



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 128

Collective action by investors

February 2015

About this guide

This guide is for investors who wish to cooperate with each other in relation to their investment in a listed company or managed investment scheme.

It provides guidance to promote investor engagement on corporate governance issues. It also identifies circumstances where acting together may lead to investors becoming associates or entering into a relevant agreement for the purposes of the takeover and substantial holding provisions of the *Corporations Act 2001* (Corporations Act).

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

This draft guide was issued in February 2015 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Policy Statement 128, issued January 1998, reissued July 1998 and rebadged as a regulatory guide 5 July 2007.

Disclaimer

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

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

DRAFT

Contents

A Overview	4
Balancing the benefits of engagement against the risk of inappropriate acquisition of control	4
Purpose of this guide	5
Additional legal considerations	6
Scope of this guide	7
B Permissible and prohibited conduct	8
The takeover and substantial holding provisions.....	8
Collective action conduct	11
Consequences of problematic collective action.....	14
Relief	16
C Additional legal considerations	17
Issues for investors to consider	17
Issues for entities to consider	18
Key terms	20
Related information.....	21

DRAFT

A Overview

Key points

Effective investor engagement can enhance corporate governance and the long-term performance and corporate value of a listed entity.

In some instances the *Corporations Act 2001* (Corporations Act) can present obstacles to investors cooperating, as engagement of this kind may require lodgement of substantial holding notices or result in a breach of the takeover provisions of the Corporations Act.

Section B of this guide provides guidance on the likely legal effect of different types of collective action by investors and also whether these constitute unacceptable circumstances. It also provides guidance on our approach to enforcement of the takeover and substantial holding provisions in the context of investor engagement.

Section C of this guide identifies some other legal issues that investors and entities need to consider in relation to investor engagement.

Balancing the benefits of engagement against the risk of inappropriate acquisition of control

- RG 128.1 A fundamental principle of corporate governance is that investors should be able to hold the board—and, through the board, management—to account for the entity’s performance. To do so, investors need to engage with the entity. Effective investor engagement can enhance the long-term performance and corporate value of an entity for all investors.
- RG 128.2 Investor engagement can take many different forms and investors may wish to engage with entities in a variety of ways, either individually or collectively. We recognise that investors should be allowed to cooperate and coordinate their actions concerning an entity in which they have invested, in the interests of promoting long-term value for all investors. At times, this type of engagement can be more effective and efficient than individual investor engagement.
- RG 128.3 However, there is a difference between investors expressing views and promoting appropriate discipline in entity decision making and investors effectively taking control of entity decision making. Regulatory support for collective action by investors must recognise that the takeover and substantial holding provisions place limits on cooperation between investors. This is to avoid control over an entity being acquired inappropriately.

DRAFT

Takeover and substantial holding provisions

- RG 128.4 We recognise the importance of the underlying purposes of the takeover and substantial holding provisions, as set out in s602(a) of the Corporations Act. The aims of these provisions include, in broad terms, ensuring:
- (a) transparency to the market about those persons who control an entity; and
 - (b) that all investors are provided with equal opportunities to consider and benefit from control proposals.
- RG 128.5 Investors acting collectively to surreptitiously obtain a substantial stake in or illegitimately obtain control over an entity can negatively affect the entity and the position of other investors in the entity.
- RG 128.6 The challenge for investors wishing to act together to promote good corporate governance in an entity is that the takeover and substantial holding provisions are broadly drafted and the actual situations to which these provisions apply are variable.
- RG 128.7 Investors concerned about common issues may become ‘associates’ or be regarded as having entered into a ‘relevant agreement’ for the purposes of the takeover or substantial holding provisions. This is because these provisions are not only concerned with the power of individual investors in relation to the voting and disposal of shares in companies or interests in managed investment schemes, but also the aggregated voting power of groups of investors who are either related to or associated with some aspect of the entity’s affairs.
- RG 128.8 Depending on the aggregated voting power of the group, investors acting collectively in this way may be required to lodge substantial holding notices relating to the group, may be prohibited from acquiring further interests in the entity under the takeover prohibition in s606 or may even breach the takeover provisions.
- RG 128.9 It may be difficult for investors to navigate through these provisions, which can serve to deter activity that does not have an illegitimate control purpose.

Purpose of this guide

- RG 128.10 The purpose of this guide is to provide guidance on how the Corporations Act provisions apply specifically to collective action by investors and to provide more clarity on when we will consider that collective action may constitute unacceptable circumstances despite not contravening the Act.
- RG 128.11 We have provided detailed guidance on the relevant takeover and substantial holding notice concepts in Regulatory Guide 5 *Relevant interests and*

DRAFT

substantial holding notices (RG 5) and we do not repeat that guidance here. Section B describes how the substantial holding notice provisions and the takeover provisions apply to collective action: see RG 128.22–RG 128.41.

- RG 128.12 To help investors and entities understand our approach to collective action by investors, in Section B we have provided illustrative examples of collective action conduct we consider is unlikely (Table 1) or more likely (Table 2) to result in institutional investors being regarded as acquiring a relevant interest or becoming associates for the purposes of the takeover and substantial holding provisions.
- RG 128.13 Our two aims in providing guidance on collective action are to:
- (a) encourage collective action by investors that can assist in promoting corporate governance improvements for the long-term benefit of an entity and its investors. Many forms of this action may occur without giving rise to any contravention of the Corporations Act or other unacceptable circumstances; and
 - (b) deter investors from undertaking collective action that is not consistent with the letter or spirit of the takeover and substantial holding provisions. At its worst, the conduct may amount to the passing of control in circumstances where those investors not engaged in the conduct are uninformed about this passing of control and are not given any opportunity to obtain benefits that might need to be paid if control were to pass legitimately.
- RG 128.14 While these examples aim to reduce uncertainty about the position of investors when acting collectively, the circumstances of each case need to be considered individually and there may be other relevant factors that trigger the takeover and substantial holding obligations.
- RG 128.15 Section B includes a discussion on the consequences of collective action that triggers or breaches the Corporations Act, and the factors we will consider when deciding whether to take enforcement action: see RG 128.47–RG 128.52. It also includes a discussion on the circumstances in which we may give individual relief to facilitate collective action: see RG 128.53–RG 128.55.

Additional legal considerations

- RG 128.16 While the question of whether the collective action by investors results in the acquisition of a relevant interest or creates an association is an important one, Section C outlines a number of other important legal considerations that:
- (a) investors need to take into account when engaging with entities (RG 128.56–RG 128.60); and

- (b) entities need to take into account when engaging with investors or responding to investor approaches (RG 128.61–RG 128.68).

RG 128.17 The discussion in Section C is a general overview only. We have also not described in this guide additional considerations that may apply to specific types of listed entities (e.g. in particular industries) or to specific types of investors (e.g. foreign investors).

Scope of this guide

RG 128.18 This guidance is focused on listed companies and managed investment schemes, in relation to which the takeover and substantial holding provisions will apply. The guidance may have some more limited relevance to unlisted companies with more than 50 members, but the substantial holding provisions will not apply to these companies.

RG 128.19 References to ‘entity’ in this guidance are to both companies and managed investment schemes while references to ‘investors’ are to members of companies and managed investment schemes. References to ‘interests’ are to interests in a managed investment scheme.

RG 128.20 While this guide sometimes refers to ‘institutional investors’, it applies equally to the actions of other investors. The focus on institutional investors throughout the guide is merely a recognition that this type of investor is likely to engage more actively in relation to the corporate governance of the entities in which they invest than other types of investors.

RG 128.21 This guide does not deal with investors coming together for the purpose of acquiring shares or interests of other investors. Investors who wish to act together for the purposes of a joint bid or scheme should refer to Section L of Regulatory Guide 9 *Takeover bids* (RG 9) for details of the approach we take to such situations.

B Permissible and prohibited conduct

Key points

This section provides guidance how the takeovers and substantial holding provisions apply to collective action. It also provides practical guidance to understand our approach to when certain conduct may raise concerns in relation to compliance with the takeover and substantial holding provisions, or otherwise gives rise to unacceptable circumstances. We have included illustrative examples of activities that are unlikely or more likely to trigger the legal provisions.

This section discusses the consequences of triggering the legal provisions or undertaking conduct amounting to unacceptable circumstances, and sets out the factors we will consider when deciding whether to review conduct and take enforcement action.

We also discuss the circumstances in which we might consider giving relief from the law to allow institutional investors to engage in collective action that would otherwise be prohibited.

The takeover and substantial holding provisions

RG 128.22 The takeover and substantial holding provisions are triggered when the following thresholds are met:

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

The thresholds are made up of a person's 'relevant interest' in voting shares or interests, combined with that of any of their associates.

RG 128.23 The thresholds for both the takeover and substantial holding provisions involve similar calculations incorporating two essential elements:

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

DRAFT

RG 128.24 These elements reflect the respective regimes' underlying policy concern with the acquisition of corporate control and the disclosure of interests that may have a capacity to dictate or influence the entity's future direction or affairs.

RG 128.25 The concept of 'relevant interest' revolves around control over voting and disposal of shares or interests. Because the concept is concerned with a person's capacity to exercise a degree of influence over securities, it encompasses connections wider than ownership. As such, a number of people may have a relevant interest in the same securities in a variety of different capacities.

Note: See Sections B and C of RG 5 for a detailed discussion on when relevant interests arise.

RG 128.26 Depending on the form and circumstances, collective action by institutional investors can result in the investors acquiring a relevant interest in the shares or interests held by the other investors. For instance, institutional investors might undertake to each other that they will vote a particular way in relation to a particular resolution or not dispose of their shares or interests until a particular issue about an entity's performance is resolved.

RG 128.27 Significant amounts of investor engagement do not, however, involve considering the voting or disposal of shares or interests and therefore do not involve the acquisition of a relevant interest. In these instances, the issue under the takeover and substantial holding provisions is not whether a person has acquired a relevant interest in voting shares or interests but rather whether a person has become the associate of another person.

RG 128.28 Investors become associates with each other under s12(2) if:

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

RG 128.29 An association may arise from a relevant agreement or concerted action relating to matters set out in s53, which include the broad variety of an entity's affairs: see RG 5.136. Therefore, it is possible for the takeover or substantial holding provisions to apply to collective action by institutional investors relating to a range of corporate governance matters, which is not necessarily being undertaken for a control purpose.

RG 128.30 It can sometimes be important when analysing the legal position to understand that a person does not automatically have a relevant interest in all the shares or interests in which an associate has a relevant interest.

RG 128.31 Detailed guidance in relation to the concepts of ‘relevant interest’ and ‘associates’ is provided in RG 5: see in particular the discussion of ‘relevant agreements’ at RG 5.31–RG 5.33 and of ‘associates’ at RG 5.131–RG 5.151.

RG 128.32 We have set out an overview of the operation of the takeover and substantial holding provisions and the issues that may arise in certain circumstances where institutional investors engage in collective action: see RG 128.33–RG 128.41.

Substantial holding provisions

RG 128.33 A person has a substantial holding if they and their associates have relevant interests in voting shares or interests carrying 5% or more of the total votes attached to all voting shares or interests of a listed entity.

Note: Expanded to include relevant interests disregarded under s609(6) (market traded options) and s609(7) (conditional agreements) in accordance with the definition of ‘substantial holding’ in s9.

RG 128.34 A person must lodge a substantial holding notice under Pt 6.1C if they:

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

RG 128.35 In assessing what level of substantial holding an institutional investor has at any point, it is important to consider whether any collective action may have caused another person to be its associate, with the result that the other person’s relevant interests must also be counted.

RG 128.36 The substantial holding provisions require disclosure of the identity of the associate and, if the association arises as a result of a relevant agreement, details of the relevant agreement: s671B(3).

RG 128.37 The substantial holding notice obligations do not prevent investors in a listed entity acting collectively. Rather, the obligations ensure that in some cases the investors will be obliged to disclose their cooperation to the market.

Takeover prohibition

RG 128.38 The takeover prohibition in s606 will be contravened (s606(1)–(2)) if an institutional investor acquires a relevant interest in issued voting shares or interests through a transaction in relation to securities so that it or another person’s voting power in an entity increases:

- (a) from 20% or below to more than 20%; or
- (b) from a starting point above 20% and below 90%.

A person's voting power is the aggregate of the votes attached to the shares or interests in which the person and associates of the person hold a relevant interest.

RG 128.39 In determining whether this provision may be breached, an institutional investor needs to be aware of whether the collective action the investor proposes to undertake means either that the investor will have a relevant interest in the shares or interests of the other person or the other person will be considered an associate of the investor.

RG 128.40 The takeover prohibition does not prohibit collective action occurring when:

- (a) the investors are not associates and have not acquired a relevant interest as a result of their engagement and interaction;
- (b) the collective action does not involve the acquisition of a relevant interest because it is conduct that is subject to a specific exclusion under the Corporations Act (e.g. being appointed as proxy within the terms of s609(6) or entering into conditional agreement within the terms of s609(7));

Note: Substantial holding notice disclosure must be made as if the relevant interests acquired through the conditional agreement are not disregarded (s671B(7)). There may of course be other circumstances applicable that mean a relevant interest arises despite the specific exclusion.

- (c) the aggregate voting power of the investors involved in the collective action is less than 20%; or
- (d) despite the aggregate voting power of the investors being more than 20%, no transaction in relation to securities has been entered into that increases a person's relevant interest (the investors have otherwise become associates).

Note: 'Transaction' is broadly defined and can include entering into a relevant agreement (see s9 and 64). The circumstances in which persons might be associates under the Corporations Act but have not entered into a relevant agreement are rare.

RG 128.41 It is important to then consider whether the collective action will affect the ability of institutional investors to engage in transactions involving the acquisition of relevant interests in the future. For instance, if an investor's situation is as described in RG 128.40(d), it may not be possible for them to acquire more shares or interests in the entity as a result of the takeover prohibition applying in the future.

Collective action conduct

RG 128.42 There are a number of collective activities by institutional investors that provide a means of effectively engaging with an entity but that do not result in an investor acquiring a relevant interest in someone else's shares or

interests, nor result in an associate relationship. We recognise the value of these activities in promoting good corporate governance in Australian entities.

- RG 128.43 While in some instances it can be clear whether conduct falls within or outside the scope of the legal provisions, due to the nature of concepts like ‘relevant agreement’ and ‘associate’, there can be uncertainty about the application of these concepts to a range of conduct.
- RG 128.44 We have provided some illustrative examples of conduct where collective action is unlikely (Table 1) or more likely (Table 2) to constitute entry into a relevant agreement resulting in the acquisition of a relevant interest or triggering an associate relationship. These examples are illustrative only. The circumstances of each case need to be considered individually. There may be other relevant factors that trigger the takeover or substantial holding provisions.
- RG 128.45 In addition, when regulating the takeover provisions we also need to consider the possibility that unacceptable circumstances may exist: see s657A. Table 1 and Table 2 also note whether the conduct may give rise to unacceptable circumstances.
- RG 128.46 To the extent that it is ambiguous whether particular conduct is caught by the takeover and substantial holding provisions or conduct is outside these provisions, our attitude to whether unacceptable circumstances exist and enforcement action is warranted will depend on whether it appears that the conduct has a control purpose and effect, rather than simply promoting good corporate governance: see RG 128.47–RG 128.52.

Table 1: Conduct unlikely to constitute acting as associates or entering into a relevant agreement giving rise to a relevant interest

Type of conduct	Explanation and analysis of issues
Institutional investors: <ul style="list-style-type: none"> • holding discussions or meetings about voting at a specific or proposed meeting of an entity; • discussing issues about the entity, including problems and potential solutions; • discussing possible matters to be raised with the entity’s board; • discussing and exchanging views on a resolution to be voted on at a meeting; or • disclosing individual voting intentions on a resolution. 	<p>If the conduct is confined to the exchange of views or information between the institutional investors, then this is unlikely to give rise to an association, involve entering into a relevant agreement or unacceptable circumstances, as each investor is not bound to act in a certain way and retains its own discretion in terms of approach on an issue.</p> <p>If the conduct extends to the formulation of joint proposals to be pursued together or there is an understanding that the institutional investors will act or vote in a particular way, then concerns may arise.</p>

DRAFT

Type of conduct	Explanation and analysis of issues
<p>Institutional investors recommending that another institutional investor votes in a particular way.</p>	<p>This is unlikely to make the institutional investors associates or constitute entering into a relevant agreement giving rise to a relevant interest if no undertaking or agreement to follow the recommendation or act in a particular way is obtained.</p> <p>Note: This type of conduct may have the benefit of the associate exclusions set out in s16 (if one entity is providing advice in a professional capacity to another entity).</p> <p>The conduct is unlikely to give rise to unacceptable circumstances.</p>
<p>Institutional investors making representations to the company's board about the company's policies, practices or particular actions that the company might consider taking</p>	<p>If the conduct comprises merely raising the same general issues of concern raised by other shareholders, usually in one-on-one or joint meetings with the company (e.g. in relation to some aspect of executive remuneration, such as the structure of the company's incentive schemes), then this is unlikely to result in the institutional investors being associates. Nor is the conduct likely to give rise to unacceptable circumstances, particularly if focused on governance issues.</p> <p>However, if this forms part of pursuing agreed joint proposals about the company then this may suggest that the institutional investors are associates. If accompanied by threats about dealings with shares or voting rights attached to shares, it can raise concerns that the institutional investors have acquired relevant interests in each other's shares via a relevant agreement.</p> <p>Making the same representations to the company's board about a control transaction proposed by one of the institutional investors, or about particular transactions that the investors may benefit from over and above any benefit to shareholders generally, may in particular give rise to concerns that unacceptable circumstances exist.</p>

Note: These examples are unlikely to give rise to an association or involve entering into a relevant agreement giving rise to a relevant interest only if the conduct is confined to the actions in the examples and does not go any further.

Table 2: Conduct more likely to constitute acting as associates or entering into a relevant agreement giving rise to a relevant interest

Type of conduct	Explanation and analysis of issues
<p>Institutional investors jointly signing with other investors:</p> <ul style="list-style-type: none"> • a s249D notice (or s252B notice in the case of managed investment schemes) to requisition a general meeting of an entity for the purposes of putting a resolution relating to the composition of the board or the entity's affairs; or • a s249N notice (or s252L notice in the case of managed investment schemes) to request the addition of a resolution to be considered at a general meeting of the entity relating to the composition of the board or the entity's affairs. 	<p>Jointly signing a s249D or s249N notice (or a s252B or s252L notice in the case of managed investment schemes) in these circumstances is likely to be considered entering into a relevant agreement and for these institutional investors to be considered associates. It is also likely to be accompanied by an understanding about the exercise of voting rights that will amount to the acquisition of a relevant interest.</p>

DRAFT

Type of conduct	Explanation and analysis of issues
Institutional investors formulating joint proposals relating to board appointments or a strategic issue.	This conduct is likely to indicate that there is an understanding between the institutional investors on a particular matter relating to the affairs of the company, which amounts to a relevant agreement or acting in concert and these investors to be considered associates.
Institutional investors: <ul style="list-style-type: none"> • accepting an inducement to vote or act in a specific way; • agreeing on a plan concerning voting; or • limiting their freedom to vote (e.g. by granting another institutional investor their irrevocable proxy) 	This conduct is likely to constitute entering into a relevant agreement and for these institutional investors to be considered associates. In addition, it may give a person control over the votes attached to shares or interests, resulting in the acquisition of a relevant interest by that person.

Consequences of problematic collective action

- RG 128.47 In some circumstances, collective action conducted by institutional investors will create a relevant interest or an associate relationship. The consequences of this will depend on whether there has been a transaction and what the resulting level of relevant interest is: see RG 128.39–RG 128.40. Where the resulting level of interests is more than 5% but less than 20%, and the collective action results in the acquisition of relevant interest or the formation of an association, the Corporations Act will require only disclosure of information. The takeover prohibition potentially applies only if the institutional investors involved collectively will have voting power of more than 20%.
- RG 128.48 We will consider enforcement action against institutional investors who act collectively in breach of the takeover and substantial holding provisions. If institutional investors act contrary to the underlying principles of Ch 6, we are likely to consider that unacceptable circumstances have occurred and may refer the matter to the Takeovers Panel.
- RG 128.49 We are likely to look more closely at potential collective action that has the characteristics set out in Table 3.

Table 3: Conduct that may attract ASIC scrutiny

Control transaction	This conduct involves an actual or proposed control transaction, being either a takeover bid or a transaction of the kind listed in s611. It is more likely in these circumstances that the collective action is being undertaken to acquire or maintain control of the entity.
----------------------------	--

