



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 193

Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance

November 2012

About this paper

This consultation paper seeks feedback on our proposal to update and consolidate a number of our regulatory guides relating to Chs 6–6C of the *Corporations Act 2001* (Corporations Act).

We are also consulting on our proposal to reissue the class orders associated with our updated guidance and to make new class orders addressing some discrete policy issues.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

This paper was issued on 14 November 2012 and is based on the Corporations Act as at the date of issue.

Disclaimer

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

Contents

The consultation process	4
A Background to the proposals	6
Our regulatory guidance and class orders relating to Chs 6–6C	6
Proposed update and consolidation of our guidance and reissue of our class orders	7
The scope of our update	8
Your feedback	9
B Relevant interests and substantial holding notices	11
Relevant interests in securities: Updated guidance	11
Relevant interest in securities: Modifications to the exceptions	12
Substantial holding notices	13
C Takeovers: Exceptions to the general prohibition	15
Creeping acquisitions	15
Rights issues and underwriting: Exceptions to the general prohibition ..	16
Accelerated rights issues	18
Other guidance	18
D Takeover bids	20
Small parcels: Value tests for determining small parcels	20
Small parcels: Proportional takeover bids	22
Collateral benefits	24
The bidder's intentions	27
Funding arrangements	27
Closing time for an automatically extended offer period	28
Acceptances received by the bidder for securities registered in a clearing and settlement facility	29
Acceptance facilities: Class order relief	30
Acceptance facilities: Automatic extensions	32
Joint bids	32
Our other updated and consolidated guidance	34
E Compulsory acquisitions and buyouts	35
Deemed relevant interests excluded in post-bid compulsory acquisition	35
Simultaneous compulsory acquisition and buyout rights	36
Lodging compulsory acquisition and buyout notices	38
F Reissue of our existing class orders	40
Update and reissue of our class orders	40
G Regulatory and financial impact	41
Appendix 1: Our existing guides	42
Appendix 2: Our existing class orders	44
Appendix 3: Cross-reference to existing guides	46
Key terms	51
List of proposals and questions	53

The consultation process

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

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

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

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

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on takeovers, compulsory acquisition and substantial holding disclosure. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section G, 'Regulatory and financial impact'.

Making a submission

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

Comments should be sent by 22 February 2013 to:

Kim Demarte
Senior Specialist, Corporations
Australian Securities and Investments Commission
Level 24, 120 Collins Street
Melbourne Vic 3000
facsimile: +61 3 9280 3288
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	14 November 2012	ASIC consultation paper released
Stage 2	22 February 2013	Comments due on the consultation paper
	March 2013	Drafting of regulatory guide
Stage 3	May 2013	Regulatory guide released

A Background to the proposals

Key points

We are proposing to update and consolidate our guidance on Chs 6–6C of the *Corporations Act 2001* (Corporations Act). Drafts of our proposed guidance have been released together with this consultation paper.

We also propose to reissue the class orders discussed in our draft guidance. These class orders will be reissued in substantially similar form, except where we are consulting on a proposed amendment.

Our draft guides are generally limited to the subject matter of the existing guides they replace. However, we are proposing to address a few new issues with additional guidance and class order relief.

Our regulatory guidance and class orders relating to Chs 6–6C

- 1 We have issued a number of regulatory guides and class orders as part of our administrative and regulatory role under the *Corporations Act 2001* (Corporations Act). These cover:
 - (a) the takeover provisions (including the exceptions to the general prohibition in s606) in Ch 6;
 - (b) the compulsory acquisition provisions in Ch 6A; and
 - (c) the substantial holding notice regime in Ch 6C.
- 2 Our regulatory guides aim to assist persons involved in, or advising on, transactions governed or affected by the requirements under these provisions by:
 - (a) explaining how we interpret, administer and may enforce the relevant requirements under the Corporations Act, including the takeover bid procedure;
 - (b) explaining the changes made by, and principles underlying, our class orders; and
 - (c) discussing some of the circumstances in which we will provide individual relief from the requirements of Chs 6–6C and the considerations underlying our approach.
- 3 Our class orders represent the general exemptions and modifications we have made to improve the operation of the provisions in light of market developments, and address issues and anomalies we have encountered in our experience administering the provisions over time.

- 4 Through our guidance and class orders, we seek to improve the efficient administration of the takeover, compulsory acquisition and substantial holding regime by enhancing understanding of the relevant requirements and increasing the commercial certainty associated with conducting and participating in regulated transactions. The underlying objective of our class orders and policies on case-by-case relief is to balance the benefits of improved efficiency and commercial certainty with the need to ensure the protections and principles underlying Chs 6–6C are maintained.

Proposed update and consolidation of our guidance and reissue of our class orders

- 5 Much of our guidance relating to takeover bids and other aspects of Chs 6–6C is currently contained in our main compendium guides:
- (a) Regulatory Guide 159 *Takeovers, compulsory acquisitions and substantial holding notices* (RG 159); and
 - (b) Regulatory Guide 171 *Anomalies and issues in the takeover provisions* (RG 171).

However, other guidance, generally addressing more discrete aspects of Chs 6–6C, is contained in number of smaller regulatory guides.

- 6 Both RG 159 and RG 171 take into account changes to the Corporations Act resulting from amendments introduced by the *Corporate Law Economic Reform Program Act 1999* (CLERP Act). At RG 159.283–RG 159.286 we discuss the continued application of some of our other policies relating to Chs 6–6C, to the extent they are not inconsistent with the Corporations Act following the CLERP Act changes and their underlying rationale remains relevant.

Our draft proposed guidance

- 7 We propose to update and reorganise a large part of our guidance on Chs 6–6C into four new consolidated guides covering the following topics:
- (a) relevant interests and substantial holding notices;
 - (b) the exceptions to the general prohibition in s606;
 - (c) takeover bids; and
 - (d) compulsory acquisitions and buyouts.
- 8 In each case our reorganised guidance is designed to:
- (a) reduce the need to consult multiple regulatory guides to find our policy on matters bearing on a particular type of transaction;

- (b) be more intuitive for those who are familiar with the relevant provisions to navigate, while also being accessible to a wider range of users;
- (c) update our policy so that it reflects our current views and practices in relation to Chs 6–6C; and
- (d) in conjunction with relevant class order modifications and exemptions where appropriate, improve the efficiency of the legislation by addressing issues we have identified over time in the administration of the relevant provisions.

9 The existing regulatory guides we have reviewed and which, to the extent relevant, form part of the new regulatory guides are listed in Appendix 1.

Reissue of our class orders

10 Some of our existing class orders will require reissue in the next few years under the *Legislative Instruments Act 2003*. We propose to reissue the class orders referred to in our draft guidance in conjunction with the release of the new guides. We anticipate that most class orders will be reissued in a similar form—however, some may be modified to take into account legislative changes or to implement specific proposals referred to in this guide.

11 The existing class orders that we propose to reissue are set out in Appendix 2.

The scope of our update

12 For the most part, our draft guides update and consolidate the guidance in the regulatory guides they replace. Accordingly, the proposals in this consultation paper for amendment to existing policies are limited to matters associated with legislative amendments, or matters necessary or desirable to address in order to ensure our revised guidance on the relevant topic reflects as far as possible our current approach.

13 We have therefore generally only proposed additional or amended guidance or class order solutions where, based on our experience in administering the provisions related to the polices and subject matters listed in Appendix 1, it appears:

- (a) there is sufficient interest in the interpretation of a provision or a general approach that clarification by ASIC may be warranted;
- (b) our existing guidance would benefit from greater elaboration or clarification of a particular point or approach we adopt in practice; or
- (c) there is sufficient need for a particular type of case-by-case relief we provide that a class order may be justified.

- 14 A few existing regulatory guides relating to takeover bids are not included in the proposed update: see Appendix 1. For the time being, these policies will continue to apply as at present: see Section Y of RG 159.
- 15 Our draft guidance is based on the law as it stands today. If there are any changes to relevant legislation we may make further changes prior to the finalisation of our guides as appropriate.

Note: On 5 October 2012 the Department of the Treasury released a scoping paper in relation to a number of issues regarding the takeover provisions raised by ASIC. The consultation process being conducted by Treasury on these issues is separate and independent from the consultation process outlined in this paper which is focused on updating and consolidating ASIC's guidance and class orders.

Your feedback

- 16 We have prepared drafts of each of our proposed new regulatory guides, which we are releasing together with this consultation paper. The draft guides incorporate the proposed updates to our existing policies, which are discussed in this paper. The proposed guides are discussed in the following sections:
- (a) Section B—draft Regulatory Guide 000 *Relevant interests and substantial holding notices*;
 - (b) Section C—draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*;
 - (c) Section D—draft Regulatory Guide 000 *Takeover bids*; and
 - (d) Section E—draft Regulatory Guide 000 *Compulsory acquisitions and buyouts*.
- 17 To assist with stakeholders' consideration of the draft guides, we have also included tables in Appendix 3 that cross-reference the policies we are updating with the sections of the draft guide dealing with the corresponding subject matter.
- 18 This consultation paper discusses a number of specific issues associated with the draft regulatory guides. We are particularly interested in receiving your feedback on these issues. However, we also welcome any comments you may have on our draft guides generally (including our existing policies).

Current and emerging issues

- 19 In addition to any comments on our updated and consolidated guides, we are also interested in your feedback on whether there are any particular issues (current or new) that you think we should consider as part of our

administrative and day-to-day enforcement role with respect to the takeover, substantial holding and compulsory acquisition provisions.

- 20 Your views and comments will help us:
- (a) improve our understanding of the market's views on areas where ASIC policy or class order solutions may improve certainty and efficiency; and
 - (b) better prioritise future policy development.
- 21 We appreciate that your submissions may raise a variety of new and existing issues of significance. We do not propose to address—as part of our current process of updating and consolidating our regulatory guides—significant or emerging issues outside the scope of this update. However, we still welcome your views on significant issues that you think we should consider or prioritise when planning future policy updates.

Issue

- A1 We would like to hear your views on current and emerging issues in takeovers, substantial holding disclosure and compulsory acquisition.

Your feedback

- A1Q1 Are there any other issues on which it would be useful to have ASIC guidance or to expand our existing guidance? If so, please give details.
- A1Q2 Are there any other issues that may be appropriate for ASIC to address by way of exemption or modification by class order? Please be specific.

B Relevant interests and substantial holding notices

Key points

Our proposed new regulatory guide on relevant interests and substantial holding notices includes updated guidance on the relevant interest concept.

In connection with the update of our guidance we propose to alter our class order modifications of s609(1) and (3) to take into account legislative changes and developments in the market.

Our draft guide also incorporates further guidance on completing substantial holding notices.

Relevant interests in securities: Updated guidance

Proposal

B1 We propose to update and consolidate our guidance on relevant interests in securities. Our updated guidance is set out in Section B of draft Regulatory Guide 000 *Relevant interests and substantial holding notices*.

Your feedback

- B1Q1** Do you have any comments on our draft updated guidance on relevant interests?
- B1Q2** Are there any other aspects of the relevant interest concept which it may be useful to draw to readers' attention?

