

Attachment 3 to CP 193



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 000

Takeover bids

November 2012

About this guide

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

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

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

This 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

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

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

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

Purpose of the takeover bid provisions

RG 000.1 A takeover bid involves an offer made to each holder of a particular class of securities in a company or listed managed investment scheme to purchase all, or a specified proportion, of their holding in accordance with Ch 6 of the Corporations Act. Offers may be made under a market bid (an offer to buy all bid class securities through the financial market on which they are listed) or an off-market bid.

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

RG 000.2 A bid is one of the ways an interested party may acquire securities that increase their voting power to more than 20% in a listed company, body or managed investment scheme, or an unlisted body with more than 50 members, without breaching the general prohibition in s606: item 1 of s611.

RG 000.3 Parts 6.3–6.9 of the Corporations Act set out detailed rules and procedures governing the conduct and terms of takeover bids. These rules reflect the purposes of Ch 6, set out in s602, which seek to ensure that:

- (a) the acquisition of control takes place in an efficient, competitive and informed market;
- (b) the holders of shares or interests, and the directors of the company, body or responsible entity:
 - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme;
 - (ii) have a reasonable time to consider the proposal; and
 - (iii) are given enough information to enable them to assess the merits of the proposal;

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

RG 000.4 If certain rules and procedures in Ch 6 are contravened in the course of carrying out a takeover bid, in addition to breaching the relevant provision, the bidder may also breach the general prohibition in s606: s612.

ASIC's role in takeover bids

RG 000.5 ASIC has general administration of the Corporations Act, including the takeover provisions in Ch 6.

RG 000.6 Our regulatory role in the administration and conduct of takeover bids primarily involves:

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

RG 000.7 ASIC's regulatory surveillance, relief, and day-to-day administration and enforcement role, with respect to takeovers, is complemented by the role of the Takeovers Panel as the main forum for resolving disputes concerning a bid.

RG 000.8 We also have a corresponding regulatory role in schemes of arrangement that enable acquisitions similar in effect to those under a bid. The coordination of our approach across both roles seeks to ensure that, as far as practicable, similar principles and protections are applied regardless of whether a control transaction is structured as a scheme or a bid.

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

Review and inquiry

RG 000.9 Under the takeover bid procedure, a series of documents must be lodged with ASIC. We conduct regular reviews of these documents, together with other available information about a takeover bid, to ensure compliance with Ch 6. Our review may consider the terms, conditions and structure of the bid as well as the disclosures made in the documents. ASIC has a general power to refuse to register or receive a document submitted for lodgement that does not comply with relevant requirements: s1274(8).

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

RG 000.10 In addition to a review, we may make inquiries in relation to a takeover to ensure that relevant parties are complying with their obligations. We may initiate inquiries if we become aware of a potential issue as a result of our ongoing monitoring of the takeover or a complaint made to us by an interested party.

RG 000.11 Our inquiries may relate to conduct occurring at any point in the takeover process. For example, we may raise concerns about public announcements or comments made to the media after a bid is publicly announced but before any takeover documents are lodged.

Our approach

RG 000.12 When conducting a review or making inquiries, in addition to considering contraventions of the Corporations Act, we also consider whether the relevant document or conduct may tend to undermine or detract from the purposes of Ch 6 set out in s602.

RG 000.13 If our review or inquiries identify matters of concern, we may take further action to correct the issue. We will often seek to resolve issues through discussions with the relevant party and by requesting that appropriate corrective action is taken. In the interests of facilitating a timely and effective outcome, our initial approaches may be informal. We may also use our compulsory powers to obtain information.

RG 000.14 If we are unable to resolve our concerns, we may take other action, including applying to the Takeovers Panel for a declaration of unacceptable circumstances or to the court for orders under s1324 or 1325A.

RG 000.15 Although we aim to act as soon as we become aware of a possible issue, it is the responsibility of each participant in the takeover process to comply with the relevant requirements of Ch 6 and the principles in s602. The fact that we have not commented on documents lodged with us, or conduct known to us, does not indicate approval of the documents or conduct. As a regulatory

body, we may take action in relation to contraventions of Ch 6 or other matters of concern at any point before, during or after a transaction.

- RG 000.16 Where we do take action, including making inquiries in response to issues raised with us by interested parties, we do so having formed an independent view on relevant matters from a regulatory perspective, even if this means that, on occasion, our views on a particular matter may coincide with one or more parties in dispute.

Exemptions and declarations

- RG 000.17 ASIC has a discretionary power under s655A(1) to grant relief from the requirements of Ch 6. This power enables us to exempt a person, or a class of persons, from the takeover provisions or to declare that the takeover provisions apply as if specified provisions were omitted, modified or varied.
- RG 000.18 We consider individual requests to exercise our powers to grant relief in particular cases. In deciding whether to grant relief, we consider the purposes of Ch 6 set out in s602: s655A(2).
- RG 000.19 We have also issued a number of class orders which modify the operation of Ch 6 in relation to all takeover bids. The terms and underlying rationale of our class orders are further discussed in this regulatory guide.
- RG 000.20 In addition to our general exemption and modification power, we have a number of more specific approval and consent powers in relation to takeovers: s619(3)(a), item 14(b) of s611, and s652B.

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

Applications to the Takeovers Panel

- RG 000.21 ASIC has standing to apply to the Takeovers Panel for a declaration of unacceptable circumstances in relation to the affairs of any company or listed scheme. Where an application is made by another party, we must be invited to make submissions on the matter and on any orders that the Panel proposes to make: s657A(4) and 657D(1).
- RG 000.22 We may make an application to the Takeovers Panel seeking appropriate orders if we consider that unacceptable circumstances exist in relation to a takeover bid. Where possible, we will often attempt to have our concerns addressed by the relevant party before making an application.

- RG 000.23 The matters on which we may choose to make submissions in proceedings brought by third parties will vary depending on the circumstances and issues raised by the application. We consider the matters raised in each case and, in determining whether to make submissions, we will often (but not exclusively) have regard to:
- (a) the interests of parties affected by the relevant circumstances who are not represented in the proceedings—in particular, retail or minority investors;
 - (b) whether the issues raise matters of policy or interpretation which may have wider implications for the conduct of takeovers generally;
 - (c) whether we have had any previous involvement or engagement with the matter or dispute at hand (e.g. we may have privately raised issues with the relevant parties that are similar to those before the Takeovers Panel); and
 - (d) whether we are in a position to provide any factual information that may assist the Takeovers Panel.

- RG 000.24 The Takeovers Panel and ASIC have entered into a memorandum of understanding (MOU) to enhance cooperation in our respective roles in takeovers. The MOU addresses information sharing, consultation on policy development, and regular liaison between ASIC and the Takeovers Panel.

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

Summary of this guide

- RG 000.25 This guide aims to assist persons involved in, or advising on, a takeover bid by improving understanding of ASIC's expectations and approach, and providing greater commercial and regulatory certainty to all participants in the takeover bid process:
- (a) We explain how ASIC interprets various requirements of the takeover bid procedure, and the principles underlying the requirements, as part of our role in administering Ch 6 (including our review and monitoring role).
 - (b) We discuss a number of circumstances in which we will consider requests to exercise our discretionary powers to grant relief for particular takeover bids or proposals.
 - (c) We outline how we have modified, and provided general exemptions from, the takeover provisions to address issues and anomalies in Ch 6 that have arisen over time in our experience administering the provisions.
- RG 000.26 Table 1 summarises the issues we have addressed in this guide by reference to common stages of a takeover bid.

- RG 000.27 Unless otherwise indicated, our guidance applies to takeover bids for listed registered managed investment schemes. Adjustments that take account of the different features of managed investment schemes are set out in s604.
- RG 000.28 Our guide consolidates and updates a number of pre-existing policies relating to takeover bids. The policies that are replaced by this guide, and have therefore been withdrawn, are listed in the appendix.

Table 1: Summary of our guidance on takeover bids

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

Topic	What our guidance covers	Reference
Supplementary statements	We discuss when sending, or not sending, supplementary statements may be misleading.	Section I
Conduct of the bid during the offer period		
Variation of offers	<p>We discuss our approach to administering the provisions regulating the variation of takeover offers, including when a conditional bid can be extended and withdrawal rights must be offered.</p> <p>We also discuss the relief we provide, or have provided, for automatic extensions, accelerated payment, conditional increases in consideration, adding scrip consideration, varying offers before dispatch and approving notices of variation.</p>	Section J
Acceptances	We discuss our class order modification in relation to the timing of acceptances for holdings registered in a clearing and settlement facility such as the Clearing House Electronic Subregister System (CHES). We also discuss the terms and requirements of our class order relief for acceptance facilities and the case-by-case automatic extension relief we may give when an acceptance facility remains in operation in the final seven days of a bid.	Section K
Non-compliant bids	We discuss the relief we may provide when the provisions disqualifying the bidder from the bid and other exceptions in items 1–4 of s611 are breached.	Section M

Other guidance you may need to consider

- RG 000.29 This guide focuses on a number of aspects of the takeover bid procedure.
- RG 000.30 You may also need to consider the guidance that we have published on other specific aspects of takeover bids, as listed in Table 2. These guides are referred to throughout this guide, where relevant.
- RG 000.31 You should also consider whether the Takeovers Panel has issued any guidance on the relevant matter.

Table 2: Other ASIC guidance that may be relevant

Regulatory guide	How our guidance may assist
When formulating takeover offers	
RG 59 <i>Announcing and withdrawing takeover bids (s653 and s746)</i>	We explain our policy on when a bid should be announced and the circumstances that trigger the requirement to make a bid. We also discuss when we consider a breach has occurred, what defences may be available to a potential bidder, and when we may consent to a bidder withdrawing its offer.

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Regulatory guide	How our guidance may assist
RG 71 <i>Downstream acquisitions</i>	We outline our policy on item 14 of s611 and upstream acquisition relief, including when we may require a bid for the downstream company.
RG 74 <i>Acquisitions approved by members</i>	We discuss some of our concerns with bids made at or around the same time as acquisitions under item 7 of s611: RG 74.97–RG 74.108.
RG 161 <i>Share and interest sale facilities</i>	We discuss our relief for sale and related purchase facilities which are sometimes offered in connection with scrip bids.
RG 163 <i>Takeovers: Minimum bid price principle—s621</i>	We consider the issues involved in determining the minimum bid price that a bidder must offer and the factors affecting that determination.
When preparing a bidder's statement, target's statement or making other disclosures	
RG 25 <i>Takeovers: False and misleading statements</i>	<p>This guide explains our 'truth in takeovers' policy, which seeks to ensure that relevant parties in a bid do not mislead target holders and the market by acting inconsistently with the statements they make.</p> <p>It also discusses:</p> <ul style="list-style-type: none"> • when and how relevant persons should provide corrective or updated disclosure in a bid; and • the action we may take where a disclosure is misleading, ambiguous or confusing.
RG 111 <i>Content of expert reports</i>	An independent expert report on the offer may be required (s640) or commissioned voluntarily. Our guides discuss the approach to the analysis in the report, what should be included to ensure that recipients are fully informed and the requirement for an expert to be independent.
RG 112 <i>Independence of experts</i>	
RG 170 <i>Prospective financial information</i>	<p>We outline our policy on issuers' obligations when disclosing prospective financial information, such as:</p> <ul style="list-style-type: none"> • when and how such information can or should be disclosed; and • what constitutes reasonable grounds for disclosing prospective financial information.
RG 228 <i>Prospectuses: Effective disclosure for retail investors</i>	<p>This guide discusses how you can present disclosure documents, such as a bidder's statement or target's statement, in a clear, concise and effective manner to assist in ensuring they are not misleading: s670A.</p> <p>It also explains:</p> <ul style="list-style-type: none"> • what information investors generally require and expect to find in a s710 prospectus; and • the requirements of s711–712, <p>which may be relevant to the bidder's disclosure in a scrip bid: s636(1)(g). See also Regulatory Guide 66 <i>Transaction-specific disclosure</i> (RG 66), which discusses the requirements under s713 in relation to quoted scrip or options over quoted scrip, and Regulatory Guide 168 <i>Disclosure: Product Disclosure Statements (and other disclosure obligations)</i> (RG 168), which gives guidance on disclosure where managed investment products are offered: s636(1)(ga).</p>
RG 230 <i>Disclosing non-IFRS financial information</i>	We discuss how you can use financial information in documents, such as a bidder's statement or target's statement, where that information is presented other than in accordance with accounting standards.

Regulatory guide	How our guidance may assist
When applying to us for relief or approval	
RG 51 <i>Applications for relief</i>	We explain how to make an application to ASIC under the Corporations Act (including applications under s619(3), 655A and s652B), and outline some of the general considerations that we take into account.
RG 92 <i>Procedural fairness to third parties</i>	We discuss how we will generally afford third parties procedural fairness when considering requests to exercise our discretionary powers.

B The takeover offers

Key points

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

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

We have also modified Ch 6 to:

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

General requirements for takeover offers

- RG 000.32 Although a bidder is generally free to devise the terms of its offers, Div 1 of Pt 6.4 sets out some general requirements that a bidder must adhere to in formulating its bid.
- RG 000.33 These requirements establish, among other things, that:
- (a) an off-market bid must be either full or proportional; and
 - (b) all offers must be the same and remain open until the end of a specified offer period, unless withdrawn.
- RG 000.34 We discuss some of the issues associated with the conditions that may attach to a takeover offer in Section D.

Classes of securities

- RG 000.35 A takeover bid may only be made for securities within a particular class: s605(1) and 617. Compulsory acquisition and buyout rights also operate in relation to securities within a particular class: s605(1).
- RG 000.36 A bidder who wishes to bid for two (or more) classes of securities in the target may simultaneously undertake separate bids in relation to each of those classes. If simultaneous bids are made for both convertible and

underlying securities in the target, we may provide relief to allow the bidder to exercise the convertible securities: see RG 000.117–RG 000.143.

Note: The prohibition on collateral benefits does not prevent simultaneous bids being made for different classes of securities in the target: s623(3)(c). However, simultaneous offers may still give rise to unacceptable circumstances in some cases: see RG 000.198–RG 000.200.

RG 000.37 In some cases, the bidder may also apply for relief to allow multiple classes of target securities to be treated as a single class for the purposes of the takeover and compulsory acquisition provisions. The circumstances in which we may grant this relief are discussed at RG 000.102–RG 000.116.

Classes and the equality principle

RG 000.38 The ‘equality principle’ set out in s602(c) is one of the principles underpinning the regulation of takeovers. It aims to ensure that holders, as far as practicable, have a reasonable and equal opportunity to participate in any benefits arising from a proposal to acquire a substantial interest in a company, body or scheme.

RG 000.39 Under the statutory framework of Ch 6, equality is achieved by requiring holders to be dealt with in a similar way to the extent that they hold similar securities. Accordingly, s602(c) refers to equality between the holders of the ‘relevant class’ of voting shares or interests.

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

RG 000.40 The significance of class distinction in the equality principle is reflected in a number of the specific requirements applying to takeover bids that are designed to reinforce the principle, including:

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

RG 000.41 These provisions promote equality on the assumption that the offers and purchases to which they refer relate to shares with similar value. If the relevant securities these provisions seek to equate have materially different rights and obligations, then requiring, for example, that the same price is offered for those securities (s621) would not ensure equal treatment.

Note: See Regulatory Guide 163 *Takeovers: Minimum bid price principle* (RG 163) at RG 163.5–RG 163.9 for further discussion of provisions reflecting the equality principle.

Determining classes

- RG 000.42 The Corporations Act does not exclusively define when securities are in a class for the purposes of Ch 6.
- RG 000.43 Neasey J, considering the earlier takeovers regime in *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 6 ACLC 389 at 393, stated:
- The expression ‘class of shares’ has no special meaning in s16(2) of the Code. It is a simple English expression, commonly used by text writers in company law. It refers to a category of shares which differs sufficiently in respect of rights, benefits, disabilities, or other incidents, as to make it distinguishable from any other category of shares, if there are any, in the capital structure of the company.
- RG 000.44 This passage was applied in a different context by Jacobs J in *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 7 ACLC 309 at 318.
- RG 000.45 Some provisions in Ch 6 indicate that certain transient differences in rights and obligations may be disregarded in delineating classes. These provisions suggest, for instance, that the identity of a class is not necessarily lost because a dividend is paid or a call made on the securities included in the class. Under s619(2)(b) and (c), offers under an off-market bid for a class of securities may differ to the extent that the difference is attributable to different accrued dividend or distribution entitlements, or different amounts paid up or remaining unpaid. Differences in consideration are ‘attributable to’ amounts paid up or dividends accrued if they correlate or are commensurate with those factors: see *Taipan Resources NL (No 11)* [2001] ATP 5.
- Note: See also s621(3A), inserted by Class Order [CO 00/2338] *Relief from the minimum bid price principle—s621(3)*, which allows for adjustments to the minimum bid price rule to account for transient differences arising from the declaration of dividends and share splits in the four months before making a bid. In the context of compulsory acquisition, see s664B(2).
- RG 000.46 Accordingly, we administer the Corporations Act on the basis that two or more securities are in the same class only where they are effectively interchangeable—that is, where:
- (a) precisely the same rights, obligations and other incidents are attached to each of them; or
 - (b) any difference in rights, obligations or other incidents is temporary and can be compensated for by a simple and certain adjustment in cash.
- RG 000.47 Classes in this context are distinguished only by differences in the rights and obligations attached to the securities rather than by differences in how particular persons can use the rights when the securities come into their hands. Differences in the rights exercisable by particular shareholders are not differences between classes of securities, even if, for some purposes, they distinguish classes of shareholders. Such differences include the inability to

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

Partly paid securities

RG 000.48 Section 605(2) provides that:

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

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

RG 000.49 This means that partly paid and fully paid securities are in the same class, at least where voting and dividend rights attaching to partly paid securities are full or proportional to the amounts paid up.

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

RG 000.50 However, where there are other differences between fully paid and partly paid shares (e.g. the partly paid shares have reduced rights not proportional to the amount paid up), they may still form separate classes for the purposes of the takeover and compulsory acquisition provisions.

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

Bid class securities issued after the s633(2) date

RG 000.51 Under s617(1), off-market bids must relate to securities that exist, or will exist, as at the date set by the bidder under s633(2). This is the date for determining to whom offers will be sent. It must be between the date that the bidder gives the bidder's statement (or a separate written notice) to the target and the date of the first offer (inclusive): s633(3).

RG 000.52 Section 617(2) allows a bid to extend to securities that come to be in the bid class during the offer period because of the conversion or exercise of rights attached to 'other securities'. These other securities must be securities that exist, or will exist, as at the date set by the bidder under s633(2). If the bid extends to securities issued during the course of the bid under s617(2), the bidder's statement must include a statement to this effect: s636(1)(j).

RG 000.53 These provisions were introduced to better facilitate the acquisition of securities under a takeover bid, including securities that come into existence on the conversion of convertible securities.

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ASIC modification: Exercise or conversion before the offer period begins

- RG 000.54 Although a bid may extend to any bid class securities issued on the conversion of, or the exercise of rights attached to, other securities existing *as at the date set by the bidder under s633(2)*, the bid will only extend to the newly issued bid class securities if they come to be in the bid class *during the offer period*.
- RG 000.55 Class Order [CO 01/1543] *Takeover bids* modifies s617(2) so that the bid extends to bid class securities issued on conversion or exercise from the date set by the bidder under s633(2) until the end of the offer period. In effect, this extends the operation of s617(2) to bid class securities that come into existence *before* the beginning of the offer period. We have also made a corresponding modification to s636(1)(j).

ASIC modification: Definition of ‘convertible securities’

- RG 000.56 Section 617(2)(a) refers to securities that ‘will convert, or may be converted, to securities in the bid class’. The definition of ‘convertible securities’ in s9 defines when securities are convertible into another class of securities. This definition may be limited to securities providing a right for the *issue* of securities in another class. It may exclude securities that *transform* into securities in another class on exercise.
- RG 000.57 Class Order [CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition* modifies the definition of ‘convertible securities’ in s9 to include a security, the rights attaching to which may change so that the security transforms into a security of another class. We have modified this definition because the mechanism for conversion is not relevant to the policy on convertible securities.

When s617(2) does not apply

- RG 000.58 Section 617(2), as modified, does not apply to bid class securities issued after the date set by the bidder under s633(2):
- (a) on the conversion of, or exercise of rights attached to, other securities where those other securities are issued after the date set by the bidder under s633(2); or
 - (b) otherwise—for example, under a dividend or distribution reinvestment plan, bonus share plan or employee share scheme.
- RG 000.59 In these circumstances, s617(2) does not apply because the bid class securities are not issued on the conversion of, or the exercise of rights attached to, other securities that exist, or will exist, as at the date set by the bidder under s633(2).

ASIC relief: Extending the bid to newly issued securities

- RG 000.60 We may give relief to allow an off-market bid to extend to bid class securities that are issued after the date set under s633(2) in circumstances that are not within s617(2). This relief is consistent with the application of the compulsory acquisition provisions to securities issued up until the end of the offer period.
- RG 000.61 Our relief will require that the bidder discloses that the bid has been extended in this way in the bidder's statement or by way of supplementary disclosure.
- RG 000.62 If we give this relief, the issue of the bid class securities must be excluded from:
- (a) the conditions permitted in item 2(d)(ii) of s611 (i.e. the happening of events prescribed in s652C(1) or (2) relating to on-market acquisitions made during the bid period); and
 - (b) s650F(1)(a) (i.e. freeing off-market bids from 'defeating conditions' that are events prescribed in s652C(1) or (2)).

