



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 170

Downstream acquisitions: Update to RG 71

November 2011

About this paper

This consultation paper sets out ASIC's proposals for updating and revising our guidance on downstream acquisitions.

We seek the views of stakeholders, including companies, listed managed investment schemes, investors and their professional advisers on our proposals.

Attached to this paper is a draft updated version of Regulatory Guide 71 *Downstream acquisitions* (RG 71) that incorporates the proposed updates and revisions.

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 11 November 2011 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

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our guidance on downstream acquisitions. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section C, 'Regulatory and financial impact'.

Making a submission

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

Comments should be sent by 16 January 2012 to:

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What will happen next?

Stage 1	11 November 2011	ASIC consultation paper released
Stage 2	16 January 2012	Comments due on consultation paper and draft updated regulatory guide
Stage 3	May 2012	Updated regulatory guide published

A Background to the proposals

Key points

Regulatory Guide 71 *Downstream acquisitions* (RG 71) sets out ASIC's guidance on downstream acquisitions. It was last updated in the 1990s and requires further updating to reflect changes to the law and relevant policy developments.

This consultation paper explains how our guidance on downstream acquisitions has evolved to reflect those changes and asks for your feedback on the draft updated regulatory guide attached to this paper.

Downstream acquisitions

- 1 A downstream acquisition occurs when a person acquires a relevant interest in the voting shares of a downstream Australian company, listed body or listed managed investment scheme as a result of an acquisition in an upstream entity.
- 2 This occurs because a person is deemed under s608(3) of the *Corporations Act 2001* (Corporations Act) to have the same relevant interests in securities that an upstream entity has if they have voting power above 20% in, or control, the entity.
- 3 The downstream acquisition will breach s606 where the relevant interest in the downstream company exceeds the thresholds in s606, unless the exemption in item 14 of s611 (item 14) applies.
- 4 The exemption in item 14 applies where the upstream entity is included in the official list of a prescribed financial market (such as ASX) or a foreign body conducting a financial market approved by us. ASIC's list of approved foreign exchanges is set out in Class Order [CO 02/259] *Downstream acquisitions: foreign stock markets*.

Our guidance

- 5 Our current guidance on downstream acquisitions is mainly contained in Regulatory Guide 71 *Downstream acquisitions* (RG 71). This policy was last updated in 1996 and was drafted in line with the predecessor provision to item 14, which was more limited than the current exemption in item 14. Item 14 is broader since it covers:
 - (a) downstream acquisitions that result from a foreign upstream acquisition (the exemption was previously limited to Australian companies); and
 - (b) all acquisitions in a downstream company (the exemption was previously limited to downstream acquisitions that resulted from a takeover bid).

- 6 Since RG 71 was drafted, the legislative framework in Ch 6 has been amended so that it applies to listed managed investment schemes, and the role of the Takeovers Panel has also been expanded. We have since provided updates on certain aspects of our guidance on downstream acquisitions in Sections E and I of Regulatory Guide 171 *Anomalies and issues in takeover provisions* (RG 171) and in Information Release 01/03 *ASIC approves overseas exchanges: Safe harbour for downstream acquisitions* (IR 01/03).
- 7 We have reviewed our guidance on downstream acquisitions in RG 71, RG 171 and IR 01/03 with a view to consolidating, updating, and revising our guidance to better assist companies, listed managed investment schemes, investors and their professional advisers who are involved in or affected by downstream acquisitions.
- 8 Following our review, we propose to update RG 71. However, we consider that the majority of our current guidance is still appropriate because the principles underlying the predecessor provision to item 14 are still relevant.

Your feedback

- 9 We have prepared a draft updated version of RG 71: see the attachment to this paper. The draft updated guide reflects the proposed updates to our guidance on downstream acquisitions and the specific changes we propose to make. We will take into account your comments before publishing a final updated version of the guide.
- 10 This consultation paper asks specific questions in Section B about those aspects of the draft updated guide that we consider particularly noteworthy, or where we are particularly interested in feedback from stakeholders before we settle our final guidance. However, we are also interested in any comments you may have on RG 71 generally.

B Proposed updates and revisions to RG 71

Key points

We propose to update and revise our guidance in RG 71 on downstream acquisitions. Our specific proposals relate to:

- updating our guidance on the exemption in item 14; and
- revising our guidance on our approach to relief applications.

The revisions to our guidance on relief applications include guidance on:

- the factors we will take into account when granting relief (in particular, the key concepts of 'control purpose' and 'substantial assets'); and
- potential relief conditions.

Our proposals on relief conditions include guidance on:

- an independent expert's valuation to determine fair value in a downstream bid;
- standstill and voting conditions; and
- a potential sell-down condition.

The exemption in item 14

Proposal

B1 We propose to update our guidance in RG 71 to:

- explain when a downstream acquisition will occur, our approach to the exemption in item 14 and the scope of the exemption (see draft RG 71.1–RG 71.4 and draft RG 71.12–RG 71.19);
- in relation to the scope of the exemption, state our view that we will not consider that a downstream acquisition is exempt from s606 merely because another exemption in s611 applies to an upstream acquisition (see draft RG 71.23–RG 71.26); and
- set out the types of circumstances in which we may consider applying to the Takeovers Panel for a declaration of unacceptable circumstances despite the exemption in item 14 applying (see draft RG 71.27–RG 71.29).

Your feedback

B1Q1 Do you have any comments on our proposed updated guidance?

B1Q2 Do you agree with the circumstances where we may consider applying to the Takeovers Panel for a declaration of unacceptable circumstances? If not, why not?

B1Q3 Are there any other matters not included in our proposed update to RG 71 that you think we should cover? If so, please give details of the type of guidance you think we should provide.

Rationale

- 11 We propose to update and revise our guidance in RG 71 on the exemption in item 14 to reflect the current law and consolidate our guidance to better assist companies, listed managed investment schemes, investors and their professional advisers who are involved in or affected by downstream acquisitions.
- 12 In relation to the scope of the exemption in item 14, we propose to update RG 71 to include guidance currently contained in RG 171 about:
- (a) our modification to item 14 in Class Order [CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition*; and
 - (b) when another exemption in s611 (such as item 1) applies to an upstream acquisition.
- 13 Our modification to item 14 in [CO 02/259] has the effect that the exemption does not apply where an upstream entity has only a secondary listing on a prescribed financial market (such as ASX) or on an approved foreign exchange.
- 14 In relation to when another exemption in s611 applies to an upstream acquisition, our guidance in RG 171 currently provides that a bidder may risk a declaration of unacceptable circumstances for a downstream acquisition where the bidder relies on item 1 of s611. We propose to include this guidance in our updated version of RG 71 to consolidate our policy on downstream acquisitions.
- 15 A downstream acquisition may give rise to unacceptable circumstances even if it satisfies the exemption in item 14. Applications to the Takeovers Panel may be made by a party affected by the downstream acquisition or by ASIC. We propose to set out in RG 71 the circumstances in which we may consider applying to the Takeovers Panel for a declaration of unacceptable circumstances despite the exemption in item 14 applying: see draft RG 71.27–RG 71.29.
- 16 The proposed update to our guidance on unacceptable circumstances amends the relevant guidance currently in RG 71, Sections E and I of RG 171 and IR 01/03 by taking into account developments in our guidance and recent decisions of the Takeovers Panel in this area: see, in particular, *Leighton Holdings Limited 01, 02, 03* [2010] ATP 13 and *Leighton Holdings 02 R* and *Cape Lambert Minsec Pty Ltd* [2009] ATP 12.

Our approach to relief applications

Proposal

B2 Relief will be required where a proposed downstream acquisition will not satisfy the exemption in item 14. We propose to revise RG 71 by clarifying our approach to applications for downstream acquisition relief in the following way:

- (a) In deciding applications for downstream acquisition relief, we will consider:
 - (i) the policy objectives of the exemption in item 14; and
 - (ii) the purposes of Ch 6, as set out in s602.

See draft RG 71.16–RG 71.19 and draft RG 71.30–RG 71.32.
- (b) We will not grant relief to facilitate a downstream acquisition that does not satisfy the exemption in item 14 if:
 - (i) relief would be inconsistent with the policy behind the exemption in item 14 or the principles in s602; or
 - (ii) after considering all the relevant circumstances, we are not satisfied that the regulatory detriment is minimal or clearly outweighed by the resulting commercial benefit (see Regulatory Guide 51 *Applications for relief* (RG 51), in particular RG 51.37–RG 51.49); or
 - (iii) the acquisition is not legal in the jurisdiction where it is to take place; or
 - (iv) it appears to us that the downstream acquisition may give rise to unacceptable circumstances.

See draft RG 71.49.

Your feedback

B2Q1 Do you agree with our proposed approach to applications for downstream acquisition relief? If not, why not?

When we may grant relief

Proposal

B3 We propose to specify that if an acquirer of an upstream entity cannot satisfy the exemption in item 14, we may grant relief on conditions where we are satisfied that the guidance and investor protections in RG 71 will be upheld.

When considering whether to grant relief, we will take into account the following factors:

- (a) whether the upstream entity is listed or unlisted;
- (b) international comity considerations;
- (c) whether control of the downstream company appears to be a significant purpose of the upstream acquisition, or whether the downstream shares are a substantial part of the upstream entity's assets;

- (d) the alternatives that are available to the acquirer (such as whether the downstream shares can be simply and efficiently separated from the other assets of the upstream entity);
- (e) whether the regulation that applies to the upstream acquisition is similar to Australian takeovers regulation;
- (f) whether the upstream entity is closely or widely held; and
- (g) any other circumstances that we consider relevant to the particular case.

See draft RG 71.35–RG 71.36.

Your feedback

B3Q1 Do you agree with our proposed guidance on the criteria that we will take into account when considering whether to grant relief? If not, why not?

B4 We also propose that relief without conditions may be available in rare and exceptional circumstances. Such relief may be available where:

- (a) we are in the process of approving a financial market or foreign exchange for the purposes of the exemption in item 14; or
- (b) the upstream entity has a secondary listing on a prescribed financial market or approved foreign exchange, which in the circumstances is effectively the primary regulation that applies to the upstream entity.

See draft RG 71.37.

Your feedback

B4Q1 Do you agree with our proposal to provide relief without conditions in rare and exceptional circumstances? If not, why not?

Rationale

- 17 We have revised our guidance on our general approach to relief to reflect the changes in the law since RG 71 was last updated. We have based our revised guidance on the policy behind the adoption of the downstream acquisition exemption in item 14. Otherwise, our guidance remains unchanged. This is because we believe that the factors currently discussed in RG 71 remain relevant to when we may grant relief for a downstream acquisition that is not exempt under item 14.
- 18 We have revised our guidance on some of the factors that are relevant to our decision about whether to grant relief: see our discussion of the key concepts of ‘control purpose’ and ‘substantial assets’ under proposals B5 and B6.
- 19 In relation to whether an entity is widely or closely held, this will be relevant to our decision about whether to grant relief. This is based in part on current guidance about unlisted upstream foreign bodies corporate in RG 71 and we have expanded this to cover all upstream entities, reflecting developments in

our guidance since RG 71 was last updated. International comity considerations will remain relevant to our consideration about whether to grant relief.

