



ASIC

Australian Securities & Investments Commission

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REGULATORY GUIDE 59

Announcing and withdrawing takeover bids (s653 and s746)

Chapter 6 — Acquisition of shares (Parts 6.3 and 6.11)

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From 5 July 2007, this document may be referred to as Regulatory Guide 59 (RG 59) or Practice Note 59 (PN 59). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 59.1) or their practice note number (e.g. PN 59.1).

Headnotes

s653; s662(2); s746; s999; public; announcement; withdrawal; takeover; bid; overbid.

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Purpose

RG 59.1 In this guide, the ASC states its views on the policy, interpretation and operation of s63 and 746 of the Corporations Law (Law). In particular, it explains the following.

- (a) Part I explains the policy of s746 (para 3–5);
- (b) Part II explains when a bid should be announced and what should be done if the bid cannot be kept confidential until that time. It also explains what an offeror should announce when a bid is delayed or called off (para 6–10);
- (c) Part III explains how s746 works and what announcements trigger the operation of the section (para 11–31);
- (d) Part IV explains how s746 works in relation to announcements of conditional bids (ie, bids subject to preconditions or defeating conditions). It also explains when an offeror should specify conditions when announcing a bid (para 32–46);
- (e) Part V explains when an offeror has a defence to a breach of s746 and outlines the two elements of the defence (s746(10) and para 47–52);
- (f) Part VI explains the four classes of cases in which it is unreasonable to expect an offeror to proceed with an announced bid (ie, the second element of the defence) (para 53–68);
- (g) Part VII explains when and how the ASC will give relief from s746 (para 69–76); and

- (h) Part VIII explains when the ASC will consent to an offeror withdrawing its offers under s653 (ie, after offers have been sent under a Part A statement). It also explains how the withdrawal should be done (para 77–87).

This guide supersedes NCSC Release 113. See also Policy Statement 92 on Procedural Fairness to Third Parties.

RG 59.2 In this guide, references to offerors, offerees and target companies include prospective offerors, offerees and target companies in relation to bids which have not been and may never be made. References to statutory provisions are to those in the Law unless otherwise specified. References to a public announcement in the context of s746 are to an announcement of an intention to make a takeover bid. They are not references to an announcement effecting a Part C or on-market takeover bid under s674. References to Listing Rules are to those of Australian Stock Exchange Ltd (Exchange).

Part I: Policy of s746

RG 59.3 The policy of s746 is to prevent the making of irresponsible public announcements by effectively imposing a duty of care on an offeror in preparing to make a bid. The section does this by forbidding an offeror from publicly announcing a bid unless it has taken adequate measures to ensure that sufficient funds will be available and that the bid can otherwise be made in accordance with the public announcement. This is important because a public announcement of a bid tends to affect the market in the target company's shares. The announcement may lead to a false market if the offeror:

- (a) has not taken all measures necessary to ensure that it can complete the bid; or
- (b) later abandons the bid other than in accordance with the terms of the public announcement.

RG 59.4 This is consistent with the Law's general policy of establishing and preserving the integrity of the market. The Law does this by attempting to ensure that the acquisition of shares in a company takes place in an efficient, competitive and informed market (*Gjergja v Cooper* [1987] VR 167 at 215).

RG 59.5 The policy of s746 is set out in para 37 of the Eggleston Committee's Second Interim Report (28 February 1969) at page 12. The same policy is set out in the City Code on Takeovers and Mergers, the rules governing the conduct of takeovers in the United Kingdom (City Code). General Principle 3 of the City Code states that: "An offeror should only announce an offer after the most careful and responsible consideration. Such an announcement should be made only when the offeror has every reason to believe that it can and will continue to be able to implement the offer." See also *ASC v Mt Burgess Mining Co* (1994) 15 ACSR 714 at 720.

Part II: Announcements relating to takeover bids

When should a bid be announced?

RG 59.6 A bid should not be announced prematurely. However, it is in the interests of an informed market that an offeror announce:

- (a) its decision to make a takeover bid; and
- (b) the terms and conditions of the bid,

as soon as practicable after it has made a firm decision (see Listing Rule 3R(2) and compare City Code Rules 2.2 and 2.3).

RG 59.7]In general, a bid should not be announced until it will definitely be made. However, if an offeror cannot maintain confidentiality until that time, it should make an announcement:

- (a) setting out those facts which are definite; and
- (b) making it clear that the bid may not proceed and why.