DRAFT

Board control	<p>This conduct involves the replacement of directors of a company.</p> <p>Particularly in circumstances where the proposed directors have a connection with the institutional investors who may be engaged in collective action, board control activity can be used as a pathway to control over the entity and more traditional control transactions. It can also be used to exert illegitimate undisclosed control by using threats to the position of existing board members to persuade an entity's board to make particular decisions.</p>
Benefits to some investors only	<p>This conduct concerns proposals that have benefits for particular investors rather than investors as a whole.</p> <p>Some of the potential for cooperative investor engagement to increase the long-term value for all investors will not be realised if only particular investor interests are served. Generally, entities are cautious about benefiting particular investors only and institutional investors seeking to obtain these benefits may be more likely to engage in behaviour to acquire control of, rather than simply make representations about, entity decision making. Proposals to give institutional investors greater veto rights than those carried by the level of their holding over the entity engaging in particular types of conduct (e.g. equity fundraising proposals) may be one example of this kind of benefit.</p>
Pattern of collective action	<p>The institutional investors involved have a history of collective action in relation to this entity or other entities that suggest that they act in concert for control purposes.</p> <p>As finding associations often depends on inferences from circumstances, it is important to take into account the broader history of institutional investors who may be acting collectively. If there is a long history of investors pursuing joint proposals, it is likely that the particular issue where the views of these institutional investors are aligned is not a common approach to one matter but part of a broader arrangement about controlling the entity. This kind of history may also mean that it is easier to imply to the entity that the voting influence of each will be combined.</p>

RG 128.50 In contrast, we are less likely to closely examine potential collective action involving matters that are about good corporate governance only. Examples might include encouraging:

- (a) better disclosure to the market;
- (b) more comprehensive board evaluation processes;
- (c) more sophisticated risk management systems;
- (d) improved sustainability or corporate social responsibility reporting; and
- (e) changes to executive remuneration structures.

RG 128.51 We may take action where institutional investors fail to lodge substantial holding notices when they are required to do so under the Corporations Act or where the disclosure in the substantial holding notice is inadequate: see RG 5 for further guidance in relation to substantial holding notices.

RG 128.52 See Section C for other legal considerations under the Corporations Act that can also arise in relation to collective actions.

Relief

- RG 128.53 We are prepared to give relief in circumstances where the collective action proposed is clearly caught by the takeover provisions, yet the nature of it is not concerned with the acquisition of a substantial interest or control over the entity. To the extent we are prepared to grant relief, we will be more likely to facilitate short-term, specific arrangements that do not include the provision of consideration. These arrangements more closely resemble the exception to the relevant interest provisions for proxies.
- RG 128.54 We will generally be reluctant to provide relief simply because there is some residual uncertainty about the legal position of collective action. The exhaustive analysis required of the facts in such cases, and the need to cast relief by reference to these facts, is unlikely to result in timely or useful relief.
- RG 128.55 In addition, any relief that we are prepared to give will generally require disclosure to the market. Given the emphasis in the Corporations Act on disclosure of substantial holdings and control transactions, we consider that in most cases the benefits to the market are outweighed by the burden involved in disclosure.

C Additional legal considerations

Key points

This section identifies a number of other important legal considerations for investors and entities involved in investor engagement. These include:

- the prohibition on insider trading;
- shadow directors;
- directors' duties;
- misleading and deceptive conduct; and
- handling confidential information.

Issues for investors to consider

Insider trading

RG 128.56 An institutional investor that has entered into a voting agreement or discussions with other institutional investors or with the entity may be in possession of inside information. For example, the mere existence of a voting agreement or the occurrence of these discussions may be price-sensitive information.

RG 128.57 Persons possessing information that is price sensitive and not generally available to the market must not trade for as long as those circumstances apply. Otherwise they could contravene the insider trading prohibition in s1043A if they apply for, acquire, or dispose of shares or interests (or enter into an agreement to do so), or procure another person to apply for, acquire, or dispose of shares or interests (or enter into an agreement to do so), after entering into a relevant agreement without informing the market that an agreement exists: see s1043A and the definition of 'inside information' in s1042A. The exceptions in s1043H–1043J (exception for knowledge of person's own intentions or activities) are unlikely to apply in these circumstances.

Shadow directors

RG 128.58 Institutional investors should be mindful of whether their actions result in them effectively managing the entity. If they do, investors may be acting as shadow directors.

RG 128.59 The definition of 'director' in s9 of the Corporations Act covers both express and implied directors, including shadow directors. A shadow director is a person that exercises control over the board from the outside. Institutional

investors should be conscious of whether their actions could constitute implied directorship. Liability for directors' duties imposed by the Corporations Act extends to shadow directors.

