



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 79

Disclosure relief for foreign scrip takeovers

March 2007

Your comments

You are invited to comment on the proposals and issues for consideration in this paper, including the explanation sections.

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by Friday 4 May 2007 and should be sent to:

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You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

What this paper is about

1 This paper sets out our proposals to give relief from the requirement to prepare a prospectus or PDS when securities are offered as consideration under a foreign regulated takeover.

Note: 'Foreign regulated takeover' and other key terms are defined in the 'Key terms' section towards the end of this paper.

2 The requirement to prepare a prospectus or PDS may deter a bidder from offering securities to Australian members of a target as an alternative to cash consideration. This means that Australian members may be deprived of the ability to receive their consideration in the form of securities. Removing the requirement to prepare a prospectus or PDS could allow Australian members to receive the same offer as their foreign counterparts and provide them with the opportunity to accept their consideration in securities rather than only in cash.

Contents

What this paper is about	3
Our policy proposals	4
Regulatory and financial impact	17
Development of policy proposal	18
Key terms	19

Our policy proposals

Policy proposal	Your feedback
<p>Prospectus and PDS relief</p> <p>A1 We propose to grant class order relief from the prospectus and PDS requirements for foreign scrip takeovers where:</p> <ul style="list-style-type: none"> (a) Australian residents hold no more than 10% of the bid class securities (see paragraph A3); (b) the bid class securities are quoted on an approved foreign market and the takeover is regulated in the jurisdiction of an approved foreign market (see paragraph A4); (c) the bidder takes all reasonable steps to ensure the takeover is carried out in accordance with applicable regulatory requirements (see paragraph A5); (d) if a bid document is provided to non-Australian offerees, the document (or an English translation if necessary) is sent to Australian offerees (see paragraph A6); and (e) offers made to Australian offerees are on terms that are at least as favourable as those made to non-Australian offerees (see paragraph A7). <p>If we grant this relief, we propose to revoke Class Order [CO 00/185] <i>Foreign securities</i>.</p> <p>A2 We propose to grant the above relief from:</p> <ul style="list-style-type: none"> (a) Parts 6D.2 and 6D.3 or s1012B and 1012C of the Corporations Act (whichever is relevant) for offers or issues of securities under foreign scrip takeovers; and (b) the requirement to prepare a prospectus or PDS for the on-sale of securities which have been issued under a foreign scrip takeover in the circumstances described in s707(3) or 	<p>A1Q1 To what extent are bidders currently deterred from extending foreign scrip takeovers to Australian offerees? Would the proposed relief increase the likelihood of bidders offering securities as consideration to Australian offerees?</p> <p>A1Q2 Does the proposed relief raise any investor protection issues?</p> <p>A1Q3 Would it be possible to impose fewer conditions while providing Australian offerees with an appropriate level of protection? Give details.</p> <p>A1Q4 Should there be any additional conditions?</p> <p>A1Q5 Should we grant relief on a case-by-case basis rather than by class order?</p> <p>A1Q6 Is there a benefit in retaining [CO 00/185] for foreign scrip takeovers where Australian residents hold more than 10% of the bid class securities?</p> <p>A2Q1 Is relief from any other provisions required?</p>

Policy proposal

1012C(6).

Note: We also propose to provide licensing relief for general advice provided under a bid document for a foreign regulated takeover (see paragraph A9).

Prescribed threshold for Australian holdings

A3 We propose that relief will be available only if Australian residents hold no more than 10% of the bid class securities. Whether securities are held by Australian residents will be determined:

- (a) by reference to:
 - (i) the address of the ultimate beneficial owner of the securities where this is revealed by:
 - (A) publicly available reports of beneficial ownership in the jurisdiction of incorporation of the target or in the jurisdiction of an approved foreign market on which the securities are quoted; or
 - (B) information otherwise known to the bidder; or
 - (ii) where the address of the ultimate beneficial owner is not known, the address recorded in the register of members of the target in respect of the securities; and
- (b) as at the date for identifying security holders to whom the bidder must send details of the foreign scrip takeover offer or, if there is no such date, the date on which offers are first made by the bidder.

