
- RG 9.250 In addition, the bidder's statement must include any other information known to the bidder that is material to a target holder's decision whether to accept the offer under the bid (other than information relating to the value of securities offered as consideration): s636(1)(m).

RG 9.251 To achieve its objective, the bidder's statement (and supplementary disclosures) should be prepared with the needs of target holders and their advisers in mind and taking into account the context in which target holders will be considering the disclosure. As noted by Bryson J in *ICAL Ltd v County Natwest Securities Aust Ltd* (1988) 13 ACLR 129 (*ICAL*) at 137:

The shareholder whom I should hypothesise for the purpose of materiality is not considering a [bidder's] statement in an ordinary market situation. The offeror is trying to induce him to come into the market, but he may not wish to do so. He does not have the ordinary motivations to inform himself and be vigilant that a willing vendor has when he set out to look for a willing purchaser. The [bidder's] statement may be the first thing that he hears or sees.

Note: Cited also in *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 15 ACLR 99 at 115 and *Ampolex Ltd v Mobil Exploration & Producing Australia Pty Ltd* (1996) 19 ACSR 354 (*Ampolex*) at 380.

RG 9.252 A bidder should also be mindful of how the information contained in the bidder's statement interacts with other public disclosures the bidder has made. For example, information previously disclosed to the market may need to be updated in the bidder's statement to ensure that target holders are sufficiently informed and are not misled. Any inconsistencies between the disclosures made in continuous disclosure notices and the bidder's statement must be clarified and explained.

RG 9.253 RG 228 discusses a number of methods and tools that can be used in preparing a document that is clear, concise and effective: Section B of RG 228. If the consideration under a bid includes scrip, a bidder should refer, in particular, to our guidance in RG 66 and Sections B–H of RG 228 when considering the content and presentation of the disclosure required under s636(1)(g) and (ga).

Note: We have also published guidance relating mainly to the content of PDSs for registered managed investment schemes that operate in particular sectors—for example, Regulatory Guide 45 *Mortgage schemes: Improving disclosure for retail investors* (RG 45). Bidders operating in these sectors should also consider our more specific guidance.

RG 9.254 Other guidance we have published that may be relevant in the preparation of the bidder's statement is set out in Table 2.

Ongoing disclosure requirements

RG 9.255 The information in a bidder's statement must be updated in a supplementary bidder's statement by the bidder when it becomes aware of:

- (a) a misleading or deceptive statement or omission previously made; or
- (b) a new circumstance arising that is material from the point of view of target holders: s643(1).

This ongoing requirement means that target holders should continue to be appraised of all relevant information throughout the course of a bid.

- RG 9.256 Successive supplementary statements form a series under the disclosure regime in Pt 6.5: s645(1) and 646. The premise of this regime is that, if material developments occur in the course of a bid, the appropriate method for disseminating that information is through a formal supplementary statement. This promotes the orderly flow of information and underlines the status of the information as an official release issued in a regulated environment: see Section B of RG 25.

Note: See also RG 9.412–RG 9.418.

Unacceptable circumstances

- RG 9.257 A failure to adequately comply with the disclosure requirements in s636, in addition to constituting a contravention, may offend the principles in s602(a) and (b) and give rise to unacceptable circumstances: see also Takeovers Panel Guidance Note 18 *Takeover documents* (GN 18).

The bidder's intentions

- RG 9.258 Sections 636(1)(c) and (d) require the bidder to disclose details of its intentions regarding:
- (a) the continuation of the target's business;
 - (b) any major changes to be made to the target's business (or, for a managed investment scheme, the operation of the scheme), including any redeployment of the fixed assets of the target, or scheme property; and
 - (c) the future employment of the target's present employees (or the replacement of the responsible entity).
- RG 9.259 If a bidder has formed intentions about a matter in s636(1)(c) or (d), it must disclose these intentions. If a bidder has actions in mind, but has made no decision to bring about any particular state of affairs regarding a matter in s636(1)(c) or (d), then it must disclose the reasons why it has not made a decision on the matter.
- RG 9.260 If a bidder bases its intentions, or its reasons for making a bid, on an analysis of the costs and benefits of merging the activities of the bidder and the target, this should also be disclosed, including the means by which the merger may be achieved.
- RG 9.261 The disclosure requirement is not confined to intentions 'adopted by the board, either expressly or by virtue of their implied assent to board papers

written by management’, but also includes those intentions formed by individual directors or officers who are responsible for planning the acquisition or integration of the target: *AAPT Ltd v Cable & Wireless Optus Ltd* [1999] NSWSC 509 (*AAPT*).

- RG 9.262 Where intentions involve any understanding or agreement with third parties, details of that understanding should be disclosed: see *National Foods Limited 01* [2005] ATP 8.
- RG 9.263 While s636(1)(c) does not itself require intentions to be formed, the Takeovers Panel has considered that a failure to formulate intentions and disclose them in the bidder’s statement may amount to a departure from the policy of s602(a) and (b)(iii): see *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [85]–[87], and *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18 at [76].

Vague expressions are insufficient

- RG 9.264 Non-committal or undecided statements of intention are insufficient to satisfy the disclosure requirements of s636. A statement that the bidder’s ‘present intention’ is to continue the target’s business, and ‘review and evaluate the activities and investments and other assets’ of the target if the offer is successful ‘amounts to nothing more than a statement that, until such time as [the bidder] forms its intentions, something it will not be able to do until its takeover offer is successful and its review and evaluation complete, the status quo will be preserved’: see *Cumberland Credit Corporation Ltd v TNT Australia Pty Ltd* (1988) 13 ACLR 371 (*Cumberland*) at 375–6. A statement of this kind alone does not sufficiently describe a bidder’s intentions.
- RG 9.265 The use of vague and indeterminate expressions to describe a bidder’s intentions undermines the purpose of the requirement in s636(1)(c) and (d): see *ICAL*. Statements that the bidder would rationalise the operations of the target and conduct a strategic review, without any indication of action to follow the review, do not amount to ‘intentions’ for the purpose of satisfying s636(1)(c) and (d). An intention to ‘integrate’ the operations of the target is similarly ambiguous: *Associated Dairies Ltd v Central Western Dairy Ltd* (1993) 11 ACLC 827.

Alternative or contingent intentions

- RG 9.266 In *Cumberland*, the court held that, if a bidder is considering alternative options for the future of the target company, it must disclose these even if it has not chosen between them.
- RG 9.267 In *ICAL*, the court held that an intention to sell significant assets of the target is no less an intention, because it is ‘not complete, unreserved and final, and

there is room for further consideration of the choice of particular assets and the time for sale’.

- RG 9.268 The bidder is required to disclose its intentions that involve alternative options, or are contingent on, or subject to, further consideration or review: *AAPT*, citing *Cumberland* and *ICAL*.
- RG 9.269 However, the bidder may reserve the right to make final decisions until it has all relevant information after the acquisition. If intentions cannot be formulated precisely until the takeover is completed, there is a need for careful language, which reflects the commercial situation and avoids encouraging speculation: *AAPT*; see also *Gantry Acquisition Corporation v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 51 FCR 554 and *Ampolex*. This careful language cannot be used to misrepresent the development of, or the level of detail attaching to, the bidder’s intentions: *Ampolex*.
- RG 9.270 The disclosure about the bidder’s intentions must take into account all potential outcomes of the bid. In particular, if a bidder discloses its intentions based on its acquiring 100% of the target, it must also disclose its intentions if it acquires a lesser degree of control.

Note: See *Stirling Resources NL v Capital Energy NL* (1996) 19 ACSR 701 and *Savage Resources Ltd v Pasma Investments Pty Ltd* (1998) 30 ACSR 1. See also *Australian Leisure & Hospitality Group Limited 01* [2004] ATP 19.

Funding arrangements

- RG 9.271 If the consideration offered under a bid is cash, or includes a cash component, the bidder must include details of its funding arrangements in the bidder’s statement under s636(1)(f).

Principles underlying the funding disclosure requirement

- RG 9.272 The object of the requirement to disclose bid financing arrangements is to ensure that target security holders have sufficient information to enable them to assess the bidder’s ability to pay for the securities it is offering to buy.
- RG 9.273 As a fundamental disclosure requirement, s636(1)(f) is also an important part of maintaining an informed market. Inadequate disclosure of funding arrangements may be misleading or otherwise give rise to a false market in the target’s (and possibly the bidder’s) securities.
- RG 9.274 The funding disclosure requirements therefore reinforce the purposes underlying Ch 6 of ensuring:
- (a) an efficient and informed market for control of the target (s602(a)); and

- (b) that target security holders and directors have sufficient information to assess the merits of the bid (s602(b)(iii)).

RG 9.275 The importance of a bid being adequately funded is also reflected in s631(2), which prohibits a person from publicly proposing to make a bid if the person is reckless about whether they will be able to perform their obligations if a substantial proportion of the offers under the bid are accepted.

What should be disclosed

RG 9.276 The principles underlying the funding disclosure requirement should be considered in determining the sufficiency of disclosures made under s636(1)(f) in any given case.

RG 9.277 To comply with its obligations, a bidder should ensure that the bidder's statement:

- (a) discloses the total amount necessary to pay for all the securities to which the bid relates or is likely to relate (including securities to which the bid may extend because of s617(2) or any ASIC relief);

Note: In a market bid, this includes any securities that may come into existence during the offer period: s617(3). See also *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18.

- (b) discloses whether the bidder holds, or has access to, sufficient funds to pay for all the securities. If the funds available to the bidder are less than the amount necessary, this should be fully explained (RG 9.281–RG 9.287);
- (c) identifies how much of the cash will come from amounts held by the bidder (RG 9.288–RG 9.290);
- (d) if some or all of the cash consideration is not sourced from the bidder's funds—identifies the person or persons providing the funds and provides details of the arrangements under which those funds are to be provided (RG 9.291–RG 9.296); and
- (e) clearly discloses any restriction on the availability of funds under external funding arrangements (RG 9.297–RG 9.299).

Other material information about funding arrangements

RG 9.278 A bidder should also be mindful of the requirements of s636(1)(g) and (ga) (in a cash and scrip offer) and s636(1)(m) to the extent that they may also require disclosure of information relating to financing arrangements that is material to a target holder's assessment of the offer. The information required under these provisions is additional to any information required under s636(1)(f).

Supplementary disclosure

- RG 9.279 When there is a change to funding arrangements, or any development relating to the funding of the bid after the lodgement of the bidder's statement, the bidder may need to provide supplementary disclosure addressing the new circumstances, including the effect of the new circumstances on any of the matters listed at RG 9.277: s643(1)(c).
- RG 9.280 Supplementary disclosure will be required, for example, where:
- (a) the bidder arranges alternative or replacement funding;
 - (b) the bidder becomes aware that a condition of a funding arrangement may not be satisfied, or funding may no longer be available because of a new circumstance;
 - (c) the bidder improves its offer in a way that increases the amount required to fund its commitments under the bid; or
 - (d) the amount of cash required to fund the bid otherwise increases (e.g. the bid is extended to newly issued bid class securities).

Disclosure when insufficient funds available for all securities

- RG 9.281 A bidder who has not organised sufficient funds to pay for all of the securities that the bid relates to must disclose its basis for expecting to be able to pay for all of the securities for which it may receive acceptances, bearing in mind the requirements of s631(2)(b).

Bidder's basis for having sufficient funding

- RG 9.282 The focus of s636(1)(f) is disclosure of a bidder's financing arrangements and, as such, the provision does not itself require the bidder to have available, on the date that the bidder's statement is lodged with ASIC, the funds necessary to pay for all the securities to which the bid relates.
- RG 9.283 However, s631(2)(b) requires that a person must not publicly propose to make a takeover bid if the person is reckless about whether they will be able to fulfil their obligations under the bid if a substantial proportion of the offers under the bid are accepted. In addition to a possible contravention of s631, if a bidder is unable to demonstrate sufficient funding on an ongoing basis, or a reasonable basis to expect to be able to fund its bid, this may also give rise to unacceptable circumstances.

Note: See Takeovers Panel Guidance Note 14 *Funding arrangements* (GN 14), paragraph 10.

- RG 9.284 Given the prohibition in s631(2)(b), the disclosures made under s636(1)(f) (and, in some cases, other paragraphs of s636(1)) should be sufficient to demonstrate the bidder's basis for expecting to have the necessary funding to

pay for the securities to which the bid relates. If the bidder's statement does not disclose a reasonable basis, this may indicate that:

- (a) the bidder is in contravention of s631(2)(b);
- (b) target holders do not have enough information to assess the bidder's ability to provide the consideration under the bid;
- (c) there is a false market in the target's and/or bidder's securities; and/or
- (d) the bid is being conducted in unacceptable circumstances: GN 14.

We may seek further information from a bidder about its arrangements and reasonable basis if these are not sufficiently evident from the disclosures made in the bidder's statement.

Note: We may also act at an earlier stage if we have concerns about a bidder's funding: see *Austock Group Limited* [2012] ATP 12.

Bidder's basis founded on expectation of a holder's behaviour

RG 9.285 Where a bidder's basis, entirely or in part, for not needing to secure full funding is an expectation that it will not need to pay for certain securities to which the bid relates because acceptances will not be received for them, the bidder must disclose the basis for this expectation. Examples of such a basis may be:

- (a) that the bidder or one of its subsidiaries holds target securities for which it cannot accept the offer; or
- (b) that arrangements exist with certain target holders not to accept the bid nor to sell to persons who might accept. Since a bidder will almost certainly acquire a relevant interest in securities that are subject to such arrangements, the bidder should be conscious of the potential for a breach of s606, or the need for substantial holding disclosure under s671B, resulting from arrangements of this kind.

RG 9.286 Target holders who allow themselves to be identified as being bound not to dispose of their securities during the bid, and who subsequently sell into the bid or to another person, may be liable under s1041H and 1041I. Conduct of this nature may also contravene s1041E and 1308 and give rise to unacceptable circumstances.

Note: See also RG 25.29–RG 25.34.

RG 9.287 Because a bidder may also be liable under these provisions, it should disclose in its bidder's statement any circumstance that is reasonably likely to obstruct the agreement not to sell into or outside the bid. For example, it should disclose, if applicable, the possibility of a mortgagee of the shares taking possession or exercising a power of sale.

Note: Under s631(2), a bidder must not propose to make a takeover bid if it is reckless about whether it will be able to perform its obligations relating to the bid if a substantial proportion of the offers under the bid are accepted.

Disclosure of bidder's own funding

- RG 9.288 The bidder's statement must set out details of the cash amounts held by the bidder for payment of the cash consideration offered: s636(1)(f)(i).
- RG 9.289 The reference to 'cash amounts held by the bidder' does not include money that the bidder expects to receive from external sources to pay the consideration but which have not been received at the relevant time that disclosure is required. Disclosure of the details of funding of this kind, such as funding from an anticipated capital raising, is instead required under s636(1)(f)(ii) and (iii) and must include details of the relevant arrangements under which the funds will be raised or otherwise made available: RG 9.291–RG 9.299.

Note: See *Aberfoyle* at 208.

- RG 9.290 In *Wright Heaton Ltd v PDS Rural Products Ltd* [1982] 2 NSWLR 301, Needham J accepted a submission by a bidder that details of cash amounts did not need to be disclosed unless they were set aside for the sole purpose of providing the cash consideration. We consider that, if the bidder has not earmarked any particular cash amounts held by it to pay for the securities to which the bid relates, the bidder must disclose that fact.

Note: Where the bidder may need to rely in part on operating cash flow, this should also be disclosed: see *Taipan Resources NL (No 3)* [2000] ATP 17.

Disclosure of external funding sources

- RG 9.291 The bidder must disclose in the bidder's statement details of any arrangements under which the cash consideration is to be provided by persons other than the bidder. This may include financial institutions, related bodies corporate or shareholders of the bidder.
- RG 9.292 The bidder must disclose the identity of any persons who are to provide funds either directly or indirectly: s636(1)(f)(ii). It is insufficient to disclose only that the bidder has directly secured funds which it anticipates will be available to satisfy its obligations under the bid. The bidder must disclose the ultimate source of the borrowings or other funding.

Note: See *Australian Consolidated Investments Ltd v Rossington Holdings Pty Ltd (No 2)* (1992) 10 ACLC 600. See also the Takeovers Panel's findings in *Pinnacle VRB Ltd 04* [2001] ATP 7 and *Tower Software Engineering Pty Ltd 01* [2006] ATP 20.

- RG 9.293 The bidder must also disclose if any borrowings are not for general purposes but are specific to the funding of the offer. For example, the depositors of banks need not be disclosed, whereas back-to-back funding arrangements or guarantees must be disclosed.

RG 9.294 If more than one person is to contribute to funding for the bid, the proportion of funding to be provided by each person must be disclosed.

Note: See *Australian Consolidated Investments Ltd v Rossington Holdings Pty Ltd* (1992) 10 ACLC 600.

