



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 234

Remaking ASIC class orders on takeovers and schemes of arrangement

August 2015

About this paper

This consultation paper sets out ASIC's proposals to remake a number of our class orders relating to takeovers and schemes of arrangement into ASIC instruments. Under the *Legislative Instruments Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from law firms, industry and other interested parties on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 05/850] *Unsolicited offers under a regulated foreign takeover bid* and Class Order [CO 02/259] *Downstream acquisitions: foreign stock markets*, which are due to expire on 1 April 2016;
- Class Order [CO 00/2338] *Relief from the minimum bid price principle—s621(3)*, which is due to expire on 1 October 2016;
- Class Order [CO 02/249] *Approved overseas financial markets—s257B(7)* and Class Order [CO 04/523] *Investor directed portfolio services takeover relief*, which are due to expire on 1 April 2017; and
- Class Order [CO 09/459] *Takeovers relief for accelerated rights issues*, which is due to expire on 1 October 2019.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 234.

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 paper was issued on 4 August 2015 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 2 October 2015 to:

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What will happen next?

Stage 1	4 August 2015	ASIC consultation paper released
Stage 2	2 October 2015	Comments due on the consultation paper
Stage 3	December 2015	Commencement of remade instrument(s)

A Background

Key points

Legislative instruments, such as class orders, are repealed automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

Purpose of 'sunseting' legislative instruments

- 1 Under the *Legislative Instruments Act 2003* (Legislative Instruments Act), legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October, whichever date occurs first, on or after the 10th anniversary of its registration on the Federal Register of Legislative Instruments (FRLI). Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument such as a class order must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

Our approach to remaking legislative instruments

- 3 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC's priorities of promoting investor and financial consumers trust and confidence and ensuring markets are fair, orderly and transparent.
- 4 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunseting, to ensure:
 - (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
 - (b) the instrument retains its effectiveness in addressing an identified issue or problem.

- 5 Generally, a Regulation Impact Statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the [Australian Government Guide to Regulation](#). We will review, including public consultation, all class orders that have a significant regulatory impact before the scheduled sunset date. Where our review finds that a class order is not operating effectively and efficiently, we will prepare a RIS to assess our proposed changes to the class order. Where the class order is operating effectively and efficiently, we will remake the class order without substantive changes.

B Remaking ASIC class orders

Key points

We are proposing to remake:

- Class Order [CO 05/850] *Unsolicited offers under a regulated foreign takeover bid*, which sunsets on 1 April 2016;
- Class Order [CO 02/259] *Downstream acquisitions: foreign stock markets*, which sunsets on 1 April 2016;
- Class Order [CO 00/2338] *Relief from the minimum bid price principle—s621(3)*, which sunsets on 1 October 2016;
- Class Order [CO 02/249] *Approved overseas financial markets—s257B(7)*, which sunsets on 1 April 2017;
- Class Order [CO 04/523] *Investor directed portfolio services takeover relief*, which sunsets on 1 April 2017; and
- Class Order [CO 09/459] *Takeovers relief for accelerated rights issues*, which, sunsets on 1 October 2019.

We have formed the preliminary view that these class orders are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework.

Each class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instruments, which reflect the minor amendments proposed in this paper, are available on our website at www.asic.gov.au/cp under CP 234.

Your feedback

- 6 You are invited to comment on any of our proposals to remake the ASIC class orders in this section, including whether you think that the class orders are currently operating effectively and efficiently.

Unsolicited offers under foreign takeover bids—[CO 05/850]

Background

- 7 Division 5A of Pt 7.9 of the *Corporations Act 2001* (Corporations Act) regulates the making of unsolicited offers to purchase financial products.
- 8 Unsolicited offers must set out certain information in a clear, concise and effective manner, including information about:
- (a) the market price of the financial product; or

- (b) if applicable:
 - (i) a fair estimate of the value of the financial product as at the date of the offer; and
 - (ii) an explanation of the basis on which the estimate was made (Div 5A of Pt 7.9).

