ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 11

Anomalies and issues in the takeover provisions of the Corporations Law

September 2000

Your comments

We invite your comments on the *proposals and issues for consideration* in this paper.

Comments are due by 15 November 2000 and should be sent to:

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What this policy proposal is about

1. The *Corporate Law Economic Reform Program Act* 1999 rewrote the provisions of the Corporations Law governing takeovers. These are contained in Chapters 6 to 6C.

2. Anomalies and issues in Chapters 6 to 6C have arisen from practical experience following commencement of the CLERP Act in March 2000. Many of the anomalies were identified as a result of applications to us for relief.

3. Some of the anomalies may be the subject of legislative amendment. The development of legislation is a matter for the Government and Parliament.

4. As the administrator of the Law we have had, and will continue to have, discussions with the Commonwealth Department of the Treasury about our policy proposals and possible legislative amendment. We consider that in the interim our policy proposals, including proposed class orders, will promote certainty in the operation of the takeovers provisions and contribute to the development of any legislative amendments.

5. This policy proposal paper deals only with anomalies and issues that we consider we can resolve pending legislative amendment.

6. In the development of our policy proposals we have also had discussions with the Panel and undertaken informal consultation with practitioners.

7. We list anomalies or issues and proposals to resolve them in the table attached, and detail policy proposals of particular importance and complexity in this policy proposal paper.

Contents

Our policy proposal — issues for consideration

Policy proposal	Issues for consideration
Associates	
1 We propose to modify the Law by class order to resolve the conflict between the definitions of "associate" in s9 and ss10-17. The proposed class order would: (a) modify the s9 definition so that it applies to all "associate" references in Chapters 6 to 6C. Currently the s9 definition is expressed to apply only to "associates of a bidder making a takeover offer, a substantial holder or a 90% holder". The s9 definition is the definition introduced by the CLERP Act. There are strong suggestions that the s9 definition was intended to apply to all of Chapters 6 to 6C. Applying a single definition avoids anomalies and problems of interpretation of other approaches; (b) exclude the operation of s10(2), which states that the ss10-17 definition is the exclusive definition of the term "associate" so that it is directly inconsistent with the s9 definition; and (c) exclude the operation of s12(1), which deals with an associate reference relating to a takeover bid and voting power.	**1A** Should the s9 definition apply to all associate references in Chapters 6 to 6C in view of the following: (a) The s9 definition does not deem a director or secretary of a body or its related body corporate to be an associate of a body; and (b) The s9 definition applies to relevant agreements for the purpose of controlling the body. This is narrower than associations through relevant agreements under s12(1)(f) and (g). The concept of relevant interest in s608, which includes power or control through an agreement, may cover much of the ground covered by s12(1)(f) and (g). **1B** Instead, should we state the view that the s9 definition applies to references to associates of a "bidder", "substantial holder" or "90% holder"? On this view, the ss10-17 definition applies to

Policy proposal	Issues for consideration
	references to associates of a "person". This view is based on the language used in the section containing the associate reference.
	1C We consider that the s9 definition was intended to apply to the substantial holding information and voting power provisions (ss610 and 671B). Under the approach in 1B, we would make a class order modification to apply the s9 definition to the voting power and substantial holding concepts. This would also resolve uncertainty, circularity and other difficulties in interpreting these provisions. If you support the approach in 1B, do you agree that the s9 definition should apply to ss610 and 671B?
	1D Instead, should we state the view that the s9 definition applies to persons who are bidders, substantial holders or 90% holders? This view is based on the circumstances of the person.
	1E Under the approach in 1D, there is a question whether the circumstances of a person should be considered at the time of, or after, a transaction that makes them a substantial holder or bidder. If you support the approach in 1D, what is the best

Policy proposal	Issues for consideration
	way to answer this question? **1F** Instead, should we state a view that the s9 definition applies to any provision that deals with a bidder, substantial holder or 90% holder and the ss10-17 definition applies to any other provision? This is a purposive approach. Should we make a class order modification applying the s9 definition to identified provisions consistent with this view? **1G** Is there another, better, approach to resolving the conflict between the s9 and ss10-17 definitions?
2 We propose under our class order to apply the exclusions from the ss10-17 definition in s16(1) to the s9 definition. These exclusions cover: (a) a professional relationship; (b) a dealer executing purchases for a client; (c) an offer under a takeover bid; and (d) the appointment of a proxy.	**2A** Do the narrower terms of the s9 definition exclude the circumstances in s16 without our relief? **2B** Should we give the relief to apply s16(1) exclusions to the s9 definition on a case by case basis? **2C** Should the professional relationship exclusion in s16(1)(a) apply only for the purposes of the voting power concept under s610, substantial holding information under s671B and compulsory acquisition under s661A? Under this approach, the exclusion would not apply for the purposes of provisions

Policy proposal	Issues for consideration
	requiring independent judgement of the professional, for example expert's reports (ss648A and 667B).
Downstream acquisitions	
3 It may be unclear whether item 1 of s611 covers downstream acquisitions. Item 1 exempts from the main takeover prohibition in s606, an acquisition that results from the acceptance of an offer under a takeover bid. It was clear that the equivalent to item 1 under the old Law, s616, did not cover downstream acquisitions. But the terms of item 1 are different. It may be appropriate that this is the subject of legislative amendment to clarify whether item 1of s611 covers downstream acquisitions.	**3A** In the interim, should we modify item 1 of s611 by class order so it is clear that item 1 does not cover downstream acquisitions? **3B** Does item 14 of s611 suggest that item 1 should not cover downstream acquisitions? Item 14 covers downstream acquisitions if the upstream body corporate is listed on a: (a) securities exchange; or (b) foreign exchange approved by us.
4 We may apply to the Panel for a declaration of unacceptable circumstances in relation to a downstream acquisition where: (a) the bidder relies on item 1 of s611; (b) we consider that one of the main purposes of the bidder in making the takeover bid was to gain control of the downstream company; and (c) shares in the downstream company comprise a substantial part of the assets of the upstream body corporate.	**4A** Should we give further guidance on the minimum proportion of upstream body corporate assets comprised by shares in the downstream company that would cause us to consider an application to the Panel? If so, what would be an appropriate proportion? (For example, the proportion may be 50%.)

Policy proposal	Issues for consideration
Non-compliance with the provisions listed in s612	
5 We propose to give class order relief so that if: (a) an application is made to the Panel for a declaration under s657A of unacceptable circumstances; and (b) the Panel does not make the declaration, the circumstances the subject of the application do not give rise to a breach of the main takeover prohibition in s606 by the operation of s612. We propose to give this relief because under s659B a bidder is prevented before the end of the bid period from applying to the court under s1325D for an order validating an inadvertent breach of the Law.	**5A** Should we give this relief in view of the limitation under s659C on the orders that a court may make after the bid period to compensatory orders? **5B** Should this relief cover a breach of a section listed in s612, for example the minimum bid price principle in s621(3), as well as the breach of s606 to which the breach of the listed section leads by operation of s612? **5C** Should we give the relief on a case by case basis, when an application under s657D is or may be made to the Panel and the bidder has not sent its offers (so that the bidder has not yet contravened s606(4))? **5D** Should we give this relief on a case by case basis if: (a) the Panel has made its decision; and (b) the bidder has not sent its offers? **5E** Should we extend this relief to the situation where the Panel makes a declaration, but makes orders for the bid to proceed, with which the bidder complies?

Policy proposal	Issues for consideration
	5F Is there a better approach to resolving the issue that a bidder is unable to obtain validation of an inadvertent breach during the bid period?
Compulsory acquisition	
6 We propose to modify by class order the test in s661A(1)(b)(ii) for compulsory acquisition following a takeover, which is whether a bidder and its associates have acquired a relevant interest in at least 75% (by number) of the securities that the bidder offered to acquire under the bid. Under our modification: (a) securities acquired from associates would be excluded from the number of securities acquired; and (b) securities held by associates would be excluded from the number of securities that the bidder offered to acquire. This would mean that a bidder could not meet the 75% test in s661A(1)(b)(ii) by acquiring an associate's securities.	
7 There has been debate by commentators about the scope of the concept "full beneficial interest" (s664A) or "full beneficial ownership" (s667A) for the purposes of compulsory acquisition by a 90% holder under s664A. It may be appropriate that this is the subject of legislative amendment to clarify the scope of the concept.	**7A** In the interim, should we modify s664A to clarify the scope of the concept "full beneficial interest"? How should we define the scope more clearly?
8 We may give case by case relief because a	**8A** Should we give relief for other

Policy proposal	Issues for consideration
holder's interest may not constitute a "full beneficial interest" under s664A(1) and (2) where: (a) the holding is scheme property of a registered managed investment scheme. The responsible entity may have no beneficial interest at all. The members normally do not have a full beneficial interest. This relief treats the scheme as an entity that owns the securities; or (b) the holder has given a mortgage, charge or other security over the holding. This is because giving security over a holding is not normally inconsistent with ownership in the commercial sense. The lender must take the security in the ordinary course of the lender's business of providing financial services and on ordinary commercial terms.	schemes or trusts? We will not give relief in the case of a holding through nominees or bare trustees. Holders through nominees have a full beneficial interest. **8B** Should we give relief so that the responsible entity can aggregate a holding of securities that is scheme property for the purposes of s664A: (a) with a holding that is scheme property of another scheme of which it is responsible entity; or (b) with any other holdings? For example, should we allow aggregation when the responsible entity has an agreement with another person for joint ownership of the company? **8C** Should we provide relief for holdings given as security considering that it may be within the power of the person to gain a full beneficial interest in the securities by repaying debt or giving alternative security? **8D** Are there any other holdings for which we should give similar relief? For example: (a) where a purchaser is not the registered holder, but has a specifically enforceable

Policy proposal	Issues for consideration
	contract; or (b) where the holder has written a call option.
Changing the responsible entity	
9 We propose to modify s601FM(1) by class order so as to make it clear that the members of a listed managed investment scheme can request or call and arrange a meeting of members under Division 1 of Part 2G.4 to consider and vote on ordinary resolutions to change the responsible entity of the scheme.	**9A** Should we modify the Law to make this clear?
Content of the bidder's statement	
10 We propose to modify s636(1)(g) by class order so that a bidder must include in the bidder's statement prospectus information about the securities offered under the bid if the bidder has been authorised to offer the securities by the issuer. We also propose to modify s636(1)(g) by class order so that such a bidder must disclose all material that would be required for a prospectus for an offer of those securities by the issuer under ss710 to 713.	**10A** Should we instead modify s636(1)(g) to require a bidder to include in the bidder's statement prospectus information if the bidder is a wholly owned subsidiary of the issuer? Or if the bidder is a subsidiary? **10B** Should we require a bidder to include in the bidder's statement prospectus information in other circumstances?