Rationale

- 22 We have updated our guidance on relevant interests, which is currently contained in Regulatory Guide 9 *Relevant interests in shares* (RG 9).
- 23 Our draft updated guidance discusses:
- (a) the basic rules for establishing a relevant interest in securities in s608; and
 - (b) the exceptions to the concept in s609—including modifications we have made to the exceptions by class order.
- 24 Our draft updated guidance on relevant interests is not an exhaustive discussion of relevant interests. Its focus is on informing users of the general scope of the relevant interest concept to assist them in identifying when they may have a relevant interest in securities for the purposes of the various requirements of the Corporations Act utilising the concept, and when their circumstances may warrant seeking appropriate advice on the issue.

Relevant interest in securities: Modifications to the exceptions

Proposal

- B2** We propose to update Class Order [CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition* so that:
- (a) our modification to s609(1) refers to a ‘security interest’—reflecting amendments to the Corporations Act effected by the *Personal Property Securities (Corporations and Other Amendments) Act 2010*. In doing so we propose to retain the terms of our modification confirming, for the avoidance of doubt, that a ‘security interest’ for the purposes of the exception includes a negative pledge; and
 - (b) our modification to s609(3) includes instructions received by a financial services licensee in relation to derivatives as well as securities on terms similar to those set out in Class Order [CO 01/1599] *Sydney Futures Exchange—participant’s relevant interest and voting power*. In doing so our modification will be extended to brokers trading derivatives on any prescribed financial market.

Your feedback

- B2Q1** Do you agree with our proposals to retain and update our modification to s609(1) in [CO 01/1542]?;
- B2Q2** Do you agree with our proposal to update and amalgamate our relief for brokers in [CO 01/1542] and [CO 01/1599]?
- B2Q3** Should there be any additional limitations to our class order relief for persons purchasing security interests in the secondary market?

Rationale

- 25 Earlier this year, the *Personal Property Security (Corporations and Other Amendments) Act 2010* amended s609(1) by replacing the reference to ‘mortgage, charge or other security’ with the defined term ‘security interest’. Under s51A, a security interest is:
- (a) a Personal Property Securities Act security interest (being generally an interest to which the *Personal Property Securities Act 2009* applies); or
 - (b) a charge, lien or pledge.

Update of our class order modification

- 26 [CO 01/1542] modifies s609(1) so that the relevant interest exception extends to:
- (a) persons holding a mortgage or other security on trust for a financier who has taken the security in the ordinary course of the financier’s business of providing financial accommodation;

- (b) purchasers of mortgages and other securities; and
- (c) negative pledges, to the extent it may be uncertain whether a negative pledge is covered by the exception.

27 Proposal B2 updates [CO 01/1542] so that it continues to extend in this way regardless of the amendments to s609(1) under the *Personal Property Securities (Corporations and Other Amendments) Act 2010*. The amendments do not appear to have affected the underlying rationale for our class order modification. Regarding our modification for negative pledges in particular, there may still be uncertainty as to whether a negative pledge falls within the definition of a ‘security interest’.

Modification for brokers dealing in derivatives

28 [CO 01/1599] modifies s609 by inserting a relevant interest exception for brokers who may acquire a relevant interest as a result of receiving specific instructions from a client directing the broker to enter into a sold position in relation to securities.

29 The original class order relief on which [CO 01/1599] is based was granted in connection with the introduction of Deliverable Share Futures on the Sydney Futures Exchange in 1996. The relief recognised that the exception from a relevant interest now found in s609(3) (as modified by [CO 01/1542]) only related to client instructions about securities, and not futures contracts. The modification in effect extended the operation of s609(3) to futures brokers.

30 We propose to update [CO 01/1599] to take account of changes to the financial markets on which derivatives are traded since our class order modification for derivatives brokers was introduced. In particular we propose to:

- (a) extend the operation of our relief to participants of any prescribed financial market where derivatives are traded; and
- (b) combine the relief with our modification of s609(3) in [CO 01/1542].

Substantial holding notices

Proposal

B3 We propose to update our guidance on substantial holding disclosure. Our updated guidance is set out in Section G of draft Regulatory Guide 000 *Relevant interests and substantial holdings*.

Your feedback

B3Q1 Do you have any comments on our draft updated guidance on substantial holding notices?

B3Q2 Are there any other aspects of substantial holding disclosure that we should give guidance on?

Rationale

31 Our updated guidance on substantial holding notices in Section G of draft Regulatory Guide 000 *Relevant interests and substantial holding notices* is based on our current guidance in Section X of RG 159. Section G includes:

- (a) new guidance on how to complete substantial holding notices; and
- (b) further guidance on complying with the requirement in s671B(4) when a transaction contributing to the change in relevant interests being disclosed involves a number of agreements that may not be in writing and readily available at the time the substantial holding notice is given (see draft Regulatory Guide 000 *Relevant interests and substantial holding notices* at RG 000.284–RG 000.287).

Note: We have also issued guidance on the substantial holding requirements as they apply to securities lending and prime broking: see Regulatory Guide 222 *Substantial holding disclosure: Securities lending and prime broking* (RG 222).

C Takeovers: Exceptions to the general prohibition

Key points

We have drafted a new regulatory guide dealing with the exceptions to the general takeovers prohibition.

We have updated our policy on the 3% creep exception in item 9. We have also updated and consolidated our guidance on rights issues and underwriting. This includes:

- providing additional guidance on our approach when examining a rights issue or underwriting arrangement; and
- clarifying that we do not consider an arrangement that is within the control of an underwriter to terminate, or is contingent on sub-underwriting or lower-tier underwriting, constitutes 'underwriting' for the purposes of the exceptions in items 10, 10A and 13 of s611.

We are also considering extending the exceptions for accelerated rights issues to cover more recent adaptations of the structure, and providing further guidance on items 8 and 12 of s611.

Creeping acquisitions

Proposal

- c1 We propose to update and consolidate our guidance relating to creeping acquisitions under item 9 of s611. The form of our updated guidance is set out in Section C of draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*.

Your feedback

- C1Q1 Do you have any comments on our updated guidance on the 3% creep exception in draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*?

Rationale

- 32 Our draft updated guidance on the 3% creep exception expands on the operation and underlying principles of the provision and our approach to considering acquisitions under item 9. It incorporates our current guidance on the exception in RG 159 and RG 171.

- 33 In particular, in our draft updated guidance we:
- (a) clarify our existing position that a six-month time limit should apply to the availability of any involuntary dilution relief we provide, in the interests of market certainty; and
 - (b) confirm that we will not provide relief, except in exceptional circumstances, to a person who is involuntarily diluted to a point above 19%.

Rights issues and underwriting: Exceptions to the general prohibition

Proposal

- c2 We propose to update and consolidate our guidance on rights issues and underwriting arrangements that have the potential to affect control of an entity. The form of our updated guidance is set out in Sections D and E of draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*.

Your feedback

- C2Q1 Do you have any comments on our draft updated guidance on rights issue and underwriting?
- C2Q2 Besides those in Table 4 of draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*, are there any other factors that we should take into account when considering whether regulatory action may be warranted in relation to a rights issue or underwriting arrangement?
- C2Q3 Do you agree with our draft guidance on arrangements that constitute underwriting? Are there any other practices which have developed that should not be considered 'underwriting' for the purposes of the exceptions?

Rationale

- 34 Our draft guidance contains an updated and consolidated discussion of issues associated with rights issues and underwriting arrangements that have the potential to affect control of an entity. Our draft guidance is centred on the rights issue and underwriting exceptions in items 10, 10A and 13 of s611 and incorporates, where appropriate, our current guidance in:
- (a) Regulatory Guide 61 *Underwriting—application of the exemptions* (RG 61);
 - (b) RG 159;
 - (c) RG 171; and

- (d) Regulatory Guide 199 *Broadening the rights issue and dividend reinvestment plan exceptions for takeovers* (RG 199).
- 35 Our draft regulatory guide includes further discussion on our approach when considering rights issues and underwriting arrangements. In particular it:
- (a) clarifies that we will examine whether arrangements may be intended to avoid Ch 6 or have an unnecessary control effect relative to the fundraising purpose—consistent with the Takeovers Panel’s guidance in Guidance Note 17 *Rights issues*; and
 - (b) sets out an updated list of factors that we will generally consider to assist issuers and their advisers when structuring a rights issue and/or putting in place underwriting arrangements (Table 4 of draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*).
- 36 Our draft updated guidance also highlights that we may take into account any overall concerns with a rights issue or underwriting arrangement when considering requests for the exercise of ASIC’s discretionary powers, including:
- (a) relief for acquisitions under a shortfall facility;
 - (b) requests for approval of nominees under s615; and
 - (c) requests for relief from the nominee procedure in a non-renounceable right issue.
- 37 We have also updated our guidance on arrangements that constitute underwriting. In particular we have:
- (a) removed discussion of ‘pre-lodgement underwriting’, as the relevant exceptions do not generally apply to arrangements where securities are offered to holders prior to the relevant rights issue or public offer; and
 - (b) clarified that arrangements that depend on sub-underwriting or lower-tier underwriting, or are subject to termination events within the underwriter’s control, should not be considered ‘underwriting’, as they do not, in effect, involve the assumption of shortfall risk (see draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition* at RG 000.145–RG 000.147).
- 38 Our draft guidance on underwriting may also be relevant in other contexts such as when describing an arrangement as ‘underwriting’ in a disclosure document or public announcement.

Accelerated rights issues

Proposal

- c3 We propose to update Class Order [CO 09/459] *Takeovers relief for accelerated rights issues* so that the exception in item 10A of s611 applies to accelerated rights issue offers with a retail rights trading component, such as a 'pro rata accelerated institutional tradeable retail entitlement offer' (PAITREO).

Your feedback

- C3Q1 Do you agree that our existing class order modification for accelerated rights issues should be amended to also apply to PAITREOs? Is there a need to extend our modification in this way?

Rationale

- 39 We are considering amending our existing class order modification for accelerated rights issues so that it also applies to rights issue structures such as PAITREOs. Under a PAITREO, the terms of the offers made to retail holders permit the rights to be traded on market, but rights trading is not permitted under the terms of the offers made to institutional holders.
- 40 Accelerated offers using these structures fall outside the rights issue exception in item 10 of s611 and the terms of our current modification in [CO 09/459] (which allows for differences only in the offer periods and dates of allotment), as offers to all holders are not made on the same terms.
- 41 We consider that differences in offer terms permitting rights trading only by retail holders does not necessarily offend the equality principle in s602(c), particularly as retail holders will not acquire control of an issuer as a result of an accelerated rights issue. However, we seek your views on whether an extension of our class order modification is justified in the circumstances.

Other guidance

Issue

- c4 We are considering whether to expand our guidance on the exceptions in s611 to cover the scope and operation of items 8 and 12.

Your feedback

- C4Q1 Is there a need for further guidance on items 8 and 12 of s611? Is the scope and operation of the exceptions sufficiently clear?