9 The value of off-market financial products can be uncertain if there is no independently verifiable price. The disclosure provisions in Div 5A of Pt 7.9 operate to ensure adequate investor protection in situations where an investor may not know the value of their financial products. The primary intention is to stop ‘low-ball offers’ being made to unsophisticated investors.

10 A recognised shortcoming of Div 5A of Pt 7.9 is that it potentially captures unsolicited offers that are made or received in Australia in connection with a takeover bid for a foreign company. The effect of this is that offers made to Australian holders of securities in a foreign company under a foreign takeover bid must be accompanied by an offer document in accordance with Div 5A of Pt 7.9.

11 In October 2005, we released [CO 05/850] to address this problem. We exempted listed bodes and their officers from compliance with Div 5A of Pt 7.9 in relation to an unsolicited offer to acquire securities of a foreign company, as long as the unsolicited offer is one of a number of offers made under a compromise or arrangement that is regulated by or under a law that is in force or in a part of an eligible foreign country.

12 The exemption applies on the condition that a person take reasonable steps to ensure that the regulated foreign takeover bid or scheme is carried out in accordance with relevant regulatory requirements.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2016, we propose to continue the relief currently given by [CO 05/850] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Unsolicited Offers—Foreign Bids) Instrument 2015/XX at Attachment 1 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following direct link: [\[CO 05/850\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;
- (b) reflect the current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Rationale

- 13 Foreign takeover bids regulated in certain jurisdictions are likely to be accompanied by adequate disclosure because these jurisdictions have takeover regimes that offer comparable levels of disclosure and investor protection to that provided in Australia. These regulated foreign takeover bids should not be subject to the disclosure provisions in Div 5A of Pt 7.9.
- 14 The relief afforded by [CO 05/850] enables the efficient making of unsolicited offers under a regulated foreign takeover bid while simultaneously maintaining adequate disclosure for investors.
- 15 Further, this relief facilitates international comity by ensuring Australian legislation does not impede a bona fide and otherwise lawful takeover offer for a foreign company. The relief ensures that takeover bids, particularly in relation to foreign companies that may only have a small percentage of Australian shareholders, are not discouraged.
- 16 The relief in [CO 05/850] safeguards against excessive costs or obstacles for foreign business transactions.

Approved foreign financial markets—[CO 02/249] and [CO 02/259]

Background

[CO 02/249]

- 17 Division 2 of Pt 2J.1 regulates share buy-backs. A company may buy back its own shares if:
- (a) the buy-back does not materially prejudice the company's ability to pay its creditors; and
 - (b) the company follows the procedures in Div 2 of Pt 2J.1.
- 18 On-market buy-backs are one type of buy-back under the Corporations Act. An on-market buy-back is defined in s9 of the Corporations Act as a buy-back by a listed corporation on a prescribed financial market in the ordinary course of trading on the market.
- 19 An on-market buy-back also occurs when an offer is made in a financial market outside of Australia that ASIC has declared in writing to be an approved financial market for the purposes of s257B(7).
- 20 In March 2002, we released [CO 02/249], which sets out our list of approved overseas financial markets. In 2005, we amended [CO 02/249] to include the JSE Securities Exchange as an approved overseas financial market: see Superseded Class Order [SCO 07/144] *Variation of Class Order [CO 02/249]*.