The offeror should promptly announce the fact that the bid has become definite (and its main terms and conditions) or has been called off, as soon as either of those things happens.¹

What should be announced when a bid is delayed or called off?

RG 59.8 An offeror should make a public announcement as soon as possible after it:

- (a) abandons or delays a bid in reliance on s746(10) or ASC relief; or
- (b) withdraws offers relying on ASC consent (s653).

The announcement should explain the offeror's change of plan and the reasons for the change. When appropriate, the ASC may withhold relief until this has been done or make relief conditional on this being done.

¹ See para 11–31 for when the public announcement of a possible bid will trigger s746, and para 32–46 on the announcement of conditional bids. See also para 4–52 for when the offeror can use the defence in s746(10) after announcing a conditional bid.

How should these announcements be made?

RG 59.9 All of the announcements discussed in para 6–8 should be made by the offeror to:

- (a) the Exchange if either the offeror or the target company is listed;
and
- (b) the ASC.

A copy should also be given to the target company.

RG 59.10 The ASC considers it to be best practice for an offeror to make these announcements. An offeror which does not make them may also breach the Law (see s705, s995, s999, s1001A, s1001B, Listing Rule 3A(1) and Listing Rule 3R).

Part III: How does s746 work?

RG 59.11 Section 746 works by creating two offences. First, s746(2) prohibits a person from making a public announcement that the person proposes to make a takeover bid (whether by takeover scheme or takeover announcement), if the person:

- (a) knows the public announcement is false or is recklessly indifferent to its truth or falsity; or
- (b) has no reasonable grounds for believing that the person will be able to fulfil the obligations under the bid if a substantial proportion of the offers are accepted.

RG 59.12 The Law does not state how many shares are a “substantial proportion” for the purpose of s746(2)(b). The ASC considers that it means any significant proportion of the shares in the target company. This is consistent with the policy of ensuring that the market is not distorted by a potential offeror indicating an intention to bid before it is reasonably sure that it is able to go ahead. The ASC will consider prosecuting any offeror which should have known that it might not have been able to provide the consideration under the bid. This may mean, for example, that the public announcement should foreshadow conditions corresponding to those which a lender would impose.

RG 59.13 The second offence is created by s746(4). That subsection provides that a person who makes a public announcement of a proposed takeover bid must make a bid for shares in that company. The bid must be made in accordance with the public announcement. It must also be made within two months or such further period as the ASC permits in writing. This is the case even if:

- (a) the offeror announces that the bid will be subject to a specified condition (ie, a precondition or defeating condition); and
- (b) the condition is not satisfied until after the announcement has been made.

RG 59.14 Subsections 746(2) and 746(4) apply to joint public announcements and public announcements of joint bids (see also s608). The fact that one notice is a public announcement does not exclude subsequent notices from also being public announcements (*TNT Australia Pty Ltd v Normandy Resources NL* (1989) 1 ACSR 1 at 26).

What announcements trigger s746?

RG 59.15 Section 746 applies if a person makes a public announcement that it proposes to make a takeover bid. This means that an announcement only triggers s746 if it satisfies three tests.

Announcement made public

RG 59.16 The first test is that the announcement must be public. This will be the case if it obtains even restricted publicity or is given to someone who will publish it in due course (see *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 1 ACSR 1 at 26–27 and *ASC v Mt Burgess Mining Co* (1994) 15 ACSR 714). Examples are a notice lodged with the Exchange and a Part A statement registered by the ASC. A Part A statement becomes public on registration because it can be inspected by the public at that time (s1274(2)(a)) and ASC Alert may tell people immediately. A notice may also be made public by being published overseas in such a way that its contents become known in Australia (s110D).

Announcement made by the offeror

RG 59.17 The second test is that the announcement must have been made public *by* the prospective offeror.

RG 59.18 The second test is satisfied when an announcement is published as the ordinary result of having been communicated privately. For example, a communication to a director of a possible target company will trigger s746 if:

- (a) the company is a disclosing entity; and
- (b) the communication is sufficiently definite to constitute a notice of an intention to make a takeover bid.

This is because a company which receives a notice of this kind must immediately give copies to the Exchange if it is listed and to the ASC if it is not. (See Listing Rules 3A(1) and 3R(2), s1001A, s1001B and *ASC v Mt Burgess Mining Co* (1994) 15 ACSR 714.)