- 20 In relation to whether an entity is listed in name only and closely held, we believe that in these circumstances the policy basis underlying the exception in item 14 will not be present and so this will be relevant when we are considering whether to grant relief. We have adopted this approach, and it was subsequently affirmed by the Takeovers Panel: see *Cape Lambert Minsec Pty Ltd* [2009] ATP 12 at 40.
- 21 In relation to the availability of relief without conditions, the guidance currently contained in RG 71 has been superseded by the expanded scope of the exemption in item 14. However, we consider that relief without conditions may still be appropriate in rare and exceptional circumstances.

Key concepts relevant to our decision about relief and conditions

Control purpose

Proposal

- B5** Our guidance in RG 71 currently identifies the existence of a control purpose as a relevant factor in deciding whether to grant relief. We propose to clarify how this will apply in the following way:
- (a) The relevant control purpose test will be whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition.
 - (b) Where a control purpose appears to be present in a downstream acquisition, we may:
 - (i) refuse relief; or
 - (ii) grant relief subject to conditions that ensure that the principles in s602 will be upheld.

See draft RG 71.40–RG 71.42.

Your feedback

- B5Q1** Do you agree with our proposal to amend the control purpose test from a 'main purpose' to a more objective consideration of whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition? If not, why not?
- B5Q2** Do you agree with our proposal to clarify our guidance on how we will deal with relief applications when a control purpose appears to be present (i.e. that we may refuse to grant relief or grant relief subject to appropriate conditions)? If not, why not?

Substantial assets

Proposal

- B6** We propose to amend our guidance in RG 71 to specifically state that whether the downstream shares are a substantial part of the upstream entity's assets:
- (a) is one of the factors we will take into account when considering whether to grant relief; and
 - (b) will be relevant to the type of conditions that we may impose on relief (if granted).

See draft RG 71.43–RG 71.45.

Your feedback

- B6Q1 Do you agree that when considering whether to grant relief, we should take into account (among other things) whether the downstream shares are a substantial part of the upstream entity's assets? If not, why not?
- B6Q2 Do you agree that whether the downstream shares are a substantial part of the upstream entity's assets is relevant to the conditions that should apply to our relief (if granted)? If not, why not?

Rationale

- 22 We believe that the above proposals will assist us in ensuring that the purposes of Ch 6 are upheld, and in particular, the principle that the shareholders of the downstream company should all have a reasonable and equal opportunity to participate in any benefits that accrue as a result of a proposal involving the acquisition of a substantial interest in the company.
- 23 We have retained an amended form of our discussion about whether there is a control purpose in relation to the downstream company. We propose to amend our guidance on the 'main purpose' test to a more objective consideration of whether control of the downstream company may be regarded as a 'significant purpose' of the upstream acquisition.
- 24 We are proposing this change because we agree with the comments by the Takeovers Panel in *Leighton Holdings Limited 02 R [2010] ATP 14* (*Leighton Holdings 02 R*) that considerations of whether control of the downstream company is 'a main purpose' are difficult to understand and apply: see *Leighton Holdings 02 R* at paragraph 72.
- 25 Our proposals clarify that, in deciding whether to grant relief, we will take into account both whether there is a control purpose in relation to the downstream company and whether the downstream shares are a substantial part of the assets of the upstream entity. Substantial assets are also a relevant factor when we are assessing the types of conditions that we may impose on relief (if granted).
- 26 If we grant relief despite a control purpose being considered to exist, we would be likely to do so only on condition that the acquirer makes a downstream bid.

- 27 Our guidance in RG 71 currently states that when considering whether to grant relief, we will take into account whether the acquirer will obtain effective control of the downstream company. We propose to provide clarification on this guidance to clearly distinguish the assessment of substantial assets from the assessment of whether the acquirer will obtain effective control of the downstream company.
- 28 The assessment of effective control is a factor that we will take into account when determining the effect of the upstream acquisition on control of the downstream company. This will be relevant to the types of conditions that should apply rather than whether we will grant relief: see draft RG 71.46–RG 71.48. In contrast, the assessment of whether the downstream shares are a substantial part of the assets of the upstream entity is a factor that we will take into account when considering whether to grant relief. This is because this factor may indicate that the acquirer appears to have a control purpose in relation to the downstream company.

Valuing assets

- 29 In relation to our proposed updated guidance, whether the downstream shares represent a substantial part of the assets of the upstream entity will depend on how the downstream company and upstream entity are valued.

Issue

- B7** We do not propose to prescribe a valuation methodology for valuing assets, because different valuation methodologies will be appropriate depending on the nature of the entities and the assets involved.

Your feedback

B7Q1 Would any additional guidance be useful in this area?

Factors relevant to the types of conditions on relief

Determining what conditions may apply

Proposal

- B8** We are considering specifying that if we decide that a downstream acquisition qualifies for relief, our relief may be subject to:
- (a) a downstream bid condition; or
 - (b) standstill and voting conditions; and/or
 - (c) other types of conditions (including a sell-down condition) instead of, or in addition to, the above conditions on a case-by-case basis.

See draft RG 71.51.

Your feedback

B8Q1 Do you agree with our proposed guidance on the types of conditions we may impose on our relief? If not, why not?

- B9** In determining what conditions should apply, we will consider:
- (a) whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition;
 - (b) whether the downstream shares represent a substantial part of the assets of the upstream entity;
 - (c) whether the downstream shares to be acquired through the upstream acquisition will give the acquirer effective control of the downstream company;
 - (d) the effect of the acquisition on the other downstream shareholders;
 - (e) whether the conditions are practical in the circumstances; and
 - (f) any other circumstances that we consider relevant to the particular case.

See draft RG 71.52 and Table 1.

Your feedback

B9Q1 Do you agree that the factors in proposal B9 are relevant to our determination of what conditions should apply to our relief? If not, why not?

B9Q2 Do you think that we should provide more guidance in RG 71 on the information an acquirer should provide so that ASIC can assess whether these factors are present? If so, please give details of the type of guidance you think we should provide.

B9Q3 Should we include more guidance on when we may impose other types of conditions? If so, please give details of the type of guidance you think we should provide.

Rationale

30 We have substantially retained the guidance currently in RG 71 on matters relevant to control. However, we have clarified the factors we will take into account when considering the types of conditions that are appropriate to impose on any relief we may grant.

31 These factors may broadly be described as factors relevant to control. We discuss our proposals on control purpose and substantial assets factors at paragraphs 22–29. In relation to our assessment of whether an acquirer will obtain effective control of the downstream company, we will consider the effect that the percentage of voting shares to which the upstream acquirer becomes entitled has on control of the downstream company.

32 While we will generally regard voting power over 50% or more of the downstream shares as constituting effective control, we may choose a lower figure consistent with s50AA and the accounting standards dealing with controlling entities. This because control may be exercised with less than 50% of the voting shares in the downstream company. We will also take into account the circumstances of the downstream company, including the share register and whether there are any other substantial shareholdings in the downstream company.

Conditions of relief

Independent expert's valuation to determine fair value in a downstream bid

Proposal

- B10** Where it is not possible to clearly and accurately determine the 'effective' price being offered for the downstream shares from the upstream acquisition price, an independent expert valuation will be required. We propose to amend our guidance on when an independent expert valuation is required—in particular, that:
- (a) an independent expert appointed by the acquirer should follow our guidance in Regulatory Guide 111 *Content of expert reports* (RG 111) (subject to any specific requirements of RG 71);
 - (b) the acquirer must provide to the independent expert all information about the downstream company that was available to the acquirer when the acquirer was fixing the price of the upstream acquisition;
 - (c) in addition to the requirement that generally the downstream bid price will need to be increased if the upstream acquisition price is increased, a revised independent expert report will generally be required in these circumstances; and
 - (d) if a new circumstance (other than an increase to the upstream acquisition price) occurs that could have a material impact on the independent expert's assessment of the fair value of the shares in the downstream company, we will also generally require that a revised independent expert report be provided to shareholders to explain the effect of the new circumstance on the independent expert's assessment of the fair value of the shares in the downstream company.

See draft RG 71.58–RG 71.67.

Your feedback

B10Q1 Do you agree with our proposed guidance on information that the acquirer should make available to the independent expert? If not, why not?

B10Q2 Do you agree that a revised independent expert report should be required where a new circumstance occurs that could have a material impact on the independent expert's assessment of the fair value of the downstream shares? If not, why not?

B10Q3 Our guidance in RG 71.63 states that:

- (a) where an independent expert gives a range of values, generally the downstream bid price should be the mid-point of the range, or the highest mid-point where various ranges are used; and
- (b) we will consider applications to vary the terms of the relief for the selection of the downstream bid price, taking into account the independent expert's advice in determining these applications.

Do you agree with this guidance? If not, why not?

Rationale

- 33 We have largely retained the guidance on downstream bids currently in RG 71. This is because the rationale behind the downstream bid condition is to, as far as is practicable, ensure that the downstream shareholders share equally in the benefits being offered to the owners of the upstream entity and are provided with all material information about the downstream bid.
- 34 We consider that, in many cases, it will be difficult to clearly and accurately determine the ‘see-through’, or ‘effective’, price of the downstream acquisition. Accordingly, we have proposed some amendments to our guidance where the downstream bid price is not ‘see-through’, consistent with the rationale behind the downstream bid condition.
- 35 Under our proposals, the independent expert should follow our guidance in RG 111, including determining the value per share inclusive of a premium for control. In relation to the information an independent expert should take into account, we have retained the guidance currently in RG 71 that an independent expert should be provided with all information about the downstream company that was available to the acquirer when the acquirer was fixing the price of the upstream acquisition.
- 36 Our proposals state that the independent expert must determine the fair value of the downstream shares as at the time when the acquirer was fixing the price of the upstream acquisition. If the upstream acquisition price is increased during the course of the upstream acquisition, this increase should be reflected in an increase to the downstream bid price.
- 37 This is because it is likely that the fair value ascribed to the shares in the downstream company would also increase because the benefit being offered to the upstream shareholders has increased. In this situation, we will also generally require that an updated independent expert’s report be provided to the shareholders of the downstream company.
- 38 New circumstances may arise during the downstream bid period that could have a material impact on the independent expert’s assessment of the fair value of the shares in the downstream company. Where the price of the upstream acquisition is not increased, we will not require the downstream bid price to be increased. This is because there is no increase to the benefit being offered to the owners of the upstream entity.
- 39 However, because new circumstances may affect whether the downstream bid price is fair, under proposal B10(d), we would generally require that a revised independent expert report be provided to downstream shareholders to explain the effect of the new circumstances on the independent expert’s assessment of the fair value of the shares in the downstream company.

- 40 Our proposals for independent experts assessing the fair value of the downstream bid price have been drafted to ensure consistency with our other guidance on independent expert reports and valuations
- 41 In relation to the selection of the downstream bid price, we have retained our guidance currently in RG 71. We consider that, as a starting point, the mid-point of the independent expert's range (or the highest mid-point where various ranges are provided) is the appropriate method for the downstream bid price to be determined to ensure fairness for the downstream shareholders. However, we are interested in feedback from stakeholders on this guidance.