Your feedback

A3Q1 Should the prescribed threshold for Australian residents be different?

A3Q2 Should we set a lower limit to the prescribed threshold so that our relief would only apply where Australian residents hold a minimal proportion of securities (e.g. 3%)?

A3Q3 Would a threshold higher than 10% threaten investor safeguards? For example, if there were a higher threshold, could this encourage foreign bidders to misuse the relief by making offers of securities to Australian residents where those offers were not merely incidental to the foreign scrip takeover? Give details.

A3Q4 Have Australian residents been excluded from any foreign scrip takeovers in circumstances where they collectively held more than 10% of the bid class securities?

A3Q5 How common is it for Australian residents to hold foreign securities through a nominee who is not located in Australia or the jurisdiction of the target?

A3Q6 Would it be preferable to replace the proposed method for determining the holdings of Australian residents with a

Policy proposal	Your feedback
<p>Approved foreign market</p> <p>A4 We propose that the bid class securities must be quoted on an approved foreign market and the takeover must be regulated in the jurisdiction of an approved foreign market. For the current list</p>	<p>requirement that bidders must believe on reasonable grounds that Australian residents are the beneficial owners of no more than 10% of securities? What factors might constitute reasonable grounds? Is there another way to calculate the holdings of Australian residents that takes into account that securities may be held by foreign nominees and that will be viable in all approved foreign markets?</p> <p>A3Q7 Is the proportion of bid class securities held by Australian residents the appropriate quantification method for the proposal? For example, would a more appropriate measure be a proportion of:</p> <ul style="list-style-type: none"> (a) securities offered under the takeover to Australian residents; or (b) securities in the main class held by Australian residents? <p>A3Q8 Should securities to which the bidder and its associates are entitled be excluded from the calculation?</p> <p>A3Q9 Should the proportion of securities held by Australian residents be determined at some other time, such as the date the foreign scrip takeover is announced?</p> <p>A4Q1 Is the requirement for bid class securities to be quoted on an approved foreign market appropriate given that Australian residents may</p>

Policy proposal

of approved foreign markets, see paragraph 17 of the Explanation section of this paper.

Foreign regulatory compliance

A5 We propose that the bidder must take all reasonable steps to ensure that the foreign scrip takeover is carried out according to applicable regulatory requirements.

Your feedback

have decided to purchase bid class securities that are not quoted on an approved foreign market? Should case-by-case relief apply where bid class securities are not quoted on an approved foreign market? What factors are relevant?

A4Q2 Should we require that the securities offered as consideration must be quoted on an approved foreign market instead of the bid class securities?

A4Q3 Should we require that the securities offered as consideration must be quoted on an approved foreign market as well as the bid class securities?

A5Q1 Is requiring the bidder to take all reasonable steps sufficient to ensure compliance?

Policy proposal	Your feedback
<p>Information requirement</p> <p>A6 We propose that any bid document connected with the foreign scrip takeover must be:</p> <p>(a) translated into English if necessary; and</p> <p>(b) sent to Australian offerees.</p>	<p>A6Q1 Is it appropriate to require the bid document to be translated into English?</p> <p>A6Q2 Would it be preferable to require the bid document to be provided in:</p> <p>(a) English if an English version is available; and</p> <p>(b) otherwise, in the language typically used by the target to communicate with its security holders?</p> <p>A6Q3 Should the bidder be permitted to post the documents on the internet rather than sending them to Australian offerees?</p>
<p>Equality requirement</p> <p>A7 We propose that offers made to Australian offerees under the foreign scrip takeover must be on terms that are no less favourable to Australian offerees than those applicable to foreign offerees.</p>	<p>A7Q1 Is this requirement appropriate? Does it raise any investor protection issues?</p> <p>A7Q2 Should we require that offers made to Australian offerees are made on identical terms to those applicable to foreign offerees?</p>