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

Offers to foreign holders

- RG 000.63 As far as practicable, all offers under a takeover bid must be the same because holders should have an equal opportunity to participate in the benefits of the bid: s619(1) and 602(c).
- RG 000.64 However, where the bid consideration includes scrip, the bidder may be constrained by foreign laws and regulations from making an offer of securities to a foreign holder. Alternatively, it may be highly impractical to comply with foreign regulations.
- RG 000.65 Section 619(3) allows the bidder to include terms in its bid that establish a 'nominee procedure' so that foreign holders can receive cash instead of the securities offered under the bid. A foreign holder for this purpose is a holder whose address on the register is a place outside Australia and the external territories: s9.
- RG 000.66 Under the nominee procedure, the bidder must appoint a nominee, approved by us, to sell the securities or rights that would otherwise be transferred to accepting foreign holders and to distribute the proceeds to those holders net of expenses.

Note: Class Order [CO 04/653] *On-sale disclosure relief for scrip bids and schemes of arrangement* provides on-sale relief for the securities transferred to the nominee.

ASIC modification: Specifying foreign holders to which the procedure applies

- RG 000.67 Section 619(3) may be read to require that, if a bidder uses the nominee procedure, it must use it for *all* foreign holders.
- RG 000.68 [CO 01/1543] modifies s619(3) to clarify that the bidder does not have to use the nominee procedure for all foreign holders of target securities. The modification provides that the issuer may specify in the bidder's statement the foreign holders to whom the nominee procedure applies—for example, by reference to the place of the foreign holder's registered address.
- RG 000.69 The nominee procedure is an exception to the usual rule that all the offers under a takeover bid must be the same. Its premise is that the takeover bid should be considered compliant even if foreign holders do not receive an offer of securities, but cash realised from the sale of the securities. The policy behind s619(1) requires the issuer to offer the securities to each foreign holder where it is not constrained by regulation from doing so.
- RG 000.70 Accordingly, the bidder may risk an application to the Takeovers Panel for a declaration of unacceptable circumstances where:
- (a) the nominee procedure is used for a foreign holder; and
 - (b) the bidder is not legally or practically constrained from making the offer to the holder.

ASIC approval of nominees

- RG 000.71 We may approve nominees for foreign holders under s619(3) in relation to scrip bids.
- RG 000.72 Because the function of these nominees is to sell securities for the benefit of foreign holders and to distribute the proceeds of sale to the holders, it is our view that nominees should operate with an appropriate standard of professionalism to protect the interests of foreign holders.
- RG 000.73 We consider that a person will generally only be suitable as a nominee under s619(3) if that person is:
- (a) an Australian financial services (AFS) licensee authorised to provide financial services to retail holders in relation to the relevant class of securities; or
 - (b) a nominee subsidiary of a person referred to in RG 000.73(a).
- RG 000.74 This is because the obligations of an AFS licensee in Pts 7.6–7.8 will usually provide sufficient protection for foreign holders for the purposes of s619(3). These obligations also mean that the nominee does not necessarily have to be independent of the issuing company.

- RG 000.75 Before approving a person as a nominee, we will also consider whether they are in a position to fulfil their responsibilities under s619(3). For example, we will not approve a person's appointment as a nominee if we are:
- (a) investigating the person; or
 - (b) taking enforcement action against the person.

Small parcels

- RG 000.76 The operating rules of some prescribed financial markets define a 'marketable parcel' of securities for the purpose of regulating dealings through the relevant market and/or associated clearing and settlement facilities. Where a holding of securities does not meet the definition of a 'marketable parcel', we refer to it in this section as a 'small parcel'.

Note: Under the current definition of 'marketable parcel' in the ASX Operating Rules, a 'small parcel' of quoted ordinary shares is a parcel of less than \$500 value based on the daily closing price of the shares.

- RG 000.77 In some cases, the rules restrict dealings that result in a small parcel holding: see, for example, ASX Settlement Operating Rule 8.10.2. See also ASX Listing Rule 8.10.1(h), which contemplates that a listed entity may act in certain circumstances to prevent a transfer of its securities that results in a small parcel holding.
- RG 000.78 Restrictions of this kind aim to reduce the number of small parcel holdings on a listed entity's register created through securities trading. This is because of the disproportionate administrative costs to the entity associated with maintaining a register with a large number of small parcel holders relative to the prevailing value of the capital contributed by these holders.

ASIC modification: Small parcels offered as consideration under a bid

- RG 000.79 When a bidder offers quoted scrip as consideration in an off-market bid, the number of securities they are required to provide to some target holders may be a small parcel. The takeover may therefore increase the number of small parcel holdings on the bidder's register.
- RG 000.80 Class Order [CO 00/343] *Unmarketable parcels* allows a bidder to deal with offers of small parcels of securities in the following two ways:
- (a) if a nominee is appointed under s619(3)—the nominee may sell the small parcel of securities offered as consideration and distribute the proceeds to the holders in accordance with s619; or

- (b) in other circumstances—the bidder may offer cash (based on the highest closing price of the securities during the specified reference period) to the holders.

RG 000.81 Given the costs associated with appointing a nominee, our class order does not require a bidder to appoint a nominee to sell the small parcel of securities and forward the cash proceeds to the holder. However, if a bidder intends to appoint a nominee and use the procedure in s619(3), this procedure must also be used when dealing with small parcels.

RG 000.82 Under the class order, the number of securities that constitute a small parcel is determined by applying the definition of ‘marketable parcel’ in the ASX Operating Rules but using the highest closing price published by the operator of any prescribed financial market on which the securities are quoted during the period beginning on the first day of the bid period, and ending on the earlier of:

- (a) five trading days before the first date on which the bidder must pay or provide bid consideration to a target holder under the terms of the offers; and
- (b) the end of the bid period.

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

RG 000.83 If accepting a proportional takeover bid would leave a shareholder with a small parcel, s618(2) provides that the offer extends to the whole parcel.

RG 000.84 This provision is an exception to the equality principle in s602(c). It prevents target security holders from being left with a parcel of shares that is disproportionately costly to dispose of compared with its value. While this benefits the target holders, it may also benefit the target because, although no new holdings are created by the acceptance of a proportional bid, it removes from the target’s register holders who may otherwise be left with small parcel holdings and retain those holdings due to the relative cost of disposal. This may reduce the overall administrative operating costs of the target.

RG 000.85 There is, however, potential for security holders in a proportional bid to abuse s618(2)—for example, by:

- (a) splitting large holdings into smaller parcels and then seeking to accept the bid for all of their securities; or
- (b) repeatedly purchasing and accepting into the bid holdings of a sufficiently small size that they attract the operation of s618(2).

- RG 000.86 These practices create uncertainty for the bidder and the market, undermine the proportional bid mechanism and are contrary to the efficient market and equality principles set out in s602(a) and (c).

Note: In *Goldlink IncomePlus Limited 04* [2009] ATP 2, the Takeovers Panel made a declaration of unacceptable circumstances in relation to share splitting in a proportional bid. The Panel's reasons for its decision further discuss our concerns with this practice.

- RG 000.87 Class Order [CO XX/XXX] *Acceptances of a proportional takeover leaving a small parcel* modifies s618(2) so that it does not apply to parcels of securities that have come into existence, or increased in size, because of a transaction entered into after the proportional bid was publicly proposed.

- RG 000.88 The modification ensures that the small parcel exception is available only to holders who will not benefit from any transaction or modification to their holding effected at a time when the potential advantage of reliance on s618(2) may be apparent. It thereby prevents target security holders from abusing the provision while preserving its operation in the case of holders who have not modified their holdings in response to the bid.

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

Acceptances by trustees and nominees

- RG 000.89 In some cases, an acceptance for a parcel of target securities by a person as trustee, nominee or otherwise on account of another person under s653B(1)(b) may attract the operation of s618(2). An acceptance of this kind will relate to a parcel of securities forming part of a larger registered holding.

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

- RG 000.90 Our class order modification also applies to restrict reliance on s618(2) when there is a change to a parcel for which an offer is deemed to have been made under s653B(1)(b)—for example, increases or transfers of a person's beneficial interests in securities that form part of a larger registered holding. In this way, our class order also seeks to deter target holders from taking advantage of s618(2) by splitting holdings through the creation of trusts or similar arrangements.

- RG 000.91 To provide bidders with sufficient information to determine whether the requirements of Class Order [CO XX/XXX] *Acceptances of a proportional takeover leaving a small parcel* have been met, a trustee or nominee who wishes to have the benefit of the s618(2) exception in respect of a parcel accepted into the bid out of a larger holding under s653B(1)(b) must provide the bidder with a notice stating:

- (a) either that the parcel is held by the holder in their own right, or if the parcel is held by the holder for a beneficiary, the name and address of the beneficiary;
 - (b) if the parcel is held for a beneficiary, the date on which the beneficiary acquired a beneficial interest in that parcel (or, if unknown, the date that the beneficiary is reasonably believed to have acquired a beneficial interest in that parcel); and
 - (c) if the parcel is held by the holder in their own right, the date of the transaction through which the holder acquired a legal interest in the parcel.
- RG 000.92 If a legal or beneficial interest in a parcel is acquired on the same date that the proportional bid is publicly proposed, the notice must specify whether that interest was acquired before the bid was publicly proposed.
- RG 000.93 The notice requirement will only apply in very limited circumstances—that is, where:
- (a) the acceptance relies on s653B(1)(b) (i.e. the notification requirements do not apply to acceptances in respect of a person’s entire registered holding);
 - (b) the acceptance relates to a parcel that is sufficiently small that the remainder of the parcel is a small parcel; and
 - (c) the accepting holder seeks to rely on s618(2) to have the bid extended to the entire parcel to which the acceptance relates.
- RG 000.94 A trustee or nominee who is content to accept only in respect of the bid proportion may accept in the usual way without giving the notice.

Consideration payable subject to providing documentation

- RG 000.95 Section 620(2) requires the offer under an off-market bid to provide that the bidder must pay the consideration under the bid within a specified period. Different periods apply if the bidder is not given, with the acceptance, documentation that is sufficient to enable the bidder to become the holder of the relevant securities:
- (a) when a bidder is given the necessary transfer documents after the acceptance of the offer but *before* the offer period ends, s620(2)(b) requires the bidder to pay the consideration within one month of receiving the documents; and
 - (b) when a bidder is given the necessary transfer documents after the acceptance of the offer and *after* the offer period ends, s620(2)(c) requires the bidder to pay the consideration within 21 days of receiving the necessary transfer documents.

RG 000.96 The periods specified in s620(2)(b) and (c) run from the time that the bidder receives the transfer documents, even if the bid remains subject to a defeating condition. This is in contrast to s620(2)(a)(i).

ASIC modification: Timing of payment in conditional offers

RG 000.97 As reflected in s620(2), the period for a bidder to pay consideration should run from the time that the necessary transfer documents are given to the bidder. The ‘necessary transfer documents’ constitute the consideration provided by the holder under the takeover contract: s9.

RG 000.98 However, for an offer that is subject to a defeating condition, the period for a bidder to pay consideration should also be referable to the time that the takeover contract becomes unconditional. At this time, the contract is binding and will not be rescinded: see the definition of ‘defeating condition’ in s9. This is consistent with s620(2)(a)(i).

RG 000.99 [CO 01/1543] modifies s620(2)(b) so that the bidder must provide in its offer that, if the bidder is given the necessary transfer documents after acceptance by the holder and before the end of the bid period, the bidder is to pay the consideration:

- (a) if the offer is subject to a defeating condition when the bidder is given the necessary transfer documents—by the earlier of one month after the takeover contract becomes unconditional or 21 days after the end of the offer period; and
- (b) if the offer is unconditional—by the earlier of one month after the bidder is given the necessary transfer documents or 21 days after the end of the offer period.

RG 000.100 [CO 01/1543] also modifies s620(2)(c) so that the bidder is to pay the consideration within 21 days after the takeover contract becomes unconditional if:

- (a) the bidder is given the necessary transfer documents after both the acceptance of the offer and the end of the offer period; and
- (b) when the bidder is given the necessary transfer documents, the offer is subject to a condition that relates to the occurrence of an event referred to in s652C(1) or (2).

RG 000.101 We have modified s620(2)(c) because a bidder may free its offer from a condition relating to the events referred to in s652C(1) or (2) not later than three business days after the end of the offer period: s650F(1)(a), and see RG 000.187–RG 000.190 on s650G. We discuss the quotation condition imposed by s625(3) at RG 000.160–RG 000.165.

C Bids for multiple classes

Key points

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

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

Treating multiple classes as a single class

RG 000.102 Multiple small classes of securities on issue in a company (e.g. different tranches of options) may create practical problems for a takeover bid or compulsory acquisition and may have a defensive effect.

ASIC relief: Bids for multiple classes

RG 000.103 In appropriate cases, we may give relief to allow two or more classes of securities to be treated as being in the same class in a takeover bid or compulsory acquisition. This relief allows the bidder to make a single bid for two or more classes at different prices.

RG 000.104 We will only give relief to treat multiple classes as a single class if:

- (a) the terms of the offers are equitable between the relevant classes, having regard to the rights and obligations attaching to the classes (see RG 000.107–RG 000.111); and
- (b) the relevant classes of security are sufficiently similar that the holders have a community of interest. For example, we will not give this relief if the differences between the classes of securities are such that the holders of the securities would not be characterised as being in the same class for the purposes of a scheme of arrangement.

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

RG 000.105 The following are some examples of the relief that may be available.

Example 1: Options

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

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

We will not give relief to treat options as being in the same class as shares: see RG 000.104(b).

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

Example 2: Dividend entitlements

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

Example 3: Partly paid securities

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

- RG 000.106 In deciding whether to give relief, we may consult with the target: Regulatory Guide 92 *Procedural fairness to third parties* (RG 92).

Offers must be equitable between the classes

- RG 000.107 Although we will not require the bidder to treat holders of securities in the two (or more) classes identically under the bid (see *Re Hills Motorway Ltd* (2002) 43 ACSR 101 at 104 concerning a scheme of arrangement), our relief instrument will require that the bidder’s offers are equitable between the classes, having regard to the rights and obligations attaching to the securities in each class.
- RG 000.108 We impose this requirement because the effect of treating the two (or more) classes as a single class is that:
- (a) the bidder may compulsorily acquire the holder’s securities as a single class on the basis of acceptances for both (or all) classes; and
 - (b) the terms of the bidder’s offers may require the holder to accept for all their securities in both (or all) classes, or none.
- RG 000.109 Assessing whether the offers are equitable will mostly involve a valuation of securities in the different classes and any scrip consideration. The question is not whether the bidder offers a fair value for each class (as in s667C), but whether, for example, the premium (if any) that the bidder offers for one class is similar to the premium offered for each other class.

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

- RG 000.110 The bidder's relief application should provide evidence that it has assessed whether the offers are equitable between the relevant classes—for example, by providing a worked-out explanation by its financial adviser. This is so that we know the bidder has made the assessment, not necessarily so that we can pre-vet whether the bidder has met the requirement.
- RG 000.111 It is the bidder's responsibility to ensure that the equitable treatment requirement is met. The bidder risks a breach of the Corporations Act (because our relief will not apply) or an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances if its offers are not equitable between the relevant classes.

Partly paid securities

- RG 000.112 Where dividend and voting rights attaching to partly paid securities are full or proportional to the amounts paid up, we do not need to give relief for these securities to be in the same class as fully paid securities with otherwise similar rights: see RG 000.48–RG 000.50.
- RG 000.113 We may grant relief on a case-by-case basis allowing a partly paid security with no dividend or voting rights to be treated as being in the same class as a fully paid security.

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

Equitable consideration

- RG 000.114 As with other cases where we give relief, offers must be equitable between the partly paid and fully paid securities, having regard to the rights and obligations attaching to each class: see RG 000.107–RG 000.111.
- RG 000.115 Section 619(2)(c) allows differences between the offers if these are attributable to the fact that the offers relate to securities on which different amounts are paid up or remain unpaid. If partly paid securities are in the same class as fully paid securities, a bidder can offer a type of consideration for partly paid securities that is different from that offered for fully paid securities (e.g. options instead of shares). The offers will only be equitable if the type of consideration reflects the commercial characteristics of the partly paid securities.

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

- RG 000.116 If a partly paid security should be valued as if it includes an option over the corresponding fully paid security, we consider that the bidder should take this option component into account in assessing whether its offers are

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

Exercising convertible securities acquired under a bid

RG 000.117 In appropriate cases, a bidder making a full, unconditional bid for voting shares should be allowed to acquire all other securities in a company. This is reflected in the exception in item 3 of s611 for acquisitions of voting shares resulting directly from the exercise of convertible securities bought on-market during the bid period. In the circumstances where this exemption applies, the bidder has fully committed to completing its bid for every voting share or interest in the bid class, and control of the company will not pass through the exercise of the convertible securities without holders of voting shares or interests having had the opportunity to dispose of all their shares or interests to the bidder.

RG 000.118 Consistent with the exception in item 3 of s611, if a bidder acquires convertible securities under a takeover bid conducted simultaneously with a bid for the underlying securities, it should not be prevented by s606 from converting or exercising the convertible securities and acquiring the underlying voting shares or interests. The Corporations Act expressly recognises that a bidder may make simultaneous takeover bids for different classes of securities in the target, and acquisitions of convertible securities under a simultaneous takeover bid are at least as well regulated, transparent and equitable as on-market acquisitions: *Re Pinnacle VRB Ltd (No 3)* [2001] ATP 2, paragraph 28.

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

RG 000.119 A prohibition on exercise may also be a disincentive for bidders to bid for convertible securities. If bidders are discouraged from making a bid for convertible securities, holders seeking to access the benefits of the bid will be forced to pay the exercise price, wait for issue of the shares and accept the takeover bid.

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

RG 000.120 We may give case-by-case relief from the general prohibition in s606 for an acquisition of voting shares by the bidder that results directly from the

exercise of convertible securities acquired under an off-market bid for the convertible securities.

- RG 000.121 However, we will only give this relief if the bidder applies for it in good time before it sends its offers to holders.
- RG 000.122 The following requirements will apply to our relief:
- (a) the bidder makes a takeover bid for all voting shares in the bid class (a full bid);
 - (b) the bid for the convertible securities is subject to a non-waivable defeating condition that the bid for the shares is:
 - (i) unconditional; or
 - (ii) subject only to conditions relating to the prescribed circumstances in s652C(1) or (2), and/or the condition in s625(3);
 - (c) the bidder's offer for the convertibles securities is equitable compared with the offer for the voting shares or interests;
 - (d) the bidder discloses in the bidder's statement that it sends to holders that it has received our relief, together with a brief description of the terms of the relief;
 - (e) the bidder discloses in the bidder's statement its intentions concerning the exercise of convertible securities; and
 - (f) the bidder sends its first offers to holders under the bids for the convertible securities and the voting shares or interests on the same day.
- RG 000.123 These requirements are discussed further below: see RG 000.125–RG 000.140.
- RG 000.124 We may also give similar relief where the bidder seeks to acquire renounceable rights: see RG 000.142–RG 000.143.

Full and unconditional bid for voting shares

- RG 000.125 Our relief will require that the bidder has made a takeover bid for all the voting shares in the bid class (i.e. a full bid). This requirement is consistent with item 3(c) of s611.
- RG 000.126 Our relief will also require that the bid for the convertible securities is subject to a non-waivable defeating condition that the bid for the shares is:
- (a) unconditional; or
 - (b) subject only to conditions relating to the prescribed circumstances in s652C(1) or (2), and/or the statutory quotation condition in s625(3) (see [CO 01/1542]).

- RG 000.127 If the bid for the shares is not unconditional from the outset (except for the prescribed circumstances conditions and the statutory quotation condition), the bid for the shares must be declared to be unconditional if this condition is to be fulfilled.
- RG 000.128 Under s650F(1)(b), the bidder may waive a condition of the bid for the shares only if it does so not less than seven days before the end of the offer period. This means that, if the bidder waives conditions of the share bid so that the bid for the convertible securities proceeds, shareholders will have at least a week to accept the offer for the shares.
- RG 000.129 This corresponds with item 3(d) of s611, which requires that the share bid is unconditional (except for the prescribed circumstances conditions and the statutory quotation condition) at the time the bidder acquires the convertible securities on-market. We equate the time that the bid for the convertible securities becomes unconditional with the time that a bidder ‘acquires’ convertible securities on-market under item 3.
- RG 000.130 These requirements follow from the policy discussed at RG 000.117 that a bidder who has made a full, unconditional bid for the voting shares should be allowed to acquire all other securities in the company.

Equitable offers

- RG 000.131 Our relief instrument will also require that the bidder’s offer for the convertible securities is equitable compared with the offer for the voting shares or interests, taking into account the rights and obligations attaching to the two classes—that is, the bidder must not make an offer at a premium for the convertible securities and an offer at market or at a discount for the shares or interests.
- RG 000.132 If the offers for the convertible securities and the shares or interests are not equitable:
- (a) there is a risk that the bidder is targeting shareholders who are also convertible security holders with a collateral benefit (s623); and
 - (b) the bidder may acquire a key parcel of voting shares or interests on exercise of the convertible securities, having paid a significant premium for the convertible securities and a discount for the shares or interests.
- RG 000.133 The requirement that the offers are equitable between the convertible securities and the shares or interests is analogous to the requirement in item 3(b) of s611 that the convertible securities are acquired through an ‘on-market transaction’. Item 3(b) ensures that the bidder acquires the convertible securities at a price that reflects the open market and not any prearrangement. It limits the risk that the bidder can direct the benefit of the

on-market offer to certain convertible security holders who are also shareholders: s623 and RG 000.195–RG 000.197.