Policy proposal	Issues for consideration
Anomalies and issues generally	
11 Attached is a table of anomalies and issues in the takeovers provisions introduced by the CLERP Act, and our proposed solutions. It includes the issues discussed in detail in this policy proposal paper.	**11A** Have we correctly identified the anomalies and issues? **11B** Have we identified all of the anomalies and issues in the takeovers provisions that we can and should resolve pending legislative amendment? **11C** Do you agree with the solutions proposed? If no, why not and what other solutions would you suggest? **11D** Is it more appropriate that the issues are resolved by legislative amendment, rather than by exercise of our modification or exemption powers in the interim?
Regulatory and financial impact	
12 We have considered the regulatory and financial impact of these policy proposals. An analysis is in the section of this paper headed "Regulatory and financial impact".	**12A** We welcome your comments on the regulatory and financial impact.

Explanation

Associates

1. Before the CLERP Act commenced, the term "associate" was defined in s9 by reference to ss10-17. The CLERP Act introduced a new definition of "associate" in s9. The definition of "associate" in ss10-17 was also retained.

   The purpose of the associate concept is to ensure that:

   (a) holdings of associates are counted together; and

   (b) an associate can not fulfil a role under the Law requiring independent judgement.

Rival definitions

2. The s9 definition is expressed to cover the associates of a bidder making a takeover offer, a substantial holder or a 90% holder. The ss10-17 definition is wider than the s9 definition, as a person's associates under the ss10-17 definition include:

   (a) directors and secretaries of a body corporate and of its related bodies corporate (s11(a) and (b)); and

   (b) persons with whom the person has made agreements about voting power and acquiring or disposing of shares, where the agreements are not for the purpose of controlling or influencing the composition of the body's board or the conduct of the body's affairs (s12(1)(d), (f) and (g)).

3. In another respect, the ss10-17 definition may be narrower than the s9 definition as s16 does not apply to the s9 definition. In particular, s16(1)(a) provides that a person is not associated with another merely because one of them gives the other advice, or acts for the other, in the proper performance of the functions attaching to a professional capacity or a business relationship.

4. There is a direct inconsistency between the s9 definition and s10(2). Section 9 states "otherwise a person's associates are determined under section 10 to 17", while s10(2) states that "a person is not an associate of the primary person except as provided in this Division". There is also a direct inconsistency between the s9 definition and s12(1). Section 9 is expressed to

cover the associates of a bidder, a substantial holder or a 90% holder. While s12(1) is expressed to cover associate references that relate to voting power or a takeover bid.

5. It is not always clear which definition of "associate" is intended to apply to which associate references in Chapters 6 to 6C.

Possible solutions

6. We have considered the following possible solutions to the conflict between the s9 and ss10-17 definitions:

   (a) Modify the Law to apply the s9 definition to all associate references in Chapters 6 to 6C. This is our preferred solution. We discuss this below.

   (b) Interpret the provisions in Chapters 6 to 6C literally with the result that the s9 definition applies to all references in Chapters 6 to 6C to an associate of a "bidder, a substantial holder or a 90% holder". The ss10-17 definition applies to all other references to associates in Chapters 6 to 6C. For example, the ss10-17 definition applies to s610 (voting power), which refers to "the person or an associate".

      This approach gives each of the definitions a role and enables them to be read consistently (leaving aside ss10(2) and 12(1)). However, it creates difficulties particularly for ss610 and 671B (substantial holdings) discussed further below. The most important difficulty is that the use of the ss10-17 definition for s610 would result in a person's voting power extending to voting shares over which that associate has a relevant interest, even if they are not shares that are the subject of a relevant agreement and the person has no control over them.

   (c) Interpret the provisions in Chapters 6 to 6C to apply the s9 definition where the person is a bidder, substantial holder or 90% holder. This approach depends on the circumstances of the relevant person. A problem with this approach is that it results in circularity, as:

      (i) the s9 definition depends on the definition of substantial holding or 90% holder;

      (ii) the definitions of substantial holding and 90% holder may depend on voting power; and

      (iii) voting power depends on a person's associates.

In addition, as the definitions of associates apply to different circumstances instead of applying to different provisions, a person's associates will change as soon as the person makes a takeover bid or becomes a substantial holder. It is possible for a person who becomes a substantial holder under the ss10-17 definition to have a holding below 5% under the s9 definition. There is a question whether the circumstances at the time of, or after, the change in circumstances determine which definition applies.

(d) Interpret the provisions in Chapters 6 to 6C to determine whether or not the purpose, context or substance of the particular provision relates to a bidder, substantial holder or 90% holder. By class order we would modify the Law to allocate the s9 or ss10-17 definition to each associate reference consistent with this purposive approach.

Proposed solution: apply s9 definition

7. We consider that legislative amendment is desirable. In the interim, we propose to make a class order modifying the s9 definition so that it applies to all "associate" references in Chapters 6 to 6C, and excluding the operation of ss10(2) and 12(1).

8. Applying the s9 definition in this way has the advantages of simplicity and certainty. The s9 definition is the new definition introduced by the CLERP Act. It is a narrower provision and expressly refers to ss10-17.

Origins of the s9 definition

9. The s9 definition is consistent with the Simplification Task Force discussion paper *Takeovers: Proposal for Simplification* (January 1996). The s9 definition can be traced to this Proposal. Proposal 6 stated:

The concept of associate will no longer be used to measure relevant interests for the purposes of section 615. Elsewhere in Chapter 6, only the following will be regarded as associates of a person:

(a) related bodies corporate (paragraph 11(b));

(b) parties to an agreement which confers corporate control (paragraphs 12(1)(d) and (e));

(c) parties to an agreement to act in concert with the person (paragraph 15(1)(a)).

This proposal is similar to the s9 definition. It is clear that the s9 definition was intended to apply to Chapter 6.

10. In relation to directors and secretaries of a body corporate, the Proposal stated on page 15:

Directors and secretaries of a body corporate will be associates of the body when they are acting in concert with the body and when they enter into relevant agreements with the body. Regarding them in all cases as associates, as at present under paragraphs 11(a) and (c), is undesirable.

The s9 definition does not deem directors or secretaries to be associates.

Substantial holdings

11. Applying the s9 definition to Chapters 6 to 6C is consistent with the apparent intention that the s9 definition applies to the substantial holding provisions. Simplification Task Force Proposal 25 suggests that the narrower s9 definition was intended to apply for the purpose of determining whether a person is a substantial holder.

12. The definition of "substantial holding" itself suggests that the s9 definition should be used for substantial holdings. The substantial holding definition states that the relevant interests which a person would have under an exchange traded option, or a conditional agreement but for s609(6) and (7), are to be taken into account in determining whether a person has a substantial holding. If the ss10-17 definition applied to determine whether a person was a substantial holder, provision for counting relevant interests through an exchange traded option or conditional agreement would not be necessary. The relevant interests of the associate would be included in determining the person's voting power.

13. If the ss10-17 definition was used for Part 6C.1, substantial holding information, the s9 definition would be redundant in the context of substantial holdings. The only use of "associate" in relation to a substantial holder is in Part 6C.1. The s9 definition is stated to apply to a "substantial holder". But under the literal approach, there are no provisions which use wording to the effect of "a substantial holder and its associates". Part

6C.1 refers to a "person". The note to s671B refers to the s9 definition.

Voting power

14. If the s9 definition applies to s671B, it is logical that it applies to s610 as substantial holding and voting power are related concepts. The definition of substantial holder in s9 equates them. Of course, any person crossing the takeover threshold in s606 is also a substantial holder. Section 671B(2) is in very similar terms to s610(1), although s671B(2) deals with a movement in, rather than the level of, the holding. Finally both s671B and s610 (together with compulsory acquisition provisions) equate with old Law provisions relying on the concept of entitlement.

15. This proposal avoids the difficulties that arise when the ss10-17 definition is applied to s610. If the ss10-17 definition applies to s610, a person's associates include persons with whom they have entered into a relevant agreement (under s12(1)(d), (f) and (g)). Their voting power extends to shares over which that associate has a relevant interest, even if they are not shares the subject of the relevant agreement and the person has no control over them. This is a problem that existed in the *Companies (Acquisition of Shares) Code*, but was fixed in the old Law. Section 609 of the old Law provided that a person was entitled to shares the subject of the relevant agreement only. There are no indications that a reversal of policy was intended.

16. Applying the s9 definition to all of Chapters 6 to 6C avoids problems of circularity and uncertainty raised by the approach of applying the s9 definition only if a person is a bidder, substantial holder or 90% holder (the circumstances approach) discussed above at paragraph 6(c).

Directors

17. A result of the proposal is that directors and secretaries, and directors and secretaries of a related body corporate are not automatically associates of a body corporate. For example, if the s9 definition applies to s629, there is no express prohibition on a defeating condition dependent on the opinion of the officer of the body corporate or a related body corporate. Such circumstances may be caught by the third limb of the s9 definition, which refers to persons "acting in concert" with each other. We may also apply to the Panel for a declaration in such circumstances.

18. There is no indication that removing the deeming of directors as associates was unintended. The Simplification Task Force recommended it (see above). The change, together with the director exclusion from the concept of relevant interest in s609(9), may be considered a response to *Clements Marshall Consolidated v ENT Limited* (1988) 13 ACLR 90. The court held that if 2 companies had shares in a third, and the 2 companies had a common director, they were entitled to the shares of the other. Each director had a relevant interest in voting shares held by the company. Directors were associates of the company under s11. The company was entitled to shares in which the director, its associate, had a relevant interest.

Relevant agreements

19. The s9 definition applies to relevant agreements for the purpose of controlling the body. This is narrower than associations through relevant agreements under s12(1)(d), (f) and (g). This is consistent with the Simplification Task Force Proposals.

20. But the concept of relevant interest includes power or control over voting or disposal that is indirect or exercised as a result of an agreement (s608(2)). For voting power and substantial holdings, s608(2) may cover much of the same ground as s12(1)(d), (f) and (g).

Expert reports

21. It appears that the ss10-17 definition was intended to apply to ss648A(3)(a) and 667B(2)(a). These provisions require that the expert's report discloses a professional relationship. The language used is virtually identical to that in s16(1)(a). Section 16(1)(a) provides an exclusion from the ss10-17 definition. There is no similar exclusion from the s9 definition. An associate can not act as an expert under ss648A(3)(a) and 667B(2)(a). If the s9 definition applied, there would be no need for the disclosure requirement, as a person with a professional relationship could not act.

22. This argument is based on the view that s648A disclosure is in relation to professional advice provided with respect to the bid. There is an argument that s648A disclosure is in relation to other professional advice. If the professional advice does not touch on the bid, then the adviser is not an associate whether the s9 definition or the ss10-17 definition applies.

23. Other difficulties arise if the ss10-17 definition applies to ss648A(3)(a) and 667B(2)(a). For example, it may not be appropriate that a person is automatically prevented from providing the bidder with an independent expert's report if they sell shares to the bidder.

Exclusions in s16

24. We propose that under our class order modification the exclusions from the ss10-17 definition in s16(1) apply to the s9 definition. These exclusions cover:

    (a) a professional relationship;

    (b) a dealer executing purchases for a client;

    (c) an offer under a takeover bid; and

    (d) the appointment of a proxy.

25. As relations between parties come within the s9 definition only if they:

    (a) are for the purpose of controlling or influencing the composition of the body's board or the conduct of the body's affairs; or

    (b) have the effect that the parties are acting, or proposing to act, in concert in relation to the body's affairs,

    we think it may be doubtful in many cases that the types of relationships mentioned in s16(1) would give rise to an association under the s9 definition in any event.

26. It has been suggested that the professional relationship exclusion in s16(1)(a) should apply only for the purposes of the voting power concept under s610, substantial holding information under s671B and compulsory acquisition following a bid under s661A.

27. Under this approach, the professional relationship exclusion in s16(1)(a) would not apply to provisions requiring independent judgement of the professional: for example, giving expert reports (ss648A and 667B) and assessing the satisfaction of defeating conditions (s629). The policy argument for this approach is that the professional duties to the bidder or target and commercial interest in a successful outcome for its client may detract from the professional's independent judgement.

28. However, ss648A(3)(a) and 667B require disclosure of the expert's professional relationship with the bidder or target (see discussion at paragraphs 21 and 22). An associate can not act as an expert under these sections. This suggests that the s16 exclusion was intended to apply to ss648A(3)(a) and 667B as well as voting power type provisions.

Downstream acquisitions

29. There is a question whether item 1 of s611 covers downstream acquisitions where voting shares in the upstream company are acquired under a takeover bid. A downstream acquisition is an acquisition of voting shares in a downstream company resulting indirectly from an acquisition of shares in an upstream body corporate.

30. Section 611 sets out a series of exemptions from the main takeover prohibition in s606. There is a separate exemption for downstream acquisitions under item 14 of s611. Item 14 provides an exemption for an acquisition that results from another acquisition of relevant interests in voting shares in a body corporate listed on:

    (a) a stock exchange; or

    (b) a foreign body conducting a stock market that is a body approved by us.

31. An exemption from the main takeover prohibition for downstream acquisitions means that the equality principle in s602(c) is not met for the holders in the downstream company. The rationale for this exception to the equality principle is that a downstream acquisition that is merely incidental to the main objective of acquiring the upstream company, should not inhibit the upstream acquisition. The exception was also a response to the risk that companies would use strategic holdings of parcels of shares in other companies as an undesirable defence tactic.

Suggestions that item 1 covers downstream acquisitions

32. The old Law equivalent of item 1, s616, was merely the gateway through the main takeover prohibition. It did not cover downstream acquisitions. This is because it applied only

to the "acquisition of shares as a result of the acceptance of an offer to acquire *those* shares made under a takeover scheme". Item 1 merely refers to "an acquisition", rather than expressly to an acquisition of the bid class securities. This difference may be no more than a result of simplified language. But item 12, for example, is more precise in making clear that the exemption does not cover downstream acquisitions. It refers to "An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made".

33. As with most items in s611, item 1 uses the language "acquisition that results from". "Result" is defined in s9 as including "result indirectly". This suggests that item 1 may cover downstream acquisitions.

34. The Note that appears before the table in s611 suggests that item 1 covers downstream acquisitions, as it says all of the exceptions in the table other than 7, 8, 12 and 13 cover acquisitions that "occur through activities in relation to other companies".

35. If item 1 of s611 covers downstream acquisitions, this continues the emphasis on the idea that a bidder should not have to make 2 fully regulated bids to move above a 20% relevant interest in the upstream company. This underpinned the requirement in s629(b) of the old Law that the upstream acquisition was made under a takeover scheme or announcement. Item 14 does not emphasise this because whether a downstream acquisition can be made under item 14 does not expressly depend on what takeover regulation applies to the bid for the upstream company.

Suggestions that item 1 does not cover downstream acquisitions

36. The Explanatory Memorandum for the CLERP Act refers to liberalising the exception for downstream acquisitions but the discussion is clearly limited to item 14 (paragraph 7.62). The discussion is limited to acquisition of shares in a *listed body* and extending the exemption to foreign bodies approved by ASIC.

37. That item 14 was enacted in a form consistent with Recommendation 19 of the Legal Committee of CASAC in its report *Anomalies in the Takeovers Provisions of the*

Corporations Law (1994) suggests Parliament did not intend that item 1 cover downstream acquisitions. The Legal Committee recommended a return to the position under the Companies (Acquisition of Shares) Code stating that there should be an exemption for downstream acquisitions that result from any acquisition permitted by the Law, subject to the limitation that the upstream company is quoted. Item 14 is also consistent with the Legal Committee's recommendation that the exemption should be extended to downstream acquisitions where the upstream company is listed on an approved foreign exchange.

38. The Legal Committee's explanation of the listed upstream company requirement was:

    …unless the upstream acquisition is a mere artifice, having as its true object the acquisition of the downstream company, the downstream acquisition should be exempt. Rather than articulate an exemption along these uncertain lines, the policy has been to provide a clear exemption where the upstream acquisition is in a listed company. In those circumstances, the upstream acquisition is likely to be a serious bid, involving the acquisition of a substantial company with a large number of shareholders…

39. If item 1 covers downstream acquisitions, this may detract from the policy behind the listed upstream company requirement in item 14. A bidder may make a takeover bid for a relatively closely held unlisted upstream company with the purpose of acquiring the downstream company.

40. There is substantial overlap with item 14 if item 1 covers downstream acquisitions. Any person acquiring shares in a listed company under a takeover bid could use either item 1 or item 14.

Proposed solution

41. It may be unclear whether item 1 of s611 covers downstream acquisitions. It may be appropriate that this is the subject of legislative amendment to clarify whether item 1 covers downstream acquisitions.

42. We may apply to the Panel for a declaration of unacceptable circumstances where:

(a) the bidder relies on item 1 of s611 to cover a downstream acquisition;

(b) we consider that one of the main purposes of the bidder in making the takeover bid is to gain control of the downstream assets; and

(c) shares in the downstream company comprise a substantial part of the assets of the upstream body corporate.

43. In such a case, the takeover bid for the upstream body corporate may be an artifice to acquire a relevant interest over 20% in the downstream company without making a takeover bid.

Non-compliance with the provisions listed in s612

44. Under s659B a bidder is prevented before the end of the bid period from applying to the court under s1325D for an order validating an inadvertent breach of the Law.

Validation by the court of a breach

45. Under s1325D a court may validate a breach of Chapter 6, if it decides that "the contravention ought to be excused in all the circumstances". Such circumstances might be inadvertence, ignorance of a relevant fact, or circumstances beyond the control of the person. Section 1325D may be particularly useful to a bidder who has committed a minor or technical breach.

46. But s659B stops the bidder from going to court to seek an order validating a breach under s1325D during the bid period. Section 659B states that only ASIC or another public authority may commence court proceedings in relation to a takeover bid before the end of the bid period, when offers close. The policy behind s659B is found in s659AA: "the object of ss659B and 659C is to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended".

Section 612

47. Section 612 provides that if a bid is carried out in breach of one of the listed sections, for example the minimum bid price principle in s621(3), the exceptions in s611 to the takeover prohibition in s606 do not apply. A breach of the listed sections leads to a breach of s606. Breaching s606 is an offence attracting a fine of $2,500 or a 6 month prison term or both. Section 612 has the effect that breaches of sections attracting a fine of $500 are elevated so that they may attract a prison term.

48. This issue has been raised with us by Market Participants in the context of s612. Although it is natural for Market Participants to be particularly concerned about breaching the main takeover prohibition, breaching s606 is not clearly more significant than other breaches of Chapter 6. Under the old Law, the question whether there was a breach of the main takeovers prohibition or another provision of Chapter 6 was much more important. Remedial orders were available only for breach of s615 of the old Law (s737). Remedial orders can restrain the enjoyment of shares acquired and unwind the takeover - an example is an order for divestment. Now any breach of Chapter 6 may attract a remedial order, and breach of the main takeover prohibition does not necessarily spoil a bid because s607 expressly provides that a transaction is not invalid merely because it involves a breach of s606.

49. There is a question whether we should give relief to cover breach of a section listed in s612, for example s621(3), as well as for the breach of s606 to which the breach of the listed section leads by operation of s612. There is also a question whether the relief should cover breach of sections in Chapter 6 other than sections listed in s612.

Role of the Panel and ASIC

50. It is unlikely that the Panel has the power to validate a breach of Chapter 6. In general, ASIC can not give relief concerning breaches of provisions of the Law that have already taken place (see Policy Statement 51 *Applications for relief* at [PS 51.63]).

Compliance with an order of the Panel

51. The consequences of complying with an order of the Panel are unclear. The bidder must comply with a Panel order made under s657D(2). By implication, the bidder is authorised to continue with its bid in compliance with a Panel order. But it

may be unclear that a court considering the matter following the bid period would find that a bidder did not breach Chapter 6 because the Panel had made an order in relation to the same circumstances.

Limitation on remedies available from a court

52. If the Panel has considered the issue and refused to make a declaration of unacceptable conduct, the type of order a court may make is limited under s659C to a compensatory order, rather than a remedial order such as a divestment order. Again, the object is to make the Panel the main forum for resolving disputes until the bid period has ended.

53. The limitation under s659C on the orders that a court may make does not apply where the Panel makes an order under s657D for the bid to proceed, with which the bidder complies. The limitation under s659C may not apply where the Panel does not make a declaration but accepts an undertaking from the party to rectify the alleged defect. This is because s659C uses the language "refuses to make the declaration".

54. The section does not restrain the court from making remedial orders where the Panel has not considered the matter. But this, together with s659B, puts a bidder who has committed a minor and technical breach in the strange situation of wanting the Panel to consider the issue and refuse to make a declaration of unacceptable circumstances. The bidder may have to initiate a Panel application concerning its own breach.

Possible solutions

55. We have considered the following possible solutions:

    (a) Class order to modify the Law so that if there is an application to the Panel and it does not make a declaration of unacceptable circumstances, there is no breach of s606 through operation of s612. This is our preferred solution, discussed further below.

    (b) Class order which extends the relief provided in paragraph (a) above to the situation where there is an application to the Panel and it makes an order under s657D allowing the bid to proceed with which the bidder complies.

(c) Class order to modify the Law as referred to in (a) or (b) that applies either to:

(i) breaches of the sections listed in s612; or

(ii) any breach of s606.

Because each of these modifications is broader than those proposed in (a) or (b), it raises the issue that it prevents the court making an order allowed under s659C.

(d) Case by case relief consistent with any of the options in (a) to (c). As we do not give retrospective relief, case by case relief would have to be given before the bidder makes its offers. Under section 606(4) a person must not make an offer if they would contravene the main takeover prohibition if the offer were accepted. This may delay offers, if a doubt has been raised whether the bidder has complied with the Law. The relief could be given when:

(i) an application under s657C is or may be made to the Panel; or

(ii) the Panel has made its decision.

(e) Possible legislative amendment to modify s659C so that it applies where the Panel makes an order under s657D with which the bidder complies. This would have the effect that a criminal penalty or a compensatory order would be the only orders that could be sought from a court. This solution reinforces the Panel's role as the main forum for resolving disputes until the bid period has ended.

(f) Possible legislative amendment to s659B so that the limitation does not apply to applications under s1325D. The result would be that a person would have access to the court under s1325D before the end of the bid period to have a breach validated. Allowing an application under s1325D would amount to a significant change in the policy behind s659B that there should be no access to court before the end of the bid period.

Proposed solution

56. It may be appropriate that this is the subject of legislative amendment. We consider it is preferable that solutions such as those referred to in paragraph 55(e) and (f) above are

implemented by legislative amendment. We are concerned to avoid the possibility of:

(a) detracting from the role that Parliament gave to the Panel as the main forum for resolving disputes until the bid period has ended; or

(b) limiting the jurisdiction of the courts,

through use of our powers.

57. In the interim, we propose to modify the Law so that if:

(a) an application is made to the Panel for a declaration under s657A of unacceptable circumstances; and

(b) the Panel does not make the declaration,

the circumstances the subject of the application do not give rise to a breach of the main takeover prohibition in s606 by the operation of s612.

58. The proposed modification will be made by class order. This has the advantage that, in the absence of a Panel order stopping the bidder sending offers, the bidder would not have to delay sending offers for fear that it will contravene s606(4).

Compulsory acquisition

Compulsory acquisition following takeover bid

59. Section 661A(1)(b)(ii) provides that for a bidder to compulsorily acquire securities following a takeover bid, the bidder and its associates must "have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid (whether the acquisitions happened under the bid or otherwise)". It is unclear whether a bidder can meet the 75% test in s661A(1)(b)(ii) by acquiring an associate's securities.

60. The policy of the section is to ensure that the bidder's offer has received overwhelming support from independent holders in the target before it is allowed to proceed to compulsory acquisition. Allowing a bidder to meet the 75% test by

purchasing an associate's securities is not consistent with this policy.

61. In addition, s661A(1)(b)(ii) refers to "the bidder and their associates" and this suggests a notion of aggregation. It can be argued that shares acquired by the bidder from an associate are not acquired by "the bidder and their associates" because they were already held by "the bidder and their associates".

62. We propose to clarify that a bidder can not meet the 75% test in s661A(1)(b)(ii) by purchasing an associate's securities. We propose to modify s661A(1)(b)(ii) by class order so that:

    (a) securities acquired from associates will be excluded from the number of securities acquired; and

    (b) securities held by associates will be excluded from the number of securities that the bidder offered to acquire.

    In other words, securities acquired from associates would be excluded from both the numerator and denominator in the percentage calculation.

Compulsory acquisition by 90% holder

63. Section 664A(1) provides that a person is a 90% holder in relation to a class of securities if the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% of the securities (by number) in that class. Section 664A(2), which also defines a 90% holder, requires that the person, alone or with a related body corporate, holds full beneficial interests in at least 90% by value of all securities of a company that are either shares or convertible into shares.

64. The phrase "full beneficial interest" is not defined. Section 667A(2) requires that if the acquirer relies on s664A(2)(c) to compulsorily acquire, the expert's report under s664C must state whether, in the expert's opinion, the acquirer has full beneficial ownership in at least 90% by value of all securities of the company that are shares or convertible into shares. The expert must give reasons.

65. We think the policy of the 90% holder concept is to cover ownership in the commercial sense.

66. The language "full beneficial ownership" is used in s667A(2). The Explanatory Memorandum for the CLERP Act suggests

full beneficial ownership is direct ownership or ownership through a nominee.

67. Commentators have suggested that a beneficial interest would not be "full" if any other person has a vested or contingent beneficial interest in the securities. There is no full beneficial interest where the securities are the subject of a fixed charge or a call option. We consider it would be very rare for a person seeking to compulsorily acquire 100% ownership to have written a call option over the securities.

68. Other commentators noted that purchasers of securities that are still registered in the vendor's name would not have a full beneficial interest unless the vendors were trustees for the purchaser. For a trust to arise, the contract must be specifically enforceable (*Glover v Willert* (1996) 14 ACLC 1,313). We do not consider that relief is appropriate in this case. Either the purchaser will soon become registered or they have failed in effecting ownership.

69. It may be appropriate that this is the subject of legislative amendment to clarify the scope of the "full beneficial interest" or "full beneficial ownership" concept. We may give case by case relief from s664A in the following circumstances.

Registered managed investment schemes

70. It is unlikely a managed investment scheme or its responsible entity (or any custodian) can be a 90% holder under s664A(1). The responsible entity does not have a full beneficial interest in securities that are scheme property.

71. A member of a managed investment scheme has a beneficial interest in particular scheme property only if they have rights against the responsible entity that are closely related to the property. Such a beneficial interest may not be "full". Commentators have argued it is unlikely that a member of a managed investment scheme in the nature of an equity investment fund would have any beneficial interest in particular scheme property.

72. Even if the members did have a full beneficial interest, their interests could not be aggregated for the purposes of s664A(1) unless they were related bodies corporate.

73. This analysis applies to the trustee and beneficiaries of any trust, except a nominee or bare trustee (holders through nominees have a full beneficial interest). But this is a problem particularly because under s660B, Chapter 6A extends to the acquisition of interests in a listed managed investment scheme.

A registered scheme may seek to gain 100% ownership of a listed scheme.

74. We may give case by case relief so that a registered managed investment scheme that has as scheme property at least 90% (by number) of a class for the purposes of s664A(1) or 90% (by value) of the securities of the company for the purposes of s664A(2)(c) is a 90% holder. This treats a registered managed investment scheme as a single entity that owns the securities.

75. Under s664A(1) and (2), a person's full beneficial interests can be aggregated with those of their related bodies corporate for the purposes of meeting the 90% test. This concept of group ownership of the securities is not appropriate in the case of a registered scheme. The responsible entity has a legal obligation to exercise rights and benefits attaching to securities that are scheme property for the benefit of members of the scheme rather than the responsible entity's corporate members (see s50AA(4)). Similarly, it may be inappropriate to aggregate holdings that are scheme property of different schemes with a common responsible entity.

Giving security over a holding

76. We may give relief on a case by case basis so that s664A applies where the holder has given a mortgage, charge or other security over the holding. This is because giving security over a holding is not normally inconsistent with ownership in the commercial sense. There are legal arguments for the view that holders who give some forms of security still have a full beneficial interest. But on the view that a beneficial interest would not be "full" if any other person has a vested or contingent beneficial interest, most or all forms of security would derogate from a full beneficial interest.

77. We will provide relief only where the holder gave the security for the purpose of a transaction entered into with the lender, if the lender took the security in the ordinary course of the lender's business of providing financial services and on ordinary commercial terms.

78. This is because it is clearer that a person remains owner of the holding in the commercial sense where they give security over the holding on arm's length terms and in the ordinary course of business of the lender.

Changing the responsible entity

79. Section 601FM(1) says that if the members want to change the responsible entity, they "may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution". It also provides: "The resolution must be an extraordinary resolution if the scheme is not listed".

80. However ss252B to 252D in Division 1 of Part 2G.4 allow members to request or call and arrange a meeting to consider special or extraordinary resolutions only. This is in contrast to s252L(1A)(c) which provides for members to give the responsible entity notice of resolutions to change the responsible entity of a listed scheme in addition to a special or extraordinary resolution.

81. The CLERP Act introduced provision for changing a responsible entity by ordinary resolution in the case of listed schemes. The Explanatory Memorandum for the CLERP Act (paragraphs 7.54 to 7.56) suggests Parliament intended that members can request a meeting to change the responsible entity by ordinary resolution. The Explanatory Memorandum states s601FM(1) "mak[es] it clear that the manager of a listed managed investment scheme can be replaced by a simple majority of unit holders who vote at a duly convened meeting". Changing the responsible entity is an issue "that arises from the application of the takeover provisions to managed investment schemes" under s604.

82. The Explanatory Memorandum also refers to consistency with the removal of company directors. Under s203D, members can remove a company director by ordinary resolution on special notice. Members can request or call and arrange a general meeting to do so under ss249D to 249F.

83. We propose to modify s601FM by class order so that the procedure for members to request a meeting in Division 1 of Part 2G.4 applies to resolutions to change the responsible entity of a listed scheme. We consider this is consistent with the apparent intention of Parliament, and in keeping with s109H (which provides that regard is to be had to the purpose or object of the Law).

Content of the bidder's statement

84. Section 636(1)(g) requires a bidder to include prospectus information about the securities offered under a takeover bid where the bidder is the issuer or the bidder controls the issuer.

85. However, where an issuer (that the bidder does not control) authorises the bidder to offer securities as consideration, the bidder is not required to include prospectus information about the securities offered. There is no requirement for disclosure in the common situation of a bidder offering securities in its parent company as consideration.

86. If the issuer authorises the bidder to offer its securities as consideration, the bidder is in the position to obtain from the issuer the information needed for prospectus level disclosure.

87. We propose to modify s636(1)(g) by class order to add as paragraph (iii) the phrase "authorised by the body that will issue the securities to offer those securities".

88. The effect of this modification is that a bidder will be required to include in the bidder's statement prospectus information about the securities offered under the bid if the bidder has been authorised by the issuer to offer them.

89. The third point of item 2 in s710(1) provides that the prospectus for a body's securities must contain information about the assets and liabilities, financial position and performance, profits and losses and prospects of that body if a person making the offer is:

    (a) the body that issued or is to issue the underlying securities; or

    (b) a person who controls that body.

    This is similar to s636(1)(g). This suggests that a bidder authorised by the issuer (that is not controlled by the bidder) to offer securities as bid consideration does not have to give prospectus disclosure concerning the financial position and performance of the issuer. It is desirable for such a bidder to give this disclosure.

90. Section 710(1)(b) limits information that must be disclosed in a prospectus by reference to a person whose knowledge is relevant. Under s710(3)(a), a person's knowledge is relevant if they are "the person offering the securities". For the purposes of s636(1)(g), the person offering the securities is the bidder. If the bidder is not the issuer and does not control the issuer, it may not have knowledge of matters concerning the issuer that would be disclosed in the prospectus if the bidder was the issuer. If the issuer authorises the bidder to offer the securities for issue as consideration, it is desirable that the bidder discloses these matters.

91. This issue does not arise where a person who is not the issuer and does not control the issuer offers securities in a fundraising rather than a takeover bid. This is because under s700(3) the person who offers securities is the person who has the capacity to issue the securities if the offer is accepted. The issuer is a person offering the securities, so that its knowledge is relevant for the purposes of s710(1)(b). It is unclear that s700(3) has the same effect in the case of a takeover bid. This is because s636(1) requires disclosure of "all material that would be required for a prospectus for an offer of those securities *by the bidder*".

92. We propose to modify s636(1)(g) by class order so that a bidder authorised by an issuer must disclose all material that would be required for a prospectus for an offer of those securities by the issuer under ss710 to 713. We would insert "and, if paragraph (iii) applies, the body" after "bidder" at the end of s636(1)(g).

Regulatory and financial impact

Introduction

1. We have considered the regulatory and financial impact of the policy proposals in this paper.

2. Our objectives in developing this policy proposal paper are:

   (a) to minimise the regulatory and financial impact on Market Participants of the anomalies identified in these policy proposals (including the attached table) by:

      (i) increasing the certainty of the regulatory requirements; and

      (ii) resolving practical difficulties in complying with the takeovers provisions; and

   (b) to maintain the purposes of the takeover provisions stated in s602. These include that:

      (i) the acquisition of control of voting shares or interests takes place in an efficient, competitive and informed market;

      (ii) holders and the target have sufficient information about the bidder and the bid, and reasonable time to consider the bid; and

      (iii) holders have a reasonable and equal opportunity to participate in any benefits of the bid.

3. We do not think that our policy proposals significantly increase the financial impact of complying with Chapters 6 to 6C, because our purpose in developing these proposals was to promote certainty and efficiency and resolve practical difficulties.

4. So that we can assess more accurately the regulatory and financial impact of our policy proposals, we seek comments on our proposals, including:

   (a) the likely regulatory impact of the proposals;

(b) the likely financial impact of the proposals; and

(c) whether the proposals take sufficient account of the purposes of takeover regulation, in particular the principles in s602.

A series of particular questions on the regulatory and financial impact of some of our proposals follows.

Associates

5. Are there any risks particularly to holders and targets because professional advisers are excluded from the definition of associate in s9?

Compulsory acquisition

6. Does uncertainty about the scope of the "full beneficial interest" concept have an undesirable regulatory and financial impact on acquirers, for example in obtaining legal advice on whether their holding amounts to a full beneficial interest?

7. Are there any risks to minority holders in allowing a managed investment scheme or a holder who has given security over their holding to compulsorily acquire under s664A(1)?

Content of the bidder's statement

8. Do you consider that it is reasonable to impose the compliance costs and potential liability involved in providing prospectus level disclosure in the bidder's statement for securities offered under the bid if the bidder has been authorised by the issuer to offer them and the bidder does not control the issuer? You should consider this in view of the policy of the Law that holders offered securities under a bid should have prospectus level disclosure if the bidder is in the position to give it.

Development of policy proposal

We have developed this policy proposal paper having regard to our experience of administering the CLERP Act takeover provisions for a period of 6 months, and after considering:

(a) Explanatory Memorandum and draft Bills for the CLERP Act;

(b) Corporate Law Economic Reform Program Proposals for Reform: Paper No. 4 *Takeovers. Corporate control: a better environment for productive investment* (1997);

(c) Simplification Task Force *Takeovers: Proposal for Simplification* (1996);

(d) Chapter 6 of the old Law;

(e) Legal Committee of the Companies and Securities Advisory Committee Report *Anomalies in the Takeovers Provisions of the Corporations Law* (1994);

(f) comments provided by the Panel in response to informal consultation;

(g) comments provided by the Department of the Treasury during informal consultation;

(h) comments expressed by several mergers and acquisitions practitioners during informal consultation in Melbourne and Sydney;

(i) ASIC policies relevant to the regulation of takeovers under the old Law;

(j) a paper given by R Simkiss at the Law Council of Australia Corporations Law Workshop July 2000 *Takeovers post CLERP: excuse me, are you my associate?*; and

(k) the following texts: Baxt, Renard, Simkiss and Webster *"CLERP" Explained* (2000); Black, Bostock, Golding and Healey *CLERP and the new Corporations Law* (2000); and Ford, Austin and Ramsay *An introduction to the CLERP Act 1999* (2000).

Key terms

In this policy proposal:

"CLERP Act" means the *Corporate Law Economic Reform Program Act* 1999;

"Law" means the Corporations Law;

"Market Participants" means bidders, targets, holders, institutional investors and their advisers;

"old Law" means the Corporations Law before it was amended by Schedule 1 to the CLERP Act;

"Panel" means the Corporations and Securities Panel;

"s9 definition" means the definition of "associate" in s9 of the Law; and

"ss10-17 definition" means the definition of "associate" in ss10-17 of the Law.

What will happen next?

Stage 1

14 September 2000	ASIC Policy Proposal Paper released

Stage 2

15 November 2000	Comments due on the Policy Proposal Paper

Stage 3

December 2000 to February 2001	Policy Statement(s) and class orders issued.

Your comments

We invite your comments on the proposals and issues for consideration in this paper.

Comments are due by 15 November 2000 and should be sent to:

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Australian Securities & Investments Commission
GPO Box 5179AA
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You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

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http://www.asic.gov.au

Anomalies and issues in the takeover provisions of the Corporations Law

Section	Issue/Anomaly	Proposed solution
S9	***Definition of "associate"*** There are two rival definitions of "associate", in s9 and ss10-17. There is a direct inconsistency between s10(2) and the s9 definition. It is not clear which definition applies to associate references in Chapters 6 to 6C. In addition, the s9 definition may include persons who would be excluded under s16(1) if the ss10-17 definition applied. It is desirable that these persons are also excluded from the s9 definition. See paragraphs 1 to 28 of the Policy Proposal Paper for further details.	Refer to the Policy Proposal Paper.
S9	***Definition of "convertible securities"*** The definition of convertible securities in s9 may not include securities that transform upon exercise so that the rights attached change as opposed to securities that give the right to be issued with securities in another class. Although the definition may not be exhaustive, as it states: "Securities are convertible into another class of securities if…" rather than " 'convertible securities' means…" Because the definition focuses on rights and options, it is probably designed to extend the phrase beyond the ordinary concept of convertibility (as in a convertible note).	Possible legislative amendment. Class order in the interim to widen the definition of convertible securities to include securities which have rights attached to them that change upon exercise.
S9	***Definition of "substantial holding"*** The expression "takeover period" is used in the definition of substantial holding in s9, but is not defined.	Possible legislative amendment. Class order in the interim to replace the reference to "takeover period" with "bid period".

S601FM	***Changing the responsible entity*** S601FM(1) makes it clear that the members of a listed scheme may change the responsible entity by ordinary resolution. However ss252B to 252D in Division 1 of Part 2G.4 allow members to request or call a meeting to consider special or extraordinary resolutions only. See paragraphs 79 to 83 of the Policy Proposal Paper for further details.	Refer to the Policy Proposal Paper.
S609(1)	***Money lending and financial accommodation*** *Issue 1* S609(1) provides an exclusion from the definition of "relevant interest" for money lending. The exclusion in s609(1) should be extended to a relevant interest acquired by a person who takes a security on ordinary commercial terms, on behalf of a lender, for a loan provided by the lender in the course of the lender's business of providing financial services. In the financial services industry, it is common that one party performs the financial service and a third party takes the security (usually a related party). The third party will have a relevant interest in the marketable securities because it has the power of disposal of those securities. If a change is made to extend s609(1) to third parties who take a security while a lender provides the financial service, a corresponding change should be made to item 6 of s611. *Issue 2* It is common practice for the agreement between the lender and the person who gives security, to contain a provision requiring the person who gives security to dispose of the security if instructed to do so by the lender in certain circumstances (for example, in the event of default by the person giving their property as security). If the ss10 to 17 definition of associate applies to s609(1), then under s12(1)(g) the person	Possible legislative amendment. Class order relief in the interim to extend the exclusion in s609(1) to a relevant interest acquired by a person who takes a security on ordinary commercial terms, on behalf of a lender, for a loan provided by the lender in the course of the lender's business of providing financial services and on ordinary commercial terms, and to modify item 6 of s611 similarly. This issue will be resolved by our proposal to modify the definition of associate in s9 so that it applies to all of Chapters 6 to 6C.

	giving security is an associate of the lender. The exclusion under s609(1) is limited to situations in which the person who gives the security is not an associate of the lender. Therefore the exclusion will not apply. *Issue 3* The language "mortgage, charge or other security taken for the purpose of a transaction entered into by the person" in s609(1) may not extend to purchasers of mortgages. The language "taken or acquired" in s609(1)(a) suggests that the section was intended to cover the secondary mortgage market.	Possible legislative amendment. Class order modification in the interim to insert the words "or acquired" after the first occurrence of the word "taken" in s609(1).
S609(3)	***Holding of securities by securities dealer*** S609(3) provides an exclusion from the definition of "relevant interest" for securities dealers. S609(3) provides that a securities dealer does not have a relevant interest in securities merely because they *hold* securities on behalf of someone else. In practice, a dealer rarely holds securities on behalf of another. Under s40 of the old Law, a dealer's relevant interest in shares was disregarded if the dealer had authority to exercise powers as the holder of the relevant interest because of instructions given to the dealer to dispose of the share on their client's behalf in the ordinary course of their business. It was uncertain whether the old section provided an exclusion for dealings under a managed discretionary account. The dealer should not enjoy an exclusion from the definition of "relevant interest" where it has a broad discretion to control the disposal of the client's securities. The exclusion should be limited to relevant interests of the dealer that arise as a result of specific instructions from a client to execute a particular trade.	Possible legislative amendment. Class order relief in the interim so that s609(3) provides that a securities dealer does not have a relevant interest in securities merely because they have specific instructions from their client to enter into a particular transaction of sale of securities on behalf of the client in the ordinary course of their securities business.
S609(6)	***Exchange traded options*** Reference to a person's obligation to *make* delivery in s609(6) may suggest that a person in the sold position under an exchange traded option or a futures contract may enjoy the exclusion from the	Possible legislative amendment. Class order modification in the interim to delete the phrase "to make" delivery from s609(6).

	definition of "relevant interest". But the person in the sold position does not derive a relevant interest from the option or futures contract. They may have a relevant interest in the securities that they hold as cover. This relevant interest should not be excluded. In the case of exchange traded options, s609(6)(a) does not exclude this relevant interest because it does not arise "merely because of" the option. In the case of futures contracts, s609(6)(b) is expressly limited to "a right to acquire" the underlying securities.	
S610(3)	*Effect of transaction or acquisition* An issue with s610(3) has been raised in relation to transfers of a holding within a group. S610(3) provides that where a person who does not have a relevant interest in securities, but whose associate does, acquires a relevant interest in the voting shares, their voting power increases. In the absence of s610(3), there would be no increase in a person's voting power, because the votes attached to the shares in which the associate had a relevant interest would already be counted in the person's voting power. It has been argued that where a holding of shares is transferred within a group, the transferee should not gain a relevant interest. The transferee may contravene s606 where a holding is wholly owned within a group before and after the transaction. It has been argued that under the old Law the transferee would always have been entitled to the shares. The issue does not seem to be as broad as this. S608(3) will often have deemed the transferee to have a relevant interest in the securities of another group entity. An entity has voting power above 20% in its sibling entity, so that s608(3) deems the entity to have the relevant interest that the sibling entity has. This is because votes of an associate are counted in the entity's voting power. The entity's parent is its associate. There is an issue despite s608(3) where the transfer is from the ultimate parent to a subsidiary. A subsidiary does not have voting power above 20% in its ultimate parent nor control its ultimate parent so that s608(3) does not apply.	Class order relief from s610(3) for a transfer: I. to an ultimate parent from a wholly owned subsidiary; and II. from an ultimate parent to a wholly owned subsidiary.

	In some circumstances, there is also an issue despite s608(3) where the transfer is to the ultimate parent from a subsidiary. S608(3) provides that paragraph (a) of that section may be used to deem a relevant interest once only in a chain of shareholding interests.	
Item 1 of s611	***Acceptance of takeover offer*** There is a question whether the exemption from the main takeover prohibition (s606) in item 1 of s611 covers downstream acquisitions where voting shares in the upstream body corporate are acquired under a takeover bid. See paragraphs 29 to 43 of the Policy Proposal Paper for further details.	Refer to the Policy Proposal Paper.
Items 2 and 3 of s611	***On market purchase during bid period*** *Issue 1* Items 2 and 3 of s611 permit on market purchases during the bid period if certain requirements are met including, that the bid is unconditional or "conditional only on the happening of an event referred to in s652C(1) or (2)". Items 2 and 3 appear to allow only conditions which require that events listed in s652C(1) or (2) occur. But s652C(1) and (2) list events entitling the bidder to withdraw offers rather than events on which the bid is conditional. *Issue 2* The exemption in item 2 of s611 may not be available to a bidder where the bid is subject to a condition in accordance with s625(3). This is because the bidder may not be able to satisfy this condition during the bid period. It requires that permission for admission to quotation will be granted no later than 7 days after the end of the bid period.	Possible legislative amendment. In the interim, this issue is addressed by our standard bidder's relief instrument. It modifies items 2 and 3 of s611 by permitting market purchases during the bid period where the bid is "subject to any conditions that relate only to the occurrence of an event or circumstances referred to in s652C(1) or (2)". This instrument will be the basis for a class order. Possible legislative amendment. Class order in the interim to modify item 2 so that the exemption applies where a bid is subject to the condition referred to in s625(3).

Item 7 of s611	***Approval by resolution of target*** The exemption for an acquisition approved by resolution of the target, is subject to members of the target being given all information known to the person proposing to make the acquisition *or their associates*. In contrast, where there is an acquisition under a takeover bid, there is no requirement that the bidder's statement includes all information known to associates of the person proposing to make the acquisition.	Policy statement to state that a bidder may apply for case by case relief if they can show that they have requested the information from their associate, but can not reasonably obtain it.
Item 9 of s611	***Manner of acquisition*** The 3% creep in 6 months exemption no longer provides that shares acquired under a pari passu offer are excluded in calculating the 3% (see former ss618 and 621). However, an acquisition as a result of a pari passu offer is itself an exemption under item 10 of s611. The Legal Committee of CASAC suggested that there should be an exclusion of pari passu offers from the calculation of the 3%. But in practice, under the old formula in s618 a pari passu offer made more of an impact than under the percentage calculation required by item 9 of s611.	Shares acquired under a pari passu offer are not excluded from the calculation of the 3% creep. We do not propose to give relief to exclude such shares.
Item 14 of S611	***Acquisition through listed company*** Item 14(a) of s611 permits a downstream acquisition resulting from the acquisition of shares in a body corporate listed on the ASX. It applies to a company listed on the ASX even if the company's principal listing is on a foreign exchange that has not received approval from us under item 14(b). A factor in granting approval under item 14(b) is whether the listed company will be subject to takeovers rules or regulations which offer a level of investor protection comparable to that offered in Australia. The ASX Listing Rules require that the foreign company has as its overseas home exchange a stock exchange that is a member of the FIBV and that the entity complies with the listing rules of its overseas home exchange. But, unless the rules of the overseas home exchange require bidders to comply with takeover requirements and those requirements offer a level of investor protection comparable with	Possible legislative amendment. Class order in the interim to modify Item 14(a) of s611 so that it provides an exemption for a downstream acquisition resulting from the acquisition of shares in a body corporate listed on the ASX, except a body corporate admitted as an exempt foreign entity. Item 14(b) would provide an exemption for a downstream acquisition resulting from an acquisition of shares in an exempt foreign entity if its overseas home exchange was an approved foreign exchange.

	Australia, the policy behind item 14(b) would not be met where a company's principal listing is on a non-approved foreign exchange.	
S615	***Treatment of foreign holders under equal access issue*** *Issue 1* S615 provides for the appointment of a nominee for foreign holders of a company's securities in the event of a rights issue by the company. On one reading, if the offer can not be made to any foreign holders a nominee must be appointed for all foreign holders, including those to whom offers can be made. It is also unclear whether s615 applies when the conditions in item 10 are not met for some but not all of the foreign holders. *Issue 2* The word "transfer" should be replaced with "issue" in 615(b).	Possible legislative amendment in order to ensure certainty. Class order in the interim to clarify that: • S615 applies when the conditions under item 10 are not met for some but not all foreign holders. • A nominee need only be appointed for those foreign holders who have not received offers. Possible legislative amendment. Class order in the interim to replace the reference to "transfer" in s615 with the word "issue".
S620(2)	***Off market bid*** S620(2)(b) and (c) do not deal with the possibility that the bid may be subject to a defeating condition when the bidder is given the necessary transfer documents	Possible legislative amendment. In the interim, this issue is addressed by the standard bidder's relief instrument. It modifies s620(2)(b) so that if the bidder is given the transfer documents before the end of the bid period:

		I. if the offer is subject to a defeating condition the bidder is not obliged to provide the consideration until the earlier of one month after the takeover contract becomes unconditional or 21 days after the end of the offer period. II. if the offer is unconditional, the bidder is not obliged to provide the consideration until the earlier of one month after the bidder is given the necessary transfer documents or 21 days after the end of the offer period. It also modifies s620(2)(c) so that if the bidder is given the necessary transfer documents after the end of the bid period, and the offer is subject to a condition which relates to the occurrence of an event referred to in s652C(1) or (2) or a condition which relates to s625(3)(c), the bidder is not obliged to provide the consideration until 21 days after the takeover contract becomes unconditional. This instrument will be the basis for a class order.
S621 & s623	***Timetable for market bids*** In the case of market bids, there is a gap between the time at which the 4 months end under the minimum bid price principle in s621, and the commencement of the restrictions on collateral benefits in s623. The minimum bid price principle in s621 requires that the bid consideration at least equals consideration for	Possible legislative amendment. Class order in the interim to modify s623 so that it refers to the "bid period" as opposed to the "offer period".

	purchases of bid class securities made by a bidder during the 4 months before the date of the bid. In the case of a market bid, the term "date" is defined in s9 to mean the date of announcement. The restrictions on collateral benefits in s623 apply to the making of offers during the "offer period", which is defined in s9 to mean the period for which offers under the takeover bid remain open. The offer period starts up to 15 days after the announcement under item 14 of s635. In theory, the bidder could offer more consideration in the interim period than it offers under the bid. There is no equivalent of the automatic variations provisions under ss651A to 651C for market bids where the bidder purchases outside the bid during the bid period.	
S624	***The offer period*** S624 provides that offers under a takeover bid must be open for the period stated in the offer, which must start on the date the first offer is made. It effectively precludes a bidder from specifying dates on which the offer period will start and end in the bidder's statement lodged without binding itself to a timetable which it may later have trouble meeting.	Possible legislative amendment. In the interim, this issue is addressed by our standard bidder's relief instrument. It modifies items 2, 3 and 5 of s633(1) so that the bidder's statement which is lodged with us and sent to the target and any relevant securities exchange, need not contain the date of the proposed offer or any other date that is related to or dependent on that date. This instrument will be the basis for a class order.
S625(3)	***Conditional offers*** S625(3) provides that if the consideration offered is or includes securities and the offer or bidder's statement states or implies that the securities are to be quoted on a stock market, the offer is subject to a condition that an application for admission to quotation will be made within 7 days after the start of the bid period. If the condition is not satisfied, s1325A(2) provides remedies. It is not entirely clear that this condition is a defeating condition. However, if it is interpreted as a defeating condition, the bidder can not extend the offer period unless one of the events set out in s650C(2) occurs. If there is an extension of	Possible legislative amendment. Class order in the interim to amend s625(3) to make it clear that a condition under s625(3) is not a defeating condition.

	the offer period, a person who accepted the offer will be able to withdraw their acceptance in the circumstances set out in s650E.	
S630	***Defeating conditions*** *Issue 1* The effect of s630(1) and s633(1) is that the bidder needs to determine an appropriate day for publication of the notice required by s630(1) at a time when it may be, in practical circumstances, impossible to know when the offers will be ready for dispatch. *Issue 2* S630(4) uses the expression "the bidder must publish" but the Explanatory Memorandum to the CLERP Act indicated that requirements to publish notices in the news media have been removed from Chapter 6.	Possible legislative amendment. In the interim, this issue is addressed by our standard bidder's relief instrument. It modifies items 2, 3 and 5 of s633(1) so that the bidder's statement which is lodged with us and sent to the target and any relevant securities exchange, need not contain the date of the proposed offer or any other date that is related to or dependent on that date. This instrument will be the basis for a class order. Possible legislative amendment. Class order in the interim to replace the words "publishing" and "publish" in s630(4) with "giving" and "give".
Item 6 of s633(1)	***Sending the bidder's statement and offers to security holders*** Item 6 of s633(1) provides that the bidder must send the bidder's statement and offers to holders of bid class securities within 14 to 28 days after the bidder's statement is sent to the target. The meaning of the statement "within 14 to 28 days", even with the assistance of s105(1), may not be entirely clear.	Possible legislative amendment. Practice Note 19 to be updated to clarify the meaning of the phrase "within 14 to 28 days after the bidder's statement is sent to the target".

S636(1)	***Content of the bidder's statement*** *Issue 1* S636(1)(g) requires a bidder to include prospectus information in relation to securities offered under a takeover bid where the bidder is the issuer or controls the issuer only. The requirement should be extended to the situation where the issuer authorises the bidder to offer the securities as consideration. See paragraphs 84 to 92 of the Policy Proposal Paper for further details. *Issue 2* S636(1)(h) and (i) require the bidder's statement to include information in relation to consideration and benefits provided during the 4 months before the date of the bid, which is the date of making the first offer. As bidder's statements are signed, lodged and served at least 14 days prior to the making of the first offer, not all necessary information may be available to include in the bidder's statement at the date of lodgement. The bidder may give consideration or benefits during this period. *Issue 3* S636(1)(k)(ii) requires the bidder's statement for an off-market bid to state the relevant interest of the bidder "immediately before the first offer is sent". The effect is that the bidder can not acquire securities	Refer to the Policy Proposal Paper. Possible legislative amendment. In the interim, this issue is addressed by the standard bidder's relief instrument. It modifies items 2, 3 and 5 of s633(1) so that the bidder's statement which is lodged with us and sent to the target and any relevant securities exchange, does not need to include the information required in relation to purchases of bid class securities by the bidder or an associate between the date of the bidder's statement and the date of the bid. The bidder's statement sent to the holders must include any information about consideration and benefits given in the interim. This instrument will be the basis for a class order. We propose that under the class order the bidder must send to the target a copy of the bidder's statement sent to holders. Possible legislative amendment. In the interim, this issue is addressed by our standard bidder's relief instrument which

	in the target of any class (not only the bid class and not only voting shares) between giving the statement and sending the first offer. The bidder must report a move of at least 1% in its holding under s671B during this period. *Issue 4* S636(1)(l) requires the bidder's statement for an off-market bid to state the bidder's voting power in the company. The effect is that the bidder can not acquire voting shares between giving the statement and sending the first offer. The bidder must report a move of at least 1% in its holding under s671B during this period.	modifies items 2, 3 and 5 of s633(1) so that the bidder's statement lodged with us and sent to the target and any relevant securities exchange, need only state the relevant interest of the bidder at the date of lodgement. The bidder's statement sent to the holders must include the relevant interest at the date the bidder sends the first offer. This instrument will be the basis for a class order. We propose that under the class order the bidder must send to the target a copy of the bidder's statement sent to holders. Possible legislative amendment. In the interim, this issue is addressed by the standard bidder's relief instrument which modifies items 2, 3 and 5 of s633(1) so that the bidder's statement lodged with us and sent to the target and any relevant securities exchange, need only state the voting power of the bidder at the date of lodgement. The bidder's statement sent to the holders must include the voting power at the date the bidder sends the first offer. This instrument will be the basis for a class order. We propose that under the class order the bidder must send to the target a copy of the bidder's statement sent to holders.
Ss636(3) and 638(5)	***Consent of person to whom statement in bidder's or target's statement attributed*** S636(3) requires a bidder to obtain the consent of a person to whom a statement in the bidder's statement is attributed. S638(5) is the equivalent provision for the target. However, if, for example, a bidder wants to include a statement made by the chairman of the target in the bidder's statement, and the takeover is a hostile takeover, the bidder may not obtain the consent of the chairman of the target. Arguably, this may prevent the target responding to the bidder's statement and the bidder responding to the target's statement.	The policy of the requirement for consent is that the maker of the statement can control and limit their liability for the statement and control the overall effect of the statement in context. We are seeking to preserve this policy, and consistency with similar provisions in Chapter 6D as far as possible.

		We propose to give class order relief allowing a bidder or target to include information in any statement made in a document which has been lodged with the ASX or ASIC. The bidder or target would have to provide the full text of the statement if requested by a holder. We also propose to give relief in similar circumstances to those in which relief is given from consent requirements for statements in disclosure documents (see Practice Note 55).
S637	***Approval of a bid*** S637 does not require a bidder's statement to be signed by directors of the bidder. However, s351 requires a document lodged with us in writing by or on behalf of a corporation or registered managed investment scheme to be signed by a director or secretary of the corporation or scheme.	Possible legislative amendment. In the interim, Policy Statement 159 to clarify that a bidder's statement need only be approved in one of the ways listed under s637, and does not have to be signed under s351.
Ss648A(2) & 667B(2)	***Disclosure by experts*** Ss648A(2) and 667B(2) do not require an expert to disclose any relationship between the associates of the expert and: • the person giving the notice; • an associate of the person giving the notice; and • the company that issued the securities or an associate of the company. Arguably, an expert should be required to disclose such relationships.	Address the issue in an update to Policy Statement 75 and Practice Note 42.

S650B(1)	***Consideration offered in off-market bids*** Under s650B(1)(h) the bidder may vary the offers made under the bid to improve the consideration offered by "offering an additional alternative form of consideration". This phrase implies that a bidder may only offer an alternative form of consideration if there is already a choice of forms of consideration.	Possible legislative amendment. Class order modification in the interim to clarify that an additional or an alternative form of consideration may be offered.
S650B(2)	***Increase in consideration offered in off-market bids*** As with s620(2)(b), the effect of s650B(2) is to compel payment of consideration even in a conditional bid. In addition, s650B(2) states that an offeree "is entitled to receive the improved consideration immediately, or immediately after the exercise of the election". In practice, this will often conflict with the timing for payment of consideration which is dictated by s620(2). The effect could be that the increase in the purchase price was required to be paid "immediately" but the time for payment of the bulk of the purchase price had not yet arrived.	Possible legislative amendment. In the interim, this issue is addressed by our standard bidder's relief instrument. It modifies s650B(2) to state that the person is entitled to receive the improved consideration immediately, except: (a) if the time for payment of the consideration in accordance with subsection 620(2) has not yet occurred, the person is not entitled to receive the improved consideration until that time; (b) if the person has to make an election before being entitled to the improved consideration, the person is not entitled to receive the improved consideration until the later of: (i) the time when the person makes the election and returns any consideration under s651B(2); (ii) the time applicable under paragraph (a). This instrument will be the basis for a class order.

S650F(1)	***Freeing off-market bids from defeating conditions*** The description of "defeating condition" in paragraph 650F(1)(a) does not appear to be consistent with the definition of "defeating condition" in s9. S650F(1)(a) allows offers to be declared free of a condition "that the bidder may withdraw unaccepted offers if an event or circumstance referred to in s 652C(1) or (2) occurs in relation to the target" by giving the target a notice. S9 defines "defeating condition", as inter alia, "a condition that … will, in circumstances referred to in the condition, result in the rescission of, or entitle the bidder to rescind, a takeover contract".	Possible legislative amendment. In the interim, this issue is addressed by our standard bidder's relief instrument. It modifies s650F(1)(a) so that it is consistent with the definition of defeating condition in s9. This instrument will be the basis for a class order.
S650G	***Contracts and acceptances void if defeating condition not fulfilled*** *Issue 1* S650G(b) states when takeover contracts and acceptances are void because a defeating condition is not fulfilled. It provides the contract or acceptance is void if "the bidder has not declared the offers to be free from the condition within the period before the date applicable under subsection 630(1) or (2)". S630(1) and (2) relate to the notice to be given by the bidder in relation to the status of the defeating conditions, while s650F relates to the procedures and dates to be complied with if freeing an off market bid from a defeating condition. S650G(b) should refer to s650F rather than s630(1) and (2). *Issue 2* S650G(c) provides that takeover contracts and acceptances are void if they are subject to a defeating condition which has not been fulfilled at the end of the offer period. It is inconsistent with s650F(1)(a), which allows a bidder to waive prescribed occurrence conditions up to 3 days after the end of the offer period.	Possible legislative amendment. In the interim, this issue is addressed by our standard bidder's relief instrument. It modifies s650G(b) so that it refers to the procedures under s650F This instrument will be the basis for a class order. Possible legislative amendment. In the interim, this issue is addressed by our standard bidder's relief instrument. It modifies s650G(c) so that it is consistent with s650F(1)(a). This instrument will be the basis for a class order.

Ss659B and 659C	***Court proceedings and the effect of non compliance*** Under s659B a bidder is prevented from applying to court under s1325D for an order validating an inadvertent breach of the Law. See paragraphs 44 to 58 of the Policy Proposal Paper for further details.	Refer to the Policy Proposal Paper.
S661A(1)	***Compulsory acquisition following takeover bid*** S661A(1)(b)(ii) provides that in order for a bidder to compulsorily acquire securities, the bidder and its associates must "have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid (whether the acquisitions happened under the bid or otherwise)". It is not entirely clear whether a bidder can meet the 75% test in s661A(1)(b)(ii) by purchasing an associate's securities. See paragraphs 59 to 62 of the Policy Proposal Paper for further details.	Refer to the Policy Proposal Paper.
S661C(4)	***Terms on which securities to be acquired*** S661C(4) refers to "shares", rather than to securities.	Possible legislative amendment. Class order in the interim to modify s661C(4) so that it refers to securities instead of shares.
S664A(1)	***Compulsory acquisition by 90% holder*** A person may become a 90% holder under s664A(2) and then subsequently cease to be a 90% holder, due to circumstances beyond the control of the person, including a change in the value of the securities. The compulsory acquisition power in s664A(3) can not be exercised unless the person is a 90% holder at the time of exercise. However, the time limit within which the power must be exercised under s664AA continues to run against a person who was but has ceased to be, a 90% holder, even though the person can not then exercise the power.	Possible legislative amendment. Relief on a case by case basis in the interim to modify s664AA so that the time limit ceases to run if the 90% holder ceases to be a 90% holder due to matters over which that person had no control.

S664A(1) & (2)	***Compulsory acquisition by 90% holder*** *Issue 1* The phrase "full beneficial interest" is not defined and the scope of the phrase is not entirely clear. See paragraphs 63 to 78 of the Policy Proposal Paper for further details. *Issue 2* A managed investment scheme would be unlikely to meet the 90% holder test. Neither the responsible entity nor the members would be likely to have a full beneficial interest in securities that are scheme property. See paragraphs 70 to 75 of the Policy Proposal Paper for further details.	Refer to the Policy Proposal Paper.
S664B	***The terms for compulsory acquisition*** S664B requires that a 90% holder acquire each security in the class for the same amount. It does not allow for factors such as the amounts that are paid up on the securities, which may justify payment of different amounts.	Possible legislative amendment. In the interim, policy statement to state that we will provide relief to allow a 90% holder to acquire securities for different amounts due to the fact that: • the offers relate to securities on which different amounts are paid up or remain unpaid; or • the offers relate to securities on which there are different accrued dividend or distribution entitlements.

S665E	***Notice of an 85% holding by a company to other members*** *Issue 1* It is not entirely clear who a company's members are for the purpose of this section. Normally a reference to a company's members means all its holders of shares of all classes (s231). This would not include for example convertible note holders. Although for non members to benefit from s665E they would have to receive a report or another notice from the company under the Law. *Issue 2* The effect of s665E is that the obligation to notify the company of an 85% holding arises even during a successful takeover where other more timely notifications occur under s671B (substantial holding information) and s661B (compulsory acquisition notice). If securities in the class to be compulsorily acquired are the only outstanding securities and a s661B notice has been served there seems no value in requiring the target at some future time to inform holders that the majority holder has moved to 85%.	Class order modification to require the company to send notices to all security holders (including option holders and convertible noteholders). Possible legislative amendment. In the interim, class order modification to exempt the target company from s665E.
Ss670C(2) & (3)	***Person liable to inform maker about deficiencies in a statement*** The expression "takeover period" is not defined. The phrase "bid period or objection period" is used in s670C(1).	Possible legislative amendment. Class order in the interim to modify the reference to "takeover period" to "bid period or objection period".