Policy proposal	Your feedback
<p>Disclaimer</p> <p>A8 We do not propose to require that the bid document sent to Australian offerees must contain statements to the effect that:</p> <ul style="list-style-type: none"> (a) the bid is conducted under the laws of a foreign jurisdiction; and (b) the rights and remedies available to Australian offerees will be different from those available under the Corporations Act. <p>Licensing relief</p> <p>A9 We propose to grant class order relief so that a person will not be required to hold an AFSL for the provision of general advice that is contained in a bid document for a foreign regulated takeover (whether cash or scrip) where:</p> <ul style="list-style-type: none"> (a) the takeover is regulated in the jurisdiction of an approved foreign market; and (b) the bid document is required to be provided under regulations governing the conduct of the takeover. 	<p>A8Q1 Can we assume that Australian offerees would generally understand that foreign takeovers are not generally governed by Australian regulation? Would a disclaimer be useful?</p> <p>A8Q2 If a disclaimer would be useful, should we prescribe other details of what it should contain, such as that financial statements included in the document may not be prepared in accordance with Australian accounting standards? If so, what information should it contain?</p> <p>A9Q1 Does the proposed relief raise any consumer protection issues?</p>

Explanation

Prospectus and PDS relief

Why is relief needed?

1 Bidders frequently offer securities as the consideration, or as an alternative to cash consideration, in takeover transactions. The securities offered will usually be shares in the bidder or a related body corporate.

2 Unless an exception applies, an offer of securities received in Australia cannot be made without an Australian prospectus or PDS: see Ch 6D and Pt 7.9 of the Corporations Act. One of these exceptions is if the offer is accompanied by an Australian bidder's statement: s708(18) and 1012D(7). This is because the bidder's statement must meet the content requirements for prospectuses or PDSs if securities are being offered as consideration: s636(1)(g) and (ga). However, a foreign offer document is not a bidder's statement and, without relief, offers of securities to Australian residents as part of a foreign scrip takeover will need a prospectus or PDS.

3 Class Order [CO 00/185] provides limited, mostly procedural relief from Ch 6D for an offer for the issue or sale of securities in connection with a foreign scrip takeover where:

- (a) the securities offered are quoted, or are reasonably expected to soon be quoted, on an approved foreign market;
- (b) the terms and conditions of the offers made to Australian offerees are the same as those made to other offerees in the same class;
- (c) Australian offerees are provided with the same offer documents as all other offerees (with English translations where necessary), modified to include any additional information necessary for compliance with Ch 6D; and
- (d) the offer complies with all legislative requirements and operating rules of the bidder's home jurisdiction and market.

4 Class Order [CO 00/185] does not provide any substantive relief from the prospectus or PDS requirement for foreign scrip takeovers. If we give the substantive relief proposed in this paper, we intend to revoke [CO 00/185].

Why should relief be granted?

5 The requirement to prepare a prospectus or PDS may mean that a foreign bidder decides not to offer securities to Australian members of

a target. This may mean that Australian members would only be entitled to cash, while non-Australian members could choose between cash and securities. There may be advantages associated with electing to receive securities as consideration over cash e.g. the securities may appreciate in value rapidly.

6 For reasons of international comity, Australian regulatory requirements should not impose excessive costs or obstacles on primarily foreign business transactions unless there is a clear need for Australian investor protection. The requirement to prepare a prospectus or PDS imposes substantial costs on what is primarily a foreign business transaction. These costs are not justified when the transaction is subject to comparable regulation in another jurisdiction, and only a small number of Australians are affected by it. The Australian investors have accepted the jurisdiction of foreign law by investing on a foreign market.

7 As discussed in paragraphs 9 to 14, other jurisdictions offer various forms of relief for foreign regulated takeovers. Although the details of overseas relief vary between jurisdictions, providing our proposed relief would be consistent with the overall approach taken in those jurisdictions.