RG 9.295 Details of the arrangements for the external financing must also be disclosed: s636(1)(f)(iii). Target holders are entitled to be told the essential provisions of these arrangements. They must be told of the material details of any funding agreements that are relevant to the bidder being able to fund its offer. It is insufficient to simply state, for example, that a bidder ‘has a loan facility’, ‘subject to the usual condition precedents’, and to which ‘there are no unusual banking terms or conditions applicable’.

Note: See *QIW Retailers Ltd v Davids Holdings Pty Ltd (No 1)* (Supreme Court (Qld), Whyte J, 12 June 1992, No 848 of 1992, unreported) and *Australian Consolidated Investments Ltd v Rossington Holdings Pty Ltd* (1992) 10 ACLC 600.

RG 9.296 The level of detail about external funding arrangements necessary to ensure that target holders have sufficient information to assess the bidder’s ability to perform its obligations may vary with the identity of the funder and the nature of the arrangements. Greater levels of disclosure may be required if a bidder and financier are foreign or are likely to be unknown to target holders: *Pinnacle VRB Ltd 04* [2001] ATP 7 at [79]–[80].

Note: This may include appropriate certification of the funder’s capacity to meet its commitments under the funding arrangements: see GN 14 at paragraph 22(a). While there may always be some level of risk involved with any external funding arrangements, as discussed by Santow J in *Re Archaean Gold NL* (1997) 23 ACSR 143 at 146, appropriate disclosure of the arrangements ensures that security holders ‘are aware of the general dimensions’ of that risk.

Disclosure of any restrictions on the availability of funds

RG 9.297 Consistent with the objective of the funding disclosure requirement, the bidder’s disclosures must include, in particular, details of the relevant terms of its external funding arrangements that have the potential to restrict the availability of funds.

Note: See *Re Archaean Gold NL* (1997) 23 ACSR 143 at 145 (in relation to a scheme of arrangement). See also *ICAL and Associated Dairies Ltd v Central Western Dairy Ltd* (1993) 11 ACLC 827. Note also comments in *Taipan Resources NL (No 10)* [2001] ATP 5 at 34(b).

RG 9.298 Examples of possible restrictions on the availability of funds include where:

- (a) a funding provider is able to demand repayment of funds after unusual events of default contained in the loan facility (e.g. the acquisition of securities by the bidder or the disposal of certain assets before the end of the offer period);

- (b) the availability of a loan facility is subject to conditions precedent beyond the bidder's control (including the settlement or execution of formal loan documentation); and
- (c) a loan facility expires before the end of the offer period.

RG 9.299 A condition contained in a loan facility which requires a defeating condition of the offer to be satisfied as a prerequisite to drawdown may become a restriction on the availability of funding if the bidder declares the offer to be free of the condition when:

- (a) the condition has not been satisfied; and
- (b) the funding provider has not waived compliance.

The bidder should disclose this potential consequence in the bidder's statement or a supplementary bidder's statement.

Scrip or managed investment products provided other than by a bidder or a controlled entity

RG 9.300 Section 636(1)(g) requires a bidder to include in the bidder's statement prospectus information about the securities offered under a takeover bid if the bidder is the issuer or the bidder controls the issuer of the scrip consideration. Section 636(1)(ga) similarly requires PDS information to be included in the bidder's statement about managed investment products offered as consideration.

RG 9.301 However, if an issuer or responsible entity that the bidder does not control authorises the bidder to offer the securities or managed investment products, these provisions, as enacted, would not require the bidder to include prospectus or PDS information about the securities in the bidder's statement. This would mean that there is no disclosure requirement, for example, if a bidder offers securities in its holding company. It is common for a holding company to use a subsidiary as a single purpose bid vehicle.

ASIC modification: Bidder must disclose prospectus or PDS information about non-controlled issuer

RG 9.302 [CO 13/521] modifies s636(1)(g) and (ga) so that a bidder that offers securities or managed investment products as consideration under a bid must also disclose prospectus or PDS information in the bidder's statement if the issuer of the securities or the responsible entity agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the securities or managed investment products. Under our modification, the bidder must disclose prospectus or PDS information even if the bidder does not control the issuer or responsible entity.

RG 9.303 We have extended the operation of s636(1)(g) and (ga) because, when a bidder offers securities or managed investment products, target holders and directors should be given prospectus or PDS information to enable them to assess the merits of the bid: s602(b)(ii).

Bidder and issuer knowledge

RG 9.304 Under [CO 13/521], a bidder must disclose all material that would be required under s710–713 for a prospectus for an offer of the securities *by the issuer*, rather than by the bidder.

RG 9.305 Our modification means that the bidder must obtain information from the issuer if:

- (a) the bidder does not have knowledge of the prospectus information; and
- (b) the issuer authorised the bidder to offer the securities.

RG 9.306 The policy underlying this requirement is that, if an issuer authorises the bidder to offer its securities as consideration, the bidder should be in a position to obtain from the issuer the information needed for prospectus disclosure.

RG 9.307 This modification is required because, while s636(1)(g) imports the disclosure requirements in s710–713, the information that must be disclosed in a prospectus is limited under s710(1)(b) by reference to a person whose knowledge is relevant. Under s710(3)(a), a person's knowledge is relevant if they are 'the person offering the securities'.

RG 9.308 In a fundraising, if a person who does not control the issuer makes an offer of securities, the person who has the capacity to issue the securities if the offer is accepted is taken to be offering the securities: s700(3). The issuer is therefore a person whose knowledge is relevant for the purposes of s710(1)(b).

RG 9.309 Without our modification, it is unclear whether s700(3) has the same effect in a takeover bid. This is because s636(1)(g) otherwise requires disclosure of all material that would be required for a prospectus for an offer of those securities *by the bidder*. A bidder that does not control the issuer may not have knowledge of matters concerning the issuer. This may mean that the bidder would not be required to disclose all the information necessary for holders to make an informed decision.

Relevant interests and dealings of foreign associates and trustees

RG 9.310 A number of matters that must be disclosed in a bidder's statement, and must be considered in the formulation of a bid, relate to interests and dealings by persons other than the bidder. These include:

- (a) the requirement to disclose in the bidder's statement:
 - (i) particulars of the dealings by the bidder and its associates in bid class securities during the four months before the date of the bid (s636(1)(h));
 - (ii) particulars of the benefits the bidder or an associate provided, or agreed to provide, in the four months before the date of the bid that were likely to induce acceptance or disposal of bid class securities (s636(1)(i));
 - (iii) the number of bid class securities the bidder under an off-market bid has a relevant interest in immediately before the first offer is sent (s636(1)(k)(ii)); and
 - (iv) the voting power the bidder under an off-market bid has in the target (s636(1)(l));
- (b) the requirement for the consideration offered under a bid to equal or exceed the maximum consideration the bidder or an associate provided, or agreed to provide, for a bid class security under any purchase or agreement during the four months before the date of the bid (s621(3)); and
- (c) the requirement for a bidder for an unlisted target to disclose to the target (as soon as practicable and, in any event, within two business days) when its voting power in the target rises above 25%, 50%, 75% and 90% (s654C).

ASIC relief: Disclosure and minimum consideration requirements

RG 9.311 We may give case-by-case relief to a bidder from the disclosure obligations in s636(1)(h), 636(1)(i)(ii), 636(1)(k)(ii), 636(1)(l), 654C and the minimum consideration requirement in 621(3) in relation to the dealings and relevant interests of:

- (a) the bidder's foreign associates; and/or
- (b) the trustees of externally managed superannuation funds of the bidder.

RG 9.312 We may give this relief because we recognise that:

- (a) the costs and time involved in collating the information required to comply with the relevant provisions in relation to foreign associates and superannuation trustees may be significant; and

- (b) there is a significant risk that, by seeking the relevant information before announcing the takeover, the bidder may disclose the pending bid (which would otherwise have remained confidential until announced) to persons who may use the information to trade.

RG 9.313 Relief will be granted subject to the conditions set out in RG 9.319–RG 9.320.

RG 9.314 Our disclosure relief does not extend to the substantial holding notice requirements in Ch 6C (or to the accelerated reporting of substantial holdings in s654B). We will not give relief from these provisions because disclosure in these cases is required when a person becomes aware of the change in relevant interest, unlike s654C which requires disclosure regardless of the person’s actual knowledge.

Foreign associates

RG 9.315 For the purposes of our relief, a bidder’s ‘foreign associates’ are related bodies corporate of the bidder that meet all of the following requirements:

- (a) they operate and are managed outside Australia;
- (b) they are associates of the bidder only because of s12(2)(a);
- (c) they are not involved in the planning or progress of the bid; and
- (d) they are not investment companies.

RG 9.316 We only propose to give the relief for foreign associates if the aggregate relevant interests in the bid class securities acquired, disposed of or held by the foreign associates are less than 5% of the bid class securities.

Trustees of bidder superannuation funds

RG 9.317 Our relief in relation to the dealings and relevant interests of the trustees of externally managed superannuation funds of the bidder will only be given if the relevant interests or acquisitions arise from dealings effected on behalf of the fund trustees by fund managers acting independently of, and without notification to, the trustee.

RG 9.318 Relief may be available in relation to the dealings and interests of a related body corporate of the bidder if:

- (a) the related body corporate acts as a trustee of a superannuation fund established for the benefit of employees of the bidder or any of its related bodies corporate; and
- (b) in the four months before the bid, the aggregate number of bid class securities in each superannuation fund, in which all such trustees have a relevant interest, is less than 5% of the bid class securities.

Conditions of relief

- RG 9.319 We will tailor the conditions we impose on our relief to the case. When granting relief from the disclosure obligations in s636 and 654C, we will generally impose conditions requiring the bidder to:
- (a) make reasonable efforts between lodging the bidder's statement with us and the end of the offer period to:
 - (i) obtain all the information required to be disclosed under s636(1)(h), 636(1)(i)(ii), 636(1)(k) and 636(1)(l); and
 - (ii) comply with s654C and the supplementary statement provisions in Div 4 of Pt 6.5;
 - (b) give us details of its efforts made to ascertain the information specified in RG 9.319(a), including copies of correspondence sent to its foreign associates or superannuation trustees, as relevant;
 - (c) disclose in the bidder's statement (as supplemented) the effect of any relief; and
 - (d) include any information obtained under RG 9.319(a) in a replacement bidder's statement or a supplementary bidder's statement.
- RG 9.320 When granting relief from the minimum bid price requirement in s621(3), we will generally impose conditions requiring the bidder to:
- (a) make reasonable efforts to find out whether a price higher than the bid price was paid, or was agreed to be paid, for bid class securities by a foreign associate of the bidder or trustee of a superannuation fund of the bidder during the four months before the bid. This obligation applies after lodging the bidder's statement with us and throughout the offer period;
 - (b) increase the price to be paid under the bid as soon as possible after it discovers that a higher price was paid, or was agreed to be paid, for bid class securities by a foreign associate of the bidder or trustee of a superannuation fund of the bidder during the four months before the bid;
 - (c) give us details of its efforts made to obtain the information specified in RG 9.320(a), including copies of correspondence sent to its foreign associates or superannuation trustees, as relevant; and
 - (d) disclose in the bidder's statement (as supplemented) the effect of any relief.

Information not available at lodgement

- RG 9.321 A bidder should provide information that is up-to-date at the time it sends the bidder's statement and offer document to holders. However, in many cases, the bidder will need to lodge the bidder's statement with ASIC some time before its dispatch to target holders: s633(1).

ASIC modification: Information required in the bidder's statement lodged with ASIC

- RG 9.322 [CO 13/521] modifies s633 so that a bidder may, as set out in Table 5, omit or provide modified disclosure in the copies of the bidder's statement that the bidder lodges with ASIC, sends to the target and sends to any relevant financial market operator.
- RG 9.323 If a bidder relies on this relief, the bidder must:
- (a) include the information specified in the third column of Table 5 in the copies of the bidder's statement sent to holders;
 - (b) at the time that the bidder dispatches its first bidder's statement to holders, send a copy of the updated bidder's statement and offer documents to the target and each relevant financial market operator; and
 - (c) attach a copy of the updated bidder's statement and offer documents to the notice of dispatch of offers the bidder lodges with ASIC under item 9 of the table in s633(1).

Table 5: Modified information requirements for the bidder's statement under [CO 13/521]

Information requirement	Relief for bidder's statement lodged with ASIC	Requirement for bidder's statements sent to holders
Holders' personal details	The bidder may omit the name and address of holders.	In practice, details must be included for dispatch.
Bid timing, including: <ul style="list-style-type: none"> • the offer period, which must be stated in the offer under s624(1); and • the date for giving the notice of status of conditions required under s630(1) 	The bidder may omit the date of the proposed offer, or any other date that is related to, or dependent on, that date.	Dates must be included.
Details of the purchases and benefits given by the bidder and its associates in relation to bid class securities in the four months before the date of the bid: s636(1)(h) and (i)	The bidder may disclose this information for the four-month period before the date of lodgement.	Disclosure must be updated to include the information for the four months before the date that offers are first made.
The bidder's relevant interest in bid class securities and voting power in the target: s636(1)(k)(ii) and (l)	The bidder may disclose this information as current at the date of lodgement.	Disclosure must be updated as at the date that offers are first made.

Why we have made this modification

- RG 9.324 A bidder should not be required to disclose information at the time of lodgement if:
- (a) the information is not available, or to disclose it would unreasonably fetter the bidder's discretions; and
 - (b) the information is not critical until the start of the offer period.

- RG 9.325 Our class order modification is similar in effect to s644(1) of the old Corporations Law, which provided that a person must register a copy of a Part A statement and a copy of one of the offers, which need not include:
- (a) the name or address of the holder;
 - (b) the date of the proposed offer or any other date that is related to, or dependent on, that date; or
 - (c) the total number of shares in each class of shares in the target and the number to which the bidder is entitled.

Bid dates

- RG 9.326 Offers under a takeover bid must remain open for the period stated in the offer: s624(1). A conditional bid must specify a date (not more than 14 days and not less than seven days before the end of the offer period) on which to give notice on the status of a defeating condition: s630(1). Our relief in [CO 13/521] means a bidder does not have to specify these dates at the time of lodgement and therefore is not committed to a timetable that it may have difficulty in meeting.

Pre-bid consideration and benefits, relevant interests and voting power

- RG 9.327 A bidder's statement must disclose details of the consideration or benefits given, or agreed to be given, by the bidder or an associate in relation to bid class securities in the four months before the date of the bid: s636(1)(h) and (i). The date of the bid is the date on which offers are first made: s9.
- RG 9.328 The bidder's statement for an off-market bid must also disclose:
- (a) the number of bid class securities in which the bidder has a relevant interest immediately before the first offer is sent (s636(1)(k)(ii)); and
 - (b) the bidder's voting power in the company (s636(1)(l)).
- RG 9.329 Our modification provides relief for a bidder wishing to enter into transactions or arrangements after lodgement which result in changes to the details that must be disclosed in the bidder's statement under the provisions detailed in RG 9.327–RG 9.328. Because information about the consideration, benefits, relevant interests and voting power may be affected by transactions between lodgement and the date of the bid (and may therefore be unavailable at the time of lodgement), the class order allows a bidder to disclose in the lodged copy of the bidder's statement:
- (a) details of the consideration and benefits for the four months before the date of lodgement; and
 - (b) the relevant interest and voting power information as at the date of lodgement.
- RG 9.330 Where this relief is relied on, the bidder's statement sent to holders must be updated so that information relevant to the period after lodgement is included.

Note: Failure to disclose details of certain transactions falling outside s636(1)(h) (e.g. purchases of non-bid class securities or derivatives) may give rise to unacceptable circumstances: see *Skywest Limited 01* [2004] ATP 10 at 78 and Takeovers Panel Guidance Note 20 *Equity derivatives* at paragraph 43.

Substantial holding disclosure

- RG 9.331 Our relief does not affect the bidder's substantial holding notice obligations under s671B. If a bidder acquires further bid class securities after lodging its bidder's statement, the bidder must still provide substantial holding information, where:
- (a) the bidder begins to have a substantial holding in the target company (s671B(1)(a));
 - (b) the bidder has a substantial holding and there is a movement of at least 1% in its holding (s671B(1)(b)); or
 - (c) the bidder makes the takeover bid for securities in the target company (s671B(1)(c)).

Updated information to be current as at date of bid

- RG 9.332 Our relief in [CO 13/521] requires the updated disclosure in the bidder's statement dispatched to holders to be current as at the date that offers are first made, consistent with the requirements in s636(1).
- RG 9.333 Although our relief in [CO 00/2338] allows a reference period for valuing quoted securities under the minimum bid price rule in s621(4) to be chosen up to five days before offers are first made, in order to accommodate finalisation and printing of the bidder's statement, our relief in [CO 13/521] does not allow disclosure to be made as at an earlier date in a similar way.

Note: Further discussion of this aspect of the relief in [CO 00/2338] can be found in Section B of RG 163.

- RG 9.334 This is because it is not normally onerous for the bidder to comply in practice with these disclosure requirements by, for example, ensuring that during the period required for printing:
- (a) it ceases increasing its voting power in the target and relevant interests in target securities; and
 - (b) it ceases buying bid class securities on-market under item 2 of s611.
- RG 9.335 Further, at the time the bidder is finalising its bidder's statement for printing, the bidder should have set the dates of its bid.