- RG 000.134 Section 623(3)(c) provides an exception from the collateral benefit prohibition for simultaneous takeover bids for different classes of securities in the target. This means a bidder does not breach s623 because of the mere fact that it bids for a different class. It does not mean that it is necessarily acceptable for a bidder to make any offer for convertible securities likely to induce target share or interest holders, who are also convertible security holders, to accept the offer for their shares or interests: see Section E.
- RG 000.135 It is the bidder's responsibility to ensure that the offers are equitable between the convertible securities and the voting shares or interests. Assessing whether the offers are equitable will involve a valuation of the convertible securities and the shares or interests: see RG 000.107.
- RG 000.136 The bidder's relief application should provide evidence that it has assessed whether the offers are equitable between the convertible securities and the voting shares or interests. The bidder should provide a worked-out explanation by its financial adviser. This is so that we know the bidder has made the assessment, not so that we can pre-vet whether the bidder has met the requirement.

Disclosure about our relief and the bidder's intentions

- RG 000.137 Holders and the market should be informed about the treatment of convertible securities under the bid and the bidder's intentions concerning exercise: s602(a) and (b).
- RG 000.138 Our relief will require the bidder to disclose in the bidder's statement it sends to holders that it has received our relief, together with a brief description of the terms of the relief.
- RG 000.139 We will also require the bidder to disclose in the bidder's statement its intentions concerning the exercise of convertible securities. The bidder should set out its intentions in the case of particular contingencies—for example, various levels of acceptances for the convertible securities and the shares or interests. Regulatory Guide 25 *Takeovers: False and misleading statements* (RG 25) deals with statements of intention during the course of a bid.
- RG 000.140 We will only give relief if the bidder applies within a reasonable amount of time before the date that it makes its offers. Other than in exceptional circumstances, we will not give this relief after the bidder has sent its offers to holders. In determining whether exceptional circumstances exist, we will consider the circumstances of the bid as a whole. Mere oversight of the fact

that relief may be required would not generally be sufficient to constitute exceptional circumstances.

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

Simultaneous offers

- RG 000.141 Our relief will require that the bidder sends its first offers to holders under the bids for the convertible securities and the voting shares or interests on the same day. This is similar to the requirement in item 3(b) of s611 that the shares or interests are acquired during the bid period.

Renounceable rights

- RG 000.142 We will also consider applications for relief from s606 so that a bidder may subscribe for target securities pursuant to renounceable rights acquired under an offer to all rights holders. It is doubtful that rights are ‘securities’ to which Chs 6–6C apply under s92(3). Our relief would require that the offer for the rights complies as far as practicable with Chs 6 and 6C as if the offer were a takeover bid.
- RG 000.143 Issues raised in *Re Anaconda Nickel Ltd (No 8)* [2003] ATP 7, *Re Anaconda Nickel Ltd (No 9)* [2003] ATP 8 and *Re Anaconda Nickel Ltd (Nos 2, 3, 4 & 5)* [2003] ATP 4 may be relevant to such an application, including whether the relief sought will adversely affect the market, and competition, for control of the target.

D Conditional offers

Key points

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

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

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

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

Notices relating to conditions in an off-market bid

- RG 000.144 Offers under an off-market takeover bid may be conditional: s625(2). When offers are subject to defeating conditions, the bidder is required to give various notices relating to the status of these conditions throughout the offer period. The notices must be given to the relevant market operator if securities in the bid class are quoted, or lodged with us if the securities are unquoted. The notices must also be given to the target.

Notice of status of conditions

- RG 000.145 Offers under a takeover bid may only be made subject to a defeating condition if the offers specify a date (no more than 14 days and no less than seven days before the close of the offer) on which the bidder is to give a notice on the status of the conditions: s630(1).

Note: Regulatory Guide 7 *Calculating time periods* (RG 7) provides further guidance on how to apply provisions of this kind referring to time periods.

- RG 000.146 Section 630(3) requires the bidder to give the notice of status of conditions on that date or the date determined under s630(2). Under s630(2)(a), if the offer period is extended, the date for giving the notice of status of conditions is taken to be postponed for the same period.
- RG 000.147 Because s650C(2) prevents the extension of a conditional offer, other than in limited circumstances after the notice is given, the specification of a date for

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

Notice of postponement of status notice

RG 000.148 If the date for giving a notice of status of conditions is postponed under s630(2)(a), the bidder must, as soon as practicable, give a notice that states the new date for giving the notice of status of conditions and provides an update on the status of conditions at that time.

Notices of fulfilment or freeing of conditions

RG 000.149 Additionally, throughout the bid period, but before the date for giving the notice of status of conditions, the bidder must give notice of the fulfilment of any conditions: s630(4). The bidder must also give a notice to declare offers free of a defeating condition: s650F(1).

RG 000.150 The bidder must give the notice of status of conditions on the relevant date regardless of whether the conditions have previously been fulfilled or the offers declared free of the conditions: s630(3). This is because some holders may not have seen any of the notices confirming that the conditions have been fulfilled, or declaring the offers to be free of the relevant conditions.

Note: [CO 01/1543] incorporates a minor and technical modification which substitutes the word 'give' for 'publish' in s630(4) and 650C(2).

The operation of s630(2)

RG 000.151 Section 630(2) provides that, whenever an offer period is extended:

- (a) the date for giving the notice of status of conditions is postponed; and
- (b) the bidder must give a notice that states the new date and provides an update on the status of conditions at the time.

RG 000.152 The continued operation of s630(2) and (3), after a date determined under s630(1) or (2) has been reached and a status notice given, is not expressly addressed in the provision.

RG 000.153 We administer the Corporations Act on the basis that s630(3) requires a notice to be given once on a single fixed date, and that the function of s630(2), to the extent that the s630(3) requirement has not yet been met, is to:

- (a) postpone the date on which the s630(3) requirement must be met; and

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

RG 000.154 Accordingly, if the offer period is extended after the bidder has already complied with s630(3), the operation of both that provision and s630(2) is exhausted.

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

RG 000.155 Given the prohibition in s650C(2), in most cases a bid will only be extended after the s630(3) notice has been given if it is unconditional. Holders do not generally need further information about the status of a bid's conditions after they have been notified that it is unconditional.

RG 000.156 However, in contrast with the provisions relating to the extension of takeover schemes before the enactment of the *Corporate Law Economic Reform Program Act 1999* (CLERP Act), it is now possible for the offer period for a conditional bid to be extended after the date for giving the notice of status of conditions has already passed: s624(2) (automatic extension) and 650C(2)(a)–(d) (extension permitted due to rival bid).

RG 000.157 It is consistent with the underlying policy of s630(2) that ongoing disclosure about the status of the bid's conditions should be provided if a conditional bid is extended, even if the status notice has previously been given: see RG 000.147. It is also consistent with the principles underlying Ch 6 set out in s602(a) and (b)—that is, that the takeover takes place in an efficient, competitive and informed market, and that security holders are given enough information to enable them to assess the merits of the takeover offer.

RG 000.158 Equivalent disclosure of the status of conditions should therefore be given on the date that a notice would have been required if s630(2) had continued to apply at all relevant times, where:

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

RG 000.159 We may seek a declaration of unacceptable circumstances if we are concerned that target holders have not been given sufficient information about the status of bid conditions.

The statutory quotation condition

RG 000.160 Where a bidder offers consideration that is, or includes, securities, and the bidder's statement or offer states or implies that the securities are to be quoted on a financial market, s625(3) imposes a condition on the offer that:

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

Note: Securities are admitted to quotation when the relevant market operator has given unconditional permission for quotation: definition of 'admit to quotation' in s9. See also Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) at RG 228.151–RG 228.155 for further discussion of statements that may give an indication of listing.

RG 000.161 The quotation condition is a statutory condition imposed by s625(3) and differs in this respect from other conditions a bidder may choose to include in its offer.

ASIC modification: Statutory quotation condition not a defeating condition

RG 000.162 [CO 01/1543] modifies s625(3) to clarify that the statutory quotation condition under s625(3)(c)(ii) is not a defeating condition. Without this relief, it is possible that the quotation condition may fall within the definition of 'defeating condition' in s9.

RG 000.163 The statutory quotation condition should not be treated as a defeating condition because, unlike other conditions:

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

- RG 000.164 The modification under [CO 01/1543] provides certainty that the condition in s625(3) is not a defeating condition. As a result:
- (a) the quotation condition will not prevent a bidder extending the offer period after giving the s630(3) notice (s650C(2));
 - (b) the quotation condition is not relevant for determining the time by which a bidder must provide the consideration for the offer under s620(2); and
 - (c) the extension of an offer subject only to the quotation condition will not postpone for more than one month the time by which a bidder has to meet its obligations under the bid, meaning the bidder does not need to offer withdrawal rights (s650E(1)).
- RG 000.165 The restrictions and consequences discussed above apply to offers subject to a defeating condition because whether and when the bidder will pay for an accepting holder's securities is uncertain. In the absence of s650E, an accepting holder could not accept a rival offer until the end of the offer period. The restriction in s650C(2) is qualified only to allow an auction for control. These concerns do not arise with respect to the quotation condition because:
- (a) the bidder does not impose and cannot waive the condition; and
 - (b) the condition is for the protection of holders (see RG 000.163(d)).

Maximum acceptance and discriminatory conditions

- RG 000.166 Under s626(1), an off-market bid must not be made subject to a 'maximum acceptance condition'. A maximum acceptance condition is one that allows a bidder to generally avoid its obligations under the offer, or reduce the maximum consideration payable under the bid, if acceptances (or the bidder's interests in the target generally) exceed a certain level.
- RG 000.167 Section 627 prohibits 'discriminatory conditions' in off-market bids that allow the bidder to acquire, or may result in the bidder acquiring, securities from some but not all of the people who accept the offer.

Policy underlying the prohibitions

- RG 000.168 The origin of the prohibitions on maximum acceptance conditions and discriminatory conditions can be found in s16(2)(h) and (j) of the *Companies (Acquisition of Shares) Act 1980*, which were inserted in accordance with the recommendations of the Companies and Securities Law Review Committee in its *Report to the Ministerial Council on partial takeover bids* (1985) (CSLRC Report).

- RG 000.169 The underlying policy of the prohibitions is related to the abolition of ‘pro rata’ offers—a type of takeover offer under which the bidder could acquire a set proportion of the total shares in the bid class (as opposed to a set proportion of each shareholder’s holding) with acceptances for excess shares scaled back at the end of the bid on a pro rata basis. In confining partial bids to proportional offers, the *Companies and Securities Legislation Amendment Act 1986* amendments were largely designed to address:
- (a) concerns that shareholders in pro rata bids accept not on the merits of the offer but under coercion for fear of becoming a locked-in minority; and
 - (b) the uncertainty that target holders face in not knowing how many of their securities will be acquired until the end of the offer period.
- RG 000.170 As discussed in the Explanatory Memorandum to the Companies and Securities Legislation Amendment Bill 1986, the prohibitions on maximum acceptance and discriminatory conditions are designed to:
- (a) address the concerns identified in the CSLRC Report that the use of such conditions may reintroduce uncertainties for target holders, and enable bidders to avoid honouring bids that prove to be more generous than required; and
 - (b) ensure that a bidder cannot achieve what is, in effect, a pro rata bid by use of these conditions.
- RG 000.171 Accordingly, the prohibitions have been widely drafted to ensure that bid terms and conditions that have the same effect as a maximum acceptance condition (in combination or otherwise) are prohibited, including conditions enabling the bidder to acquire shares from some but not all accepting shareholders. The provision on which s627 is based was specifically directed at preventing conditions allowing a bid to be structured to achieve a ‘first come first served’ outcome.

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

Minimum acceptance conditions

- RG 000.172 A minimum acceptance condition is a condition that, in effect, requires the bidder to achieve a minimum level of acceptances under the bid.
- RG 000.173 A correctly expressed minimum acceptance condition will not breach s626 or 627, or offend the policy underlying those provisions, because it will not facilitate prorating or coerce acceptances.
- RG 000.174 A bidder may free its offers from a minimum acceptance condition under s650F(1). However, a bidder may not vary the level of acceptances to which the condition relates. A minimum acceptance condition must also not be

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

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

Minimum acceptance conditions that relate to only one form of consideration

- RG 000.175 Where alternative forms of consideration are offered under an off-market bid, the offers must not include a defeating condition to the effect that the offers will fail unless at least a certain amount or proportion of one of the alternatives is the subject of acceptances. This is the case, even if the condition is expressed as a minimum acceptance condition relating to one of the alternative forms of consideration.
- RG 000.176 An example is where holders may choose between scrip or cash consideration and offers are subject to a condition that holders who accept for not less than 50% of the shares elect to receive the cash consideration.
- RG 000.177 One effect of this condition is that the offer need not proceed if the bidder receives acceptances for more than 50% of the shares from persons who elect to receive scrip.
- RG 000.178 Accordingly, as with a maximum acceptance condition, this condition provides that the offers will terminate if the number of securities for which the bidder receives acceptances reaches or exceeds a particular number. The particular number will depend on the number of shares in respect of which acceptances are eventually received for both forms of consideration. This exposes holders to uncertainty and allows a bidder to resile from an over-generous bid.

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

Maximum consideration conditions

- RG 000.179 The prohibition on maximum acceptance conditions includes conditions that have the effect that the maximum consideration offered under the bid will be reduced if the bidder receives more than a certain number of acceptances or otherwise acquires interests in the target exceeding a certain level.
- RG 000.180 This provision ensures that a bidder is not able to avoid the policy underlying the prohibition on maximum acceptance conditions by providing that the consideration payable will reduce as an alternative to the bidder being able to terminate the bid.

Conditions relating to prescribed events in s652C

RG 000.181 Offers may be freed from a defeating condition using the process set out in s650F. For conditions relating to events of the kind referred to in s652C(1) or (2), the bidder must give the target a notice declaring that the offers are free from the condition no later than three business days after the end of the offer period: s650F(1)(a). For other conditions, the notice must be provided no less than seven days before the end of the offer period: s650F(1)(b).

ASIC modification: Defeating condition does not allow withdrawal of offers

RG 000.182 [CO 01/1543] modifies s650F(1)(a) to correct a drafting error, which suggests that a defeating condition relating to the events listed in s652C allows a bidder to *withdraw* unaccepted offers.

RG 000.183 Under s9, a defeating condition is a condition that:

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

RG 000.184 A defeating condition does not allow the bidder to withdraw unaccepted offers. Offers may be withdrawn only with ASIC's written consent: s652B. Without our consent to withdraw offers, a bid should run its full course.

Note: Unfulfilled defeating conditions are important factors in determining whether we will give our consent: see Regulatory Guide 59 *Announcing and withdrawing takeover bids (s653 and s746)* (RG 59).

RG 000.185 The reference to withdrawing unaccepted offers in s650F(1)(a) is also inconsistent with the rest of the paragraph that provides for the condition to be freed up to three business days after the end of the offer period. Withdrawing unaccepted offers brings forward the end of the offer period. This accelerates the operation of s650G rendering takeover contracts and acceptances in a conditional bid void. There is therefore no need to withdraw unaccepted offers after the end of the offer period because unaccepted offers will have lapsed by this time.

RG 000.186 Our modification ensures that s650F(1)(a):

- (a) is consistent with the definition of 'defeating condition' under s9; and
- (b) no longer implies that defeating conditions allow bidders to withdraw unaccepted offers.

Section 652C conditions at the close of the offer

- RG 000.187 Under s650G, takeover contracts and acceptances are void if a defeating condition is not fulfilled at the end of the offer period and the bidder has not declared the offers to be free from that condition.
- RG 000.188 Section 650G(b) refers to the date applicable under s630(1) or (2) as the date by which the bidder must declare offers to be free from the condition—however, the paragraph is concerned with the notice under s650F(1) rather than s630.

ASIC modification: Applicable timing for freeing defeating conditions

- RG 000.189 [CO 01/1543] modifies s650G(b) to refer to the applicable date for giving a notice under s650F(1) when freeing offers from a defeating condition, rather than the notice of status of conditions under s630(1) or (2).
- RG 000.190 Without our relief, a bidder would have to free offers from a defeating condition not less than seven days before the end of the offer period. This is inconsistent with s650F(1)(a), which allows a bidder to free offers from a defeating condition relating to circumstances in s652C(1) or (2) up to three business days after the end of the offer period. This three-day period allows a bidder sufficient time to consider all the circumstances up to the end of the offer period to decide whether to free offers from the defeating condition.

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

E Collateral benefits

Key points

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

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

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

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

The prohibition on collateral benefits

RG 000.191 Section 623(1) prohibits certain collateral benefits being offered or given to target holders outside the bid process. In particular, it prevents a bidder or an associate of the bidder giving, offering to give, or agreeing to give a benefit to a person if:

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

RG 000.192 Section 623(1) is one of the linchpins of the takeover bid procedure in Ch 6. It gives effect to the policy stated in s602(c) that holders should have equal access to the benefits passing under a bid. It does so by reinforcing a primary expression of the equal opportunity principle—that is, the requirement that all offers under a bid are the same and, as such, the benefits of the bid are shared equally: see s619(1). This requirement would be undermined if a bidder or its associates were able to offer or give to only some holders a collateral benefit outside the bid.

Note: Section 623 is one of a number of provisions applying the equality principle. In particular, s623 is complemented by s621(3)–(5) and s622, which extend the principle into the pre-bid period: see RG 163.5–RG 163.9.

RG 000.193 The prohibition on collateral benefits also underpins the efficiency and integrity of the takeover bid procedure as a preliminary to post-bid

compulsory acquisition under Pt 6A.1: s602(d). This is because the right to compulsorily acquire, on the same terms as those offered under the bid, is premised on the overwhelming level of acceptance of those terms—which may be distorted if some parties receive benefits outside the bid: see draft Regulatory Guide 000 *Compulsory acquisitions and buyouts* at RG 000.28–RG 000.31.

RG 000.194 For similar reasons, s623(1) helps to ensure that the acquisition of control through the takeover bid process occurs in an efficient, competitive and informed market: s602(a).

Exceptions to the prohibition

RG 000.195 The prohibition on collateral benefits does not prevent:

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

RG 000.196 With respect to RG 000.195(b), a transaction takes place on-market if it is effected on a prescribed financial market in a way defined as ‘on-market’ in the rules governing the operation of the relevant market: s9. For trading on ASX and Chi-X, the relevant definition of an ‘on-market’ transaction is contained in Rule 1.4.3 of the ASIC Market Integrity Rules (ASX Market) 2010 and Rule 1.4.3 of the ASIC Market Integrity Rules (Chi-X Australia Market) 2011, respectively.

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

RG 000.197 The policy underlying the exception from s623(1) for on-market purchases is that the competitive market process should afford holders equal access and opportunity to participate in any benefits, and limit the risk that the bidder is able to selectively direct the benefits flowing from its purchases to particular target holders: see also item 2 of s611. Accordingly, the definition of ‘on-market’ generally excludes transactions that are prearranged between the parties (including special crossings).

Unacceptable circumstances

RG 000.198 Even if offering or giving a collateral benefit does not contravene the prohibition in s623, the collateral benefit may still give rise to unacceptable circumstances—for example, because it offends the equality principle in s602(c). The application of the equality and other principles in s602 is not limited to any particular stage of the bid. A collateral benefit may therefore

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

- RG 000.199 In considering a collateral arrangement or transaction in the context of a bid, we will take into account both whether there is a contravention of s623 and whether there may otherwise be unacceptable circumstances, having regard to the principles in s602.
- RG 000.200 The Takeovers Panel has published guidance on when collateral benefits may give rise to unacceptable circumstances: Takeovers Panel Guidance Note 21 *Collateral benefits* (GN 21). In addition to the equality principle, the Takeovers Panel notes that circumstances involving the giving of a collateral benefit may also offend the efficient market principle in s602(a)—for example, if the arrangement involving the collateral benefit has the effect of deterring alternative bidders or buyers: see GN 21, paragraph 28.

Prohibited benefits

- RG 000.201 The scope of collateral benefits that may be prohibited under s623 is broad. As well as collateral benefits passing from the bidder to a target holder, benefits passing from an associate of the bidder to an associate of the holder are also prohibited.
- RG 000.202 A benefit of any nature may fall within the prohibition: s9. A benefit may involve any kind of advantage or value accruing to a holder. Cases on the antecedent provisions have confirmed the broad variety of advantages constituting a benefit, including:
- (a) the advantage of an unconditional off-market purchase of target securities where offers under the bid are conditional (*Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 28 ACSR 1 and *Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 187 (*Aberfoyle*));
 Note: See also *Citect Corporation Ltd* [2006] ATP 6.
 - (b) the advantage of selling other assets to the holder at a premium in connection with the sale of the target securities or selling an entire holding in the context of a proportional bid (see *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Pty Ltd* (1993) 177 CLR 508 and *Albert v Votaint No 320 Pty Ltd* (1987) 13 ACLR 336); and
 - (c) the ability to acquire a large parcel of shares all at once, participate in an attractive investment opportunity or acquire shares without brokerage (*Aberfoyle*).
- RG 000.203 The broad construction of benefit for this purpose is underscored by the express exclusions in s623(3).

Benefits likely to induce acceptance or disposal

- RG 000.204 Under s623(1), only benefits that are ‘likely to induce’ acceptance of the offer, or the disposal of target securities, are prohibited.
- RG 000.205 This limitation was introduced by the CLERP Act to address the potential that transactions outside the scope of the underlying policy of the prohibition may have been caught under the predecessor provisions. In particular, this requirement was designed to exclude benefits, such as payments made by the bidder in the ordinary course of its business, that may not be commercially connected with the bidder’s acquisition of target securities under the bid.