Rationale

- 42 Item 8 of s611 provides an exception from the general prohibition in s606 for acquisitions resulting from an issue of securities where the issuer has not started to carry on any business and has not borrowed any money.
- 43 Item 12 of s611 provides an exception for issues to a promoter under a company's first disclosure document (usually an initial public offering prospectus).
- 44 The scope of these exceptions may be unclear in some circumstances. We may consider providing further clarification on these exceptions if we receive feedback from the market that there is a need for guidance.

D Takeover bids

Key points

We have drafted a new regulatory guide to update and consolidate our existing guidance on takeover bids.

Our draft guidance incorporates updated discussion of the prohibition on collateral benefits and disclosure of a bidder's intentions and funding arrangements in the bidder's statement. It also extends our existing guidance on relief for joint bids to take into account schemes of arrangement.

We propose to amend our existing class orders relating to small parcels offered as consideration in bids and schemes. We are also proposing to introduce new class orders addressing:

- the potential abuse of s618(2) through the use of share splitting and similar devices that are designed to enable a holder to accept for their entire holding in a proportional bid;
- the potential for an automatic extension to alter the time of day an offer closes to midnight;
- when an acceptance for a holding registered in a clearing and settlement facility is effective where the holder has returned an acceptance form to the bidder; and
- the potential for a bidder to acquire a relevant interest in securities tendered into an acceptance facility.

We also propose to provide case-by-case relief to ensure that a bid is automatically extended under s624(2) where a bidder triggers the release of instructions in an acceptance facility towards the end of the offer period.

Small parcels: Value tests for determining small parcels

Proposal

- D1 We propose to amend the definition of 'market value' in s619(5) (inserted by Class Order [CO 00/343] *Unmarketable parcels*) to be the highest closing price for the securities published by 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 consideration to a target holder under the terms of the offers; and
 - (b) the end of the bid period.

Your feedback

- D1Q1 Do you agree with our proposal to amend the definition of 'market value' in [CO 00/343]?
- D1Q2 Is the period of five trading days before the first date for payment appropriate? Would a time closer to the date for payment be more appropriate?

- D2** We also propose to amend the definition of 'market value' in related Class Order [CO 04/653] *On-sale disclosure relief for scrip bids and schemes of arrangement*. Our amendment will clarify that, for the purposes of a small parcel sale facility in a scheme, a small parcel is to be determined by reference to the highest closing price from the date the scheme booklet is registered by ASIC until the date the court order is lodged with ASIC.

Your feedback

- D2Q1 Do you agree with our proposed reference period for determining small parcels in the scheme context? If not, what would be a more appropriate period?

Rationale

- 45 In takeover bids with a scrip component, our modification under [CO 00/343] allows a bidder to put in place arrangements so that target holders who would otherwise receive a 'small parcel' of securities as consideration under the offer, instead receive cash.
- 46 In accordance with the definition in s619(5) (inserted by [CO 00/343]) to determine whether a parcel of securities to be provided is a small parcel for the purposes of our modification, the bidder must consider the 'market value' of the securities. The class order currently defines 'market value' for this purpose as the 'highest closing price for the securities published during the bid period by any prescribed financial market on which the securities are quoted'.
- 47 In some cases where, under the terms of the offer required by s620(2), the bidder must pay or provide the bid consideration before the end of the bid period, it may be impractical to determine whether an accepting holder would receive a small parcel before the consideration is due (and if no nominee is appointed under s619(3), how much cash consideration must be provided).
- 48 Additionally, the reference to the 'bid period' may leave it open to bidders and target holders to take different views on the interpretation of when the reference period ends (e.g. the end of the full bid period or the bid period up until the consideration is payable).

- 49 To provide greater clarity, we propose to amend the definition of ‘market value’ in the class order as set out in proposal D1. These amendments aim to:
- (a) provide certainty about the period to be considered when determining the market value of securities to be provided to a particular accepting holder; and
 - (b) where the bidder must pay or provide the consideration for the offer before the end of the bid period, provide the bidder with sufficient time to determine whether a particular accepting shareholder would receive a small parcel.

On-sale relief

- 50 We also propose to amend the definition of ‘market value’ in Class Order [CO 04/653] *On-sale disclosure relief for scrip bids and schemes of arrangement*, which includes on-sale relief for small parcel share sale facilities in connection with schemes. The definition of ‘market value’ for the scheme on-sale relief currently refers to the ‘bid period’. We propose to substitute that reference to an analogous reference period for a scheme.
- 51 As set out in proposal D2, our amendment will clarify that a ‘small parcel’ for such a facility is to be determined by reference to the highest closing price from the date the scheme booklet is registered by ASIC until the date the court order is lodged with ASIC. We propose to utilise these dates as they most closely approximate the ‘bid period’ in a takeover bid and are readily ascertainable by all parties concerned.

Small parcels: Proportional takeover bids

Proposal

- D3 We propose to modify the operation of s618(2) in proportional takeover bids by class order, to prevent accepting shareholders engaging in ‘share splitting’ and similar devices to accept for a greater proportion of their holding than otherwise permitted. Our modification will prevent persons from relying on s618(2) if the relevant parcel has come into existence, or increased in size, because of a transaction entered into after the bid is publicly proposed.

Our modification will provide that holders seeking to rely on s618(2) for an acceptance for one or more parcels forming part of a larger holding under s653B(1)(b) will need to provide a notice to the bidder setting out details of beneficial interests, and when those interests arose, to verify their eligibility.

Your feedback

- D3Q1 Do you agree with our proposal to issue a class order to prevent share splitting in a proportional takeover bid? If not, why not?
- D3Q2 Are there any other conditions or requirements that should apply to our modification?
- D3Q3 Are there any ways the administrative burden of the notification requirements could be reduced while still providing sufficient evidentiary support to allow conduct contrary to the underlying purpose of the class order to be identified?

Rationale

- 52 Section 618(2) is an exception to the equality principle in s602(c). It provides that if a target holder would be left with a small parcel as a result of accepting a proportional bid, the holder may accept for their entire holding. The provision recognises the disproportionate costs to an accepting holder of disposing of a small parcel relative to the value of the parcel, and the benefits to the bidder of reducing the number of small parcel holdings remaining on the register.
- 53 As highlighted by the circumstances in *GoldLink IncomePlus Limited 04* [2009] ATP 2 (*GoldLink 04*), this provision is potentially open to abuse by target holders. *GoldLink 04* concerned attempts by a small group of shareholders to accept a proportional takeover bid for their entire holding (which, in aggregate, was many times the size of a small parcel) by splitting their holding into smaller parcels.
- 54 In *GoldLink 04*, the Takeovers Panel found share splitting in a proportional bid was unacceptable, given the purposes of Ch 6, as it was contrary to:
- (a) the efficient market principle in s602(a); and
 - (b) the equality principle in s602(c) (see *GoldLink 04* at [40], [44]).

Class order modification

- 55 Our proposed class order would amend s618(2) to exclude its application where a target holder, after the announcement of a proportional bid, alters their holding, or their interest in a parcel, in a way that may result in an advantage were s618(2) to apply. For example, the class order would prevent a person relying in s618(2) where they have:
- (a) split a holding among a number of related parties into smaller holdings; or
 - (b) purchased a holding on market, or ‘topped-up’ an existing holding after the announcement of the bid, in anticipation of being able to sell the entire holding into the bid rather than the bid proportion. The repeated

application of this process may lead to arbitrage or distort the market, as the premium offered under the bid generally relates to the bid proportion.

- 56 Our class order modification is proposed only to address a technical problem arising in proportional bids. Proportional bids are relatively rare and we do not anticipate that our proposed modification will more broadly affect the relative attractiveness of proportional bids.

Notification requirements

- 57 Our class order modification also applies to restrict reliance on s618(2) where there is a change to a parcel for which an offer is deemed to have been made under s653B(1)(b). This is to deter similar conduct to that discussed in paragraph 55, which may be effected through the use of trusts and other devices.
- 58 To provide bidders with sufficient information to determine whether the exclusion in our class order applies in relation to a particular parcel, we propose that a nominee, trustee or other person should have to provide the bidder with information about the parcel's ownership. The requirements are set out in draft Regulatory Guide 000 *Takeover bids* at RG 000.89–RG 000.94.
- 59 We do not anticipate that the notice requirement will prove unreasonably burdensome for professional trustees and custodians (who may need to accept for a large number of parcels where the target is widely held), as a notice need only be provided when the acceptance is for a parcel sufficiently small to otherwise attract s618(2) and when the accepting holder seeks to rely on s618(2). It is relatively unlikely that professional trustees and custodians would hold interests of that size non-beneficially.
- 60 The notice requirement will only apply when a person seeks to accept for their entire holding. A trustee or nominee will retain the option of simply accepting for the bid proportion, thereby avoiding the notification requirement.

Collateral benefits

Proposal

- D4 We propose to update and consolidate our guidance on the prohibition on collateral benefits in s623. The form of our updated guidance is set out in Section E of draft Regulatory Guide 000 *Takeover bids*.

Your feedback

- D4Q1 Do you have any comments on our updated guidance on collateral benefits in draft Regulatory Guide 000 *Takeover bids*?
- D4Q2 Do you agree that the factors listed in Table 3 of draft Regulatory Guide 000 *Takeover bids* may be relevant when considering whether a benefit is likely to induce acceptance or disposal? Are there any other factors that will often suggest, or may be relevant in considering, inducement?

- D5 We propose to continue to grant relief from the collateral benefits prohibition only in limited cases. The relief we propose to grant is set out in draft Regulatory Guide 000 *Takeover bids* at RG 000.221–RG 000.241.

Your feedback

- D5Q1 Do you agree that we should only grant relief from the collateral benefits prohibition in limited cases?
- D5Q2 Should we continue to grant relief from s623 for benefits given to a controlling holder by a bidder when substituting as guarantor or acquiring a debt?
- D5Q3 Should we continue to grant case-by-case relief for benefits given in connection with the bidder's arrangements for funding a takeover bid, even if the prohibition on collateral benefits no longer applies in the pre-bid period? If so, should this relief instead be provided by way of class order?

Rationale

- 61 We have updated and consolidated our guidance on the prohibition on collateral benefits. Our updated guidance in Section E of draft Regulatory Guide 000 *Takeover bids* discusses our general approach to the prohibition, our class order modifying the operation of the prohibition in market bids, and the case-by-case relief from s623 we may consider. Where relevant, it reflects our existing policy in:
- (a) Regulatory Guide 35 *Collateral benefits in takeovers* (RG 35);
 - (b) Regulatory Guide 145 *Collateral benefits—Takeovers funding and pre-bid purchases* (RG 145); and
 - (c) Section N of RG 171.
- 62 Our draft guidance is focused on the test introduced by the CLERP Act that the benefit must be 'likely to induce' the recipient or an associate to accept the bid or dispose of target securities. Our draft guidance reflects the 'balance of factors' approach we take when considering the likely effect of a benefit that is offered to some but not all target holders. The 'balance of factors' approach to the test of inducement is wider than the 'net benefits' test.