RG 59.19 The second test is not satisfied by:

- (a) a confidential communication to a director of a possible target in the course of discussions which *may* lead to a bid being made, when the communication is not sufficiently definite (see para 18(b));

- (b) a confidential application to the ASC for relief regarding a contemplated bid, or consultation with an affected person in confidence about that application; or
- (c) a genuinely private communication (eg, a confidential communication to an advisor) which is published without authority and promptly retracted.

Although these communications do not trigger s746, the offeror may still have to make an announcement to the market explaining its intentions (see Listing Rule 3A(1), s1001B and para 7).

Announcement that the offeror proposes to bid

RG 59.20 The third test is that the offeror must announce that it *proposes* to make a takeover bid. This means that s746 may be triggered even if the announcement does not:

- (a) contain details of the consideration or other terms to be offered; or
- (b) announce a definite intention to bid.

RG 59.21 This is because the word “propose” allows something less than a fixed and settled intention which is not likely to be changed: *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 545 at 606–607, *Hooker Rex P/L v SA Land Commission* (1976) 14 SASR 63 at 68–70 and *Ex parte Christensen* [1984] 1 Qd R 382 at 387. The idea must have gone past the mere discussion stage. It must involve something more than a mere inward thought, or a tentative, vague and unsettled notion. However, the thinking or discussion of the idea need not yet have resolved all relevant matters, including matters of detail. The plan can also be tentative (eg, a final decision has not yet been made whether or not it will proceed) or contingent (eg, on obtaining the necessary finance).

RG 59.22 A broad construction of the word “propose” is necessary because:

- (a) a statute must not be interpreted in a way which makes it ineffectual (*ABC Staff Association v Bonner* (1984) 54 ALR 653 at 658 and Gifford’s *Statutory Interpretation* (1990) at 68–69); and
- (b) a narrow construction would make s 746 ineffectual by allowing a potential offeror to avoid the section by:
 - (i) announcing a bid but deliberately leaving some details open (*Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 545 at 607); or

- (ii) expressing its intention to bid in qualified language. For example, it could say that it is contemplating making a bid, or will contemplate making a bid if a certain event occurs (eg, if it obtains approval from the Australian Competition and Consumer Commission).

The broad construction is therefore necessary to achieve the policy of s 746: see para 3–5.

How can s746(4) be satisfied?

RG 59.23 Subsection 746(4) requires a bid to be made in accordance with a public announcement. The bid must therefore be made on terms not substantially less favourable than those referred to in the announcement: s746(1)(b). This means a bid on terms as favourable as those announced (both as to price and as to defeating conditions) except in minor or insignificant respects.

RG 59.24 Subsection 746(4) is satisfied if:

- (a) a person who announces a bid causes a second person to actually make the bid; and
- (b) the second person is an associate of the first person rather than a rival bidder “flushed out” by the public announcement.

This is because a reference to doing something includes a reference to causing it to be done: s52, s746(1)(a)(ii) and the definition of “make” in s9. However, this does not allow the first person to avoid other liabilities which may arise under s746. For example, the first person is still liable if the bid was announced without the person having reasonable grounds for believing that the obligations under the bid could be performed: s746(2)(b).

RG 59.25 The ASC considers that an offeror can satisfy s746(4) by making a bid that is different in procedural respects from that mentioned in the public announcement. For example, the offeror can publicly announce a Part C bid but eventually make an unconditional cash Part A bid.

RG 59.26 Similarly, it is acceptable for the bid consideration to be different from but as attractive as, the consideration mentioned in the public announcement. An offeror can more easily satisfy this requirement when it wants to change the consideration offered from scrip to cash of an equivalent value. However, it will be much harder to satisfy when the offeror wants to change from cash to scrip. This is because of the market’s preference for liquidity: see *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 1 ACSR 1.

RG 59.27 Subsection 746(4) does not necessarily require an offeror which has served a Part A statement on a target company to make offers under that statement. The offeror may comply with the subsection by making its bid under another Part A statement (time permitting). However, the terms of the bid must be as favourable as those referred to in the first Part A statement: see RG 59.23.

What happens if s746 is breached?

RG 59.28 The ASC may take enforcement action if it appears that the Law has been breached in relation to an announced bid. For example, it may apply to the Court for orders under s1114 and 1324 for a suspected breach of s746(2) and 995: *ASC v Mt Burgess Mining Co* (1994) 15 ACSR 714.