Note: See Anomalies Report, pp. 49–50, and Corporations Law Simplification Program Task Force, *Takeovers—Proposal for simplification*, January 1996.

- RG 000.206 In *Aberfoyle*, Finkelstein J implied a similar limitation in the pre-CLERP provision to that now found in s623(1), stating at 221:

There is good reason for confining the operation of s698 to the provision of benefits that are connected with or have the potential to influence or induce a decision to sell shares in the target company. If the section is not confined in that way then there will be a very real risk of a contravention of s698 as a consequence of dealings between companies that have no possible relationship to the acquisition of shares in one of them.

- RG 000.207 The current test brings the focus of the prohibition into line with its underlying objective of prohibiting benefits that induce a holder to sell their securities.

Note: This underlying objective was also recognised in the policies of ASIC’s predecessor relating to relief from the provision: see National Companies and Securities Commission (NCSC) Policy Statement 160 *Offers for securities not included in relevant class of shares*, paragraph 13.

Factors taken into account in considering inducement

- RG 000.208 Table 3 discusses a number of factors that we will commonly consider when examining collateral arrangements and transactions that may involve a benefit prohibited under s623(1).
- RG 000.209 These factors do not represent a complete list of the matters that may be relevant, and each case will differ on its facts. In considering whether a benefit is likely to induce acceptance or disposal, we look at the overall circumstances of the arrangement or transaction giving rise to the benefit and the nature of the benefit. As such, no particular factor should be considered a ‘safe harbour’.

Note: See also GN 21.

- RG 000.210 The factors listed in Table 3 may also be relevant in determining whether benefits given in the four-month period before the date of the bid may need to be disclosed in the bidder’s statement: s636(1)(i).

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

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

Broker handling fees

- RG 000.211 In some cases, a bidder will seek to offer incentives to a broker in the form of handling fees to solicit acceptances of its bid. Offering or giving a fee of this kind may involve a contravention of s623, if:
- (a) the broker or an associate of the broker receives the fee in respect of holdings in which they have an interest; or
 - (b) the fee is split with, or passed on to, accepting holders by the broker.
- RG 000.212 In particular, excessive broker handling fees may create significant pressure and incentives for some or all of the fee to be passed on—increasing the likelihood of inducement: see *AurionGold Ltd* [2002] ATP 13, [61]. Bidders intending to put in place handling fee arrangements should consider Takeovers Panel Guidance Note 13 *Broker handling fees* (GN 13), which discusses the circumstances where a fee may give rise to unacceptable circumstances.

When the prohibition applies

- RG 000.213 The relevant period during which the prohibition on collateral benefits operates depends on whether the bid is a market bid or an off-market bid.

ASIC modification: Market bids

- RG 000.214 [CO 01/1543] modifies s623 so that, for a market bid, the prohibition applies during the ‘bid period’ rather than the ‘offer period’.
- RG 000.215 We have made this modification because, without it, there would be a gap between the time at which the minimum bid price principle in s621(3)–(5) stops applying and the time that the prohibition on collateral benefits starts applying.
- RG 000.216 The offer period for a bid is defined to mean the period for which offers under the takeover bid remain open: s9. For a market bid, the bidder’s offer does not start until 15 days after the bidder announces the bid: item 14 of s635(1). However, the reference period for the minimum bid price principle ends at the date of the announcement: s621(3).

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

- RG 000.217 The gap between the operation of s621(3)–(5) and s623 for a market bid means that, in theory, the bidder could offer more consideration in the interim than it offers under the takeover bid. There would be no automatic

increase in the bid consideration under s651A, which is limited to off-market bids.

RG 000.218 This gap is filled if the prohibition on collateral benefits applies during the bid period rather than the offer period because, for a market bid, the bid period starts when the bid is announced to the securities exchange and ends at the end of the offer period: s9.

RG 000.219 We consider that this extension is appropriate because the collateral benefits prohibition in s623 is intended to pick up where the minimum bid price principle in s621(3)–(5) leaves off. Both extend the equality principle in s602(c) beyond the consideration that the bidder offers under the takeover bid.

Off-market bids

RG 000.220 Our class order does not affect the operation of the collateral benefits prohibition in off-market bids. Section 623(1) applies during the offer period in an off-market bid.

Relief from the collateral benefits prohibition

RG 000.221 The CLERP amendments narrowed the scope of the collateral benefits prohibition so that:

- (a) only benefits that are likely to induce acceptance or disposal are prohibited (RG 000.204–RG 000.207);
- (b) offers under simultaneous takeover bids are excluded from the operation of the prohibition (s623(3)(c)); and
- (c) the prohibition no longer applies to benefits offered or given pre-bid (see s698(2) and (4) of the old Corporations Law).

RG 000.222 Commensurate with the more focused settings of the post-CLERP provisions, we will generally be very cautious in providing relief from s623(1). This is because a benefit that is likely to induce an acceptance, but which is not offered to all holders, will be likely to fall within the mischief of the prohibition and offend the equality principle in s602(c).

RG 000.223 Occasionally, an arrangement or transaction involving a collateral benefit that may technically induce one or more holders to accept a bid, but which is not available to all holders under the bid, may nonetheless justify relief from the prohibition. This may include:

- (a) transactions that:
 - (i) are necessary to allow a bid to be completed;
 - (ii) do not offend the equality principle; and

- (iii) benefit the target holder in a capacity other than as a share or interest holder: see RG 000.226–RG 000.241; and
- (b) cases where an overwhelming majority of the entity’s membership are linked by collateral interests that may not be made the subject of a takeover bid (e.g. a company operating under cooperative principles).

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

RG 000.224 In each case, however, we will only consider granting relief if we are satisfied that the relief would not undermine the principles in s602 and, in particular, the equality principle in s602(c).

RG 000.225 Our consideration of any requests for relief will often necessitate commercial evaluations of the benefits involved. However, it is not our function to make judgments of this nature. As such, applicants will generally need to provide quantitative assessments, including independent expert advice.

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

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

RG 000.226 In some situations, we may grant case-by-case relief to allow a bidder to:

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

RG 000.227 Arrangements of this kind may be necessary because the controlling holder may not be prepared to continue as guarantor or principal creditor after having lost control of the target.

RG 000.228 Relief may be justified in these circumstances but only if the applicant satisfies us that the terms on which it is to replace the vendor in its relationship with the target company do not involve a value transfer to the controlling holder.

RG 000.229 This means that, if the bidder purchases a debt, the price paid by the bidder should be no more than the price a bank might have paid to take over the loan. For example, in the case of a loan to an insolvent target, to buy the loan at face value would be likely to confer an unacceptable benefit on the controlling holder. Any proposal for a bidder to take over a loan to an insolvent target will be tested against the alternative that the bidder simply makes takeover offers subject to a defeating condition that the loan be released.

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

ASIC relief: Funding a takeover

RG 000.230 A bidder seeking to raise capital in connection with the funding of a bid may offer or issue securities to a person who also holds target securities. If a bidder does this when the prohibition on collateral benefits is in operation, the bidder may contravene s623 if the associated benefit is likely to induce the holder to accept the bid: *Aberfoyle*. It is possible that a bidder entering into an underwriting arrangement with a target holder may also contravene s623. In each case, whether a benefit of this kind is likely to induce acceptance will be a question of fact.

Note: See Table 3. See also Companies and Securities Advisory Committee (CASAC), *Recommendations for reform of s621(4) and 623(2) & (3) of the Corporate Law Economic Reform Program Bill 1998*, December 1998, p. 8, which states that the question of whether a contravention occurs may rest on a link with the bid. However, a benefit given in connection with a fundraising may also give rise, more generally, to unacceptable circumstances: see RG 000.198–RG 000.200.

RG 000.231 As a result, in certain circumstances, the prohibition on collateral benefits may restrict a bidder's ability to fund a takeover by way of underwriting, placement or other equity offerings. This could have the effect of unnecessarily deterring takeover bids.

RG 000.232 We are prepared to give case-by-case relief from s623 to allow a bidder to:

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

RG 000.233 However, we will only give relief if target holders are not favoured in any particular way (e.g. in the allocation policy applicable to the retail offer under the prospectus).

RG 000.234 Our primary aim in providing relief in these circumstances is to ensure that, as far as practicable, no commercial benefits are selectively given to target holders which may materially influence their decision whether or not to accept the bid.

Underwriting and placements

RG 000.235 We will generally only grant relief for underwriting and placements on the basis that the requirements and conditions set out in Table 4 are satisfied.

RG 000.236 In some cases, these requirements and conditions will apply to both the bidder and the underwriter. Where our relief requires the underwriter to comply with a condition, the underwriter must provide to the bidder and us a written statement that it will comply with this condition and that it accepts the condition applies to it.

RG 000.237 Where we provide relief but the parties involved do not comply with the conditions on which our relief was granted, or subsequently act contrary to the underlying purpose of our relief, we may take further regulatory action, including applying to the Takeovers Panel for a declaration of unacceptable circumstances.

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

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

Relief requirements and conditions	Explanation
<p>When entering into a funding agreement with an underwriter, the bidder must have reasonable grounds for believing that the underwriter has a disposal relevant interest in the target of less than 5% of the bid class securities in the target.</p>	<p>All things being equal, the more substantial an underwriter's holding in the target, the higher the risk that underwriting or placements may be offered to that person as an inducement. If a bidder offers underwriting or placements to a number of target holders, and the underwriting or placements have the capacity to induce those holders to accept the bid, this may affect the success of the bid.</p>
<p>The bidder must also have reasonable grounds for believing that the underwriters who have entered into funding agreements with the bidder do not, in aggregate, have a disposal relevant interest in the target of 20% or more of the bid class securities in the target.</p>	<p>We consider that, generally, there needs to be an upper limit on the holding an underwriter has in the target and on the aggregate holding in the target of all underwriters who enter into funding agreements with the bidder. We consider the respective 5% and 20% requirements sufficiently limit the risk that underwriting or placements will be offered as an inducement to target holders to accept the bid.</p> <p>If a bid is for all the voting shares or interests in the target and a potential underwriter has not lodged a substantial holding notice in relation to the target, the bidder will normally be able to satisfy itself that the underwriter has a disposal relevant interest of less than 5% of securities in the bid class.</p>
<p>The bidder must not knowingly purchase any securities in the target in which the underwriter has a disposal relevant interest between the time that:</p> <ul style="list-style-type: none"> • the bidder first makes an offer to the underwriter to enter into a funding agreement; and • the bidder receives from the underwriter the written statement referred to at RG 000.236. 	<p>We consider that it is reasonable to limit the bidder's ability to purchase an underwriter's securities in the target while a bidder's offer to the underwriter for underwriting or placements is open for acceptance. Otherwise, it would be possible for the relief to be abused.</p>
<p>The bidder may only knowingly purchase securities in the target in which the underwriter has a disposal relevant interest if the bidder has no reason to believe that the purchase would result in the underwriter contravening the relief conditions applying to it.</p>	<p>This condition complements the requirements imposed on the underwriter.</p>

RG 000.238 Under the conditions and requirements listed in Table 4, a 'disposal relevant interest' denotes a relevant interest sourced from a disposal power over securities—specifically, a relevant interest disregarding the operation of s608(1)(b), 608(3)(a) and 608(8). It is more likely that an underwriter will be able to direct its related companies to accept the bid for those securities over which it has control of disposal. It is also arguably unreasonable to count, for the purposes of the 5% and 20% conditions, or the restrictions on an underwriter accepting the bid, those securities over which the underwriter does not have power of disposal.

Rights issues

- RG 000.239 Our relief for rights issues will generally allow a bidder to raise funds irrespective of whether any of its shareholders are holders of bid class securities. We consider that a rights issue of securities by the bidder to its shareholders, which complies with ASX Listing Rule 7.7, would have less of a tendency to induce the bidder's shareholders who are also target holders to accept the bid. This is because the issue is unrelated to existing holdings in the target.

Retail offers under a prospectus

- RG 000.240 Our relief for fundraising by way of offers under a prospectus (provided that target holders are not favoured in any way in the allocation policy under the prospectus) is limited to retail offers. It is not available for institutional offers or for underwriting or sub-underwriting the offer.
- RG 000.241 An offer to subscribe for shares under a retail offer in a prospectus is open to target holders and the general public. While there is a risk that a bidder could offer a benefit to target holders through an offering under a prospectus, the risk of this happening is minimised if target holders are not favoured in the allocation policy under the prospectus. We may take regulatory action, such as applying to the Takeovers Panel, if it becomes apparent that the prospectus is a sham designed to give benefits to certain target holders.

F The bidder's statement

Key points

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

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

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

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

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

General principles

RG 000.242 The bidder's statement is the primary disclosure document issued by the bidder during the course of a takeover bid. In an off-market bid, it must include, or accompany, the offers: item 1 of s633(1). In a market bid, it must be made available to the market on the day the bid is announced: item 3 of s635(1).

RG 000.243 The principal purpose of both the bidder's statement and target's statement is to provide target holders with sufficient information to make an informed decision in response to the offer under a bid. Together, these documents seek to ensure that:

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

- RG 000.244 The disclosures made in the bidder's statement are underpinned by a number of provisions which reinforce the need to ensure that the information provided to target holders is effective and reliable. In particular:
- (a) the bidder's statement must be approved by a resolution of the board (s637(1));
 - (b) the bidder must lodge a copy of the bidder's statement with ASIC (item 2 of s633(1) and item 5 of s635(1));
 - (c) statements made in, or accompanied by, the bidder's statement, or based on a statement by a person, require the relevant person's consent (s636(3) and (4));
 - (d) liability attaches to the bidder, its directors, persons named with consent and others for dispatching a bidder's statement that contains a misleading or deceptive statement, or omits required information or new material circumstances arising since lodgement (s670A and 670B);
 - (e) liable parties must inform the bidder throughout the bid period if there is a misleading or deceptive statement or omission, or if a new circumstance arises (s670C);
 - (f) a person is deemed to have made a misleading statement about a future matter in the bidder's statement if they do not have reasonable grounds for making the statement (s670A(2)); and
 - (g) the bidder's statement must include an independent expert report discussing any consideration other than cash or quoted securities given by the bidder for target securities in the four months before the date of the bid (s636(2)).

Content and presentation of the bidder's statement

- RG 000.245 Sections 636(1) and (2) set out the information that a bidder's statement must contain. This includes specific matters relating to the bidder's intentions, dealings and interests in the target and the consideration offered under the bid. In particular:
- (a) where the consideration includes cash—the bidder must disclose details of its funding arrangements (s636(1)(f)); and
 - (b) where the consideration includes securities—the bidder must include the information that would be required for an offer of the securities under a prospectus or PDS (s636(1)(g) and (ga)).
- RG 000.246 In addition, the bidder's statement must include any other information known to the bidder that is material to a target holder's decision whether to accept the offer under the bid (other than information relating to the value of securities offered as consideration): s636(1)(m).

RG 000.247 To achieve its objective, the bidder's statement (and supplementary disclosures) should be prepared with the needs of target holders and their advisers in mind and taking into account the context in which target holders will be considering the disclosure. As noted by Bryson J in *ICAL Ltd v County Natwest Securities Aust Ltd* (1988) 13 ACLR 129 at 137 (*ICAL*):

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

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

RG 000.248 A bidder should also be mindful of how the information contained in the bidder's statement interacts with other public disclosures the bidder has made. For example, information previously disclosed to the market may need to be updated in the bidder's statement to ensure that target holders are sufficiently informed and are not misled. Any inconsistencies between the disclosures made in continuous disclosure notices and the bidder's statement must be clarified and explained.

RG 000.249 RG 228 discusses a number of methods and tools that can be used in preparing a document that is clear, concise and effective: RG 228.19–RG 228.45. If the consideration under a bid includes scrip, a bidder should refer, in particular, to our guidance in RG 66 and Sections B–H of RG 228 when considering the content and presentation of the disclosure required under s636(1)(g) and (ga).

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

RG 000.250 Other guidance we have published that may be relevant in the preparation of the bidder's statement is set out in Table 2.

Ongoing disclosure requirements

RG 000.251 The information in a bidder's statement must be updated in a supplementary bidder's statement by the bidder when it becomes aware of:

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

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

RG 000.252 Successive supplementary statements form a series under the disclosure regime in Pt 6.5: s645(1) and 646. The premise of this regime is that, if material developments occur in the course of a bid, the appropriate method for disseminating that information is through a formal supplementary statement. This promotes the orderly flow of information and underlines the status of the information as an official release issued in a regulated environment: see RG 25.46–RG 25.66.

Note: See also RG 000.394–RG 000.400.

Unacceptable circumstances

RG 000.253 A failure to adequately comply with the disclosure requirements in s636, in addition to constituting a contravention, may offend the principles in s602(a) and (b) and give rise to unacceptable circumstances: see also Takeovers Panel Guidance Note 18 *Takeover documents* (GN 18).

The bidder's intentions

RG 000.254 Sections 636(1)(c) and (d) require the bidder to disclose details of its intentions regarding:

- (a) the continuation of the target's business;
- (b) any major changes to be made to the target's business (or, for a managed investment scheme, the operation of the scheme), including any redeployment of the fixed assets of the target, or scheme property; and
- (c) the future employment of the target's present employees (or the replacement of the responsible entity).

RG 000.255 If a bidder has formed intentions about a matter in s636(1)(c) or (d), it must disclose these intentions. If a bidder has actions in mind, but has made no decision to bring about any particular state of affairs regarding a matter in s636(1)(c) or (d), then it must disclose the reasons why it has not made a decision on the matter.

RG 000.256 If a bidder bases its intentions, or its reasons for making a bid, on an analysis of the costs and benefits of merging the activities of the bidder and the target, this should also be disclosed, including the means by which the merger may be achieved.

RG 000.257 The disclosure requirement is not confined to intentions 'adopted by the board, either expressly or by virtue of their implied assent to board papers

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

- RG 000.258 Where intentions involve any understanding or agreement with third parties, details of that understanding should be disclosed: see *National Foods Limited 01* [2005] ATP 8.
- RG 000.259 While s636(1)(c) does not itself require intentions to be formed, the Takeovers Panel has considered that a failure to formulate intentions and disclose them in the bidder's statement may amount to a departure from the policy of s602(a) and (b)(iii): see *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [85]–[87], and *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18 at [76].

Vague expressions are insufficient

- RG 000.260 Non-committal or undecided statements of intention are insufficient to satisfy the disclosure requirements of s636. A statement that the bidder's 'present intention' is to continue the target's business, and 'review and evaluate the activities and investments and other assets' of the target if the offer is successful 'amounts to nothing more than a statement that, until such time as [the bidder] forms its intentions, something it will not be able to do until its takeover offer is successful and its review and evaluation complete, the status quo will be preserved': see *Cumberland Credit Corporation Ltd v TNT Australia Pty Ltd* (1988) 13 ACLR 371 at 375–6 (*Cumberland*).
- RG 000.261 The use of vague and indeterminate expressions to describe a bidder's intentions undermines the purpose of the requirement in s636(1)(c) and (d): see *ICAL*. Statements that the bidder would rationalise the operations of the target and conduct a strategic review, without any indication of action to follow the review, do not amount to 'intentions' for the purpose of satisfying s636(1)(c) and (d). An intention to 'integrate' the operations of the target is similarly ambiguous: *Associated Dairies Ltd v Central Western Dairy Ltd* (1993) 11 ACLC 827.

Alternative or contingent intentions

- RG 000.262 In *Cumberland*, the court held that, if a bidder is considering alternative options for the future of the target company, it must disclose these even if it has not chosen between them.
- RG 000.263 In *ICAL*, the court held that an intention to sell significant assets of the target is no less an intention because it is 'not complete, unreserved and final, and there is room for further consideration of the choice of particular assets and the time for sale'.

- RG 000.264 The bidder is required to disclose its intentions that involve alternative options, or are contingent on, or subject to, further consideration or review: *AAPT*, citing *Cumberland* and *ICAL*.
- RG 000.265 However, the bidder may reserve the right to make final decisions until it has all relevant information after the acquisition. If intentions cannot be formulated precisely until the takeover is completed, there is a need for careful language, which reflects the commercial situation and avoids encouraging speculation: *AAPT*; see also *Gantry Acquisition Corporation v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 51 FCR 554 and *Ampolex Ltd v Mobil Exploration & Producing Australia Pty Ltd* (1996) 19 ACSR 354. This careful language cannot be used to misrepresent the development of, or the level of detail attaching to, the bidder's intentions: *Ampolex*.
- RG 000.266 The disclosure about the bidder's intentions must take into account all potential outcomes of the bid. In particular, if a bidder discloses its intentions based on its acquiring 100% of the target, it must also disclose its intentions if it acquires a lesser degree of control.

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

Funding arrangements

- RG 000.267 If the consideration offered under a bid is cash, or includes a cash component, the bidder must include details of its funding arrangements in the bidder's statement under s636(1)(f).

Principles underlying the funding disclosure requirement

- RG 000.268 The object of the requirement to disclose bid financing arrangements is to ensure that target security holders have sufficient information to enable them to assess the bidder's ability to pay for the securities it is offering to buy.
- RG 000.269 As a fundamental disclosure requirement, s636(1)(f) is also an important part of maintaining an informed market. Inadequate disclosure of funding arrangements may be misleading or otherwise give rise to a false market in the target's (and possibly the bidder's) securities.
- RG 000.270 The funding disclosure requirements therefore reinforce the purposes underlying Ch 6 of ensuring:
- (a) an efficient and informed market for control of the target (s602(a)); and
 - (b) that target security holders and directors have sufficient information to assess the merits of the bid (s602(b)(iii)).

- RG 000.271 The importance of a bid being adequately funded is also reflected in s631(2), which prohibits a person from publicly proposing to make a bid if the person is reckless about whether they will be able to perform their obligations if a substantial proportion of the offers under the bid are accepted.

What should be disclosed

- RG 000.272 The principles underlying the funding disclosure requirement should be considered in determining the sufficiency of disclosures made under s636(1)(f) in any given case.
- RG 000.273 To comply with its obligations, a bidder should ensure that the bidder's statement:
- (a) discloses the total amount necessary to pay for all the securities to which the bid relates or is likely to relate (including securities to which the bid may extend because of s617(2) or any ASIC relief);

Note: In a market bid, this includes any securities that may come into existence during the offer period: s617(3). See also *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18.
 - (b) discloses whether the bidder holds, or has access to, sufficient funds to pay for all the securities. If the funds available to the bidder are less than the amount necessary, this should be fully explained (RG 000.277–RG 000.283);
 - (c) identifies how much of the cash will come from amounts held by the bidder (RG 000.284–RG 000.286);
 - (d) if some or all of the cash consideration is not sourced from the bidder's funds—identifies the person or persons providing the funds and provides details of the arrangements under which those funds are to be provided (RG 000.287–RG 000.292); and
 - (e) clearly discloses any restriction on the availability of funds under external funding arrangements (RG 000.293–RG 000.295).

Other material information about funding arrangements

- RG 000.274 A bidder should also be mindful of the requirements of s636(1)(g) and (ga) (in a cash and scrip offer) and s636(1)(m) to the extent that they may also require disclosure of information relating to financing arrangements that is material to a target holder's assessment of the offer. The information required under these provisions is additional to any information required under s636(1)(f).

Supplementary disclosure

- RG 000.275 When there is a change to funding arrangements, or any development relating to the funding of the bid after the lodgement of the bidder's

statement, the bidder may need to provide supplementary disclosure addressing the new circumstances, including the effect of the new circumstances on any of the matters listed at RG 000.273: s643(1)(c).

- RG 000.276 Supplementary disclosure will be required, for example, where:
- (a) the bidder arranges alternative or replacement funding;
 - (b) the bidder becomes aware that a condition of a funding arrangement may not be satisfied, or funding may no longer be available because of a new circumstance;
 - (c) the bidder improves its offer in a way that increases the amount required to fund its commitments under the bid; or
 - (d) the amount of cash required to fund the bid otherwise increases (e.g. the bid is extended to newly issued bid class securities).

Disclosure when insufficient funds available for all securities

- RG 000.277 A bidder who has not organised sufficient funds to pay for all of the securities that the bid relates to must disclose its basis for expecting to be able to pay for all of the shares for which it may receive acceptances, bearing in mind the requirements of s631(2)(b).

Bidder's basis for having sufficient funding

- RG 000.278 The focus of s636(1)(f) is disclosure of a bidder's financing arrangements and, as such, the provision does not itself require the bidder to have available, on the date that the bidder's statement is lodged with ASIC, the funds necessary to pay for all the securities to which the bid relates.
- RG 000.279 However, s631(2)(b) requires that a person must not publicly propose to make a takeover bid if the person is reckless about whether they will be able to fulfil their obligations under the bid if a substantial proportion of the offers under the bid are accepted. In addition to a possible contravention of s631, if a bidder is unable to demonstrate sufficient funding on an ongoing basis, or a reasonable basis to expect to be able to fund its bid, this may also give rise to unacceptable circumstances.

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

- RG 000.280 Given the prohibition in s631(2)(b), the disclosures made under s636(1)(f) (and, in some cases, other paragraphs of s636(1)) should be sufficient to demonstrate the bidder's basis for expecting to have the necessary funding to pay for the securities to which the bid relates. If the bidder's statement does not disclose a reasonable basis, this may indicate that:
- (a) the bidder is in contravention of s631(2)(b);

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

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

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

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

RG 000.281 Where a bidder's basis, in whole or in part, for not needing to secure full funding is an expectation that it will not need to pay for certain securities to which the bid relates because acceptances will not be received for them, the bidder must disclose the basis for this expectation. Examples of such a basis may be:

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

RG 000.282 Target holders who allow themselves to be identified as being bound not to dispose of their securities during the bid, and who subsequently sell into the bid or to another person, may be liable under s1041H and 1041I. Conduct of this nature may also contravene s1041E and 1308 and give rise to unacceptable circumstances.

Note: See also RG 25.29–RG 25.34.

RG 000.283 Because a bidder may also be liable under these provisions, it should disclose in its bidder's statement any circumstance that is reasonably likely to obstruct the agreement not to sell into or outside the bid. For example, it should disclose, if applicable, the possibility of a mortgagee of the shares taking possession or exercising a power of sale.

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

Disclosure of bidder's own funding

- RG 000.284 The bidder's statement must set out details of the cash amounts held by the bidder for payment of the cash consideration offered: s636(1)(f)(i).
- RG 000.285 The reference to 'cash amounts held by the bidder' does not include money that the bidder expects to receive from external sources to pay the consideration but which have not been received at the relevant time that disclosure is required. Disclosure of the details of funding of this kind, such as funding from an anticipated capital raising, is instead required under s636(1)(f)(ii) and (iii) and must include details of the relevant arrangements under which the funds will be raised or otherwise made available: RG 000.287–RG 000.295.

Note: See *Aberfoyle* at 208.

- RG 000.286 In *Wright Heaton Ltd v PDS Rural Products Ltd* [1982] 2 NSWLR 301, Needham J accepted a submission by a bidder that details of cash amounts did not need to be disclosed unless they were set aside for the sole purpose of providing the cash consideration. We consider that, if the bidder has not earmarked any particular cash amounts held by it to pay for the securities to which the bid relates, the bidder must disclose that fact.

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

Disclosure of external funding sources

- RG 000.287 The bidder must disclose in the bidder's statement details of any arrangements under which the cash consideration is to be provided by persons other than the bidder. This may include financial institutions, related bodies corporate or shareholders of the bidder.
- RG 000.288 The bidder must disclose the identity of any persons who are to provide funds either directly or indirectly: s636(1)(f)(ii). It is insufficient to disclose only that the bidder has directly secured funds which it anticipates will be available to satisfy its obligations under the bid. The bidder must disclose the ultimate source of the borrowings or other funding.

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

- RG 000.289 The bidder must also disclose if any borrowings are not for general purposes but are specific to the funding of the offer. For example, the depositors of banks need not be disclosed, whereas back-to-back funding arrangements or guarantees must be disclosed.

RG 000.290 If more than one person is to contribute to funding for the bid, the proportion of funding to be provided by each person must be disclosed.

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

RG 000.291 Details of the arrangements for the external financing must also be disclosed: s636(1)(f)(iii). Target holders are entitled to be told the essential provisions of these arrangements. They must be told of the material details of any funding agreements that are relevant to the bidder being able to fund its offer. It is insufficient to simply state, for example, that a bidder ‘has a loan facility’, ‘subject to the usual condition precedents’, and to which ‘there are no unusual banking terms or conditions applicable’.

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

RG 000.292 The level of detail about external funding arrangements necessary to ensure that target holders have sufficient information to assess the bidder’s ability to perform its obligations may vary with the identity of the funder and the nature of the arrangements. Greater levels of disclosure may be required if a bidder and financier are foreign or are likely to be unknown to target holders: *Pinnacle VRB Ltd 04* [2001] ATP 7 at [79]–[80].

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

Disclosure of any restrictions on the availability of funds

RG 000.293 Consistent with the objective of the funding disclosure requirement, the bidder’s disclosures must include, in particular, details of the relevant terms of its external funding arrangements that have the potential to restrict the availability of funds.

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

RG 000.294 Examples of possible restrictions on the availability of funds include where:

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

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

RG 000.295 A condition contained in a loan facility which requires a defeating condition of the offer to be satisfied as a prerequisite to drawdown may become a restriction on the availability of funding if the bidder declares the offer to be free of the condition when:

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

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

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

RG 000.296 Section 636(1)(g) requires a bidder to include in the bidder's statement prospectus information about the securities offered under a takeover bid if the bidder is the issuer or the bidder controls the issuer of the scrip consideration. Section 636(1)(ga) similarly requires PDS information to be included in the bidder's statement about managed investment products offered as consideration.

RG 000.297 However, if an issuer or responsible entity that the bidder does not control authorises the bidder to offer the securities or managed investment products, these provisions, as enacted, would not require the bidder to include prospectus or PDS information about the securities in the bidder's statement. This would mean that there is no disclosure requirement, for example, if a bidder offers securities in its holding company. It is common for a holding company to use a subsidiary as a single purpose bid vehicle.

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

RG 000.298 [CO 01/1543] modifies s636(1)(g) and (ga) so that a bidder that offers securities or managed investment products as consideration under a bid must also disclose prospectus or PDS information in the bidder's statement if the issuer of the securities or the responsible entity agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the securities or managed investment products. Under our modification, the bidder must disclose prospectus or PDS information even if the bidder does not control the issuer or responsible entity.

RG 000.299 We have extended the operation of s636(1)(g) and (ga) because, when a bidder offers securities or managed investment products, target holders and directors should be given prospectus or PDS information to enable them to assess the merits of the bid: s602(b)(ii).

Bidder and issuer knowledge

RG 000.300 Under [CO 01/1543], a bidder must disclose all material that would be required under s710–713 for a prospectus for an offer of the securities *by the issuer*, rather than by the bidder.

RG 000.301 Our modification means that the bidder must obtain information from the issuer if:

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

RG 000.302 The policy underlying this requirement is that, if an issuer authorises the bidder to offer its securities as consideration, the bidder should be in a position to obtain from the issuer the information needed for prospectus disclosure.

RG 000.303 This modification is required because, while s636(1)(g) imports the disclosure requirements in s710–713, the information that must be disclosed in a prospectus is limited under s710(1)(b) by reference to a person whose knowledge is relevant. Under s710(3)(a), a person's knowledge is relevant if they are 'the person offering the securities'.

RG 000.304 In a fundraising, if a person who does not control the issuer makes an offer of securities, the person who has the capacity to issue the securities if the offer is accepted is taken to be offering the securities: s700(3). The issuer is therefore a person whose knowledge is relevant for the purposes of s710(1)(b).

RG 000.305 Without our modification, it is unclear whether s700(3) has the same effect in a takeover bid. This is because s636(1)(g) otherwise requires disclosure of all material that would be required for a prospectus for an offer of those securities *by the bidder*. A bidder that does not control the issuer may not have knowledge of matters concerning the issuer. This may mean that the bidder would not be required to disclose all the information necessary for holders to make an informed decision.

Relevant interests and dealings of foreign associates and trustees

RG 000.306 A number of matters that must be disclosed in a bidder's statement, and must be considered in the formulation of a bid, relate to interests and dealings by persons other than the bidder. These include:

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

ASIC relief: Disclosure and minimum consideration requirements

RG 000.307 We may give case-by-case relief to a bidder from the disclosure obligations in s636(1)(h), s636(1)(i)(ii), s636(1)(k)(ii), s636(1)(l), s654C and the minimum consideration requirement in s621(3) in relation to the dealings and relevant interests of:

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

RG 000.308 We may give this relief because we recognise that:

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

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

RG 000.309 Relief will be granted subject to the conditions set out in RG 000.315–RG 000.316.

RG 000.310 Our disclosure relief does not extend to the substantial holding notice requirements in Ch 6C (or to the accelerated reporting of substantial holdings in s654B). We will not give relief from these provisions because disclosure in these cases is required when a person becomes aware of the change in relevant interest, unlike s654C which requires disclosure regardless of the person’s actual knowledge.

Foreign associates

RG 000.311 For the purposes of our relief, a bidder’s ‘foreign associates’ are related bodies corporate of the bidder that meet all of the following requirements:

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

RG 000.312 We only propose to give the relief for foreign associates if the aggregate relevant interests in the bid class securities acquired, disposed of or held by the foreign associates are less than 5% of the bid class securities.

Trustees of bidder superannuation funds

RG 000.313 Our relief in relation to the dealings and relevant interests of the trustees of externally managed superannuation funds of the bidder will only be given if the relevant interests or acquisitions arise from dealings effected on behalf of the fund trustees by fund managers acting independently of, and without notification to, the trustee.

RG 000.314 Relief may be available in relation to the dealings and interests of a related body corporate of the bidder if:

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

Conditions of relief

- RG 000.315 We will tailor the conditions we impose on our relief to the case. When granting relief from the disclosure obligations in s636 and 654C, we will generally impose conditions requiring the bidder to:
- (a) make reasonable efforts between lodging the bidder's statement with us and the end of the offer period to:
 - (i) obtain all the information required to be disclosed under s636(1)(h), s636(1)(i)(ii), 636(1)(k) and 636(1)(l); and
 - (ii) comply with s654C and the supplementary statement provisions in Div 4 of Pt 6.5;
 - (b) give us details of its efforts made to ascertain the information specified in (a) above, including copies of correspondence sent to its foreign associates or superannuation trustees, as relevant;
 - (c) disclose in the bidder's statement (as supplemented) the effect of any relief; and
 - (d) include any information obtained under RG 000.315(a) in a replacement bidder's statement or a supplementary bidder's statement.
- RG 000.316 When granting relief from the minimum bid price requirement in s621(3), we will generally impose conditions requiring the bidder to:
- (a) make reasonable efforts to find out whether a price higher than the bid price was paid, or was agreed to be paid, for bid class securities by a foreign associate of the bidder or trustee of a superannuation fund of the bidder during the four months before the bid. This obligation applies after lodging the bidder's statement with us and throughout the offer period;
 - (b) increase the price to be paid under the bid as soon as possible after it discovers that a higher price was paid, or was agreed to be paid, for bid class securities by a foreign associate of the bidder or trustee of a superannuation fund of the bidder during the four months before the bid;
 - (c) give us details of its efforts made to obtain the information specified in (a) above, including copies of correspondence sent to its foreign associates or superannuation trustees, as relevant; and
 - (d) disclose in the bidder's statement (as supplemented) the effect of any relief.

Information not available at lodgement

- RG 000.317 A bidder should provide information that is up-to-date at the time it sends the bidder's statement and offer document to holders. However, in many cases the bidder will need to lodge the bidder's statement with ASIC some time before dispatch: s633(1).

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

- RG 000.318 [CO 01/1543] modifies s633 so that a bidder may, as set out in Table 5, omit or provide modified disclosure in the copies of the bidder's statement that the bidder lodges with ASIC, sends to the target and sends to any relevant financial market operator.
- RG 000.319 If a bidder relies on this relief, the bidder must:
- (a) include the information specified in the third column of Table 5 in the copies of the bidder's statement sent to holders; and
 - (b) at the time that the bidder dispatches its first bidder's statement to holders, send a copy of the updated bidder's statement to ASIC, the target and any relevant financial market operator.

Table 5: Modified information requirements for the bidder's statement under [CO 01/1543]

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

Why we have made this modification

- RG 000.320 A bidder should not be required to disclose information at the time of lodgement if:
- (a) the information is not available, or to disclose it would unreasonably fetter the bidder's discretions; and
 - (b) the information is not critical until the start of the offer period.
- RG 000.321 Our class order modification is similar in effect to s644(1) of the old Corporations Law, which provided that a person must register a copy of a Part A statement and a copy of one of the offers, which need not include:

- (a) the name or address of the holder;
- (b) the date of the proposed offer or any other date that is related to, or dependent on, that date; or
- (c) the total number of shares in each class of shares in the target and the number to which the bidder is entitled.

Bid dates

RG 000.322 Offers under a takeover bid must remain open for the period stated in the offer: s624(1). A conditional bid must specify a date (not more than 14 days and not less than seven days before the end of the offer period) on which to give notice on the status of a defeating condition: s630(1). Our relief in [CO 01/1543] means a bidder does not have to specify these dates at the time of lodgement and therefore is not committed to a timetable that it may have difficulty in meeting.

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

RG 000.323 A bidder's statement must disclose details of the consideration or benefits given, or agreed to be given, by the bidder or an associate in relation to bid class securities in the four months before the date of the bid: s636(1)(h) and (i). The date of the bid is the date on which offers are first made: s9.

RG 000.324 The bidder's statement for an off-market bid must also disclose:

- (a) the number of bid class securities in which the bidder has a relevant interest immediately before the first offer is sent (s636(1)(k)(ii)); and
- (b) the bidder's voting power in the company (s636(1)(l)).

RG 000.325 Our modification provides relief for a bidder wishing to enter into transactions or arrangements after lodgement which result in changes to the details that must be disclosed in the bidder's statement under the provisions detailed in RG 000.323–RG 000.324. Because information about the consideration, benefits, relevant interests and voting power may be affected by transactions between lodgement and the date of the bid (and may therefore be unavailable at the time of lodgement), the class order allows a bidder to disclose in the lodged copy of the bidder's statement:

- (a) details of the consideration and benefits for the four months before the date of lodgement; and
- (b) the relevant interest and voting power information as at the date of lodgement.

RG 000.326 Where this relief is relied on, the bidder's statement sent to holders must be updated so that information relevant to the period after lodgement is included.

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

Substantial holding disclosure

- RG 000.327 Our relief does not affect the bidder's substantial holding notice obligations under s671B. If a bidder acquires further bid class securities after lodging its bidder's statement, the bidder must still provide substantial holding information, where:
- (a) the bidder begins to have a substantial holding in the target company (s671B(1)(a));
 - (b) the bidder has a substantial holding and there is a movement of at least 1% in its holding (s671B(1)(b)); or
 - (c) the bidder makes the takeover bid for securities in the target company (s671B(1)(c)).

Updated information to be current as at date of bid

- RG 000.328 Our relief in [CO 01/1543] requires the updated disclosure in the bidder's statement dispatched to holders to be current as at the date that offers are first made, consistent with the requirements in s636(1).
- RG 000.329 Although our relief in [CO 00/2338] allows a reference period for valuing quoted securities under the minimum bid price rule in s621(4) to be chosen up to five days before offers are first made, in order to accommodate finalisation and printing of the bidder's statement, our relief in [CO 01/1543] does not allow disclosure to be made as at an earlier date in a similar way.
- Note: Further discussion of this aspect of the relief in [CO 00/2338] can be found at RG 163.10–RG 163.24.
- RG 000.330 This is because it is not normally onerous for the bidder to comply in practice with these disclosure requirements by, for example, ensuring that during the period required for printing, it:
- (a) ceases increasing its voting power in the target and relevant interests in target securities; and
 - (b) ceases buying bid class securities on-market under item 2 of s611.
- RG 000.331 Further, at the time the bidder is finalising its bidder's statement for printing, the bidder should have set the dates of its bid.

Changes to a bidder's statement between lodgement and dispatch

- RG 000.332 It may be necessary or desirable for a bidder to amend its bidder's statement after it has been lodged, but before it is dispatched. The disclosure regime under Pt 6.5 provides for amendments to be made by way of a supplementary bidder's statement—however, the operation of the provisions may be unclear or less suited to updates before dispatch.

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

- RG 000.333 Where bid class securities are quoted and a supplementary statement is lodged with us, the combined operation of item 6 of s633(1) (and s635(1)), s646 and 647(3)(b) is to require the bidder to send the original bidder's statement to holders, to lodge the supplementary statement with us and to send a copy to the operator of the prescribed financial market.
- RG 000.334 Where bid class securities are not quoted, and a supplementary bidder's statement is lodged with us before the bidder's statement is dispatched to holders, it is uncertain whether the combined operation of item 6 of s633(1), 646 and 647(3)(c) requires that:
- (a) the supplementary bidder's statement must be dispatched as soon as practicable and, potentially, before dispatching the original bidder's statement;
 - (b) the supplementary bidder's statement must be dispatched with the original bidder's statement; or
 - (c) the supplementary bidder's statement must be dispatched before dispatch of the original bidder's statement but must be dispatched again with the original bidder's statement.

ASIC exemption: Replacement bidder's statements

- RG 000.335 Where a supplementary bidder's statement is lodged with us before dispatch of the bidder's statement, Class Order [CO 00/344] *Changes to a bidder's statement between lodgement and dispatch* allows a bidder to dispatch a replacement bidder's statement incorporating the substantive information in both the original and each subsequent supplementary bidder's statement.

Note: The supplementary bidder's statement must be lodged before the latest time by which the bidder's statement may be dispatched under s633(1) or 635(1).

- RG 000.336 [CO 00/344] also relieves the bidder of its obligation under s647(3)(c) to dispatch a copy of the bidder's supplementary statement to holders before and/or when dispatching the bidder's statement if the bidder dispatches a replacement bidder's statement (the bidder's obligations under s647(3)(a) and (b) are unaffected).

- RG 000.337 The relief in [CO 00/344] is available on the conditions set out in Table 6.

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

Condition	Details
Lodgement and sending of replacement and marked-up replacement	As soon as practicable, the bidder must lodge with us and send to the target (and, if the target is listed, the operator of the prescribed financial market): <ul style="list-style-type: none"> • a copy of the replacement bidder's statement; and • a marked-up copy of the replacement bidder's statement showing the changes from the original bidder's statement.

Condition	Details
Dispatch of replacement	<p>The bidder must dispatch the replacement bidder's statement:</p> <ul style="list-style-type: none"> • in an off-market bid—14 to 28 days after the replacement bidder's statement is lodged with us and sent to the target (and, if applicable, the operator of the prescribed financial market), unless: <ul style="list-style-type: none"> – the only change from the original bidder's statement is an update on the valuation of securities offered as bid consideration; – the target provides written consent following approval in any of the ways a target's statement may be approved, as specified in s639(1); or – we agree in writing to a shorter period of time: see RG 000.340–RG 000.341; and • in a market bid—within 14 days after the replacement bidder's statement is lodged with us and sent to the target (and, if applicable, the operator of the prescribed financial market).
Content of replacement	<p>The replacement bidder's statement must:</p> <ul style="list-style-type: none"> • be clearly identified as a replacement bidder's statement; • explain that it replaces the original bidder's statement lodged with us; • be dated the day it is lodged with us; and • give the date that the original bidder's statement was lodged with us.

Policy underlying our class order relief

- RG 000.338 We have granted class order relief under [CO 00/344] because it is preferable for a holder to receive a single replacement bidder's statement, when the original bidder's statement has been amended before dispatch, rather than:
- (a) where the bid class securities are not quoted—either:
 - (i) the original bidder's statement and a separate supplementary bidder's statement; or
 - (ii) a supplementary bidder's statement received before the original bidder's statement; and
 - (b) where the bid class securities are quoted—an original bidder's statement that has been amended by a supplementary bidder's statement that has been sent to the operator of the prescribed financial market.
- RG 000.339 We have also provided relief to remove any confusion about the procedure that must be adopted when dispatching original and supplementary bidder's statements for bid class securities that are not quoted. This arises when reading item 6 of s633(1), s646 and 647(3)(c) together.

Replacement bidder's statements and the bid timetable

- RG 000.340 [CO 00/344] provides that the timetables for market and off-market bids recommence after the replacement bidder's statement has been sent to the

target, so that the target has the following periods of time to consider any changes made by the bidder:

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

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

RG 000.341 We may consent in writing to shorten the period, after consulting with the target, if the changes to the bidder's statement are:

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

Potential for misleading conduct

RG 000.342 [CO 00/344] does not require the bidder to prepare a replacement bidder's statement whenever a supplementary statement is lodged with us. However, it should be noted that, in some cases, it may be misleading to holders if a bidder's statement and a comprehensive supplementary bidder's statement are dispatched to holders at the same time (see *Pancontinental Mining Ltd v Goldfields Ltd* (1995) 16 ACSR 463 at 472), or if a holder receives a supplementary statement before receiving the statement it is intended to supplement.

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

RG 000.343 As discussed at RG 000.317–RG 000.331, [CO 01/1543] allows the bidder to omit from the version of the bidder's statement lodged with us certain information unavailable at the time of lodgement. It also allows the bidder to give standard information as at the date lodged, such as details of the bidder's relevant interest.

RG 000.344 The bidder must complete or update the information before it dispatches the bidder's statement. The requirements in items 4 and 5 of Schedule D of [CO 00/344]—for example, to date the bidder's statement with the day on which the replacement statement is lodged—do not apply. This is because these are standard changes made under [CO 01/1543], rather than under our relief in [CO 00/344] relating to replacement bidder's statements.

Extension of time for sending the bidder's statement

RG 000.345 In an off-market bid, the bidder must send the bidder's statement and offers to each target holder over no more than three days during the period of 14 to 28 days after the bidder's statement is sent to the target: item 6 of s633(1). A bidder must make its offers in this way within two months after publicly proposing the bid: s631.

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

RG 000.346 We may give relief to extend the period for sending the bidder's statements beyond 28 days after the bidder's statement is sent to the target if:

- (a) the bidder could not reasonably be expected to dispatch the bidder's statement within the time provided; or
- (b) it would be advantageous to holders if the bidder's statement were sent to them at a later time.

RG 000.347 We will only consider giving this relief if the time constraints and other conditions imposed by s631 will be met. However, where we have given the bidder an extension of the two-month period in s631, this relief may be given if the bid documents will be sent within the extended period: see RG 59.71–RG 59.76.

RG 000.348 We may give this relief because, if the two-month deadline imposed by s631 will be met, holders under an off-market bid should not generally be adversely affected by an extension of time for dispatching the bidder's statement.

RG 000.349 If the delay in dispatching the bidder's statement means the bidder must prepare a supplementary bidder's statement, our relief may be conditional on the bidder instead sending a replacement bidder's statement in reliance on [CO 00/344].

G The target's statement

Key points

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

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

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

General principles

- RG 000.350 The target's statement contains the target board or responsible entity's formal response to a bid. In an off-market bid, it must be sent to holders no later than 15 days after the target is notified of the dispatch of the offers: item 11 of s633(1). In a market bid, it must be made available to the market within 14 days after the bid is announced: item 10 of s635(1).
- RG 000.351 Together with the bidder's statement, the objective of the target's statement is to provide target holders with sufficient information for them to make an informed decision in response to the bid—in accordance with the purposes of Ch 6 set out in s602(a) and (b). As with the bidder's statement, the disclosures made in the target's statement are reinforced by a number of statutory rights and requirements designed to enhance their effectiveness and reliability: see RG 000.243–RG 000.244.

Content and presentation of the target's statement

- RG 000.352 Section 638 governs the content requirements of the target's statement. It contains two basic elements:
- (a) the directors' recommendations; and
 - (b) the general disclosure test.
- RG 000.353 Under s638(3), the target's statement must include a statement by each director of the target:
- (a) recommending that offers under the bid are accepted or not accepted, and giving reasons for the recommendation; or
 - (b) giving reasons why a recommendation is not made.

RG 000.354 The directors' recommendations are important disclosures because it is common that some target holders will pay particular regard to the views of the board. The prospect of securing a favourable recommendation from target directors (i.e. a 'friendly' bid) will often be attractive to a bidder. Accordingly, it is essential that the disclosure surrounding the directors' recommendations is fully explained and reasoned.

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

RG 000.355 As with the general disclosure test applying to a prospectus in s710, the test in s638 is designed to engender a focus on the information required by investors. In considering the content and presentation of the target's statement, target directors and responsible entities should pay particular regard to our guidance in RG 228 on how disclosure documents can be presented in a clear, concise and effective manner.

Note: See also GN 18, paragraph 11.

RG 000.356 When preparing the target's statement, target directors and responsible entities should also take into account previous public disclosures that have been made in other contexts—particularly where those disclosures may be misleading or may not include sufficient detail: see also RG 000.248. This includes disclosures such as advertisements, media articles and continuous disclosure announcements: see also RG 228.173.

RG 000.357 Other guidance we have published that may be relevant in the preparation of the target's statement is set out in Table 2.

Ongoing disclosures

RG 000.358 As is the case with the bidder, the target must also ensure that the disclosure made in the target's statement is kept up to date and accurate. Where additional or corrective disclosures are required, these should be made in a supplementary target's statement: see RG 25 and RG 000.251–RG 000.252.

Note: See also RG 000.394–RG 000.400.

Unacceptable circumstances

RG 000.359 In addition to resulting in a contravention, a failure to adequately comply with the disclosure requirements in s638 may offend the principles in s602(a) and (b) and may give rise to unacceptable circumstances: see RG 000.253.

Extension of time for sending the target's statement

RG 000.360 Under item 12 of s633(1), the target in an off-market bid must send a copy of the target's statement to each holder:

- (a) no earlier than the day on which the target sends the target's statement to the bidder; and
- (b) no later than 15 days after the target receives a notice that all offers have been sent as required by item 6 of s633(1).

RG 000.361 In some cases, a target may have difficulty in meeting this timetable. A common reason given by a target for the delay in preparing the target's statement is the lack of ready access to information that may be material to a holder's decision to accept an offer under the bid.

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

ASIC relief: Extended time for dispatch

RG 000.362 We may give relief to extend the time in which the target must send its target's statement to holders under an off-market bid. We will consider giving this relief if:

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

RG 000.363 In addition to requiring the target to advise the market of the extension of time, we may also require the target to immediately inform the market of significant information that is already in the target's possession and that holders require in deciding whether to accept offers under the bid.

RG 000.364 We will not give this relief if we consider that the target already has all the material information that a holder needs to assess the merits of a bid.

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

RG 000.365 If the target cannot reasonably be expected to dispatch its target's statement to holders more than 10 business days before the close of the bid:

- (a) the target may ask the bidder to extend its bid; or

- (b) the target may apply for the relief discussed at RG 000.366 to dispatch an incomplete target's statement.

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

RG 000.366 In limited circumstances, we may grant relief to allow a target to dispatch an incomplete target's statement. For example, we may grant relief on condition that the target:

- (a) advises its holders of the nature, extent and significance of the relevant deficiencies in the target's statement; and
- (b) undertakes to provide a supplementary target's statement which remedies all the deficiencies mentioned in (a) above as soon as practicable.

Note: Where the target has commissioned an expert report the target should avoid releasing the expert's conclusion in advance of the final report: see Regulatory Guide 112 *Independence of experts* (RG 112) at RG 112.62–RG 112.65.

Receivers and managers

RG 000.367 A target's statement must contain a statement by each director of the target:

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

RG 000.368 Section 638(4) covers the circumstances when a target is being wound up or is under administration. In these circumstances, the statements under s638(3) must be made by the liquidator or administrator. However, s638 does not address how the obligations of target directors will best be fulfilled if a receiver and manager has been appointed to manage the affairs of the target: see s90.

ASIC relief: Receivers and managers assuming directors' obligations

RG 000.369 We may give relief to allow a receiver and manager to assume all of the functions of the directors in relation to a target's statement where:

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

RG 000.370 We may provide this relief because we consider that there is no reason why a receiver and manager should be denied the same powers in this situation as are given to a liquidator or an administrator.

H Consents

Key points

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

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

- made by official persons or made in official documents;
- published in books, journals or comparable publications; and
- made in documents lodged with ASIC or a securities exchange.

The consent requirement

RG 000.371 A bidder's statement or target's statement may only include, or be accompanied by, a statement by a person, or a statement based on a statement by a person, with that person's consent: s636(3) and 638(5).

RG 000.372 A bidder or target is required to obtain the consent of the person who makes a statement before using it in the bidder's or target's statement so that the person can:

- (a) control or limit their liability; and
- (b) control the overall effect of the statement.

Note: See Regulatory Guide 55 *Statements in disclosure documents and PDSs: Consent to quote* (RG 55) at RG 55.6–RG 55.7.

Consent to quote officials and publications

RG 000.373 A bidder or target may wish to include a statement that is not specific to the bid, bidder, target or their businesses. This may be useful in meeting the requirement that the bidder's or target's statement contains all information that holders would reasonably require to make an informed decision about whether to accept the offer.

ASIC exemption: Consent to quote officials and publications

RG 000.374 Class Order [CO 03/635] *Takeovers: consent to quote officials and publications* exempts bidders and targets from s636(3) and 638(5) so that the bidder's or target's statement may include a statement by an official person

or author without their consent and without stating that they have given their consent.

- RG 000.375 [CO 03/635] allows the inclusion of a statement that:
- (a) fairly represents a statement by an official person; or
 - (b) is a correct and fair copy of, or extract from:
 - (i) a public official document; or
 - (ii) a statement that has already been published in a book, journal or comparable publication.
- RG 000.376 The class order does not apply if the original statement was made in connection with:
- (a) the takeover bid;
 - (b) the bidder or target; or
 - (c) any business, property or person that is the subject of the bidder's or target's statement.
- RG 000.377 Our relief does not protect a bidder or target from liability if it uses a statement and knows that the statement is misleading or presents the statement in a misleading or deceptive way.

Policy underlying our exemption

- RG 000.378 Case law indicates that, in general, the author of a statement will not be civilly liable for its inclusion (or the inclusion of a statement based on it) in a bidder's or target's statement if the original statement was not made for the purpose of being included in the bidder's or target's statement: *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148; *Bride as Trustees for the Pinwernyng Family Trust v KMG Hungerfords* (1991) 109 FLR 256; and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 142 ALR 750.
- RG 000.379 Our policy on s636(3) and 638(5) seeks to achieve consistency with our policy on the equivalent provision in the context of fundraising: s716(2)
- Note: See RG 55 and Class Order [CO 00/193] *Experts: Citing in disclosure documents*.

Government officials and public official documents

- RG 000.380 Without our relief, bidders or targets would be required to obtain consent to refer to the statements of government officials and government publications—for example, publications of the Australian Bureau of Statistics or the Commonwealth Bureau of Meteorology. To obtain the consent of Government to use such a general statement may be onerous for the bidder or target. There is a low risk of liability for the Government in these circumstances.

- RG 000.381 The Crown in right of the Commonwealth may be exposed to civil liability for damages for a misleading statement included in a bidder's or target's statement: s5A(3) and (5). But liability is unlikely if the statement was not made for the purpose of being included in the bidder's or target's statement.
- RG 000.382 Guidance on the meaning of the phrase 'public official document' in the class order exception can be found in cases that have considered the term 'public document' in an evidentiary context. A public document is one made by a public official as the result of a public inquiry and is available to the public: Lord Blackburn in *Sturla v Freccia* [1874–80] All ER Rep 657. Documents do not become public official documents merely because they have been lodged with a government department or statutory authority and are maintained for public access on a registry by the department or authority.

Publications

- RG 000.383 It is generally impractical for the bidder or target to obtain the consent of the author of a statement in a book, journal or other comparable publication, if the statement is not specific to the bid, bidder, target or their businesses. There is also a low risk of liability for the author in this case.
- RG 000.384 The phrase 'book, journal or comparable publication' in the class order exception includes references to statements in a form, and of a standard, similar to that normally contained in a book or journal, but which are made available through the internet or other electronic means. This excludes, for example, references to statements made in internet chat rooms, news groups and homepages with unaccountable content (with anonymous participants or without editorial control).

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

- RG 000.385 We may give case-by-case relief to permit the bidder's or target's statement to include a statement by an official person, or in a public official document, which was made in connection with the bid, bidder, target or their respective businesses.
- RG 000.386 However, we will not give relief if:
- (a) the Commonwealth's interests are involved—for example, in the context of a privatisation; or
 - (b) the statement was made for the purpose of being included in the takeover document.
- RG 000.387 This is because liability is more likely in these cases: see RG 000.381.

Consent to use a lodged statement

RG 000.388 It may be difficult to obtain a person's consent to include in a bidder's or target's statement a public statement they have made in a lodged document—particularly in the context of a hostile takeover bid. For example, it may be difficult for a bidder to obtain the consent of the target's chairman to include their statement in a bidder's statement.

ASIC modification: Using a lodged statement

RG 000.389 [CO 01/1543] modifies s636(3) and 638(5) so that the bidder's or target's statement may include a statement by a person without the person's consent, if the statement was made in a document that has been lodged with:

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

RG 000.390 For the relief to apply:

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

RG 000.391 We have provided this modification because, if a person makes a statement in a document lodged with a securities exchange under the listing rules or with us, they do so in a regulated context for the purpose of informing holders and the market. The person who makes the statement should be mindful of potential liability. It is readily foreseeable that the statement may be quoted in the context of a takeover bid.

RG 000.392 Our relief does not protect a bidder or target from liability if it uses a statement and the statement is presented in a misleading or deceptive manner.

RG 000.393 Where possible, our policy on s636(3) and 638(5) seeks to be consistent with our policy on the equivalent provision in a fundraising context: s716(2).

Note: We may give case-by-case relief similar to that given for consent by an expert in prospectuses: see RG 55.

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I Supplementary statements

Key points

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

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

Supplementary statements when the target is listed

- RG 000.394 If the target is listed and the bid class securities are quoted, s647(3) requires any supplementary statements, prepared by either the bidder or the target, to be lodged with us and sent to the prescribed financial market as soon as practicable. It does not require the bidder to dispatch the supplementary document to target holders.
- RG 000.395 Despite compliance with s647(3), in some circumstances, failure to send a supplementary statement to holders may give rise to unacceptable circumstances under s657A—for example, this failure may be contrary to the purposes of Ch 6 of ensuring that:
- (a) holders are given enough information to enable them to assess the merits of the proposal (s602(b)(iii)); and
 - (b) as far as practicable, holders all have reasonable and equal opportunities to participate in any benefits accruing to holders (s602(c)).
- RG 000.396 It may also be appropriate to send a supplementary statement to holders to counteract a misleading or confusing statement previously sent to holders during the offer period: see RG 25.66.
- RG 000.397 In some circumstances, it may also be misleading to send a supplementary statement to a holder either before or with the original bidder's statement. We have provided relief enabling bidders to dispatch replacement documents: see RG 000.332–RG 000.344.

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

- RG 000.398 If the target is listed and the bid class securities are quoted, we may refer a matter to the Takeovers Panel if the failure of a bidder or target to dispatch a supplementary statement to holders appears to constitute unacceptable

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

RG 000.399 We may also refer a matter to the Takeovers Panel if they lodge or dispatch a supplementary statement either before or with the original bidder's statement, if it has the tendency to mislead holders in the circumstances: see also RG 000.342.

RG 000.400 In deciding whether to refer a matter to the Takeovers Panel, we will consider the content of, and the extent of the publicity given to, the supplementary statement.

J Variation of offers

Key points

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

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

In appropriate cases, we may provide relief for variations:

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

Extending the offer period under an off-market bid

- RG 000.401 Section 650C permits a bidder to extend an unconditional bid at any time before the end of the offer period. However, where a bid is subject to a defeating condition, an extension of the offer period is only permitted after the bidder has given its s630(3) notice if certain events in relation to a competing offer occur: s650C(2).

Extension of an unconditional bid that was previously conditional

- RG 000.402 Whether a variation extending the offer period is permitted under s650C(2) must be determined as at the time of variation. If, at the time of the variation, the bid is open and unconditional, the extension is lawful. It is not relevant to the lawfulness of the extension of a presently unconditional offer, that when originally made, the bid was subject to a defeating condition and the time for giving a s630(3) notice in relation to that condition has passed.
- RG 000.403 The suggestion that the time for determining the operation of s650C(2) is the time at which the offer was originally made is not supported by the actual wording of the provision, and there are no policy grounds for prohibiting the extension of an unconditional offer, which was originally conditional, after the s630(3) notice has been given.

Dispatch of notices extending an unconditional bid

RG 000.404 To effect an extension of the offer period, the bidder must prepare, lodge and dispatch a notice of variation in accordance with s650D. A notice of variation that merely extends the offer period at a time when the bid is not subject to any defeating conditions does not need to be sent to holders who have already accepted the offer, but must be sent to other holders who received an offer: s650D(1)(c) and 650D(2).

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

RG 000.405 An extension of the offer period does not affect the rights of holders who have already accepted an unconditional bid because the time for providing consideration under a conditional takeover contract runs from the later of:

- (a) the holder's acceptance; and
- (b) the contract becoming unconditional.

It is therefore unnecessary to send notices of variation to holders who have already accepted.

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

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

RG 000.406 An off-market takeover offer that remains subject to a defeating condition may be extended on the day specified in s630(3) for giving the notice if:

- (a) the s630(3) notice has not already been given; and
- (b) the extension is effected before the end of that day.

RG 000.407 If the extension is effected before the end of the day on which the notice must be given, it does not contravene s650C(2). The extension of the offer before the end of the day has the effect that the s630(3) notice will no longer be due on that day. Once the extension is effected, the date for giving the s630(3) notice is postponed by a period equal to the extension: s630(2)(a).

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

RG 000.408 Although the prohibition in s650C(2) is expressed to apply only after the notice under s630(3) is given, it would not be possible for a bidder to extend a conditional offer on a later day in reliance on its own failure to give the notice. We may decline to accept for lodgement a notice of variation submitted in these circumstances: s1274(8).

Closing time for an automatically extended offer period

- RG 000.409 Under s624(2), an offer period is automatically extended if, during the final seven days of the offer period, the bidder's voting power in the target increases to more than 50%, or in an off-market bid, the offers under the bid are varied to improve the consideration offered. If either of these events occurs, s624(2) extends the offer period so that it ends 14 days after the triggering event.
- RG 000.410 While the term 'day' is not defined in the Corporations Act, the legal position is generally that a day comprises a full 24 hours, ending at midnight.
- Note: See *Prowse v McIntyre* (1961) 111 CLR 264. Our view of the legal position on time periods is set out in RG 7.
- RG 000.411 In contrast, the offer period for a takeover bid, as originally determined or subsequently extended by the bidder, may end at any time of day specified by the bidder, as long as it lasts for at least one month and not more than 12 months: s624(1)(b).
- RG 000.412 If an off-market bid is automatically extended, it is likely that s624(2) requires the extended offer period to stay open until midnight on the 14th day after the triggering event. This may create confusion because a bidder will often have previously specified a closing time that is earlier than midnight.
- RG 000.413 While it is likely that the law technically applies in the same way to an automatically extended market bid, in practice, acceptances under a market bid can only be received up until the time the relevant financial market closes on the 14th day of the extension period.

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

ASIC modification: Automatic extensions in off-market bids

- RG 000.414 Class Order [CO XX/XXX] *Closing time for an automatically extended bid* provides relief from the requirement for an automatically extended offer period to remain open until midnight on the closing day.
- RG 000.415 This class order provides that an automatically extended offer period for an off-market bid remains open on the 14th day of the extension period until the time of day that the offer period would have ended if it had not been extended.

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

- RG 000.416 We have modified s624(2) to reduce the potential that confusion may arise as a result of the operation of this provision, and to ensure that the bid will still close at a time of day that is commercially suitable for the bidder.

- RG 000.417 Bidders should ensure that the closing time for the offer period is clearly stated in the notice of automatic extension given under s624(2).

ASIC modification: Automatic extensions in market bids

- RG 000.418 Class Order [CO XX/XXX] *Closing time for an automatically extended bid* provides relief so that an automatically extended market bid is no longer required to remain open until midnight on the 14th day of the extended offer period. Given the practical constraints discussed in RG 000.413, [CO XX/XXX] requires that an automatically extended market bid remains open until the conclusion of ordinary trading on the relevant market on the 14th day of the extension period.
- RG 000.419 Bidders should state clearly, in the notice of automatic extension, that offers may be accepted until the close of trading on the relevant day.

Withdrawal rights

- RG 000.420 Under s650E, a holder who has accepted an offer under an off-market bid that is subject to a defeating condition has a right to withdraw their acceptance if the bidder varies the offer in a way that postpones for more than one month the time when the bidder has to meet their obligations under the bid.
- RG 000.421 This will most frequently occur when the offer period for a conditional takeover offer is extended. In such a case, the notice of variation to effect the extension must inform people about the right to withdraw: s650D(1)(a)(ii).
- Note: To adequately inform people, the notice should include, among other things, a clear statement about which holders have the right to withdraw: see *Sirtex Medical Limited* [2003] ATP 22.
- RG 000.422 Section 650E enables a target holder who has committed to sell their shares, and who may be dependent on the consideration for that sale arriving within a particular time period, to change their mind if that time period is unexpectedly extended.

Cumulative extensions

- RG 000.423 To determine whether s650E(1)(b) is triggered, the date from which the relevant postponement should be reckoned is the date for the provision of the consideration under the offers, as originally dispatched, no matter how short the extension.
- RG 000.424 The alternative reading—that the postponement is measured from the date for providing consideration under the offers, as previously extended, even if previous extensions have already had the effect of postponing the time for

payment—is excluded by both the construction of the provisions and their underlying policy.

RG 000.425 The following examples illustrate the application of s650E in practice.

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

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

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

Example 5: Subsequent extensions

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

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

RG 000.426 As a result of the operation of s650E, holders may be able to withdraw their acceptance after the offers under the bid have closed.

Automatic extensions

RG 000.427 An off-market bid may be extended automatically under s624(2)(a) if, within the final seven days of the offer period, the bidder improves the consideration offered.

Note: Section 650B sets out the various ways in which a bidder may vary a bid to improve the consideration offered.

RG 000.428 If a bidder improves its offer in a way that triggers an automatic 14-day extension under s624(2)(a), the bidder must offer withdrawal rights under s650E if, as a result of the variation, the time for the bidder to meet its obligations under the bid (reckoned by reference to the dates in the offers, as originally dispatched) is postponed for more than one month.

RG 000.429 The notice of variation for the improvement in consideration must inform holders about their right to withdraw acceptances under s650E: s650D(1)(a)(ii).

RG 000.430 This does not apply to automatic extensions triggered by the operation of s651A, or as a result of the bidder's voting power increasing to more than 50%.

ASIC relief: Variations to shorten payment periods

RG 000.431 Where offers have been declared unconditional, an extension of the offer period does not result in holders having a right to withdraw, because the time for provision of the consideration under contracts arising from acceptances is not postponed.

RG 000.432 The same result can be achieved without declaring the offers unconditional, by varying them to abridge the time between their close and the date for payment by a period equal to the extension.

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

RG 000.433 Because s650E(1)(b) refers to the time by which the bidder has to meet its obligations under the terms of the bid, to ensure that s650E is not triggered, despite any intention on the part of the bidder to abridge the time for payment, a bidder must formally vary the terms of the bid to reflect the abridgement. Because a variation of this type is not permitted under Pt 6.6, an ASIC modification under s655A will be required: s650A(1).

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

RG 000.434 We may grant a modification to permit a bidder to vary its offers to accelerate payment terms for this purpose, if it appears to us that doing so is not contrary to the principles underlying Ch 6.

Variation to allow conditional increase in consideration

RG 000.435 Section 650B sets out the various ways in which a bidder may vary the offers under an off-market bid to improve the consideration offered, including by increasing the amount of cash or the number of securities offered. Part 6.6 does not expressly provide for an increase in consideration that is conditional on a minimum acceptance condition.

ASIC relief: Conditional increases in off-market bids

- RG 000.436 We may grant case-by-case relief to allow a bidder to send a notice of variation during an off-market bid, which provides for an increase in consideration that is subject to a minimum acceptance condition, if the bidder:
- (a) does not require that the minimum acceptance condition is met at a point in time before the close of the bid; and
 - (b) pays the increased consideration, even if the minimum acceptance condition is waived.
- RG 000.437 A bidder may, without seeking relief, announce that it will increase its off-market bid if it receives a certain level of acceptances. Our relief removes any doubt by allowing a bidder to vary the terms of its offer to provide for the conditional increase in accordance with the requirements discussed in RG 000.436.
- RG 000.438 We may facilitate a variation of this kind because we consider that an increase in consideration during the bid period, which is conditional on a minimum acceptance condition, is not contrary to the principles in s602—provided that there is sufficient disclosure of the effect of the conditional increase.
- RG 000.439 We will not grant relief if the bidder proposes to require that the minimum acceptance condition is satisfied at a point in time before the close of the bid because we consider that this applies undue pressure on holders to accept the bid earlier than they otherwise would.

Time for payment of consideration

- RG 000.440 In connection with relief to conditionally increase the consideration payable under the bid, we may also give relief to delay the time for paying the part of the consideration representing the increase. We will give relief if the increase is still conditional at the time that the original consideration becomes payable. Under our relief, the time for paying the increase will be analogous with s620 and [CO 01/1543].
- RG 000.441 For example, if the bidder is given the necessary transfer documents with the acceptance and the increase is still conditional, the bidder must pay the increase by the end of whichever of the following periods ends earlier:
- (a) one month after the increase becomes unconditional; or
 - (b) 21 days after the end of the offer period: see s620(2)(a).

Adding scrip consideration to an off-market bid

- RG 000.442 Section 650B(1) does not expressly permit a bidder to improve the consideration under an off-market bid by adding (other than as an alternative) securities that were not previously on offer—for example, adding scrip to an all-cash offer as opposed to adding a scrip alternative to a cash offer. This is implied from the context in s650B(1)(a), (f) and (h) and from s650B(2), which requires an election to be made about the form of consideration to be taken.
- RG 000.443 Under s650B(1)(b), a bidder is able to improve the consideration by increasing the number of securities offered. This means that, if a certain security is already on offer, the bidder may increase the number of those securities offered as consideration. However, s650B(1)(b) does not permit a bidder to add a new kind of security to the consideration offered.

ASIC relief: Adding a new scrip component to existing consideration

- RG 000.444 We may give relief to allow a bidder to improve the consideration offered by adding fully paid securities to its off-market bid, if the bidder:
- (a) lodges a supplementary bidder's statement that complies with the disclosure obligations in s636(1)(g) or (ga) and any other necessary disclosure obligations;
 - (b) sends a copy of the supplementary bidder's statement to each holder, to the target and to the prescribed financial market if the target is listed; and
 - (c) lodges a copy of the notice of variation required under s650D and sends a copy to the target, to the prescribed financial market if the target is listed, and to holders (s650D(1)(c)(ii)).

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

- RG 000.445 Under an off-market bid, a bidder may offer a combination of cash and scrip as consideration under its bid from the commencement of the bid. We consider that a bidder should be able to improve an existing offer by adding a fully paid scrip component if the target board and holders have sufficient information and time to consider the significant changes to the terms of the offer involved.
- RG 000.446 If we grant this relief for securities that the bidder states or implies will be listed, we may also give consequential relief from s625(3)(c)(i).

Varying off-market offers before dispatch

- RG 000.447 Offers under an off-market takeover bid cannot be varied or freed from a defeating condition before they have been dispatched. Although Pt 6.6 enables a bidder to vary an off-market takeover offer, no offers have been made until offer documents have been dispatched to holders.
- RG 000.448 Part 6.6 does not refer to offers that are merely proposed, and the procedure it sets out for off-market offers is not appropriate to variations in the terms that are proposed to be offered. This is because the procedure:
- (a) requires copies of the notice of variation to be dispatched immediately to holders (who are not yet ascertained and who would, in any case, derive little benefit from a notice varying an offer they have not seen); and
 - (b) does not provide for the target to be given an opportunity to respond to the varied offer in its target's statement.
- RG 000.449 For similar reasons, offers may not be declared to be free of defeating conditions under s650F before they have been dispatched.
- RG 000.450 Further, item 6 of s633(1) requires that the offers that are dispatched to holders must be made on the terms set out in the bidder's statement and offer document lodged with ASIC under item 2 of s633(1). For this reason, it is also not possible to vary the proposed terms of an offer before dispatch by way of a supplementary bidder's statement or a replacement bidder's statement.

ASIC relief: Dispatch of amended documents

- RG 000.451 We will normally grant relief to allow offers to be dispatched on terms that vary from those contained in the original bidder's statement, if:
- (a) the altered documents would have been accepted for lodgement;
 - (b) the target's opportunity to make a pertinent response in its target's statement is not prejudiced; and
 - (c) the proposed variation is not contrary to the purposes of Ch 6 set out in s602.
- RG 000.452 The circumstances that led to the alteration may call for explanation in the supplementary or replacement bidder's statement.

Approving notices of variation

- RG 000.453 Section 637 requires that the copy of the bidder's statement that is lodged with us must be approved:

- (a) for a bidder that is a body corporate:
 - (i) if the bid is an all-cash bid—by a resolution passed by the directors; or
 - (ii) otherwise—by a unanimous resolution passed by all the directors; or
- (b) for a bidder that is an individual—by the bidder: s637(1).

RG 000.454 In contrast with s637, if the bidder is a body corporate, s650D(3) states that a notice of variation must be signed:

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

ASIC exemption: Approval of notice of variation

RG 000.455 Class Order [CO 03/633] *Takeovers: notice of variation* exempts the bidder from s650D(3) on condition that it *approves* a notice of variation to offers under its takeover bid in any of the ways that a bidder's statement can be approved under s637.

RG 000.456 We have provided this relief because we consider that it is appropriate for a bidder to have the option of approving a notice of variation in any of the ways that a bidder's statement can be approved under s637.

Lodging documents with ASIC

RG 000.457 As with the bidder's statement, a notice of variation lodged with us must still comply with s351. Section 351(1) states that a director or secretary of the company must sign the notice. If it is a foreign company, the notice may be signed by:

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

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

RG 000.458 [CO 03/633] does not affect the requirement in s351. We do not have a power to give relief from this requirement.

RG 000.459 We note that, if the Corporations Act requires something to be signed, it can be signed by an individual using a power of attorney from the person required to sign: s52A.

K Acceptances

Key points

We have modified the operation of s653A so that, for the purposes of Ch 6, a bidder that receives a completed acceptance form for a Clearing House Electronic Subregister System (CHES) holding can treat that instruction or authority as being an acceptance of the takeover offer.

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

We may also provide a technical modification to s624(2)(b) where an acceptance facility may be triggered near the close of a takeover offer.

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

- RG 000.460 Under s653A and reg 6.8.01 of the Corporations Regulations 2001 (Corporations Regulations), an acceptance of a takeover offer for quoted securities to which the operating rules of a clearing and settlement facility apply is only effective if made in the way specified in those rules. For securities registered on the CHES system, the relevant rules are the ASX Settlement Operating Rules (Settlement Rules).
- RG 000.461 A target holder whose securities are CHES registered can instruct their broker directly to accept the bid through CHES. As an alternative, the offer terms will usually provide that the target holder can return an acceptance form to the bidder instructing the bidder (or its representative) that they accept the bid—which the bidder may then seek to effect by engaging the holder’s broker through CHES: Settlement Rule 14.14.7.
- Note: If the target holder’s securities are registered on an issuer-sponsored register rather than CHES, the only method by which the holder can generally accept the bid is to return a completed acceptance form to the bidder.
- RG 000.462 It has been held that, where a target holder whose securities are CHES registered returns an acceptance form, there is no acceptance of the bid until the acceptance is ‘processed’ by effecting it through the CHES system. This is because of the combined effect of s653A, regs 6.8.01 and 7.11.24 of the Corporations Regulations, and Settlement Rule 14.14: *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55.

ASIC modification: Timing of CHES acceptance

RG 000.463 Class Order [CO XX/XXX] *Timing of acceptances for securities registered in a clearing and settlement facility* modifies the Corporations Act so that, for the purposes of Ch 6 generally, a holder is taken to have accepted the bid when:

- (a) the bidder has received a written instruction or authority from the holder entitled to accept the offer; and
- (b) the instruction or authority is to cause the bidder to effect acceptance of the bid.

This modification does not affect the requirement in s653A that the acceptances must be processed in accordance with the rules of the relevant clearing and settlement facility in effecting settlement of the takeover contract.

RG 000.464 Our modification is designed to improve certainty for bidders and holders, where a holder seeks to accept the offer for CHES-registered securities by returning a completed acceptance form to the bidder or its representative.

RG 000.465 Many target holders will consider that they have accepted the bid once the bidder has received a completed acceptance form. However, without our modification, an acceptance made in this manner would not be taken to be an acceptance until it was processed through CHES. Our modification means, for example, that:

- (a) even if the acceptance is not yet processed, it will be taken into account in determining whether the bidder has received acceptances that increase its voting power to over 50% in the final seven days of a bid (s624(2)(b));
- (b) if the bidder varies the bid in a way that postpones the bidder's obligations under the bid for more than one month, the target holder may still be entitled to withdrawal rights under s650E even if the variation is effected before the acceptance is processed; and
- (c) the bidder must take the acceptance into account when determining whether there has been a change in its voting power that may need to be disclosed in a substantial holding notice, even if the acceptance has yet to be processed.

Acceptance facilities

RG 000.466 An acceptance facility is an arrangement allowing all or specified holders of target securities to indicate conditional support for a takeover bid. Under the facility, registered and beneficial holders provide a third-party 'facility agent' with completed acceptance documents or instructions to a custodian

to accept a bid. The facility agent is authorised to release the acceptances or instructions to the bidder or custodian once a particular level of support has been achieved and the bidder has given the facility agent a notice confirming that the bid will be declared unconditional.

The purpose of acceptance facilities

- RG 000.467 Acceptance facilities are designed to overcome the difficulties a bidder may have in achieving a requisite level of acceptances due to the conditionality of a bid. Target holders may be reluctant to provide a binding acceptance for fear of having their securities locked up in a conditional bid with no certainty of success, or missing out if a higher rival offer emerges. Further, institutional investors may be prevented from accepting a conditional bid, or a bid achieving less than a certain level of acceptances, because of restrictions in their investment mandates.
- RG 000.468 This can cause a problem for bidders because:
- (a) it will often not be possible to satisfy a minimum acceptance condition, or achieve the necessary level of acceptances, without certain holders (such as institutional holders) accepting; and
 - (b) in some cases, these holders will not accept unless the condition is met or the necessary level of acceptances achieved.
- RG 000.469 Acceptance facilities address this issue by providing a means for target holders to indicate a willingness to accept the bid if it becomes unconditional and/or attracts a specified level of support. This allows the bidder to declare the bid free of the conditions when it is assured that the requisite level of acceptances will be achieved.
- RG 000.470 For administrative reasons, the terms of an acceptance facility may provide that only institutional, large or sophisticated holders of target securities may participate. Appropriately constituted, a facility of this kind may not offend the equality principle in s602(c), provided that smaller holders retain an equal and reasonable opportunity to accept the bid and facility participants do not receive a discriminatory benefit in using the facility.

Relevant interests arising from acceptance facilities

- RG 000.471 A bidder generally establishes an acceptance facility by engaging a third party to administer the facility in accordance with specified terms. The facility agent, in turn, enters into a series of agreements with facility participants.
- RG 000.472 The facility agent will generally obtain power to control the disposal of the securities accepted into the facility because it is instructed and authorised to take action to effect acceptance once the preconditions to release under the

terms of the facility have been met. However, it is common for a facility to be structured so that the agent may avail itself of the bare trustee or AFS licensee exceptions in s609(2) and (3) (as modified by [CO 01/1542]) and therefore does not acquire a relevant interest in the securities.

RG 000.473 It is possible that a bidder may acquire a relevant interest in target securities at the time that a facility participant provides acceptance or custodial instructions to the facility agent under an acceptance facility. This is because the bidder and facility participants may be viewed as parties to an overall arrangement or understanding in relation to the securities, irrespective of whether they deal with each other directly: see also s52.

Note: This view may be supported by the fact that one of the key objectives of an acceptance facility is to provide the bidder with a level of assurance that, in the circumstances, and on the conditions specified, it will be able to acquire the securities that are the subject of the facility.

RG 000.474 An arrangement or understanding of this kind may be sufficient to constitute a ‘relevant agreement’ under the broad definition in s9. The bidder may therefore acquire a relevant interest in facility participants’ securities outside the takeover bid and in contravention of s606 by virtue of the accelerator provision in s608(8).

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

RG 000.475 Class Order [CO XX/XXX] *Acceptance facilities* provides relief, for the avoidance of doubt, so that a bidder does not acquire a relevant interest merely because it has a power to control the disposal of securities as a result of a holder or beneficial owner tendering acceptance or custodial instructions in respect of the securities into an acceptance facility.

RG 000.476 Our relief only applies if:

- (a) the acceptance facility is the only acceptance facility established by the bidder in relation to the bid class;
- (b) the facility is either:
 - (i) for a conditional bid only—open only to institutional holders who have provided the facility agent with a certificate confirming that, because of a restriction in their investment mandate, they are prevented from accepting the bid while it is conditional; or
 - (ii) for a conditional or unconditional bid—open to all target holders;
- (c) the terms on which all facility users participate are the same;
- (d) the facility is operated by a facility agent, independent of the bidder, who is an AFS licensee authorised to provide financial services of the kind necessary to operate the facility;

- (e) under the terms of the facility, whether or not acceptances and instructions tendered into the facility are released by the facility agent depends solely on either or both of the following occurring and/or either or both of the following being the subject of a written confirmation from the bidder:
 - (i) the bidder declaring the bid free of all conditions or stating that it will declare the bid free of all conditions no later than the time that all facility acceptances are processed; and
 - (ii) the securities in which the bidder and its associates have a relevant interest combined with the securities that are the subject of the facility exceeding a specified percentage of securities in the bid class;
- (f) facility participants are free to withdraw from the facility at any time until the preconditions to the facility agent releasing the acceptances or instructions are met; and
- (g) the facility is disclosed and operated in accordance with the relevant safeguards discussed at RG 000.478–RG 000.481;

RG 000.477 We have provided this relief because acceptance facilities established on appropriate terms and operated in an appropriate manner may improve the efficiency and competitiveness of the bid process by removing structural impediments to the success of bids. Our relief removes uncertainty that a bidder who has established such a facility may be liable for a contravention of s606 as a result.

Disclosure

RG 000.478 The overall level of acceptances received by a bidder in relation to a bid is often a significant factor in a target holder's decision about whether and when to accept a bid. Target holders may also be influenced by the decision of substantial holders to accept or reject the bid: see RG 25.29–RG 25.34 and RG 25.71–RG 25.76. Full and accurate disclosure about acceptances received throughout the course of a bid is therefore critical in ensuring that:

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

RG 000.479 Acceptance facilities provide a mechanism for participants to signify their willingness to accept a bid—subject to specified preconditions—by providing, in effect, an 'indicative acceptance'. The level of indicative acceptances demonstrated through a facility may similarly factor in the decisions of target holders and the market. A bidder must therefore ensure

that target holders are provided with an equivalent level of disclosure about the number of securities tendered into the facility throughout the course of the bid, together with sufficiently detailed and prominent information to understand the terms and operation of the facility and appreciate the distinction between actual acceptances and facility acceptances.

RG 000.480 A bidder establishing an acceptance facility should disclose in the bidder's statement, or a supplementary bidder's statement, full details of the facility including all relevant terms and the arrangements the bidder has entered into to enable the operation of the facility.

RG 000.481 Further, if bid class securities are listed on a prescribed financial market, the bidder should provide disclosure that is equivalent to the disclosure that would be required under the substantial holding provisions if the bidder's voting power included securities tendered into the acceptance facility. The terms of the facility will need to provide for the facility agent to provide information about facility acceptances at the end of each day in sufficient time for the bidder to disclose every 1% movement in the aggregate level of actual voting power and facility acceptances by 9.30 am the following morning. The information should be provided in an announcement or a letter covering a relevant substantial holding notice, which:

- (a) clearly sets out:
 - (i) the aggregate number and percentage of bid class securities in which the bidder and its associates have a relevant interest and which are the subject of facility acceptances; and
 - (ii) a breakdown between the two categories; and
- (b) contains a statement:
 - (i) setting out the preconditions to the facility agent releasing the facility acceptances; and
 - (ii) warning that the facility acceptances may be withdrawn by facility participants at any time until the preconditions are met.

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

RG 000.482 The bidder, target and other market participants must ensure that they do not misrepresent facility acceptances as actual acceptances.

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

RG 000.483 Section 650F(1) prevents a bidder from freeing an offer from a defeating condition (other than a 'prescribed occurrence' condition) during the final seven days of the offer period. This prohibition, together with the prohibition on extending conditional bids, other than in the circumstances specified in

s650C(2), provides target holders with an opportunity to consider the final terms of the bid.