Changes to a bidder's statement between lodgement and dispatch

- RG 9.336 It may be necessary or desirable for a bidder to amend its bidder's statement after it has been lodged with ASIC, but before it is dispatched to holders. The disclosure regime under Pt 6.5 provides for amendments to be made by

way of a supplementary bidder's statement—however, the operation of the provisions may be unclear or less suited to updates before dispatch.

Note: Small typographical changes may be able to be made to a bidder's statement without a supplementary document: see Regulatory Guide 23 *Updating and correcting prospectuses and application forms* (RG 23) at RG 23.37.

- RG 9.337 Where bid class securities are quoted and one or more supplementary bidder's statements are lodged with ASIC before the bidder's statement is dispatched to holders, the combined operation of item 6 of s633(1) (and item 6 of 635(1)), 646, 647(3)(b) and the definition of 'bidder's statement' in s9 is to require the bidder to send a copy of each supplementary statement to the operator of each prescribed financial market as soon as practicable and to dispatch the original bidder's statement, together with the supplementary statements, to holders.
- RG 9.338 Where bid class securities are not quoted, and a supplementary bidder's statement is lodged with ASIC before the bidder's statement is dispatched to holders, it may be that the combined operation of item 6 of s633(1), 646 and 647(3)(c) means that the supplementary bidder's statement:
- (a) must be sent to holders before dispatching the original bidder's statement; and
 - (b) must be dispatched again with the original bidder's statement.

ASIC modification: Replacement bidder's statements

- RG 9.339 Class Order [CO 13/528] *Changes to a bidder's statement between lodgement and dispatch* modifies Ch 6 to enable a bidder to lodge with ASIC, and dispatch to holders, a replacement bidder's statement incorporating the substantive information in both the original and each subsequent supplementary bidder's statement.

Note: The replacement bidder's statement must be lodged with ASIC and sent to the target and each relevant prescribed financial market before the latest time by which the bidder's statement may be dispatched under s633(1) or 635(1).

- RG 9.340 [CO 13/528] also modifies s647(3)(c) to ensure that a bidder for securities that are not quoted does not need to dispatch a copy of a supplementary bidder's statement to holders 'as soon as practical' if the statement is lodged with ASIC before dispatch of the original bidder's statement. The effect of our modification is that a bidder who lodges a supplementary bidder's statement in relation to an offer for unquoted securities before dispatch must either:
- (a) send the supplementary with the original bidder's statement at the time of dispatch (see the definition of 'bidder's statement' in s9 and s646); or
 - (b) if the conditions the for use of a replacement in [CO 13/528] are satisfied, dispatch a replacement bidders statement.

Note: The obligations of bidders under s647(3)(a) and (b) are unaffected by the modification.

RG 9.341 The relief to dispatch a replacement bidder's statement in [CO 13/528] is available on the terms set out in Table 6.

Table 6: Terms of our relief for replacement bidder's statements

Term	Details
Lodgement and sending of replacement and marked-up replacement	<p>No later than the time allowed for sending the original bidder's statement, the bidder must lodge with us and send to the target (and, if the target is listed, the operator of the prescribed financial market):</p> <ul style="list-style-type: none"> • a copy of the replacement bidder's statement; and • a marked-up copy of the replacement bidder's statement showing the changes from the original bidder's statement.
Dispatch of replacement	<p>The bidder must dispatch to holders the replacement bidder's statement:</p> <ul style="list-style-type: none"> • in an off-market bid—14 to 28 days after the replacement bidder's statement and marked-up replacement is lodged with us and sent to the target (and, if applicable, the operator of the prescribed financial market), unless: <ul style="list-style-type: none"> – the only change from the original bidder's statement is an update on the valuation of securities offered as bid consideration; – the target provides written consent following approval in any of the ways a target's statement may be approved, as specified in s639(1); or – ASIC agrees in writing to a shorter period of time: see RG 9.344–RG 9.345; and • in a market bid—within 14 days after the replacement bidder's statement and marked-up replacement is lodged with us and sent to the target (and, if applicable, the operator of the prescribed financial market).
Content of replacement	<p>The replacement bidder's statement must:</p> <ul style="list-style-type: none"> • be clearly identified as a replacement bidder's statement; • be dated the day it is lodged with us; • explain that it replaces the original bidder's statement and each supplementary bidder's statement lodged with us; • incorporate all the substantive information in the original bidder's statement and each supplementary bidder's statement that was lodged before, or at the same time as, the replacement; • give the date that the original bidder's statement and each supplementary bidder's statement was lodged with us; and • set out or reflect offers under the bid that are on the same terms as those set out in the original bidder's statement and offer document (if any) lodged with ASIC.

Policy underlying our class order relief

RG 9.342 We have granted class order relief under [CO 13/528] because it will often be preferable for a holder to receive a single replacement bidder's statement, when the original bidder's statement has been amended before dispatch, rather than:

- (a) where the bid class securities are not quoted—either:

- (i) the original bidder's statement and a separate supplementary bidder's statement; or
 - (ii) a supplementary bidder's statement received before the original bidder's statement; and
- (b) where the bid class securities are quoted—an original bidder's statement that has been amended by a separate supplementary bidder's statement.

RG 9.343 Our relief with respect to the dispatch of original and supplementary bidder's statements for bid class securities that are not quoted is designed to ensure that target holders are not confused by receiving a supplementary statement before the original bidder's statement, and to remove any uncertainty about the procedure that the bidder must adopt when a supplementary statement is lodged with ASIC before dispatch.

Replacement bidder's statements and the bid timetable

RG 9.344 [CO 13/528] provides that the timetables for market and off-market bids recommence after the replacement bidder's statement, and marked-up replacement has been lodged with ASIC and sent to the target and each relevant market operator, so that the target and others have the following periods of time to consider any changes made by the bidder:

- (a) in an off-market bid—at least 14 days and no more than 28 days, unless ASIC or the target agree in writing to a shorter period of time; or
- (b) in a market bid—14 days.

Note: The 14-day period does not apply where the only change in the replacement is to reflect changes in the valuation of securities offered as bid consideration since the day that the bidder lodged the original bidder's statement.

RG 9.345 We may consent in writing to shorten the period, after consulting with the target, if the changes to the bidder's statement are:

- (a) insubstantial; or
- (b) the result of negotiations with the target.

Potential for misleading conduct

RG 9.346 [CO 13/528] does not require the bidder to prepare a replacement bidder's statement whenever a supplementary statement is lodged with us. However, it should be noted that, in some cases, it may be misleading to holders if a bidder's statement and a comprehensive supplementary bidder's statement are dispatched to holders at the same time (see *Pancontinental Mining Ltd v Goldfields Ltd* (1995) 16 ACSR 463 at 472), or if a holder receives a supplementary statement before receiving the statement it is intended to supplement.

Omitting information that is unavailable when the bidder's statement is lodged

- RG 9.347 As discussed at RG 9.321–RG 9.335, [CO 13/521] allows the bidder to omit from the version of the bidder's statement lodged with us certain information unavailable at the time of lodgement. It also allows the bidder to give standard information as at the date lodged, such as details of the bidder's relevant interests. The bidder must complete or update the information before it dispatches the bidder's statement to holders.
- RG 9.348 The requirements in s633A(3)(b) and (c) and s635A(3)(b) and (c) (inserted by [CO 13/528])—for example, to date the bidder's statement with the day on which the replacement statement is lodged—do not apply. This is because these are standard changes made under [CO 13/521], rather than under our relief in [CO 13/528] relating to replacement bidder's statements.

Extension of time for sending the bidder's statement

- RG 9.349 In an off-market bid, the bidder must send the bidder's statement and offers to each target holder over no more than three days during the period of 14 to 28 days after the bidder's statement is sent to the target: item 6 of s633(1). A bidder must make its offers in this way within two months after publicly proposing the bid: s631.

ASIC relief: Extended time for dispatch of bidder's statement

- RG 9.350 We may give relief to extend the period for sending the bidder's statements to holders beyond 28 days after the bidder's statement is sent to the target if:
- (a) the bidder could not reasonably be expected to dispatch the bidder's statement within the time provided; or
 - (b) it would be advantageous to holders if the bidder's statement were sent to them at a later time.
- RG 9.351 We will only consider giving this relief if the time constraints and other conditions imposed by s631 will be met. However, where we have given the bidder an extension of the two-month period in s631, this relief may be given if the bid documents will be sent within the extended period: see RG 59.71–RG 59.75.
- RG 9.352 We may give this relief because, if the two-month deadline imposed by s631 will be met, holders under an off-market bid should not generally be adversely affected by an extension of time for dispatching the bidder's statement.

RG 9.353 If the delay in dispatching the bidder's statement to holders means the bidder must prepare a supplementary bidder's statement, our relief may be conditional on the bidder instead sending a replacement bidder's statement in reliance on [CO 13/528].

G The target's statement

Key points

The objective of the target's statement is to ensure that target holders have the information they need to make an informed decision in response to a takeover bid. This includes the directors' recommendations.

We may give case-by-case relief to extend the time in which a target must send its target's statement to target holders.

We may also give relief for a validly appointed receiver and manager to assume the target directors' responsibilities in relation to the target's statement.

General principles

- RG 9.354 The target's statement contains the target board or responsible entity's formal response to a bid. In an off-market bid, it must be sent to holders no later than 15 days after the target is notified of the dispatch of the offers: item 11 of s633(1). In a market bid, it must be made available to the market within 14 days after the bid is announced: item 10 of s635(1).
- RG 9.355 Together with the bidder's statement, the objective of the target's statement is to provide target holders with sufficient information for them to make an informed decision in response to the bid—in accordance with the purposes of Ch 6 set out in s602(a) and (b). As with the bidder's statement, the disclosures made in the target's statement are reinforced by a number of statutory rights and requirements designed to enhance their effectiveness and reliability: see RG 9.247–RG 9.248.

Content and presentation of the target's statement

- RG 9.356 Section 638 governs the content requirements of the target's statement. It contains two basic elements:
- (a) the directors' recommendations; and
 - (b) the general disclosure test.
- RG 9.357 Under s638(3), the target's statement must include a statement by each director of the target:
- (a) recommending that offers under the bid are accepted or not accepted, and giving reasons for the recommendation; or
 - (b) giving reasons why a recommendation is not made.

RG 9.358 The directors' recommendations are important disclosures because it is common that some target holders will pay particular regard to the views of the board. The prospect of securing a favourable recommendation from target directors (i.e. a 'friendly' bid) will often be attractive to a bidder. Accordingly, it is essential that the disclosure surrounding the directors' recommendations is fully explained and reasoned.

Note: See also Takeovers Panel Guidance Note 22 *Recommendations and undervalue statements* (GN 22).

RG 9.359 As with the general disclosure test applying to a prospectus in s710, the test in s638 is designed to engender a focus on the information required by investors. In considering the content and presentation of the target's statement, target directors and responsible entities should pay particular regard to our guidance in RG 228 on how disclosure documents can be presented in a clear, concise and effective manner.

Note: See also GN 18, paragraph 11.

RG 9.360 When preparing the target's statement, target directors and responsible entities should also take into account previous public disclosures that have been made in other contexts—particularly where those disclosures may be misleading or may not include sufficient detail: see also RG 9.252. This includes disclosures such as advertisements, media articles and continuous disclosure announcements: see also RG 228.173.

RG 9.361 Other guidance we have published that may be relevant in the preparation of the target's statement is set out in Table 2.

Ongoing disclosures

RG 9.362 As is the case with the bidder, the target must also ensure that the disclosure made in the target's statement is kept up to date and accurate. Where additional or corrective disclosures are required, these should be made in a supplementary target's statement: see RG 25 and RG 9.255–RG 9.256.

Note: See also RG 9.412–RG 9.418.

Unacceptable circumstances

RG 9.363 In addition to resulting in a contravention, a failure to adequately comply with the disclosure requirements in s638 may offend the principles in s602(a) and (b) and may give rise to unacceptable circumstances: see RG 9.257.

Extension of time for sending the target's statement

RG 9.364 Under the takeover bid procedure set out in s633 and 635, the target's statement must be lodged with ASIC, and sent to the bidder, the relevant market operators and the target holders. Table 7 sets out the timing for these steps in off-market bids and market bids.

Table 7: Timing for lodgement and dispatch of target's statements

Action	Off-market bid	Market bid
Lodgement with ASIC	A date no later than 15 days after receiving notice that all the bidder's offers have been sent	Within 14 days after the bid announcement
Sending to bidder and relevant market operators		
Dispatch to target holders	A date no earlier than the above date, and no later than 15 days after receiving notice that all the bidder's offers have been sent	Within 14 days after the bid announcement

RG 9.365 In some cases, a target may have difficulty in meeting the timetable for dispatch of the target's statement to holders. A common reason given by a target for the delay in preparing the target's statement is the lack of ready access to information that may be material to a holder's decision to accept an offer under the bid.

Note: For example, delays may result from the need to compile up-to-date information on mining tenements or the business of subsidiaries located outside Australia.

ASIC relief: Extended time for dispatch

RG 9.366 We may give relief to extend the time in which the target must send its target's statement to holders under a bid. We will consider giving this relief if:

- (a) the factors that have led to delay in preparing the target's statement are beyond the target's control;
- (b) the target's statement is sent to holders more than 10 business days before the offers are scheduled to close; and
- (c) if the target is listed—the target informs the market of the extension of time and, where appropriate, recommends that holders do not accept offers or make any final decisions in relation to the bid until they have read the target's statement.

RG 9.367 In addition to requiring the target to advise the market of the extension of time, we may also require the target to immediately inform the market of significant information that is already in the target's possession and that holders require in deciding whether to accept offers under the bid.

- RG 9.368 We will not give this relief if we consider that the target already has all the material information that a holder needs to assess the merits of a bid.
- RG 9.369 We will generally aim to give an extension that is only as long as is reasonably necessary in the circumstances. In many cases, the target will be in a position to complete the preparation of the target's statement before the deadline for dispatch and will need only a short extension on account of the logistics involved in dispatch (e.g. the time required for printing the target's statement).
- RG 9.370 Where it appears that a longer extension is justified, we may also consider additional relief to extend the relevant deadline for the target to lodge the target's statement with ASIC, and send it to the bidder and any relevant market operator. Any extension of the deadline for lodgement with ASIC and service on the target and relevant market operators may be for a shorter period than the time we allow for dispatch of the target's statement to holders because:
- (a) the lodgement and service requirements do not involve the same level of logistics as dispatch; and
 - (b) target holders and the market should have access to the target's statement at the earliest time possible.

Where dispatch cannot occur less than 10 days before the close of offers

- RG 9.371 If the target cannot reasonably be expected to dispatch its target's statement to holders more than 10 business days before the close of the bid:
- (a) the target may ask the bidder to extend its bid; or
 - (b) the target may apply for the relief discussed at RG 9.372 to dispatch an incomplete target's statement.

Note: If a bidder does not agree to extend the bid in these circumstances, we may refer the matter to the Takeovers Panel for a finding of unacceptable circumstances under s657A.

- RG 9.372 In limited circumstances, we may grant relief to allow a target to dispatch an incomplete target's statement to holders. For example, we may grant relief on condition that the target:
- (a) advises its holders of the nature, extent and significance of the relevant deficiencies in the target's statement; and
 - (b) undertakes to provide a supplementary target's statement which remedies all the deficiencies mentioned in RG 9.372(a) as soon as practicable.

Note: Where the target has commissioned an expert report, the target should avoid releasing the expert's conclusion in advance of the final report: see RG 112.62–RG 112.65.

Receivers and managers

RG 9.373 A target's statement must contain a statement by each director of the target:

- (a) recommending that offers under the bid are accepted or not accepted, and giving reasons for the recommendation; or
- (b) giving reasons why a recommendation is not made: s638(3).

RG 9.374 Section 638(4) covers the circumstances when a target is being wound up or is under administration. In these circumstances, the statements under s638(3) must be made by the liquidator or administrator. However, s638 does not address how the obligations of target directors will best be fulfilled if a receiver and manager has been appointed to manage the affairs of the target: see s90.

ASIC relief: Receivers and managers assuming directors' obligations

RG 9.375 We may give relief to allow a receiver and manager to assume all of the functions of the directors in relation to a target's statement where:

- (a) the receiver and manager lodges with us a statutory declaration stating that they have been validly appointed; and
- (b) the directors are no longer in a position to carry out their obligations as directors of the target.

RG 9.376 We may provide this relief because we consider that there is no reason why a receiver and manager should be denied the same powers in this situation as are given to a liquidator or an administrator.

H Consents

Key points

Takeover documents may only include a statement attributed to a person, or based on a statement by another person, with that person's consent.

We have provided class order relief allowing bidders and targets to include certain statements without consent. Our relief applies to statements:

- made by official persons or made in official documents;
- published in books, journals or comparable publications;
- contained in a previous publicly available geological report;
- consisting of factual trading data; or
- made in documents lodged with ASIC or a securities exchange.