[CO 02/259]

- 21 Unless a relevant exception applies, s606 prohibits an acquisition that increases a person's voting power in a listed company (or an unlisted company with more than 50 members):
- (a) from 20% or below to more than 20%; or
 - (b) from a starting point that is above 20% and below 90%.
- 22 Item 14 of s611 (item 14) exempts downstream acquisitions from the s606 prohibition when the acquisition results from an upstream acquisition of a relevant interest in voting shares of a body corporate that is included in the official list of:
- (a) a prescribed financial market (including ASX); or
 - (b) a foreign body conducting a financial market that is a body approved in writing by ASIC.
- 23 The policy intention behind item 14 is to:
- (a) preserve the free flow of shares in widely held entities listed on appropriate exchanges;
 - (b) prevent companies constructing a takeover defence through the acquisition of strategic parcels in downstream companies; and
 - (c) enhance international comity through the removal of obstacles to primarily foreign business transactions.
- 24 In March 2002, we released [CO 02/259] to enable foreign financial markets that have comparable disclosure requirements to ASX to rely on the exemption provided in item 14.
- 25 [CO 02/259] was amended in 2005 to include the JSE Securities Exchange South Africa on the list of approved foreign bodies conducting a financial market for the purposes of item 14: see Superseded Class Order [CO 05/84] *JSE Securities Exchange South Africa added to ASIC's downstream acquisition takeover relief*.

Proposal

- B2** To preserve their effect beyond their respective sunset dates of 1 April 2017 and 1 April 2016, we propose to continue the relief currently given by [CO 02/249] and [CO 02/259] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Approved Foreign Financial Markets) Instrument 2015/XX at Attachment 2 to this consultation paper. You can access the current instruments on www.comlaw.gov.au by clicking on the following direct links: [\[CO 02/249\]](#) and [\[CO 02/259\]](#).

The only changes proposed are to:

- (a) define 'eligible foreign market' to accommodate the recent increase in acquisition activity by owners of exchanges;
- (b) update the name of the legislative instrument;
- (c) reflect current drafting practice and update the format of the current document;
- (d) simplify the drafting to give greater clarity;
- (e) update legislative references and definitions; and
- (f) correct any minor drafting errors.

Rationale

- 26 We have proposed to combine [CO 02/249] and [CO 02/259] into one new legislative instrument so that the list of overseas financial markets is the same for the purposes of s257B(7) (on-market buy-backs) and item 14 (downstream acquisitions through a listed foreign company).
- 27 We consider the relief in [CO 02/249] and [CO 02/259] beneficial to both Australian investors and foreign entities because:
- (a) it facilitates international comity through the removal of excessive costs and regulatory obstacles to primarily foreign business transactions; and
 - (b) it maintains sufficient investor disclosure.
- 28 We have proposed to include a definition of 'eligible foreign market' in draft ASIC Corporations (Approved Foreign Financial Markets) Instrument 2015/XX. The draft instrument will provide relief to a foreign body conducting an 'eligible foreign market'.
- 29 We consider that this new approach in wording more effectively accommodates the increase in acquisition activity by owners of exchanges, while at the same time ensures that the foreign financial markets capable of relying on the relief are restricted to those with comparable disclosure regimes to ASX.

Takeovers relief for accelerated rights issues—[CO 09/459]

Background

- 30 A traditional rights issue is made on a pro rata basis—that is, an entity offers existing holders the opportunity to subscribe for new securities or interests in proportion to their holding of securities or interests in that class. The terms of the offer are the same for each holder, including the timing of the offers.

- 31 By contrast, in an accelerated rights issue offers generally proceed in two tranches: institutional and retail. Institutional holders are required to deal with their pro rata entitlement before other holders and are generally allotted their securities first. This allows issuers to receive a significant proportion of the offer proceeds from their institutional holders in a very short timeframe.
- 32 In the absence of an applicable exemption, a person is prohibited under Ch 6 of the Corporations Act from acquiring a relevant interest in securities in an entity as a result of participating in an accelerated rights issue if that acquisition would result in the person's or someone else's voting power in the entity breaching the takeover thresholds stipulated in s606.
- 33 Item 10 of s611 provides an exemption for traditional rights issues that satisfy a number of conditions (e.g. the terms of all the rights issues offers are the same); however, this exemption does not extend to accelerated rights issues.
- 34 In June 2009, we released [CO 09/459], which notionally inserts item 10A of s611 (item 10A) to provide an exemption from the takeovers provisions in Ch 6 for accelerated rights offers.
- 35 The accelerated rights issue exception in item 10A is similar to the rights issue exception, but allows for:
- (a) timing differences between the offer periods and dates of allotment for retail and institutional holders, to accommodate accelerated rights issue structures; and
 - (b) differences in the offers resulting from the ability of retail holders, but not institutional holders, to trade their rights.
- 36 The exception only applies where the retail allotment of the accelerated rights issue occurs within two months of the allotment to institutional investors. The modification does not extend to shortfall offers or mean that an offeror does not have to comply with the nominee process in s615.

