

# Attachment 1 to CP 193



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 000

# Relevant interests and substantial holding notices

November 2012

### About this guide

This guide is for investors who acquire an interest in the securities of a company or managed investment scheme, and their advisers. It:

- discusses the concept of a 'relevant interest' and various issues a person must consider in determining whether they have a relevant interest in securities under the *Corporations Act 2001* (Corporations Act);
- explains the requirement for a person to disclose the relevant interest in voting shares and voting interests that they and their associates have when they acquire or maintain a substantial holding in a listed company or managed investment scheme; and
- outlines ASIC's class order modifications to the relevant interest and substantial holding provisions.

### About ASIC regulatory documents

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

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

**Regulatory guides:** give guidance to regulated entities by:

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

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

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

### Document history

This draft guide was issued in November 2012 and is based on legislation and regulations as at the date of issue.

### Disclaimer

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

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

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## A Overview

### Key points

The relevant interest concept defines the scope of a number of regulatory requirements under the *Corporations Act 2001* (Corporations Act) relating to corporate control and the disclosure of interests—in particular, the takeover and substantial holding provisions.

These provisions are concerned with a person's relevant interest in voting shares or voting interests. They require the disclosure of details about a person's substantial interests and regulate the acquisition of voting power above levels at which a person may acquire control over certain entities.

This guide discusses the relevant interest concept, including some of the circumstances in which a person may or may not have a relevant interest. It also discusses some of the modifications to the relevant provisions we have made by class order.

### Purpose of this guide

RG 000.1 This guide aims to assist investors and their legal advisers to understand and apply the concept of a 'relevant interest' in securities, and its relevance to the takeover and substantial holding requirements of the Corporations Act.

RG 000.2 These requirements apply when the votes attached to securities, in which a person and any of their associates have a relevant interest (as a proportion of all voting shares or interests), increase above one of the following two thresholds:

- (a) the 5% substantial holding threshold—after which a person must provide substantial holding notices relating to movements above or below the threshold, and any change of 1% or more (Pt 6C.1); and
- (b) the 20% takeover threshold—after which acquisitions and offers to acquire relevant interests in voting shares or interests are only permitted through certain transactions or in certain circumstances (Ch 6).

Note 1: See also draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*.

Note 2: In this guide, references to chapters (Chs), parts (Pts) or sections (s) are to the Corporations Act, unless otherwise specified.

RG 000.3 This guide also seeks to assist persons who have an obligation to provide a substantial holding notice under Pt 6C.1 to comply with their obligation to provide accurate and adequate disclosure.

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- RG 000.4 In this guide, we primarily discuss the relevant interest concept as it is applied in the context of the takeover and substantial holding provisions. However, the relevant interest concept is used in other contexts and different exceptions may apply to exclude a person having a relevant interest for the purposes of some regulatory requirements but not others.
- RG 000.5 Accordingly, when considering the relevant interest concept for the purposes of provisions other than the takeover and substantial holding provisions, users of this guide should ensure that the relevant interest concept applies in a similar way in the relevant context.

## The relevant interest concept

- RG 000.6 The concept of a ‘relevant interest’ in securities defines the connections with securities falling within the scope of the takeover, post-bid compulsory acquisition and substantial holding provisions of the Corporations Act. The concept is therefore a fundamental part of the regulation of corporate control and market disclosure.
- RG 000.7 A relevant interest is concerned with a person’s capacity to exercise a degree of influence over securities. Accordingly, the concept encompasses connections wider than ownership, including connections giving rise to power or control over the voting or disposal of securities. As such, a number of people may have a relevant interest in the same securities in a variety of different capacities.
- RG 000.8 The nature of power or control over voting or disposal that may give rise to a relevant interest is intentionally expressed in wide terms to prevent avoidance of relevant requirements. A relevant interest can arise from power or control through agreements, arrangements, understandings and practices that are legally unenforceable, and whether or not the power or control is indirect, implied or informal.
- Note: See discussion of the Companies (Amendment) Bill 1971 (NSW), The Hon John Waddy MP, *Parliamentary debates*, New South Wales Legislative Assembly, 9 September 1971, pp. 912–913.
- RG 000.9 Table 1 summarises the principal provisions of the Corporations Act that use the relevant interest concept.

**Table 1: Rights and obligations under the Corporations Act depending on a person's relevant interest**

Topic	Provisions	Explanation
Takeovers	Ch 6	<p>Acquisitions of a relevant interest in voting shares or interests that increase a person's voting power to more than 20%, or from a point above 20%, are prohibited under s606 unless they are made under a takeover bid, authorised under one of the other exceptions in s611, or the person's voting power is already above 90%. This prohibition also applies to:</p> <ul style="list-style-type: none"> <li>acquiring legal or equitable interests that result in another person's voting power increasing in the same way; and</li> <li>offers or invitations that would result in a breach of s606 if accepted.</li> </ul> <p>Note: See draft Regulatory Guide 000 <i>Takeover bids</i> and draft Regulatory Guide 000 <i>Takeovers: Exceptions to the general prohibition</i>.</p>
Post-bid compulsory acquisition and buyouts	Pt 6A.1	<p>The right of a bidder to compulsorily acquire remaining securities, following a takeover bid, and the obligation to make buyout offers to remaining holders and convertible security holders, depend on whether the bidder and its associates have relevant interests in at least 90% of the securities in the bid class: s661A(1), 662A(1) and 663A(1).</p> <p>Note: See draft Regulatory Guide 000 <i>Compulsory acquisitions and buyouts</i>.</p>
Substantial holding disclosure	Pt 6C.1	<p>Persons who, together with their associates, have relevant interests in voting shares representing 5% or more of the votes in a listed company, or listed registered managed investment scheme, must disclose details of their relevant interest. Disclosure must also be made when a person's voting interest changes by 1%, they cease to have a substantial holding or they make a takeover bid.</p> <p>Note: See Section G of this guide. See also Regulatory Guide 222 <i>Substantial holding disclosure: Securities lending and prime broking</i> (RG 222).</p>
Tracing relevant interests	Pt 6C.2	<p>A listed company, listed managed investment scheme or ASIC may direct a person to disclose details of their relevant interests in voting shares or interests in the scheme: s672A and 672B. A register of information about relevant interests must be kept by the entity: s672DA.</p> <p>Note: See Regulatory Guide 86 <i>Tracing beneficial ownership</i> (RG 86).</p>
Director disclosure	s205F, 205G, 300(11) and (12)	<p>A director of a listed public company must provide the relevant market operator with details of their relevant interests in any securities of the company or a related body corporate within 14 days of their appointment (other than reappointment at the same meeting), the company's listing and any change in the director's interests.</p> <p>A listed entity must give the same information to ASX within five business days of these events, and when a director ceases to be a director: ASX Listing Rule 3.19A. If the company has given the information, the director may be eligible for an exemption: Class Order [CO 01/1519].</p> <p>The annual directors' report of a listed company or listed managed investment scheme must also include similar details: see s300(11) and (12). A director of a company must also give the company any information about the director that is necessary for the company to comply with Ch 6: s205F.</p> <p>Note: See Regulatory Guide 193 <i>Notification of directors' interests in securities—Listed companies</i> (RG 193).</p>

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## The use of the relevant interest concept in takeovers and substantial holding disclosure

- RG 000.10 The takeover and substantial holding provisions are concerned with the relevant interests a person has in voting shares in a company, or voting interests in a managed investment scheme. A voting share or interest is an issued share or interest that carries a right to vote beyond limited matters such as a winding up, buyback or capital reduction, or the variation of rights: s9.
- RG 000.11 The focus of the provisions on voting rights reflects their underlying objective—to regulate the acquisition of corporate control and the disclosure of significant interests that may dictate or influence the entity’s future direction or affairs.
- RG 000.12 Consistent with these objectives, where there are groups of people who are either related or associated with respect to some aspect of the entity’s affairs, the takeover and substantial holding provisions apply by reference to the aggregated voting capacity of the group.
- RG 000.13 This is achieved through the use of the related definition of an ‘associate’. In considering their obligations under the takeover and substantial holding provisions, a person must, accordingly, take into account not only the relevant interest they may have in voting shares or interests, but also the relevant interests of any ‘associates’.
- RG 000.14 This aggregate of votes connected with a person and their associates through the relevant interest concept is the threshold trigger for both the general prohibition in relation to takeovers and the substantial holding disclosure requirements.
- RG 000.15 We discuss the related concepts of association and voting power in Section C of this guide.

### Unacceptable circumstances

- RG 000.16 Interests or arrangements relating to securities which do not give rise to a relevant interest may nonetheless occasion circumstances that are contrary to the principles and purposes underlying the takeover provisions set out in s602.
- RG 000.17 The Takeovers Panel may make a declaration of unacceptable circumstances under s657A involving interests or arrangements of this kind.

Note: See, for example, Takeovers Panel Guidance Note 20 *Equity derivatives*, which applies to interests arising through equity derivatives that may not give rise to a relevant interest.

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## Summary of this guide

- RG 000.18 Table 2 summarises the issues we have addressed in this guide.
- RG 000.19 Unless otherwise indicated, our guidance applies with respect to listed registered managed investment schemes. Adjustments that take account of the different features of managed investment schemes are set out in s12(3), 604 and 610(5).

**Table 2: Summary of our guidance on relevant interests and substantial holdings**

Topic	What our guidance covers	Reference
Relevant interests in securities	We discuss three principal aspects of the relevant interest concept that should be considered when applying the definition in s608 and 609: the basic rule, extensions to the basic rule and the exceptions. We also discuss some class order modifications that we have made to the exceptions.	Section B
Takeovers and substantial holdings: Applying the relevant interest concept	We discuss how the relevant interest concept is applied in the context of the takeover and substantial holding requirements through the related concepts of 'associates', 'voting power' and the definition of a 'substantial holding'.	Section C
Options	We discuss the relevant interests that may arise from options and how a person having a relevant interest as a result of an option agreement should comply with their substantial holding obligations.	Section D
Warrants	We outline the relevant interests that may arise from warrants and the class order relief we have provided so that relevant interests and associations do not arise in some cases. We also discuss how a person having a relevant interest under the terms of a warrant should comply with their substantial holding obligations.	Section E
Escrow arrangements	We discuss the class order relief we have provided for escrow arrangements required under the ASX Listing Rules, and the case-by-case relief we may provide for voluntary escrows.	Section F
Substantial holding notices	We discuss how a person should comply with the requirement to provide a substantial holding notice and the approach a person should take to various requirements. We also discuss the relief we have given to bidders who are required to provide regular notices as a result of acceptances during the takeover bid.	Section G

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## B Relevant interests in securities

### Key points

There are three general tests to consider when determining whether a person has a relevant interest in securities: the basic rule, the extensions to the basic rule, and the exceptions.

The nature of power or control giving rise to a relevant interest is broadly cast to prevent avoidance of complying with the requirements of the Corporations Act. It extends to understandings, arrangements and practices that may be informal or implied.

A person may be deemed to have a relevant interest in securities as a result of having interests in, or control over, a body corporate or managed investment scheme, or as a result of entering into a conditional agreement.

A number of exceptions apply so that, in certain circumstances, a person is taken not to have a relevant interest in securities. Some of these exceptions apply when determining relevant interests in a limited context—for example, under the takeover provisions but not the substantial holding provisions. We have modified or extended some of the exceptions by class order.

### Applying the relevant interest definition

- RG 000.20 Sections 608 and 609 define when a person has a relevant interest in securities: s9. Under these provisions, a person must consider and apply three general tests:
- (a) whether a person has a relevant interest under the *basic rule*;
  - (b) whether a person is deemed to have a relevant interest under the *extended rules*; and
  - (c) whether the situation giving rise to the relevant interest falls within one of the *exceptions*.
- RG 000.21 Table 3 summarises these tests, as applied in s608 and 609, and includes a cross-reference to further discussion of each aspect in this guide.

**Table 3: Summary of the relevant interest concept**

Test	Description	Reference
<b>1. The basic rule</b>		
The basic rule: s608(1)–(2)	This is the general rule which determines whether a connection a person has with securities gives rise to a relevant interest. Under the rule, a relevant interest is derived from holding securities, or having some kind of power or control over voting or disposal.	RG 000.24– RG 000.33
<b>2. Extensions to the basic rule</b>		
Deemed interest through one or more bodies corporate or schemes: s608(3)–(7)	A person is deemed to have the same relevant interest in securities that a body corporate or managed investment scheme has if they have over 20% voting power or control of the body corporate or scheme. A person may have a deemed relevant interest through a chain of companies or schemes.	RG 000.37– RG 000.47
Deemed present interest in anticipation of performance of agreement or understanding, or exercise of right: s608(8)	A person acquires a relevant interest at the time of entering into an agreement or understanding, or being granted enforceable rights or options to acquire securities, regardless of whether any conditions are attached, or the time for performance or exercise.  Note: We have modified this concept for the purposes of the substantial holding requirements as they apply to securities lending arrangements: see RG 222.	RG 000.49– RG 000.55
<b>3. Exceptions</b>		
Exceptions: s609	In certain cases, despite the basic rule and the extended rules, a person is taken not to have a relevant interest because of a particular situation or connection with securities. These exceptions apply on their terms and do not prevent a person having a relevant interest on the basis of another connection falling outside the exception.	RG 000.57– RG 000.59

### Relevant interests of a body corporate in its own securities

RG 000.22 Under the relevant interest concept, a body corporate may have a relevant interest in its own securities: s608(9). This means that the takeover and substantial holding requirements apply to the body in the same way that they do to any other person who has a relevant interest in the body's securities.

RG 000.23 The body's relevant interest in its own securities may also be relevant to other persons—for example, if they may be deemed to have the same relevant interest in the body's holding in its own securities, or may be an associate of the body.

Note: An interest of this kind may arise, for example, under an escrow agreement with a security holder: see RG 000.231–RG 000.235.

## The basic rule for a relevant interest

- RG 000.24 The basic rule set out in s608(1) is that:
- A person has a relevant interest in securities if they:
- (a) are the holder of the securities;
  - (b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or
  - (c) have power to dispose of, or control the exercise of a power to dispose of, the securities.
- RG 000.25 It does not matter how remote the relevant interest is or how it arises under the basic rule. If two or more people can jointly exercise a power described, each are taken to have the power: s608(1).

### The broad nature of power or control

- RG 000.26 The nature of the power or control over voting or disposal that may give rise to a relevant interest under the basic rule is deliberately cast in wide terms. Under s608(2), it expressly extends to power or control that:
- (a) is indirect, implied or informal;
  - (b) may be exercised alone or jointly with someone else;
  - (c) does not relate to a particular security;
  - (d) may be made subject to restraint or restriction; and/or
  - (e) may be exercised through, or counter to, a trust, agreement or practice (in combination or otherwise and whether enforceable or not).
- RG 000.27 The wide scope of s608(2) derives from the legislature's concern that the objectives of the regulatory regime should not be circumvented:
- [W]hen dealing with a relevant interest in shares, it is important that the legislation clearly apply to the informal arrangements and gentlemen's agreements that can so often be arrived at in order to avoid any inconvenient obligations imposed by law.
- The Hon John Waddy MP, *Parliamentary debates*, New South Wales Legislative Assembly, 9 September 1971, p. 913.
- RG 000.28 The breadth of the extended definition of power or control has been acknowledged and applied in a number of cases: see, for example, *TVW Enterprises Ltd v Queensland Press Ltd* (1983) 7 ACLR 821 at 839 (*TVW Enterprises*) and *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [90]–[92] (*Yandal Gold*).
- RG 000.29 However, in applying the expanded notion of power or control in s608(2), it is still necessary to consider whether a power exists 'to exercise some true or actual measure of control' over voting or disposal: *Re Kornblums Furnishings Ltd* (1981) 6 ACLR 25 at 36 (*Kornblums Furnishings*); *TVW*

*Enterprises* at 838; *Yandal Gold* at [73]; and *Edensor Nominees Pty Ltd v ASIC* (2002) 41 ACSR 325 at [33] (*Edensor Nominees*).

Note: Control that is minor or peripheral, or merely hypothetical, theoretical or notional, may not be included: *North Sydney Brick & Tile Co Ltd v Darvall* (No 2) (1986) 10 ACLR 837 (*Darvall*) at 844; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 5 ACSR 720 at 747–748; and *Yandal Gold* at [73]. See also *Azumah Resources Ltd* [2006] ATP 34.

### Power or control through trusts, practices and relevant agreements

- RG 000.30 Under s608(2)(b), power or control may arise under a trust, agreement or practice (alone or in combination), whether enforceable or not. An agreement in this context means a relevant agreement: s9. A ‘relevant agreement’ is widely defined in s9 to mean:
- an agreement, arrangement or understanding:
    - (a) whether formal or informal or partly formal and partly informal; and
    - (b) whether written or oral or partly written and partly oral; and
    - (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.
- RG 000.31 As defined, a relevant agreement embraces a broad range of relationships that need not necessarily be legal relationships—including understandings from which relevant parties may be free to withdraw.
- RG 000.32 A person may therefore have a relevant interest in securities on the basis of indirect power or control arising from an informal or implied practice, or an understanding with another person that is unenforceable: *Yandal Gold* at [73]. However, in determining whether some true measure of control exists as part of unenforceable arrangements or understandings of this kind, it must be assumed that the parties act in accordance with, rather than contrary to, their arrangement or understanding: *Edensor Nominees* at [33].
- RG 000.33 Section 608(8) may also be relevant in considering whether a relevant agreement gives rise to a relevant interest. Under this provision, if a person does not already have a relevant interest on the basis of the relevant agreement, the person would still be deemed to have a present relevant interest if one would arise, were the relevant agreement to be performed: see RG 000.49–RG 000.55.