RG 59.29 Breach of s746(2) or (4) is a criminal offence (s1311(1)). It also gives rise to civil liability: s746(8) and 746(9). However, a mandatory injunction to force the bid to proceed cannot be obtained under s1324: s746(11). Nor can it be obtained as a remedial order: s613.

RG 59.30 The prescribed penalty for the offence created by s746(2) is the heaviest under Ch 6. It aligns that offence with the market manipulation offences in Div 2 of Pt 7.11. The mental element of the offence is:

- (a) the awareness that the bid may not proceed as announced for whatever reason; or
- (b) the absence of reasonable grounds to believe that the offeror will be able to meet its obligations.

Conduct which breaches s746(2) will usually breach s999 as well.

RG 59.31 An offeror can apply to the ASC for relief from s746. That relief will rarely be given and cannot be given after the section has been breached (para 69–75). The only exception is that the ASC can extend the time limit in s746(4) after it has expired (s70). The offeror can also apply to the ASC for a no-action letter, although these will rarely be given (para 76). The ASC does not have a special power to consent to a bid not being made.

Part IV: Conditional bids

RG 59.32 An offeror generally assumes the risks of publicly announcing a bid unless it anticipates those risks by announcing that it intends to make a bid subject to specified conditions. This part explains why that presumption applies and what results it can have. In this part, “specified conditions” refers to conditions which are specified in the public announcement of a bid. It includes preconditions (ie, the bid will only be made after a certain event occurs) and defeating conditions.

Why does the presumption apply?

RG 59.33 The presumption applies because:

- (a) a false market may arise if the offeror is able to abandon the bid other than in accordance with the terms of its public announcement (para 3–5);
- (b) the offeror must make a bid on terms and conditions as favourable as those publicly announced (s746(1)(b), 746(4) and para 23);
- (c) the offeror can avoid having to make an announced bid if specified conditions are not satisfied and it can make out the defence in s746(10) (para 56 and 57); and
- (d) the offeror will be liable if it announces a bid without reasonable grounds for believing that it will be able to perform obligations arising from the bid if a substantial proportion of its offers are accepted (s746(2)(b) and see para 12). It will also be liable if it later introduces conditions which are uncertain or unlikely to be fulfilled. Those conditions will tend to make the offers illusory (see para 36 and s662(2)).

Results of presumption

RG 59.34 By way of example, the presumption can lead to the following results.

Bid announced as being subject to specified conditions

RG 59.35 An offeror announces a bid to be made subject to specified conditions. The market is entitled to assume that the offeror

has mentioned all of the conditions to the bid in its announcement (ie, that no other conditions will apply to the bid). A false market will arise if the offeror can add other conditions later. Section 746 will therefore be infringed if:

- (a) the specified conditions are satisfied but the bid is not made at all;
or
- (b) when the bid is made, it is subject to some condition not mentioned in the public announcement.

Conditional bid announced but conditions unspecified

RG 59.36 An offeror announces a conditional bid but does not specify the relevant conditions. Defeating conditions may be included in the takeover offers when they are made. This is because the market is on notice that unspecified conditions will be introduced. Section 746 will be infringed, however, if the offeror attempts to avoid having to complete the bid by introducing conditions which are not reasonably capable of satisfaction.

Bid announced with no mention of conditions

RG 59.37 An offeror announces a bid but does not mention any conditions. Section 746 will not be infringed if the bid is made subject to conditions which the market would anticipate as a matter of course in a bid of the kind announced. For example, s746 is not infringed if:

- (a) an offeror announces a Part A bid and does not mention any defeating conditions; and
- (b) the takeovers offers are conditional, but only as to prescribed occurrences and the offeror obtaining control (ie, more than 50% acceptances).

RG 59.38 The ASC will not give advice as to other conditions it will accept for this purpose, whether in general terms or in relation to particular cases. This is because the ASC cannot predict:

- (a) what conditions the market will anticipate; or
- (b) how the market will understand or misunderstand a public announcement.

An offeror should err on the side of caution in announcing a bid which will be subject to conditions. This is because the offeror is responsible for the consequences of its public announcement.

Unconditional bid announced

RG 59.39 An offeror announces an unconditional bid. Section 746 will be infringed if the offeror subsequently makes the bid subject to any defeating condition.

