

Ms Meera Siva Nathan
Lawyer, Corporations
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000
Via email: meera.sivanathan@asic.gov.au

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Dear Ms Siva Nathan,

Consultation Paper 234 - proposal to remake certain class orders relating to takeovers and schemes of arrangement

We refer to ASIC's Consultation Paper 234 regarding ASIC's proposals to remake certain class orders relating to takeovers and schemes of arrangement. The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to respond to the Consultation Paper.

The Committee supports the remaking of the class orders, subject to the following comments.

1. **UNSOLICITED OFFERS UNDER FOREIGN TAKEOVER BIDS—[CO 05/850]**
 - 1.1 We suggest clarifying that the references to "rules" include rules made by a self-regulatory organisation.
 - 1.2 We suggest that the exemption be broadened so as also to cover the "statutory merger" procedures common in European and US jurisdictions.
 - 1.3 We suggest that in paragraph (b)(ii) of the definition of "foreign takeover bid", the words "the person making the offer, that person and their associates or any other person" be replaced with "any person".
 - 1.4 We suggest that in clause 5 of the draft instrument, the words "to purchase" be replaced with "with respect to", as the current drafting is not appropriate in the case of paragraph (b) of the definition of "unsolicited offer" (an invitation to make an offer to sell under s1019F).

1.5 We suggest that in clause 5 of the draft instrument, the words "the offer" be replaced with "unsolicited offer", so as to make it clear that this refers to the defined term rather than an offer under s1019D.

2. **APPROVED FOREIGN FINANCIAL MARKETS—[CO 02/249] AND [CO 02/259]**

2.1 We suggest adding "for the purposes of subsection 257B(7)" at the end of clause 5 and adding "for the purposes of item 14(b)" at the end of clause 6. The current drafting suggests that each of the declaration and the approval is made for both purposes referred to in clause 3.

3. **TAKEOVERS RELIEF FOR ACCELERATED RIGHTS ISSUES – [CO 09/459]**

3.1 We suggest that in notional item 10A paragraph (b), the words "proposed date for the" be inserted before "issue of securities". This will ensure that exempt investors are not unfairly denied the benefit of the exemption where the issue of securities to persons who are not exempt investors is delayed.

4. **MINIMUM BID PRICE – [CURRENTLY, CO 00/2338]**

4.1 We suggest that the draft instrument should be made under section 669 (as well as section 655A) in order to make it clear that the definition of "takeover bid" as it applies in Chapter 6A includes a takeover bid which only satisfies the requirements of section 621(3) due to the modifications in the draft instrument. This would help to counter any argument that, given subparagraph 669(5)(b)(i), the meaning of defined terms as they apply to references in Chapter 6A can only be modified by means of an exercise of power under section 669.

4.2 We support the notional insertion of s619(2)(da), but note that the word "that" immediately following "section 621(3B)" should be "than".

4.3 We note that (as in the current class order), the instrument uses the phrase

"maximum consideration under a purchase or agreement during the 4 months before the date of the bid"

in 2 places as a short hand reference to the requirement in section 621(3) of

"maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid".

It is not clear to us that a court would always treat both phrases as having the same meaning (for example, in respect of an agreement for a purchase which occurs prior to the 4 month period where the consideration is provided during the 4 month period). We suggest clarifying this by, either:

(a) Modifying the wording in section 621(3) to conform with notional subsections (3A) and (3B); or

- (b) Simply referring in notional subsections (3A) and (3B) to "...less than the minimum consideration required under subsection (3) ...".

Conclusion and further contact

The Corporations Committee would be pleased to discuss any aspect of this submission. Please contact the Chair of the Committee, Bruce Cowley, on _____ if you would like to discuss this submission.

Yours sincerely,

John Keeves, Chairman
Business Law Section