#### Example 1: Voting agreements

Shareholder A enters into an agreement with Shareholder B under which Shareholder B agrees, in exchange for a cash sum, to vote in accordance with Shareholder A’s direction on a resolution at an upcoming general meeting of the company.

Shareholder A acquires a relevant interest in Shareholder B’s holding as a result of the voting agreement because Shareholder A will control the power, or the exercise of the power, to vote the securities: s608(1)(b). Shareholder B continues to have a relevant interest in the securities as holder under s608(1)(a)—but also as the person with the legal power to vote and dispose of the securities (even if doing so may result in a breach of the agreement): s608(1)(b) and (c) and s608(2)(b)(ii).

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**Example 2: Agreements or understandings about acceptance of a takeover bid**

Bid Co Ltd has made a full conditional takeover bid for Target Ltd at \$1.00 a share. A representative of Bid Co Ltd and a major shareholder of Target Ltd agree during a telephone conversation that the major holder will accept the bid and that Bid Co Ltd will increase the offer to \$1.10 and declare it unconditional.

Bid Co Ltd will obtain a relevant interest in the shareholder's shares in Target Ltd as a result of the 'relevant agreement' to acquire the major holder's shares concluded during the telephone conversation—regardless of any practical difficulties there may be in achieving enforceability of this agreement through a court. Because the relevant interest is acquired as a result of the relevant agreement rather than acceptance of the bid (even though it is to be given effect through acceptance of the bid), Bid Co Ltd may breach s606: *Corebell Pty Ltd v New Zealand Insurance Co Ltd* (1988) 13 ACLR 349.

Bid Co Ltd would also have acquired a relevant interest in the major shareholder's shares if, prior to Bid Co making the bid, it had an understanding with the major shareholder that it would accept the bid, once made, even if the understanding was unenforceable. However, while an unenforceable understanding from which parties are free to withdraw may constitute a relevant agreement, a consensus of some sort between the parties may still be required: see also *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263 at [37].

**Negative power or control**

- RG 000.34 Under the basic rule, a relevant interest in securities may arise from a person's power to 'control the exercise' of voting rights or 'the exercise' of a power to dispose.
- RG 000.35 A person may have a power to control the exercise of a power to dispose of, or vote, securities even if they only have a power to prevent or restrain another person from disposing of or voting the securities. A relevant interest may therefore arise from a 'negative' power over disposal or voting, which may be exercised in limited circumstances. Examples include:
- (a) the power to restrict the ability of a counterparty to dispose of securities (together with any other assets) that it holds, pending implementation of a merger or other transaction (*Australian Pipeline Limited v Alinta Ltd* [2007] FCAFC 55 (*Alinta Ltd*));
  - (b) escrow arrangements with a security holder, restricting disposal of the securities for a fixed period (see RG 000.231–RG 000.235); and
  - (c) a pre-emptive right, or right of first refusal, over the sale and transfer of securities (*Kornblums Furnishings* at 36 and *TVW Enterprises* at 839).
- RG 000.36 Pre-emptive rights derived from a company, body or scheme's constitution, which are available on the same terms to all members, are taken not to give

rise to a relevant interest under s609(8). However, pre-emptive rights that do not fall within the exception (e.g. because they differ between members or arise under a private agreement) may give rise to a relevant interest in each of the securities that are the subject of pre-emption: *Darvall*.

## Extension to the basic rule: Interests in a body corporate or managed investment scheme

- RG 000.37 In addition to any relevant interests arising under the basic rule, a person may be deemed to have the same relevant interest in any securities that certain connected bodies corporate or managed investment schemes have. Under s608(3), a person is taken to have the same relevant interests as:
- (a) a body corporate, or managed investment scheme, in which the person's voting power is over 20% (s608(3)(a)); or
  - (b) a body corporate, or managed investment scheme, that the person controls (s608(3)(b)).

Note: The 'voting power' referred to in s608(3)(a) is based on the aggregate relevant interest of the person and each of their associates in relation to the entity (if any). We discuss this concept further at RG 000.113–RG 000.138.

- RG 000.38 However, s608(3)(a) does not apply to relevant interests that the body corporate, or managed investment scheme, is itself deemed to have merely because of s608(3)(a) (i.e. merely on account of a voting power of more than 20% in another body corporate or scheme). In contrast, s608(3)(b) may be applied repeatedly: see RG 000.45.

### Control under s608(3)

- RG 000.39 Section 608(4) provides that, for the purposes of s608(3)(b), a person controls a body corporate, or managed investment scheme, if they have the capacity to determine the outcome of decisions about the financial and operating policies of that body corporate or scheme.
- RG 000.40 Under this test, a person will generally control a body corporate or scheme if they are in a position to command more than 50% of the votes that may be cast at a general meeting because, for example, they would have the capacity to appoint or remove directors. However, the capacity to determine the outcome of decisions about the financial and operating policies of a body corporate may also arise when a person holds less than 50% of the votes that may be cast at a general meeting but otherwise has practical or effective control.
- RG 000.41 Section 608(5) provides that, in determining whether a person has control of a body corporate:

- (a) the practical influence a person can exert (rather than the rights they can enforce) is the issue to be addressed; and
- (b) any practice or pattern of behaviour affecting the body corporate's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

RG 000.42 However, a person is not taken to control a body corporate merely because:

- (a) that person, together with an entity that is not an associate, jointly has the capacity to determine the outcome of decisions about the body corporate's financial and operating policies (s608(6)); or
- (b) the person has a capacity that they are under a legal obligation to exercise for the benefit of someone else (or, if the person is a body corporate, for the benefit of someone other than the body corporate's members) (s608(7)).

### **Association by control and s608(3)(a)**

RG 000.43 The deeming provision in s608(3)(b) overlaps to some extent with the definition of 'associate'. Two bodies corporate may be associates where one controls, or is controlled by, the other, or where both are controlled by the same entity (whether the entity is a natural person, body corporate, partnership or trust): s12(2)(a) and 64A. A similar test for control applies in this context: s50AA.

RG 000.44 Associations arising from control are relevant in applying s608(3)(a). The relevant interest of a person's associates in the securities of a body or managed investment scheme is a component of a person's own voting power in the body or scheme. This means that a person may be deemed to have a relevant interest in securities under s608(3)(a) on the basis of an associate's holding in that entity which, either in whole or in part, results in a combined relevant interest of over 20%. We discuss associates and voting power further in Section C.

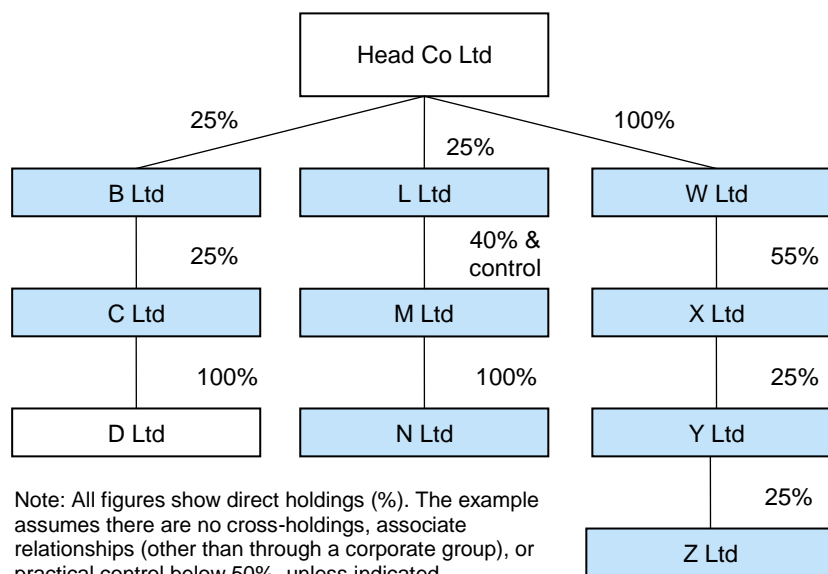
### **The operation of the deeming provisions through a chain of bodies corporate or managed investment schemes**

RG 000.45 Section 608(3) may operate in relation to a hierarchy of entities because the relevant interest of each entity is successively imported to the entity immediately above in the chain of interests: *NCSC v Brierley Investments Ltd* (1988) 14 ACLR 177 at 190. However, the 20% interest limb in s608(3)(a) can only be applied once in the chain, while the controlled entity limb in s608(3)(b) may have unlimited application.

RG 000.46 An example of the operation of s608(3) in relation to a chain of entities is discussed below, based on Figure 1.



**Figure 1: Relevant interests arising through interests in a body corporate or managed investment scheme**



RG 000.47 In the above example, the companies in which Head Co Ltd has a relevant interest under s608(3) are shaded in blue. The following explains why Head Co Ltd does, or does not, have a relevant interest in securities in each of the companies at the bottom of the three chains:

- (a) C Ltd has a relevant interest in 100% of D Ltd securities through a direct holding. B Ltd also has a relevant interest in 100% of D Ltd by virtue of its 25% holding (and voting power) in C Ltd: s608(3)(a). However, because s608(3)(a) can only apply once, Head Co Ltd is not deemed to also have the relevant interest in 100% of D Ltd that B Ltd has, even though it has voting power of more than 20% in B Ltd. Head Co Ltd therefore has no relevant interest in D Ltd shares (but does have a relevant interest in B Ltd’s holding of C Ltd securities: s608(3)(a)).
- (b) M Ltd has a relevant interest in 100% of N Ltd securities through a direct holding. L Ltd has a voting power of 40% in M Ltd, but also has practical control of M Ltd, so it is deemed to have the same relevant interest in 100% of N Ltd under s608(3)(b). Because Head Co Ltd has a voting power of over 20% in L Ltd, and s608(3)(a) has not yet been applied, Head Co Ltd is deemed to also have a relevant interest in the 100% stake in N Ltd.
- (c) Y Ltd has a direct relevant interest in 25% of Z Ltd. X Ltd is deemed to have a relevant interest in the 25% stake in Z Ltd: s608(3)(a). W Ltd is also deemed to have a relevant interest in the 25% stake in Z Ltd on account of X Ltd’s deemed relevant interest and its controlling holding in X Ltd: s608(3)(b). Because Head Co Ltd controls W Ltd, it also has a relevant interest in the 25% stake in Z Ltd as s608(3)(b) has successive operation.

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RG 000.48 This example assumes there are no cross-holdings, associate relationships (other than through a corporate group), or practical control below 50% (other than where specified)—however, in applying s608(3), all relevant circumstances must be taken into account. For example, if Head Co Ltd had effective control of B Ltd, even though it holds only a direct 25% stake, it would have a relevant interest in D Ltd.

## Extension to the basic rule: Anticipation of performance of agreement or exercise of right or option

RG 000.49 The relevant interest concept is further extended by s608(8). This provision applies to transactions and arrangements relating to securities to bring back to the earliest point in time the moment at which a person will be treated as having a relevant interest in the securities: *Re Adelaide Holdings Ltd* (1982) 6 ACLR 675 at 679. The provision is sometimes referred to as the ‘accelerator provision’ because it may cause a relevant interest to arise sooner than it otherwise would.

RG 000.50 Section 608(8) operates when a person has a relevant interest in issued securities and (whether before or after acquiring the relevant interest) the person:

- (a) has entered or enters into a relevant agreement with another person with respect to the securities (s608(8)(b)(i));
- (b) has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition) (s608(8)(b)(ii)); or
- (c) has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities (s608(8)(b)(iii)).

The effect of s608(8) is that the other person is taken to already have a relevant interest in the securities if they would have the relevant interest on performance of the agreement, enforcement of the right or exercise of the option.

RG 000.51 The three subparagraphs in s608(8)(b) are not mutually exclusive: *Chew v Hamilton* (1985) 13 ACLR 440 at 446. The ambit of a relevant agreement referenced in s608(8)(b)(i) is particularly broad and, in many cases, will also encompass enforceable rights and options of the kind referred to in s608(8)(b)(ii) and (iii): see RG 000.30–RG 000.33.

RG 000.52 One effect of the accelerator provision is to confirm that a person has a relevant interest even though their connection with a security holding is derived from a conditional transaction, arrangement or right.

- RG 000.53 Of course, in some cases, a conditional transaction or preliminary arrangement may in any event, have resulted in a relevant interest under the basic rule, given the expansive nature of power or control referred to in s608(2): see, for example, *Alinta Ltd* at [243]–[246] and *Nicholas v Commissioner for Corporate Affairs (Vic)* (1982) 7 ACLR 45 at 54–55.
- RG 000.54 The accelerator provision only operates where the person who enters the agreement, gives the enforceable right, or grants the option has a relevant interest in securities themselves. If the person acquires a relevant interest in the securities subsequently, the provision will operate in relation to those securities from that time: s608(8)(b).

### Specific applications

- RG 000.55 We discuss further the application of the relevant interest concept, including the accelerator provision, as it applies to options and warrants in Sections D and E.
- RG 000.56 For securities lending arrangements, we have modified the application of s608(8), in the context of the substantial holding provisions, so that a lender's relevant interest in loaned securities is not affected by the borrower ceasing to have a relevant interest: see Class Order [CO 11/272] *Substantial holding disclosure: securities lending and prime broking*. This modification is discussed further at RG 222.34–RG 222.37.

## Exceptions

- RG 000.57 Section 609 sets out a number of situations in which a person is taken not to have a relevant interest. These exceptions only apply to relevant interests arising merely because of the particular situation or circumstance. A person may still have a relevant interest because of other connections, or aspects of relevant arrangements or affairs falling outside the specified situation or circumstance. Not all the exceptions in s609 apply in the context of the substantial holding disclosure requirements: see the definition of 'substantial holding' in s9 and 671B(7).
- RG 000.58 We have modified some of the s609 exceptions by class order to clarify their operation. We have also introduced a number of new situations that are taken not to give rise to a relevant interest by way of class order modification. In some cases, the modified and extended exceptions under our class orders only apply when considering certain requirements under the Corporations Act (e.g. the takeover provisions but not the substantial holding provisions).
- RG 000.59 Where a person does not have a relevant interest in securities because of s609, no other person will be deemed to have a relevant interest in those securities through the application of s608(3).

RG 000.60 Table 4 outlines the exceptions (including modifications and additions made by class order) that should be taken into account in determining whether a person has a relevant interest in securities for the purposes of the takeover and substantial holding requirements. The table also includes cross-references to further discussion and guidance, where applicable.

Note: Table 4 sets out the exceptions to the relevant interest concept for the purposes of the takeover and substantial holding provisions only. Some of ASIC's class order modifications included in the table apply only to Chs 6 and 6C. When considering relevant interests in other contexts, readers should carefully consider the applicability of the exceptions introduced or modified by class order.

**Table 4: Exceptions to the relevant interest concept: Takeovers and disclosure of substantial holdings**

Exception	Situation not giving rise to a relevant interest	Reference
<b>Exceptions applying for the purposes of both the takeover provisions and the substantial holding requirements</b>		
Moneylenders' security interests	Security interests taken or acquired in the ordinary course of a non-associated person's business of providing financial accommodation on ordinary commercial terms  Note: A 'security interest' is defined in s51A.	s609(1) and Class Order [CO 01/1542]; see also RG 000.61–RG 000.67
Bare trustees	Bare trustees (including nominees) where a beneficiary under the trust has a relevant interest because of a presently enforceable and unconditional right	s609(2)
AFS licensees acting on client instructions	A relevant interest an Australian financial services (AFS) licensee has merely because, in the ordinary course of its financial services business, it receives specific instructions from its client to dispose of the securities  Note: We have extended similar relief to derivatives brokers acting on instructions: Class Order [CO 01/1599].	s609(3) and Class Order [CO 01/1542]; see also RG 000.68–RG 000.76
Buybacks	Relevant interests arising merely because a company has entered into a buyback agreement	s609(4)
Single meeting proxies	Proxy holders or corporate representatives appointed for a single meeting for no consideration	s609(5)
Pre-emptive rights in constitution	Pre-emptive rights in a company, body or managed investment scheme's constitution which are on the same terms for all members	s609(8)
Directorship	Directorship of a body corporate, which, in itself, does not give rise to a relevant interest in securities in which the body corporate has a relevant interest	s609(9)
Market and facility operators	Operation of a clearing and settlement facility  Note: We have provided a further exception for ASX in relation to restricted securities: Class Order [CO 03/634].	s609(9A)

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Exception	Situation not giving rise to a relevant interest	Reference
IDPS operators	The operation of an investor directed portfolio service (IDPS) complying with Class Order [CO 02/294]	Class Order [CO 04/523]; see also Regulatory Guide 148 <i>Investor directed portfolio services</i> (RG 148)
Institutional investors' collective voting arrangements	Institutional investors holding, as principal, voting power of less than 20%, who enter into a voting agreement on a particular issue at a single meeting for no consideration, announce their agreement and comply with all the terms of the relevant class order relief	Class Order [CO 00/455]; see also Regulatory Guide 128 <i>Collective action by institutional investors</i> (RG 128)
<b>Exceptions applying for the purposes of the takeover provisions but not the substantial holding requirements</b>		
Exchange-traded options, warrants and derivatives	Relevant interests arising because of market-traded options or rights to acquire securities under a derivative. The exception applies until the time to make or take delivery  Note: We have extended this exception to include market-traded warrants: see RG 000.173–RG 000.230.	s609(6); see also RG 000.161–RG 000.165 and RG 000.173–RG 000.230
Agreements subject to holder approval or ASIC relief	Relevant interests arising because of agreements that are conditional on holder approval under item 7 of s611, or ASIC relief, which do not confer influence over voting rights and do not restrict disposal for more than three months  The exception applies until approval or relief is given	s609(7); see also Regulatory Guide 74 <i>Acquisitions approved by members</i> (RG 74) at RG 74.94–RG 74.96
Listing rule escrow agreements	A listed company's relevant interest in its own securities arising from restrictions on disposal of a holding of restricted securities applied under Chapter 9 of the ASX Listing Rules	Class Order [CO 03/634]; see RG 000.236–RG 000.243
<b>Exceptions applying for the purposes of the substantial holding requirements only</b>		
Prime broking and custodial service providers	A relevant interest arising from a right to borrow securities at some future time under certain prime broking or custodial arrangements complying with Class Order [CO 11/272]. The exception ceases when the prime broker or custodian exercises the borrowing right (i.e. the acquisition of the relevant interest is deferred)	Class Order [CO 11/272]; see also RG 222

### ASIC modification: The money lending and financial accommodation exception

- RG 000.61 Section 609(1) provides an exception from the definition of 'relevant interest' for a person who takes a security interest in the ordinary course of their business of providing financial accommodation and on ordinary commercial terms. The exception does not apply if the security interest relates to the property of an associate.
- RG 000.62 Class Order [CO 01/1542] modifies the exception in s609(1) to extend it to:

- (a) persons holding a security interest (such as a mortgage) on trust for a financier in the ordinary course of the financier's business of providing financial accommodation;
- (b) purchasers of a security interest of this kind; and
- (c) financiers, where their lending is supported by a negative pledge.