63 Our approach to collateral benefits set out in draft Regulatory Guide 000 *Takeover bids* will also be relevant to scheme proponents and their advisers. We will take into account similar considerations to those set out in our draft guidance when examining, and considering requests for a ‘no objection’ letter in relation to, schemes of arrangement that could otherwise, in whole or in part, have been structured as a takeover bid: see Regulatory Guide 60 *Schemes of arrangement* (RG 60) at RG 60.23.

Relief

64 In some cases it may be appropriate for a bidder who seeks to enter into arrangements that may lead to a contravention of s623 to apply to ASIC for relief: see Takeovers Panel, *Collateral benefits*, issues paper, 9 November 2005, paragraphs 8–9; and *S.A. Liquor Distributors Ltd* [2002] ATP 22 at [43].

65 Our guidance in draft Regulatory Guide 000 *Takeover bids* states that we will grant relief from the prohibition on collateral benefits sparingly, particularly in light of the CLERP Act amendments that narrowed the focus of s623: see our current guidance in RG 35.13.

66 However, in our guidance in draft Regulatory Guide 000 *Takeover bids* we set out that we will continue to grant relief:

- (a) for certain transactions with a controlling holder (see our current guidance in RG 35.18 and RG 35.19(b)); and
- (b) for placements, underwriting and other fundraising arrangements connected with a bid (see our current guidance in RG 145).

67 Our draft guidance also clarifies that we may grant relief in certain cases where a target’s members are linked by collateral interests outside the corporate structure that cannot be made the subject of a regulated takeover bid—for example, common arrangements associated with co-operatives and time-sharing schemes. This relief will be considered on a case-by-case basis, taking into account the principles in s602 and, in particular, the equality principle in s602(c): see draft Regulatory Guide 000 *Takeover bids* at RG 000.226–RG 000.229.

68 Our draft guidance does not maintain our policy at RG 35.19(a), which states that we may provide relief to facilitate a bidder purchasing directly from an ultimate controller, an intermediate holding company that holds a downstream interest in target securities.

The bidder's intentions

Proposal

- D6 We propose to update our guidance relating to disclosure of the bidder's intentions required under s636(1)(c) and (d). The form of our updated guidance is set out in draft Regulatory Guide 000 *Takeover bids* at RG 000.254–RG 000.266.

Your feedback

- D6Q1 Do you have any comments on our updated guidance on disclosure of the bidder's intentions in draft Regulatory Guide 000 *Takeover bids*?

Rationale

- 69 Where relevant, our draft guidance on the disclosure requirements regarding a bidder's intentions is based on Regulatory Guide 11 *Disclosure of offerors' intentions in takeover documents* (RG 11). RG 11 included reference to cl 20(2) of Pt A and cl 15 in Pt C of s750 of the old Corporations Law (now repealed). Clause 20(2), which extended the disclosure requirement to include 'possible courses of action', was removed as part of the CLERP Act amendments. Following the CLERP Act amendments, RG 11 has been a 'continuing policy' to the extent that it is consistent with the Act: see RG 159.283–RG 159.284.
- 70 Our draft guidance provides further detail on the scope of 'intentions' that must be disclosed. In particular, in our draft guidance we provide additional detail on:
- (a) the kinds of expressions that do not satisfy s636(1)(c);
 - (b) the extent to which alternative or contingent intentions must be disclosed; and
 - (c) the need for the bidder's intentions to consider all potential outcomes of the bid.

Funding arrangements

Proposal

- D7 We propose to update our guidance on the requirement in s636(1)(f) that the bidder disclose details of its funding arrangements when cash, or a cash component, is offered as consideration. The form of our updated guidance is set out in draft Regulatory Guide 000 *Takeover bids* at RG 000.267–RG 000.295.

Your feedback

D7Q1 Do you have any comments on our updated guidance on bid funding in draft Regulatory Guide 000 *Takeover bids*?

Rationale

- 71 Our draft guidance on bid funding is based on our current guidance in Regulatory Guide 37 *Takeovers—financing arrangements* (RG 37), which discussed the requirements of cl 11 in Pt A and cl 8 in Pt C of s750 of the old Corporations Law (now repealed). Following the CLERP Act amendments, RG 37 has been a ‘continuing policy’ to the extent that it is consistent with the Corporations Act: see RG 159.283–RG 159.284.
- 72 Among other things, our draft guidance on funding arrangements:
- (a) refers to a number of decisions by the courts and the Takeovers Panel since the publication of RG 37;
 - (b) incorporates further guidance on legislative changes such as the introduction of the supplementary disclosure regime; and
 - (c) highlights the interaction of the disclosure requirement with s631(2)(b) and notes that we may make further inquiries when the disclosures made under s636(1)(f) do not sufficiently demonstrate the bidder’s reasonable basis for expecting to be able to pay the cash consideration it is offering.

Closing time for an automatically extended offer period**Proposal**

D8 We propose to modify s624(2) by class order so that where an offer is automatically extended, it ends at the time of day it would have ended but for the extension, rather than at midnight on the 14th day of the extended period.

Your feedback

D8Q1 Do you agree with our proposed modification to s624(2) regarding the time of day an offer period ends? If not, why not?

Rationale

- 73 Under s624(2), if certain events occur in the final seven days the offer period for a bid may be automatically extended so that it ends 14 days after the relevant event.

- 74 The likely effect of s624(2) is that the extended offer period ends at the conclusion of the 14th day after the triggering event, even if the bidder has previously specified a set time of day for the offers to close. This is the result of the general legal position that a ‘day’ comprises a full 24 hours ending at midnight.

Note: See *Prowse v McIntyre* (1961) 111 CLR 264. For a recent application of this principle see *Autumn Solar Installations Pty Ltd v Solar Magic Australia Pty Ltd* [2010] NSWSC 463. See also Regulatory Guide 7 *Calculating time periods* (RG 7).

- 75 In order to reduce the potential for confusion, and ensure the bid will close at the most commercially suitable time of day, we propose to modify the provisions by class order so that automatically extended offers will no longer be required to remain open until midnight on the 14th day of the extended period. The extended period will instead conclude:
- (a) in the case of an off-market bid—at the time of day the offer period would have ended if the automatic extension had not occurred; and
 - (b) in the case of a market bid—at the conclusion of ordinary trading on the final day of the extension period.

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

Proposal

- D9 We propose modify Ch 6 by class order to clarify that when a target holder gives the bidder an acceptance form containing a written instruction or authority accepting the offer for bid class securities registered in a clearing and settlement facility (such as that operated through CHESSE), the offer is taken to have been accepted when the completed form is received by the bidder.

Your feedback

- D9Q1 Do you agree with our proposal to modify Ch 6 to clarify the time of acceptances of offers through clearing and settlement facilities? If not, why not?

Rationale

- 76 Although target holders with CHESSE-registered holdings can directly instruct their broker to accept the bid, for some target holders a more familiar method of acceptance is instead to return a completed acceptance form to the bidder or its representative—an alternative traditionally offered by bidders. This is recognised by ASX Settlement Operating Rule 14.14.7, which provides a mechanism for bidders that have received completed acceptance forms to initiate their processing through CHESSE. Completion

and return of an acceptance form is also the method by which a target holder with an issuer sponsored holding must generally accept the bid.

- 77 In *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55, the Full Federal Court determined that the combined operation of s653A, reg 6.8.01 and 7.11.24 of the Corporations Regulations 2001 and ASX Settlement Operating Rule 14.14 means that unless and until an acceptance for CHES-registered securities is processed in accordance with the ASX Settlement Operating Rules, it is not an acceptance of the offer: see [17] and [223]. As a result there may be a delay between the time a bidder receives a completed acceptance form from a target holder and the time the target holder is taken to have accepted the bid for the purposes of Ch 6.
- 78 Our proposed class order modification seeks to provide certainty for bidders and holders and align the operation of Ch 6 with the expectations of target holders that once they have delivered the bidder a completed acceptance form they have accepted the offer: see draft Regulatory Guide 000 *Takeover bids* at RG 000.460–RG 000.465.
- 79 The proposed amendments are made only for the purposes of Ch 6 and do not affect the requirement that the procedures in the rules of the relevant clearing and settlement facility must be complied with to effect settlement of the takeover contract.

Acceptance facilities: Class order relief

Proposal

D10 We propose to modify the takeover provisions by class order to confirm that a bidder does not acquire a relevant interest in securities at the time they are tendered into an acceptance facility established by the bidder in connection with the bid. The terms and conditions of our modification will be consistent with our proposed guidance, set out in draft Regulatory Guide 000 *Takeover bids* at RG 000.466–RG 000.482.

Among other things, we propose to require that:

- (a) if the facility is only open to institutional holders (rather than all) on the basis that only institutional holders are prevented from accepting the takeover offer on account of their investment mandates, participation in the facility must be limited to institutional holders who are in fact restricted by their investment mandate and have provided written certification to this effect to the facility agent; and
- (b) the bidder and facility agent must make disclosures and operate the facility in accordance with the safeguards set out in draft Regulatory Guide 000 *Takeover bids* at RG 000.476 and RG 000.480–RG 000.481.

Your feedback

D10Q1 Do you agree with our proposal to provide class order relief confirming that a bidder does not acquire a relevant interest through an acceptance facility? If so, should we provide this relief on a case-by-case basis rather than by class order? If you disagree, please explain why.

D10Q2 Will our proposed modification provide an opportunity for bidders to improve the legal certainty associated with the operation of an acceptance facility by strengthening the current structure of facilities? If so, which aspects of the facility arrangements could be improved?

D10Q3 Do you agree with our proposal to limit participation in institutional acceptance facilities to institutions that are actually restricted by their mandates? Is there a benefit in having other holders participate regardless? If so, why should all holders not be eligible to participate? What are the most common restrictions found in investment mandates that inhibit institutional holders' ability to accept a bid?

D10Q4 Do you agree with the other proposed requirements of the class order relief and associated guidance in draft Regulatory Guide 000 *Takeover bids*, including the requisite terms on which acceptance facilities need to be established? Are there any other conditions or terms that may be appropriate?

Rationale

- 80 Over the past decade acceptance facilities have become an increasingly common feature of takeover bids conducted in Australia. It appears that the terms, structure and operation of acceptance facilities have been largely consistent during this time.
- 81 The Takeovers Panel in *Patrick Corporation Limited 03* [2006] ATP 12 considered that, appropriately constituted, an institutional acceptance facility did not offend the equality principle in s602(c). However, there remains a question about whether the overall arrangements and understandings that form part of the structure of an acceptance facility, and are necessary for the facility to fulfil its purpose of providing assurance to a bidder, may result in the bidder acquiring a relevant interest in securities tendered into the facility: see draft Regulatory Guide 000 *Takeover bids* at RG 000.471–RG 000.474.
- 82 Our proposed class order and associated guidance is designed to address any legal uncertainty and to establish an administrative framework and basic standards for the use of acceptance facilities in the future.
- 83 For the most part, the terms of our proposed class order reflect well-recognised features of acceptance facilities observed to date. In proposing to

limit participation in institutional acceptance facilities to those institutions that are the subject of restrictive mandates we are seeking to ensure that all holders are treated equally, except to the extent doing so may raise practical difficulties for particular holders.

Acceptance facilities: Automatic extensions

Proposal

D11 We propose to provide guidance on the case-by-case relief that we may grant so that, for the purposes of s624(2)(b) only, a bidder is taken to have voting power in securities that are the subject of an acceptance facility as soon as the bidder triggers the release of the acceptances and instructions under the facility by giving a confirmation notice to the facility agent. Our proposed guidance is set out in draft Regulatory Guide *Takeover bids* at RG 000.487–RG 000.493.

Your feedback

D11Q1 Do you agree with the proposed draft guidance and our proposed case-by-case relief on when bidders have voting power in securities in an acceptance facility?

Rationale

- 84 If a bidder has less than 50% voting power in the target, the bidder may allow their conditional bid to enter the final seven days of the offer period in expectation that, if the aggregate of a bidder's voting power and the securities tendered into an acceptance facility increases to greater than 50%, it will be able to trigger the facility by providing a confirmation that it will declare the bid free of conditions once the 'conversion' of facility acceptances into real acceptances brings about an automatic extension under s624(2)(b).
- 85 Our proposed relief is designed to provide greater certainty about this process, by removing the possibility (particularly where the triggering of the acceptance facility occurs towards the close of offers) that the automatic extension may not eventuate due to the failure of certain parties to effect the acceptances or instructions released from the facility before the end of the offer period.

Joint bids

Proposal

D12 We propose to broaden our policy on joint bids so that it takes account of schemes of arrangement as well as takeover bids. Our updated

guidance is set out in Section L of draft Regulatory Guide 000 *Takeover bids*.

Your feedback

D12Q1 Do you agree with our proposal to amend our policy on joint bids to take account of schemes of arrangement?

D12Q2 Do you agree with the conditions we are proposing to apply when relief is sought for joint proponents of a scheme of arrangement?

D13 We also propose to modify our joint bid policy to facilitate a joint bid by two bidders without the condition requiring the joint bidders to accept or match a higher rival bid or scheme where one of the joint bidders has less than a 3% relevant interest in the target securities.

Your feedback

D13Q1 Do you agree with our proposal to amend our policy on the match or accept condition in joint bid relief in this way? Are the circumstances in which we propose to provide this concession appropriate?

D13Q2 Do you consider the 3% limit appropriate?

Rationale

86 We propose to broaden our joint bid policy so that it encompasses schemes of arrangement. The updated policy will apply both to joint bids that are structured as schemes of arrangement and to rival offers that are structured as schemes of arrangement. We are proposing to update our policy in this way to take account of the fact that control transactions may be structured as a bid or as a scheme of arrangement. Since publishing our original policy, we have given case-by-case relief to joint bids that are structured as schemes of arrangement.

87 There are some differences in the proposed conditions that apply to bids and schemes of arrangement that reflect the differences between the two transaction structures. For example, in a joint bid that is structured as a scheme, we are proposing a condition that the joint bidders and their associates must not vote in the same class as other target shareholders.

Conditions applying where one joint bidder holds less than 3%

88 In some cases two parties may wish to enter into joint bid arrangements in circumstances where one party has a holding of less than 3%. The potential deterrent effect of entering into joint bid arrangements in this circumstance may be of minimal importance, given the size of the second bidder's holding. This may justify relaxing the condition that the joint bidder must match or accept a higher rival bid or scheme.

- 89 However, we do not propose to grant relief without the ‘match or accept’ condition if the joint bidders have arranged their holdings to take advantage of this concession: see draft Regulatory Guide 000 *Takeover bids* at RG 000.508. We will also look at the overall situation and consider the potential deterrent effect before granting relief without the ‘match or accept’ condition.

Our other updated and consolidated guidance

Proposal

- D14 We propose to update and consolidate our other guidance relating to takeover bids in the form of draft Regulatory Guide 000 *Takeover bids*.

Your feedback

- D14Q1 Do you have any comments on any other aspects of our updated guidance in draft Regulatory Guide 000 *Takeover bids*?

Rationale

- 90 Draft Regulatory Guide 000 *Takeover bids* incorporates a number of more minor updates to our existing regulatory guides.
- 91 These updates include:
- (a) clarification that we will carefully consider the effect of any relief sought to treat ‘out of the money’ and ‘in the money’ options as the same class (see Example 1 at RG 000.105 in draft Regulatory Guide 000 *Takeover bids*);
 - (b) updated guidance on the requirements and operation of s630, taking into account changes under the CLERP Act (see draft Regulatory Guide 000 *Takeover bids* at RG 000.144–RG 000.159);
 - (c) our proposed extension of the relief we may provide for disclosure of relevant interests and dealings of foreign associates and trustees to additionally include s636(1)(i)(ii) (see draft Regulatory Guide 000 *Takeover bids* at RG 000.306–RG 000.316);
 - (d) our proposed expansion of the relief we may provide to add fully paid securities to existing consideration on offer (currently our policy in Section L of RG 159 only refers to relief to add securities to a cash bid) and consequential relief from s625(3)(c)(i) (see draft Regulatory Guide 000 *Takeover bids* at RG 000.442–RG 000.446).

E Compulsory acquisitions and buyouts

Key points

We propose to modify s661A by class order to clarify that, in reckoning the 90% relevant interest test for post-bid compulsory acquisitions:

- deemed relevant interests arising under s608(3)(b) are not excluded; and
- deemed relevant interests of the bidder's associates arising under s608(3)(a) are excluded.

We also propose to modify the post-bid buyout provisions to clarify that, in certain circumstances, a bidder does not have to make buyout offers when it is undertaking post-bid compulsory acquisition. Our draft guide clarifies that we will generally not give relief from the post-bid buy-out requirements for convertible securities on the basis that a bidder intends to utilise general compulsory acquisition.

Our draft guide includes discussion on lodging compulsory acquisition and buyout notices. In conjunction with the release of our proposed guidance, we intend to update our approved forms to clarify that it is not necessary to lodge a copy of every individual form with us.

Deemed relevant interests excluded in post-bid compulsory acquisition

Proposal

- E1 We propose to modify s661A(2) to clarify that only deemed relevant interests that the bidder has due to s608(3)(a) are excluded from the 90% relevant interest test in s661A(1)(b)(i).

Your feedback

- E1Q1 Do you agree that our proposed clarification with respect to deemed relevant interests is consistent with the intended operation of s661A(2)? If not, why not?

- E2 We also propose to extend s661A(2) so that deemed relevant interests of the bidder's associates are also excluded.

Your feedback

- E2Q1 Do you agree with our proposal to extend s661A(2) to relevant interests held by the bidder's associates?

Rationale

- 92 There are two threshold tests for compulsory acquisition following a takeover bid. To meet the 90% relevant interest test, the bidder and its associates must have a relevant interest in at least 90% of the securities in the bid class: s661A(1)(b)(i).
- 93 Section 661A(2), as currently modified by [CO 01/1544], states that, for the purposes of determining whether the 90% relevant interest test has been met, any relevant interests that the bidder has ‘merely because of the operation of s608(3) (relevant interest by 20% interest in body corporate)’ are to be disregarded. In referring to s608(3), there may be some uncertainty about whether the exclusion in s661A(2) applies to deemed relevant interests on the basis of control of another entity: s608(3)(b).
- 94 Proposal E1 is intended to clarify that only deemed relevant interests under s608(3)(a) are excluded. We think this is consistent with the legislature’s intention, based on:
- (a) the description in s661A(2) of the types of relevant interest to be disregarded as ‘relevant interest by 20% interest in body corporate’; and
 - (b) discussion in the advisory report on which the amendments introducing s661A(2) were largely based (see Legal Committee of the Companies and Securities Advisory Committee, *Compulsory acquisitions*, January 1996 (Compulsory Acquisitions Report)).
- Note: The Compulsory Acquisitions Report recommended that relevant interests in securities arising merely because of a deemed interest under s33 of the old Corporations Law (now repealed) should be excluded. Section 33 only referred to the 20% deeming test now found in s608(3)(a).
- 95 Proposal E2, if implemented, will ensure that the exclusion in s661A(2) extends to deemed relevant interests of an associate of the bidder. The underlying policy of the exclusion—that it is not appropriate to count deemed interests that may be artificial—applies equally to the interests of the bidder’s associates as it does to the bidder: see draft Regulatory Guide 000 *Compulsory acquisitions and buyouts* at RG 000.47–RG 000.49.

Simultaneous compulsory acquisition and buyout rights

Proposal

- E3 We propose to modify s662A by class order to clarify that, if the bidder has given a compulsory acquisition notice following a takeover bid under s661B, the bidder does not have to make buyout offers to remaining holders in accordance with s662B and 662C.

Your feedback

- E3Q1 Do you agree with our proposed modification regarding simultaneous compulsory acquisition and buyout rights for the reasons outlined? If not, why not?
- E3Q2 Will class order relief of this kind materially impact on the rights of remaining holders of bid class securities?

- E4** We propose to give guidance on the interaction between the post-bid buyout requirements for convertible securities in Div 3 of Pt 6A.1 and the general compulsory acquisition provisions. We propose to confirm in our guidance that we will not give relief from the post-bid buyout provisions to a person who is compulsorily acquiring convertible securities under Div 1 of Pt 6A.2.

Your feedback

- E4Q1 Do you agree with our proposed draft guidance regarding the buyout provisions and compulsory acquisition of convertible securities?
- E4Q2 Do you agree with our policy to not provide relief from the post-bid buyout requirements for convertible securities? If not, why not?

Rationale

- 96 In some cases securities may be subject to compulsory acquisition, while at the same time a holder is entitled to have their interest in the security bought out under Ch 6A. The interaction of the parallel processes of compulsory acquisition and buyout may be unclear in some respects.
- 97 Our draft guide will provide further guidance on how simultaneous rights may operate and adopt the policy on relief from the relevant provisions set out in proposals E3 and E4.

Post-bid compulsory acquisition and buy-out rights in relation to bid class securities

- 98 Our modification in proposal E3 addresses the potential that the buyout provisions in Div 2 of Pt 6A.2 continues to apply in these circumstances, even if no security holder will receive a buyout notice and the terms that the bidder must offer under any buyout are the same as those under the contemporaneous compulsory acquisition process.
- 99 Proposal E3 means that a bidder does not need to lodge a buyout notice and provide the notice to relevant market operators when no notices need be given to remaining holders: see draft Regulatory Guide 000 *Compulsory acquisitions and buyouts* at RG 000.130–RG 000.139.

General compulsory acquisition and post-bid buyouts of convertible securities

- 100 Our draft guidance under proposal E4 clarifies that, even though a bidder may be restricted in its ability to negotiate more favourable terms under the buyout notice due to the prohibition in s664D, the right to be bought out at a court-determined price remains. We also highlight the need to ensure that the notices of general compulsory acquisition are accompanied by sufficient disclosure explaining the reason for and effect of the contemporaneous compulsory acquisition and buyout rights: see draft Regulatory Guide 000 *Compulsory acquisitions and buyouts* at RG 000.142–RG 000.146.
- 101 We also propose to clarify that we will generally not grant relief from the buyout requirement in respect of convertible securities merely because the bidder is proceeding to utilise general compulsory acquisition.
- 102 We will not provide this relief because to do so may deprive convertible security holders of valuable rights, particularly as the general compulsory acquisition process may be abandoned by the bidder. For further discussion of the reasons why we do not consider this relief is appropriate, see draft Regulatory Guide 000 *Compulsory acquisitions and buyouts* at RG 000.147–RG 000.150.

Lodging compulsory acquisition and buyout notices

Proposal

- E5 We propose to provide guidance on the appropriate procedures for lodging buyout and compulsory acquisition notices with us.

Your feedback

- E5Q1 Do you have any comments on our draft guidance on procedures for lodging buyout and compulsory acquisition notices (including our proposal to amend our approved forms)? If not, why not?

Rationale

- 103 We have observed that lodging parties have in the past taken different approaches to the lodgement requirements for compulsory acquisition and buyout notices under s661B(1), 662B(1), 663B(1), 664C(2) and 665B(1). In some cases, a copy of every fully completed notice to be given to a security holder is lodged. In other cases, only one of the notices or a ‘pro forma’ notice omitting personalised details is lodged.

- 104 Relief has also frequently been sought from ASIC to confirm that lodgement of a single pro forma notice (omitting the name and address of each recipient) is sufficient.
- 105 We intend to update our approved forms so that the notices to be sent to holders will no longer contain information that may differ depending on the recipient. This amendment will confirm that a person giving a compulsory acquisition or buyout notice is able to lodge a single notice in standard form and give a copy of that standard notice to each relevant holder: see draft Regulatory Guide 000 *Compulsory acquisition and buyouts* at RG 000.170–RG 000.172.
- 106 Our draft guidance referred to in proposal E5 discusses our expectation that lodging parties will provide us with copies of documents which are to accompany a compulsory acquisition or buyout notice. Providing these documents at lodgement improves our ability to deal with any regulatory concerns that may arise in relation to accompanying disclosure as efficiently as possible.

F Reissue of our existing class orders

Key points

In connection with the release of our updated and consolidated guidance, we propose to reissue the various class orders discussed in the guides.

Update and reissue of our class orders

Proposal

F1 When we publish our new guidance, we propose to reissue the existing class orders to which the guidance relates. The class orders we propose to reissue are listed in Appendix 2. Unless otherwise indicated we propose to reissue the class orders largely in their existing form.

Your feedback

F1Q1 Do you have any comments on the current form of the class orders we are proposing to reissue?

Rationale

- 107 We have issued a number of class orders modifying the provisions of Chs 6–6C. Our class orders clarify and amend the operation of the law in certain instances.
- 108 Under the *Legislative Instruments Act 2003*, our class orders automatically expire periodically and must be reissued. Many of the class orders discussed in our draft regulatory guides will expire progressively over the next few years.
- 109 Our proposal to refresh the operation of our class orders is part of the process of updating and consolidating our guidance on Chs 6–6C relating to the class orders. The list of class orders we are proposing to reissue is set out in Appendix 2.
- 110 For the most part we will update and reissue the class orders in substantially the same form. We invite your comments on the existing form and content of these class orders as part of our general update.
- 111 In some cases we have proposed specific policy changes to an existing class order in this consultation paper. In these cases we are interested in any views you may have both on our proposed amendment to the class order and any other aspects of the existing class order.

G Regulatory and financial impact

- 112 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) facilitating efficient control transactions and disclosures of substantial interests; and
 - (b) ensuring the protections and principles underlying the regulatory regime in Chs 6–6C are maintained.
- 113 Before settling on a final policy, we will comply with the Australian Government’s regulatory impact analysis (RIA) requirements by:
- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
 - (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
 - (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).
- 114 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 115 To ensure that we are in a position to properly complete any required RIS, we ask you to provide us with as much information as you can about our proposals or any alternative approaches, including:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits,
- See ‘The consultation process’ p. 4.

Appendix 1: Our existing guides

116 The subject matter of the regulatory guides listed in Table 1 has been reviewed and, where appropriate, incorporated into the new draft regulatory guides.

Table 1: Guidance included

Regulatory Guide	
RG 5	<i>Relevant interests in unissued share capital</i>
RG 6	<i>Variation of takeover offers</i>
RG 9	<i>Relevant interests in shares</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 31	<i>Acquisitions and disposals by a broker acting as principal</i>
RG 35	<i>Collateral benefits in takeovers</i>
RG 37	<i>Takeovers—financing arrangements</i>
RG 48	<i>Takeovers aspects of options over shares</i>
RG 61	<i>Underwriting—application of exemptions</i>
RG 88	<i>Trustee and nominee companies</i>
RG 143	<i>Takeovers provisions: Warrants</i>
RG 145	<i>Collateral benefits—Takeovers funding and pre-bid purchases</i>
RG 159	<i>Takeovers, compulsory acquisitions and substantial holding notices</i>
RG 171	<i>Anomalies and issues in the takeover provisions</i>
RG 199	<i>Broadening the rights issue and dividend reinvestment plan exceptions for takeovers</i>

117 The guidance listed in Table 2 relating to Chs 6–6C has not been included in the proposed update and consolidation.

Table 2: Other guidance

Regulatory Guide	
RG 25	<i>Takeovers: False and misleading statements</i>
RG 59	<i>Announcing and withdrawing takeover bids (s653 and s746)</i>
RG 71	<i>Downstream acquisitions</i> Note: This guide was recently updated
RG 74	<i>Acquisitions approved by members</i> Note: This guide was recently updated
RG 128	<i>Collective action by institutional investors</i>
RG 163	<i>Takeovers: Minimum bid price principle—s621</i>

Appendix 2: Our existing class orders

- 118 The class orders listed in Table 3 are being reviewed and updated in connection with the release of our proposed new guidance. Where we have proposed specific policy changes to existing class orders, we have included cross-references to the discussion in the consultation paper. We invite you to comment on these class orders.
- 119 Table 3 also includes class orders that are relatively new. Consequently, we do not propose to reissue these class orders at this time.

Table 3: Existing class orders with cross-references (as applicable) to changes proposed in this consultation paper

Class order		Comments	Reference
[CO 00/193]	<i>Experts: citing in disclosure documents</i>	Update and reissue	
[CO 00/343]	<i>Unmarketable parcels</i>	Reissue with amendments	Proposal D1
[CO 00/344]	<i>Changes to a bidder's statement between lodgement and despatch</i>	Update and reissue	
[CO 01/1541]	<i>Changing the responsible entity</i>	Update and reissue	
[CO 01/1542]	<i>Relevant interests, voting power and exceptions to the main takeover prohibition</i>	Reissue with amendments	Proposal B2
[CO 01/1543]	<i>Takeover bids</i>	Update and reissue	
[CO 01/1544]	<i>Compulsory acquisition following a takeover bid</i>	Update and reissue	
[CO 01/1599]	<i>Sydney Futures Exchange—participant's relevant interest and voting power</i>	Reissue with amendments	Proposal B2
[CO 02/924]	<i>Call warrant holder takeovers relief</i>	Update and reissue	
[CO 02/925]	<i>Call warrant takeovers relief</i>	Update and reissue	
[CO 02/926]	<i>Put warrant takeovers relief</i>	Update and reissue	
[CO 02/927]	<i>Warrant trustee takeovers relief</i>	Update and reissue	
[CO 03/633]	<i>Takeovers: notice of variation</i>	Update and reissue	
[CO 03/634]	<i>Takeovers: listing rule escrow</i>	Update and reissue	
[CO 03/635]	<i>Takeovers: consent to quote officials and publications</i>	Update and reissue	
[CO 03/636]	<i>Takeovers: non-transferable employee securities</i>	Update and reissue	

Class order		Comments	Reference
[CO 04/631]	<i>Associates: right to dispose of securities</i>	Update and reissue	
[CO 04/653]	<i>On-sale disclosure relief for scrip bids and schemes of arrangement</i>	Reissue with amendments	Proposal D2
[CO 04/1413]	<i>Bidder giving substantial holding notice</i>	Update and reissue	
[CO 08/35]	<i>Disclosure relief for rights issues</i>	Will not reissue as part of this consultation	
[CO 09/459]	<i>Takeovers relief for accelerated rights issues</i>	Will not reissue as part of this consultation (amendment only proposed)	Proposal C3

120 Table 4 lists those class orders included in our existing regulatory guides that we are not proposing to update and reissue. Many of these class orders have either expired, been revoked or replaced by other class orders.

Table 4: Expired or revoked class orders referred to in existing regulatory guides

Class order		Comments
[CO 97/1]	<i>Banks—Pro Forma 81 relief</i>	Expired following repeal of s730 of the old Corporations Law
[CO 99/841]	<i>Relevant interest in or entitlement to a share held by a call warrant issuer solely as a result of holding warrant</i>	Expired following repeal of s730 of the old Corporations Law
[CO 99/842]	<i>Relevant interest in or entitlement to a share held by a call warrant issuer as cover for its obligation under warrant</i>	Expired following repeal of s730 of the old Corporations Law
[CO 99/843]	<i>Relevant interest in or entitlement to a share held by a put warrant issuer solely as a result of issuing a warrant</i>	Expired following repeal of s730 of the old Corporations Law
[CO 00/345]	<i>Notice by 85% holder</i>	Revoked, see Class Order [CO 07/568] <i>Revocation of class orders [CO 00/345] and [CO 01/1545]</i>
[CO 00/2375]	<i>Downstream acquisitions: London Stock Exchange</i>	Revoked, incorporated into Class Order [CO 02/259] <i>Downstream acquisitions: foreign stock markets</i>
[CO 01/53]	<i>Downstream acquisitions: Approved overseas exchanges</i>	Revoked, incorporated into [CO 02/259]
[CO 01/921]	<i>Downstream acquisitions: New Zealand Stock Exchange</i>	Revoked, incorporated into [CO 02/259]
[CO 01/1545]	<i>85% holder notices</i>	Revoked, see [CO 07/568]

Appendix 3: Cross-reference to existing guides

121 Table 5–Table 8 set out cross-references to those parts of our existing guidance that are incorporated into the various sections of our draft regulatory guides.