Proposal

B3 To preserve its effect beyond the sunset date of 1 October 2019, we propose to continue the relief currently given by [CO 09/459] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Takeovers—Accelerated Rights Issues) Instrument 2015/XX at Attachment 3 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following direct link: [\[CO 09/459\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;

- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Rationale

- 37 The relief currently offered by [CO 09/459] is desirable because it creates an exception for persons who will, for technical reasons, exceed the takeover threshold in s606 merely as a result of participating in an accelerated rights issue.
- 38 Without the exception provided by [CO 09/459], the market structure of many accelerated rights issues would lead to technical breaches of the Corporations Act due to the difference in timing of the take-up of the offer between institutional and retail investors.
- 39 It is our view that the current scope of relief provided by [CO 09/459] remains relevant to current policy settings and, accordingly, should be remade in substantially the same form.

Relevant interests in investor directed portfolio services—[CO 04/523]

Background

- 40 Investor directed portfolio services (IDPS) are custodial, transactional and consolidated reporting services that operate as a master fund, master trust or wrap service. They are designed to allow clients to manage and retain control of their investment portfolios with consolidated tax, transaction and performance reporting.
- 41 We treat IDPSs and IDPS-like schemes (platforms) as managed investment schemes for holding and dealing with investments selected by clients, unless they are exempted under relevant class orders. The financial product advice provisions of the Corporations Act apply where advice is given about using a platform.
- 42 Our policy on IDPS generally is set out in Regulatory Guide 148 *Platforms that are managed investment schemes* (RG 148). This policy was updated in 2013 following the release of Consultation Paper 176 *Review of ASIC policy on platforms: Update to RG 148* (CP 176).
- 43 Class Order [CO 13/763] *Investor directed portfolio services* defines the operator of an IDPS as ‘a public company that is a holder of an Australian

financial services licence that is authorised to operate an IDPS and who provides an IDPS or a function that forms part of the IDPS’.

44 An IDPS will be exempted from the managed investment scheme provisions and fundraising provisions if it has the prescribed features set out in RG 148.7.

45 In May 2004, we released [CO 04/523] to provide IDPS operators with an exemption from acquiring a relevant interest in securities held through the IDPS merely because they are the operator of the IDPS, provided that they met certain criteria (set out most recently in [CO 13/763]).

Proposal

B4 To preserve its effect beyond the sunset date of 1 October 2019, we propose to continue the relief currently given by [CO 04/523] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (IDPS—Relevant Interests) Instrument 2015/XX at Attachment 4 to this consultation paper. You can access the current instrument on www.comlaw.gov.au or by clicking on the following direct link: [\[CO 04/523\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;
- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Rationale

46 We granted the relief in [CO 04/523] because we consider that operators of an IDPS have powers over securities held through the IDPS so limited that they should be treated in a manner similar to a bare trustee. The relief was deliberately not extended to operators of IDPS-like schemes because operators of these schemes generally have wider powers over securities held through the schemes.

47 The relief provided by [CO 04/523] is still required because, without the exception, technical breaches of the Corporations Act would result as the IDPS operator is deemed to have a relevant interest in securities held by the IDPS.