The consent requirement

- RG 9.377 A bidder's statement or target's statement may only include, or be accompanied by, a statement by a person, or a statement based on a statement by a person, with that person's consent: s636(3) and 638(5).
- RG 9.378 A bidder or target is required to obtain the consent of the person who makes a statement before using it in the bidder's or target's statement so that the person can:
- (a) control or limit their liability; and
 - (b) control the overall effect of the statement.
- RG 9.379 For further discussion on the consent requirement, including the kinds of statements that attract the consent requirement and what a person must do to comply, see RG 55.

Consent to quote officials and publications

- RG 9.380 A bidder or target may wish to include certain statements that are not specific to the bid, bidder, target or their businesses. This may be useful in meeting the requirement that the bidder's or target's statement contains all information that holders would reasonably require to make an informed decision about whether to accept the offer.

ASIC modification: Consent to quote officials and publications

- RG 9.381 Class Order [CO 13/523] *Citation of experts and consent to quote* modifies s636 and 638 so that the bidder's or target's statement may include a statement by an official person or author without their consent and without stating that they have given their consent.
- RG 9.382 The modification in [CO 13/523] allows the inclusion of a statement that:
- (a) fairly represents a statement by an official person; or
 - (b) is a correct and fair copy of, or extract from:
 - (i) a public official document; or
 - (ii) a statement that has already been published in a book, journal or comparable publication.
- RG 9.383 However, the relief does not apply if the original statement was made in connection with:
- (a) the takeover bid;
 - (b) the bidder or target; or
 - (c) any business, property or person that is the subject of the bidder's or target's statement.
- RG 9.384 Our relief also does not protect a bidder or target from liability if it uses a statement and knows that the statement is misleading or presents the statement in a misleading or deceptive way.

Policy underlying our modification

- RG 9.385 Case law indicates that, in general, the author of a statement will not be civilly liable for its inclusion (or the inclusion of a statement based on it) in a bidder's or target's statement if the original statement was not made for the purpose of being included in the bidder's or target's statement: *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148; *Bride as Trustees for the Pinwernying Family Trust v KMG Hungerfords* (1991) 109 FLR 256; and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 142 ALR 750.
- RG 9.386 Our policy on s636(3) and 638(5) seeks to achieve consistency with our policy on the equivalent provision in the context of fundraising: s716(2) and 1013K(1).

Note: See RG 55 and [CO 13/523].

Government officials and public official documents

- RG 9.387 Without our relief, bidders or targets would be required to obtain consent to refer to the statements of government officials and government publications—for example, publications of the Australian Bureau of Statistics or the Commonwealth Bureau of Meteorology. To obtain the consent of Government to use such a general statement may be onerous for the bidder or target. There is a low risk of liability for the Government in these circumstances.
- RG 9.388 The Crown in right of the Commonwealth may be exposed to civil liability for damages for a misleading statement included in a bidder's or target's statement: s5A(3) and (5). However, liability is unlikely if the statement was not made for the purpose of being included in the bidder's or target's statement.
- RG 9.389 Guidance on the meaning of the phrase 'public official document' in the class order exception can be found in cases that have considered the term 'public document' in an evidentiary context. A public document is one made by a public official as the result of a public inquiry and is available to the public: Lord Blackburn in *Sturla v Freccia* [1874–80] All ER Rep 657. Documents do not become public official documents merely because they have been lodged with a government department or statutory authority and are maintained for public access on a registry by the department or authority.
- RG 9.390 For further discussion of issues associated with statements by foreign 'official persons', statements in a foreign 'official document' or summaries of resource exploration reports lodged with government departments, see RG 55.54–RG 55.55.

Publications

- RG 9.391 It is generally impractical for the bidder or target to obtain the consent of the author of a statement in a book, journal or other comparable publication, if the statement is not specific to the bid, bidder, target or their businesses. There is also a low risk of liability for the author in this case.
- RG 9.392 The phrase 'book, journal or comparable publication' in the class order exception includes references to statements in a form, and of a standard, similar to that normally contained in a book or journal, but which are made available through the internet or other electronic means. This excludes, for example, references to statements made in internet chat rooms, news groups and homepages with unaccountable content (i.e. with anonymous participants or without editorial control).

ASIC relief: Consent to quote official statements with some connection to a bid

- RG 9.393 We may give case-by-case relief to permit the bidder's or target's statement to include a statement by an official person, or in a public official document, which was made in connection with the bid, bidder, target or their respective businesses.
- RG 9.394 However, we will not give relief if:
- (a) the Commonwealth's interests are involved—for example, in the context of a privatisation; or
 - (b) the statement was made for the purpose of being included in the takeover document.
- RG 9.395 This is because liability is more likely in these cases: see RG 9.388.

Consent to use geological reports or trading data

- RG 9.396 Disclosures in the bidder's or target's statement relating to the acquisition or exploitation of mining tenements will often contain a technical assessment or valuation of the tenements. This is generally prepared in accordance with the JORC Code and/or the Valmin Code by a member of the Australasian Institute of Mining and Metallurgy (AusIMM) or the Australian Institute of Geoscientists (AIG).

Note: The JORC Code is incorporated into the ASX Listing Rules and applies when reporting exploration targets and results and mineral resources and reserves: see ASX Listing Rule 5.6 and ASX Listing Rules Appendix 5A. AusIMM and AIG have adopted the Valmin Code for independent expert reports concerning mineral and petroleum assets and securities.

- RG 9.397 Bidder's and target's statements will also frequently contain trading data relating to trading on a prescribed financial market or foreign exchange which is sourced from a market operator or other data provider (e.g. Bloomberg, Reuters or IRESS).

ASIC modification: Geological reports and trading data

- RG 9.398 Class Order [CO 07/429] *Consent to quote: Citing trading data and geological reports in takeovers* provides relief from the consent requirement in s636(3) and 638(5) in limited circumstances for:
- (a) the citation of a previous geological report in a current geologist's report, dealing with the estimation, assessment or evaluation of minerals, in a bidder's or target's statement; and

- (b) the use of trading data relating to trading on a prescribed financial market (e.g. ASX) or an approved foreign exchange (e.g. the New York Stock Exchange) in a bidder's or target's statement.

Note: The list of prescribed financial markets is set out in reg 1.0.02A of the Corporations Regulations 2001 (Corporations Regulations). For a list of approved foreign exchanges, see [CO 07/429].

- RG 9.399 [CO 07/429] allows the citation of a previous geological report in a current geologist's report included in the bidder's or target's statement, where:
- (a) the current geologist is a Member and/or Fellow of AusIMM or AIG with a minimum of five years experience relevant to estimating, assessing and evaluating minerals of the kind that are the subject of the report;
 - (b) the statement is made in, or based on, a statement made in the previous geological report which is publicly available (with or without payment of a fee) at or from:
 - (i) a government department, authority or agency of the Commonwealth or an Australian state or territory; or
 - (ii) ASX;
 - (c) the previous geological report was not prepared in connection with the takeover bid;
 - (d) the previous geological report was not prepared or commissioned by the bidder or target (as the case may be), any of their associates, or a person with or from whom the bidder or target (as the case may be) or any of their associates:
 - (i) has shared an interest in a tenement that is the subject of the current geological report; or
 - (ii) has purchased the tenement that is the subject of the current geological report; and
 - (e) the current geological report includes, close to the first occurring reference to the previous geological report, the name of the author of the previous report and a statement that the author of the previous report has not consented to its use in the current report.

RG 9.400 With respect to trading data, [CO 07/429] allows the inclusion in the bidder's or target's statement of copies, extracts and accurate representations or analysis of quantitative data on the price and volume of trading in financial products, provided that the bidder's or target's statement includes, close to the first occurring reference to trading data, the name of the person who prepared the trading data and a statement that the person who prepared the trading data has not consented to its use.

RG 9.401 Quantitative trading data is purely factual information. If the bidder or target adds commentary, analysis or deduction, the attribution to the market data

provider should be clearly limited to the underlying trading data. The relief in [CO 07/429] extends to a citation where the market data provider:

- (a) presents trading data in pictorial form (e.g. graphs, charts and diagrams); and
- (b) applies simple, objective formulas to trading data (e.g. volume-weighted average prices).

For our relief to apply, the information must not amount to subjective analysis or financial modelling, and must retain its purely factual character.

Policy underlying our modification

- RG 9.402 Our relief for geological reports and trading data is designed to facilitate appropriate disclosures in bidder's and target's statements, and mirrors the relief that we provide from the equivalent provisions in the context of fundraising: s716(2) and 1013K(1): see RG 55.60–RG 55.67.
- RG 9.403 It recognises that the preparation of a geological report inherently requires the author to refer to previous results and assessments with respect to the mining tenements (historical results). In many cases, the historical results are obtained from an open file register or website of a government department, authority or agency, or an open register or website of ASX. The historical results are often obtained from geologists' reports commissioned by the previous holders of the tenements.
- RG 9.404 It also recognises that trading data is purely factual information. Although the consent requirement applies to raw trading information and other purely factual information, in the same way that it applies to professional opinion and analysis, we provide relief because the risk of trading data being misleading or inaccurate is limited. It is also unlikely that the market data provider would be liable.

Consent to use a lodged statement

- RG 9.405 It may be difficult to obtain a person's consent to include in a bidder's or target's statement a public statement they have made in a lodged document—particularly in the context of a hostile takeover bid. For example, it may be difficult for a bidder to obtain the consent of the target's chairman to include their statement in a bidder's statement.

ASIC modification: Using a lodged statement

- RG 9.406 [CO 13/521] modifies s636(3) and 638(5) so that the bidder's or target's statement may include a statement by a person without the person's consent, if the statement was made in a document that has been lodged with:
- (a) ASIC; or

- (b) the operator of a prescribed financial market (by a listed company, managed investment scheme or other listed body in compliance with the listing rules).

RG 9.407 For the relief to apply:

- (a) the bidder's or target's statement must:
 - (i) fairly represent the statement; or
 - (ii) include, or be accompanied by, a correct and fair copy of the document, or part of the document, that contains the statement; and
- (b) if the bidder's or target's statement is not accompanied by a copy of the document, or part of the document, that contains the statement:
 - (i) the bidder or target must provide the document, or part of the document, free of charge if requested to by a holder during the bid period; and
 - (ii) the bidder's or target's statement must:
 - (A) identify the document or part of the document; and
 - (B) inform holders of their right to obtain a copy of the document, or part of the document.

RG 9.408 We have provided this modification because, if a person makes a statement in a document lodged with a securities exchange under the listing rules or with us, they do so in a regulated context for the purpose of informing holders and the market. The person who makes the statement should be mindful of potential liability. It is readily foreseeable that the statement may be quoted in the context of a takeover bid.

RG 9.409 Our relief does not protect a bidder or target from liability if it uses a statement and the statement is presented in a misleading or deceptive manner. It also applies only for the purposes of the consent requirement in s636(3) and 638(5) and does not affect any requirement under industry guidelines, standards and codes (e.g. the JORC Code) to include a consent or other statement by an author or other person whose work is referred to or relied on, or who is otherwise involved in making a statement.

Relief from consent in other cases

RG 9.410 We may give case-by-case relief from the consent requirement in s636(3) and 638(5) in other circumstances.

RG 9.411 Applicants for this relief should use as a guide the criteria discussed at RG 55.71–RG 55.74 with respect to the case-by-case relief from the consent requirement that we consider to be applicable to a disclosure document or PDS.

I Supplementary statements

Key points

Although a bidder or target may not strictly be required to dispatch a supplementary statement to holders, we consider it may be appropriate to counteract a misleading or confusing statement made in the original statement.

We may refer a bidder or a target to the Takeovers Panel if its failure to dispatch a supplementary statement to holders appears to constitute unacceptable circumstances.

Supplementary statements when the target is listed

- RG 9.412 If the target is listed and the bid class securities are quoted, s647(3) requires any supplementary statements, prepared by either the bidder or the target, to be lodged with us and sent to the prescribed financial market as soon as practicable. It does not require the bidder to dispatch the supplementary document to target holders.
- RG 9.413 Despite compliance with s647(3), in some circumstances, failure to send a supplementary statement to holders may give rise to unacceptable circumstances under s657A—for example, this failure may be contrary to the purposes of Ch 6 of ensuring that:
- (a) holders are given enough information to enable them to assess the merits of the proposal (s602(b)(iii)); and
 - (b) as far as practicable, holders all have reasonable and equal opportunities to participate in any benefits accruing to holders (s602(c)).
- RG 9.414 It may also be appropriate to send a supplementary statement to holders to counteract a misleading or confusing statement previously sent to holders during the offer period: see RG 25.66.
- RG 9.415 In some circumstances, it may also be misleading to send a supplementary statement to a holder either before or with the original bidder's statement. We have provided relief enabling bidders to dispatch replacement documents: see RG 9.336–RG 9.348.

When we will consider referring a bidder or a target to the Takeovers Panel

- RG 9.416 If the target is listed and the bid class securities are quoted, we may refer a matter to the Takeovers Panel if the failure of a bidder or target to dispatch a supplementary statement to holders appears to constitute unacceptable

circumstances. We may refer the matter to the Takeovers Panel in these circumstances despite their compliance with s647(3).

- RG 9.417 We may also refer a matter to the Takeovers Panel if they lodge or dispatch a supplementary statement either before or with the original bidder's statement, if it has the tendency to mislead holders in the circumstances: see also RG 9.346.
- RG 9.418 In deciding whether to refer a matter to the Takeovers Panel, we will consider the content of, and the extent of the publicity given to, the supplementary statement.

J Variation of offers

Key points

A bidder may only vary the offers under an off-market bid in accordance with s650A–650D. The bidder may improve the consideration on offer or extend the offer period but must offer withdrawal rights in certain circumstances.

We have modified s624 so that, if the offer period is automatically extended, it ends at a certain time of day rather than midnight. We have also provided relief so that the formalities associated with approving a notice of variation are similar to those for the bidder's statement.

In appropriate cases, we may provide relief for variations:

- shortening the time for payment to avoid the need to offer withdrawal rights in connection with an extension of the offer period;
- providing for an increase of the consideration on offer that is conditional on the satisfaction of a minimum acceptance condition;
- improving the consideration on offer by adding fully paid securities; or
- altering the terms of the offers before dispatch.

Extending the offer period under an off-market bid

- RG 9.419 Section 650C permits a bidder to extend an unconditional bid at any time before the end of the offer period. However, where a bid is subject to a defeating condition, an extension of the offer period is only permitted after the bidder has given its s630(3) notice if certain events in relation to a competing offer occur: s650C(2).

Extension of an unconditional bid that was previously conditional

- RG 9.420 Whether a variation extending the offer period is permitted under s650C(2) must be determined as at the time of variation. If, at the time of the variation, the bid is open and unconditional, the extension is lawful. It is not relevant to the lawfulness of the extension of a presently unconditional offer, that when originally made, the bid was subject to a defeating condition and the time for giving a s630(3) notice in relation to that condition has passed.
- RG 9.421 The suggestion that the time for determining the operation of s650C(2) is the time at which the offer was originally made is not supported by the actual wording of the provision, and there are no policy grounds for prohibiting the extension of an unconditional offer, which was originally conditional, after the s630(3) notice has been given.

Extension of a conditional bid on the s630(3) date

- RG 9.422 An off-market takeover offer that remains subject to a defeating condition may be extended on the day specified in s630(3) for giving the notice if:
- (a) the s630(3) notice has not already been given; and
 - (b) the extension is effected before the end of that day.
- RG 9.423 If the extension is effected before the end of the day on which the notice must be given, it does not contravene s650C(2). The extension of the offer before the end of the day has the effect that the s630(3) notice will no longer be due on that day. Once the extension is effected, the date for giving the s630(3) notice is postponed by a period equal to the extension: s630(2)(a).

Extension of a conditional bid after the s630(3) date

- RG 9.424 Although the prohibition in s650C(2) is expressed to apply only after the notice under s630(3) is given, it would not be possible for a bidder to extend a conditional offer on a later day in reliance on its own failure to give the notice. We may decline to accept for lodgement a notice of variation submitted in these circumstances: s1274(8).

Closing time for an automatically extended offer period

- RG 9.425 Under s624(2), an offer period is automatically extended if, during the final seven days of the offer period, the bidder's voting power in the target increases to more than 50%, or in an off-market bid, the offers under the bid are varied to improve the consideration offered. If either of these events occurs, s624(2) extends the offer period so that it ends 14 days after the triggering event.
- RG 9.426 While the term 'day' is not defined in the Corporations Act, the legal position is generally that a day comprises a full 24 hours, ending at midnight.
- Note: See *Prowse v McIntyre* (1961) 111 CLR 264. Our view of the legal position on time periods is set out in RG 7.
- RG 9.427 In contrast, the offer period for a takeover bid, as originally determined or subsequently extended by the bidder, may end at any time of day specified by the bidder, as long as it lasts for at least one month and not more than 12 months: s624(1)(b).
- RG 9.428 If an off-market bid is automatically extended, it is likely that s624(2) requires the extended offer period to stay open until midnight on the 14th day after the triggering event. This may create confusion because a bidder will often have previously specified a closing time that is earlier than midnight.