Table 5: Relevant interests and substantial holding notices: Cross-reference to existing guidance

Section of draft guide	Existing guidance
B Relevant interests in securities	
Applying the relevant interest definition	RG 9
The basic rule for a relevant interest	
Extension to the basic rule: Interests in a body corporate or managed investment scheme	
Extension to the basic rule: Anticipation of performance or exercise of agreement or right	
Exceptions	RG 171, Section B RG 171, Section C
C Takeovers and substantial holdings: Applying the relevant interest concept	
The takeover and substantial holding disclosure thresholds	N/A
Voting power	
Deemed increase in voting power: Acquisitions from an associate	RG 171, Section D
Associates	N/A
Disposal rights giving rise to an association	RG 171, Section Y
D Options	
	RG 5 RG 48
E Warrants	
	RG 143
F Escrow arrangements	
	RG 159, Section Q
G Substantial holding notices	
	RG 159, Section X

Table 6: Exceptions to the general takeover prohibition: Cross-reference to existing guidance

Section of draft guide	Existing guidance
B On-market purchases during the bid period	RG 171, Section F
C Creeping acquisitions	
Combining the 3% creep exception with other exceptions	RG 171, Section H
The 3% creep exception and the efficient market principle	N/A
Dilution below 19% voting power	RG 159, Section A
D Rights issues	
Accelerated rights issues	RG 199, Section B
Rights issues and underwriting: Unacceptable circumstances	RG 159, Section R
Shortfall facilities	RG 199, Section C
Offers to foreign holders: The nominee procedure	RG 159, Section B RG 171, Section K RG 199, Section D
E Underwriting	
The exceptions for underwriting	RG 61
What is underwriting?	RG 159, Section R
Arrangements not considered underwriting	
Related party underwriting: Member approval	
Underwriting a dividend reinvestment plan	RG 199, Section E
F Acquisitions by brokers: Client facilitation	RG 31

Table 7: Takeover bids: Cross-reference to existing guidance

Section of draft guide	Existing guidance
B The takeover offers	
Classes of securities	RG 10 RG 159, Section C
Bid class securities issued after the s633(2) date	RG 159, Section D RG 171, Section L
Offers to foreign holders	RG 159, Section B RG 171, Section K

Section of draft guide	Existing guidance
Small parcels	RG 159, Section E
Consideration payable subject to providing documents	RG 171, Section M
C Bids for multiple classes	
Treating multiple classes as a single class	RG 159, Section C
Exercising convertible securities acquired under a bid	RG 159, Section S
D Conditional offers	
The notice of status of conditions	RG 6.2
The statutory quotation condition	RG 171, Section O
Maximum acceptance and discriminatory conditions	RG 27
Conditions relating to 'prescribed events' in s652C	RG 171, Section S
Section 652C conditions at the close of the offer	RG 171, Section T
E Collateral benefits	
The prohibition on collateral benefits	RG 35
Prohibited benefits	N/A
When the prohibition applies	RG 171, Section N
Relief from the collateral benefits prohibition	RG 35 RG 145
F The bidder's statement	
The bidder's intentions	RG 11
Funding arrangements	RG 37
Scrip or managed investment products provided other than by bidder or controlled entity	RG 171, Section Q
Relevant interests and dealings of foreign associates and trustees	RG 159, Section J
Information not available at lodgement	RG 171, Section P
Changes to a bidder's statement between lodgement and dispatch	RG 159, Section F
Extension of time for sending the bidder's statement	RG 159, Section H
G The target's statement	
Extension of time for sending the target's statement	RG 159, Section I

Section of draft guide	Existing guidance
Receivers and managers	RG 159, Section K
H Consents	
Consent to quote officials and publications	RG 159, Section T
Consent to use lodged statement	RG 171, Section R
I Supplementary statements	RG 159, Section G
J Variation of offers	
Extension of offer period under an off-market bid	RG 6.1, RG 6.4 and RG 6.6
Closing time for an automatically extended offer period	N/A
Withdrawal rights	RG 6.9
Variation to allow conditional increase in consideration	RG 159, Section M
Adding scrip consideration to an off-market bid	RG 159, Section L
Varying off-market offers before dispatch	RG 6.3
Approving notices of variation	RG 159, Section N
K Acceptances	N/A
L Joint bids	RG 159, Section Z
M Non-compliant bids	RG 171, Section J

Table 8: Compulsory acquisition and buyouts: Cross-reference to existing guidance

Section of draft guide	Existing guidance
B Post-bid compulsory acquisition	
The requirement to bid for all securities	RG 159, Section V
The 90% relevant interest threshold	N/A
The 75% acquisition threshold	RG 159, Section W RG 171, Section U
Compulsory acquisition of employee and other non-transferable securities	RG 159, Section U
C General compulsory acquisition	
Full beneficial interests	RG 171, Section V
The six month time limit for general compulsory acquisition	RG 171, Section W

Section of draft guide	Existing guidance
D Buyout rights	N/A
E Expert reports	RG 159, Section O
F Lodging compulsory acquisition and buyout documents	N/A

Key terms

Term	Meaning in this document
3% creep exception	The exception to the general prohibition in item 9 in s611
90% relevant interest test	The threshold test for post-bid compulsory acquisition in s661A(1)(b)(i) of the Corporations Act
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s12 of the Corporations Act
bid class	Has the meaning given in s9 of the Corporations Act
bidder	A bidder under a takeover bid as defined in s9 of the Corporations Act
bid period	Has the meaning given in s9 of the Corporations Act
buyout right	The right of a minority holder of securities or convertible securities to be bought out under s662C, 663C or 665C of the Corporations Act
Ch 6 (for example)	A chapter of the Corporations Act (in this example numbered 6)
CHESS	Clearing House Electronic Subregister System
CLERP Act	<i>Corporate Law Economic Reform Program Act 1999</i>
[CO 01/1542] (for example)	An ASIC class order (in this example number 01/1542)
Compulsory Acquisitions Report	Legal Committee of the Companies and Securities Advisory Committee, <i>Compulsory acquisitions</i> , January 1996
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
fully paid securities	Securities for which no amount remains unpaid
general prohibition	The prohibitions on offers, invitations, acquisitions and transactions in s606 of the Corporations Act
holder	A holder of securities
joint bid	A takeover bid or scheme proposal under which two or more parties together seek to acquire control of a target entity

Term	Meaning in this document
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
PAITREO	Pro rata accelerated institutional tradeable retail entitlement offer. An accelerated rights issue structure under which retail security holders are able to trade their rights following the institutional component
post-bid compulsory acquisition	Compulsory acquisition following a takeover bid under Div 1 of Pt 6A.1 of the Corporations Act
Pt 6A.1 (for example)	A part of the Corporations Act (in this example numbered 6A.1), unless otherwise specified
relevant interest	Has the meaning given in s9, 608 and 609 of the Corporations Act
RG 159 (for example)	An ASIC regulatory guide (in this example numbered 159)
rights issue	Involves an offer by an entity to issue new securities in a class to existing holders of that class in proportion to their holding as at a specified date
s611 (for example)	A section of the Corporations Act (in this example numbered 611), unless otherwise specified
securities	Has the meaning given to that term for the purposes of Chs 6–6C in s92(3) of the Corporations Act
shortfall	Securities offered but not taken up under an offer
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
takeover bid	Has the meaning given in s9 of the Corporations Act
target	Has the meaning given in s9 of the Corporations Act
underwriting	In the context of a capital raising, broadly the assumption of a risk that investors will not take up all of an offer of securities by agreeing to take up any shortfall
voting power	Has the meaning given in s610 of the Corporations Act

List of proposals and questions

Proposal	Your feedback
A1 We would like to hear your views on current and emerging issues in takeovers, substantial holding disclosure and compulsory acquisition.	<p>A1Q1 Are there any other issues on which it would be useful to have ASIC guidance or to expand our existing guidance? If so, please give details.</p> <p>A1Q2 Are there any other issues that may be appropriate for ASIC to address by way of exemption or modification by class order? Please be specific.</p>
B1 We propose to update and consolidate our guidance on relevant interests in securities. Our updated guidance is set out in Section B of draft Regulatory Guide 000 <i>Relevant interests and substantial holding notices</i> .	<p>B1Q1 Do you have any comments on our draft updated guidance on relevant interests?</p> <p>B1Q2 Are there any other aspects of the relevant interest concept which it may be useful to draw to readers' attention?</p>
<p>B2 We propose to update Class Order [CO 01/1542] Relevant interests, voting power and exceptions to the main takeover prohibition so that:</p> <p>(a) our modification to s609(1) refers to a 'security interest'—reflecting amendments to the Corporations Act effected by the Personal Property Securities (Corporations and Other Amendments) Act 2010. In doing so we propose to retain the terms of our modification confirming, for the avoidance of doubt, that a 'security interest' for the purposes of the exception includes a negative pledge; and</p> <p>(b) our modification to s609(3) includes instructions received by a financial services licensee in relation to derivatives as well as securities on terms similar to those set out in Class Order [CO 01/1599] Sydney Futures Exchange—participant's relevant interest and voting power. In doing so our modification will be extended to brokers trading derivatives on any prescribed financial market.</p>	<p>B2Q1 Do you agree with our proposals to retain and update our modification to s609(1) in [CO 01/1542]?;</p> <p>B2Q2 Do you agree with our proposal to update and amalgamate our relief for brokers in [CO 01/1542] and [CO 01/1599]?</p> <p>B2Q3 Should there be any additional limitations to our class order relief for persons purchasing security interests in the secondary market?</p>
B3 We propose to update our guidance on substantial holding disclosure. Our updated guidance is set out in Section G of draft Regulatory Guide 000 <i>Relevant interests and substantial holdings</i> .	<p>B3Q1 Do you have any comments on our draft updated guidance on substantial holding notices?</p> <p>B3Q2 Are there any other aspects of substantial holding disclosure that we should give guidance on?</p>

Proposal	Your feedback
<p>C1 We propose to update and consolidate our guidance relating to creeping acquisitions under item 9 of s611. The form of our updated guidance is set out in Section C of draft Regulatory Guide 000 <i>Takeovers: Exceptions to the general prohibition</i>.</p>	<p>C1Q1 Do you have any comments on our updated guidance on the 3% creep exception in draft Regulatory Guide 000 <i>Takeovers: Exceptions to the general prohibition</i>?</p>
<p>C2 We propose to update and consolidate our guidance on rights issues and underwriting arrangements that have the potential to affect control of an entity. The form of our updated guidance is set out in Sections D and E of draft Regulatory Guide 000 <i>Takeovers: Exceptions to the general prohibition</i>.</p>	<p>C2Q1 Do you have any comments on our draft updated guidance on rights issue and underwriting?</p> <p>C2Q2 Besides those in Table 4 of draft Regulatory Guide 000 <i>Takeovers: Exceptions to the general prohibition</i>, are there any other factors that we should take into account when considering whether regulatory action may be warranted in relation to a rights issue or underwriting arrangement?</p> <p>C2Q3 Do you agree with our draft guidance on arrangements that constitute underwriting? Are there any other practices which have developed that should not be considered 'underwriting' for the purposes of the exceptions?</p>
<p>C3 We propose to update Class Order [CO 09/459] Takeovers relief for accelerated rights issues so that the exception in item 10A of s611 applies to accelerated rights issue offers with a retail rights trading component, such as a 'pro rata accelerated institutional tradeable retail entitlement offer' (PAITREO).</p>	<p>C3Q1 Do you agree that our existing class order modification for accelerated rights issues should be amended to also apply to PAITREOs? Is there a need to extend our modification in this way?</p>
<p>C4 We are considering whether to expand our guidance on the exceptions in s611 to cover the scope and operation of items 8 and 12.</p>	<p>C4Q1 Is there a need for further guidance on items 8 and 12 of s611? Is the scope and operation of the exceptions sufficiently clear?</p>
<p>D1 We propose to amend the definition of 'market value' in s619(5) (inserted by Class Order [CO 00/343] Unmarketable parcels) to be the highest closing price for the securities published by 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:</p> <p>(a) five trading days before the first date on which the bidder must pay or provide consideration to a target holder under the terms of the offers; and</p> <p>(b) the end of the bid period.</p>	<p>D1Q1 Do you agree with our proposal to amend the definition of 'market value' in [CO 00/343]?</p> <p>D1Q2 Is the period of five trading days before the first date for payment appropriate? Would a time closer to the date for payment be more appropriate?</p>