8 In addition to proposing disclosure relief for offers of securities under foreign scrip takeovers, we propose to provide relief from the on-sale provisions in s707(3) and 1012C(6). Without on-sale relief, a person who receives securities in the circumstances described in s707(3) or 1012C(6) would not be able to sell those securities within Australia within 12 months of receiving them unless the person provides a prospectus or PDS or an exemption from the on-sale provisions applies.

What is the current approach in foreign jurisdictions?

9 The United States, the United Kingdom, Singapore and Hong Kong all provide, or are proposing to provide, some form of disclosure relief for offers of securities under foreign scrip takeovers.

United States

10 In the United States, a foreign corporation making a takeover offer in which securities are offered as consideration is given an exemption from all US prospectus requirements under rule 802 of the general rules and regulations promulgated under the *Securities Act 1933* where:

- (a) the shareholding of US residents in the foreign company is no more than 10% of issued capital that is the subject of the bid;
- (b) the issuer permits 'US holders' to participate in the offer on terms as favourable as any other security holder;

- (c) the issuer:
 - (i) translates any ‘informational document’ into English;
 - (ii) provides the documents on a comparable basis to how they are provided in its home jurisdiction; and
 - (iii) reasonably informs US holders if it publishes informational documents relating to the offer in its home jurisdiction; and
- (d) a disclaimer in a prescribed form is included prominently in the offer document. The disclaimer must state that:
 - (i) the offer is for the securities of a foreign company;
 - (ii) the offer is subject to disclosure requirements that are different from those of the US;
 - (iii) any financial statements included in the document may not be prepared on a basis comparable to US standards;
 - (iv) US securities laws may not be enforceable in a foreign court and it may be difficult to compel a foreign company to subject itself to a US court; and
 - (v) the issuer may purchase securities otherwise than under the offer, for example by open market actions.

United Kingdom

11 In the United Kingdom, a prospectus is required for an offer of securities to the public unless a relevant exception applies: s85(1) of the *Financial Services and Markets Act 2000* (UK).

12 There is an exception (s85(5)(b) and prospectus rule 1.2.2) for securities offered in connection with a scrip takeover bid if a document is available containing information which is regarded by the Financial Services Authority as being equivalent to that of a prospectus, taking into account the requirements of European Community legislation.

Singapore

13 In Singapore, the prospectus provisions of the *Securities and Futures Act 2001* (Singapore) do not apply to securities offered in connection with a scrip takeover bid for shares in a foreign corporation that is not listed on an approved exchange in Singapore, where the offer:

- (a) is extended to all members of the corporation or the relevant class of security holders (other than the offeror); and
- (b) complies with the laws, codes and other requirements relating to takeovers of the country in which the target corporation is incorporated: s273 of the *Securities and Futures Act 2001*.

Hong Kong

14 Hong Kong is proposing to exempt from its prospectus regime offers made to holders of shares or debentures in the context of a foreign regulated takeover or merger where:

- (a) the offers comply with the laws and regulatory requirements of the target's home jurisdiction and any principal stock exchange on which it is listed; and
- (b) the laws and regulatory requirements apply in a recognised jurisdiction which has disclosure requirements that are comparable to the disclosure requirements in the Hong Kong Code on Takeovers and Mergers: paragraphs 27 to 28 of *Consultation Conclusions on the Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance* (Securities and Futures Commission, September 2006).

Prescribed threshold for Australian holdings

15 It is a condition of the proposed relief that Australian residents hold no more than 10% of the bid class securities. Where Australian residents hold no more than 10% of the bid class securities, a foreign scrip takeover is likely to be primarily a foreign business transaction. The 10% threshold is also consistent with the percentage threshold applicable to relief from the prospectus requirements for rights offers by foreign companies under Class Order [CO 00/183] *Foreign rights issue*.