RG 000.484 Sections 650F(1) and 650C(2) may mean that a bidder is unable to give the facility agent a notice confirming that it will drop certain outstanding conditions during the final seven days of the offer period. However, in some cases, the bidder may still be able to give a notice if it is clear that doing so will necessarily result in an automatic extension under s624(2)(b). This is because:

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

RG 000.485 However, a bidder seeking to rely on s624(2)(b) may face uncertainty if the aggregate of the bidder's voting power and facility acceptances only reaches 50% near to the end of the offer period. This is because there may be a delay between the bidder giving its notice and the facility acceptances being realised as actual acceptances. In the case of instructions that are released by the facility agent to custodians, the timing of the actual acceptance by the custodian will depend on how quickly the custodian acts after receiving the instructions.

RG 000.486 If the bidder does not receive enough of the facility acceptances in time to increase its voting power to above 50%, the bid may close subject to unfulfilled defeating conditions and all takeover contracts will be void: s650G.

ASIC relief: Automatic extension of a bid

RG 000.487 We may give case-by-case relief so that, for the purposes of s624(2)(b) only, if a bidder has established an acceptance facility, it is taken to have voting power in securities that are the subject of the facility as soon as it gives the notice triggering the release of the acceptances and instructions by the facility agent.

RG 000.488 Our relief ensures that, where a bidder triggers an acceptance facility before the close of an offer, and its voting power in the target will increase to above 50% once the bidder receives actual acceptances for the securities tendered into the facility, the bid will be extended despite the potential delay in giving effect to the facility instructions. We consider that relief of this kind is

appropriate because it improves certainty associated with the operation of an acceptance facility.

RG 000.489 The requirement that the bidder must have triggered the facility is consistent with the rationale underlying s624(2)(b) of ensuring that target holders who might have declined the offer on the basis that they wished to remain with the existing management—but would accept if the bidder obtained a majority holding in the target—are given a further opportunity to consider the offers in light of the bidder acquiring majority control: Explanatory Memorandum to the CLERP Bill, paragraph 7.83.

RG 000.490 We will only give relief if the bid is conditional and the acceptance facility complies with the requirements of Class Order [CO XX/XXX] *Acceptance facilities* including the disclosure requirements discussed at RG 000.478–RG 000.481.

Unacceptable circumstances

RG 000.491 Acceptance facilities can increase the complexity of a bid. It is therefore essential that:

- (a) target holders and the market are provided with clear and full disclosure about the nature and role of the facility and facility acceptances; and
- (b) the facility is not operated or used in a way that undermines the purposes of Ch 6 set out in s602, or otherwise gives rise to a breach of the Corporations Act.

RG 000.492 We will consider the statements made by, and the conduct of, the bidder, target, facility users or other market participants in relation to acceptance facilities to ensure that they are consistent with the underlying spirit of our relief and the principles in s602. For example, we may carefully examine the actions of facility participants who repeatedly tender into and withdraw from a facility, or who tender into a facility in contradiction of a previous statement: see also RG 25 and s1041H.

RG 000.493 Any person who abuses, or makes potentially misleading disclosures about an acceptance facility risks further regulatory action—including an application to the Takeovers Panel for a declaration of unacceptable circumstances.

L Joint bids

Key points

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

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

Issues associated with joint bids

- RG 000.494 A joint bid involves two or more parties (joint bidders) agreeing to seek control of a target company by a takeover bid or scheme of arrangement.
- RG 000.495 To facilitate the bid for joint control, the parties will generally agree to exercise power over the voting or disposal of securities jointly. Under s608(1), when the parties enter into these joint bid arrangements, they will be taken to each have a relevant interest in the other joint bidder's securities and to be associates of each other under s12.
- RG 000.496 Depending on the joint bidders' pre-existing interests in voting shares in the target, each joint bidder's voting power in a company may increase to a level prohibited by s606(1) as a result of entering into the joint bid arrangements. Without relief, the parties may therefore be prevented from entering into the joint bid arrangements.

Deterrent effect of joint bids

- RG 000.497 The entry into joint bid arrangements will give each joint bidder the voting power of the collective pre-bid stake (i.e. the sum of each joint bidder's voting power in the target). The existence of this higher pre-bid stake, or even the mere fact of the parties joining forces, may discourage rival bids and any ensuing auction for control of the target.
- RG 000.498 The deterrent effect of the joint bid arrangements may accordingly deprive non-associated security holders in the target of a fair and reasonable price for their securities.

RG 000.499 Consequently, a joint bid arrangement that is not subject to appropriate conditions may detract from an efficient and competitive market for control of voting securities in the target.

Entering into joint bid arrangements

ASIC relief: Joint bids

RG 000.500 We may give relief to facilitate joint bids where s606 may otherwise have prohibited the bidders from coming together to make the bid or propose the scheme. Our relief will generally be subject to each of the conditions set out in Table 7.

RG 000.501 The conditions of our relief are designed to address the concern that the joint bid arrangements might deter rival offers, and seek to ensure that the price offered is acceptable to the majority of the holders of securities in which the joint bidders and their associates do not have voting power.

Table 7: Conditions of relief for joint bids

Condition	Cross-references for further explanation
<p>1. Acceptance by non-associated shareholders</p> <p>The joint bid must be subject to a condition that there are acceptances by holders of a minimum of 50.1% of the bid class securities in respect of which the joint bidders do not have voting power at the beginning of the offer period.</p> <p>The bidder's statement must state that the joint bidders will not waive this condition.</p> <p>For a joint bid structured as a scheme of arrangement, the joint bidders and their associates must not vote in the same class as other target holders.</p>	<p>RG 000.502–RG 000.503</p>
<p>2. Acceptance into higher rival bid / No vote against higher rival scheme</p> <p>The joint bidders and their associates must accept a rival bid that is higher than their bid unless they match the rival bid. In the case of a higher rival scheme of arrangement, the joint bidders and their associates must not vote against the scheme.</p>	<p>RG 000.504–RG 000.509</p>
<p>3. Expert report</p> <p>The joint bidders must use their best endeavours to have the target engage an independent expert to prepare a report on whether the joint bid is fair and reasonable to target holders who are not associates of the bidders (or, in the case of a scheme of arrangement, whether the scheme is in the best interests of the target holders).</p>	<p>RG 000.510</p>

Condition	Cross-references for further explanation
<p>4. Termination of joint bid arrangements</p> <p>The joint bidders must immediately terminate any relevant agreements or arrangements relating to the joint bid if the bid or scheme for which relief was obtained:</p> <ul style="list-style-type: none"> • does not proceed (including, in a scheme, because the scheme did not receive the necessary majority vote under s411(4)(a), or the court makes an order, which is final and not appealable, not to approve the scheme under s411(4)(b)); or • fails because of a defeating condition that has neither been satisfied nor waived. 	RG 000.511

Acceptance by non-associated shareholders

- RG 000.502 The non-waivable condition that non-associated holders representing at least 50.1% of the outstanding securities accept the bid, which we require when granting relief for a joint takeover bid, is designed to address the concern that the increased voting power of the joint bidders may determine the outcome of the bid. It provides the non-associated shareholders with a collective power of veto over the terms of the offer.
- RG 000.503 In a scheme, even if relief is not required, interested parties should either not vote in favour of the resolution to approve the scheme, or should vote in a separate class: see RG 60.94. Accordingly, class distinction, and the approval thresholds in a scheme, will generally afford a suitable proxy to the non-waivable condition imposed in a joint takeover bid.

Higher rival bid

- RG 000.504 We require joint bidders to accept or match a higher rival bid to address the risk that the increased stake held by the joint bidders under the joint bid arrangements may deter a rival bidder from launching a higher bid and any ensuing auction for control. In the case of a higher rival scheme of arrangement, the joint bidders and their associates must not vote against the scheme.
- RG 000.505 A higher rival offer, under this condition, is a bid or a scheme offering more than 105% of the value of the joint bidders' bid consideration. We will require joint bidders to accept a higher rival takeover bid for their entire joint holding unless they increase their bid to match the rival bid within seven days after the start of the offer period of the rival bid. We will only require joint bidders to accept a higher rival bid once that bid has become unconditional except for prescribed occurrence conditions.
- RG 000.506 Given the differences between bids and schemes (including that a scheme requires court approval and a resolution of members passed by the majority specified in s411(4)(a)(ii)), we will require that the joint bidders and their associates not vote against a higher rival scheme even though the rival scheme will not be unconditional at the time of the vote.

- RG 000.507 Both the joint bid and the rival offer may offer consideration in the form of cash, listed or unlisted scrip, or a combination of cash and listed or unlisted scrip. Where scrip, or a combination of cash and scrip, is on offer under either, we will consider whether to require the joint bidders to accept the rival bid (or, in the case of a scheme, not vote against the rival scheme) on a case-by-case basis, taking into account factors such as the liquidity of the scrip and any expert report assessing the value of the scrip. We may consider what the net cash proceeds would be on a sale of the scrip by the joint bidders within a reasonable period.
- RG 000.508 We may not impose this condition if a bidder with a relevant interest in the target securities enters into the arrangements with a second bidder that has less than 3% voting power in the target securities—unless:
- (a) we are concerned that a rival bidder may still be deterred by the joint bid arrangements; or
 - (b) the joint bidder came to have voting power of less than 3% as a result of transactions involving the other joint bidder or its associates.
- RG 000.509 If we do not impose a higher rival bid condition, we will impose an obligation on the joint bidders to consult with us in a timely manner if a bona fide third-party proposal arises, and provide target holders with all available material information about the third-party proposal and sufficient time to consider such information.

Expert reports

- RG 000.510 The requirement to commission an independent expert report as part of the joint bid is designed to help the non-associated security holders determine whether the price offered by the joint bidders is fair and reasonable. This is similar to the requirement in s640(1)(a) that a target's statement include an expert report about whether the offer is fair and reasonable when the bidder's voting power in the target is 30% or more.

Termination of joint bid arrangements

- RG 000.511 The requirement to terminate joint bid arrangements when the bid or scheme falls away confines the relief to the particular joint bid proposed. Relief is not intended to facilitate joint bidders to retain the increased voting power acquired under any agreements or arrangements relating to the joint bid, when they have not proceeded with the joint bid, or when a defeating condition of the bid has not been satisfied or waived.

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

M Non-compliant bids

Key points

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

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

Issues arising from a non-compliant bid

- RG 000.512 The exceptions from the general prohibition in items 1–4 of s611 do not apply if a takeover bid is carried out in breach of certain provisions listed in s612. In effect, this elevates the seriousness of the breach of the provisions listed in s612 because offers or acquisitions under, or in connection with, the bid may result in an additional breach of s606.
- RG 000.513 The s612 provisions include the minimum bid price rule in s621 and the procedural steps in s633(1) and s635(1)—so a failure to dispatch offers in time may lead to a breach of s606 on account of the bid being non-compliant.

Addressing a non-compliant bid

- RG 000.514 Under s659B, a bidder is prevented, before the end of the bid period, from applying to the court for an order validating an inadvertent breach of Ch 6 under s1325D. The object of this limitation is to make the Takeovers Panel the main forum for resolving disputes about a takeover bid until the bid period has ended: s659AA.
- RG 000.515 If a contravention of a provision listed in s612 occurs, the bidder may face uncertainty about whether its takeover bid will be unwound by a remedial order of the court following the bid. This is a particular issue where the contravention is elevated to a breach of s606. A court may perceive a breach of s606 as more serious than other breaches. A breach of s606 may also have a more serious impact on the reputation of the bidder.

ASIC relief: Removing the effect of s612

- RG 000.516 We may give case-by-case relief to a bidder from the effect of s612 if the bidder has, or may have, breached the relevant provisions because of:

- (a) the bidder's inadvertence or mistake (provided that the bidder was not acting recklessly or without appropriate regard to its obligations);
- (b) the bidder not having been aware of a relevant fact or occurrence; or
- (c) circumstances beyond the control of the bidder.

RG 000.517 As a condition of relief, we may require the bidder to take corrective action to address the effect of the contravention.

RG 000.518 Our relief will mean that the breach does not give rise to a contravention of the general prohibition in s606—however, it will not cover the primary breach of the relevant provisions listed in s612. Third parties will retain a cause of action for the original breach (subject to s659C).

RG 000.519 We are prepared to give this relief because, in some cases, if a bidder inadvertently breaches the takeover provisions, s612 should not automatically elevate the seriousness of that breach. Our relief seeks to reduce the uncertainty that the bidder faces about whether its takeover bid may be unwound by a remedial order of the court following the bid.

RG 000.520 We expect that applications for this relief will be exceptional. We will normally consult with directors of the target before granting this relief.

When we will not give relief

RG 000.521 We will not give relief from the operation of s612 after the bidder sends its offers and bidder's statement to holders. This is because, generally, we cannot give relief for breaches of the Corporations Act that have already taken place: see Regulatory Guide 51 *Applications for relief* (RG 51) at RG 51.67.

RG 000.522 If the bidder has contravened a provision listed in s612, the bidder will only breach s606 when it makes its offers under the bid. Under s606(4), a person must not make an offer where they would contravene the general prohibition if the offer were accepted.

Takeovers Panel proceedings

RG 000.523 If the Takeovers Panel has considered the issue and refused to make a declaration of unacceptable circumstances, the type of order a court may make is limited under s659C to an order to pay compensation, rather than a remedial order.

RG 000.524 However, the limitation in s659C cannot apply unless there has been an application to the Takeovers Panel for a declaration of unacceptable circumstances.

RG 000.525 If an application has been made, or is likely to be made, to the Takeovers Panel under s657A for a declaration concerning the circumstances amounting to the breach, we may not give the relief before considering the decision of the Panel. If the Panel refuses to make a declaration, there may be less need for the relief as the bidder may not face uncertainty as to whether its takeover bid may be unwound by a remedial order of the court following the bid: s659C.

DRAFT

Appendix: Status of our previous guidance

- RG 000.526 This guide updates our previous guidance on certain aspects of the takeover bid process. Additional updated guidance on other aspects of takeover bids is provided in:
- (a) draft Regulatory Guide 000 *Relevant interests and substantial holding notices*;
 - (b) draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*; and
 - (c) draft Regulatory Guide 000 *Compulsory acquisitions and buyouts*.
- RG 000.527 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 takeover bids are listed in Table 8.

Table 8: Superseded regulatory guides

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

Ongoing guidance on the CLERP amendments to the managed investment provisions

- RG 000.528 For the avoidance of doubt, the policy in the pre-existing Section A of RG 171 has not been withdrawn. It addresses an anomaly in the law—specifically, s601FM—which allows members of a registered scheme to remove the responsible entity by taking action under Div 1 of Pt 2G.4.
- RG 000.529 Class Order [CO 01/1541] *Changing the responsible entity* modifies s601FM to make it clear that the members of a listed registered managed investment scheme may request or call a meeting to consider and vote on an ordinary resolution to change the responsible entity. This is consistent with the position for changing company directors.
- RG 000.530 The action that members can take under Div 1 of Pt 2G.4 requires them to consider a special or extraordinary resolution only: see s252B–252D. However, s252L(1B)(c) allows members to put an ordinary resolution forward at a meeting to change the responsible entity.
- RG 000.531 This issue arises because s604 of the CLERP Act extended the takeover provisions to listed managed investment schemes: Explanatory Memorandum to the CLERP Bill. The Explanatory Memorandum states that s601FM ‘mak[es] it clear that the manager of a listed managed investment scheme can be replaced by a simple majority of unit holders who vote at a duly convened meeting’.
- RG 000.532 Austin J considered s601FM in *MTM Funds Management Ltd v Cavaleone Holdings* (2000) 158 FLR 121. His Honour found at 134 that:
- The amending legislation systematically changes many provisions to reflect the drafter’s view that a resolution to remove the responsible entity should be an ordinary resolution in the case of a listed scheme ... Section 252B is, however, not amended. If the consequence of not amending it is that a special or extraordinary resolution is required, then the clear legislative policy enunciated in the explanatory memorandum is thwarted ... s601FM(1) provides that the resolution for removal and replacement is to be an ordinary resolution, and s252B merely deals with the machinery for requisitioning the meeting.

Key terms

Term	Meaning in this document
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.
Anomalies Report	Legal Committee of the Companies and Securities Advisory Committee, <i>Anomalies in the takeovers provisions of the Corporations Law</i> , March 1994
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s9 of the Corporations Act
ASX	The exchange market operated by ASX Limited
bid class	Has the meaning given in s9 of the Corporations Act
bidder	A bidder under a takeover bid as defined in s9 of the Corporations Act
bidder's statement	Has the meaning given in s9 of the Corporations Act
bid period	Has the meaning given in s9 of the Corporations Act
Ch 6 (for example)	A chapter of the Corporations Act (in this example numbered 6)
class	A class of securities
CLERP Act	<i>Corporate Law Economic Reform Program Act 1999</i>
CLERP Bill	Corporate Law Economic Reform Program Bill 1998
[CO 01/1543] (for example)	An ASIC class order (in this example numbered 01/1543)
convertible securities	Has the meaning given in s9 of the Corporations Act as modified by [CO 01/1542]
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001

Term	Meaning in this document
CSLRC Report	Companies and Securities Law Review Committee's <i>Report to the Ministerial Council on partial takeover bids</i> (1985)
defeating condition	Has the meaning given in s9 of the Corporations Act
disposal relevant interest	A relevant interest disregarding the operation of: <ul style="list-style-type: none"> • s608(1)(b) (relevant interest arising from the power to exercise or control the exercise of voting rights); • 608(3)(a) (deemed relevant interest arising from a voting power of 20% or more); and • 608(8) (accelerated relevant interest)
fully paid securities	Securities for which no amount remains unpaid
general prohibition	The prohibition on offers, invitations, acquisitions and transactions in s606 of the Corporations Act
GN 21 (for example)	Takeovers Panel guidance note (in this example numbered 21)
holder	A holder of securities
in the money	For a convertible security, that the cost of exercising the convertible security is less than the market value of the underlying security
joint bid	A takeover bid or scheme proposal under which two or more parties together seek to acquire control of a target entity
old Corporations Law	The law set out in s82 of the <i>Corporations Act 1989</i> , which preceded the Corporations Act. Unless otherwise indicated, a reference to the old Corporations Law is a reference to the law as it stood prior to implementation of the CLERP Act
option	A contractual arrangement under which one party has the right, but not the obligation, to buy or sell an underlying asset from the other at a set price and before a specified future time
out of the money	For a convertible security, that the cost of exercising the convertible security is more than the market value of the underlying security
partly paid securities	Securities for which some amount remains unpaid and may be subject to a call from the company
PDS	Product Disclosure Statement
Product Disclosure Statement	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.

Term	Meaning in this document
Pt 6.4 (for example)	A part of the Corporations Act (in this example numbered 6.4)
reg 6.8.01 (for example)	A regulation of the Corporations Regulations (in this example number 6.8.01)
relevant interest	Has the meaning given in s608 and 609 of the Corporations Act
RG 60 (for example)	An ASIC regulatory guide (in this example numbered 60)
s602 (for example)	A section of the Corporations Act (in this example numbered 602), unless otherwise specified
scrip bid	A bid under which the consideration offered is new or existing securities
securities	Has the meaning given to that term for the purposes of Ch 6A in s92(3) of the Corporations Act
Settlement Rules	ASX Settlement Operating Rules
small parcel	A parcel of securities that does not meet the definition of 'marketable parcel' in the relevant rules governing the operation of a financial market
substantial holding	Has the meaning given in s9 of the Corporations Act
supplementary statement	A supplementary bidder's statement or supplementary target's statement of the kind referred to in Div 4 of Pt 6.5 of the Corporations Act
takeover bid	Has the meaning given in s9 of the Corporations Act
takeover provisions	The provisions of Ch 6 of the Corporations Act that regulate the acquisition of corporate control
target	Has the meaning given in s9 of the Corporations Act
target's statement	Has the meaning given in s9 of the Corporations Act
voting power	Has the meaning given in s610 of the Corporation

Related information

Headnotes

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

Class orders

[CO 00/193] *Experts: citing in disclosure documents*

[CO 00/343] *Unmarketable parcels*

[CO 00/344] *Changes to a bidder's statement between lodgement and despatch*

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

[CO 01/1541] *Changing the responsible entity*

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

[CO 01/1543] *Takeover bids*

[CO 03/633] *Takeovers: notice of variation*

[CO 03/635] *Takeovers: consent to quote officials and publications*

[CO 04/653] *On-sale disclosure relief for scrip bids and schemes of arrangement*

[CO XX/XXX] *Acceptances of a proportional takeover leaving a small parcel*

[CO XX/XXX] *Closing time for an automatically extended bid*

[CO XX/XXX] *Timing of acceptances for securities registered in a clearing and settlement facility*

[CO XX/XXX] *Acceptance facilities*

Regulatory guides

RG 7 *Calculating time periods*

RG 23 *Updating and correcting prospectuses and application forms*

RG 25 *Takeovers: False and misleading statements*

RG 51 *Applications for relief*

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

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

RG 60 *Schemes of arrangement*

RG 66 *Transaction-specific disclosure*

RG 71 *Downstream acquisitions*

RG 74 *Acquisitions approved by members*

RG 92 *Procedural fairness to third parties*

RG 111 *Content of expert reports*

RG 112 *Independence of experts*

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

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

RG 170 *Prospective financial information*

RG 228 *Prospectuses: Effective disclosure for retail investors*

RG 230 *Disclosing non-IFRS financial information*

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

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

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

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Ampolex Ltd v Mobil Exploration & Producing Australia Pty Ltd (1996) 19 ACSR 354

Associated Dairies Ltd v Central Western Dairy Ltd (1993) 11 ACLC 827

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Citect Corporation Ltd [2006] ATP 6

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

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GN 13 *Broker handling fees*

GN 14 *Funding arrangements*

GN 18 *Takeover documents*

GN 21 *Collateral benefits*

GN 22 *Recommendations and undervalue statements*

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