Proposal	Your feedback
<p>D2 We also propose to amend the definition of 'market value' in related Class Order [CO 04/653] On-sale disclosure relief for scrip bids and schemes of arrangement. Our amendment will clarify that, for the purposes of a small parcel sale facility in a scheme, a small parcel is to be determined by reference to the highest closing price from the date the scheme booklet is registered by ASIC until the date the court order is lodged with ASIC.</p>	<p>D2Q1 Do you agree with our proposed reference period for determining small parcels in the scheme context? If not, what would be a more appropriate period?</p>
<p>D3 We propose to modify the operation of s618(2) in proportional takeover bids by class order, to prevent accepting shareholders engaging in 'share splitting' and similar devices to accept for a greater proportion of their holding than otherwise permitted. Our modification will prevent persons from relying on s618(2) if the relevant parcel has come into existence, or increased in size, because of a transaction entered into after the bid is publicly proposed.</p> <p>Our modification will provide that holders seeking to rely on s618(2) for an acceptance for one or more parcels forming part of a larger holding under s653B(1)(b) will need to provide a notice to the bidder setting out details of beneficial interests, and when those interests arose, to verify their eligibility.</p>	<p>D3Q1 Do you agree with our proposal to issue a class order to prevent share splitting in a proportional takeover bid? If not, why not?</p> <p>D3Q2 Are there any other conditions or requirements that should apply to our modification?</p> <p>D3Q3 Are there any ways the administrative burden of the notification requirements could be reduced while still providing sufficient evidentiary support to allow conduct contrary to the underlying purpose of the class order to be identified?</p>
<p>D4 We propose to update and consolidate our guidance on the prohibition on collateral benefits in s623. The form of our updated guidance is set out in Section E of draft Regulatory Guide 000 <i>Takeover bids</i>.</p>	<p>D4Q1 Do you have any comments on our updated guidance on collateral benefits in draft Regulatory Guide 000 <i>Takeover bids</i>?</p> <p>D4Q2 Do you agree that the factors listed in Table 3 of draft Regulatory Guide 000 <i>Takeover bids</i> may be relevant when considering whether a benefit is likely to induce acceptance or disposal? Are there any other factors that will often suggest, or may be relevant in considering, inducement?</p>

Proposal	Your feedback
<p>D5 We propose to continue to grant relief from the collateral benefits prohibition only in limited cases. The relief we propose to grant is set out in draft Regulatory Guide 000 <i>Takeover bids</i> at RG 000.221–RG 000.241.</p>	<p>D5Q1 Do you agree that we should only grant relief from the collateral benefits prohibition in limited cases?</p> <p>D5Q2 Should we continue to grant relief from s623 for benefits given to a controlling holder by a bidder when substituting as guarantor or acquiring a debt?</p> <p>D5Q3 Should we continue to grant case-by-case relief for benefits given in connection with the bidder’s arrangements for funding a takeover bid, even if the prohibition on collateral benefits no longer applies in the pre-bid period? If so, should this relief instead be provided by way of class order?</p>
<p>D6 We propose to update our guidance relating to disclosure of the bidder’s intentions required under s636(1)(c) and (d). The form of our updated guidance is set out in draft Regulatory Guide 000 <i>Takeover bids</i> at RG 000.254–RG 000.266.</p>	<p>D6Q1 Do you have any comments on our updated guidance on disclosure of the bidder’s intentions in draft Regulatory Guide 000 <i>Takeover bids</i>?</p>
<p>D7 We propose to update our guidance on the requirement in s636(1)(f) that the bidder disclose details of its funding arrangements when cash, or a cash component, is offered as consideration. The form of our updated guidance is set out in draft Regulatory Guide 000 <i>Takeover bids</i> at RG 000.267–RG 000.295.</p>	<p>D7Q1 Do you have any comments on our updated guidance on bid funding in draft Regulatory Guide 000 <i>Takeover bids</i>?</p>
<p>D8 We propose to modify s624(2) by class order so that where an offer is automatically extended, it ends at the time of day it would have ended but for the extension, rather than at midnight on the 14th day of the extended period.</p>	<p>D8Q1 Do you agree with our proposed modification to s624(2) regarding the time of day an offer period ends? If not, why not?</p>
<p>D9 We propose modify Ch 6 by class order to clarify that when a target holder gives the bidder an acceptance form containing a written instruction or authority accepting the offer for bid class securities registered in a clearing and settlement facility (such as that operated through CHES), the offer is taken to have been accepted when the completed form is received by the bidder.</p>	<p>D9Q1 Do you agree with our proposal to modify Ch 6 to clarify the time of acceptances of offers through clearing and settlement facilities? If not, why not?</p>

Proposal	Your feedback
<p>D10 We propose to modify the takeover provisions by class order to confirm that a bidder does not acquire a relevant interest in securities at the time they are tendered into an acceptance facility established by the bidder in connection with the bid. The terms and conditions of our modification will be consistent with our proposed guidance, set out in draft Regulatory Guide 000 <i>Takeover bids</i> at RG 000.466–RG 000.482.</p> <p>Among other things, we propose to require that:</p> <ul style="list-style-type: none"> (a) if the facility is only open to institutional holders (rather than all) on the basis that only institutional holders are prevented from accepting the takeover offer on account of their investment mandates, participation in the facility must be limited to institutional holders who are in fact restricted by their investment mandate and have provided written certification to this effect to the facility agent; and (b) the bidder and facility agent must make disclosures and operate the facility in accordance with the safeguards set out in draft Regulatory Guide 000 <i>Takeover bids</i> at RG 000.476 and RG 000.480–RG 000.481. 	<p>D10Q1 Do you agree with our proposal to provide class order relief confirming that a bidder does not acquire a relevant interest through an acceptance facility? If so, should we provide this relief on a case-by-case basis rather than by class order? If you disagree, please explain why.</p> <p>D10Q2 Will our proposed modification provide an opportunity for bidders to improve the legal certainty associated with the operation of an acceptance facility by strengthening the current structure of facilities? If so, which aspects of the facility arrangements could be improved?</p> <p>D10Q3 Do you agree with our proposal to limit participation in institutional acceptance facilities to institutions that are actually restricted by their mandates? Is there a benefit in having other holders participate regardless? If so, why should all holders not be eligible to participate? What are the most common restrictions found in investment mandates that inhibit institutional holders' ability to accept a bid?</p> <p>D10Q4 Do you agree with the other proposed requirements of the class order relief and associated guidance in draft Regulatory Guide 000 <i>Takeover bids</i>, including the requisite terms on which acceptance facilities need to be established? Are there any other conditions or terms that may be appropriate?</p>
<p>D11 We propose to provide guidance on the case-by-case relief that we may grant so that, for the purposes of s624(2)(b) only, a bidder is taken to have voting power in securities that are the subject of an acceptance facility as soon as the bidder triggers the release of the acceptances and instructions under the facility by giving a confirmation notice to the facility agent. Our proposed guidance is set out in draft Regulatory Guide <i>Takeover bids</i> at RG 000.487–RG 000.493.</p>	<p>D11Q1 Do you agree with the proposed draft guidance and our proposed case-by-case relief on when bidders have voting power in securities in an acceptance facility?</p>
<p>D12 We propose to broaden our policy on joint bids so that it takes account of schemes of arrangement as well as takeover bids. Our updated guidance is set out in Section L of draft Regulatory Guide 000 <i>Takeover bids</i>.</p>	<p>D12Q1 Do you agree with our proposal to amend our policy on joint bids to take account of schemes of arrangement?</p> <p>D12Q2 Do you agree with the conditions we are proposing to apply when relief is sought for joint proponents of a scheme of arrangement?</p>

Proposal	Your feedback
D13 We also propose to modify our joint bid policy to facilitate a joint bid by two bidders without the condition requiring the joint bidders to accept or match a higher rival bid or scheme where one of the joint bidders has less than a 3% relevant interest in the target securities.	D13Q1 Do you agree with our proposal to amend our policy on the match or accept condition in joint bid relief in this way? Are the circumstances in which we propose to provide this concession appropriate? D13Q2 Do you consider the 3% limit appropriate?
D14 We propose to update and consolidate our other guidance relating to takeover bids in the form of draft Regulatory Guide 000 <i>Takeover bids</i> .	D14Q1 Do you have any comments on any other aspects of our updated guidance in draft Regulatory Guide 000 <i>Takeover bids</i> ?
E1 We propose to modify s661A(2) to clarify that only deemed relevant interests that the bidder has due to s608(3)(a) are excluded from the 90% relevant interest test in s661A(1)(b)(i).	E1Q1 Do you agree that our proposed clarification with respect to deemed relevant interests is consistent with the intended operation of s661A(2)? If not, why not?
E2 We also propose to extend s661A(2) so that deemed relevant interests of the bidder's associates are also excluded.	E2Q1 Do you agree with our proposal to extend s661A(2) to relevant interests held by the bidder's associates?
E3 We propose to modify s662A by class order to clarify that, if the bidder has given a compulsory acquisition notice following a takeover bid under s661B, the bidder does not have to make buyout offers to remaining holders in accordance with s662B and 662C.	E3Q1 Do you agree with our proposed modification regarding simultaneous compulsory acquisition and buyout rights for the reasons outlined? If not, why not? E3Q2 Will class order relief of this kind materially impact on the rights of remaining holders of bid class securities?
E4 We propose to give guidance on the interaction between the post-bid buyout requirements for convertible securities in Div 3 of Pt 6A.1 and the general compulsory acquisition provisions. We propose to confirm in our guidance that we will not give relief from the post-bid buyout provisions to a person who is compulsorily acquiring convertible securities under Div 1 of Pt 6A.2.	E4Q1 Do you agree with our proposed draft guidance regarding the buyout provisions and compulsory acquisition of convertible securities? E4Q2 Do you agree with our policy to not provide relief from the post-bid buyout requirements for convertible securities? If not, why not?
E5 We propose to provide guidance on the appropriate procedures for lodging buyout and compulsory acquisition notices with us.	E5Q1 Do you have any comments on our draft guidance on procedures for lodging buyout and compulsory acquisition notices (including our proposal to amend our approved forms)? If not, why not?
F1 When we publish our new guidance, we propose to reissue the existing class orders to which the guidance relates. The class orders we propose to reissue are listed in Appendix 2. Unless otherwise indicated we propose to reissue the class orders largely in their existing form.	F1Q1 Do you have any comments on the current form of the class orders we are proposing to reissue?