- RG 9.429 While it is likely that the law technically applies in the same way to an automatically extended market bid, in practice, acceptances under a market bid can only be received up until the time the relevant financial market closes on the 14th day of the extension period.

Note: See *Gosford Quarry Holdings Limited* [2008] ATP 11.

ASIC modification: Automatic extensions in off-market bids

- RG 9.430 [CO 13/521] provides relief from the requirement for an automatically extended offer period to remain open until midnight on the closing day.
- RG 9.431 This class order provides that an automatically extended offer period for an off-market bid remains open on the 14th day of the extension period until the time of day that the offer period would have ended if it had not been extended.

Note: For example, if immediately before the automatic extension, the offers were due to close at 5 pm on the final day of the offer period, the automatically extended offer period would end at 5 pm on the final day of the extended period.

- RG 9.432 We have modified s624(2) to reduce the potential that confusion may arise as a result of the operation of this provision, and to ensure that the bid will still close at a time of day that is commercially suitable for the bidder.
- RG 9.433 Bidders should ensure that the closing time for the offer period is clearly stated in the notice of automatic extension given under s624(2).

ASIC modification: Automatic extensions in market bids

- RG 9.434 [CO 13/521] provides relief so that an automatically extended market bid is no longer required to remain open until midnight on the 14th day of the extended offer period. Given the practical constraints discussed in RG 9.429, [CO 13/521] requires that an automatically extended market bid remains open until the conclusion of ordinary trading on the relevant market on the 14th day of the extension period.
- RG 9.435 Bidders should state clearly, in the notice of automatic extension, that offers may be accepted until the close of trading on the relevant day.

Withdrawal rights

- RG 9.436 Under s650E, a holder who has accepted an offer under an off-market bid that is subject to a defeating condition has a right to withdraw their acceptance if the bidder varies the offer in a way that postpones for more than one month the time when the bidder has to meet their obligations under the bid.

- RG 9.437 This will most frequently occur when the offer period for a conditional takeover offer is extended. In such a case, the notice of variation to effect the extension must inform people about the right to withdraw: s650D(1)(a)(ii).
- RG 9.438 Section 650E enables a target holder who has committed to sell their shares, and who may be dependent on the consideration for that sale arriving within a particular time period, to change their mind if that time period is unexpectedly extended.

Cumulative extensions

- RG 9.439 To determine whether s650E(1)(b) is triggered, the date from which the relevant postponement should be reckoned is the latest date for the provision of the consideration under the offers, as originally dispatched, no matter how short the extension.

Note: In a conditional bid, this date is generally referenced from the end of the offer period: s620(2)(a).

- RG 9.440 The alternative reading—that the postponement is measured from the date for providing consideration under the offers, as previously extended, even if previous extensions have already had the effect of postponing the time for payment—is excluded by both the construction of the provisions and their underlying policy.
- RG 9.441 The following examples illustrate the application of s650E in practice.

Example 4: First extension of the close of the offer period to a date more than one month after the original close date

An off-market bid that is subject to defeating conditions has already been extended once by three weeks. The bidder wishes to extend the bid by a further three weeks.

The bidder must offer withdrawal rights in effecting the second three-week extension because the cumulative effect of the extension will be to postpone the bidder's obligations under the bid (in accordance with the terms of the bid, reflecting the requirement in s620(2)) for more than a month from the original date on which the bidder was to perform its obligations.

Example 5: Subsequent extensions

Following the circumstances referred to in Example 4, the bidder again wishes to extend the bid by a further three-week period. The bid is still subject to defeating conditions.

The bidder must again offer target holders the right to withdraw. Even though the new closing date for the offer will be less than a month after the most recent closing date, the extension gives rise to a postponement of over a month when reckoned by reference to the original date on which the bidder was to meet its obligations under the bid.

- RG 9.442 In both of the above examples, the bidder must offer withdrawal rights to target holders who accepted prior to the extension, even if those target holders accepted the offer at a time when the close of the offer period (and therefore the latest time for payment) was later than the date in the offers as originally dispatched. This is because, in ASIC's view, s650E(1)(b) operates by reference to the bidder's obligations under the terms of the bid generally. The bid terms are the same regardless of when the offer is accepted by particular target holders.
- RG 9.443 This view is also consistent with the general policy discussed at RG 9.438. As demonstrated in the above examples, s650E operates such that target holders may have the right to withdraw on the basis of extensions of less than one month. In these circumstances, the delay caused by the extension is the same for all holders who have accepted, regardless of when they accepted or whether the relevant extension is for less than one month from the previous closing date. Each accepting holder will have the time for payment, which they may be dependent on, unexpectedly extended by the same period and accordingly should have equivalent rights to withdraw.
- RG 9.444 Moreover, target holders who have only recently accepted may have done so on the basis of the level of acceptances the bid has achieved. If withdrawal rights are only open to some accepting target holders and not others, the holders who cannot withdraw may be 'locked in' to the bid even though the level of acceptances subsequently falls as a result of the withdrawal of other holders.
- RG 9.445 As a result of the operation of s650E, target holders may be able to withdraw their acceptance after the offers under the bid have closed.

Automatic extensions

- RG 9.446 An off-market bid may be extended automatically under s624(2)(a) if, within the final seven days of the offer period, the bidder improves the consideration offered.
- Note: Section 650B sets out the various ways in which a bidder may vary a bid to improve the consideration offered.
- RG 9.447 If a bidder improves its offer in a way that triggers an automatic 14-day extension under s624(2)(a), the bidder must offer withdrawal rights under s650E if, as a result of the variation, the time for the bidder to meet its obligations under the bid (reckoned by reference to the dates in the offers, as originally dispatched) is postponed for more than one month.
- RG 9.448 The notice of variation for the improvement in consideration must inform holders about their right to withdraw acceptances under s650E: s650D(1)(a)(ii).

- RG 9.449 This does not apply to automatic extensions triggered by the operation of s651A, or as a result of the bidder's voting power increasing to more than 50%.

ASIC relief: Variations to shorten payment periods

- RG 9.450 Where offers have been declared unconditional, an extension of the offer period does not result in holders having a right to withdraw, because the time for provision of the consideration under contracts arising from acceptances is not postponed.
- RG 9.451 The same result can be achieved without declaring the offers unconditional, by varying them to abridge the time between their close and the date for payment by a period equal to the extension.

Note: See *Blaze Asset Pty Ltd v Target Energy Ltd* [2009] FCA 698.

- RG 9.452 Because s650E(1)(b) refers to the time by which the bidder has to meet its obligations under the terms of the bid, to ensure that s650E is not triggered, despite any intention on the part of the bidder to abridge the time for payment, a bidder must formally vary the terms of the bid to reflect the abridgement. Because a variation of this type is not permitted under Pt 6.6, an ASIC modification under s655A will be required: s650A(1).

Note: Sections 650B–650D provide the sole method by which offers under off-market bids may be varied. Failure to comply with Pt 6.6 will result in an invalid variation, which may in turn void all acceptances and contracts under the bid: see *Primelife Corporation Ltd v Aevum* [2005] NSWSC 269.

- RG 9.453 We may grant a modification to permit a bidder to vary its offers to accelerate payment terms for this purpose, if it appears to us that doing so is not contrary to the principles underlying Ch 6.

Variation to allow conditional increase in consideration

- RG 9.454 Section 650B sets out the various ways in which a bidder may vary the offers under an off-market bid to improve the consideration offered, including by increasing the amount of cash or the number of securities offered. Part 6.6 does not expressly provide for an increase in consideration that is conditional on a minimum acceptance condition.

ASIC relief: Conditional increases in off-market bids

- RG 9.455 We may grant case-by-case relief to allow a bidder to send a notice of variation during an off-market bid, which provides for an increase in consideration that is subject to a minimum acceptance condition, if the bidder:

- (a) does not require that the minimum acceptance condition is met at a point in time before the close of the bid; and
- (b) pays the increased consideration, even if the minimum acceptance condition is waived.

RG 9.456 A bidder may, without seeking relief, announce that it will increase its off-market bid if it receives a certain level of acceptances. Our relief removes any doubt by allowing a bidder to vary the terms of its offer to provide for the conditional increase in accordance with the requirements discussed in RG 9.455.

RG 9.457 We may facilitate a variation of this kind because we consider that an increase in consideration during the bid period, which is conditional on a minimum acceptance condition, is not contrary to the principles in s602—provided that there is sufficient disclosure of the effect of the conditional increase.

RG 9.458 We will not grant relief if the bidder proposes to require that the minimum acceptance condition is satisfied at a point in time before the close of the bid because we consider that this applies undue pressure on holders to accept the bid earlier than they otherwise would.

Time for payment of consideration

RG 9.459 In connection with relief to conditionally increase the consideration payable under the bid, we may also give relief to delay the time for paying the part of the consideration representing the increase. We will give relief if the increase is still conditional at the time that the original consideration becomes payable. Under our relief, the time for paying the increase will be analogous with s620 and [CO 13/521].

RG 9.460 For example, if the bidder is given the necessary transfer documents with the acceptance and the increase is still conditional, the bidder must pay the increase by the end of whichever of the following periods ends earlier:

- (a) one month after the increase becomes unconditional; or
- (b) 21 days after the end of the offer period: see s620(2)(a).

Adding scrip consideration to an off-market bid

RG 9.461 Section 650B(1) does not expressly permit a bidder to improve the consideration under an off-market bid by adding (other than as an alternative) securities that were not previously on offer—for example, adding scrip to an all-cash offer as opposed to adding a scrip alternative to a cash offer. This is implied from the context in s650B(1)(a), (f) and (h) and

from s650B(2), which requires an election to be made about the form of consideration to be taken.

- RG 9.462 Under s650B(1)(b), a bidder is able to improve the consideration by increasing the number of securities offered. This means that, if a certain security is already on offer, the bidder may increase the number of those securities offered as consideration. However, s650B(1)(b) does not permit a bidder to add a new kind of security to the consideration offered.

ASIC relief: Adding a new scrip component to existing consideration

- RG 9.463 We may give relief to allow a bidder to improve the consideration offered by adding fully paid securities to its off-market bid, if the bidder:
- (a) lodges with ASIC a supplementary bidder's statement that complies with the disclosure obligations in s636(1)(g) or (ga) and any other necessary disclosure obligations;
 - (b) sends a copy of the supplementary bidder's statement to each holder, to the target and to the prescribed financial market if the target is listed; and
 - (c) lodges with ASIC a copy of the notice of variation required under s650D and sends a copy to the target, to the prescribed financial market if the target is listed, and to holders (s650D(1)(c)(ii) as modified by [CO 13/521]: see RG 9.481–RG 9.486).

Note: Where the offers are improved by adding securities to existing consideration, target holders who have already accepted may be entitled to make a fresh election as to consideration: see s650B(2) and (3).

- RG 9.464 Under an off-market bid, a bidder may offer a combination of cash and scrip as consideration under its bid from the commencement of the bid. We consider that a bidder should be able to improve an existing offer by adding a fully paid scrip component if the target board and holders have sufficient information and time to consider the significant changes to the terms of the offer involved.
- RG 9.465 If we grant this relief for securities that the bidder states or implies will be listed, we may also give consequential relief from s625(3)(c)(i).

Varying off-market offers before dispatch

- RG 9.466 Offers under an off-market takeover bid cannot be varied or freed from a defeating condition before they have been dispatched. Although Pt 6.6 enables a bidder to vary an off-market takeover offer, no offers have been made until offer documents have been dispatched to holders.

- RG 9.467 Part 6.6 does not refer to offers that are merely proposed, and the procedure it sets out for off-market offers is not appropriate to variations in the terms that are proposed to be offered. This is because the procedure:
- (a) requires copies of the notice of variation to be dispatched immediately to holders (who are not yet ascertained and who would, in any case, derive little benefit from a notice varying an offer they have not seen); and
 - (b) does not provide for the target to be given an opportunity to respond to the varied offer in its target's statement.
- RG 9.468 For similar reasons, offers may not be declared to be free of defeating conditions under s650F before they have been dispatched.
- RG 9.469 Further, item 6 of s633(1) requires that the offers that are dispatched to holders must be made on the terms set out in the bidder's statement and offer document lodged with ASIC under item 2 of s633(1). For this reason, it is also not possible to vary the proposed terms of an offer before dispatch by way of a supplementary bidder's statement or a replacement bidder's statement.

ASIC relief: Dispatch of amended documents

- RG 9.470 We will normally grant relief to allow offers to be dispatched on terms that vary from those contained in the original bidder's statement, if:
- (a) the altered documents would have been accepted for lodgement;
 - (b) the target's opportunity to make a pertinent response in its target's statement is not prejudiced; and
 - (c) the proposed variation is not contrary to the purposes of Ch 6 set out in s602.
- RG 9.471 The circumstances that led to the alteration may call for explanation in the supplementary or replacement bidder's statement.

Approving notices of variation

- RG 9.472 Section 637 requires that the copy of the bidder's statement that is lodged with us must be approved:
- (a) for a bidder that is a body corporate:
 - (i) if the bid is an all-cash bid—by a resolution passed by the directors; or
 - (ii) otherwise—by a unanimous resolution passed by all the directors; or

(b) for a bidder that is an individual—by the bidder: s637(1).

RG 9.473 In contrast with s637, if the bidder is a body corporate, s650D(3) states that a notice of variation must be signed:

- (a) if the bidder has two or more directors—by at least two directors of the bidder who are authorised to do so by a resolution passed at a directors' meeting; or
- (b) if the bidder has only one director—by that director.

ASIC modification: Approval of notice of variation

RG 9.474 [CO 13/521] modifies s650D so that a notice of variation need not be signed if it is approved in any of the ways that a bidder's statement can be approved under s637.

RG 9.475 We have provided this relief because we consider that it is appropriate for a bidder to have the option of approving a notice of variation in the same way as a bidder's statement rather than signing the notice.

Lodging documents with ASIC

RG 9.476 As with the bidder's statement, a notice of variation lodged with us must still comply with s351. Section 351(1) states that a director or secretary of the company must sign the notice. If it is a foreign company, the notice may be signed by:

- (a) its local agent; or
- (b) if the local agent is a company—a director or secretary of the company: s351(1).

Note: A 'local agent' in relation to a foreign company is a person who is a local agent by virtue of s601CG(5): s9.

RG 9.477 Our modification in [CO 13/521] does not affect the requirement in s351. We do not have a power to give relief from this requirement.

RG 9.478 We note that, if the Corporations Act requires something to be signed, it can be signed by an individual using a power of attorney from the person required to sign: s52A.

Dispatching notices of variation

RG 9.479 To effect a variation of the offers under an off-market takeover bid (including an extension of the offer period), the bidder must prepare, lodge and dispatch a notice of variation in accordance with s650D.

RG 9.480 Under s650D(1)(c)(ii), the notice of variation must be dispatched to everyone to whom offers were made under the bid. However, at the time of the variation, some persons to whom offers were made may no longer hold bid class securities because they have disposed of their holding to another person (e.g. by selling the securities on market). Holders who have disposed of their holdings in this way are unlikely to want to continue to receive notices relating to the bid.

ASIC modification: Persons to whom notices of variation are to be dispatched

RG 9.481 [CO 13/521] modifies s650D(1)(c) so that, where the bidder has obtained a copy of a register that relates to a class of target securities the holders of which the bidder sent offers under the bid, and that records the name and address of holders as at a time subsequent to the s633(2) record date, the bidder must send the notices of variation to:

- (a) those persons, shown on the most recent copy of the register obtained by the bidder, to whom the bidder would have had to send the bidder's statement and offers under item 6 of the table in s633(1) if the date set by the bidder under s633(2) had been the date at which the holdings are recorded on that copy of the register; and
- (b) any other person who has accepted the offer under the bid.

RG 9.482 The modification in s650D(1)(c) operates separately in relation to each class of target securities (the holders of which the bidder sent offers under the bid) and, if the bidder does not have access to an updated register in relation to a particular class, then the existing requirement to send to everyone to whom offers were made applies with respect to holders in that class.

RG 9.483 For example, if the bidder has an updated register for one class (e.g. ordinary shares in the bid class) but not another (e.g. convertible securities—the holders of which the bidder sent the bidder's statement and offers because the bid extended under s617(2) to ordinary shares issued on exercise of the convertible securities) the bidder must:

- (a) in respect of the class for which the more recent register is available to the bidder—send notices of variation to the persons in the class recorded on the register; and
- (b) in respect of the other class—send notices of variation to the persons in the class to whom offers were made under the bid.

RG 9.484 [CO 13/521] also modifies s624(2) to align the persons to whom the bidder must dispatch a written notice that an automatic extension has occurred with the modified requirements in s650D(1)(c)—except to the extent that the bidder may be required to give the s624(2) notice to persons who have accepted the offer.