Misleading and deceptive conduct

- RG 128.60 Some instances of investor engagement, including collective statements, occur through statements made by investors publicly, including in the media. When making public statements, institutional investors should be careful that the statements are not misleading or deceptive: see s1041H of the Corporations Act and s12DA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

Issues for entities to consider

Duty to act in best interests of the company

- RG 128.61 While we recognise the benefits of directors engaging with institutional investors, directors have a duty to act in the best interests of the body corporate: s181(1). That is, directors have a duty to act for the best interests of the company as a whole, as opposed to the interest of any individual investor or collection of investors.
- RG 128.62 The responsible entity of a managed investment scheme, and its officers, also have a duty to act in the best interests of members: s601FC(1)(c) and 601FD(1)(c), respectively.

Duty to act for a proper purpose

- RG 128.63 Directors have a duty to act for a proper purpose: s181(2). That is, directors must use their powers for their intended purpose, not a collateral purpose: see *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285. A 'collateral purpose' may include where a director uses their powers or corporate funds to advance personal interests in responding to an approach by an institutional investor: see *Advance Bank v FAI* [1987] 9 NSWLR 464.
- RG 128.64 In election and proxy solicitation cases, which may have commenced because of collective action by investors, directors may be exceeding or abusing their powers where they:
- (a) expend an unreasonable sum of the entity's money;
 - (b) expend corporate funds on material relevant only to questions of personality and not corporate policy; or

- (c) otherwise act in a manner that is excessive or unfair in the circumstances, given the corporate purpose to be attained (see *Advance Bank v FAI* [1987] 9 NSWLR 464, at 485).

Confidential information

- RG 128.65 Engagement with institutional investors should not be viewed as a way in which those investors can gain price-sensitive information additional to that already disclosed to the market as a whole. This type of engagement should instead focus on institutional investors providing the listed entity with feedback regarding previously disclosed information or information that is clearly not price sensitive.
- RG 128.66 Even if the information discussed has already been disclosed or is not price sensitive, selective engagement with particular institutional investors can also lead to perceptions of unfairness.
- RG 128.67 While we recognise it is important that listed entities actively engage with their investors, these entities should be careful that they are not selectively disclosing confidential, price-sensitive information when doing so. This could constitute a breach of the entity's continuous disclosure obligations under the ASX Listing Rules and the Corporations Act, and creates the risk of insider trading.

Note: In Report 393 *Handling of confidential information: Briefings and unannounced transactions* (REP 393), we make recommendations for companies on the handling of confidential information.

Misleading and deceptive conduct

- RG 128.68 As noted in RG 128.60, some instances of investor engagement occur through statements made by institutional investors publicly, including in the media. Companies should be careful when making public statements in response to investor communications to the market that the statements are not misleading or deceptive: see s1041H of the Corporations Act and s12DA of the ASIC Act.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investment Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
associates	Has the meaning given in s9 of the Corporations Act
Ch 6 (for example)	A Chapter of the Corporations Act (in this example numbered 6)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
institutional investor	A body corporate whose primary functions are to: <ul style="list-style-type: none"> • pool the funds of persons to whom the institutional investor owes a fiduciary duty; and • invest the funds of any of the following: <ul style="list-style-type: none"> – a registered managed investment scheme under Ch 5C of the Corporations Act; – a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust within the meaning of the <i>Superannuation Industry (Supervision) Act 1993</i>; or – a statutory fund of a registered life insurance company within the meaning of the <i>Life Insurance Act 1995</i>
Pt 6C.1 (for example)	A Part of the Corporations Act (in this example numbered 6C.1)
relevant interest	Has the meaning given in s608 and 609 of the Corporations Act
REP 393 (for example)	An ASIC report (in this example numbered 393)
s602 (for example)	A section of the Corporations Act (in this example numbered 602)
substantial holding	Has the meaning given in s9 of the Corporations Act
voting power	Has the meaning given in s610 of the Corporations Act

DRAFT

Related information

Headnotes

associates, collective action, corporate governance, institutional investors, investor engagement, relevant agreement, relevant interest, substantial holding, takeover, unacceptable circumstances, voting agreement

Regulatory guides

RG 5 *Relevant interests and substantial holding notices*

RG 9 *Takeover bids*

Legislation

ASIC Act, s12DA

Corporations Act, Ch 6, Pt 6C.1, s9, 12(2), 16, 53, 64, 181(1), 181(2), 602, 606, 608, 609(6), 609(7), 611, 671B, 1041H, 1042A, 1043A, 1043H–1043J

Cases

Advance Bank v FAI [1987] 9 NSWLR 464

Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285

Reports

REP 393 *Handling of confidential information: Briefings and unannounced transactions*