Standstill and voting conditions

Proposal

- B11** We are considering specifying in RG 71 that standstill and voting conditions (with or without other conditions) may apply when:
- control of the downstream company does not appear to be a significant purpose of the upstream acquisition;
 - the downstream shares are not a substantial part of the upstream entity's assets; and
 - the acquirer will not obtain effective control of the downstream company.

See draft RG 71 at Table 1.

A voting condition may also apply when our relief is subject to a downstream bid condition. The effect of this condition would be that the acquirer would not be able to exercise, control or procure the exercise of votes attached to the downstream shares in excess of 20% until the close of the downstream bid.

See draft RG 71.55.

Your feedback

- B11Q1 Do you agree with the circumstances where standstill and voting conditions may apply? If not, why not?
- B11Q2 Do you think standstill and voting conditions are appropriate? If not, why not?
- B11Q3 Do you anticipate any practical difficulties with applying either a standstill and/or a voting condition on relief? If so, please give details.

- B12** We propose to specify in RG 71 that different types of standstill and voting conditions may apply to our relief depending on whether the acquirer obtains absolute or effective control of the upstream entity. For example:
- where the acquirer will obtain effective control of the upstream entity (i.e. the acquirer acquires a relevant interest in 80% of the upstream entity, which has a relevant interest in 20% of the downstream company), we propose to specify that our relief will be subject to:

- (i) a standstill condition preventing the acquirer from acquiring a relevant interest in any more shares in the downstream company (whether in its individual capacity or through the upstream entity); and
 - (ii) a voting condition preventing the acquirer from exercising, or procuring the exercise of, any votes attached to the downstream shares it acquired a relevant interest in as a result of the upstream acquisition.
- (b) In cases where the acquirer does not obtain absolute or effective control of the upstream entity (i.e. the acquirer acquires a relevant interest in 30% of the upstream entity, which has a relevant interest in 20% of the downstream company), we propose to specify that our relief will be subject to:
- (i) a standstill condition that applies to the acquirer (that does not prevent an increase in the relevant interest arising because the upstream entity has increased its relevant interest in the shares of the downstream company under an exemption in s611, such as item 7 or item 9); and
 - (ii) either:
 - (A) a voting condition that applies to the upstream entity for the specified period, where the upstream entity supports the application and agrees to such a condition being imposed; or
 - (B) some other type of condition, such as a condition that, during the specified period, the acquirer must not procure the exercise of any votes attached to the downstream shares it acquired a relevant interest in as a result of the upstream acquisition.

See draft RG 71.74–RG 71.82.

Your feedback

B12Q1 Do you agree with our proposals to impose different types of standstill and voting conditions depending on whether the acquirer obtains absolute or effective control of the upstream entity? If not, why not?

B12Q2 Under our proposals, if a voting condition may be impractical or inappropriate in some circumstances, we may apply other types of conditions on our relief. Do you have any suggestions about what other types of conditions we should impose?

Rationale

- 42 Standstill and voting conditions have been part of our guidance on relief for some time, but in practice have been infrequently applied. We have substantially retained the guidance currently in RG 71 on standstill and voting conditions, for the purposes of consultation. We have proposed some specific revisions that may address some of the practical difficulties we anticipate may arise where these conditions apply to our relief.

- 43 The main purpose of standstill and voting conditions is to protect the interests of downstream shareholders in circumstances where the upstream acquirer has obtained a relevant interest in more than 20% of the downstream company. The interests of downstream shareholders are protected because standstill and voting conditions reduce the control effect of the downstream acquisition.
- 44 A standstill condition will generally prevent the acquirer from acquiring a relevant interest in any more shares in the downstream company. However, a standstill condition may affect the upstream entity. This is because, if the upstream entity increases its relevant interest in the downstream company, it will cause the acquirer's relevant interest in the downstream company to also increase: see s606(2) and 608(3).
- 45 We consider that different types of standstill and voting conditions should apply depending on whether the acquirer obtains absolute or effective control of the upstream entity. The standstill and voting conditions in proposal 0 are appropriate where the acquirer obtains absolute or effective control of the upstream entity. This is because, in these circumstances, the acquirer is in a position to control the affairs of the upstream entity, including decisions about acquiring a further relevant interest in the shares of the downstream company and exercising, controlling, or procuring the exercise by the upstream entity of, the votes attached to the shares in the downstream company.
- 46 In contrast, we consider that the standstill and voting conditions in proposal B12(b) are appropriate where the acquirer does not obtain absolute or effective control of the upstream entity. In these cases, we consider that applying the standstill condition in proposal B12(a)(i) may cause unfair prejudice to the upstream entity because it would be prevented from relying on exemptions in s611 that would otherwise be available. This is because an increase to the upstream entity's relevant interest in the downstream company would cause the acquirer to breach s606(2). In addition, we consider that a voting condition may be of limited benefit because it will be the upstream entity not the acquirer that will control the power to exercise the votes attached to the downstream shares. Proposal B12(b)(ii) addresses this practical difficulty.
- 47 In relation to applying a voting condition on the upstream entity, we acknowledge that this may cause the potential for conflicts of interest to arise for the directors of the upstream entity. We believe that proposal B12(b)(ii)(B) addresses the practical difficulties with a voting condition while ensuring that the interests of downstream shareholders are protected. We are still considering the application of standstill and voting conditions and are particularly interested in stakeholder feedback on these proposals.
- 48 In our updated guidance in RG 71, we propose to consider all the circumstances when determining whether to impose standstill and voting conditions, including submissions from the upstream entity. We will take into account the aim of protecting the interests of downstream shareholders and

the effect of our relief on the upstream entity. We also aim to reduce the risk that our relief is abused by seeking to ensure that an acquirer is not permitted to act in a manner contrary to the basis on which our relief was granted.

Other conditions that may apply

Proposal

B13 We propose to specify in RG 71 that, depending on the circumstances of a particular application, we may consider applying other types of conditions to our relief instead of, or in addition to standstill, voting or downstream bid conditions. These conditions will be assessed on a case-by-case basis and may include a sell-down condition, as a possible alternative to a downstream bid condition.

See draft RG 71.83–RG 71.85.

Your feedback

B13Q1 Do you agree with our proposal for a sell-down condition as a potential alternative to a downstream bid condition? If not, why not?

B13Q2 Do you think there are any particular circumstances (i.e. the size of the downstream shareholding or the liquidity of the downstream shares) that we should consider before granting relief to permit a sell-down rather than a downstream bid?

B14 If a sell-down condition is imposed, we propose that the acquirer must:

- (a) appoint a broker to reduce the acquirer's voting power in the downstream company to 20% or less within 14 days of the acquisition of control by the acquirer of the upstream entity (or otherwise upon the acquisition of the power to control the disposal of the downstream shares);
- (b) not exercise, or procure the exercise of, any voting rights attached to the downstream shares in excess of 20% without our consent; and
- (c) in selling any securities acquired under the relief, ensure that the broker uses its best endeavours to obtain as wide a placement as practicable for the highest practicable price.

See draft RG 71.86.

Your feedback

B14Q1 Do you agree with the proposed requirements of the sell-down condition? If not, why not?

B14Q2 Do you think that the proposed 14-day time period allows sufficient time for an acquirer to sell down its interest in the downstream company to below 20%? Or do you think some other time period would be appropriate? If so, please give details.

Rationale

- 49 Applications for downstream acquisition relief typically involve complex issues. Accordingly, we may need to adapt the conditions of relief to the particular circumstances of an application as appropriate. For this reason, we propose that we may impose conditions other than those in proposals B10 and B11 on a case-by-case basis.
- 50 We are proposing considering a sell-down condition as a potential alternative to a downstream bid condition. However, we would expect that a sell-down condition would only be available in limited circumstances.
- 51 A sell-down condition would generally state that the acquirer must appoint a broker to sell down the acquirer's interest in the downstream company to a level at or below 20% within 14 days.
- 52 We have based the indicative requirements for our proposed sell-down condition on the requirements that will generally apply to our relief for brokers acting as principals through the provision of client facilitation services, as set out in Regulatory Guide 31 *Acquisitions by a broker acting as principal for client facilitation purposes* (RG 31).
- 53 We consider that these requirements strike an appropriate balance between maintaining the regulatory objectives of the sell-down condition, while at the same time allowing an orderly process for an acquirer to reduce its voting power in the downstream company. We consider that, in appropriate cases, a sell-down condition can achieve the same regulatory objectives as a downstream bid condition, while providing greater commercial flexibility to upstream acquirers without unduly prejudicing the interests of downstream shareholders or impacting on the market for the downstream shares.

C Regulatory and financial impact

54 In developing the proposals for our guidance on downstream acquisitions in this paper, we have carefully considered their regulatory and financial impact.

55 On the information currently available to us we think that the proposals will strike an appropriate balance between:

- (a) ensuring that downstream acquisitions that are incidental to the main objective of acquiring the upstream entity are not adversely affected by the fact that the upstream entity holds securities in a downstream company; and
- (b) the purposes of Ch 6 set out in s602.

56 We do not anticipate the proposed guidance will have a significant regulatory or financial impact.

57 Before updating our guidance in RG 71, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR);
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

58 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

59 To ensure that we are in a position to properly complete any required RIS, we ask you to provide us with as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

List of proposals and questions

Proposal/issue	Your feedback
<p>B1 We propose to update our guidance in RG 71 to:</p> <p>(a) explain when a downstream acquisition will occur, our approach to the exemption in item 14 and the scope of the exemption (see draft RG 71.1–RG 71.4 and draft RG 71.12–RG 71.19);</p> <p>(b) in relation to the scope of the exemption, state our view that we will not consider that a downstream acquisition is exempt from s606 merely because another exemption in s611 applies to an upstream acquisition (see draft RG 71.23–RG 71.26); and</p> <p>(c) set out the types of circumstances in which we may consider applying to the Takeovers Panel for a declaration of unacceptable circumstances despite the exemption in item 14 applying (see draft RG 71.27–RG 71.29).</p>	<p>B1Q1 Do you have any comments on our proposed updated guidance?</p> <p>B1Q2 Do you agree with the circumstances where we may consider applying to the Takeovers Panel for a declaration of unacceptable circumstances? If not, why not?</p> <p>B1Q3 Are there any other matters not included in our proposed update to RG 71 that you think we should cover? If so, please give details of the type of guidance you think we should provide.</p>
<p>B2 Relief will be required where a proposed downstream acquisition will not satisfy the exemption in item 14. We propose to revise RG 71 by clarifying our approach to applications for downstream acquisition relief in the following way:</p> <p>(a) In deciding applications for downstream acquisition relief, we will consider:</p> <p>(i) the policy objectives of the exemption in item 14; and</p> <p>(ii) the purposes of Ch 6, as set out in s602.</p> <p>See draft RG 71.16–RG 71.19 and draft RG 71.30–RG 71.32.</p> <p>(b) We will not grant relief to facilitate a downstream acquisition that does not satisfy the exemption in item 14 if:</p> <p>(i) relief would be inconsistent with the policy behind the exemption in item 14 or the principles in s602; or</p> <p>(ii) after considering all the relevant circumstances, we are not satisfied that the regulatory detriment is minimal or clearly outweighed by the resulting commercial benefit (see Regulatory Guide 51 <i>Applications for relief</i> (RG 51), in particular RG 51.37–RG 51.49); or</p> <p>(iii) the acquisition is not legal in the jurisdiction where it is to take place; or</p> <p>(iv) it appears to us that the downstream acquisition may give rise to unacceptable circumstances.</p> <p>See draft RG 71.49.</p>	<p>B2Q1 Do you agree with our proposed approach to applications for downstream acquisition relief? If not, why not?</p>