- RG 9.485 Our modification of s650D(1)(c) and s624(2) recognises that bidders will commonly obtain copies of the target register throughout the bid period for the purposes of communications and/or ongoing monitoring of the bid's progress. It seeks to ensure that the bidder's notices regarding variation of its offers are, as far as practicable, sent to persons for whom the variation is likely to be relevant, based on the most-up-to date information available to the bidder.
- RG 9.486 Our modification of s650D(1)(c)(ii) expressly includes each person who has accepted the offer under the bid in order to ensure that persons who may not be on the more recent version of the register, because their securities have been acquired by the bidder under the bid, still receive notices relating to improvements in consideration which may affect them: see s650B(2).

Dispatch of notices extending an unconditional bid

- RG 9.487 Under s650D(2), a notice of variation that merely extends the offer period at a time when the bid is not subject to any defeating conditions does not need to be sent to holders who have already accepted the offer. However, the notice must still be sent to other holders specified in s650D(1)(c)(ii) (as modified by [CO 13/521]).

Note: Section 650D(2) reflects aspects of the previous requirements found in s657(1)(b) and 657(3) of the old Corporations Law. The varied wording in s650D(2) does not evince an intention to alter these requirements. Rather, it is part of a general plain English rewrite of Ch 6: see Explanatory Memorandum to the CLERP Bill, paragraph 2.40.

- RG 9.488 An extension of the offer period does not affect the rights of holders who have already accepted an unconditional bid because the time for providing consideration under a conditional takeover contract runs from the later of:
- (a) the holder's acceptance; and
 - (b) the contract becoming unconditional.
- RG 9.489 Section 650D(2) recognises that it is therefore unnecessary to send notices of variation to holders who have already accepted.

Note: This contrasts with the position where the variation affects terms of the offer other than the offer period. Holders who have already accepted the offer still need to be notified of the variation, even if the offer is unconditional, because the holder may be entitled to improved or alternative consideration under s650B(2).

K Acceptances

Key points

We have modified the Corporations Act so that, for the purposes of applying the requirements of Chs 6 and 6C only (other than s653A), if a bidder receives a completed acceptance form in respect of securities registered in a clearing and settlement facility such as the Clearing House Electronic Subregister System (CHES) the holder is taken to have accepted the offer under the bid in relation to the securities. Our modification does not affect the requirement to comply with the rules of the clearing and settlement facility.

We have also provided class order relief to ensure that a bidder does not acquire a relevant interest as a result of a target holder participating in an appropriately constituted acceptance facility.

We have also modified s624(2) to address issues that may arise when an acceptance facility is triggered near the close of a takeover offer.

Acceptances received by the bidder for securities registered in a clearing and settlement facility

- RG 9.490 Under s653A and reg 6.8.01 of the Corporations Regulations, an acceptance of a takeover offer for quoted securities to which the operating rules of a clearing and settlement facility apply is only effective if made in the way specified in those rules. For securities registered on the CHES system, the relevant rules are the ASX Settlement Operating Rules (Settlement Rules).
- RG 9.491 A target holder whose securities are CHES registered can instruct their broker directly to accept the bid through CHES. As an alternative, the offer terms will generally provide that the target holder can return an acceptance form to the bidder instructing the bidder (or its representative) that they accept the bid—which the bidder may then seek to effect by engaging the holder’s broker through CHES: Settlement Rule 14.14.7. For some target holders, returning a completed acceptance form may be a more familiar method of acceptance.
- Note: If the target holder’s securities are registered on an issuer-sponsored register rather than CHES, the only method by which the holder can generally accept the bid is to return a completed acceptance form to the bidder.
- RG 9.492 It has been held that, where a target holder whose securities are CHES registered returns an acceptance form, there is no acceptance of the bid until the acceptance is ‘processed’ by effecting it through the CHES system. This is because of the combined effect of s653A, regs 6.8.01 and 7.11.24 of

the Corporations Regulations, and Settlement Rule 14.14: *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55.

ASIC modification: Treatment of paper acceptances for securities registered in a clearing and settlement facility

- RG 9.493 [CO 13/521] modifies the Corporations Act so that, for the purposes of Chs 6 and 6C, an offer is taken to have been accepted in respect of securities registered in a clearing and settlement facility when:
- (a) the bidder has received a written instruction or authority (or both) from a holder entitled to accept the offer (or a person with a right to be registered as holder); and
 - (b) the instruction or authority is given for the purpose, and has the effect, of enabling the bidder to instruct another person through the relevant clearing and settlement facility to effect acceptance of the offer.
- RG 9.494 Our modification does not affect the requirements of s653A—including that the acceptances must be processed in accordance with the rules of the relevant clearing and settlement facility. It is also not designed to affect the common law position in relation to offer and acceptance, only the application of Chs 6 and 6C.
- RG 9.495 We have made this modification to improve certainty for bidders and holders by clarifying the application of Chs 6 and 6C where a holder seeks to accept a takeover offer for securities registered in a clearing and settlement facility such as CHESSE by returning a completed acceptance form to the bidder or its representative. The modification seeks to align the operation of Ch 6 with the expectations of target holders that once they have delivered the bidder a completed acceptance form they have accepted the offer.
- RG 9.496 The modification in [CO 13/521] means that, in relation to acceptance forms received by the bidder or its representative in respect of securities registered in a clearing and settlement facility:
- (a) the bidder must take the acceptance into account when determining whether there has been a change in its voting power that may need to be disclosed in a substantial holding notice, even if the acceptance has yet to be processed;
 - (b) the relevant interest acquired by the bidder upon receiving the acceptance form will fall within the exception in item 1 of s611;
 - (c) even if the acceptance is not yet processed, it will be taken into account in determining whether the bidder has received acceptances that increase its voting power to over 50% in the final seven days of a bid (s624(2)(b)); and
 - (d) if the bidder varies the bid in a way that postpones the bidder's obligations under the bid for more than one month, the target holder

may still be entitled to withdrawal rights under s650E even if the variation is effected before the acceptance is processed.

Acceptance facilities

RG 9.497 An acceptance facility is an arrangement allowing all or specified holders of target securities to indicate conditional support for a takeover bid. Under the facility, registered and beneficial holders provide a third-party ‘facility agent’ with completed acceptance documents or instructions to a custodian to accept a bid. The facility agent is authorised to release the acceptances or instructions to the bidder or custodian once a particular level of support has been achieved and the bidder has given the facility agent a notice confirming that the bid will be declared unconditional.

The purpose of acceptance facilities

RG 9.498 Acceptance facilities are designed to overcome the difficulties a bidder may have in achieving a requisite level of acceptances due to the conditionality of a bid. Target holders may be reluctant to provide a binding acceptance for fear of having their securities locked up in a conditional bid with no certainty of success, or missing out if a higher rival offer emerges. Further, institutional investors may be prevented from accepting a conditional bid, or a bid achieving less than a certain level of acceptances, because of restrictions in their investment mandates.

RG 9.499 This can cause a problem for bidders because:

- (a) it will often not be possible to satisfy a minimum acceptance condition, or achieve the necessary level of acceptances, without certain holders (e.g. institutional holders) accepting; and
- (b) in some cases, these holders will not accept unless the condition is met or the necessary level of acceptances achieved.

RG 9.500 Acceptance facilities address this issue by providing a means for target holders to indicate a willingness to accept the bid if it becomes unconditional and/or attracts a specified level of support. This allows the bidder to declare the bid free of the conditions when it is assured that the requisite level of acceptances will be achieved.

RG 9.501 For administrative reasons, the terms of an acceptance facility may provide that only institutional, large or sophisticated holders of target securities may participate. Appropriately constituted, a facility of this kind may not offend the equality principle in s602(c), provided that smaller holders retain an equal and reasonable opportunity to accept the bid and facility participants do not receive a discriminatory benefit in using the facility.

Relevant interests arising from acceptance facilities

- RG 9.502 A bidder generally establishes an acceptance facility by engaging a third party to administer the facility in accordance with specified terms. The facility agent, in turn, enters into a series of agreements with facility participants.
- RG 9.503 The facility agent will generally obtain power to control the disposal of the securities accepted into the facility because it is instructed and authorised to take action to effect acceptance once the preconditions to release under the terms of the facility have been met. However, it is common for a facility to be structured so that the agent may avail itself of the AFS licensee exception in s609(3) (as modified by [CO 13/520]) and therefore does not acquire a relevant interest in the securities.
- RG 9.504 It is possible that a bidder may acquire a relevant interest in target securities at the time that a facility participant provides acceptance or custodial instructions to the facility agent under an acceptance facility. This is because the bidder and facility participants may be viewed as parties to an overall arrangement or understanding in relation to the securities, irrespective of whether they deal with each other directly: see also s52.
- Note: This view may be supported by the fact that one of the key objectives of an acceptance facility is to provide the bidder with a level of assurance that, in the circumstances, and on the conditions specified, it will be able to acquire the securities that are the subject of the facility.
- RG 9.505 An arrangement or understanding of this kind may be sufficient to constitute a ‘relevant agreement’ under the broad definition in s9. The bidder may therefore acquire a relevant interest in facility participants’ securities outside the takeover bid and in contravention of s606 by virtue of the accelerator provision in s608(8).

ASIC modification: Bidder’s relevant interest arising from an acceptance facility

- RG 9.506 [CO 13/520] provides relief, for the avoidance of doubt, so that a bidder does not acquire a relevant interest merely because it has a power to control the disposal of securities as a result of a holder or beneficial owner tendering acceptance or custodial instructions in respect of the securities into an acceptance facility.
- RG 9.507 Our relief only applies if:
- (a) the acceptance facility is the only acceptance facility established by the bidder in relation to the bid class;
 - (b) in the case of an unconditional bid—participation in the facility is open to all persons entitled to accept the bid;

- (c) the terms on which all facility users participate are the same;
- (d) the facility is operated by a facility agent who:
 - (i) is a person other than the bidder or an associate of the bidder; and
 - (ii) holds an AFS license that covers the provision of financial services of the kind necessary to operate the facility;
- (e) under the terms of the facility, whether or not acceptances and instructions tendered into the facility are released by the facility agent depends solely on either or both of the following occurring and/or either or both of the following being the subject of a written confirmation from the bidder:
 - (i) the bidder declaring the bid free of all conditions or stating that it will declare the bid free of all conditions no later than the time that all facility acceptances are processed; and
 - (ii) the securities in which the bidder and its associates have a relevant interest combined with the securities that are the subject of the facility exceeding a specified percentage of securities in the bid class;
- (f) facility participants are free to withdraw from the facility at any time until the preconditions to the facility agent releasing the acceptances or instructions are met; and
- (g) the facility is disclosed and operated in accordance with the relevant safeguards discussed at RG 9.510–RG 9.513;

RG 9.508 We have provided this relief because acceptance facilities established on appropriate terms and operated in an appropriate manner may improve the efficiency and competitiveness of the bid process by removing structural impediments to the success of bids. Our relief removes uncertainty that a bidder who has established such a facility may be liable for a contravention of s606 as a result.

ASIC relief: Other acceptance facilities

RG 9.509 In exceptional cases we may provide relevant interest relief for acceptance facilities that do not meet one or more conditions referred to in paragraph RG 9.507. In doing so we will consider the underlying policy of the relevant conditions and the potential effect of any relief, having regard to the principles in s602.

Disclosure

RG 9.510 The overall level of acceptances received by a bidder in relation to a bid is often a significant factor in a target holder's decision about whether and when to accept a bid. Target holders may also be influenced by the decision

of substantial holders to accept or reject the bid: see RG 25.29–RG 25.34 and RG 25.71–RG 25.76. Full and accurate disclosure about acceptances received throughout the course of a bid is therefore critical in ensuring that:

- (a) target holders and the market are not misled;
- (b) the bid takes place in an efficient, competitive and informed market (s602(a)); and
- (c) target holders have enough information to enable them to assess the merits of the offer under the bid (s602(b)(iii)).

RG 9.511 Acceptance facilities provide a mechanism for participants to signify their willingness to accept a bid—subject to specified preconditions—by providing, in effect, an ‘indicative acceptance’. The level of indicative acceptances demonstrated through a facility may similarly factor in the decisions of target holders and the market. A bidder must therefore ensure that target holders are provided with an equivalent level of disclosure about the number of securities tendered into the facility throughout the course of the bid, together with sufficiently detailed and prominent information to understand the terms and operation of the facility and appreciate the distinction between actual acceptances and facility acceptances.

RG 9.512 A bidder establishing an acceptance facility should disclose in the bidder’s statement, or a supplementary bidder’s statement, full details of the facility including all relevant terms and the arrangements the bidder has entered into to enable the operation of the facility.

RG 9.513 Further, if bid class securities are listed on a prescribed financial market, the bidder should provide disclosure that is equivalent to the disclosure that would be required under the substantial holding provisions if the bidder’s voting power included securities tendered into the acceptance facility. The terms of the facility will need to provide for the facility agent to provide information about facility acceptances at the end of each day in sufficient time for the bidder to disclose every 1% movement in the aggregate level of actual voting power and facility acceptances by 9.30 am the following morning. The information should be provided in an announcement or a letter covering a relevant substantial holding notice, which:

- (a) clearly sets out:
 - (i) the aggregate number and percentage of bid class securities in which the bidder and its associates have a relevant interest and which are the subject of facility acceptances; and
 - (ii) a breakdown between the two categories; and
- (b) contains a statement:
 - (i) setting out the preconditions to the facility agent releasing the facility acceptances; and

- (ii) warning that the facility acceptances may be withdrawn by facility participants at any time until the preconditions are met.

Note: For an unlisted target, the bidder should make equivalent disclosures to those that would be made under s654C.

RG 9.514 The bidder, target and other market participants must ensure that they do not misrepresent facility acceptances as actual acceptances.

The operation of acceptance facilities near to the close of a conditional bid

RG 9.515 Section 650F(1) prevents a bidder from freeing an offer from a defeating condition (other than a 'prescribed occurrence' condition) during the final seven days of the offer period. This prohibition, together with the prohibition on extending conditional bids, other than in the circumstances specified in s650C(2), provides target holders with an opportunity to consider the final terms of the bid.

RG 9.516 Sections 650F(1) and 650C(2) may mean that a bidder is unable to give the facility agent a notice confirming that it will drop certain outstanding conditions during the final seven days of the offer period. However, in some cases, the bidder may still be able to give a notice if it is clear that doing so will necessarily result in an automatic extension under s624(2)(b). This is because:

- (a) if the bidder's voting power is below 50% at the time that the notice is given to the facility agent and the aggregate of the bidder's voting power and the facility acceptances is greater than 50%, once the actual acceptances resulting from the trigger of the facility are received, the offer period will be extended by 14 days under s624(2)(b); and
- (b) following an extension, the bidder will be able to drop the conditions in accordance with its undertaking in the notice given to the facility agent because there will then be more than seven days until the end of the offer period.

RG 9.517 However, a bidder seeking to rely on s624(2)(b) may face uncertainty if the aggregate of the bidder's voting power and facility acceptances only reaches 50% near to the end of the offer period. This is because there may be a delay between the bidder giving its notice and the facility acceptances being realised as actual acceptances. In the case of instructions that are released by the facility agent to custodians, the timing of the actual acceptance by the custodian will depend on how quickly the custodian acts after receiving the instructions.

RG 9.518 If the bidder does not receive enough of the facility acceptances in time to increase its voting power to above 50%, the bid may close, subject to unfulfilled defeating conditions, and all takeover contracts will be void: s650G.

ASIC modification: Automatic extension of a bid

- RG 9.519 [CO 13/521] modifies s624 so that, where a bidder has established an acceptance facility, it may elect, for the purposes of s624(2)(b) only, to be taken to obtain voting power in securities that are the subject of the facility as soon as it gives the notice triggering the release of the acceptances and instructions by the facility agent.
- RG 9.520 Our relief applies only if:
- (a) the bid is conditional (other than with respect to ‘prescribed occurrence’ conditions);
 - (b) the acceptance facility complies with the requirements of [CO 13/520], including the disclosure requirements discussed at RG 9.510–RG 9.513; and
 - (c) the bidder has included in its s630(3) notice a statement that it has elected to have s624(5) (inserted by [CO 13/521]) apply and a description of the effect of that provision.
- RG 9.521 Our modification in [CO 13/521] ensures that, where a bidder satisfies the conditions for release of acceptances from an acceptance facility before the close of an offer, and its voting power in the target will increase to above 50% once the bidder receives actual acceptances for the securities tendered into the facility, the bid will be extended despite the potential delay in giving effect to the facility instructions. We consider that relief of this kind is appropriate because it improves the certainty associated with the operation of an acceptance facility.
- RG 9.522 The requirement that the bidder must have triggered the facility in order to rely on our relief is consistent with the rationale underlying s624(2)(b) of ensuring that target holders who might have declined the offer on the basis that they wished to remain with the existing management—but would accept if the bidder obtained a majority holding in the target—are given a further opportunity to consider the offers in light of the bidder acquiring majority control: Explanatory Memorandum to the CLERP Bill, paragraph 7.83.