16 The proposed test for determining the level of Australian ownership recognises that Australian residents may hold securities in foreign companies through nominees. When calculating the 10% threshold, we propose that the bidder must take account of beneficial ownership information known to it or publicly available in beneficial ownership documents lodged in the target's jurisdiction of incorporation or in the jurisdiction of an approved foreign market on which the bid class securities are quoted. While this will not provide a complete picture of the level of underlying Australian ownership, a more onerous test may discourage bidders from making use of any relief.

Approved foreign markets

17 The following are approved foreign markets for the purposes of the relief proposed in this paper:

- (a) American Stock Exchange;
- (b) Borsa Italiana;
- (c) Bursa Malaysia Main Board and Bursa Malaysia Second Board;

- (d) Euronext Amsterdam;
- (e) Euronext Paris;
- (f) Frankfurt Stock Exchange;
- (g) Hong Kong Stock Exchange;
- (h) JSE;
- (i) London Stock Exchange;
- (j) NASDAQ Stock Market;
- (k) New York Stock Exchange;
- (l) New Zealand Exchange;
- (m) Singapore Exchange;
- (n) SWX Swiss Exchange;
- (o) Tokyo Stock Exchange; and
- (p) Toronto Stock Exchange.

18 Policy Statement 72 *Foreign securities prospectus relief* [PS 72] sets out the criteria we take into account when considering an application to add a market to the list of approved foreign markets. The market must:

- (a) be a member of the World Federation of Exchanges (formerly the Federation Internationale des Bourses de Valeurs);
- (b) be internationally recognised (that is it has concessional treatment and recognition from other jurisdictions);
- (c) have rules which meet ASX's listing and quotation, market information, regulatory and trading and settlement principles;
- (d) be a key world trading centre; and
- (e) be overseen by a government regulatory authority: [PS 72.64].

19 The proposed requirement for the relevant securities in the target to be quoted on an approved foreign market and for the takeover to be regulated in the jurisdiction of an approved foreign market is aimed at providing Australian offerees with a level of protection by ensuring that:

- (a) a foreign scrip takeover is a serious transaction involving a substantial body with a large number of security holders occurring in an informed market; and
- (b) foreign scrip takeovers are subject to regulation (particularly disclosure requirements) that is comparable to Australian regulation.

Foreign regulatory compliance

20 A bidder must take all reasonable steps to ensure that the foreign scrip takeover is carried out according to applicable regulatory requirements. We have not proposed that compliance with foreign regulatory requirements must be complete so as to avoid the possibility that a minor or technical breach would disentitle a bidder to relief.

Information requirement

21 We propose that Australian offerees must receive English language disclosure about the securities offered to them so that they are able to make an informed assessment of those securities. However, we are seeking submissions on:

- (a) the extent to which the requirement for English language disclosure may mean that bidders do not extend offers of securities to Australian members of a target; and
- (b) if an English translation is not available, whether an appropriate balance between investor protection and facilitating Australian participation would be achieved by allowing documents to be provided in the language typically used by the target company to communicate with its security holders.

Equality requirement

22 Offers made to Australian offerees must be on terms that are at least as favourable as those applicable to foreign offerees. It would be inappropriate to grant relief to facilitate a transaction under which Australian offerees were treated less favourably than foreign offerees.

Disclaimer

23 We do not propose that a bid document sent to Australian offerees must contain a disclaimer. That is because we expect that Australian offerees would understand that foreign takeovers are not generally governed by Australian regulation. Further, we do not wish to be prescriptive as to the content requirements of bid documents that are subject to foreign regulation.

Foreign compromises and arrangements

24 We note that Class Order [CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Part 5.1 schemes and foreign schemes of arrangement* provides relief from the prospectus and PDS requirements for offers of securities under compromises or arrangements in the following foreign jurisdictions whose regulation has the same essential characteristics as Pt 5.1 of the Corporations Act:

- (a) Hong Kong;
- (b) Malaysia;
- (c) New Zealand;
- (d) Singapore;
- (e) South Africa; and
- (f) the United Kingdom.