Proposal/issue	Your feedback
<p>B3 We propose to specify that if an acquirer of an upstream entity cannot satisfy the exemption in item 14, we may grant relief on conditions where we are satisfied that the guidance and investor protections in RG 71 will be upheld. When considering whether to grant relief, we will take into account the following factors:</p> <ul style="list-style-type: none"> (a) whether the upstream entity is listed or unlisted; (b) international comity considerations; (c) whether control of the downstream company appears to be a significant purpose of the upstream acquisition, or whether the downstream shares are a substantial part of the upstream entity's assets; (d) the alternatives that are available to the acquirer (such as whether the downstream shares can be simply and efficiently separated from the other assets of the upstream entity); (e) whether the regulation that applies to the upstream acquisition is similar to Australian takeovers regulation; (f) whether the upstream entity is closely or widely held; and (g) any other circumstances that we consider relevant to the particular case. <p>See draft RG 71.35–RG 71.36.</p>	<p>B3Q1 Do you agree with our proposed guidance on the criteria that we will take into account when considering whether to grant relief? If not, why not?</p>
<p>B4 We also propose that relief without conditions may be available in rare and exceptional circumstances. Such relief may be available where:</p> <ul style="list-style-type: none"> (a) we are in the process of approving a financial market or foreign exchange for the purposes of the exemption in item 14; or (b) the upstream entity has a secondary listing on a prescribed financial market or approved foreign exchange, which in the circumstances is effectively the primary regulation that applies to the upstream entity. <p>See draft RG 71.37.</p>	<p>B4Q1 Do you agree with our proposal to provide relief without conditions in rare and exceptional circumstances? If not, why not?</p>
<p>B5 Our guidance in RG 71 currently identifies the existence of a control purpose as a relevant factor in deciding whether to grant relief. We propose to clarify how this will apply in the following way:</p> <ul style="list-style-type: none"> (a) The relevant control purpose test will be whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition. (b) Where a control purpose appears to be present in a downstream acquisition, we may: <ul style="list-style-type: none"> (i) refuse relief; or (ii) grant relief subject to conditions that ensure that the principles in s602 will be upheld. <p>See draft RG 71.40–RG 71.42.</p>	<p>B5Q1 Do you agree with our proposal to amend the control purpose test from a 'main purpose' to a more objective consideration of whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition? If not, why not?</p> <p>B5Q2 Do you agree with our proposal to clarify our guidance on how we will deal with relief applications when a control purpose appears to be present (i.e. that we may refuse to grant relief or grant relief subject to appropriate conditions)? If not, why not?</p>

Proposal/issue	Your feedback
<p>B6 We propose to amend our guidance in RG 71 to specifically state that whether the downstream shares are a substantial part of the upstream entity's assets:</p> <ul style="list-style-type: none"> (a) is one of the factors we will take into account when considering whether to grant relief; and (b) will be relevant to the type of conditions that we may impose on relief (if granted). <p>See draft RG 71.43–RG 71.45.</p>	<p>B6Q1 Do you agree that when considering whether to grant relief, we should take into account (among other things) whether the downstream shares are a substantial part of the upstream entity's assets? If not, why not?</p> <p>B6Q2 Do you agree that whether the downstream shares are a substantial part of the upstream entity's assets is relevant to the conditions that should apply to our relief (if granted)? If not, why not?</p>
<p>B7 We do not propose to prescribe a valuation methodology for valuing assets, because different valuation methodologies will be appropriate depending on the nature of the entities and the assets involved.</p>	<p>B7Q1 Would any additional guidance be useful in this area?</p>
<p>B8 We are considering specifying that if we decide that a downstream acquisition qualifies for relief, our relief may be subject to:</p> <ul style="list-style-type: none"> (a) a downstream bid condition; or (b) standstill and voting conditions; and/or (c) other types of conditions (including a sell-down condition) instead of, or in addition to, the above conditions on a case-by-case basis. <p>See draft RG 71.51.</p>	<p>B8Q1 Do you agree with our proposed guidance on the types of conditions we may impose on our relief? If not, why not?</p>
<p>B9 In determining what conditions should apply, we will consider:</p> <ul style="list-style-type: none"> (a) whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition; (b) whether the downstream shares represent a substantial part of the assets of the upstream entity; (c) whether the downstream shares to be acquired through the upstream acquisition will give the acquirer effective control of the downstream company; (d) the effect of the acquisition on the other downstream shareholders; (e) whether the conditions are practical in the circumstances; and (f) any other circumstances that we consider relevant to the particular case. <p>See draft RG 71.52 and Table 1.</p>	<p>B9Q1 Do you agree that the factors in proposal B9 are relevant to our determination of what conditions should apply to our relief? If not, why not?</p> <p>B9Q2 Do you think that we should provide more guidance in RG 71 on the information an acquirer should provide so that ASIC can assess whether these factors are present? If so, please give details of the type of guidance you think we should provide.</p> <p>B9Q3 Should we include more guidance on when we may impose other types of conditions? If so, please give details of the type of guidance you think we should provide.</p>

Proposal/issue	Your feedback
<p>B10 Where it is not possible to clearly and accurately determine the ‘effective’ price being offered for the downstream shares from the upstream acquisition price, an independent expert valuation will be required. We propose to amend our guidance on when an independent expert valuation is required—in particular, that:</p> <ul style="list-style-type: none"> (a) an independent expert appointed by the acquirer should follow our guidance in Regulatory Guide 111 Content of expert reports (RG 111) (subject to any specific requirements of RG 71); (b) the acquirer must provide to the independent expert all information about the downstream company that was available to the acquirer when the acquirer was fixing the price of the upstream acquisition; (c) in addition to the requirement that generally the downstream bid price will need to be increased if the upstream acquisition price is increased, a revised independent expert report will generally be required in these circumstances; and (d) if a new circumstance (other than an increase to the upstream acquisition price) occurs that could have a material impact on the independent expert’s assessment of the fair value of the shares in the downstream company, we will also generally require that a revised independent expert report be provided to shareholders to explain the effect of the new circumstance on the independent expert’s assessment of the fair value of the shares in the downstream company. <p>See draft RG 71.58–RG 71.67.</p>	<p>B10Q1 Do you agree with our proposed guidance on information that the acquirer should make available to the independent expert? If not, why not?</p> <p>B10Q2 Do you agree that a revised independent expert report should be required where a new circumstance occurs that could have a material impact on the independent expert’s assessment of the fair value of the downstream shares? If not, why not?</p> <p>B10Q3 Our guidance in RG 71.63 states that:</p> <ul style="list-style-type: none"> (a) where an independent expert gives a range of values, generally the downstream bid price should be the mid-point of the range, or the highest mid-point where various ranges are used; and (b) we will consider applications to vary the terms of the relief for the selection of the downstream bid price, taking into account the independent expert’s advice in determining these applications. <p>Do you agree with this guidance? If not, why not?</p>
<p>B11 We are considering specifying in RG 71 that standstill and voting conditions (with or without other conditions) may apply when:</p> <ul style="list-style-type: none"> (a) control of the downstream company does not appear to be a significant purpose of the upstream acquisition; (b) the downstream shares are not a substantial part of the upstream entity’s assets; and (c) the acquirer will not obtain effective control of the downstream company. <p>See draft RG 71 at Table 1.</p> <p>A voting condition may also apply when our relief is subject to a downstream bid condition. The effect of this condition would be that the acquirer would not be able to exercise, control or procure the exercise of votes attached to the downstream shares in excess of 20% until the close of the downstream bid.</p> <p>See draft RG 71.55.</p>	<p>B11Q1 Do you agree with the circumstances where standstill and voting conditions may apply? If not, why not?</p> <p>B11Q2 Do you think standstill and voting conditions are appropriate? If not, why not?</p> <p>B11Q3 Do you anticipate any practical difficulties with applying either a standstill and/or a voting condition on relief? If so, please give details.</p>

Proposal/issue	Your feedback
<p>B12 We propose to specify in RG 71 that different types of standstill and voting conditions may apply to our relief depending on whether the acquirer obtains absolute or effective control of the upstream entity. For example:</p> <p>(a) where the acquirer will obtain effective control of the upstream entity (i.e. the acquirer acquires a relevant interest in 80% of the upstream entity, which has a relevant interest in 20% of the downstream company), we propose to specify that our relief may be subject to:</p> <p>(i) a standstill condition preventing the acquirer from acquiring a relevant interest in any more shares in the downstream company (whether in its individual capacity or through the upstream entity); and</p> <p>(ii) a voting condition preventing the acquirer from exercising, or procuring the exercise of, any votes attached to the downstream shares it acquired a relevant interest in as a result of the upstream acquisition.</p> <p>(b) In cases where the acquirer does not obtain absolute or effective control of the upstream entity (i.e. the acquirer acquires a relevant interest in 30% of the upstream entity, which has a relevant interest in 20% of the downstream company), we propose to specify that our relief may be subject to:</p> <p>(i) a standstill condition that applies to the acquirer (that does not prevent an increase in the relevant interest arising because the upstream entity has increased its relevant interest in the shares of the downstream company under an exemption in s611, such as item 7 or item 9); and</p> <p>(ii) either:</p> <p>(A) a voting condition that applies to the upstream entity for the specified period, where the upstream entity supports the application and agrees to such a condition being imposed; or</p> <p>(B) some other type of condition, such as a condition that, during the specified period, the acquirer must not procure the exercise of any votes attached to the downstream shares it acquired a relevant interest in as a result of the upstream acquisition.</p>	<p>B12Q1 Do you agree with our proposals to impose different types of standstill and voting conditions depending on whether the acquirer obtains absolute or effective control of the upstream entity? If not, why not?</p> <p>B12Q2 Under our proposals, if a voting condition may be impractical or inappropriate in some circumstances, we may apply other types of conditions on our relief. Do you have any suggestions about what other types of conditions we should impose?</p>

See draft RG 71.74–RG 71.82.