RG 000.63 We have made these modifications to ensure that a person does not have a relevant interest in securities merely because they participate in common commercial 'arm's length' mortgage structures and transactions.

RG 000.64 Table 5 sets out the modifications to s609(1) we have made under [CO 01/1542], together with an explanation of the rationale underlying the change.

**Table 5: Modifications to s609(1) under Class Order [CO 01/1542]**

Modification	Details	Explanation
Security trustees	We have extended the exception to relevant interests arising from a security interest acquired by a person (the security trustee) on ordinary commercial terms, for the benefit of one or more financiers in relation to financial accommodation provided by the financiers in the ordinary course of the financier's business of providing financial accommodation.	Lending transactions are often structured so that a security trustee takes and holds a mortgage for the benefit of the financier. The security trustee usually has a relevant interest in the securities covered by the mortgage because it has the power to dispose of these securities. Without our relief, the security trustee may not be covered by the exception in s609(1). Section 609(1) may require the mortgage to be taken in the ordinary course of the security trustee's business of lending money or providing other financial accommodation. It is unlikely that the security trustee is in this business.
Purchasers	We have modified the exception to make it clear that it is not limited to the initial financier (or its security trustee), but also applies to a purchaser of the security interest.	The exception in s609(1) is limited to a 'security interest taken for the purposes of a transaction entered into by the person'. This may not extend to purchasers of mortgages. It is uncertain whether the purchaser acquires the mortgage for the purposes of a loan 'entered into' by the purchaser. While the use of the word 'acquired' in s609(1)(a) suggests that the provision was intended to cover the secondary mortgage market, our modification is designed to remove any doubt.
Negative pledges	We have modified the exception to clarify that it extends to a relevant interest acquired by a financier because its lending is supported by a negative pledge covering the securities.	Negative pledges are used by financiers to protect themselves in corporate debt financing. But there may be uncertainty about whether a negative pledge is covered by the reference to a 'security interest' in s609(1). A negative pledge is a contractual promise by a borrower to the financier that the borrower will not create an encumbrance on its assets (the securities) in favour of another financier. A negative pledge may not constitute a security interest, as defined in s51A, because it does not give the financier any proprietary interest in assets of the borrower.

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### Corresponding modifications to item 6

- RG 000.65 Item 6 of s611 contains an exception from the general prohibition in s606 which corresponds with the exception from the relevant interest concept in s609(1). The exception in item 6 is for an acquisition that results from an exercise of power, or appointment as receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest.
- RG 000.66 Class Order [CO 01/1542] contains corresponding modifications to item 6 of s611 so that:
- (a) the exception applies to security trustees (without our relief, the security trustee's business would have to be lending or providing other financial accommodation); and
  - (b) for the exception, a security interest includes a negative pledge.
- RG 000.67 Our class order also includes a technical modification of item 6 of s611 to clarify its operation in relation to receivers when a security interest is exercised. The item is expressed to apply to a person appointed 'as a receiver' but only if the person's ordinary business includes providing financial accommodation: item 6(a) of s611. A receiver is unlikely to be in this business. We have modified item 6 so that it applies to acquisitions resulting from the appointment of a receiver. It is likely that the equivalent provision under the old Corporations Law covered an acquisition by a receiver appointed by the financier: *Haughton Properties Pty Ltd v Sandridge City Development Co Pty Ltd* (1994) 13 ACLC 1. Without our relief, the drafting of item 6 of s611 may disturb this result.

Note: See also *BioProspect Limited 01* [2008] ATP 8.

### ASIC modification: The exception for AFS licensees

- RG 000.68 Class Order [CO 01/1542] modifies s609 so that an AFS licensee does not have a relevant interest in the securities of its client merely because it receives specific instructions from the client directing the licensee (in the ordinary course of its financial services business):
- (a) to dispose of the securities; or
  - (b) to enter into a sold position in relation to the securities.
- RG 000.69 Our modification replaces s609(3), which otherwise provided an exclusion from the relevant interest concept for an AFS licensee who *holds* securities on behalf of its client in the ordinary course of its financial services business.

#### Securities dealers

- RG 000.70 Class Order [CO 01/1542] modifies the application of the exception in s609(3) in relation to securities dealers because a dealer does not generally hold securities on behalf of its client. A securities dealer is normally an agent

of its client rather than a trustee, and is authorised to exercise powers of the holder (specifically, the power to dispose) without actually holding the securities. Section 40 of the old Corporations Law—the predecessor to s609(3)—merely referred to:

authority to exercise powers as the holder of the relevant interest only because of instructions given to the person ... to dispose of the share on [another] person's behalf ...

- RG 000.71 The principle underlying our modification is that a securities dealer should not have a relevant interest in securities when it is merely acting under specific instructions from its client to dispose of the client's securities. This is because:
- (a) the dealer has limited discretion in disposing of the securities; and
  - (b) the dealer's power to dispose is for a limited period.

#### **Derivatives dealers**

- RG 000.72 The exception in s609(3) operates in relation to dealings in securities by an AFS licensee. It does not apply to derivatives trading. The definition of securities under s9 does not include market-traded options or derivatives—therefore, s609(3) does not extend to analogous circumstances involving derivatives.
- RG 000.73 Without relief, a broker whose ordinary business includes dealing in derivatives, and who enters into a sold position on instruction from a client, may have a relevant interest in the underlying securities.
- RG 000.74 Class Order [CO 01/1599] replicates the exception for securities dealers so that a derivatives broker does not have a relevant interest in relation to a security merely because the broker has received specific instructions from the client directing it to enter into a sold position in relation to that security in the ordinary course of the broker's business (which includes derivatives trading).

#### **Managed discretionary accounts**

- RG 000.75 The exclusion for dealers was intended to cover only relevant interests of a dealer that arise as a result of specific instructions from a client directing the dealer to dispose of the securities. The exclusion does not cover managed discretionary accounts, where the dealer has a broader discretion to control the disposal of the client's securities.
- RG 000.76 Accordingly, our modifications in [CO 01/1542] and [CO 01/1599] do not cover dealer-managed discretionary accounts.



## C Takeovers and substantial holdings: Applying the relevant interest concept

### Key points

The takeover and substantial holding provisions operate by reference to thresholds depending on a person's relevant interest in voting shares or voting interests combined with that of any associates.

Acquisitions from an associate may be deemed to involve an increase in voting power under s610(3). We have modified Ch 6 so that, in certain cases, an acquisition by a subsidiary from its ultimate holding company does not involve a deemed increase in voting power, consistent with the treatment of other intra-group transfers.

A person may be an associate on the basis that they have, or propose to enter into, a relevant agreement, or propose to act in concert in relation to a body. Bodies corporate may also be associates on the basis of a relationship of control or common control. We have provided class order relief so that parties to an agreement to acquire and dispose of securities are not associates merely because of the disposal right.

### The takeover and substantial holding thresholds

RG 000.77 The relevant interest concept is central to the framework of the takeover and substantial holding provisions because it defines the connections that are taken into account in applying the principal thresholds triggering the requirements of Ch 6 and Pt 6C.1:

- (a) the general prohibition in s606 in relation to takeovers; and
- (b) the definition of a 'substantial holding' in s9 and the 'movement of at least 1%' in s671B(2).

RG 000.78 The thresholds for both the takeover provisions and substantial holding provisions involve similar calculations incorporating two essential elements:

- (a) accounting for the votes attached to voting shares or interests, in which a person has a relevant interest; and
- (b) the aggregation of the relevant interests in voting shares or interests of a person and their associates.

RG 000.79 These elements reflect the underlying concern of the respective regimes with the acquisition of corporate control and the disclosure of interests that may have a capacity to dictate or influence the entity's future direction or affairs.

RG 000.80 For the purposes of the takeover provisions, both elements are incorporated through the definition of a person's 'voting power' in s610. In the substantial holding context, the elements are found in the definitions in s9 and 671B(2),



which are similar to the ‘voting power’ definition. Both definitions incorporate the concept of an ‘associate’ set out in s12.

### Application of the provisions

- RG 000.81 The entities with respect to which the takeover and substantial holding provisions apply are similar but not identical. Both regimes apply to a person’s interests in:
- (a) listed companies;
  - (b) listed registered managed investment schemes; and
  - (c) listed bodies that are not companies but are incorporated or formed in Australia.

However, the takeover provisions also apply to a person’s interests in unlisted companies with more than 50 members.

### The substantial holding disclosure threshold

- RG 000.82 Under s671B, a person must give certain information about their relevant interests, and the interests of any associates, in voting shares in a listed company or body, or voting interests in a listed registered managed investment scheme, to the company or scheme and each relevant market operator.
- RG 000.83 A person must provide a substantial holding notice if they:
- (a) begin to have, or cease to have, a substantial holding in the listed body;
  - (b) have a substantial holding in the listed body and there is a movement of at least 1% in their holding; or
  - (c) make a takeover bid for securities of the listed body: s671B(1).
- RG 000.84 A person has a substantial holding if they and their associates have (or would have but for certain exceptions in s609) relevant interests in voting shares or interests carrying more than 5% of the total votes attached to all voting shares or interests: s9. There is movement of more than 1% if, using the same formula, the percentage of votes has increased or decreased by this amount from the percentage previously disclosed: s671B(2).

Note: For further discussion about when a person is an associate, see RG 000.113–RG 000.138.

- RG 000.85 A person also has a substantial holding throughout the period between making a takeover bid and the end of the bid period: s9. A bidder must therefore provide substantial holding disclosure about movements of at least 1% even if they hold less than 5% before or after the movement.

## The general takeover threshold

- RG 000.86 Under Ch 6, the acquisition of corporate control is regulated by way of a general prohibition on offers, invitations, acquisitions and transactions that result in a breach of the takeover threshold (s606), subject to a number of permitted exceptions (s611).
- RG 000.87 Section 606(1) prohibits a person from acquiring a relevant interest in voting shares issued through a transaction relating to those shares if the transaction results in that person's, or someone else's, voting power in the company increasing:
- (a) from 20%, or below, to more than 20%; or
  - (b) from a starting point above 20% and below 90%.
- RG 000.88 A person is also prohibited from acquiring a legal or equitable interest in securities if another person acquires a relevant interest and this results in a breach of the same threshold: s606(2). A person must not make an offer or invitation that would breach the prohibitions in s606(1) or (2), if accepted or taken up and accepted.
- RG 000.89 Two principal aspects of the prohibition under s606(1) are the requirements that:
- (a) the person must acquire a relevant interest through a *transaction*; and
  - (b) the person's, or someone else's, *voting power* must increase.
- Note: The prohibition in s606(2) also requires the acquisition of a relevant interest in voting shares but not necessarily through a transaction.
- RG 000.90 We discuss voting power further at RG 000.95–RG 000.112.

## Acquiring a relevant interest through a transaction

- RG 000.91 A person acquires a relevant interest if they *obtain* a relevant interest, even if the relevant interest they obtain arises as a result of the deeming provisions in s608(3) and (8): *Yandal Gold* at [82]–[100] and *Edensor Nominees* at [34]–[39]. A person is also taken to acquire a relevant interest when:
- (a) securities in which the person already had a relevant interest become voting shares in the company (e.g. the conversion of non-voting securities); or
  - (b) there is an increase in the number of votes that may be cast on a poll attached to voting shares, in which the person already had a relevant interest (e.g. when partly paid securities with proportional voting rights are paid up in full): s606(6).
- RG 000.92 Under s606(1), a transaction giving rise to the acquisition of the relevant interest must have been entered into by, or on behalf of, the person and must be in relation to securities: s606(1). Under s64, and the definition of 'enter into' in s9, entry into a transaction in relation to shares or securities includes:

- (a) entering into, or becoming a party to, a relevant agreement in relation to the shares or securities (see RG 000.30–RG 000.33); and
- (b) exercising an option to have the shares or securities allotted, issued or granted.

RG 000.93 The general prohibition in s606 may therefore apply to prevent a person from entering into, or becoming a party to, a relevant agreement (including an unenforceable arrangement or understanding, or an agreement that does not necessarily involve the sale or purchase of any securities) if the person would obtain a relevant interest in breach of the takeover threshold: see, for example, *Flinders Diamonds Ltd v Tiger International Resources Inc* (2004) 49 ACSR 199 at [40].

RG 000.94 A person may also be prevented by s606 from exercising options to be issued voting shares unless the resulting acquisition falls within an exception to the prohibition in s611.

## Voting power

RG 000.95 The general prohibition in s606 operates when a person's voting power increases above the takeover threshold.

RG 000.96 Under s610(1), a person's voting power in a body is the total number of votes attached to all the voting shares in the body that the person or an associate has a relevant interest in as a percentage of the total votes attached to all voting shares:

$$\text{Voting power} = \frac{\text{Person's and associates' votes}}{\text{Total votes in designated body}} \times 100$$

RG 000.97 The same calculation applies to determine a person's voting power in a managed investment scheme by reference to voting interests in the scheme.

RG 000.98 Votes attached to voting shares, in which a person and their associates have a relevant interest, are counted in calculating a person's voting power even if the person's relevant interest arises from the person's power or control over disposal rather than voting.

## Votes attached to voting shares or interests

RG 000.99 Voting power can only be derived from voting shares or interests and the general prohibition only applies where a person acquires a relevant interest in voting shares (or voting interests in a managed investment scheme). The substantial holding requirements are similarly concerned only with voting shares and interests: s671B(3).

- RG 000.100 A voting share is defined in s9 as an issued share in a body that carries any voting rights beyond the right to vote on the following:
- (a) a proposal to reduce the body's share capital;
  - (b) a resolution to approve the terms of a buyback agreement;
  - (c) a proposal that affects the rights attached to the share;
  - (d) a proposal to wind up the body;
  - (e) a proposal to dispose of the whole of the body's property, business and undertaking; and
  - (f) a resolution while a dividend (or part of a dividend) for the share is unpaid and during a winding-up.

- RG 000.101 Under the formula in s610, a person's voting power depends on the number of votes attached to the relevant voting shares. The focus on votes rather than absolute holdings provides the most accurate reflection of a person's power to influence decision making at a general meeting. Given the possibility that the number of votes attached to a share may vary, s610(2) further refines the approach by providing that (in determining voting power) the number of votes attached to a voting share is the number of votes that can be cast in respect of the share on a poll on the election of a director (or, if director election is not determined through voting, on the adoption or amendment of the constitution).

Note: See the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998, paragraph 7.62.

## Deemed increase in voting power: Acquisitions from an associate

- RG 000.102 A person's voting power includes the votes attached to voting shares in which both the person and their associates have a relevant interest. Because an associate's votes are already counted, a person's voting power would not increase under the definition in s610(1) when the person acquires voting shares from their associate. This is the case even if the person did not have a relevant interest in the associate's voting shares before the acquisition. Because there is no increase in voting power, a transaction of this kind would not be caught by the general prohibition in s606: s606(1)(c) and 606(2)(b).
- RG 000.103 In general, a person should not be free to acquire a relevant interest in voting shares from their associate without triggering s606. Commercially, there may be a significant difference between a person having a relevant interest in shares in a company and the person's associate having a relevant interest. An acquisition from an associate may effect a change of control of a company—a matter with which s606 is concerned.

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RG 000.104 Section 610(3) addresses this situation by deeming that, for the purposes of s606, a person’s voting power increases when they acquire a relevant interest in voting shares if, before the acquisition, an associate had a relevant interest in the shares but the person did not. This brings the acquisition within the scope of s606.

### Corporate groups

RG 000.105 Members of a corporate group are generally associates of each other: see s12(2)(a). As such, under s610(3), the voting power of a group company may be deemed to have increased because it acquires securities from another group company.

RG 000.106 However, s610(3) only operates when the person acquiring the relevant interest does not have a relevant interest before the transaction. Because of the overlap between the definition of ‘associate’ in s12(2)(a) and the deeming provision in s608(3), in many cases, the group company acquiring the voting shares will already have a relevant interest in the voting shares: see RG 000.43–RG 000.44. Section 610(3) will not be triggered if s608(3) applies, such that the acquiring group company already has a relevant interest.

RG 000.107 Table 6 demonstrates how s608(3) and 610(3) apply to acquisitions within a corporate group.

**Table 6: Acquisitions within a corporate group: s608(3) and 610(3)**

Acquisition	Application of s608(3) and 610(3)
Acquisition from a sibling company	<p>Section 610(3) is not triggered by an acquisition of securities from a sibling company because, under s608(3), the acquirer will be deemed to have a relevant interest in the securities of its sibling.</p> <p>Under s608(3)(a), a person is deemed to have the relevant interest of a body corporate in which the person’s voting power is over 20%. The acquirer has voting power of over 20% in its sibling because its holding company’s votes in the sibling are counted in the acquirer’s voting power: s610(1). The holding company is the acquirer’s associate.</p>
Acquisition by a subsidiary from an intermediate company	<p>Section 610(3) is not triggered by an acquisition of securities by a subsidiary from its holding company, if the holding company is an intermediate company in the group.</p> <p>The subsidiary already has the relevant interest in the securities that the intermediate company has because of s608(3). The subsidiary has voting power of over 20% in the intermediate company. The subsidiary has the voting power of the ultimate holding company in the intermediate company. The ultimate holding company is the subsidiary’s associate.</p>

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Acquisition	Application of s608(3) and 610(3)
Acquisition by a subsidiary from its ultimate holding company	<p>Section 610(3) is triggered when a subsidiary acquires securities from the ultimate holding company.</p> <p>Section 608(3) does not apply. A subsidiary does not have voting power of over 20% in its ultimate holding company: s608(3)(a). Nor does the subsidiary control its ultimate holding company: s608(3)(b).</p>

### ASIC modification: Acquisitions within a group

- RG 000.108 As set out in Table 6, an acquisition by a subsidiary from its ultimate holding company will generally result in the subsidiary's voting power increasing for the purposes of s606 because of the operation of s610(3).
- RG 000.109 However, an acquisition of securities by one group company from another should not trigger s606. Unless the transfer increases the voting power of a person outside the group, it cannot change ultimate control over the issuer of the securities.
- RG 000.110 Class Order [CO 01/1542] modifies s610 so that a subsidiary that acquires securities from its holding company is not taken to have increased its voting power as a result of the acquisition. For simplicity, the relief effected by [CO 01/1542] applies to any transfer from a holding company (not just an ultimate holding company).
- RG 000.111 Our relief does not apply where, as a result of the acquisition, the voting power of a person outside the group increases. A person is outside the group if they are not a subsidiary of the ultimate holding company.
- RG 000.112 This underlines the existing position under the Corporations Act that an acquisition by a subsidiary from its holding company can result in a breach of s606 if the subsidiary, or a group company in another part of the group:
- (a) has a holder outside the group with voting power of over 20%, or with control (s608(3)); or
  - (b) has an agreement with a person outside the group for the purpose of controlling the issuer of the securities.

### Associates

- RG 000.113 A number of people may be taken to be associates for the purposes of the takeover, substantial holding and compulsory acquisition provisions.
- RG 000.114 The associate concept is applied in a variety of contexts in Chs 6–6C where the objective of the relevant provision requires persons to be treated as a

group on the basis of their relationship, common interests or concerted objectives.

- RG 000.115 The relevant interests of associates must be considered when calculating a person's voting power and when considering whether a person has a substantial holding: s9 and 610. The nature of an association and an associate's relevant interests must also be disclosed in a substantial holding notice: s671B(3). Persons who collectively acquire securities cannot avoid the general prohibition in s606, or the requirement to disclose details of substantial holdings, because all voting shares are treated as a single block.
- RG 000.116 Further, associates of a person are excluded from taking certain actions that the person themselves cannot take—including giving an escalating or collateral benefit (s622 and 623) or voting on a resolution to approve an acquisition under item 7 of s611. The actions of a person's associate are also equated to those of the person, in some cases—for example, the minimum bid price rule in s621(3) and the prohibition on certain defeating conditions in s629. The associate is grouped with the person, in these circumstances, because they may not be acting independently.

### Relationships giving rise to an association

- RG 000.117 Section 12 defines the relationships and circumstances giving rise to an association for the purposes of Chs 6–6C and related references. Table 7 sets out the bases on which a person may be an associate under s12.

**Table 7: Relationships giving rise to an association under s12**

Relationship	Details
Bodies corporate—control or common control: s12(2)(a)	A body corporate is an associate of another body corporate if it controls, or is controlled by, the other body corporate, or both bodies corporate are controlled by the same entity (including a natural person).
Relevant agreement: s12(2)(b)	A second person is associated with the first person if the second person is a person with whom the first person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs.
Acting in concert: s12(2)(c)	A second person is associated with the first person if the second person is a person with whom the first person is acting, or proposing to act, in concert in relation to the designated body's affairs.

Note: The defined relationships apply to managed investment schemes with the necessary modifications to references to voting shares and to controlling or influencing the composition of the board: see s12(3).



## Relevant agreements and acting in concert

RG 000.118 Under s12(2) a person may be an associate if:

- (a) they propose to enter into, or have, a relevant agreement for the purposes of controlling or influencing the composition of the body's board or the conduct of the body's affairs (s12(2)(b)); or
- (b) they propose to act, or are acting, in concert in relation to the body's affairs (s12(2)(c)).

Note: In relation to a matter relating to securities in a body or managed investment scheme, the person may be an associate of the issuer of the securities and vice versa: s12(4).

RG 000.119 The circumstances in which an association may arise on the basis of a 'relevant agreement' under s12(2)(b) and 'acting in concert' under s12(2)(c) will often involve a significant overlap. This is because a 'relevant agreement' is defined broadly to include any agreement, arrangement or understanding, whether formal or informal, written or oral, and regardless of whether it is enforceable at law or in equity: s9. An understanding of this kind will often form a necessary part of concerted action: see *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No 4)* (1984) 2 ACLC 829 at 832.

RG 000.120 'Acting in concert' connotes knowing conduct the result of communication between the parties—not simultaneous actions which occur spontaneously (or coincidentally).

Note: *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 373; *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501 (*Bank of Western Australia*) at 524; and *Bateman v Newhaven Park Stud Ltd* (2004) 49 ACSR 597 at [33].

RG 000.121 It contemplates a consensus between parties as to a common purpose or objective. As with a 'relevant agreement', the understanding need not be formal or enforceable, and it is not essential that parties are committed to it or bound to support it—but there must be some adoption of it: *Bank of Western Australia* at 542. See also RG 000.30–RG 000.33.

RG 000.122 It is also unnecessary for a person to be doing or performing any physical or overt act to be 'acting in concert'. A person need only be 'engaged in a concert': *Industrial Equity Ltd v Commissioner for Corporate Affairs (Vic)* (1989) 1 ACSR 153 at 159.

### Affairs of a body corporate

RG 000.123 Both of the bases for an association under s12(2)(b) and (c) are concerned with the affairs of a body (or managed investment scheme). The affairs of a body corporate extend (but are not limited) to the wide variety of affairs referred to in s53: reg 1.0.18 of the Corporations Regulations 2001 (Corporations Regulations). These include:



- (a) the promotion, formation, membership, control, business, trading, transactions and dealings, property, liabilities, profits and other income, receipts, losses, outgoings and expenditure of the body;
- (b) the internal management and proceedings of the body;
- (c) the ownership of shares, debentures and interests in a managed investment scheme made available by the body; and
- (d) the power of persons to exercise, or control the exercise of, voting or disposal of shares.

Note: In this guide, references to regulations (regs) are to the Corporations Regulations, unless otherwise specified.

### Drawing inferences from indicia of an association

- RG 000.124 The nature and basis of many associate relationships mean that, in considering whether a relevant agreement exists, or whether parties are acting in concert, it will often be necessary to draw inferences from matters such as partial evidence, patterns of behaviour and a lack of a commercially viable explanation for the impugned circumstances: *Winepros Ltd* [2002] ATP 18 at [27] and *Dromana Estate Ltd OIR* [2006] ATP 8 at [25].
- RG 000.125 Circumstances that may be relevant in determining whether an association is likely to exist include:
- (a) a shared goal or purpose of the parties involved;
  - (b) prior collaborative conduct;
  - (c) structural links (including trust arrangements, common directorships, family ties and business relationships);
  - (d) common investments and dealings;
  - (e) common knowledge of relevant facts; and
  - (f) actions or dealings that are uncommercial.

Note: See *Viento Group Ltd* [2011] ATP 1 at [120], considering factors in *Mount Gibson Iron Limited* [2008] ATP 4. See also *CMI Limited* [2011] ATP 4.

### Exclusions from the definition of 'associate'

- RG 000.126 Section 16(1) excludes from the definition of 'associate' in s12, associate relationships arising merely because:
- (a) one person gives advice to the other or acts on the other's behalf in the proper performance of the functions attaching to a professional capacity or a business relationship;
  - (b) one person (a client) gives to another person, whose ordinary business includes dealing in financial products on the client's behalf (broker),

specific instructions to acquire financial products on the client's behalf in the ordinary course of that business;

- (c) one person has sent, or proposes to send, to the other an offer under a takeover bid for shares held by the other; or
- (d) one person has appointed the other (other than for valuable consideration given by the other or by an associate of the other) to vote as a proxy or representative at a meeting of members, or a class of members, of a body corporate.

RG 000.127 The exclusions only apply to associate relationships that would arise 'merely because' of the particular circumstances described. A person may still be an associate on account of understandings, arrangements or other connections falling outside those specified in s16(1).

## Disposal rights giving rise to an association

RG 000.128 It is possible that a person who enters into an agreement that includes a disposal right may become associated with the counterparty under s12(2)(b) or (c), taking into account the definition of 'affairs of a body corporate' in s53. Examples of agreements that contain disposal rights are:

- (a) an on-market or off-market share acquisition agreement;
- (b) an agreement for the acquisition of an equity derivative, whether entered into or acquired on-market or off-market;
- (c) a pre-bid acceptance agreement (under which the bidder agrees with a holder that the holder will accept the bidder's offer);
- (d) a listing rule or voluntary escrow; and
- (e) a pre-emptive right or right of first refusal.

RG 000.129 Section 53 was originally intended to apply in the insolvency context and some of the paragraphs are more difficult to apply in the associate context. Other paragraphs are easier to read with s12. A disposal right may create an association because of references in s53 to the 'ownership of shares' or the 'power of persons to dispose of or exercise control over the disposal of shares': s53(e) and (f). See also RG 000.123.

RG 000.130 If the definition of 'associate' applies to a disposal right, a party would be taken to have voting power not only in the securities that are the subject of the disposal right, but all securities held by the other party.

RG 000.131 The legislative history of the 'associate' definition suggests that this result is wider than Parliament intended. This was a problem under the *Companies (Acquisition of Shares) Act 1980* and corresponding codes which was rectified under the old Corporations Law. Paragraph 1908 of the Explanatory Memorandum to the Corporations Bill 1988 stated that:

any shares held by an associate of a person (the association arising by virtue of an agreement by the person to acquire particular shares from the other person) which are not subject to the agreement will not be included in the person's entitlement.

- RG 000.132 The Takeovers Panel has also recognised the legislative intention to exclude associations arising merely from agreements that involve nothing more than the sale and purchase of securities: see *Crescent Gold Limited 02* [2011] ATP 14 at [36].

### **ASIC modification: Relevant agreements for disposal**

- RG 000.133 Class Order [CO 04/631] modifies the definition of 'associate' in s12(2)(b) and (c) to make it clear that parties to a relevant agreement are not associates merely because the agreement contains a provision giving a party the right to dispose of securities in the designated body or to control the exercise of a power to dispose of the securities.
- RG 000.134 Our modification is consistent with the underlying objective of the associate concept in s12. The concept groups together persons with a common purpose in relation to a company. It aims to ensure that a person is not treated as acting independently from a person with whom they are in fact cooperating.
- RG 000.135 A disposal right is not, in itself, an indication that the parties have a common purpose or objective in relation to the broader direction or destiny of the company. The parties may not be seeking to achieve any more together than to simply acquire and dispose of securities.

### **Relevant interests**

- RG 000.136 A disposal right gives rise to a relevant interest for the person who has the ability to dispose, or control the disposal of, the securities that are the subject of the right: s608. Class Order [CO 04/631] affects only the potential association between the parties, and not the relevant interest arising from the disposal right. As a result, a party's voting power may still increase—but only on the basis of the acquisition of a relevant interest in the securities that are the subject of the agreement.

### **Circumstances where our modification does not apply**

- RG 000.137 Class Order [CO 04/631] only relates to a disposal right. It does not operate in relation to any other provision of an agreement or any other relevant agreement between the parties that creates an association, and it does not apply to any other provision or agreement that indicates the parties have a common purpose in relation to a company.
- RG 000.138 Examples of circumstances where our modification would not apply are when there is another term in the agreement or another agreement that:

- (a) the parties will seek to remove one or more of the directors;
- (b) one party will vote for the appointment of a director nominated by the other party;
- (c) the disposal right is conditional on such board changes;
- (d) is concerned with dividend policy;
- (e) is concerned with the future sale or acquisition of an asset by the company to or from a party;
- (f) a party will vote in favour of, or against, a corporate action (e.g. in favour of the issue of options or against liquidation);
- (g) the parties will consult on voting; or
- (h) the person who disposes of securities under the relevant agreement will continue to play a role in directing the company, whether through representation on the board or otherwise.

## D Options

### Key points

An option is a security for the purposes of Chs 6–6C and can be the subject of a takeover bid and compulsory acquisition.

However, because options are generally not voting shares, the requirements of Chs 6–6C will not apply directly to a person's relevant interests in options. However, options may give rise to a relevant interest in the securities underlying the option, which may be voting shares.

### Call options and put options

RG 000.139 An option is a contract under which one party (the option taker) has the right, but not the obligation, to buy or sell an asset from another (the option writer) at a set price on or before a specified future time.

RG 000.140 There are two basic types of options over securities: call options and put options. Table 8 summarises the position of the respective parties to a call option and a put option—in this guide, we refer to these parties as being either in the bought position or the sold position. These positions reflect the outcome of the exercise of the option.

**Table 8: Call and put options**

Option type	Party	Right/obligation	Position
Call option	Taker	Exercisable right to buy underlying securities	Bought
	Writer	Agrees to sell underlying securities if the taker exercises the option	Sold
Put option	Taker	Exercisable right to sell underlying securities	Sold
	Writer	Agrees to buy underlying securities if the taker exercises the option	Bought

RG 000.141 Options may be granted over existing shares or other securities. In addition, a company may grant call options that give the taker the right to be issued new shares in the company. Options of this kind are sometimes referred to as 'company options' or 'options over unissued shares'.

## Options as a security

- RG 000.142 Options may give rise to a relevant interest in the securities underlying the option, which may be voting shares.
- RG 000.143 However, an option may also be a security itself (distinct from its underlying security), for the purposes of Chs 6–6C, and may therefore be made the subject of a takeover bid and compulsory acquisition: s92(3)(e). However, because options are not voting shares, the general prohibition in s606 and the substantial holding requirements will generally not apply directly to a person's relevant interests in options.

Note: A market-traded option is not a security for the purposes of Chs 6–6C: s92(3)(g).

## Options for the issue of new securities

- RG 000.144 Options to acquire new shares or other securities may be granted by the company that issues the underlying class of securities. Options for the issue of new shares are often listed on a financial market alongside the underlying shares.
- RG 000.145 Options for the issue of new shares do not give rise to a relevant interest in shares before shares are issued following exercise of the option. Although options for the issue of new shares may be said to relate to 'unissued shares', this reference should not be understood to imply that unissued shares exist. Shares are created at the time they are issued: *Re VGM Holdings Ltd* [1942] 1 All ER 224. See also *Exicom Pty Ltd v Futuris Corporation Ltd* (1995) 18 ACSR 404.
- RG 000.146 Additionally, the takeover and substantial holdings provisions do not account for unissued shares. Even if an option to have a share issued could be described as a power to control the future disposal of that share, the definition of 'voting share' in s9 only includes issued shares. Further, the accelerator provision (which brings forward the time for recognising a relevant interest under options and other agreements) only applies when the counterparty has a relevant interest in issued shares: s608(8)(a).

## Acquiring a relevant interest on exercise

- RG 000.147 The earliest time that the holder of an option for the issue of shares can acquire a relevant interest in the shares is when they are issued. On issue, the person to whom they are allotted will acquire a relevant interest in those shares for the purposes of the takeover and substantial holding provisions.
- RG 000.148 The acquisition of shares resulting from the exercise of an option to be issued shares is a transaction to which the general prohibition in s606 applies: see RG 000.92(b). The holder of an option over unissued shares may therefore be prevented from exercising the option if doing so would result in

a breach of the takeover threshold, unless an exception to the general prohibition applies to the resulting acquisition.

## Options over issued securities

- RG 000.149 Under the basic rule, a person has a relevant interest in securities, for the general prohibition in s606 and the substantial holding requirements, if they:
- (a) are the holder of the securities;
  - (b) have a power to exercise, or control the exercise of, a right to vote attached to the securities; or
  - (c) have a power to dispose of, or control the exercise of a power to dispose of, the securities: s608(1).
- RG 000.150 For most options over issued shares, the person in the bought position may not have a direct relevant interest in the underlying shares that derives from control over the voting or disposal of the shares underlying the option: s608(1)(b) and (c).
- RG 000.151 However, if the person in the sold position has an existing relevant interest in the underlying securities to which the options relate, the person in the bought position is deemed to acquire a relevant interest in the underlying securities before the options are exercised under s608(8)(b)(i)–(iii).
- RG 000.152 This is because a call taker has the right to purchase the number of underlying securities covered by the option agreement from the call writer. On performance of the agreement, enforcement of the right or exercise of the option, the call taker would have a relevant interest in the underlying shares. The accelerator provision in s608(8) brings back to the earliest possible point in time (i.e. when the option itself is granted) the moment at which a person is treated as having a relevant interest in the underlying shares: see RG 000.49–RG 000.56.
- RG 000.153 Similarly, a put taker has the right or option to require the put writer to purchase the number of securities covered by the option agreement. The put writer acquires a relevant interest in the underlying shares if the put taker has an existing relevant interest in those shares: s608(8)(b)(i)–(iii).
- RG 000.154 As a result the person in the bought position acquires a relevant interest in the securities underlying call and put options if the person in the sold position has a relevant interest in underlying securities (whether acquired before or after the option is issued).

Note: For exchange-traded options, see also RG 000.161–RG 000.163.

## Identification of the underlying shares

- RG 000.155 When determining whether a person in the bought position acquires a relevant interest in the underlying shares, the question of how identifiable the underlying shares must be with the options held needs to be considered.
- RG 000.156 In *Yaramin Pty Ltd v Augold NL* (1997) 11 ACLR 439 (*Yaramin*), at 442, de Jersey J rejected the argument that s9(6) of the *Companies (Acquisition of Shares) Act 1980* should be confined in its operation to agreements relating to designated shares or parcels of shares.
- RG 000.157 Taking into account the statements made by the court in the *Yaramin* case, and the policy underlying s608(2) (which states that it does not matter whether power or control cannot be related to a particular security), our view is that shares will be sufficiently identifiable with options, for the purpose of s608(8), if the person in the sold position has a relevant interest in shares that are equivalent in number and class to the shares to which the options relate.
- RG 000.158 If, while the options are current, the person in the sold position has a relevant interest in fewer shares than are required to satisfy the exercise of all the options, the person in the bought position only has a relevant interest in the lesser number of shares. Every time the number of shares in which the person in the sold position has a relevant interest changes, the number of shares in which the person in the bought position has a relevant interest changes accordingly.

## Position on exercise of options

- RG 000.159 A person in the bought position may have already acquired a relevant interest in the underlying shares as a result of entering into an option agreement. In this situation, the existence of their relevant interest in the underlying shares, and any voting power based on that interest, for the purposes of s606 and Pt 6C.1, will not change when the person purchases the underlying shares on exercising the call or put option. However, this is subject to a possible change in the level of relevant interest or voting power during the life of the option: see RG 000.158.

## Person in the sold position

- RG 000.160 The person in the bought position acquires a relevant interest in the underlying securities when the option is written (if the person in the sold position has a relevant interest in the underlying securities at the time). However, the person in the sold position does not cease to have a relevant interest merely as a result of entering into the option agreement. The person in the sold position will often retain their relevant interest until the option is exercised and the underlying securities transferred.



## Exchange-traded options

- RG 000.161 Exchange-traded options are standardised series of options that ASX has determined may be traded through its financial market. Exchange-traded options are options over issued shares.
- RG 000.162 Through a process of novation under the ASX Clear Operating Rules, exchange-tradeable option contracts are split in two on registration—with the effect that the operator of the clearing and settlement facility becomes a central counterparty standing between the taker and writer of the option. Each party's obligation is then owed directly to the operator of the clearing and settlement facility. Delivery obligations on exercise of the option are also randomly assigned by the clearing and settlement operator within an option series.
- RG 000.163 While the application of s608(8) is complicated by the novation of option contracts on registering with the operator of the clearing and settlement facility, we consider that the provision operates so that a person in the bought position under an exchange-traded option is deemed to have a relevant interest in the underlying shares. This view is supported by the existence of the exemption in s609(6), the policy underlying s671B(7) and paragraph (a)(ii) of the definition of 'substantial holding' in s9.

Note: See Information Release IR 98/14 *Exchange-traded options—relief from s615 of the Corporations Law*, 14 August 1998.

## The partial exception

- RG 000.164 Section 609(6) operates as an exception to s608(8), so that a person does not have a relevant interest in securities merely because of:
- (a) a market-traded option over the securities (i.e. exchange-traded options); or
  - (b) a right to acquire the securities given by a derivative.
- RG 000.165 The exception does not apply, however, when considering a person's relevant interest for the purposes of the substantial holding provisions: s671B(7) and the definition of 'substantial holding' in s9. As such, a person must take into account any relevant interests they or their associates may have in considering their disclosure obligations under the substantial holding provisions.
- RG 000.166 Where the exception in s609(6) applies, for the purposes of the takeover provisions, it ceases to apply when the obligation to make or take delivery of the securities arises.

## Association

- RG 000.167 It is possible that an option agreement may result in an association between the parties under s12(2). If parties to an option are associates, they need to account for the relevant interests held by the counterparty in considering their

obligations under the takeover and substantial holding provisions—including any relevant interests that are not the subject of the option agreement.

Note: For example, the option may be a relevant agreement entered into for the purpose of controlling or influencing the conduct of share ownership or the power of persons to dispose of, or exercise control over the disposal of, shares: s12(2)(b) read with reg 1.0.18 and s53(e) and (f). See also RG 000.113–RG 000.127.

- RG 000.168 However, under the relief provided by Class Order [CO 04/631], no association arises between the parties merely because an option agreement contains a right to dispose of underlying securities, or to control the exercise of a power to dispose: see RG 000.133–RG 000.138.
- RG 000.169 Most option agreements will not give rise to an association between the parties to the option. However, if the option agreement contains other terms (e.g. an agreement to consult on voting), the parties may be associated: see RG 000.137–RG 000.138.

## Substantial holding disclosure

- RG 000.170 In some cases, particularly when a call or put option is traded on an exchange, the person in the bought position may have difficulty in complying with the obligation under s671B(1) to notify details of the relevant interests that they themselves and the person in the sold position have in the underlying shares. This would be the case if the person in the bought position does not know the identity of, or details of the relevant interests of, the person in the sold position.
- RG 000.171 In this case, we accept that the person in the bought position discharges their obligation if they assess their entitlements and, where appropriate, lodge notices under s671B on the basis that the person in the sold position has relevant interests in enough shares to satisfy their obligations under the options, without specifying the nature of the relevant interests of the person in the sold position.
- RG 000.172 If a person were to contravene s671B(1) in such circumstances, they would not be liable to pay damages to a person who suffers loss or damage as a result of the contravention: s671C(2).

## E Warrants

### Key points

Warrant issuers and warrant holders are not associates merely because of the warrant.

We have given class order relief so that holders of quoted call warrants do not have a relevant interest merely because they have a right to acquire the securities.

We have given class order relief so that issuers of quoted put warrants do not have a relevant interest because the holder has given the issuer a right in relation to the securities.

### What are warrants?

- RG 000.173 Warrants are financial products, primarily issued by financial institutions, which provide a level of exposure to an underlying asset, instrument or index. The terms of warrants vary as they are agreed between the issuer and holder. However, a warrant series that meets the requisite criteria may be admitted to trading on ASX.
- RG 000.174 Many deliverable warrants are similar to options over issued shares—providing a right to the holder to buy or sell a share at a set price (the strike price) until a date in the future (the expiry date). Table 9 summarises some of these types of warrants.
- RG 000.175 As with options, warrants can give rise to a relevant interest in underlying securities, which may need to be taken into account when determining a person's obligations under the takeover and substantial holding provisions.

**Table 9: Characteristics of some deliverable warrants commonly relating to shares**

Type of warrant	Key characteristic
Regular call warrant	Entitles the holder to buy a fixed quantity of the underlying shares from the issuer.
Regular put warrant	Entitles the holder to sell a fixed quantity of the underlying shares to the issuer.
Instalment warrant	Following payment of an initial instalment, the holder is entitled to specified rights, such as dividends, distributions and franking credits, paid by an underlying share. The holder may make an optional final payment later to purchase the share in full. The 'unpaid amount' for the share is often treated as a loan from the warrant issuer.

Type of warrant	Key characteristic
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Endowment warrant	Typically, a long-term warrant carrying the right to purchase a share by payment of an outstanding amount which fluctuates over time. The outstanding amount will generally increase with the application of regular interest payments and decrease when dividends and other distributions from the share are applied.
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Note: This table includes a general description of the common features of each type of warrant. Individual warrant terms may vary significantly from those described.

### General characteristics and similarities with options

- RG 000.176 Warrants have the following characteristics that are similar to options and that distinguish them from shares:
- they are frequently designed to give an investor financial exposure to the performance of the underlying entity or commodity—rather than, necessarily, control over the company;
  - they do not give direct control over the underlying securities until they are exercised; and
  - they generally have relatively short, fixed lives, compared with equities.
- RG 000.177 The rights and obligations of warrant issuers are often very similar to those of option writers. Likewise, the rights and obligations of warrant holders are very similar to those of option takers.

### Quoted warrants

- RG 000.178 Warrants that are quoted on ASX generally have these additional characteristics:
- ASX applies an overall limit to the proportion of the underlying securities over which exercisable quoted warrants may be issued (except for fully covered warrants);
  - there are specific disclosure regimes for warrant issuers in the ASX Operating Rules;
  - within a series, their terms are standardised, fully disclosed and are not variable by the issuer or holder;
  - they are primarily marketed to, and acquired and traded by, retail investors; and
  - in general, they have relatively longer lives than exchange-traded options (except for long-life flex options).
- RG 000.179 Unlike exchange-traded option writers, who are anonymous except to the operator of the relevant clearing and settlement facility, the issuer of a quoted warrant is a single entity that is always readily identifiable, so the application of s606 and the substantial holding provisions to warrants is more focused.

## Our approach to warrants and relief

RG 000.180 The terms of warrant agreements set out the rights and obligations of the holders and writers of warrants in relation to the underlying securities. Given the variety of terms on which warrants may be issued, the appropriate consequence of issuing or acquiring a warrant under the takeover or substantial holding provisions will necessarily differ between warrant series.

RG 000.181 Accordingly, as a general principle, we base our regulatory treatment of warrants on the rights and obligations that different persons have in relation to particular warrants, regardless of the type of warrant. The criteria we use for determining relief for warrants are the specific mechanisms by which particular warrants deal with the issues of ownership, disposal power and voting rights of the underlying shares, and the timing and nature of exercising rights, rather than the structure or form of the warrants.

### ASIC relief: Relevant interests arising from quoted warrants

RG 000.182 We recognise that, for many warrants, the rights and obligations in relation to underlying securities are sufficiently remote or tenuous that they are unlikely to be used as a means of gaining control of a company. For this reason, we have provided class order relief allowing warrant issuers, holders and, where applicable, trustees, to disregard, in some cases, a relevant interest in underlying securities arising from warrants quoted on ASX. Table 10 contains a summary of this relief.

**Table 10: Summary of ASIC's relevant interest relief for quoted warrants**

Party	Relevant interest	Treatment of relevant interest	Reference
<b>Call warrants</b>			
Holder	Accelerated relevant interest arising from the right to acquire securities underlying the warrant from the issuer: s608(8)	Substantial holding disclosure—no relief provided. The relevant interest must be counted.	RG 000.190– RG 000.195
	Relevant interest arising from a right to require the securities are kept in trust under the warrant	Takeovers—relief provided to disregard the relevant interest if no power exists under the warrant to control voting or disposal: [CO 02/924].	
Issuer	Relevant interest arising from holding underlying securities	No relief provided. The relevant interest must be counted.	RG 000.196– RG 000.200
	Relevant interest in underlying securities held in trust by a trustee under the terms of the warrant	Relief provided to disregard the relevant interest until expiry, provided that the issuer has no power to control voting or disposal other than to enforce certain terms of the trust: [CO 02/925].	RG 000.196– RG 000.200

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Party	Relevant interest	Treatment of relevant interest	Reference
Trustee	Relevant interest arising from holding the securities, or powers under the trust that may be exercised to satisfy the rights or obligations of the issuer or holder	Relief provided to disregard the relevant interest in the trust securities, provided that: <ul style="list-style-type: none"> <li>discretions under the terms of the trust deed are limited to specified matters and exercised on ordinary commercial terms or like manner; or</li> <li>the trustee is a bare trustee that cannot rely on s609(2): [CO 02/927].</li> </ul>	RG 000.208– RG 000.218
<b>Put warrants</b>			
Holder	Relevant interest arising from holding underlying securities	No relief provided. The relevant interest must be counted.	RG 000.201– RG 000.202
Issuer	Accelerated relevant interest arising from the acquisition of securities from the holder on exercising the holder's right to put	Relief provided to disregard the relevant interest if no power exists under the warrant to control voting or disposal: [CO 02/926].	RG 000.203– RG 000.207
	Relevant interest in underlying securities arising from the rights given to the issuer under the terms of the warrant, or a trust securing the obligations of the warrant holder (and/or issuer)	Relief provided to disregard the relevant interest until expiry, provided that the issuer has no power to control voting or disposal other than to enforce certain terms of the trust on exercise, expiry or default by the warrant holder: [CO 02/926].	RG 000.203– RG 000.207
Trustee	Relevant interest arising from holding or powers under trust for purpose of satisfying rights or obligations of issuer or holder	Relief provided to disregard the relevant interest in the trust securities, provided that: <ul style="list-style-type: none"> <li>discretions under the terms of the trust deed are limited to specified matters and exercised on ordinary commercial terms or like manner; or</li> <li>the trustee is a bare trustee that cannot rely on s609(2): [CO 02/927].</li> </ul>	RG 000.208– RG 000.218

Note: Given the variety of terms on which warrants are issued, a particular warrant series may give rise to a relevant interest in underlying securities on a basis other than those listed above.

### Association relief

RG 000.183 As with options, in addition to giving rise to a relevant interest in underlying securities, a warrant may also result in the issuer and holder becoming associates: see RG 000.167–RG 000.169.

RG 000.184 The nature of the relationship between most issuers and holders of quoted warrants means that the mere fact of entering into a warrant agreement should not constitute an association that the law recognises for tracing entitlements or relevant interests—provided that the association does not give a call warrant holder either a direct or indirect power over the voting shares.

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RG 000.185 For certainty, we have provided class order relief to disregard any association between warrant issuers and holders arising merely because of the warrant: see RG 000.214–RG 000.218.

### **Reliance on ASIC relief**

RG 000.186 We are concerned that warrant issues should not be used to abuse the policy underlying our relief for warrants through sham transactions.

RG 000.187 If a person does anything that is not within the spirit of our class order relief, or uses the class order relief in a way that is contrary to the principles and purposes set out in s602, we may apply to the Takeovers Panel for declarations and orders. Any party seeking to use warrants in a control transaction is advised to seek our advice before embarking on any such course of conduct.

RG 000.188 We may also consider taking injunctive, or other action, against parties that act outside the class order relief and contravene Chs 6 and/or 6C. We may also review the suitability for licensing of any AFS licensee who breaches, or facilitates the breach of, any of the takeover or substantial holding provisions (including by failing to comply with the requirements of the class order relief).

## **Call warrants**

RG 000.189 Call warrants over underlying shares can give rise to a relevant interest in some cases. We have provided relevant interest relief in certain circumstances.

### **Holder's relevant interests**

RG 000.190 Call warrants give the holder of a warrant the right, but not the obligation, to acquire the underlying securities under the terms of the warrant agreement. Therefore, a call warrant holder has a relevant interest in the securities that are the subject of the warrant agreement and in which the warrant issuer has a relevant interest.

RG 000.191 Section 608(8) will accelerate that relevant interest to the point of entry into the warrant agreement, even if the warrant or the right is only exercisable in the future. The call warrant holder has a relevant interest in the underlying securities even if the exercise of the warrant is subject to strict conditions: s608(2).

RG 000.192 Under s609(6)(b), a person does not have a relevant interest merely because they have a right to acquire the securities given by a derivative. Some warrants are derivatives—however, others may not be because they are securities: see s761D(3)(c), 764A(1)(a), reg 7.1.04(7) and the definition of ‘security’ in s761A. See also the definition of ‘warrant’ in reg 1.0.02.

- RG 000.193 Additionally, s609(6)(b) only applies to a relevant interest that the holder has because of their right to acquire the securities. Without relief, the holder may, additionally or alternatively, have a relevant interest because of a right under the warrant to require the securities to be kept in trust.
- RG 000.194 Class Order [CO 02/924] provides relief to the holders of call warrants that may be securities, or otherwise fall outside s609(6) on their terms, so that the holders are able to disregard a relevant interest arising from a warrant in a similar way that relevant interests are disregarded when s609(6)(b) applies.
- RG 000.195 Although the result of the relief is that no relevant interest arises for the purposes of the takeover provisions, as a consequence of holding a call warrant, any relevant interest that would arise, but for the relief, must still be taken into account for the purposes of the substantial holding provisions. This is consistent with the treatment of derivatives under the definition of ‘substantial holding’ in s9 and 671B(7).

### **Issuer’s relevant interests**

- RG 000.196 The issuer of a covered call warrant normally retains a relevant interest in securities that it holds as cover for its obligations under the warrant. It retains the relevant interest, even when it places underlying securities in trust for holders. This is because the warrant is only a conditional agreement. If the holder does not exercise the warrant, or defaults in some way, the effect of the basic warrant agreement is that the securities remain the property of the issuer, or return to the issuer out of the trust arrangements. Therefore, it will actually be very difficult for the issuer to dispose of these securities while the warrant exists, in a way that results in the issuer ceasing to have a relevant interest.
- RG 000.197 For an issuer to dispose of the underlying securities, it must first transfer its rights and obligations in relation to the securities to another person. The onus will lie squarely on any issuer of covered call warrants, who asserts that it no longer has a relevant interest in the cover securities, to convince ASIC that its arrangements relating to the cover securities mean that it has disposed of those securities.
- RG 000.198 We have issued Class Order [CO 02/925] for issuers of covered call warrants to disregard any relevant interest that may arise from holding the underlying securities as cover against the rights of the holders and the obligations of the issuer.
- RG 000.199 The class order only applies if:
- (a) the underlying securities are held in trust under the terms of the call warrant; and
  - (b) the call warrant issuer does not have the power to control voting—other than to enforce the terms of the trust, or to retain ownership if the call warrant expires unexercised or the call warrant holder defaults.



- RG 000.200 If a call warrant issuer has ensured that the underlying securities are lodged with a nominee company or trustee, and it has no power to control voting or disposal of the underlying securities (other than requiring the trustee or nominee to comply with the provisions of the trust or warrant agreement), the relevant interest that a call warrant issuer may have in the underlying securities is sufficiently remote for it to be disregarded.

## Put warrants

### Holder's relevant interests

- RG 000.201 We will not grant relief to put warrant holders from the takeover or substantial holding provisions—except to disregard an association formed solely by entry into a quoted put warrant agreement.
- RG 000.202 There is no reason for granting relief to put warrant holders, because holding the warrant does not affect their control over any underlying securities. Other than disregarding an association formed solely by entry into a quoted put warrant agreement, we will not grant put warrant holders relief from s606 or the substantial holding provisions.

### Issuer's relevant interests

- RG 000.203 Put warrants give the holder the right, but not the obligation, to sell the underlying securities to the issuer. Therefore, a put warrant issuer has a relevant interest in the securities that are the subject of the warrant agreement, and in which the put warrant holder has a relevant interest. Section 608(8) will accelerate that relevant interest to the point of entry into the warrant agreement, even if the warrant or the right is only exercisable by the warrant holder, and only at some time in the future.
- RG 000.204 A warrant issuer may also have a relevant interest in the underlying security because the holder, under the terms of the warrant (or the trust securing the obligations under the warrant), has given the issuer a right in relation to the securities.
- RG 000.205 In particular, this may arise in relation to instalment or endowment warrants with a loan component. Under such warrants, the holder may be required to place the underlying security in trust to secure their obligations. Without relief, the issuer may have a relevant interest under s608(8)(b)(ii), because the issuer has a right to dispose of the securities held in trust if the holder does not exercise the put option.
- RG 000.206 We have granted relief under Class Order [CO 02/926] so that the relevant interests of put warrant issuers are disregarded in these situations.

- RG 000.207 We have granted this relief because:
- (a) as a result of the secondary trading of quoted warrants, issuers of quoted put warrants will not be able to trace the relevant interests or intentions of the warrant holders; and
  - (b) issuers have no present control over the underlying securities.

## Trustees and associations

### Warrant trustee relief

- RG 000.208 We have granted relief in Class Order [CO 02/927] in relation to the general prohibition in s606 and the substantial holding provisions for a trustee who holds securities on trust to satisfy the obligations of an issuer or holder of warrants.
- RG 000.209 The relief allows the trustee to disregard any relevant interest in the securities it holds as cover which arise merely because it has certain discretions under the trust deed. The relief applies when the trustee has certain discretions that might prevent it from being covered by the exception for bare trustees in s609(2).
- RG 000.210 Allowable discretions include:
- (a) discretions available on the default or insolvency of the issuer or holder;
  - (b) discretions in relation to certain transactions affecting share capital, such as rights issues or capital reconstructions;
  - (c) discretions in relation to takeover bids or schemes of arrangement (the relief allows for a discretion to bring forward the time for exercise but not a discretion to decide whether to accept or reject a bid); and
  - (d) discretions to lend the securities.
- RG 000.211 The discretions must be exercised on ordinary commercial terms or in an ordinary commercial manner.
- RG 000.212 We have provided the relief for trustees because, in the circumstances in which the relief applies, the trustee's power is tenuous and information about any substantial holding resulting from the trustee's role would likely be immaterial to the market.
- RG 000.213 Class Order [CO 02/927] recognises that the purpose of the trust may be to secure the obligations of the warrant holder under the warrant as well as the warrant issuer. It recognises that, under the terms of the warrant, a trustee may exercise a range of discretionary powers over the securities in trust. It is unlikely that these powers would be used as a means of gaining control of a company.

## Associations

- RG 000.214 Entering into a call warrant agreement or put warrant agreement may make the issuer and holder associates under s12(2). This may also have implications in terms of s608(3)(a), under which a person is deemed to have the same relevant interest as another body corporate in which it has voting power of over 20%. An associate's relevant interests in the body corporate are included in calculating a person's voting power.
- RG 000.215 For quoted warrants, the aggregation of voting power of issuers and holders by s608(3)(a) is inappropriate because:
- (a) most warrant issuers are financial institutions with widespread and diverse shareholdings, and have funds management arms that trade actively in securities. This would make monitoring the issuer's holdings very difficult for warrant holders; and
  - (b) most warrant issuers have a wide spread of holders, who are likely to have portfolios of their own, and these would need to be aggregated with the issuer's holdings. This would make monitoring the holders' entitlements very difficult for warrant issuers.
- RG 000.216 Because the issuer is so easily identifiable in the case of a warrant, aggregations can readily focus on one person.
- RG 000.217 Class Orders [CO 02/925] and [CO 02/926] give relief to disregard any association between warrant holders and warrant issuers merely because of the warrant.
- RG 000.218 The remoteness of an association between warrant issuers and holders that arises solely because of a warrant agreement means that the association should not be recognised for the purposes of aggregation under s608(8)(a). Our class order relief operates so that the association between the issuers and holders will clearly not operate in relation to s608(8)(a).

## Terms and scope of ASIC relief

- RG 000.219 Our class order relief only applies on the strict terms of the relief. There are a number of key limitations on our relief that need to be considered.
- RG 000.220 The relief also operates, in some cases, only to defer recognition of a relevant interest to a later event. As a result, a person may be taken to acquire underlying securities at that later time when the relief is no longer applicable.

### **Control over voting or disposal**

- RG 000.221 Our class order relief does not apply if the call warrant holder or put warrant issuer, at any time until the exercise of the warrant, has the power to control voting or disposal of any of the securities underlying the warrant (other than as provided for in the class order).

### **Quoted warrants**

- RG 000.222 Our class order relief only applies to quoted warrants over listed securities. Many of the preconditions for relief—such as standardised contracts, disclosure by issuers, and anonymous markets—apply only to quoted warrants. The continuous disclosure requirements for listed securities also add a desirable level of transparency to trading in warrants.

### **Stated reliance on relief**

- RG 000.223 Our class order relief also applies only when the offering circular or product disclosure statement relating to the warrant discloses that the relief in the class order applies.

### **When class order relief ceases to apply**

- RG 000.224 Our class order relief for call and put warrants ceases to apply:
- (a) on the exercise, maturing or lapsing of warrants. If a warrant is exercised or allowed to mature, either the call warrant holder or the call warrant issuer obtains control over the underlying securities. Therefore, it is logical to recognise the relevant interests that had previously been deemed to be too remote or tenuous; or
  - (b) if the terms of a warrant change, so that either the issuer or the holder acquires the power to control voting or disposal of the underlying securities.

### **Passive acquisition**

- RG 000.225 If, under the terms of a warrant, the holder or issuer automatically gains a relevant interest in voting shares or interests on the expiry of a warrant, the person will still legally acquire the shares or interests when it acquires the relevant interest under the terms of the warrant agreement. There will still be an acquisition, even though the person takes no positive action at the time.
- RG 000.226 On issuing or acquiring the warrant, the person will enter into a transaction in relation to the underlying securities and will acquire the relevant interest in the securities as a result of entering into the warrant agreement. We reject any suggestion that it would be possible to construct a warrant agreement that would give a person a relevant interest in the underlying securities without entering into a transaction at the time of gaining the relevant interest.

RG 000.227 Similarly, if a person avails themselves of our class order relief, on the exercise or lapse of the warrant, any relevant interest or voting power that has been disregarded under the relief will commence being counted for the purposes of the Corporations Act, and the person will acquire the relevant interest, and therefore the share, at the time the relief ceases to have effect. Even though the agreement had been entered into previously, and the relevant interest was only acquired on the lapse of the effect of the relief, the person would acquire the underlying securities at the time of gaining the relevant interest.

## Substantial holding obligations

RG 000.228 We will not give relief to disregard any relevant interest or entitlement that may arise from holding a call warrant for the purposes of the substantial holding provisions.

RG 000.229 We recognise that call warrant holders may have difficulty in determining their voting power for the purposes of the substantial holding provisions. However, we consider that, because the markets for the underlying securities and derivatives are closely related, it is reasonable to require call warrant holders to disclose their holdings of warrants to the market by aggregating them with any other relevant interests in, or entitlements to, the underlying securities.

RG 000.230 In accordance with this approach, there are two ways that call warrant holders can comply with the substantial holding notification requirements:

- (a) by closely monitoring the warrant issuer's holdings of the underlying securities and:
  - (i) aggregating the relevant interest that the holder gains through its holding of call warrants with any other entitlements to underlying securities it has apart from its call warrants; and
  - (ii) reporting any changes in its entitlements arising from changes in the warrant issuer's holdings; or

Note: It would not be acceptable for a warrant holder who takes this approach to seek to avoid its obligations under the substantial holding provisions by deliberately avoiding inquiring about any changes in the warrant issuer's holdings in the underlying securities.

- (b) (the preferred way) by assuming that the warrant issuer currently has sufficient securities to meet any obligations under the warrants it has issued—that is, assume that each warrant held gives voting power in relation to the relevant number of underlying securities, as recommended for options: see RG 000.170–RG 000.172.

## F Escrow arrangements

### Key points

A person may acquire a relevant interest in securities as a result of an agreement placing the securities into escrow. In some cases, this may mean an entity has a relevant interest in its own securities.

We have modified s609 so that a listed company does not have a relevant interest in securities merely because the company must apply restrictions on the disposal of the securities under Chapter 9 of the ASX Listing Rules. Our relief does not apply to the requirement to disclose substantial holdings.

We may give case-by-case relief, modifying s609, so that a company, underwriter or lead manager does not have a relevant interest merely because they require a holder to enter into an escrow arrangement that is not required under the ASX Listing Rules.

### Relevant interests arising from escrow arrangements

- RG 000.231 A holder of securities may enter into arrangements to have those securities held in escrow for a period of time. Under an escrow arrangement, the holder generally agrees not to dispose of the securities, or rights or interests connected with the securities, for the duration of the escrow.
- RG 000.232 An entity will commonly enter into escrow arrangements with certain existing security holders in support of a public offering of securities. This may promote investor confidence and an orderly market: see RG 000.240–RG 000.243.

### Relevant interests of parties to escrow arrangements

- RG 000.233 A person who enters into an escrow arrangement with a holder has a relevant interest in the securities that are subject to the escrow because the person controls the exercise of a power to dispose of the securities: s608(1)(c). The power to control disposal includes the ‘negative power’ of restriction: RG 000.35.

Note: See also s609(7), which provides that a relevant interest does not arise from certain agreements which ‘restrict’ the disposal of securities for no more than three months.

- RG 000.234 Section 608(9) states that s608 may result in a body corporate having a relevant interest in its own securities. This confirms that a company may have a relevant interest in its own securities if it has entered into an escrow arrangement with a security holder.

- RG 000.235 In the absence of relief, companies and other counterparties to an escrow arrangement will generally have to account for their relevant interests in the securities held in escrow in considering their obligations under the takeover and substantial holding provisions.

## Escrow arrangements under the ASX Listing Rules

- RG 000.236 Under Chapter 9 of the ASX Listing Rules, certain listed companies must apply restrictions on the disposal by holders of certain ‘restricted securities’, and enter into a restriction agreement placing the securities in escrow, so that the holder may not deal with the securities for a specified time (a maximum of two years): ASX Listing Rules 9.1 and 9.2 and Appendix 9B.

Note: In this guide, we refer to such arrangements as ‘listing rule escrow’.

- RG 000.237 The company must also take steps to restrict the transfer of the restricted securities: ASX Listing Rules 9.5 and 9.14.

### ASIC modification: Escrow arrangements under the ASX Listing Rules

- RG 000.238 Class Order [CO 03/634] modifies s609 so that a listed company does not have a relevant interest in securities merely because the company must apply restrictions on the disposal of the securities as part of a listing rule escrow under Chapter 9 of the ASX Listing Rules. Our modification applies for the purposes of the takeover provisions in Ch 6, but not the substantial holding requirements in s671B.

- RG 000.239 Our class order also modifies s609 so that ASX, as the market operator, does not have a relevant interest merely because it has the power to control the disposal of securities that are the subject of a listing rule escrow. This includes ASX’s power to consent to the release of securities from the escrow in the event of a takeover bid or scheme of arrangement: ASX Listing Rule 9.17. The relief for the operator of ASX applies for the purposes of both the takeover provisions in Ch 6 and the substantial holding requirements in s671B.

### Why we consider relief for listing rule escrows is appropriate

- RG 000.240 We have given the relief in [CO 03/634] to facilitate the benefit of a ‘fair, orderly and transparent market’, which the listing rule escrow requirements seek to achieve: s792A.

- RG 000.241 Listing rule escrow is designed to align:
- (a) the interests of a vendor of an asset to the company, a seed capitalist, a promoter or a provider of professional services rewarded with securities; and
  - (b) the interests of other holders.
- RG 000.242 As noted in ASX Guidance Note 11 *Restricted securities and voluntary escrow*, at paragraph 2:
- ... [E]scrow delays the time in which a vendor can realise the value of the securities. The delay allows the value of assets or services sold to an entity to become more apparent, and for the market price of the entity's securities to adjust before the vendor receives full consideration. In that way, the business risk is shared between the vendor and other investors.
- RG 000.243 The escrow arrangements may promote an orderly market in the securities by preventing a sell-down of a substantial number of securities immediately after the securities are issued.

## Voluntary escrows

- RG 000.244 In some cases, a holder may be requested to enter into an escrow arrangement, in circumstances where a listing rule escrow is not required (a 'voluntary escrow'), by:
- (a) a company; or
  - (b) an underwriter or lead manager.
- RG 000.245 The company, underwriter or lead manager may require the voluntary escrow to promote investor confidence in an offer of securities.

### ASIC relief: Voluntary escrow arrangements

- RG 000.246 We may give case-by-case relief to further modify s609 so that a company, underwriter or lead manager does not have a relevant interest in securities placed in escrow merely because they require a holder to enter into a voluntary escrow arrangement. As with relief for listed companies under [CO 03/634], this relief will apply for the purposes of the takeover provisions in Ch 6, but not the substantial holding requirements in s671B: see RG 000.267–RG 000.268.
- RG 000.247 We provide this relief because voluntary escrows may provide similar benefits to listing rule escrows—aligning the interests of the holders that are subject to escrow with those of other holders, and promoting an orderly market for the securities: RG 000.240–RG 000.243. Relief for professional underwriters also promotes capital raising and reorganisation by allowing the underwriters to protect themselves from an early sell-down which may depress the price of securities.



RG 000.248 However, we will only give relief for voluntary escrows that meet certain requirements and in certain circumstances. This is because the benefits of an escrow must be balanced against the possible defensive effect of an escrow against any potential takeover. The requirements for our relief are discussed further below.

### **Purpose of the escrow arrangements**

RG 000.249 The relief available for companies, underwriters and lead managers generally differs, taking into account the purpose of the escrow and the desirability of minimising the potential defensive effect of escrow arrangements.

### **Relief for companies**

RG 000.250 We may grant voluntary escrow relief to a company where the escrow arrangement relates to securities issued to the holder:

- (a) as promoter; or
- (b) in return for seed capital, assets or services.

RG 000.251 We will generally only grant relief of this kind for the escrow of newly issued securities. This is consistent with the underlying rationale of allowing time for the value of assets and services to become apparent: see RG 000.242. Requiring that the securities are newly issued also ensures that our voluntary escrow relief for companies is not available to extend a prior escrow arrangement, such as a previous listing rule escrow.

Note: In limited cases, we may grant relief to companies for the escrow of securities that are not newly issued if, in the circumstances, this fact does not detract from the rationale in RG 000.251. For example, we may grant relief for an escrow arrangement with promoters who have held securities for some time before an initial public offering (IPO) where the value of the entity has not been sufficiently established before listing.

### **Relief for underwriters and lead managers**

RG 000.252 Voluntary escrow relief for underwriters or lead managers may be available for agreements with promoters, seed capitalists, vendors and providers of assets or services.

RG 000.253 We may also provide relief for underwriters seeking to enter into escrow agreements covering existing securities of a controller or a substantial holder. Relief for existing securities of this kind is extended to underwriters and lead managers because an underwriter, in requiring an escrow, is less likely to have a defensive purpose.

RG 000.254 Accordingly, we will only provide relief if the underwriter or lead manager is underwriting or managing in the ordinary course of its business of underwriting or managing offers of securities.

## Permitted terms of escrow agreements

RG 000.255 We will generally only give relief for an escrow arrangement if the relevant escrow agreements meet the requirements set out in Table 11.

**Table 11: Escrow agreements: Requirements for voluntary escrow relief**

Requirement	Details
Restriction	The escrow agreement must restrict disposal and not voting.
Terms	<p>The escrow agreement must allow the holder to accept into a successful takeover bid and allow the securities to be transferred or cancelled as part of a merger by scheme of arrangement.</p> <p>A 'successful bid' for this purpose is one where the holders of at least 50% of the bid class securities that are not subject to escrow, and to which the offer under the bid relates, have accepted.</p> <p>The escrow agreement must require the securities to be returned to escrow if the bid does not become unconditional.</p> <p>Note: Proponents of an escrow should ensure that the wording of the proposed agreement reflects this requirement as it applies to both a full or a proportional bid.</p>
Duration	<p>The escrow must terminate no later than:</p> <ul style="list-style-type: none"> <li>• for an escrow arrangement with an underwriter or lead manager—one year after the date that the parties enter into the voluntary escrow; or</li> <li>• for an escrow arrangement with the company—two years after the date that the parties enter into the voluntary escrow</li> </ul>

### No restriction on voting

RG 000.256 An escrow agreement should not restrict a holder's ability to exercise the voting rights attached to securities placed in escrow. A voting restriction is not necessary to achieve the underlying objectives of escrow: see RG 000.241–RG 000.242. An escrow agreement that confers the power to control the exercise of votes attached to securities in escrow may also indicate a purpose other than escrow, for which relevant interest relief may not be appropriate.

### Carve-out for a successful bid

RG 000.257 Our requirement that an escrow agreement must allow the holder to accept into a successful takeover bid is similar to the requirement in ASX Listing Rules 9.17 and 9.18. It is designed to reduce the defensive effect of the escrow.

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RG 000.258 However, even if holders are free to accept a successful takeover bid, an escrow arrangement may still have a defensive effect. A potential bidder may be discouraged because it is more difficult to build a pre-bid stake. There may also be an increased difficulty for a bidder in having to first acquire more than 50% of the available securities (those that are not subject to escrow).

RG 000.259 We will take into account the overall circumstances in considering whether the purpose or effect of a proposed escrow arrangement may be to construct a takeover defence: see RG 000.263–RG 000.264.

Note: For example, we may closely examine escrow arrangements that cover a very high proportion of an entity's issued securities or a strategic holding in the context of the particular make-up of an entity's register.

### **Period of voluntary escrow**

RG 000.260 Given the potential defensive effect of escrow arrangements, the period of a voluntary escrow should be limited. Under our relief, the maximum duration permitted for the voluntary escrow is one year for 'underwriter escrow' and two years for 'company escrow'.

RG 000.261 These periods are consistent with the periods applicable to listing rule escrows, and are designed to provide a balance between the following considerations:

- (a) sufficient delay for the market to value goods and services provided by the holder and to prevent a sell-down immediately after the securities are issued; and
- (b) minimising the period during which the holder is restrained from further selling. A prolonged escrow may affect the market for control over the company.

### **Other requirements**

RG 000.262 If the securities that are subject to escrow are issued under a prospectus, we will require details of the voluntary escrow to be disclosed in the prospectus: see also RG 228.159–RG 228.160. If the issue of the securities is approved at a meeting of holders, the details must be disclosed in the notice of meeting or explanatory statement accompanying the notice.

### **Takeover defence**

RG 000.263 Even if a proposed voluntary escrow arrangement generally meets the requirements for relief outlined, we will not give relief if we consider that a purpose or effect of the escrow may be to construct a defence against a takeover.

RG 000.264 An escrow employed as a defence may be subject to challenge before the Takeovers Panel or a court by a bidder, holder or ASIC on the basis that it constitutes unacceptable circumstances or is inconsistent with the duties of the target's directors.

### **Applications**

RG 000.265 Applications for relief for voluntary escrow should fully explain the circumstances and purposes of the proposed escrow arrangements, and should be accompanied by a copy of the proposed escrow agreement. Applicants should also include any related documentation, such as relevant disclosure documents.

RG 000.266 Our relief for voluntary escrow generally involves a modification of s609 to enable a person to disregard a relevant interest resulting from an escrow arrangement for the purposes of the takeover provisions. However, to ensure that the parties' obligations under the substantial holding provisions are not affected by the modification to s609, it will be necessary to make a corresponding modification to s671B: see RG 000.267–RG 000.268. As such, an interrelated application under s673 will also be required at the time that an application is made under s655A for voluntary escrow relief.

## **Substantial holding disclosure**

RG 000.267 Our relief for companies and underwriters or lead managers that enter into listing rule escrows, or voluntary escrows, does not extend to the substantial holding provisions. A party will still acquire a relevant interest as a result of entering into an escrow arrangement, for the purposes of s671B, and will be required to notify the relevant company and the market of details of their relevant interests in accordance with the requirements of that provision.

RG 000.268 In particular, substantial holding information given to the relevant market operator must be accompanied by the escrow agreement and any other documents setting out the terms of a relevant agreement contributing to the creation of the escrow: s671B(4).

## G Substantial holding notices

### Key points

The requirement to disclose details of substantial holdings in listed entities is designed to ensure that investors have access to information about the identity, interests and dealings of persons who may be in a position to influence or control the destiny of an entity.

A person who gives a substantial holding notice must give full rather than minimal or technical disclosure. This includes details of net movements and a full explanation of the basis and nature of any relevant interests or associations comprising the person's voting power.

A substantial holding notice must be accompanied by documents, in writing and readily available, setting out the terms of any relevant agreement contributing to the situation giving rise to the need for substantial holding disclosure. A statement giving details of any contract, scheme or arrangement, which is not in writing and readily available, must also be provided. A substantial holder cannot avoid giving relevant details of an overall arrangement by separating them out into a later agreement subject to finalisation.

### Principles underlying substantial holding disclosure

RG 000.269 The purpose of the substantial holding provisions is to ensure that holders, directors and the market have timely access to sufficient information concerning:

- (a) who the controllers of substantial blocks of voting shares are;
- (b) who the associates of substantial holders are;
- (c) details of any consideration or special benefits that a person received for disposing of their relevant interest; and
- (d) details of any agreements, special conditions or restrictions that may affect the disposal of shares or the way in which they are voted.

RG 000.270 The substantial holding disclosure requirements can be traced back to the consideration by the UK Board of Trade's Committee on Company Law Amendment (Cohen Committee) of the longstanding requirement to maintain and provide public access to the company's register of members and the impact of nominee shareholdings on its underlying objective. The committee noted:

... the intention thereof is to enable a shareholder to know who his co-adventurers are and the public to find out who control[s] the business in which they are contemplating investment or to which they are considering granting credit.

Note: See Board of Trade (UK), *Report of the Committee on Company Law Amendment* (Cohen Committee), Cmd 6659, 1945, paragraph 77.

RG 000.271 The report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General (Eggleston Committee), from which the Australian substantial holding disclosure regime originates, confirms a similar underlying objective:

... shareholders are entitled to know whether there are in existence, substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend.

Commonwealth, *Second interim report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General* (Eggleston Committee), Parl Paper No 43, 1969, paragraph 4.

RG 000.272 The substantial holding disclosure requirements promote the principle that the acquisition of control should take place in an efficient, competitive and informed market: s602(a). However, the purpose of the requirement is not limited to identifying bidders or potential bidders. The general purpose is to maintain an efficient, competitive and informed market in quoted securities. This includes substantial holdings acquired through securities lending and prime broking arrangements: see RG 222.9.

## When is substantial holding disclosure required?

RG 000.273 A person must provide a substantial holding notice if they:

- (a) begin to have, or cease to have a substantial holding in a listed body;
- (b) have a substantial holding in a listed body and there is a movement of at least 1% in their holding; or
- (c) make a takeover bid for securities of a listed body: s671B(1).

RG 000.274 A person has a substantial holding if, together with their associates, they have a relevant interest in voting shares carrying 5% or more of votes: s9. Certain relevant interests, which are exempt for the purposes of the takeover provisions, are counted for the substantial holding disclosure requirements—for example, relevant interests arising under market-traded options and conditional agreements: s9, 609(6), 609(7) and 671B(7).

### Net movements in substantial holdings

RG 000.275 When the substantial holding requirement is triggered by the movement of a holding in one direction, followed by a movement in the opposite direction, the holder must disclose the movement in each direction: s671B(1)(b). The holder must not merely disclose the net movement between one notice and the next. The holder must give the information required by s671B(3) in each notice, even if the situation changes by the time that the information is required to be given: Note 2 to s671B(1). Forms 604 and 605 require the

holder to disclose particulars of each change in a relevant interest since they were last required to give a notice.

- RG 000.276 For example, where offers under a bid close subject to defeating conditions (except for a prescribed circumstances condition: s650F(1)(a)), the bidder must disclose both its increased substantial holding as a result of acceptances, and its reduced holding immediately on close. Under s671B(6)(b)(ii), the bidder must disclose this information by 9.30 am on the next business day because it will be aware of the level of acceptances during the bid period. The bidder should carefully monitor acceptances at the close.

### Other disclosures

- RG 000.277 Information about substantial holdings may need to be included in the annual report: see, for example, ASX Listing Rule 4.10.4.
- RG 000.278 A person may also need to disclose information about a ‘substantial interest’ that they have in an entity to avoid unacceptable circumstances in the context of a possible control transaction: see Takeovers Panel Guidance Note 20 *Equity derivatives*. The interests that must be disclosed need not necessarily give rise to a relevant interest or an obligation to disclose under the substantial holding provisions.

## Time for giving notice

- RG 000.279 A person must give a substantial holding notice within two business days of becoming, or ceasing to be, a substantial holder in a listed body, or a movement of at least 1% in their holding in a listed body—or by 9.30 am on the next business day during a takeover bid: RG 000.281—whether or not they have completed a larger investment move or unwound their investment position within that time: s671B(6)(a).
- RG 000.280 The short deadlines for giving notices are designed ‘to compel, in fast-moving markets, the immediate disclosure of the identity of the persons who become substantial security holders’: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 511.

### Takeover bid for a listed company

- RG 000.281 When there is a takeover bid for a listed company, if the substantial holding requirement is triggered during the bid period, notices must be given by 9.30 am on the next business day: s654B and 671B(6)(b). This applies to all substantial holders, not just bidders.

### Takeover bid for an unlisted company

- RG 000.282 Where there is a takeover bid for an unlisted company, the bidder must give the target a notice if its voting power rises to 25%, 50%, 75% and/or 90%. The bidder must give the notice as soon as practicable and, in any event, within two business days after the increase occurs: s654C.

### Securities lending and prime broking

- RG 000.283 Under Class Order [11/272] *Substantial holding disclosure: securities lending and prime broking*, a prime broker or custodian may defer taking into account a relevant interest arising from a borrowing right for compliance with the substantial holding requirement when a control transaction is underway for the relevant listed securities. Despite this, voluntary disclosure to the market and the listed entity is appropriate in such circumstances to avoid the non-disclosure giving rise to unacceptable circumstances. For further discussion, see RG 222.59–RG 222.67.

## Documents to accompany notice

- RG 000.284 The substantial holder must give to the company and the relevant market operator copies of all agreements, arrangements or understandings that contribute in some way to the situation giving rise to the need to provide the notice: s671B(4). The quality or degree of contribution to the situation is irrelevant.
- RG 000.285 In *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263, at 271–272, Wicks J recognised that:
- All there has to be is a reasonable nexus between the agreement on the one hand and the relevant interest on the other ... the expression ‘contribution’ is used because the draftsman recognised that there might well be more than one relevant agreement in the situation concerned and that any contribution, even if it duplicates what has been said elsewhere, would be regarded as relevant for the purposes of s671B(4). Once a relevant agreement is found to have made a contribution, the quality or degree of that contribution is beside the point.
- RG 000.286 Where multiple agreements contribute to the situation, a copy of all agreements must accompany the notice. Substantial holders cannot avoid their obligation to disclose full or substantive details of all contributing agreements and arrangements by, for example:
- (a) entering into a preliminary agreement or understanding incorporating limited terms (which triggers the substantial holding requirement); and then
  - (b) omitting substantive details of the overall transaction on the basis that a formal or collateral written agreement or arrangement containing these details was (or will be) finalised at a later time after the immediate substantial holding disclosure requirement arising in relation to the transaction has been discharged.



RG 000.287 When a preliminary step or agreement gives rise to a change in voting power before other agreements contributing to the overall situation have been finalised, the substantial holding notice must still be accompanied by a statement setting out full and accurate details of other agreements or arrangements that have been negotiated: s671B(4)(b). As noted in *Austar United Communications Limited* [2003] ATP 16 at [43], a failure to provide details of surrounding agreements or arrangements may also give rise to unacceptable circumstances, having regard to the efficient, competitive and informed market principle set out in s602(a).

### **ASIC exemption: Takeover bid acceptances**

RG 000.288 Class Order [CO 04/1413] *Bidder giving substantial holding notice* modifies s671B(4) so that a bidder does not need to give copies of the bidder's statement, offer document and acceptance forms with a substantial holding notice for acquisitions under the bid.

RG 000.289 The bidder is still required to lodge the bidder's statement and offer document with ASIC and the relevant market operator under s633(1).

## **The information to be provided in a substantial holding notice**

RG 000.290 Under s671B(3), a substantial holder must give the following information in a substantial holding notice:

- (a) the person's name and address;
- (b) details of their relevant interest in voting shares or interests in the relevant company or scheme;
- (c) details of any relevant agreement through which they would have a relevant interest in voting shares or interests in the relevant company or scheme;
- (d) the name of each associate who has a relevant interest in voting shares in the company or interests in the scheme, together with details of:
  - (i) the nature of their association with the associate;
  - (ii) the relevant interests of the associate; and
  - (iii) any relevant agreement through which the associate has the relevant interest;
- (e) if the information is being given because of a movement in their holding—the size and date of that movement;
- (f) if the information is being given because a person has ceased to be an associate—the name of that person; and
- (g) any other particulars that are prescribed.

- RG 000.291 This information must be given in the prescribed form: s671(4). The prescribed forms for substantial holding notices are:
- (a) Form 603 *Notice of initial substantial holder*;
  - (b) Form 604 *Notice of change of interest of substantial holder*; and
  - (c) Form 605 *Notice of ceasing to be a substantial holder*: reg 1.0.03 and Sch 1 of the Corporations Regulations.
- RG 000.292 These forms must be completed in accordance with the directions and instructions specified in the form: reg 1.0.04. Where there is insufficient space to complete a particular section, details can be provided in an annexure to the form with a cross-reference to the annexure included in the relevant section.
- RG 000.293 Table 12 provides some guidance on completing the various sections of Form 603. This guidance is also generally relevant when completing the corresponding sections in Forms 604 and 605, with necessary adjustments.

**Table 12: Guidance on completing ASIC Form 603 *Notice of initial substantial holder***

Item	Directions
<b>1. Details of substantial holder</b>	
Name ACN/ARSN (if applicable)	<p>A single joint notice can be given for two or more persons who have similar or related relevant interests or are associates: RG 000.294–RG 000.297. The joint notice providers can be given a collective title for ease of reference elsewhere in the form, where possible.</p> <p>The names and addresses of each person for whom the notice is given must still be listed in paragraph 7. Where a large group is to be defined, use an annexure.</p>
Date of becoming a substantial holder	<p>Remember that a person may acquire a relevant interest in securities (and therefore become a substantial holder) before an agreement is performed.</p> <p>For example, a person who makes an ordinary purchase of securities on-market will acquire a relevant interest in those securities when the trade takes place, not when settlement occurs (usually three days later).</p>
<b>2. Details of voting power</b>	
<p>This paragraph sets out the relevant securities from which the substantial holder’s voting power (on the date they became a substantial holder) is derived: s671B(3)(b). For more information on voting power, see RG 000.95–RG 000.101.</p>	
Class of securities	<p>Shares in a company and interests in a managed investment scheme, if not divided into two or more classes, constitute a single class: s57. If a person’s voting power is derived from more than one class of voting shares or interests, the details of the securities in which the substantial holder and their associates have a relevant interest should be set out in separate rows.</p> <p>Use a descriptor for each class of securities that is likely to be easily understood and fully distinguishable from any other securities on issue (e.g. ‘fully paid ordinary shares’).</p>

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Item	Directions
	<p>This paragraph is only concerned with relevant interests in voting shares or interests that contribute to voting power—so do not include securities in which the holder has a relevant interest that do not themselves carry voting rights (e.g. options or warrants), but do include any underlying voting shares or interests that the holder has a relevant interest in by virtue of the options or warrants. Details of any options or warrants giving a relevant interest in underlying voting shares or interests should be disclosed in paragraph 3.</p> <p>Note: Further information on relevant interests arising from options and warrants is set out in Sections D and E of this guide.</p>
<p>Number of securities</p> <p>Person’s votes</p>	<p>Set out the number of securities in each class that the substantial holder and their associates have a relevant interest in, and the number of votes that may be cast for these holdings.</p> <p>Where each share or interest carries one vote, these numbers will be the same. Partly paid shares may have voting rights that are proportional to the amount paid up.</p> <p>Note: See, for example, ASX Listing Rule 6.9.</p>
<p>Voting power</p>	<p>Express the substantial holder’s voting power as a percentage.</p>

**3. Details of relevant interests**

This paragraph sets out details of the relevant interests in voting shares or interests from which the substantial holder’s voting power (on the date that they became a substantial holder) is derived. It provides further information about the relevant interests disclosed in paragraph 2: s671B(3)(b), (c) and (d).

<p>Holder of relevant interest</p>	<p>The relevant interests each person contributing to the substantial holder’s voting power (including any associates) has in voting shares or interests should be disclosed separately by reference to the nature of the relevant interest. For example, where a substantial holder has relevant interests in some voting shares as the holder of the shares, and relevant interests in other voting shares as a result of an option over the shares, the holder should set these out as separate items.</p>
<p>Nature of relevant interest</p>	<p>In describing the nature of each relevant interest, give full rather than minimal or technical disclosure. It is not sufficient to merely describe the legal provision giving rise to the relevant interest. Include details of:</p> <ul style="list-style-type: none"> <li>• any relevant agreement or circumstances by which the relevant interest was acquired; and</li> <li>• any qualification or limitation on any power to control or influence the voting or disposal of the relevant securities.</li> </ul> <p>See: RG 000.298–RG 000.301. Use an annexure if more room is required.</p> <p>Under s671(4), a copy of relevant agreements, or a statement giving full details of contracts, schemes or arrangements contributing to the situation giving rise to the need to provide a substantial holding notice may have to accompany the substantial holding notice: RG 000.284–RG 000.289.</p>
<p>Class and number of securities</p>	<p>Set out the class (identified in paragraph 2) and number of securities in which the previously described relevant interests arise.</p>

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Item	Directions
<b>4. Details of present registered holders</b>	
This paragraph requires details of who holds the securities in which the relevant interests disclosed in paragraph 3 arise.	
Holder of relevant interest	Each holder of a relevant interest disclosed at paragraph 3 should be named here.
Registered holder of securities	<p>The person currently registered as the holder of the securities in which the person in the first column has a relevant interest (e.g. if the voting shares or interests are directly held, the same person will occupy the first and second columns).</p> <p>If the identity of the present registered holder cannot be determined (e.g. an on-market purchase that has not yet settled or a relevant interest arising from an exchange-traded option), write 'unknown'.</p>
Person entitled to be registered as holder	<p>List the person(s) who are entitled to be registered as holder of the securities that are the subject of the relevant interest.</p> <p>In many cases, the circumstances giving rise to the relevant interest will involve the holder of that relevant interest having a right to become (if they are not already) registered as the holder of the securities—for example, if the relevant interest arises because shares or interests are:</p> <ul style="list-style-type: none"> <li>• held by a custodian on trust; or</li> <li>• acquired under an agreement that has not yet settled (including an on-market purchase).</li> </ul>
Class and number of securities	Set out the class (identified in paragraph 2) and the number of securities in which the previously described relevant interests arise.
<b>5. Consideration</b>	
This paragraph is concerned with the consideration given for the relevant interests discussed in paragraph 3 in the four months before the day on which the holder became a substantial holder.	
Holder of relevant interest	<p>Each holder of a relevant interest disclosed at paragraphs 3 and 4, who has acquired that relevant interest in the four-month period before the date given in paragraph 1, should be named here.</p> <p>Consider, for example, the following scenario:</p> <ul style="list-style-type: none"> <li>• Hold Co controls two subsidiaries, each of which directly holds 3% of the voting shares in a company;</li> <li>• Early Subsidiary purchased its shares on 1 January;</li> <li>• Late Subsidiary purchased its shares on 1 July; and</li> <li>• Hold Co, Early Subsidiary and Late Subsidiary give a joint notice on 2 July.</li> </ul> <p>For the purposes of this paragraph, only details of the voting shares purchased by Late Subsidiary need to be given. However, note that all three companies giving the notice will be a 'Holder of relevant interest' in relation to that parcel.</p>
Date of acquisition	The date in the four-month period before the date given in paragraph 1 that the securities giving rise to the relevant interest were acquired—see discussion in relation to paragraph 1 above.

Item	Directions
Consideration (cash or non-cash)	<p>The consideration given for acquiring the relevant interest must be clearly set out.</p> <p>Details of the consideration must include any and all benefits (monetary or otherwise) that any person from whom a relevant interest was acquired has, or may become entitled to receive, in relation to that acquisition. Details must be included even if the benefit is conditional on the happening of a contingency. Details must be included of any benefit paid on behalf of the substantial holder or their associate in relation to the acquisitions, even if they are not paid directly to the person from whom the relevant interest was acquired: Note 9 on Form 603.</p> <p>The description of cash consideration paid must be expressed precisely, or must be able to be readily calculated with precision—that is, on the basis of an amount per share. For example, it is not sufficient to state that the shares were acquired at a price between \$X or \$Y, or at a price per share that has been rounded to the nearest whole cent.</p>
Class and number of securities	Set out the class (identified in paragraph 2) and the number of securities in which the relevant interest was acquired.
<b>6. Associates</b>	
<p>This paragraph requires disclosure of the basis of any associate relationship that has contributed to the substantial holder's voting power: s671B(3)(d). The nature of the associate's relevant interests is set out in paragraph 3.</p>	
Name and ACN/ARSN (if applicable)	As with the description of the relevant interests in paragraph 3, full and detailed disclosure of the nature of the association should be set out—not simply a generic, technical or legal description referencing the provisions of the Corporations Act.
Nature of association	For example, it is not sufficient to merely state that a person is an associate because they are acting in concert with the substantial holder. The notice must describe the relevant transaction in clear commercial and legal terms: see RG 000.298–RG 000.301.
<b>7. Addresses</b>	
Name	This includes not only the substantial holder(s), but any other persons named as holders of relevant interests, registered holders of securities, persons entitled to be registered as holders of securities, and associates.
Address	

## Joint notices

- RG 000.294 A single transaction or event may result in the voting power of a number of different persons changing and, as a result, a number of persons each having an individual obligation to give a substantial holding notice in respect of their changed voting power.
- RG 000.295 When two or more persons have similar or related relevant interests, or are associates, so that they acquire or change their substantial holding because of the same transaction, they may give a single joint notice (rather than lodging separate notices). A joint notice will satisfy s671B for each person, provided that it clearly identifies each person and the details of their relevant interest or the nature of their association: s671B(3). No relief from us is necessary in these circumstances.

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RG 000.296 The person giving the notice must have the authority to bind other persons on whose behalf the notice is given.

Note: For parties to a securities lending transaction and the use of joint notices, see our guidance at RG 222.93–RG 222.94.

RG 000.297 A substantial holder should take care in presenting complex information in a joint notice—for example, about associations—so that it does not contravene s671B(3) or 1041H (misleading or deceptive conduct).

## Full disclosure

RG 000.298 A person who gives a substantial holding notice must give full rather than minimal or technical disclosure. A notice lacking sufficient information for an investor to understand the nature of the substantial holding, or the change in holding, does not promote the principles underlying the substantial holding disclosure requirement. A notice should fully, specifically and accurately disclose the identity of the substantial holder, the details of the substantial holding or the change in holding, and any relevant agreement and the nature of any relevant association in accordance with the requirements of s671B(3).

RG 000.299 It is not sufficient for a notice to describe the nature of the substantial holding or association generically, or describe its bare legal nature by reference to the provisions of the Corporations Act. For example, the holder must not merely say: ‘X and Y are associated because X is acting in concert with Y in relation to the affairs of Company Z’. The notice must describe the relevant transaction in clear commercial and legal terms.

RG 000.300 The substantial holder must disclose any qualifications to their power to vote or dispose of the securities. They must disclose all benefits given for the acquisition or change in substantial holding. If the transaction took place on a prescribed financial market, the notice should say so. The holder should use attachments to the form if there is insufficient room to explain the transaction or association in full. The substantial holder should define or explain any acronyms, shorthand or codes (e.g. generated by the holder’s compliance system) used in the notice.

RG 000.301 Without full disclosure of substantial holdings, there is a risk that the market will be misled about the ownership and control of listed entities. It is also important that the disclosure allows the market to understand the nature of the substantial holding being disclosed.

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## Appendix: Superseded guidance

RG 000.302 This guide provides updated guidance on relevant interests. Additional updated guidance on other aspects of Chs 6–6C is provided in:

- (a) draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*;
- (b) draft Regulatory Guide 000 *Takeover bids*; and
- (c) draft Regulatory Guide 000 *Compulsory acquisitions and buyouts*.

RG 000.303 Together, these four guides consolidate and replace a number of pre-existing regulatory guides, taking into account changes in the law since the guides were first published. The guides replaced by this guide on relevant interests and substantial holding notices are listed in Table 13.

**Table 13: Superseded regulatory guides**

Number	Name of guide
RG 5	<i>Relevant interests in unissued share capital</i>
RG 9	<i>Relevant interests in shares</i>
RG 48	<i>Takeovers aspects of options over shares</i>
RG 143	<i>Takeovers provisions: Warrants</i>
RG 159	<i>Takeovers, compulsory acquisitions and substantial holding notices</i> (parts of RG 159 have been replaced by other guides)
RG 171	<i>Anomalies and issues in the takeover provisions</i> (parts of RG 171 have been replaced by other guides)

## Key terms

Term	Meaning in this document
20% interest limb	Section 608(3) of the Corporations Act, under which a person is deemed to have a relevant interest on the basis of s608(3)(a)
accelerator provision	Section 608(8) of the Corporations Act
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act  Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s12 of the Corporations Act
ASX	The exchange market operated by ASX Limited
bid class	Has the meaning given in s9 of the Corporations Act
bidder	A bidder under a takeover bid, as defined in s9 of the Corporations Act
bid period	Has the meaning given in s9 of the Corporations Act
bought position	The party to a call or put option that on exercise will acquire the underlying security
call	A call option
Ch 6 (for example)	A chapter of the Corporations Act (in this example numbered 6)
class	A class of securities
CLERP Act	<i>Corporate Law Economic Reform Program Act 1999</i>
[CO 01/1542] (for example)	An ASIC class order (in this example numbered 01/1542)
controlled entity limb	Section 608(3) of the Corporations Act, under which a person is deemed to have a relevant interest on the basis of s608(3)(b)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act

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Term	Meaning in this document
Corporations Regulations	Corporations Regulations 2001
general prohibition	The prohibitions on offers, invitations, acquisitions and transactions in s606 of the Corporations Act
holder	A holder of securities
listing rule escrow	An escrow arrangement entered into in accordance with the requirements of Chapter 9 of the ASX Listing Rules
old Corporations Law	The law, set out in s82 of the <i>Corporations Act 1989</i> , which preceded the Corporations Act. Unless otherwise indicated, a reference to the old Corporations Law is a reference to the law as it stood before implementation of the CLERP Act
option	A contractual arrangement under which one party has the right, but not the obligation, to buy or sell an underlying asset from the other at a set price and before a specified future time
Pt 6C.1 (for example)	A part of the Corporations Act (in this example numbered 6C.1)
put	A put option
reg 1.0.18 (for example)	A regulation of the Corporations Regulations (in this example numbered 1.0.18)
relevant interest	Has the meaning given in s608 and 609 of the Corporations Act
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
s602 (for example)	A section of the Corporations Act (in this example numbered 602), unless otherwise specified
securities	Has the meaning given to that term for the purposes of Chs 6–6C in s92(3) of the Corporations Act
sold position	The party to a call or put option that on exercise will dispose of the underlying security
substantial holding	Has the meaning given in s9 of the Corporations Act
takeover threshold	The level of voting power specified in s606(1)(c) and 606(2)(b) that triggers the operation of the general prohibition
target	Has the meaning given in s9 of the Corporations Act
underlying security	The security that is acquired or disposed of when an option is exercised

<b>Term</b>	<b>Meaning in this document</b>
voluntary escrow	An escrow arrangement that is not required to be entered into under the ASX Listing Rules
voting power	Has the meaning given in s610 of the Corporations Act
warrant	A financial product, primarily issued by financial institutions, which provide a level of exposure to an underlying asset, instrument or index

## Related information

### Headnotes

acting in concert, associates, corporate groups, disclosure, escrow arrangements, exchange traded options, financial accommodation, options, relevant agreements, relevant interests, security interest, substantial holdings, takeover threshold, unacceptable circumstances, voluntary escrow, voting interests, voting power, voting shares, warrants

### Class orders and pro formas

[CO 00/455] *Collective action by institutional investors*

[CO 01/1519] *Disclosure of directors' interests*

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

[CO 01/1599] *Sydney Futures Exchange—participant's relevant interest and voting power*

[CO 02/924] *Call warrant holder takeovers relief*

[CO 02/925] *Call warrant takeovers relief*

[CO 02/926] *Put warrant takeovers relief*

[CO 02/927] *Warrant trustee takeovers relief*

[CO 03/634] *Takeovers: listing rule escrow*

[CO 04/523] *Investor directed portfolio services takeovers relief*

[CO 04/631] *Associates: right to dispose of securities*

[CO 04/1413] *Bidder giving substantial holding notice*

[CO 11/272] *Substantial holding disclosure: securities lending and prime broking*

### Regulatory guides

RG 74 *Acquisitions approved by members*

RG 86 *Tracing beneficial ownership*

RG 128 *Collective action by institutional investors*

RG 148 *Investor directed portfolio services*

RG 193 *Notification of directors' interests in securities—listed companies*

RG 222 *Substantial holding disclosure: Securities lending and prime broking*

## Information sheets

INFO 50 *Notifying the ASX about directors' interests in company securities*

## Legislation

Corporations Act, s9, 12, 12(2)(a), 12(2)(b), 12(2)(c), 12(3), 12(a), 50AA, 53, 53(e), 53(f), 64, 64A, 92(3), 205F, 205G, 300(11), 300(12), 602(a), 604, 606, 606(1), 606(1)(c), 606(2), 606(2)(b), 606(3), 606(6), 606(8), 608, 608(1), 608(1)(a), 608(1)(b), 608(1)(c), 608(2), 608(2)(b), 608(3), 608(3)(a), 608(3)(b), 608(4)–(7), 608(8), 608(8)(b)(i), 608(8)(b)(ii), 608(8)(b)(iii), 608(9), 609(1)–(5), 609(6), 608(6)(b), 608(7)–(9), 608(9A), 610, 610(1)–(3), 611, 633(1), 650F(1)(a), 654B, 654C, 657A, 661A(1), 662A(1), 663A(1), 671B, 671B(1), 671B(1)(b), 671B(2), 671B(3), 671B(4), 671B(6)(a), 671B(6)(b), 671B(6)(b)(ii), 672A, 672B, 672DA; Corporations Regulations, Sch 1, regs 1.0.02, 1.0.03, 1.0.04, 1.0.18, 7.1.04(7)

*Companies (Acquisition of Shares) Act 1980* and corresponding state codes

## Cases

*Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No 4)* (1984) 2 ACLC 829

*ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 (*Yandal Gold*)

*Austar United Communications Limited* [2003] ATP 16

*Australian Pipeline Limited v Alinta Ltd* [2007] FCAFC 55 (*Alinta Ltd*)

*Azumah Resources Ltd* [2006] ATP 34

*Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501

*Bateman v Newhaven Park Stud Ltd* (2004) 49 ACSR 597

*BioProspect Limited 01* [2008] ATP 8

*Chew v Hamilton* (1985) 13 ACLR 440 at 446.

*CMI Limited* [2011] ATP 4

*Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 5 ACSR 720

*Dromana Estate Ltd 01R* [2006] ATP 8

*Edensor Nominees Pty Ltd v ASIC* (2002) 41 ACSR 325 (*Edensor Nominees*)

- Exicom Pty Ltd v Futuris Corporation Ltd* (1995) 18 ACSR 404
- Flinders Diamonds Ltd v Tiger International Resources Inc* (2004) 49 ACSR 199
- Green v Crusader Oil NL* (1986) 4 ACLC 188
- Haughton Properties Pty Ltd v Sandridge City Development Co Pty Ltd* (1994) 13 ACLC 1
- Industrial Equity Ltd v Commissioner for Corporate Affairs (Vic)* (1989) 1 ACSR 153
- Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] AC 500
- New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263
- Nicholas v Commissioner for Corporate Affairs (Vic)* (1982) 7 ACLR 45 at 54-55
- North Sydney Brick & Tile Co Ltd v Darvall (No 2)* (1986) 10 ACLR 837 (Darvall)
- Re Kornblums Furnishings Ltd* (1981) 6 ACLR 25 (*Kornblums Furnishings*)
- Re VGM Holdings Ltd* [1942] 1 All ER 224
- Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367
- TVW Enterprises Ltd v Queensland Press Ltd* (1983) 7 ACLR 821 (*TVW Enterprises*)
- Viento Group Ltd* [2011] ATP 1
- Winepros Ltd* [2002] ATP 18
- Yaramin Pty Ltd v Augold NL* (1997) 11 ACLR 439

## **Media and information releases**

- IR 98/14 *Exchange-traded options-relief from s 615 of the Corporations Law*, 14 August 1998
- IR 02/16 *ASIC issues new class orders about warrants*, 18 September 2002
- IR 04/22 *ASIC gives 'associate' and IDPS takeover relief*, 16 June 2004
- IR 04/59 *ASIC releases policy on substantial holdings*, 18 November 2004

## **ASIC forms**

Form 603 *Notice of initial substantial holder*

Form 604 *Notice of change of interests of substantial holder*

Form 605 *Notice of ceasing to be a substantial holder*

## **Other documents**

ASX Guidance Note 11 *Restricted securities and voluntary escrow*

Board of Trade (UK) (Cohen Committee), *Report of the Committee on Company Law Amendment*, Cmd 6659, 1945

Commonwealth, *Second Interim Report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General* (Eggleston Committee), Parl Paper No 43 (1969)

Takeovers Panel Guidance Note 20 *Equity derivatives*