Unacceptable circumstances

- RG 9.523 Acceptance facilities can increase the complexity of a bid. It is therefore essential that:
- (a) target holders and the market are provided with clear and full disclosure about the nature and role of the facility and facility acceptances; and
 - (b) the facility is not operated or used in a way that undermines the purposes of Ch 6 set out in s602, or otherwise gives rise to a breach of the Corporations Act.

- RG 9.524 We will consider the statements made by, and the conduct of, the bidder, target, facility operator and users, and other market participants in relation to acceptance facilities to ensure that they are consistent with the underlying spirit of our relief and the principles in s602. For example, we may carefully examine the actions of facility participants who repeatedly tender into and withdraw from a facility, or who tender into a facility in contradiction of a previous statement: see also RG 25 and s1041H.
- RG 9.525 We also expect that facility operators will have in place appropriate arrangements to verify that the acceptances and acceptance instructions they admit into, and continue to hold in, the facility are valid and relate to an identified parcel of bid class securities that the facility user has an immediate capacity to deliver. The tendering of acceptances and instructions in respect of securities that a person does not own, and the failure of systems designed to ensure the veracity of the information reported to the market regarding facility acceptances, may result in target holders and the market being misled, or the principles in s602 being undermined: see RG 9.510–RG 9.511.
- RG 9.526 Any person who abuses, or makes potentially misleading disclosures about, an acceptance facility risks further regulatory action—including an application to the Takeovers Panel for a declaration of unacceptable circumstances.

L Joint bids and schemes

Key points

Joint bid or scheme arrangements that result in the joint bidders or acquirers having voting power of over 20% will often be prohibited by s606. These arrangements may also discourage rival bids or scheme proposals and detract from an efficient and competitive market for control.

We may give relief to allow two or more bidders or acquirers to enter into joint arrangements. Our relief will be subject to conditions that are designed to address the concern that the joint arrangements might discourage an auction for control of the target, and that seek to ensure that the price offered is acceptable to a majority of disinterested target security holders.

Issues associated with joint bids and schemes

- RG 9.527 A joint bid or scheme involves two or more parties (joint bidders or acquirers) agreeing to seek control of a target entity by a takeover bid (joint bid) or a Pt 5.1 compromise or arrangement (joint scheme).
- RG 9.528 To facilitate the bid for joint control, the parties will generally agree to exercise power over the voting or disposal of securities jointly. Under s608(1), when the parties enter into these joint bid or scheme arrangements, they will be taken to each have a relevant interest in the other joint bidder or proponent's securities and to be associates of each other under s12.
- RG 9.529 Depending on the joint bidders or acquirers' pre-existing interests in voting shares in the target, each joint bidder or proponent's voting power in an entity may increase to a level prohibited by s606(1) as a result of entering into the joint arrangements. Without relief, the parties may therefore be prevented from entering into the joint arrangements.

Deterrent effect of joint bids and schemes

- RG 9.530 The entry into joint bid or scheme arrangements will give each joint bidder or proponent the voting power of the collective pre-bid stake (i.e. the sum of each joint bidder or proponent's voting power in the target). The existence of this higher pre-bid stake, or even the mere fact of the parties joining forces, may discourage rival bids or schemes and any ensuing auction for control of the target.
- RG 9.531 The deterrent effect of the joint bid or scheme arrangements may accordingly deprive non-associated security holders in the target of a fair and reasonable price for their securities.

- RG 9.532 Consequently, a joint bid or scheme arrangement that is not subject to appropriate conditions may detract from an efficient and competitive market for control of voting securities in the target.

Entering into joint arrangements

ASIC relief: Joint bids and schemes

- RG 9.533 We may give relief to facilitate joint bids or schemes where s606 may otherwise have prohibited the bidders or acquirers from coming together to make the bid or propose the scheme. Our relief will generally be subject to each of the conditions set out in Table 8.
- RG 9.534 The conditions of our relief are designed to address the concern that the joint bid or scheme arrangements might deter rival offers, and seek to ensure that the price offered is acceptable to the majority of the holders of securities in which the joint bidders or acquirers and their associates do not have voting power.

Table 8: Conditions of relief for joint bids and schemes

Condition	Cross-references for further explanation
<p>1. Acceptance by non-associated shareholders</p> <p>In the case of a joint bid, the offers must be subject to a condition that there are acceptances for a minimum of 50.1% of the bid class securities in respect of which the joint bidders do not have voting power at the beginning of the offer period.</p> <p>The bidder's statement must state that the joint bidders will not waive this condition.</p> <p>In the case of a joint scheme, the joint acquirers and their associates must not vote in the same class as other target holders.</p>	RG 9.535–RG 9.536
<p>2. Acceptance into higher rival bid / No vote against higher rival scheme</p> <p>The joint bidders or acquirers and their associates:</p> <ul style="list-style-type: none"> • must accept a rival bid that is higher than their bid or scheme proposal unless they match the rival bid; and • if a higher rival scheme of arrangement is proposed, must not vote against the scheme. 	RG 9.537–RG 9.543
<p>3. Expert reports</p> <p>The joint bidders or acquirers must use their best endeavours to have the target engage an independent expert to prepare a report on whether:</p> <ul style="list-style-type: none"> • in a joint bid—the bid is fair and reasonable to target holders who are not associates of the bidders; or • in a joint scheme—whether the scheme is in the best interests of the target holders. 	RG 9.544

Condition	Cross-references for further explanation
<p>4. Termination of joint bid arrangements</p> <p>The joint bidders or acquirers must immediately terminate any relevant agreements or arrangements relating to the joint bid or scheme if the bid or scheme for which relief was obtained:</p> <ul style="list-style-type: none"> • does not proceed (including, in a scheme, because the scheme did not receive the necessary majority under s411(4)(a), or the court makes an order, which is final and not appealable, not to approve the scheme under s411(4)(b)); or • fails because of a defeating condition that has neither been satisfied nor waived. 	RG 9.545

Acceptance by non-associated shareholders

RG 9.535 The non-waivable condition that non-associated holders representing at least 50.1% of the outstanding securities accept the bid, which we require when granting relief for a joint bid, is designed to address the concern that the increased voting power of the joint bidders may determine the outcome of the bid. It provides the non-associated shareholders with a collective power of veto over the terms of the offer.

Note: See also *Lion-Asia Resources Pte Ltd* [2009] ATP 25 at 24.

RG 9.536 In a joint scheme, even if relief is not required, interested parties should either not vote in favour of the resolution to approve the scheme, or should vote in a separate class: see RG 60.94. Accordingly, class distinction, and the approval thresholds in a scheme, will generally afford a suitable proxy to the non-waivable condition imposed in a joint bid.

Higher rival bid or scheme

RG 9.537 We require joint bidders and acquirers, and their associates, to accept or match a higher rival bid to address the risk that the increased stake held by the joint bidders or acquirers under the joint bid or scheme arrangements may deter a rival bidder from launching a higher bid and any ensuing auction for control. In the case of a higher rival scheme of arrangement, joint bidders or acquirers and their associates must not vote against the scheme.

Note: We will assess which associates of the bidder this requirement applies to when determining an application for relief. We will generally require that an associate is bound where it is reasonable for the bidders or acquirers to procure the associate to be bound by the condition.

RG 9.538 A higher rival bid or scheme, under this condition, is a bid or a scheme offering more than 105% of the value of the consideration offered by the joint bidders or acquirers. We will require joint bidders or acquirers to accept a higher rival takeover bid for their entire joint holding unless they increase their bid to match the rival bid within seven days after the start of the offer

period of the rival bid. We will only require joint bidders to accept a higher rival bid after that bid has become unconditional except for ‘prescribed occurrence’ conditions.

- RG 9.539 Given the differences between bids and schemes (including that a scheme requires court approval and a resolution of members passed by the majority specified in s411(4)(a)(ii)), we will require that the joint bidders and their associates not vote against a higher rival scheme even though the rival scheme will not be unconditional at the time of the vote.

How we will administer this condition

- RG 9.540 Both the joint bidders or acquirers and the rival offerors may offer consideration in the form of cash, listed or unlisted scrip, or a combination of cash and listed or unlisted scrip. Where scrip, or a combination of cash and scrip, is on offer under either, we will consider whether to require the joint bidders or acquirers to accept the rival bid (or, in the case of a rival scheme, not vote against the scheme) on a case-by-case basis, taking into account factors such as the liquidity of the scrip and any expert report assessing the value of the scrip. We may consider what the net cash proceeds would be on a sale of the scrip by the joint bidders or acquirers within a reasonable period.

When we may not impose this condition

- RG 9.541 We may not impose this condition if a bidder or proponent with a relevant interest in the target securities enters into the arrangements with a second bidder or proponent that has less than 3% voting power in the target securities—unless:
- (a) we are concerned that a rival offeror may still be deterred by the joint bid or scheme arrangements; or
 - (b) the joint bidder or proponent came to have voting power of less than 3% as a result of transactions involving the other joint bidder or proponent or its associates.

Note: We may provide this relief where the exception in item 9 of s611 is not available to the joint bidders or acquirers.

- RG 9.542 We may also not impose this condition if one of the joint bidders or acquirers already holds or controls over 50% of the target’s voting shares or interests. This is because that bidder or proponent’s interests and voting power in the target would already itself be a significant deterrent to a rival bid. Accordingly, relative to the existing circumstances, the potential impact of the joint bid or scheme arrangements in preventing an auction for control may be less of a concern. As with our position discussed at RG 9.541(b), in deciding whether or not to impose this condition in these circumstances, we will similarly take into account any arrangements between the parties and

their associates that appear to have been designed to ensure that one joint bidder or proponent acquires control of over 50% for the purpose of avoiding the imposition of the condition.

- RG 9.543 If we do not impose a higher rival bid condition, we will impose an obligation on the joint bidders or acquirers to consult with us in a timely manner if a bona fide third-party proposal arises, and ensure that target holders are provided with all available material information about the third-party proposal and sufficient time to consider such information.

Note: For example, requirements designed to ensure that target holders are informed of any rival proposal could be included in any bid or merger implementation agreement that the joint bidders or acquirers negotiate.

Expert reports

- RG 9.544 The requirement to commission an independent expert report as part of the joint bid or scheme is designed to help the non-associated security holders determine whether the price offered by the joint bidders is fair and reasonable. This is similar to the requirement in s640(1)(a) that a target's statement include an expert report about whether the offer is fair and reasonable when the bidder's voting power in the target is 30% or more.

Termination of joint arrangements

- RG 9.545 The requirement to terminate joint bid or scheme arrangements when the bid or scheme falls away confines the relief to the particular joint bid or scheme that is proposed. Relief is not intended to facilitate joint bidders or acquirers retaining the increased voting power acquired under any agreements or arrangements relating to the joint bid or scheme, when they have not proceeded with the joint bid or scheme, or when a defeating condition of the bid has not been satisfied or waived.

Note: Our relief will also generally require that the joint bidders or acquirers disregard their temporarily elevated voting power when making acquisitions in purported reliance on the 3% creep exception in item 9 of s611.

Joint arrangements and s609(7)

- RG 9.546 Under s609(7), joint bid or scheme arrangements do not give rise to a relevant interest if they:
- (a) are conditional on a resolution under item 7 of s611 being passed;
 - (b) do not confer any control over, or power to substantially influence, the exercise of a voting right attached to securities; and
 - (c) do not restrict disposal of securities for more than three months from the date when the agreement is entered into.

RG 9.547 This temporary exception was introduced to address the difficulties arising because a person acquires a relevant interest through agreements that are conditional on item 7 approval before the approval is obtained (and therefore before the item 7 exception to the prohibition in s606 is available): s608(8).

Note: See the Explanatory Memorandum to the CLERP Bill, paragraph 7.62, and the Anomalies Report, pp. 21–25. See also RG 74.94–RG 74.96.

RG 9.548 Joint bidders or acquirers may seek to rely on s609(7) by making their joint bid or scheme arrangements subject to approval at a meeting of target holders in accordance with item 7 of s611. In doing so, the joint bidders or acquirers may be seeking to avoid the conditions that would otherwise generally apply to our relief.

RG 9.549 However, the fact that joint bid or scheme arrangements are made subject to approval under item 7 by the joint bidders or acquirers does not, in practice, alter the potential deterrent effect that the joint bid or scheme arrangements may have in discouraging rival bids and any resulting auction for control of the target during the period in which the joint bidders or acquirers are relying on s609(7). It is this potential deterrent effect that the protections in ASIC's relief are designed to address, and that may otherwise mean that the joint bidders or acquirers' acquisition of control over the target does not take place in an efficient, competitive and informed market: s602(a).

Note: See also our general caution in relation to reliance on the exceptions in s611 in combination: Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (RG 6) at RG 6.14 and RG 74.97–RG 74.103.

RG 9.550 We may seek a declaration of unacceptable circumstances from the Takeovers Panel, or take other regulatory action, where it is apparent that joint bidders or acquirers have sought to avoid the protections imposed under our relief by entering into joint bid or scheme arrangements in purported reliance on s609(7).

ASIC relief: Alternative form of relief for joint arrangements subject to holder approval

RG 9.551 As an alternative to providing relief for joint bids or schemes by way of an exemption from the general prohibition in s606, we will consider requests for relief to extend the maximum three-month period during which s609(7) may apply with respect to joint bid or scheme arrangements that both:

- (a) meet the requirements of our policy (including the applicable conditions set out in Table 8); and
- (b) are conditional on item 7 approval.

RG 9.552 In the past, relief in this form has generally been sought by joint acquirers proceeding by way of scheme of arrangement to address timing difficulties

associated with putting the item 7 resolution to holders at the same time as the scheme proposal.

- RG 9.553 When granting relief in this form, we will apply the same considerations and conditions as if we were considering relief for arrangements that are not subject to item 7 approval. The relief must also be sought before the joint bid or scheme arrangements are entered into for the reasons discussed at RG 9.549–RG 9.550.

M Non-compliant bids

Key points

A bid carried out in contravention of certain provisions may be non-compliant for the purposes of items 1–4 of s611: s612. In certain circumstances, we may give case-by-case relief where a bidder has or may have contravened one of these provisions.

Our relief is considered exceptional and should be sought before making the takeover offers.

Issues arising from a non-compliant bid

- RG 9.554 The exceptions from the general prohibition in items 1–4 of s611 do not apply if a takeover bid is carried out in breach of certain provisions listed in s612. In effect, this elevates the seriousness of the breach of the provisions listed in s612 because offers or acquisitions under, or in connection with, the bid may result in an additional breach of s606.
- RG 9.555 The s612 provisions include the minimum bid price rule in s621 and the procedural steps in s633(1) and 635(1)—so a failure to dispatch offers in time may lead to a breach of s606 on account of the bid being non-compliant.

Addressing a non-compliant bid

- RG 9.556 Under s659B, a bidder is prevented, before the end of the bid period, from applying to the court in relation to the takeover bid. The object of this limitation is to make the Takeovers Panel the main forum for resolving disputes about a takeover bid until the bid period has ended: s659AA. However, it may also prevent the bidder seeking an order validating an inadvertent breach of Ch 6 under s1325D before the close of the bid.

Note: In some cases, it may still be possible to seek remedial relief from a court in relation to certain technical defects during the bid period: see *Re Venturex Resources Ltd* (2009) 72 ACSR 358 with respect to the court's powers under s1325A(2). See also *Re Emerald Capital Limited* (2008) 68 ACSR 579 at [18] regarding remedial orders after a bid has come to an end due to the failure of a purported extension.

- RG 9.557 If a contravention of a provision listed in s612 occurs, the bidder may face uncertainty about whether its takeover bid will be unwound by a remedial order of the court following the bid. This is a particular issue where the contravention is elevated to a breach of s606. A court may perceive a breach

of s606 as more serious than other breaches. A breach of s606 may also have a more serious impact on the reputation of the bidder.

ASIC relief: Removing the effect of s612

- RG 9.558 We may give case-by-case relief to a bidder from the effect of s612 if the bidder has, or may have, breached the relevant provisions because of:
- (a) the bidder's inadvertence or mistake (provided that the bidder was not acting recklessly or without appropriate regard to its obligations);
 - (b) the bidder not having been aware of a relevant fact or occurrence; or
 - (c) circumstances beyond the control of the bidder.
- RG 9.559 As a condition of relief, we may require the bidder to take corrective action to address the effect of the contravention.
- RG 9.560 Our relief will mean that the breach does not give rise to a contravention of the general prohibition in s606—however, it will not cover the primary breach of the relevant provisions listed in s612. Third parties will retain a cause of action for the original breach (subject to s659C).
- RG 9.561 We are prepared to give this relief because, in some cases, if a bidder inadvertently breaches the takeover provisions, s612 should not automatically elevate the seriousness of that breach. Our relief seeks to reduce the uncertainty that the bidder may face about whether its takeover bid will be unwound by a remedial order of the court following the bid.
- RG 9.562 We expect that applications for this relief will be exceptional. We will normally consult with directors of the target before granting this relief.