Proposal/issue	Your feedback
<p>B13 We propose to specify in RG 71 that, depending on the circumstances of a particular application, we may consider applying other types of conditions to our relief instead of, or in addition to standstill, voting or downstream bid conditions. These conditions will be assessed on a case-by-case basis and may include a sell-down condition, as a possible alternative to a downstream bid condition.</p> <p>See draft RG 71.83–RG 71.85.</p>	<p>B13Q1 Do you agree with our proposal for a sell-down condition as a potential alternative to a downstream bid condition? If not, why not?</p> <p>B13Q2 Do you think there are any particular circumstances (i.e. the size of the downstream shareholding or the liquidity of the downstream shares) that we should consider before granting relief to permit a sell-down rather than a downstream bid?</p>
<p>B14 If a sell-down condition is imposed, we propose that the acquirer must:</p> <ul style="list-style-type: none"> (a) appoint a broker to reduce the acquirer’s voting power in the downstream company to 20% or less within 14 days of the acquisition of control by the acquirer of the upstream entity (or otherwise upon the acquisition of the power to control the disposal of the downstream shares); (b) not exercise, or procure the exercise of, any voting rights attached to the downstream shares in excess of 20% without our consent; and (c) in selling any securities acquired under the relief, ensure that the broker uses its best endeavours to obtain as wide a placement as practicable for the highest practicable price. <p>See draft RG 71.86.</p>	<p>B14Q1 Do you agree with the proposed requirements of the sell-down condition? If not, why not?</p> <p>B14Q2 Do you think that the proposed 14-day time period allows sufficient time for an acquirer to sell down its interest in the downstream company to below 20%? Or do you think some other time period would be appropriate? If so, please give details.</p>



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 71

Downstream acquisitions

November 2011

About this guide

This guide is for companies, listed managed investment schemes, investors and their advisers who are involved in, or affected by, downstream acquisitions.

In some circumstances, a downstream acquisition may breach s606 of the *Corporations Act 2001* (Corporations Act).

This guide explains:

- the downstream acquisition exemption in item 14 of s611 (item 14);
- when we may grant relief;
- the conditions that may apply to our relief; and
- how to apply for relief.

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 draft version was issued in November 2011 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Policy Statement 71, issued 15 November 1993, reissued 1 July 1996, rebadged as a regulatory guide 5 July 2007.

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

A person may acquire a relevant interest in the shares of a downstream company as a result of an acquisition of a relevant interest in an upstream entity.

This guide explains:

- downstream acquisitions and when a person may breach s606 as a result of an upstream acquisition (see RG 71.1–RG 71.4);
- the exemption for downstream acquisitions in item 14 of s611 (item 14), our approach, the scope of the exemption, and when we may apply to the Takeovers Panel for a declaration of unacceptable circumstances even though the exemption in item 14 is satisfied (see Section B);
- when we may grant relief to allow downstream acquisitions that would breach s606 because they do not satisfy the exemption in item 14 (see Section C);
- the conditions that may apply to our relief (see Section D); and
- how to apply for relief (see Section E).

What is a downstream acquisition?

RG 71.1 A downstream acquisition occurs when a person acquires a relevant interest in the shares of a downstream company as a result of an acquisition in an upstream entity (downstream acquisition).

RG 71.2 This is because a person is deemed under s608(3) of the *Corporations Act 2001* (Corporations Act) to have the same relevant interests in securities that an upstream entity has if they have voting power above 20% in, or control, the entity.

Note: For ease of reference, we have generally used the term ‘company’ and ‘shares’ when referring to the downstream company because this is consistent with the language adopted in Ch 6. However, Ch 6 and this guide also applies to the acquisition of relevant interests in voting securities of listed bodies and voting interests of listed managed investment schemes: s603 and 604. In relation to the upstream company, body or scheme, Ch 6 uses the terms ‘listed company’ and ‘body corporate’. For ease of reference, we have used the term ‘upstream entity’ throughout this guide.

RG 71.3 The downstream acquisition will breach s606 in circumstances where the relevant interest in the downstream company exceeds the thresholds in s606, unless the exemption in item 14 of s611 (item 14) applies.

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RG 71.4 Two examples of downstream acquisitions that may breach the thresholds in s606 are set out below.

Example 1: Acquiring a relevant interest in an upstream entity

Company A acquires a relevant interest in 40% of the securities in Entity B where Entity B has a relevant interest in 25% of the shares in Company C. This will result in Company A acquiring a relevant interest in 25% of the shares in Company C (by the application of s608(3)(a)).

Example 2: Acquiring control of an upstream managed investment scheme

Company A acquires control of Scheme 1 where Scheme 1 has a relevant interest in 25% of the interests in Scheme 2 (a listed managed investment scheme). This will result in Company A acquiring a relevant interest in 25% of the interests in Scheme 2 (by application of s608(3)(b)).

Note: It is assumed in each example that Company A did not have an existing relevant interest in the shares in Company C or in the interests in Scheme 2.

Purposes of Ch 6

RG 71.5 The purposes of Ch 6 as set out in s602 are relevant to downstream acquisitions. This is because a downstream acquisition may result in:

- (a) an upstream acquirer obtaining control over a substantial interest in the downstream company without downstream shareholders being given an opportunity to consider the proposal, contrary to the principle in s602(b); or
- (b) the downstream holders not being given an equal opportunity to share in any premium for control of the downstream shares that is reflected in the price paid for the upstream acquisition, contrary to the principle in s602(c).

RG 71.6 A downstream acquisition that satisfies the exemption in item 14 may nonetheless give rise to unacceptable circumstances if the acquisition offends the principles in s602. We will also consider the purposes of Ch 6 when considering whether to give relief to a downstream acquisition that does not satisfy the exemption in item 14 and the conditions that should apply to our relief.

The exemption in item 14

RG 71.7 The exemption in item 14 applies where the upstream entity is included in the official list of a prescribed financial market (such as ASX) or a foreign body conducting a financial market approved by us. ASIC's list of approved foreign exchanges is set out in Class Order [CO 02/259] *Downstream acquisitions: foreign stock markets*.

RG 71.8 When considering whether a downstream acquisition is exempt from the prohibition in s606, persons acquiring a relevant interest in an upstream entity should be aware that there are limits to the scope of the exemption in item 14, and a downstream acquisition may risk an application to the Takeovers Panel for a declaration of unacceptable circumstances even though the exemption applies. For a discussion of the downstream acquisition exemption in item 14 and the circumstances in which it should apply, see Section B.

When ASIC may grant relief

RG 71.9 ASIC has discretionary powers under s655A to grant relief from the requirements of Ch 6. The circumstances where we may grant relief to permit a downstream acquisition that does not satisfy the exemption in item 14 are discussed in Section C.

Conditions of relief that may apply

RG 71.10 The types of conditions that we may impose on any relief we grant will depend on the circumstances of the downstream acquisition: see Section D. Table 1 in Section D summarises when certain conditions will apply and where to find more information on them.

Applying for relief

RG 71.11 Applications for relief should be made before the upstream acquisition is made. For details on how to apply for relief, see Section E.

B The exemption in item 14

Key points

Item 14 provides an exemption from s606 for downstream acquisitions where the upstream entity is listed on a prescribed financial market (including ASX) or on an approved foreign exchange.

This section explains:

- the exemption in item 14 (see RG 71.12–RG 71.15);
- our approach to the exemption (see RG 71.16–RG 71.18); and
- the scope of the exemption, including when we may apply to the Takeovers Panel for a declaration of unacceptable circumstances (see RG 71.19–RG 71.26 and RG 71.27–RG 71.29).

The exemption in item 14

- RG 71.12 Item 14 exempts a downstream acquisition from breaching s606 where 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 us.
- RG 71.13 The exemption in item 14 was introduced following recommendations by the Legal Committee of Companies and Securities Advisory Committee (CASAC) in its paper *Anomalies in the takeover provisions of the Corporations Law* (March 1994).
- RG 71.14 We have approved a list of foreign exchanges for the purposes of item 14: see Class Order [CO 02/259] *Downstream acquisitions: foreign stock markets*. All of the foreign bodies conducting a financial market included in this list are also included in the list of approved foreign exchanges in Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72).

Note: Unless otherwise stated, our relief only extends to the main board of these markets.

- RG 71.15 In approving the list of foreign exchanges included in [CO 02/259], we took into account the criteria set out at RG 72.54 because we consider that the extension of the item 14 exemption to foreign exchanges that meet these criteria satisfies the policy behind the exemption in item 14: see RG 71.17.

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Our approach to the exemption

RG 71.16 Our approach to the exemption for downstream acquisitions in item 14 is to uphold the policy behind the exemption while also taking into account the investor protections afforded to downstream shareholders in s602.

RG 71.17 The policy behind the exemption in item 14 is designed 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.

Note: See CASAC paper, *Anomalies in the takeover provisions of the Corporations Law* (March 1994) at pp. 30–32.

RG 71.18 International comity considerations underpin the extension of the exemption in item 14 to downstream acquisitions occurring as a result of an acquisition in a foreign entity listed on an approved foreign exchange. This is because Australian securities regulation should not impose excessive costs or regulatory obstacles on primarily foreign corporate transactions, unless there is a clear need for Australian investor protection.

Scope of the exemption

RG 71.19 When considering whether a downstream acquisition is exempt from the prohibition in s606, persons acquiring a relevant interest in an upstream entity should be aware that:

- (a) the upstream entity must have a primary listing (and not only a secondary listing) on a prescribed financial market (including ASX) or an approved foreign exchange;
- (b) we will not consider that a downstream acquisition is exempt from s606 merely because another exemption in s611 applies to an upstream acquisition; and
- (c) a downstream acquisition may risk an application to the Takeovers Panel for a declaration of unacceptable circumstances even if it satisfies the exemption in item 14.

Secondary listings

RG 71.20 Class Order [CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition* modifies item 14 to exclude secondary listings from the scope of the exemption. This is because the place of

incorporation and the listing rules of the exchange on which the upstream entity has its primary listing may not satisfy the policy behind the exemption in item 14. This means that the item 14 exemption will not apply if the upstream entity only has a secondary listing on a prescribed financial market or on an approved foreign exchange: see [CO 01/1542].

RG 71.21 Where a person makes an upstream acquisition and the upstream entity has only a secondary listing on a prescribed financial market or an approved foreign exchange, the acquirer may apply to us for individual downstream acquisition relief: see Section C.

RG 71.22 We have approved a list of foreign exchanges for the purposes of item 14: see [CO 02/259]. For a discussion of when we may approve a new foreign exchange for the purposes of item 14, see RG 71.97–RG 71.99.

Note: A body with a secondary listing on ASX is referred to in the ASX Listing Rules as an ‘exempt foreign entity’.

Upstream acquisitions where another exemption in s611 applies

RG 71.23 We will not consider that a downstream acquisition is exempt from s606 merely because another exemption in s611 applies to an upstream acquisition.

RG 71.24 Downstream acquisitions will most often arise when a person makes a takeover offer for an upstream entity. There is an exemption from s606 for acquisitions that result from the acceptance of a takeover offer made under Ch 6: see item 1 of s611. We do not consider that item 14 is satisfied merely because another exemption in s611 applies to the upstream acquisition.

RG 71.25 This is because:

- (a) there is a separate express exemption for downstream acquisitions in item 14; and
- (b) nothing in s611 or the policy underlying the exemptions suggests that s606 will not apply to an acquisition that satisfies another exemption but involves a downstream acquisition that is not exempt under item 14.

RG 71.26 An acquirer who cannot rely on item 14 but seeks to rely on another exemption in s611 in relation to a downstream acquisition may risk regulatory action by us, including an application to the Takeovers Panel for a declaration of unacceptable circumstances.