25 We may also provide case-by-case prospectus and PDS relief for foreign regulated compromises and arrangements with the same essential characteristics as Pt 5.1: see [PS 188.21].

Licensing relief

26 If a bidder or a target provides a bid document to Australian residents in connection with a foreign regulated takeover, whether scrip or cash, this may be providing general advice.

27 Class Order [CO 03/606] *Financial product advice – exempt documents* provides licensing relief so that issuers of certain documents (including Australian bidder's and target's statements) are not required to obtain an AFSL for the provision of any general advice contained in those documents.

28 Approved foreign jurisdictions provide takeover regimes which offer a comparable level of disclosure and investor protection to that provided in Australia. Where a takeover is regulated in an approved foreign jurisdiction, we propose to extend the relief contained in [CO 03/606] so that it covers bid documents for the takeover.

Regulatory and financial impact

1 We have considered the regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating commercial activity and ensuring investor protection.

Important details sought from you

2 So that we can more fully assess the financial and regulatory impact of our proposals we specifically invite you to provide details of:

- (a) the number and size of recent foreign scrip takeovers in which offers of securities have not been extended to Australian investors, together with details of the percentage holdings of Australian investors in those transactions;
- (b) the number and size of recent foreign scrip takeovers in which offers of securities have been extended to Australian investors, together with details of the percentage holdings of Australian investors in those transactions;
- (c) the profile of Australian wholesale and retail investors who make direct investments in foreign entities and the nature of those investments;
- (d) the extent to which Australian investors in foreign entities hold securities through foreign nominees;
- (e) the extent to which bidders structure foreign scrip takeovers to allow participation by those Australian investors for whom a prospectus or PDS is not required (e.g. professional investors under s708(11));
- (f) the extent to which our proposed relief will make it more likely that offers of securities under foreign scrip takeovers will be extended to Australian investors;
- (g) other possible options that would achieve our objectives; and
- (h) the likely financial impact of the proposals.

3 In particular, give consideration to the costs and benefits of these proposals. Where possible, we are seeking both quantitative and qualitative data.

Development of policy proposal

This policy proposal results from ASIC's acknowledgement of the costs faced by bidders in extending foreign scrip takeover offers to Australian residents and through our observation of the developments occurring in other jurisdictions.

Key terms

In this policy proposal, terms have the following meanings:

approved foreign market A foreign market approved by ASIC under [PS 72]. (Those approved at the date of this paper are listed in paragraph 17 of the Explanation section of this paper).

AFSL Australian financial services licence.

ASIC Australian Securities and Investments Commission.

ASX Australian Stock Exchange.

bid class The class or classes of securities the subject of a foreign scrip takeover.

bid document A document provided to holders of bid class securities in connection with a foreign regulated takeover.

bidder A person offering to acquire bid class securities under a foreign scrip takeover.

[CO 00/185] (for example) An ASIC class order (in this example numbered 00/185).

Corporations Act The *Corporations Act 2001* including regulations made for the purposes of the Corporations Act.

foreign regulated takeover A transaction involving the acquisition of control or potential control of a foreign body or a substantial interest in that body that involves an offer being made to acquire all or some of the securities held by:

- (a) all holders of securities in the foreign body in the same class; or
- (b) all such holders other than the person making the offer, that person and their associates or any other person to whom, under the regulatory requirements applicable to the transaction, the offer does not have to be made.

foreign scrip takeover A foreign regulated takeover where securities form all or part of the consideration offered for bid class securities.

general advice Has the meaning given in s766B(4) of the Corporations Act.

offeree A person to whom an offer of securities under a foreign scrip takeover is made.

PDS Product Disclosure Statement.

[PS 72] (for example) An ASIC policy statement (in this example numbered 72).

securities Has the meaning given in s92 of the Corporations Act.

target The entity the subject of a foreign scrip takeover.