When we will not give relief

- RG 9.563 We will not give relief from the operation of s612 after the bidder sends its bidder's statement and offers to holders. This is because, generally, we cannot give relief for breaches of the Corporations Act that have already taken place: see RG 51.67.
- RG 9.564 If the bidder has contravened a provision listed in s612, the bidder will only breach s606 when it makes its offers under the bid. Under s606(4), a person must not make an offer where they would contravene the general prohibition if the offer were accepted.

Takeovers Panel proceedings

- RG 9.565 If the Takeovers Panel has considered the issue and refused to make a declaration of unacceptable circumstances, the type of order a court may

make is limited under s659C to an order to pay compensation, rather than a remedial order.

- RG 9.566 However, the limitation in s659C cannot apply unless there has been an application to the Takeovers Panel for a declaration of unacceptable circumstances.
- RG 9.567 If an application has been made, or is likely to be made, to the Takeovers Panel under s657A for a declaration concerning the circumstances amounting to the breach, we may not give the relief before considering the decision of the Panel. If the Panel refuses to make a declaration, there may be less need for the relief as the bidder may not face uncertainty about whether its takeover bid will be unwound by a remedial order of the court following the bid: s659C.

Appendix: Status of our previous guidance

- RG 9.568 This guide updates our previous guidance on certain aspects of the takeover bid process. Additional updated guidance on other aspects of takeover bids is provided in:
- (a) RG 5 *Relevant interests and substantial holding notices*;
 - (b) RG 6 *Takeovers: Exceptions to the general prohibition*; and
 - (c) RG 10 *Compulsory acquisitions and buyouts*.
- RG 9.569 Together, these four guides consolidate and replace a number of pre-existing regulatory guides, taking into account changes in the law since the guides were first published. The regulatory guides replaced by this guide on takeover bids are listed in Table 9.

Table 9: Superseded regulatory guides

Number	Name of guide
SRG 6	<i>Variation of takeover offers</i>
SRG 10	<i>Classes of shares</i>
SRG 11	<i>Disclosure of offerors' intentions in takeover documents</i>
SRG 27	<i>Takeovers: Minimum acceptance conditions</i>
SRG 35	<i>Collateral benefits in takeovers</i>
SRG 37	<i>Takeovers: Financing arrangements</i>
SRG 145	<i>Collateral benefits: Takeovers funding and pre-bid purchases</i>
SRG 159	<i>Takeovers, compulsory acquisitions and substantial holding notices</i> Note: Parts of SRG 159 have been replaced by other guides.
SRG 171	<i>Anomalies and issues in the takeover provisions</i> Note: Parts of SRG 171 have been replaced by other guides.

Ongoing guidance on the CLERP amendments to the managed investment provisions

- RG 9.570 For the avoidance of doubt, the policy in the pre-existing Section A of RG 171 has not been withdrawn. It addresses an anomaly in the law—specifically, s601FM—which allows members of a registered managed investment scheme to remove the responsible entity by taking action under Div 1 of Pt 2G.4.

- RG 9.571 Class Order [CO 13/519] *Changing the responsible entity* modifies s601FM to make it clear that the members of a listed registered managed investment scheme may request or call a meeting to consider and vote on an ordinary resolution to change the responsible entity. This is consistent with the position for changing company directors.
- RG 9.572 The action that members can take under Div 1 of Pt 2G.4 requires them to consider a special or extraordinary resolution only: see s252B–252D. However, s252L(1B)(c) allows members to put an ordinary resolution forward at a meeting to change the responsible entity.
- RG 9.573 This issue arises because s604 of the CLERP Act extended the takeover provisions to listed managed investment schemes: Explanatory Memorandum to the CLERP Bill. The explanatory memorandum states that s601FM:
- ... mak[es] it clear that the manager of a listed managed investment scheme can be replaced by a simple majority of unit holders who vote at a duly convened meeting.
- RG 9.574 Austin J considered s601FM in *MTM Funds Management Ltd v Cavalane Holdings* (2000) 158 FLR 121. His Honour found at 134 that:
- The amending legislation systematically changes many provisions to reflect the drafter's view that a resolution to remove the responsible entity should be an ordinary resolution in the case of a listed scheme ... Section 252B is, however, not amended. If the consequence of not amending it is that a special or extraordinary resolution is required, then the clear legislative policy enunciated in the explanatory memorandum is thwarted ... s601FM(1) provides that the resolution for removal and replacement is to be an ordinary resolution, and s252B merely deals with the machinery for requisitioning the meeting.

Key terms

Term	Meaning in this document
acquirers	In relation to a joint scheme, two or more parties who are proposing to acquire a controlling interest in a target entity under the joint scheme
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
AIG	Australian Institute of Geoscientists
AusIMM	Australasian Institute of Mining and Metallurgy
Anomalies Report	Legal Committee of the Companies and Securities Advisory Committee, <i>Anomalies in the takeovers provisions of the Corporations Law</i> , March 1994
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s9 of the Corporations Act
ASX	The exchange market operated by ASX Limited
bid class	Has the meaning given in s9 of the Corporations Act
bidder	A bidder under a takeover bid as defined in s9 of the Corporations Act
bidder's statement	Has the meaning given in s9 of the Corporations Act
bid period	Has the meaning given in s9 of the Corporations Act
Ch 6 (for example)	A chapter of the Corporations Act (in this example numbered 6)
CHESS	Clearing House Electronic Subregister System
class	A class of securities
CLERP Act	<i>Corporate Law Economic Reform Program Act 1999</i>
CLERP Bill	Corporate Law Economic Reform Program Bill 1998
[CO 13/521] (for example)	An ASIC class order (in this example numbered 13/521)

Term	Meaning in this document
consent requirement	The requirement for an issuer to obtain the consent of a person to include in a disclosure document or PDS a statement by the person, or a statement said in the disclosure document or PDS to be based on a statement by the person, under s716(2) or 1013K(1)
convertible securities	Has the meaning given in s9 of the Corporations Act as modified by [CO 13/520]
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CSLRC Report	Companies and Securities Law Review Committee's <i>Report to the Ministerial Council on partial takeover bids</i> (1985)
defeating condition	Has the meaning given in s9 of the Corporations Act
disposal relevant interest	A relevant interest disregarding the operation of: <ul style="list-style-type: none"> • s608(1)(b) (relevant interest arising from the power to exercise or control the exercise of voting rights); • 608(3)(a) (deemed relevant interest arising from a voting power of 20% or more); and • 608(8) (accelerated relevant interest)
financial market	As defined in s767A of the Corporations Act, a facility through which offers to acquire or dispose of financial products are regularly made or accepted
fully paid securities	Securities for which no amount remains unpaid
general prohibition	The prohibition on offers, invitations, acquisitions and transactions in s606 of the Corporations Act
GN 21 (for example)	Takeovers Panel guidance note (in this example numbered 21)
holder	A holder of securities
in the money	For a convertible security, that the cost of exercising the convertible security is less than the market value of the underlying security
joint bid or scheme	A takeover bid or proposal for a Pt 5.1 compromise or arrangement under which two or more parties together seek to acquire control of a target entity
JORC Code	Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, prepared by the Joint Ore Reserves Committee of the AusIMM, AIG and Minerals Council of Australia (2012 edition)

Term	Meaning in this document
old Corporations Law	The law set out in s82 of the <i>Corporations Act 1989</i> , which preceded the Corporations Act. Unless otherwise indicated, a reference to the old Corporations Law is a reference to the law as it stood prior to implementation of the CLERP Act
option	A contractual arrangement under which one party has the right, but not the obligation, to buy or sell an underlying asset from the other at a set price and before a specified future time
out of the money	For a convertible security, that the cost of exercising the convertible security is more than the market value of the underlying security
partly paid securities	Securities for which some amount remains unpaid and may be subject to a call from the company
prescribed financial market	A financial market prescribed in reg 1.0.02A of the Corporations Regulations
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
Pt 6.4 (for example)	A part of the Corporations Act (in this example numbered 6.4)
reg 6.8.01 (for example)	A regulation of the Corporations Regulations (in this example number 6.8.01)
relevant interest	Has the meaning given in s608 and 609 of the Corporations Act
RG 60 (for example)	An ASIC regulatory guide (in this example numbered 60)
s602 (for example)	A section of the Corporations Act (in this example numbered 602), unless otherwise specified
scrip bid	A bid under which the consideration offered is new or existing securities
securities	Has the meaning given to that term for the purposes of Ch 6A in s92(3) of the Corporations Act
Settlement Rules	ASX Settlement Operating Rules
small parcel	A parcel of securities that does not meet the definition of 'marketable parcel' or 'minimum parcel' in the relevant rules governing the operation of a financial market (or if there is no definition, a parcel of less than \$500 in value based on the daily closing price of the securities)
substantial holding	Has the meaning given in s9 of the Corporations Act

Term	Meaning in this document
supplementary statement	A supplementary bidder's statement or supplementary target's statement of the kind referred to in Div 4 of Pt 6.5 of the Corporations Act
takeover bid	Has the meaning given in s9 of the Corporations Act
takeover provisions	The provisions of Ch 6 of the Corporations Act that regulate the acquisition of corporate control
target	Has the meaning given in s9 of the Corporations Act
target's statement	Has the meaning given in s9 of the Corporations Act
Valmin Code	Code for the Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports, prepared by the Valmin Committee (2005 edition)
voting power	Has the meaning given in s610 of the Corporations Act

Related information

Headnotes

acceptance facilities, anomalies, associates, bid class, bidder's statement, classes of securities, collateral benefits, consent, defeating conditions, foreign holders, joint bids, maximum acceptance condition, notice of status of conditions, notice of variation, relevant interest, small parcels, supplementary statements, takeover bids, target's statement

Class orders

[CO 00/2338] *Relief from the minimum bid price principle—s621(3)*

[CO 07/429] *Consent to quote: Citing trading data and geological reports in takeovers*

[CO 13/519] *Changing the responsible entity*

[CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition*

[CO 13/521] *Takeover bids*

[CO 13/523] *Citation of experts and consent to quote*

[CO 13/525] *On-sale disclosure relief for scrip bids and schemes of arrangement*

[CO 13/528] *Changes to a bidder's statement between lodgement and dispatch*

Regulatory guides

RG 5 *Relevant interests and substantial holding notices*

RG 6 *Takeovers: Exceptions to the general prohibition*

RG 7 *Calculating time periods*

RG 10 *Compulsory acquisitions and buyouts*

RG 23 *Updating and correcting prospectuses and application forms*

RG 25 *Takeovers: False and misleading statements*

RG 45 *Mortgage schemes: Improving disclosure for retail investors*

RG 51 *Applications for relief*

RG 55 *Statements in disclosure documents and PDSs: Consent to quote*

RG 59 *Announcing and withdrawing takeover bids (s653 and 746)*

RG 60 *Schemes of arrangement*

RG 66 *Transaction-specific disclosure*

RG 71 *Downstream acquisitions*

RG 74 *Acquisitions approved by members*

RG 92 *Procedural fairness to third parties*

RG 111 *Content of expert reports*

RG 112 *Independence of experts*

RG 161 *Share and interest sale facilities*

RG 163 *Takeovers: Minimum bid price principle—s621*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 170 *Prospective financial information*

RG 228 *Prospectuses: Effective disclosure for retail investors*

RG 230 *Disclosing non-IFRS financial information*

Legislation

Companies (Acquisition of Shares) Act 1980, s16(2)(h), 16(2)(j)

Corporations Act, Ch 6, s9, 12(2), 52A, 92(3), 252B–252D, 252L(1B)(c), 351, 601CG(5), 601FM, 670A, 670B, 670C, 710–713, 1041E, 1041H, 1041I, 1274(8), 1308, 1324, 1325A, 1325A(2), 1325D; Corporations Regulations, regs 6.8.01, 7.11.24

Explanatory Memorandum to the CLERP Bill, paragraphs 2.40, 7.62, 7.68–7.69, 7.83; CLERP Act, s604

Explanatory Memorandum to the Companies and Securities Legislation Amendment Bill 1986; *Companies and Securities Legislation Amendment Act 1986*

Cases

AAPT Ltd v Cable & Wireless Optus Ltd [1999] NSWSC 509 (*AAPT*)

Aberfoyle Ltd v Western Metals Ltd (1998) 28 ACSR 187 (*Aberfoyle*)

Albert v Votraint No 320 Pty Ltd (1987) 13 ACLR 336

- Ampolex Ltd v Mobil Exploration & Producing Australia Pty Ltd* (1996)
19 ACSR 354 (*Ampolex*)
- Associated Dairies Ltd v Central Western Dairy Ltd* (1993) 11 ACLC 827
- AurionGold Ltd* [2002] ATP 13
- Austock Group Limited* [2012] ATP 12
- Australian Consolidated Investments Ltd v Rossington Holdings Pty Ltd*
(No 2) (1992) 10 ACLC 600
- Australian Leisure & Hospitality Group Limited 01* [2004] ATP 19
- Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55
- Blaze Asset Pty Ltd v Target Energy Ltd* [2009] FCA 698
- Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 28
ACSR 1
- Bride as Trustees for the Pinwernying Family Trust v KMG Hungerfords*
(1991) 109 FLR 256
- Citect Corporation Ltd* [2006] ATP 6
- Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 6 ACLC 389
- Cumberland Credit Corporation Ltd v TNT Australia Pty Ltd* (1988) 13
ACLR 371 (*Cumberland*)
- Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997)
142 ALR 750
- Gantry Acquisition Corporation v Parker & Parsley Petroleum Australia Pty
Ltd* (1994) 51 FCR 554
- Goldlink IncomePlus Limited 04* [2009] ATP 2
- Gosford Quarry Holdings Limited* [2008] ATP 11
- ICAL Ltd v County Natwest Securities Aust Ltd* (1988) 13 ACLR 129 (*ICAL*)
- Lion-Asia Resources Pte Ltd* [2009] ATP 25
- Mildura Co-operative Fruit Company Limited* [2004] ATP 5
- Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148
- MTM Funds Management Ltd v Cavalane Holdings* (2000) 158 FLR 121
- Multiplex Prime Property Fund 01 and 02* [2009] ATP 18

National Foods Limited 01 [2005] ATP 8

Pancontinental Mining Ltd v Goldfields Ltd (1995) 16 ACSR 463

Pinnacle VRB Ltd 04 [2001] ATP 7

Primelife Corporation Ltd v Aevum [2005] NSWSC 269

Prowse v McIntyre (1961) 111 CLR 264

QIW Retailers Ltd v Davids Holdings Pty Ltd (No 1) (Supreme Court (Qld), Whyte J, 12 June 1992, No 848 of 1992, unreported)

Re Anaconda Nickel Ltd (Nos 2, 3, 4 & 5) [2003] ATP 4

Re Anaconda Nickel Ltd (No 8) [2003] ATP 7

Re Anaconda Nickel Ltd (No 9) [2003] ATP 8

Re Archaean Gold NL (1997) 23 ACSR 143

Re Emerald Capital Limited (2008) 68 ACSR 579

Re Hills Motorway Ltd (2002) 43 ACSR 101

Re iSOFT Group Ltd [2011] FCA 680

Re Pinnacle VRB Ltd (No 3) [2001] ATP 2

Re Venturex Resources Ltd (2009) 177 FCR 391 and 72 ACSR 358

S.A. Liquor Distributors Ltd [2002] ATP 22

Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Pty Ltd (1993) 177 CLR 508

Savage Resources Ltd v Pasminco Investments Pty Ltd (1998) 30 ACSR 1

Skywest Limited 01 [2004] ATP 10

Skywest Limited 04 [2004] ATP 26

Sovereign Life Assurance Co v Dodd [1892] 2 QB 573

Stirling Resources NL v Capital Energy NL (1996) 19 ACSR 701

Sturla v Freccia [1874–80] All ER Rep 657

Taipan Resources NL (No 3) [2000] ATP 17

Taipan Resources NL (No 10) [2001] ATP 5

Taipan Resources NL (No 11) [2001] ATP 5

TNT Australia Pty Ltd v Normandy Resources NL (1989) 7 ACLC 309 and 15 ACLR 99

Tower Software Engineering Pty Ltd 01 [2006] ATP 20

Wright Heaton Ltd v PDS Rural Products Ltd [1982] 2 NSWLR 301

Media and information releases

01-293MR ASIC signs MOU with Takeovers Panel, 20 August 2001

07-114MR ASIC technical relief facilitates final stages of Qantas bid, 3 May 2007

09-225MR ASIC gives credit ratings agencies improved control over ratings use, 12 November 2009

Takeovers Panel guidance notes

GN 13 *Broker handling fees*

GN 14 *Funding arrangements*

GN 18 *Takeover documents*

GN 21 *Collateral benefits*

GN 22 *Recommendations and undervalue statements*

Other documents

Companies and Securities Law Review Committee, *Report to the Ministerial Council on partial takeover bids*, 1985

Legal Committee of the Companies and Securities Advisory Committee, *Anomalies in the takeovers provisions of the Corporations Law*, March 1994

Corporations Law Simplification Program Task Force, *Takeovers—Proposal for simplification*, January 1996

Companies and Securities Advisory Committee, *Recommendations for reform of s621(4) and 623(2) & (3) of the Corporate Law Economic Reform Program Bill 1998*, December 1998