Unacceptable circumstances

RG 71.27 A downstream acquisition may give rise to unacceptable circumstances even if it satisfies the exemption in item 14. An application to the Takeovers Panel for a declaration of unacceptable circumstances and orders (which include remedial orders) in relation to the affairs of a company can be made by ASIC or any other interested person: see Pt 6.10, Div 2, Subdiv B.

RG 71.28 Whether the circumstances of a downstream acquisition are unacceptable will depend on the particulars of each case. However, the Takeovers Panel will have regard to the purposes of Ch 6 set out in s602 when considering an application for a declaration of unacceptable circumstances. The Takeovers Panel stated in *Australian Pipeline Trust 01R* [2006] ATP 29 at [106] that:

...there is clear indication in the explanatory memoranda and the relevant extrinsic material (for the *Corporations Act* and its preceding legislation) that the legislature was concerned that the exemption set out in Item 14 not be abused and the intent of Chapter 6 not be avoided.

RG 71.29 The types of circumstances in which we may consider applying to the Takeovers Panel for a declaration of unacceptable circumstances despite the exemption in item 14 applying include where:

- (a) control of the downstream company is a significant purpose of the upstream acquisition (see, for example, the discussion in *Leighton Holdings Limited 02 R* [2010] ATP 14 at 67 and 70–86, and *Leighton Holdings 01, 02, 03* [2010] ATP 13 at 55); and/or

Note: If the downstream shares comprise over 50% of the assets of the upstream entity, the Takeovers Panel will consider if (among other factors) reliance on item 14 is unacceptable in the circumstances: see the discussion in *Leighton Holdings Limited 02 R* [2010] ATP 14.

- (b) the downstream acquisition technically satisfies the exemption in item 14 but subverts or otherwise does not meet the policy basis for reliance on the exemption in item 14, such as where the upstream entity is listed in name only and is closely held (see *Cape Lambert Minsec Pty Ltd* [2009] ATP 12 at 40).

C When ASIC may grant relief

Key points

Relief will be required where a downstream acquisition does not satisfy the exemption in item 14.

This section explains:

- our approach to relief (see RG 71.30–RG 71.34);
- when we may grant relief (see RG 71.35–RG 71.37);
- key concepts relevant to our decision whether to grant relief (see RG 71.38–RG 71.48); and
- when we will not grant relief (see RG 71.49).

Our approach to relief applications

- RG 71.30 A person may apply for relief to make a downstream acquisition that would otherwise result in the person breaching s606. This will be required if the upstream entity is unlisted or does not have a primary listing on a prescribed financial market (such as ASX) or on an approved foreign exchange.
- RG 71.31 In deciding whether to grant relief for a downstream acquisition that does not satisfy the exemption in item 14, we will consider:
- (a) the policy objectives of the exemption in item 14 (see RG 71.16–RG 71.18); and
 - (b) the purposes of Ch 6, as set out in s602 (see RG 71.5–RG 71.6).
- RG 71.32 A prerequisite to relief will be compliance by the party applying for relief with the disclosure obligations discussed below.

Disclosure obligations

- RG 71.33 Before we grant relief for a downstream acquisition that does not satisfy item 14, the applicant must satisfy us that the market for the shares in the downstream company is adequately informed about the upstream acquisition.
- RG 71.34 We will not grant relief unless the acquirer of the upstream entity discloses to the downstream company details about the timing and terms of the upstream acquisition at the time the upstream acquisition is announced. If the downstream company is listed, this will enable the downstream company to make an announcement to the relevant financial market about the upstream acquisition and the implications for the downstream shareholders. If the downstream company is not listed, the provision of this information will enable the downstream company to communicate directly with its members about the upstream acquisition and the potential implications of the upstream acquisition on the downstream company.

When we may grant relief

RG 71.35 We may grant relief subject to conditions appropriate to the circumstances if we are satisfied that the policy and investor protections identified in this guide will be upheld.

RG 71.36 We will consider the following factors when deciding whether to grant relief:

- (a) whether the upstream entity is listed or unlisted. We will be more likely to grant relief if the upstream entity is listed;
- (b) international comity considerations;
- (c) whether control of the downstream company appears to be a significant purpose of the upstream acquisition or whether the downstream shares are a substantial part of the upstream entity's assets;

Note: If we grant relief despite these factors being present, we would be likely to impose a downstream bid condition to ensure that the principles in s602 will be upheld.

- (d) the alternatives that are available to the acquirer. There may be other ways to structure a transaction so that relief is not required, such as where the downstream shares can be simply and efficiently separated from the other assets of the upstream entity. In these circumstances, we may refuse relief as unnecessary. However, we understand that negotiations to separate the downstream shares from the assets of an upstream entity may be impracticable in the circumstances;
- (e) whether the regulation that applies to the upstream acquisition achieves similar regulatory outcomes to Australian takeovers regulation;
- (f) whether the upstream entity is widely or closely held:
 - (i) we will be unlikely to grant relief where the upstream entity is unlisted and closely held or listed in name only and closely held; and
 - (ii) where the upstream entity is closely held, it may also be easier for the acquirer to negotiate to separate the shares in the downstream company from the other assets of the upstream entity and relief would be unnecessary; and
- (g) any other circumstances that we consider relevant to the particular case.

RG 71.37 We may grant relief without conditions in rare and exceptional circumstances. The circumstances where we may grant relief without conditions are where:

- (a) we are in the process of approving the relevant financial market or foreign exchange for the purposes of item 14; or
- (b) the upstream entity has a secondary listing on a prescribed financial market or approved foreign exchange, which in the circumstances is effectively the primary regulation that applies to the upstream entity.

Key concepts relevant to our decision about relief and conditions

- RG 71.38 When deciding whether to grant relief and the conditions that may apply, the following concepts are relevant:
- (a) whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition (this is relevant to both whether we will grant relief and the conditions that may apply);
 - (b) whether the downstream shares are a substantial part of the upstream entity's assets (this is relevant to both whether we will grant relief and the conditions that may apply); and
 - (c) whether the acquirer will obtain effective control of the downstream company as a result of the upstream acquisition (this is relevant to the conditions that may apply).
- RG 71.39 For a discussion of the conditions that may apply to our relief, see Section D. For guidance on the information that should be provided to us when applying for relief, see Section E.

Control purpose

- RG 71.40 If there is a control purpose in relation to the downstream company, we may refuse to grant relief, or grant relief subject to conditions that ensure that the principles in s602 will be upheld (such as requiring that the acquirer make a downstream bid).
- RG 71.41 When assessing whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition, we will take into account all the relevant circumstances. These will include whether the circumstances suggest that the upstream acquisition has been structured or designed to avoid complying with Ch 6 in relation to the downstream company.
- RG 71.42 The following factors may suggest to us that control of the downstream company is a significant purpose of the upstream acquisition:
- (a) the percentage of shares in the downstream company held by the upstream entity, including whether the shares comprise a substantial part of the assets of the upstream entity;
 - (b) the voting power of the acquirer in the downstream company at the time of the application, as well as the voting power of the acquirer following the upstream acquisition;
 - (c) the nature of the assets of the upstream entity, other than the shares in the downstream company (i.e. whether they are highly liquid, or are readily procurable or saleable commodities otherwise than through the upstream acquisition);

- (d) any association or aggregation of relevant interests or voting power caused by the downstream acquisition; and
- (e) cross-shareholdings, common board memberships and any other common significant management or other relevant relationships between any of the following:
 - (i) the acquirer;
 - (ii) the upstream entity;
 - (iii) the downstream company; or
 - (iv) their associates.

Substantial assets

- RG 71.43 If the downstream shares comprise a substantial part of the assets of the upstream entity, we may refuse relief or grant relief subject to conditions that ensure that the principles in s602 will be upheld (such as requiring that the acquirer make a downstream bid).
- RG 71.44 We will normally regard 50% of the upstream entity's assets as the threshold for determining whether the downstream shares constitute 'a substantial part of the assets of the upstream entity'. If the market value of the downstream shares constitutes more than 50% of the value of the assets of the upstream entity, we will be more likely to determine that control of the downstream company is a significant purpose of the upstream acquisition.
- RG 71.45 While 50% or more of the assets of the upstream entity is the threshold for determining whether the downstream shares constitute a substantial part of the assets of the upstream entity, we may choose to lower this figure taking into account the practical circumstances of the proposed acquisitions (e.g. if the upstream entity has significant cash assets).

Effective control

- RG 71.46 If the acquirer will obtain effective control of the downstream company as a result of an upstream acquisition, any relief granted would generally be subject to a condition that the acquirer make a downstream bid for the downstream company.
- RG 71.47 When determining whether the acquirer will obtain effective control of the downstream company, we will generally regard voting power of 50% or above as constituting effective control. This is because the acquirer will have absolute or effective control over the downstream company with control over 50% or more of the voting shares.
- RG 71.48 We may choose a figure lower than 50% if it appears to us that effective control over the downstream company, such as is envisaged under s50AA or

the accounting standards dealing with controlling entities, may be exercised with less than 50% of the voting shares in the downstream company. We will also consider the circumstances of the downstream company, including the share register and whether there are any other substantial shareholdings in the downstream company.

When we will not grant relief

- RG 71.49 We will not grant relief to facilitate a downstream acquisition where:
- (a) relief would be inconsistent with the policy behind the exemption in item 14 and the principles in s602; or
 - (b) after considering all the relevant circumstances, we are not satisfied that the regulatory detriment is minimal or clearly outweighed by the resulting commercial benefit (see Regulatory Guide 51 *Applications for relief* (RG 51), in particular RG 51.37–RG 51.49); or
 - (c) the upstream acquisition is not legal in the jurisdiction where it is to take place; or
 - (d) it appears to us that the downstream acquisition may give rise to unacceptable circumstances.

D Conditions of relief

Key points

This section explains the factors we will consider when determining the types of conditions that may apply to our relief: see RG 71.50–RG 71.53.

The conditions that may apply to our relief are:

- a downstream bid condition (see RG 71.54–RG 71.73); or
- standstill and voting conditions (see RG 71.74–RG 71.82); and/or
- other conditions instead of, or in addition to, these conditions, including a sell-down condition (see RG 71.83–RG 71.86).

What conditions may apply?

- RG 71.50 Before we grant relief to allow a downstream acquisition that does not satisfy item 14, the applicant must satisfy us that the market for the shares in the downstream company will be adequately informed about the upstream acquisition. This will generally require the applicant to comply with certain disclosure obligations: see RG 71.33–RG 71.34.
- RG 71.51 Where we grant relief to allow a downstream acquisition that does not satisfy the exemption in item 14, our relief will be subject to:
- (a) a downstream bid condition; or
 - (b) standstill and voting conditions; and/or
 - (c) other types of conditions (including a sell-down condition) instead of, or in addition to, the above conditions on a case-by-case basis.
- RG 71.52 When determining the conditions that should apply, we will consider:
- (a) whether control of the downstream company may be regarded as a significant purpose of the upstream acquisition (see RG 71.40–RG 71.42);
 - (b) whether the downstream shares represent a substantial part of the assets of the upstream entity (see RG 71.43–RG 71.45);
 - (c) whether the downstream shares to be acquired through the upstream acquisition will give the acquirer effective control of the downstream company (see RG 71.46–RG 71.48);
 - (d) the effect of the acquisition on the other downstream shareholders;
 - (e) whether the conditions are practical in the circumstances; and
 - (f) any other circumstances that we consider relevant to the particular case.

Note: When calculating the downstream shares to which the upstream acquirer is entitled to, or becomes entitled to following the downstream acquisition, we will include the shares and interests in the downstream company referred to in RG 71.42.

RG 71.53 Table 1 summarises the different types of conditions that may apply to our relief.

Table 1: Conditions that may apply

Conditions	When they may apply
<p>Downstream bid condition (see RG 71.54–RG 71.73)</p>	<p>This condition will generally apply when:</p> <ul style="list-style-type: none"> • control of the downstream company appears to be a significant purpose; or • downstream shares are a substantial part of the upstream entity's assets; or • effective control of the downstream company will be obtained.
<p>Standstill and voting conditions (see RG 71.74–RG 71.82)</p>	<p>These types of conditions will generally apply when:</p> <ul style="list-style-type: none"> • control of the downstream company does not appear to be a significant purpose; • downstream shares are not a substantial part of the upstream entity's assets; and • effective control of the downstream company will not be obtained.
<p>Other types of conditions (including a sell-down condition) (see RG 71.83–RG 71.86)</p>	<p>We will apply other types of conditions on a case-by-case basis, as appropriate. These conditions may be instead of, or in addition, to the above conditions.</p>

Downstream bid condition

RG 71.54 A downstream bid condition will require the acquirer to make a takeover bid for the downstream company on terms consistent with the policy set out below. The purpose of the downstream bid condition is to ensure that, as far as is practicable, the downstream shareholders share equally in the benefits being offered to the upstream holders under the upstream acquisition. Our guidance on the terms of the downstream bid is based on the Federal Court decision in *BTR Plc v Westinghouse Brake and Signal Co (Australia) Ltd* (1992) 106 ALR 35.

RG 71.55 Where our relief is subject to a downstream bid condition, we may also impose a voting condition that would generally prevent the acquirer from being able to exercise, or procure the exercise of, the votes attached to the downstream shares in excess of 20% until the close of the downstream bid. This condition is to ensure fairness between the acquirer and the other downstream shareholders during the downstream bid period.

Type of bid

- RG 71.56 A downstream bid must be an offer to acquire all (and not a specified proportion) of the bid class securities that the acquirer does not otherwise have a relevant interest in and that exist or will exist at the date specified in the bidder's statement lodged with ASIC.

Pricing of downstream bid

- RG 71.57 We will normally require a downstream bid to be cash or include a cash alternative that is not less than the fair value ascribed to the downstream shares by an independent expert approved by us, or the 'effective' price.

'Effective' price

- RG 71.58 If the price effectively being offered to the upstream shareholders for the shares in the downstream company held by the upstream entity can be clearly and accurately determined from the upstream acquisition price, we will allow the downstream bid to be made at the 'effective' price (i.e. where the upstream entity is a listed investment entity and upstream acquisition price does not indicate that the market price for each of the investments is unreliable).
- RG 71.59 We reserve the discretion in such cases to alter the pricing mechanism for the downstream bid if later information indicates that the 'effective' price paid for the downstream shares is not as transparent as represented to us in the application. Any uncertainty about the price will be reduced if we have the opportunity to obtain submissions from third parties who may be affected by our decision before we alter the pricing mechanism for the downstream bid. These submissions would be on the mechanism for determining the price of the downstream bid.
- RG 71.60 If the upstream acquisition price is 'see-through' and is increased during the course of the upstream acquisition, the increase must be reflected in an increase in the downstream bid price.

Independent expert's valuation to determine fair value

- RG 71.61 It will often not be possible to clearly and accurately determine the 'effective' price being offered for the downstream shares from the upstream acquisition price. Where this is the case, we will generally require that the consideration for the downstream bid must not be less than the fair value ascribed to the shares in the downstream company as determined by an independent expert approved by us.

- RG 71.62 In determining the fair value of shares in the downstream company:
- (a) the independent expert should follow the guidance in Regulatory Guide 111 *Content of expert reports* (RG 111);
 - (b) the independent expert must determine the value per share, inclusive of a premium for control, regardless of percentage ownership of the downstream company (as this valuation method, by definition, distributes any control premium equally between all shareholders);
 - (c) the acquirer must ensure that when determining the fair value for the shares in the downstream company, the independent expert is provided with all information about the downstream company that was available to the acquirer when the acquirer was fixing the price of the upstream acquisition;
 - (d) the acquirer of the upstream entity must pay the independent expert's fees; and
 - (e) the independent expert's report must be included in the acquirer's bidder's statement for the downstream company.
- RG 71.63 If the independent expert gives a range of values, calculated by one valuation methodology, generally the price shall be the mid-point of the range. This is because where it is not possible to determine an 'effective' price, the independent expert report serves the function of determining a fair value for the downstream shares. If the independent expert gives different values or different mid-points calculated by different methodologies, we consider that the highest value or highest mid-point should be used. We may consider requests to vary the terms of the relief for the selection of the downstream bid price and will consider the independent expert's advice in determining these applications.
- RG 71.64 The independent expert must determine the fair value of the downstream shares as at the time when the acquirer was fixing the price of the upstream acquisition. If the price of the upstream acquisition is subsequently increased, the expert must determine the fair value of the downstream shares at the time of the increase and prepare a revised independent expert report. If necessary, the price of the downstream bid must be increased so that it is at least equal to this new value.
- RG 71.65 In this situation, we will generally require the preparation of a revised independent expert report, and the value of the downstream bid must not be less than the updated fair value of the downstream shares as at the time when the acquirer was fixing the increased price of the upstream acquisition.
- RG 71.66 New circumstances may arise during the downstream bid period that could have a material impact on the independent expert's assessment of the fair value of the downstream company's shares. Where the price of the upstream acquisition is not increased as a result of the new circumstances, we will not require the downstream bid price to be increased because there is no increase in the benefit being offered to the upstream shareholders.

RG 71.67 However, we will generally require the preparation of a revised independent expert report. This is because the new circumstances may affect whether the downstream bid price is fair. Accordingly, the downstream shareholders should be provided with updated information that explains the effect of the new circumstances on the independent expert's assessment of the fair value of the shares in the downstream company.

Other terms of downstream bid

RG 71.68 We will normally require a downstream bid to meet the following other conditions:

(a) *Duration*

The legislature has determined that one month is the minimum period to satisfy s602(b): see s624(1)(b). However, if an acquirer makes its downstream bid before the upstream acquisition becomes unconditional, the acquirer must ensure that its downstream bid remains open long enough for shareholders to consider that bid in light of significant events in the upstream acquisition. The downstream bid should remain open for at least two weeks after the acquirer becomes unconditionally entitled to more than 20% of the voting shares in the upstream entity or the upstream acquisition becomes unconditional (whichever is the later).

(b) *Dispatch*

Offers must be dispatched no later than four weeks after the acquirer becomes entitled to more than 20% of the voting shares in the upstream entity or the upstream acquisition is declared unconditional (whichever is the earlier).

Note: If an upstream offer is made in a foreign jurisdiction where the takeover threshold is greater than 20%, we may increase the relevant references in this guide to 20% of the voting shares in the upstream entity.

Permissible defeating conditions of downstream bid

RG 71.69 Our relief will normally limit the defeating conditions that the acquirer may place on the downstream bid. However, provided that it undertakes in its offer to use its best endeavours to satisfy them, our relief will generally allow an acquirer to impose the following defeating conditions on its downstream bid:

- (a) the upstream acquisition is successful (providing that success is defined as being unconditionally entitled to more than 20% of the voting shares in the upstream entity);
- (b) no prescribed occurrence occurs. The condition may relate to events that occur from the date of the announcement of the upstream acquisition, but must be worded to lapse once the acquirer has achieved control of the downstream company via the upstream acquisition; and

- (c) requisite regulatory approval is gained (e.g. from the Foreign Investment Review Board or the Australian Competition and Consumer Commission (ACCC)).

RG 71.70 We will not allow a downstream bid to be subject to a defeating condition for minimum acceptances or that the acquirer achieve the thresholds for compulsory acquisition set out in s661A(1).

Note: In *BTR Plc v Westinghouse Brake and Signal Co (Australia) Ltd* (1992) 106 ALR 35 (BTR case), the Federal Court held that the predecessor of ASIC, the Australian Securities Commission (ASC), was entitled to refuse to permit an acquirer to make a downstream bid subject to a compulsory acquisition condition.

Related relief for downstream company—Expert report under s640

RG 71.71 To satisfy s640, the downstream target may be required to provide an expert report that states whether in the expert's opinion, the takeover offers are fair and reasonable and gives the reasons for forming that opinion. We may exempt the downstream target from the provisions of s640 if the expert report is required only because the acquirer became a major shareholder of the downstream company as a result of the upstream acquisition. In these cases, the protection of an expert report under s640 is not required. Also, the pricing of the downstream bid would have been determined in accordance with our policy.

RG 71.72 This relief may be inappropriate if material changes to the target company occur between the date of the expert's report and the date for dispatch of the target's statement.

RG 71.73 We will not grant this relief where s640 would require an expert report for any reason other than that the acquirer became a major shareholder of the downstream company as a result of the upstream acquisition. In these cases, the acquirer may be assumed to have had access to confidential information about the downstream company and to have been in a position to control or influence the actions and responses of both the target boards for the duration of the offer.

Standstill and voting conditions

RG 71.74 Where our relief is subject to standstill and voting conditions, we will consider whether the acquirer will obtain absolute or effective control of the upstream entity before deciding what types of standstill and voting conditions will apply.

RG 71.75 Where the acquirer will obtain absolute or effective control of the upstream entity (e.g. the acquirer will acquire a relevant interest in 80% of the

upstream entity, which holds a relevant interest in 20% of the shares in the downstream company), our relief will be subject to:

- (a) a 'standstill condition' that, for a specified period (see RG 71.77), the acquirer will not acquire, or procure the upstream entity to acquire, a relevant interest in any more shares in the downstream company; and
- (b) a 'voting condition' that, for the specified period, the acquirer will not exercise, control the exercise, or procure the exercise, of any votes attached to the shares in the downstream company in which it acquired a relevant interest in as a result of the upstream acquisition.

- RG 71.76 Where the acquirer will not obtain absolute or effective control of the upstream entity (e.g. the acquirer will acquire a relevant interest in 30% of the upstream entity, which holds a relevant interest in 20% of the shares in the downstream company), our relief will be subject to:
- (a) a standstill condition that, for a specified period (see RG 71.77), the acquirer will not acquire a relevant interest in any more shares in the downstream company, that does not prevent an increase in the relevant interest arising because the upstream entity increases its relevant interest in the downstream company under an exemption in s611, such as item 7 or item 9; and
 - (b) either:
 - (i) a voting condition that applies to the upstream entity for the specified period, where the upstream entity supports the application and agrees to such a condition being imposed; or
 - (ii) some other type of condition, such as a condition that the acquirer must not procure the exercise of any votes attached to the downstream shares it acquired a relevant interest in as a result of the upstream acquisition during the specified period.

RG 71.77 The specified period will be equivalent to the minimum period of time within which the applicant could have acquired the same number of voting shares using the 3% creep exemption in item 9 of s611.

RG 71.78 The purpose of standstill and voting conditions is to protect the interests of downstream company shareholders in circumstances where the upstream acquirer has obtained a relevant interest in more than 20% of the downstream company. The interests of downstream shareholders are protected because standstill and voting conditions reduce the control effect of the downstream acquisition.

RG 71.79 We consider that different types of standstill and voting conditions should apply depending on whether the acquirer obtains absolute or effective control of the upstream entity. This is because, where the acquirer obtains absolute or effective control of the upstream entity, the acquirer is in a position to control the affairs of the upstream entity, including decisions

about acquiring a further relevant interest in the shares of the downstream company and exercising, controlling, or procuring the exercise by the upstream entity of, the votes attached to the shares in the downstream company.

- RG 71.80 In contrast, we consider that less restrictive standstill and voting conditions are appropriate where the acquirer does not obtain absolute or effective control of the upstream entity. In these cases, we consider that a less restrictive standstill condition is appropriate because of the impact such a condition may have on the upstream company (i.e. in these cases, our relief should not prevent the upstream entity from relying on exemptions in s611 that would otherwise be available). In addition, we consider that a voting condition may be of limited benefit because it will be the upstream entity not the acquirer that will control the power to exercise the votes attached to the downstream shares.
- RG 71.81 In relation to applying a voting condition on the upstream entity, we acknowledge that this may cause the potential for conflicts of interest to arise for the directors of the upstream entity. However, we consider that this condition or an appropriate alternative condition (such as the one discussed at RG 71.76(b)(ii)) will ensure that the interests of downstream shareholders are adequately protected.
- RG 71.82 When considering whether to impose standstill and voting conditions on our relief, we will consider all the relevant circumstances, including submissions from the upstream entity. We will take into account the aim of protecting the interests of downstream holders by reducing the effect of the upstream acquisition on control of the downstream company and the effect of our relief on the upstream entity. When granting relief, we aim to reduce the risk that our relief is abused by seeking to ensure that an acquirer is not permitted to act in a manner contrary to the basis on which our relief was granted.

Other conditions that may apply

- RG 71.83 We may consider that the conditions discussed above are not appropriate in the circumstances of a particular application. We may also consider that, given the particular circumstances of a proposed downstream acquisition, other conditions should apply to our relief in addition to standstill, voting or downstream bid conditions. We may apply other conditions to our relief on a case-by-case basis.

Sell-down condition

RG 71.84 One type of condition we may consider applying as an alternative to a downstream bid condition is a sell-down condition. We expect that we will grant relief subject to a sell-down condition in limited circumstances.

Note: When considering whether to impose a sell-down condition, we may consult with affected third parties such as the downstream company and substantial shareholders of the downstream company.

RG 71.85 Where our relief is subject to a sell-down condition, the condition will require the acquirer to sell down its interest in the downstream company within a specified time (and if this is not achieved, the acquirer or a subsidiary will be required to make a downstream bid consistent with the policy in this guide).

RG 71.86 If the acquirer is required to sell down its interest in the downstream company, our condition will normally state that the acquirer must:

- (a) appoint a broker to reduce the acquirer's voting power in the downstream company to 20% or less within 14 days of acquiring control of the upstream entity (or otherwise acquiring the power to control the disposal of the downstream shares);
- (b) not exercise, or procure the exercise of, any voting rights attached to the downstream shares in excess of 20% without our consent; and
- (c) in selling any downstream shares acquired under the relief, ensure that the broker appointed uses its best endeavours to obtain as wide a placement as practicable, for the highest practicable price.

E Applying for relief

Key points

This section sets out the process for applying for relief from s606 in relation to a downstream acquisition that does not satisfy the exemption in item 14.

How to apply for relief

- RG 71.87 We have discretionary power to grant relief from the requirements of Ch 6 in the form of an exemption from specified provisions, or a declaration that varies or modifies specified provisions as they apply to a person: see s655A.
- RG 71.88 Downstream acquisitions generally involve complex transactions and issues. Applicants should ensure that there will be sufficient time for us to consider an application for individual downstream acquisition relief. Applications should normally be lodged no later than 28 days before the relevant upstream acquisition is to be made. Additional time should be allowed for applications that are outside the scope of our existing policy.
- RG 71.89 Applicants seeking relief should approach us before the upstream acquisition takes place. We do not generally have power to grant retrospective relief. This means that we are unlikely to grant relief to allow a downstream acquisition if a breach of s606 has already occurred. Applicants should also refer to Regulatory Guide 51 *Applications for relief* (RG 51) before deciding on a course of action or timetable for any acquisition.
- RG 71.90 Applications may be lodged, with the relevant fee, at any ASIC office and/or by email to applications@asic.gov.au.

Information applicants should provide

- RG 71.91 When applying for relief, applicants should refer to Section C and Section D of this guide and provide full particulars of the proposed upstream and downstream acquisitions (including the timing, extent and price of the proposed acquisitions) and drafts of the relevant upstream acquisition transaction documents.
- RG 71.92 An applicant should also provide particulars of:
- (a) its voting power in the downstream company at the date of its application; and
 - (b) all acquisitions and disposals, by the applicant and any associate, of securities in the downstream company and in the upstream entity in the four months before the date of its application.

- RG 71.93 To assist us in determining whether control over the downstream shares is a significant purpose of the upstream acquisition, applicants must provide us with:
- (a) a clear breakdown of the assets of the upstream target with absolute and percentage values for the major items and for the downstream shares;
 - (b) information as to the intrinsic value of the assets of the upstream target to the acquirer other than the downstream shares; and
 - (c) a list of the top 20 shareholders of the downstream company, and any associations between them and the applicant.
- RG 71.94 An application should clearly explain the regulatory regime under which the upstream acquisition will take place. The application should especially explain:
- (a) the disclosure regime; and
 - (b) the nature of any provisions equivalent to the principles in s602 and provisions equivalent to s621 and 623.

Procedural fairness

- RG 71.95 In some circumstances, we will consider that we are required to consult with the downstream company, the shareholders of the downstream company or other potentially adversely affected third parties: see Regulatory Guide 92 *Procedural fairness to third parties* (RG 92).
- RG 71.96 The directors of the target company will normally be assumed to be suitable representatives of the interests of the downstream shareholders. However, this may not be the case where:
- (a) the acquirer of the upstream entity has been a substantial shareholder of the upstream target and the upstream target has been in a position to control or influence the composition of the board of the downstream company;
 - (b) the acquirer has been in a position to control the downstream board in any other way; or
 - (c) there is evidence or we have been made aware of a dispute between shareholders and the board of the company about the management and corporate governance of the company.

Approving a foreign exchange

- RG 71.97 We have approved a list of foreign exchanges for the purposes of item 14: see [CO 02/259]. Unless otherwise stated, our relief applies to the main board of these markets (e.g. our relief will not extend to debt listings).
- RG 71.98 In approving the list of foreign exchanges included in [CO 02/259] we took into account the criteria set out at RG 72.54, because the extension of the item 14 exemption to foreign exchanges that meet these criteria satisfies the policy behind the exemption in item 14: see RG 71.17.
- RG 71.99 A foreign body conducting an exchange may apply to us for approval for the purposes of item 14. A foreign body corporate may also apply, but the assistance of the foreign body conducting the exchange is highly desirable. An application to approve a new foreign exchange will be a new policy application: see RG 51 for guidance on making new policy applications.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited (ACN 008 624 691) or the exchange market operated by ASX Limited
ASX Listing Rules	The listing rules of ASX
CASAC	The Legal Committee of the Companies and Securities Advisory Committee
Ch 6	A chapter of the Corporations Act (in this example, numbered 6)
[CO 02/259] (for example)	An ASIC class order (in this example, numbered 02/259)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
downstream acquisition	Acquisition of a relevant interest in the shares of a downstream company as a result of an acquisition in an upstream entity
downstream company	An Australian company, listed body or listed managed investment scheme with some of its shares or voting interests owned by an upstream company
effective price	A price for the downstream shares that is able to be clearly and accurately determined from the upstream acquisition price
IR 01/03 (for example)	An ASIC information release (in this example numbered 01/03)
item 14	Item 14 of s611 of the Corporations Act
Pt 5.1	A part of the Corporations Act (in this example numbered 5.1)
relevant interest	Has the meaning given by s608 and 609 of the Corporations Act
RG 51 (for example)	An ASIC regulatory guide (in this example, numbered 51)
s611 (for example)	A section of the Corporations Act (in this example, numbered 611), unless otherwise specified
sell down	An acquirer reduces its voting power in a downstream company

Term	Meaning in this document
standstill condition	A condition that we may impose on our relief preventing the acquirer from acquiring a relevant interest in any more shares in the downstream company
Takeovers Panel	The panel established under s171 of the <i>Australian Securities and Investments Commission Act, 2001</i> and given various powers under Pt 6.10 of the Corporations Act
upstream acquisition	Acquisition of a relevant interest or control in an Australian or foreign upstream entity
upstream entity	An Australian or foreign company or body corporate or managed investment scheme that holds shares in a downstream company or voting interests in a downstream Australian listed managed investment scheme
voting condition	A condition that we may impose on our relief preventing the acquirer (and in some circumstances, the upstream entity) from exercising or procuring the exercise of any votes attached to the shares in the downstream company
voting power	Has the meaning given in s610 of the Corporations Act
voting share	Has the meaning given in s9 of the Corporations Act

Related information

Headnotes

conditions of relief, disclosure to market, downstream acquisition, downstream company, foreign body, international comity, listed companies, policy for granting relief, prohibition on breach of ‘20% threshold’, takeovers, unacceptable circumstances, unlisted companies, upstream acquisition, upstream entity.

Class orders and pro formas

[CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition*

[CO 02/259] *Downstream acquisitions: Foreign stock markets*

[CO 05/84] *JSE Securities Exchange South Africa added to ASIC’s downstream acquisition takeover relief*

Regulatory guides

RG 51 *Applications for relief*

RG 72 *Foreign securities prospectus relief*

RG 92 *Procedural fairness to third parties*

RG 111 *Content of expert reports*

Legislation

Corporations Act, s50AA, 602(b), 602(c), 606, 608, 608(3)(a), 608(3)(b), 608(4), 608(5), 611 (items 1, 7, 9, 10 and 14), 621, 623, 624(1)(b), 640, 655A, 655A(1), 655A(2), 657A, 661A(1)

Cases

Australian Pipeline Trust 01 [2006] ATP 29

BTR Plc v Westinghouse Brake and Signal Co (Australia) Ltd (1992) 106 ALR

Cape Lambert Minsec Pty Ltd [2009] ATP 12

Leighton Holdings Limited 01, 02 and 03 [2010] ATP 13

Leighton Holdings Limited 02 R [2010] ATP 14

Reports

CASAC, March 1994, *Anomalies in the takeovers provisions of the Corporations Law*

Media and information releases

IR 01/03 ASIC *approves overseas exchanges: Safe harbour for downstream acquisitions*

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