Minimum bid price—[CO 00/2338]

Background

- 48 The minimum bid price principle upholds the ‘equality principles’ that are pivotal to the takeovers regime set out in Ch 6. The equality principles prescribe that all the holders of a class of securities must have a reasonable and equal opportunity to participate in any benefits through a proposal under which a person would acquire a substantial interest in a company.
- 49 Section 621(3) operates to ensure that the equality principles apply during the period immediately prior to the offer period and provides as follows:
- The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.
- 50 References in s621(3) to ‘consideration’ are to the value of that consideration: s621(4). Section 621(3) does not require the bid consideration to be of the same kind as the consideration given in the four months before the bid, but it does require that it be of equal value. The intention includes allowing a bidder to buy shares for cash before a scrip bid, provided the scrip it offers under the bid is worth as much as the cash it paid before the bid.
- 51 For the purposes of the minimum bid price principle, the consideration offered or provided for a security is:
- (a) the amount of a cash sum;
 - (b) the value of non-cash consideration; or
 - (c) for mixed consideration, the cash sum and the value of the other consideration.
- 52 The drafting of s621 gives rise to certain technical and practical difficulties in the takeovers process. [CO 00/2338] inserts into the Corporation Act s621(3A), (3B) and (3C), and 621(4A), which together operate to resolve these practical difficulties in circumstances where:
- (a) there is a decrease in the value of the target’s securities due to a share split under s254H, or a dividend is declared where the ex-date is after the date of the purchase or agreement and at or before the date of the bid (s621(3A));
 - (b) consideration below the bid consideration is offered to:
 - (i) a body corporate in the same wholly owned group as the bidder; or
 - (ii) nominees and bare trustees of bid class securities for the bidder or a body mentioned in paragraph 52(b)(i) (s621(3B) and (3C)); or

- (c) a bidder makes a pre-bid purchase for cash and then follows this with a takeover offer under which the consideration offered comprises quoted securities, and the value of the quoted securities declines between the date of lodgement of the bid with ASIC and the opening of the offer (s621(4A)).

53 [CO 00/2338] also inserts s621(4B) into the Corporation Act, which extends the operation of the instrument to cover quoted securities on approved foreign exchanges.

Proposal

B5 To preserve its effect beyond the sunset date of 1 October 2016, we propose to continue the relief currently given by [CO 00/2338] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Minimum Bid Price) Instrument 2015/XX at Attachment 5 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following direct link: [\[CO 00/2338\]](#).

The only changes proposed are to:

- (a) notionally insert s619(2)(da) into the Corporations Act;
- (b) update the name of the legislative instrument;
- (c) reflect the current drafting practice by updating the format of the current document;
- (d) simplify the drafting to give greater clarity;
- (e) update legislative references and definitions; and
- (f) correct any minor drafting errors.

Rationale

54 Without the relief offered by [CO 00/2338], technical breaches would arise relating to the valuation of quoted securities, timing and other procedural issues.

55 It is our view that the current scope of relief provided by [CO 00/2338] remains relevant to current policy settings and, accordingly, should be remade in substantially the same form.

56 We have proposed to use the draft instrument to insert s619(2)(da) into the Corporations Act, which ensures that stakeholders who rely on s621(3B) are not required to apply for individual relief from the provisions of s619(1).

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
Ch 6 (for example)	A Chapter of the Corporations Act (in this example numbered 6)
[CO 05/850] (for example)	An ASIC class order (in this example numbered 05/850)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Div 5A (for example)	A Division of the Corporations Act (in this example numbered 5A)
IDPS	Investor directed portfolio services
IDPS-like schemes	Investor-directed-portfolio-services-like scheme, as defined in [CO 13/762]
item 10A	Item 10A of s611, notionally inserted by [CO 09/459]
Item 14	Item 14 of s611
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
Pt 7.9 (for example)	A Part of the Corporations Act (in this example numbered 7.9)
RIS	Regulation Impact Statement
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
s257B(7) (for example)	A section of the Corporations Act (in this example numbered 257B(7)), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect