ASIC
Australian Securities & Investments Commission

REPORT 350

Response to submissions on CP 193 Takeovers, compulsory acquisitions and substantial holdings

June 2013

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 193 *Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance* (CP 193) and details our responses in relation to those issues.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Disclaimer

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

This report does not contain ASIC policy. Please see:

- Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5);
- Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (RG 6);
- Regulatory Guide 9 *Takeover bids* (RG 9); and
- Regulatory Guide 10 *Compulsory acquisitions and buyouts* (RG 10).

Contents

A Overview/Consultation process

1 In Consultation Paper 193 *Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance* (CP 193) we consulted on proposals to update and reorganise our guidance on Chs 6–6C of the *Corporations Act 2001* (Corporations Act) by consolidating it into four new regulatory guides on:

(a) relevant interests and substantial holding notices;

(b) the exceptions to the general prohibition in s606;

(c) takeover bids; and

(d) compulsory acquisitions and buyouts.

2 We also consulted on our proposal to reissue, in conjunction with the release of the new guides, a number of class orders to which the updated guides relate.

3 This report highlights the key issues that arose out of the submissions received in relation to CP 193 and our responses to those issues.

4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 193. We have limited this report to the key issues.

5 For a list of the non-confidential respondents to CP 193, see the appendix. Copies of the submissions are on the ASIC website at www.asic.gov.au/cp under CP 193.

Responses to consultation

6 We received seven submissions in response to CP 193 from the legal community and other interested parties. We are grateful to respondents for taking the time to send us their comments. We are also grateful to the individuals who provided feedback and discussed specific issues with us prior to, and during, the consultation process.

7 All respondents were generally very supportive of our proposal to update and consolidate our guidance.

8 Many respondents agreed with the majority of the proposals in CP 193. The matters on which issues were raised, or more detailed comments provided, differed amongst respondents. However, some of the more common issues respondents focused on were:

- the reissue of our class order modification to the exception in s609(1), facilitating secondary market trading of secured debt;

- our guidance on the takeovers aspects of rights issues and the exceptions to s606 that apply to underwriting;
- the proposal to limit our class order relief for institutional acceptance facilities to facilities allowing participation only by institutions actually restricted by their investment mandates;
- the extension of our policy on joint bids to schemes;
- the potential for certain employee performance rights to fall outside the ambit of Chs 6 and 6A; and
- technical and/or specific aspects of the takeover and compulsory acquisition provisions and processes that we could provide our interpretation of, or modify by class order, to assist practitioners and other interested parties.

B Relevant interests and substantial holding notices

Key points

Respondents were generally supportive of our updated guidance on relevant interests and substantial holding notices.

We received feedback suggesting we provide further guidance on certain aspects of our policy, including:

- when a relevant interest may arise from equity derivatives;
- the financial accommodation exception and related class order relief; and
- when a bidder is expected to provide substantial holding information under s671B(1)(c).

Guidance on relevant interests: Equity derivatives

9 Attachment 1 to CP 193, draft Regulatory Guide 000 *Relevant interests and substantial holding notices*, included guidance on the application of the relevant interest concept and the substantial holding requirements to options and warrants.

10 We received feedback that we could provide guidance on relevant interests and substantial holding disclosure obligations arising from other equity derivatives, such as cash-settled equity swaps.

ASIC's response

Our guidance in Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5), on exchange traded options and warrants, discusses the relatively standard features of these financial products and (where relevant) the class order relief we have provided.

Given other equity derivatives can vary significantly in their nature and complexity, we have decided not to include further specific guidance in RG 5 on these products at this time.

RG 5 provides some general guidance about relevant interests, which may assist when considering the application of the concept to equity derivatives. However, as noted in CP 193, our guidance on relevant interests is not designed to be an exhaustive discussion of relevant interests. In deciding to limit our discussion to options and warrants, we have tried to ensure our guidance remains accessible to a wide audience, while also seeking to

address the needs of those relatively well versed with the relevant interest concept.

Moreover, the application of the relevant interest and substantial holding provisions to equity derivatives is one of the issues outlined in the Treasury scoping paper on takeovers issues, which was released in October 2012. Treasury is currently considering the outcomes of consultations on the issues raised in this scoping paper. We are of the view that any specific guidance from ASIC on other equity derivatives is best provided once the outcome of this process is known.

The financial accommodation exception

11 In CP 193 we proposed to reissue our modification to the financial accommodation exception in s609(1) contained in Class Order [CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition* and, taking into account recent amendments to the provision, amend our relief so that it references the definition of a 'security interest' in s51A. We invited submissions on whether there should be any limitations on the relevant interest relief we provide in our reissued class order for persons purchasing security interests over Ch 6 securities in the secondary market.

12 Respondents to this question favoured ASIC continuing the current arrangements under [CO 01/1542], noting that abuse of the provision or relief could instead be dealt with by seeking a declaration of unacceptable circumstances from the Takeovers Panel. One respondent suggested we may wish to state in particular that we will apply to the Takeovers Panel if a financier is relying on the relief with a purpose of gaining control of the company.

13 It was also suggested that our class order relief might be extended to wholly owned subsidiaries, when the financial accommodation is provided on ordinary commercial terms, to remove the need for case-by-case relief. Another respondent requested that we clarify whether the exceptions in s609(1) or item 6 of s611 applied to entities in a corporate group that provided financial accommodation to related entities in the corporate group.

ASIC's response

We have retained our class order relief to facilitate the secondary market for secured debt: see Class Order [13/520] *Relevant interests, voting power and exceptions to the general prohibition*.

However, we have also provided additional guidance at RG 5.74–RG 5.76 on the circumstances in which we may consider taking regulatory action, including seeking a declaration of unacceptable circumstances, in connection with reliance on the financial accommodation exception as modified. This includes situations

where reliance on the exceptions in s609(1) or item 6 of s611 may be excluded or inconsistent with the underlying policy of the exceptions—such as when the financier or its associates acquire the security interest in connection with a control transaction.

We will continue considering, on a case-by-case basis, whether to give financial accommodation relief to wholly owned subsidiaries where the parent company is in the business of giving financial accommodation. We consider this a preferable approach to help ensure the underlying principles of the provision, and our relief, are met.

We have not included specific guidance relating to financial accommodation within a corporate group. However, our guidance at RG 5.74–RG 5.76, on when we may take regulatory action, similarly applies to intra-group financing arrangements that are outside the scope of s609(1) or otherwise contrary to its underlying principles.

Substantial holding disclosure

14 Attachment 1 to CP 193 set out additional guidance on the substantial holding requirements.

15 We received feedback suggesting that, due to varying market practice, it would be helpful for ASIC to provide specific guidance on when we consider a person 'makes a takeover bid' for the purposes of s671B(1)(c).

16 Some respondents also suggested we should simplify some of the compliance burden associated with the substantial holding disclosure regime. Examples of possible changes included relief from the requirement to list group entities in a substantial holding notice and the requirement to provide notices when a reportable change in voting power occurs solely due to changes in the issuer's capital.

ASIC's response

RG 5 includes a new discussion on when a person 'makes a takeover bid' for the purpose of the substantial holding provisions: see RG 5.293.

As noted in our response at paragraph 10, the application of substantial holding provisions to equity derivatives is one of the issues outlined in the Treasury scoping paper. Treasury is currently considering the outcomes of consultations on the issues raised in this scoping paper. We are of the view that any additional guidance from ASIC is best provided once the outcome of this process is known.

C Takeovers: Exceptions to the general prohibition

Key points

Respondents generally supported our updated guidance on exceptions to the general prohibition.

We received feedback suggesting we provide further guidance on certain aspects of our policy, including:

- the nominee process for accelerated rights issues;
- the factors we consider in relation to rights issues and underwriting, and when we may take regulatory action; and
- the circumstances in which we will exercise our discretion to approve nominees.

Nominee process for accelerated rights issues

17 Attachment 2 to CP 193, draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition*, provided updated guidance on the nominee process set out in s615, which applies for both items 10 and 10A of s611. Part of the process requires that the company issue to the nominee the securities that would otherwise be issued to the foreign holders.

18 One respondent suggested we update [CO 01/1542] to remove the requirement in s615(b) in relation to accelerated rights issues, noting that entitlements of foreign holders in such rights issues are often not assignable in practice.

19 It was also suggested that the nominee process itself is not always necessary for accelerated, non-renounceable rights issues, as the nominee in such rights issues will generally manage the sale of the securities via a book build process that will not result in proceeds in excess of the offer price.

ASIC's response

We have maintained the general requirement that companies seeking to rely on item 10A of s611 must comply with the nominee process: see Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (RG 6) at RG 6.113. This is consistent with the policy of equal treatment of holders underlying the exceptions in items 10 and 10A of s611.

For non-renounceable rights issues generally, RG 6 acknowledges that the requirements of s615 may be problematic in certain circumstances. We provide specific guidance on when

we may grant case-by-case relief from s615, taking into account the underlying policy of s615: see RG 6.125–RG 6.132.

Despite this, it should be noted that we will not grant relief where the rights issue exceptions may be being used for control purposes.

Guidance on rights issues and underwriting: Regulatory action

20 In CP 193 we consulted on the consolidation and update of our guidance on rights issues generally, including our pre-existing guidance on when we may take regulatory action in relation to a rights issue or underwriting arrangement that may give rise to unacceptable circumstances. Table 4 of draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition* set out some of the relevant factors we will generally consider.

21 The feedback we received largely supported the inclusion of Table 4 as useful guidance. One respondent, however, suggested that it may be more appropriate for the Takeovers Panel's Guidance Note 17 *Rights issues* (GN 17) to act as the sole source of guidance on when unacceptable circumstances may arise from a rights issue or underwriting arrangement. To this extent, the respondent noted that our guidance was largely consistent with GN 17.

22 It was also suggested that we clarify our guidance in relation to non-renounceability and how it may contribute to unacceptable circumstances.

ASIC's response

We have retained our guidance on our general approach to rights issues and related underwriting arrangements: see RG 6.83–RG 6.88.

In line with the feedback supporting the inclusion of Table 4, we consider that it is useful for RG 6 to confirm the factors we will consider when assessing rights issues and underwriting arrangements. This guidance is relevant to ensuring not only that the market understands our regulatory approach to rights issues in our administration and enforcement role regarding Ch 6 (including when we may make application to the Takeovers Panel under s657C(2)(c)), but also the broader issues we will take into account when assessing applications for the exercise of ASIC's discretionary powers in relation to particular rights issues.

We have updated our guidance in Table 4 of RG 6 on how we will take into account the fact that a rights issue is non-renounceable in assessing a rights issue or associated underwriting arrangement. Table 4 states that the significance of this factor will vary, depending on the advantages and disadvantages of making a particular offer renounceable.

ASIC approval of nominees

23 In CP 193 we highlighted that, in updating our policy on when we approve nominees for the purposes of s615, we may take into account any overall concerns with the rights issue or underwriting arrangements to which the application relates. This approach is also taken when considering other requests for the exercise of our discretionary powers—as discussed in Section D of draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition.*

24 We received feedback from one respondent about our proposed approach, suggesting that the Takeovers Panel is the appropriate forum to take action where we have concerns about a rights issue or underwriting arrangement. That respondent noted that ASIC's exercise of power to approve a nominee should be limited to whether we have concerns about the proposed nominee.

ASIC's response

We are concerned to ensure that the rights issue and underwriting exceptions are not used as a means to acquire control of companies, and thereby deprive minority or other share or interest holders of the benefits associated with participating in a control transaction.

We acknowledge the feedback on our approach to considering applications to approve nominees under s615, and that some practitioners do not support this policy.

However, we have retained this approach and the related guidance, which reflects our current practice when assessing applications for approval of nominees. This approach was reached after careful consideration of the policy underlying both s615 and the exceptions to which s615 relate. In particular, and as a matter of administrative law, we consider that it is appropriate to have regard to the principles in s602 generally when determining whether to exercise ASIC's approval power under s615, and that it would be inconsistent with those principles for ASIC to, for example, exercise its powers in such a way that would facilitate a rights issue or underwriting arrangement that appears to be designed to avoid the requirements of Ch 6.

This approach is also consistent with the focus of our guidance in RG 6 on rights issues and underwriting arrangements generally. The overall update to our guidance reflects that monitoring and making inquiries regarding rights issues is an important part of our regulatory role of ensuring that investors and financial consumers are confident and informed, and that markets are fair and efficient. Our efforts in this regard recognise that in some cases, where a rights issue or underwriting arrangement may result in a change of control of an issuer, there may be no independent share or interest holders in the issuer who are otherwise in a position to make inquiries of, or raise concerns

with, the issuer about the rights issue or underwriting arrangements.

Arrangements not considered underwriting: termination rights

25 Attachment 2 to CP 193 incorporated our existing policies on the kind of arrangements that we consider constitute underwriting. These policies confirm our view that a central element of underwriting is the assumption of risk by the underwriter. Draft Regulatory Guide 000 *Takeovers: Exceptions to the general prohibition* also included further clarification on arrangements that we do not consider constitute underwriting, because they do not in effect involve the assumption of shortfall risk by the 'underwriter'.

26 We received feedback from one respondent that our updated guidance on when the existence of certain termination rights could mean an arrangement is not underwriting may be too broad. The respondent agreed with the policy justification in situations where an underwriter is clearly in complete control of when an agreement is terminable, but raised concerns that the guidance's reference to termination events over which the underwriter may merely have 'some' control may preclude certain customary conditions that allow the underwriter to terminate on the basis of a reasonable or bona fide opinion regarding an event over which they do not have control.

27 Another respondent also requested that we clarify what would constitute 'some control' by an underwriter over a termination event. The respondent suggested the 'sole control' test, similar to s629(1)(b), would be more appropriate. It was also suggested that we provide further guidance on the types of termination rights that may cause us to take the view that the arrangement is not underwriting, due to the 'underwriter' having 'some control' over the relevant event.

28 Where the principal arrangement is not considered to be underwriting, the respondent also requested that we clarify that any sub-underwriters (who are generally contractually bound to the underwriter but not the issuer) are nonetheless able to rely on the exceptions to the general prohibition.

ASIC's response

We have amended our guidance on termination clauses so that it refers more generally to termination rights that effectively give the underwriter a discretion or option to underwrite from the outset.

In doing so we have clarified that this includes termination rights dependent on events over which the underwriter has 'effective control' rather than 'some control': see RG 6.148–RG 6.152. We have also clarified that we do not consider an underwriter has a termination right within their 'effective control' solely because under the terms of the arrangement the underwriter is able to

terminate on the basis of their reasonable and bona fide view of the materiality or effect of an event over which they do not have effective control: see RG 6.152.

The 'effective control' test is slightly broader than the 'sole control' test proposed, principally to capture situations where the nature of the termination event is such that the underwriter essentially retains an option to proceed from the outset of the arrangement and is therefore not in effect assuming shortfall risk.

Similarly, we have clarified that a termination event such as a token fall in the relevant market index, which is sufficiently insignificant that it is effectively certain to occur, may also mean the underwriter is, in effect, not assuming shortfall risk: see RG 6.151.

In relation to sub-underwriting, where the principal arrangement is not considered underwriting, we have provided guidance at RG 6.150 that any sub-underwriter is also unable to rely on the underwriting exceptions, as a sub-underwriter's shortfall risk exists only where the principal underwriter has assumed this risk. This also reflects the fact that a sub-underwriter generally contracts only with the principal 'underwriter' to assume risk (whether in part or whole).

An alternative for a sub-underwriter that is prepared to bear shortfall risk is to contract directly with the issuer as a principal underwriter.

D Takeover bids

Key points

Respondents were generally supportive of our updated guidance on takeover bids.

We received feedback suggesting we provide further guidance on certain aspects of our policy, including:

- when we may grant relief to facilitate 'capped' forms of consideration with reference to s626;
- whether we agree with the Takeovers Panel's 'net benefit' test for collateral benefits;
- when target shareholders should be offered withdrawal rights; and
- joint bid relief and the operation of s609(7).

We also received feedback suggesting changes to our relevant class orders.

'Capped' bid consideration and s626

29 Attachment 3 to CP 193, draft Regulatory Guide 000 *Takeover bids*, updated our policy in Regulatory Guide 27 *Takeovers: Minimum acceptance conditions* (now superseded) on the prohibition on maximum acceptance and consideration conditions in s626. In particular, our updated guidance noted that offers that involve alternative forms of consideration where one form is 'capped' at a maximum amount (such that the bid may fail if too many holders elect for the capped form of consideration) are contrary to the prohibition in s626. Our guidance confirmed that this is the case even if the cap is expressed as a minimum acceptance condition in relation to one of the alternatives.

30 Our guidance also noted more generally that the prohibition in s626 extends to conditions that have the effect of reducing the maximum consideration offered under the bid, rather than defeating the bid.

31 One respondent suggested that we provide further guidance on when we would be willing to grant relief to facilitate 'capped' forms of consideration in the context of our updated policy on s626, noting that we have provided such relief in certain circumstances in the past.

ASIC's response

As discussed in Regulatory Guide 9 *Takeover bids* (RG 9), the purpose of s626 is to reduce uncertainty for offerees and prevent

bidders from making, and then seeking to resile from, over-generous bids.

Following the feedback we received, we have included a note at RG 9.183 (which discusses maximum acceptance conditions that may result in the reduction of consideration rather than the failure of the bid) to clarify that we will consider the underlying policy of the prohibition on maximum acceptance conditions when assessing 'capped' offer structures that involve the bidder substituting an alternative form of consideration when the cap is reached. These considerations will also apply when we are considering applications for relief.

In particular, we note in our guidance that we may closely examine the value of the alternative forms of consideration, the setting of the cap and the disclosures surrounding the structure.

The bidder's intentions

32 Attachment 3 to CP 193 updated our guidance in Regulatory Guide 11 *Disclosure of offerors' intentions in takeover documents* (now superseded) on disclosure of the bidder's intentions, as required under s636(1)(c) and (d).

33 One respondent noted our updated guidance implied that when a bid is subject to a 90% minimum acceptance condition that the bidder does not intend to waive, the bidder should disclose its intentions if they acquire between 50% and 90% control in the target. It was submitted that in this context, this information would not be useful to target shareholders.

ASIC's response

We have retained our guidance on this issue in RG 9. When a takeover offer is made subject to a minimum acceptance condition, a bidder may reserve the right to waive that condition. If this is the case, our view is that it is relevant to a target shareholder's consideration of the offer to understand the bidder's intentions (to the extent they have been formed) in the event the target becomes a wholly owned subsidiary, as well as the extent the intentions may alter if the target becomes a partly owned subsidiary. This approach to disclosure of the bidder's intentions is consistent with market practice we have observed and legal commentary.

Guidance on collateral benefits

34 Attachment 3 to CP 193 incorporated updated guidance on the prohibition on collateral benefits in s623. This guidance was focused on the legal test in s623, introduced under the *Corporate Law Economic Reform Program Act*

1999, that the benefit must not be 'likely to induce' acceptance or disposal and reflected our approach of balancing a number of general factors. This test is broader than the *prima facie* 'net benefits' test referred to in the Takeovers Panel's Guidance Note 21 *Collateral benefits* (GN 21), which discusses the Panel's approach to considering when a benefit may give rise to unacceptable circumstances.

35 One respondent noted our draft guidance was silent on whether we agree with the Takeover Panel's approach and the 'net benefits' test, and suggested it would be helpful to confirm our view given the market, applying the test, assumes that a benefit given on arm's length terms is unlikely to breach s623.

36 Another respondent commented on our guidance on when we would be willing to grant relief from s623 for a benefit given to a controlling holder by a bidder when substituting as guarantor or acquiring a debt. In particular, the respondent noted that our guidance appears to contemplate different treatment for loans and guarantees, as we require there to be no value transfer only in the case of substitutions for loans.

ASIC's response

As noted in CP 193, our guidance on the 'inducement' test involves considerations broader than simply whether the benefit given is a 'net benefit' (or whether the benefit is given on arm's length terms).

As noted at RG 9.207–RG 9.210, the 'inducement' test was introduced to deal with a number of issues arising from the strict interpretation of the predecessor provision, which in some cases prohibited transactions that were not commercially connected with the bidder's acquisition of target securities. Before the introduction of the 'inducement' test the 'net benefits' concept was one approach applied in some court decisions relating to the predecessor provision to s623.

We have not incorporated the 'net benefits' test in our updated guidance in RG 9 because:

- our guidance is focused on the 'inducement' test that applies under the law rather than the considerations relevant to determining whether unacceptable circumstances exist. While we acknowledge that consideration of whether a 'net benefit' is given may be relevant in considering the legal prohibition (see below), the inducement test is broader—in particular, under the 'inducement' test a benefit given on arm's length terms could still contravene s623 if it induces target holders to accept into a bid or dispose of bid class securities;
- our guidance takes into account similar factors to the 'net benefits' test but emphasises that the overall test is inducement. For example, one element is the 'materiality' of the benefit, which incorporates similar considerations; and

- conceptually, we think a benefit that in fact induces a person but does not meet the 'net benefits' test should be prohibited. GN 21 also acknowledges that there may be inducement without a 'net benefit'.

Our guidance on case-by-case relief from the prohibition on collateral benefits in relation to arrangements with controlling holders to acquire or replace a loan or substitute as a guarantor does not distinguish between loans and guarantees. In both cases there must be no value transfer: see RG 9.232. As noted in RG 9.233, particular issues can arise in the case of an insolvent target.

Replacement bidder's statements

37 One respondent suggested that, when reissuing the relief in Class Order [CO 00/344] *Changes to a bidder's statement between lodgement and dispatch*, which allows a bidder to dispatch a replacement bidder's statement, we should amend the relief so that it does not reimpose the 14-day waiting period between lodgement and dispatch. This period can be waived with the consent of the target or ASIC.

38 The respondent suggested that in most cases there is not usually any need for dispatch of a replacement bidder's statement to be delayed and that in any event a bidder can avoid the delay by instead sending a supplementary bidder's statement.

ASIC's response

The minimum 14-day period between lodgement and dispatch of the bidder's statement, specified in item 6 of the table in s633(1) and items 13 and 14 of the table in s635(1), provides an opportunity for the target, ASIC and other interested parties to examine and consider the disclosures made by the bidder before dispatch. The requirement in [CO 00/344] resetting this time period on lodgement of a replacement bidder's statement recognises that, as with the original bidder's statement, a bidder has substantial freedom to structure and present the information in a replacement bidder's statement and to determine the substantive disclosures it makes.

However, we acknowledge that in many cases the changes or new information incorporated in a replacement bidder's statement may not be of such a magnitude that it is necessary to delay its dispatch.

On balance, we consider that the current setting of our relief is preferable because:

- without the 14-day period operating in default, a bidder could potentially make significant changes shortly before dispatch, leaving the target, ASIC and others with insufficient time to

review the replacement bidder's statement and/or apply to the Takeovers Panel to prevent dispatch of disclosures that may be misleading or deceptive;

- under the current setting, the bidder is able to obtain the target or ASIC's consent to waive the 14-day period. This mechanism is specifically designed to address those cases where the delay is unjustified and is commonly used in the process of negotiating issues or concerns with the target or ASIC during the 14-day period (see the Takeovers Panel's Guidance Note 5 *Specific remedies—Information deficiencies* (GN 5) at paragraph 27);
- although the bidder is able to dispatch a supplementary bidder's statement together with the original bidder's statement in some circumstances, there is a natural limit in this approach inherent in the general requirement not to dispatch misleading takeover documents (see GN 5 at paragraph 10); and
- allowing a bidder to automatically lodge a replacement bidder's statement without resetting the period for dispatch may lead to bidders lodging poorer quality original bidder's statements on the basis that any issues can be dealt with by lodging a replacement bidder's statement at a later time during the 14-day period.

Our reissued relief retains the pre-existing settings that reset the timetable for dispatch on lodgement of a replacement bidder's statement: see Class Order [CO 13/528] *Changes to a bidder's statement between lodgement and dispatch*.

Withdrawal rights

39 In Attachment 3 of CP 193 we discussed how we administer the requirement for a bidder to offer accepting holders withdrawal rights after the bidder varies the bid in a way that postpones (for more than one month) the time when the bidder has to meet their obligations under the bid: s650E(1)(b). Our approach is that a bidder must calculate the total period of extension from the original date for performance under the offers at the time of dispatch.

40 One respondent raised the issue of how the time is calculated in relation to an accepting holder who accepted when the closing date of the offer was later than the original closing date. The respondent suggested that the correct view was that withdrawal rights do not arise for those holders, in relation to whom the bidder's obligations under the extension are not postponed for more than one month (calculated from the closing date as it stood at the time of the person's acceptance). The respondent noted that there did not appear to be a policy justification for the contrary view.

ASIC's response

We have included further clarification of ASIC's views on this issue at RG 9.442–RG 9.444.

We take the view that the correct application of s650E(1) is that withdrawal rights should be given to all holders (who have previously accepted the bid) when the closing date of a conditional bid is extended to a date more than one month from the original closing date.

In our view, this is consistent with the wording of s650E(1), which refers to the terms of the bid generally (rather than particular offers). We also consider that it is consistent with the underlying policy of the provision that persons who are dependent on the consideration arriving at a specific time should have the opportunity to withdraw if that time period is unexpectedly extended. The delay caused by an extension of the bid is the same for all holders who have accepted, regardless of when they accepted or whether the relevant extension is for less than one month from the previous closing date.

Bidders can avoid the need to offer withdrawal rights by seeking relief to shorten the time for payment.

Dispatching notices of variation

41 One respondent suggested that we should amend the requirement to send a notice of variation to everyone to whom offers were made under the bid: s650D(1)(c)(ii).

42 The respondent noted that the requirement often means that persons who were previously target holders, but are no longer on the target's register and no longer have any interest in the bid, are sent notices. The respondent recommended that we require that notices only be given to those who continue to hold target securities.

ASIC's response

As part of the reissue of our class orders we have included a new modification to s650D(1)(c) so that notices of variation are sent to persons on the most up-to-date register (of each relevant class of securities) available to the bidder: see Class Order [CO 13/521] *Takeover bids*. Our modification also applies to notices that must be given under s624(2).

CHESS acceptances

43 In CP 193 we proposed to introduce a new class order modification in response to the Full Federal Court's decision in *Australian Pipeline Limited v*

Alinta Limited [2007] FCAFC 55, where the court found that a holder whose securities are CHESS registered and who sends a completed paper acceptance form to the bidder—in accordance with the procedure in Rule 14.14.7 of the ASX Settlement Operating Rules (paper acceptance)—has not accepted the bid until the acceptance is processed, and the bidder does not acquire a relevant interest before that point.

44 The proposed relief, which we have given in the past on a case-by-case basis, confirmed that for the purposes of applying the provisions of Ch 6 (other than s653A) the bid is taken to have been accepted at the time the paper acceptance is received. As a result, the paper acceptance:

(a) will give rise to a relevant interest that:

(i) falls within the exception in item 1 of s611 as an acceptance; and

(ii) is reportable under the substantial holding provisions;

(b) will be taken into account in determining the bidder's voting power for the purposes of s624(2)(b); and

(c) cannot be used to deny a holder withdrawal rights under s650E on the basis that the holder's acceptance was not yet effective where an extension of the bid is effected after the paper acceptance is given but before the acceptance is processed.

45 Two respondents agreed with the proposal. However, one respondent was opposed on the basis that the proposal may result in unreliable information being provided to the market regarding acceptances. This was because the system of processing through CHESS is designed to validate the acceptance by confirming the relevant holding and reserving the securities in a sub-position, to ensure they cannot otherwise be dealt with pending settlement or withdrawal of the takeover contract.

46 In the case of a paper acceptance the sub-position is not applied unless and until the holder's broker replies to the CHESS message sent by the bidder on receipt of the paper acceptance. The respondent noted that on occasions the holder has a different holding to that specified, or the holder's broker needs prompting to respond to the bidder's message (which lapses after a set period). Further, the holder could, after giving the form, effectively nullify their acceptance by giving a contrary instruction to their broker not to validate the bidder's CHESS message. The respondent was concerned that the reporting of paper acceptances yet to be reserved would reduce the integrity of disclosure and that back-end processes may need to be re-engineered to manage an additional pre-processing stage.

ASIC's response

We have decided to proceed with the modification as proposed.

Importantly, the modification does not apply to s653A and is not designed to affect the process under the ASX Settlement Operating Rules for processing acceptances or the common law rules of offer and acceptance. Our modification deems a relevant holder to have accepted only for the purposes of applying the provisions in Ch 6 (and 6C)—that is, by assuming a holder has accepted in determining, for example, whether the holder has a withdrawal right or whether a relevant interest arises.

While we note the particular issues raised about the integrity of information provided to the market regarding acceptances, we consider that it is appropriate for a bidder to nonetheless report to the market instructions given to it by a holder, or a person entitled to give good title to bid class securities, during the course of the bid. The reporting regime for substantial holdings, which is based on the relevant interest concept, frequently requires the disclosure of voting power to the market that arises from arrangements less certain than concluded contracts for sale and which may be withdrawn or terminated at the discretion of one party (e.g. the reporting regime regarding acceptances tendered into an acceptance facility, discussed in RG 9.490–RG 9.496). We consider the reporting of paper acceptances is therefore consistent with this regime.

We expect a bidder will make appropriate inquiries about paper acceptances that appear irregular. A bidder must take into account similar considerations when determining whether an acceptance is genuine and effective in relation to securities held on the issuer-sponsored subregister. In a substantial holding notice the bidder may also need to distinguish between processed and unprocessed acceptances in fully describing the nature of the relevant interests it is reporting.

Acceptance facilities

47 In CP 193 we proposed to issue a new class order to confirm that a bidder does not acquire a relevant interest in securities, and therefore possibly breach s606, as a result of a holder tendering into an acceptance facility. One of the terms of the relief we proposed is that, where a facility is only open to institutional holders rather than all holders (an institutional acceptance facility), participation in the institutional acceptance facility must be restricted to institutional holders who are, in fact, restricted by their investment mandate and have provided written certification to this effect to the facility agent.

48 While the relief was generally supported overall, a number of respondents disagreed with this term. In particular, they variously noted:

(a) institutional mandates are not the only reason institutions do not accept bids—many simply are disinclined to accept a conditional bid;

(b) the Takeovers Panel in *Patrick Corporation Limited 03* [2006] ATP 12 took the view that institutional acceptance facilities do not involve discriminatory or collateral benefits or offend the equality principle in s602(c); and

(c) the proposal will result in institutional acceptance facilities either being used less often (denying the market information about institutional views and potentially preventing otherwise well-priced bids from succeeding) or an increase in the use of retail acceptance facilities (which is often undesirable given the potential for confusion on the part of retail holders about the nature of the facility and the need for the facility agent to have a Australian financial service (AFS) licence authorising them to provide services to retail clients).

49 Attachment 3 to CP 193 also provided new guidance on when we may give case-by-case relief so that, for the purposes of s624(2)(b) only, if a bidder has established an acceptance facility, the bidder is taken to have voting power in securities that are the subject of the facility as soon as it gives notice triggering the release of the acceptance and instructions by the facility agent (automatic extension relief).

50 Generally we received feedback that we should grant automatic extension relief by way of class order, rather than on a case-by-case basis.

ASIC's response

In response to the feedback received we have included relevant interest relief for acceptance facilities in Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition*, without generally requiring that institutional acceptance facilities are limited to institutions restricted by their investment mandates. We have, however, required the facility to be open to all holders in the case of an unconditional bid.

This means that a bidder will be able to establish an acceptance facility that is only open to specified holders (such as institutional holders) where the bid is conditional. When the bid is unconditional, the acceptance facility will need to be open to all holders. However, RG 9 also indicates that in exceptional cases we may give case-by-case relief for acceptance facilities that do not fall within the parameters of the class order.

We consider that this position somewhat addresses the concerns raised by respondents that institutional caution in relation to conditionality in particular may prevent an otherwise attractive offer from succeeding, potentially to the detriment of all target holders, but also ensures equality of opportunity in the case of unconditional bids where a facility is established to allow holders to register acceptances conditional on a particular level of

acceptances being achieved (e.g. where higher consideration is available at that level). This position also addresses the concerns that, contrary to the conclusion in *Patrick Corporation Limited 03*, institutional acceptance facilities do involve a selective benefit.

Based on the feedback received, we have also decided to grant automatic extension relief by way of class order modification rather than on a case-by-case basis: see [CO 13/521]. This relief is subject to certain conditions, including that the acceptance facility must meet the requirements for relevant interest relief in [CO 13/520] and that the bidder's s630(3) notice must include a statement that it has elected to rely on the relief and a description of its effect.

Joint bid relief for joint schemes of arrangement

51 Attachment 3 to CP 193 broadens our policy to provide relief for joint bids structured as schemes of arrangement on conditions equivalent to those imposed on joint bids structured as takeovers. This involved updates to reflect that we will:

(a) provide relief for joint arrangements that proceed by way of scheme on similar terms—adjusting for differences in the scheme process where appropriate; and

(b) in certain circumstances, require joint bidders and proponents to not vote against a higher rival scheme as well as matching or accepting a higher rival bid.

52 We received mixed feedback supporting our proposal to extend our joint bids policy to recognise the role of schemes of arrangement as an alternative vehicle for a control transaction. One respondent suggested that we should not impose the 'match and accept' condition where one party already has control of the target.

53 A number of respondents also raised the issue of recent joint schemes that have proceeded without relief by making their arrangements conditional on item 7 approval (to be sought at the scheme meeting) and relying on s609(7) in the interim. It was suggested that we should provide further guidance on when we will extend the maximum three-month period, as set out in s609(7), a scheme proponent can rely on, to help with a scheme's tight timeframe.

ASIC's response

In response to the feedback received, we have incorporated further guidance to state that we may not impose a 'match and accept' condition where one joint bidder controls over 50% of the target: see RG 9.542.

We have also included guidance at RG 9.546–RG 9.550 on our position on joint bidders who seek to rely on s609(7). In particular, we may take regulatory action, including applying to the Takeovers Panel, when joint bidders rely on s609(7) to avoid our conditions of relief. This recognises that the fact joint bid or scheme arrangements are made subject to approval under item 7 does not, in practice, alter the potential deterrent effect that the arrangements may have in discouraging rival bids and any resulting auction for control of the target in the period during which the joint bidders or proponents are relying on s609(7). It is this potential deterrent effect that the protections in our relief are designed to address and that may otherwise be contrary to the efficient market principles in s602(a).

We will consider requests for relief to extend the maximum three-month period during which s609(7) may apply to joint bid or scheme arrangements. When granting relief, we will apply the same considerations and conditions as if we were considering relief for arrangements not subject to item 7 approval.

E Compulsory acquisitions and buyouts

Key points

Respondents were generally supportive of our updated guidance on compulsory acquisitions and buyouts.

We received feedback suggesting that we should:

- modify the 75% acquisition test in s661A(1)(b)(ii);
- give class order relief or indicate when we may be prepared to give individual relief for employee performance rights to be made the subject of a takeover or compulsory acquisition; and
- modify the general compulsory acquisition and post-bid buyout provisions for convertible securities, so that the buyout process is delayed until it is clear that general compulsory acquisition will not proceed.

The 75% acquisition test

54 One of the threshold tests for post-bid compulsory acquisition in s661A(1)(b)(ii) is that a bidder must 'acquire' at least 75% of the securities it offered to acquire under the bid.

55 One respondent suggested that we should:

(a) modify this test so that it only requires a person to 'acquire relevant interests in' at least 75% of the securities; and

(b) make consequential changes to our class order relief so that, for the purposes of this test, the restricted definition of a relevant interest effected by s661A(2) applies.

The respondent noted that, in rare cases, the broader requirement to 'acquire' the securities may affect a bidder who did not start the bid with a significant holding in the target.

ASIC's response

In our view the 75% acquisition test requires a bidder to do more than merely obtain a relevant interest in securities: see also s661A(4)(d). In most cases the application of the test will be straightforward because, due to the prohibition on collateral benefits, there are generally only two ways a bidder can acquire securities it offered to purchase under the bid: through the bid and on-market.

We have decided not to modify the operation of the 75% acquisition test so that it applies instead to the acquisition of a relevant interest. This is because:

- the cases when the test may create unreasonable difficulties for a bidder are rare;
- on the other hand, relaxing the test could potentially lead to its abuse or other unintended consequences (e.g. the bidder satisfying the test on the basis of arrangements that, while giving rise to a relevant interest, do not in substance involve the final purchase of the securities by the bidder); and
- in appropriate cases, a bidder is able to seek case-by-case relief from ASIC.

A key rationale for applying the 75% acquisition test, in addition to the 90% relevant interest test, is to ensure that overwhelming acceptance of the bid terms is demonstrated, in particular, in cases where the bidder and its associates commence the bid with a significant holding. It is in these cases that it is clearest that the 90% relevant interest test alone may be insufficient to ensure overwhelming acceptance is demonstrated.

However, in the rare cases where a bidder who does not start with a significant holding is nonetheless unable to demonstrate the acquisition of more than 75% of securities, the reasons for the bidder being unable to do so may also, in some cases, mean that the bidder's offer has not received overwhelming acceptance. Accordingly, it is preferable that the question of whether compulsory acquisition rights should be available in these circumstances is considered on a case-by-case basis by a bidder seeking appropriate relief.

Employee performance rights

56 A number of respondents noted that certain employee performance rights may be derivatives rather than securities. As a result, performance rights may not be able to be made the subject of a takeover or compulsory acquisition.

57 One respondent suggested that we should modify the Corporations Act, or indicate that we may provide case-by-case relief, to treat employee performance rights the same as employee options for the purposes of Ch 6. Another respondent suggested class order or case-by-case relief should be available to extend the general compulsory acquisition provisions in Pt 6A.2 to employee performance rights.

ASIC's response

We have included new guidance in Regulatory Guide 10 *Compulsory acquisitions and buyouts* (RG 10) stating that we

may grant relief to allow a person who is a 90% holder under s664A(2) in relation to each class of shares or interests that may be issued under an employee performance right to compulsorily acquire the performance rights.

The terms of employee performance rights will often mean that rights to be issued new securities vest when a change of control occurs. As a result we do not anticipate that this relief will frequently be required. However, in appropriate cases our relief may give a level of certainty to a bidder seeking to acquire all of the voting shares or interests in an entity and all of the entity's obligations to issue new voting shares or interests.

We have not modified Ch 6 to apply to employee performance rights that are not securities at this time. However, we note that where new bid class securities are issued by the target after the s633(2) date as a result of the vesting of employee performance rights, the bidder may seek relief to extend its bid to those securities in accordance with our existing policy at RG 9.60–RG 9.63.

General compulsory acquisition and post-bid buyout of convertible securities

58 In CP 193 we invited comments on our guidance in draft Regulatory Guide 000 *Compulsory acquisitions and buyouts* regarding the interaction of the requirements of the general compulsory acquisition and post-bid buyout provisions in relation to convertible securities. In particular, our new guidance confirmed that we will not generally give relief from the post-bid buyout provisions in Div 3 of Pt 6A.1 in relation to convertible securities to a bidder who seeks to acquire the convertible securities under general compulsory acquisition. This differs from our position where both the post-bid compulsory acquisition and post-bid buyout provisions apply to bid class securities, because:

(a) in the case of a post bid buyout of bid class securities there is no right to be bought out on terms other than the terms offered under the post-bid compulsory acquisition; and

(b) there may be value in the buyout right available to convertible security holders even when a 90% holder is seeking to utilise general compulsory acquisition, because a court can determine the buyout price and the general compulsory acquisition may not proceed.

59 One respondent agreed with our proposed policy position. However, another respondent raised concerns that the need to give both a compulsory acquisition and buyout notice would confuse holders and that instead we should modify the provisions so that the buyout process is delayed until it is clear that general compulsory acquisition will not proceed.

ASIC's response

As stated at RG 10.154, in accordance with the requirement to include in the notice of compulsory acquisition all information material to deciding whether or not to object, the holders of convertible securities the subject of general compulsory acquisition will generally need to be informed of any prevailing buyout rights: s664C(1)(e).

As such, where the buyout and compulsory acquisition processes overlap, there is an obligation on bidders to fully and clearly explain both processes involved so that holders are able to make an informed decision and are not misled: s670A(1)(e). Where clear explanations are given, holders should not be confused merely because they receive the two notices in prescribed form relating to the separate compulsory acquisition and buyout processes.

Given this, we do not consider the balance of regulatory convenience necessitates delaying a convertible holder's access to their right to be bought out.

Appendix: List of non-confidential respondents

- Allens Linklaters
- Corporations Committee of the Business Law Section of the Law Council of Australia
- Corrs Chambers Westgarth
- Herbert Smith Freehills
- Hermes Equity Ownership Services