RG 59.40 Some offerors regard it as commercially attractive to announce that their bids will be unconditional. That is a commercial decision which they are entitled to take but they must also take the consequences of their decision. The factors which make an unconditional bid attractive will contribute to a false market if conditions are later introduced and the offeror does not proceed with the bid because the conditions are not met.

When should an offeror specify conditions when announcing a bid?

RG 59.41 An offeror which will only be able to make a bid if a certain event occurs should state in its public announcement that this event is a precondition or defeating condition of the bid. It should also ensure that the condition is clearly explained and sufficiently definite (see s662(2)).

RG 59.42 Consider the example of an offeror which will only be able to make a bid if it obtains approval under the *Foreign Acquisitions and Takeovers Act 1975* (Cth), *Banks (Shareholdings) Act 1972* (Cth), *Broadcasting Act 1942* (Cth), *Trade Practices Act 1974* (Cth). Alternatively, the offeror may only be able to bid lawfully if it gets ASC relief (eg, relief to extend s629 to a takeover made under an overseas regime).

RG 59.43 When announcing its bid, the offeror should say that the approval is a precondition or defeating condition of the bid. It may otherwise be liable as follows.

(a) The offeror may be liable under s746(2) because it knows or should reasonably know that it can only proceed with the bid if it gets the approval. In other words, if the offeror announces the bid without making it conditional on getting the approval, the offeror may have breached the subsection by:

- (i) making a false announcement or making an announcement with reckless indifference as to whether it is true or false (s746(2)(a)); or
- (ii) announcing a bid without reasonable grounds for believing that it will be able to perform its obligations under the bid if a substantial proportion of its offers are accepted (s746(2)(b)).

An offeror which announces a takeover bid which it may not be able to complete because of a foreseen risk, therefore comes within the words of s746(2). But if the announcement adequately discloses that risk, it comes within an implied exception to s746(2) (see also para 7).

- (b) The offeror may also be liable under s746(4) if it fails to make the bid because the approval is not obtained (see para 56–59).

Bid subject to preconditions and time limit in s746(4)

RG 59.44 Without relief, an offeror has to make a bid “before the end of 2 months after the day on which the announcement was made” (s746(4)). This is the case even if the offeror announces that the bid will be subject to a specified precondition. If the precondition cannot be satisfied within that time, the offeror has to apply to the ASC for relief (see para 69–76).

RG 59.45 The ASC will only give relief if the announcement of the bid specifies when the condition is likely to be satisfied and why (see also s705, 765 and 995). Relief will be conditional on the offeror:

- (a) keeping the market informed (see para 6–10); and
- (b) using its best endeavours to ensure that the condition is satisfied within the specified time (see also para 56(c)).

RG 59.46 Subsections 746(2) and 746(4) do not prohibit an offeror from mentioning conditions which are not fundamental when announcing a bid.

Part V: When does the defence in s746(10) apply?

RG 59.47 Subsection 746(10) gives an offeror a defence against the offeror's liability to pay compensation under s746(8) for a breach of s746. It also provides a defence against a prosecution for breach of s746(4), but not against a prosecution for breach of s746(2).

RG 59.48 To rely on the defence, the offeror has to make out the elements in s746(10).

Changed or newly discovered circumstances

RG 59.49 The first element is that there must have been either:

- (a) a change in circumstance after the public announcement was made, over which the offeror had no control (*BT Australia Ltd v Bell Bros Pty Ltd* (1981) 27 SASR 557), that is, a change in circumstance not caused by the offeror; or
- (b) circumstances existing when the announcement was made, of which the offeror was not aware and could not reasonably have been expected to have been aware.

RG 59.50 This means that an offeror cannot establish the defence by relying on pre-existing circumstances which it could have discovered by making usual inquiries. A failure to make these usual inquiries may also attract s746(2). Nor can the offeror rely on s746(10) if it does not proceed with the bid simply because it has changed its mind; eg, changing its evaluation of relevant circumstances or the inferences which it has drawn from those circumstances.

Unreasonable to expect offeror to proceed

RG 59.51 The second element is that, as at the time that the bid is abandoned, it must be unreasonable to expect the offeror to proceed with the bid (either within the two month time limit or at all). In particular, it must be unreasonable because of the changed or newly discovered circumstances.

RG 59.52] It is normally reasonable to expect an offeror to proceed with an announced bid. This is based on the policy of s746 (para 3–5). It is also based on the fact that:

- (a) an offeror can choose the time and content of its public announcement, and include any conditions it thinks prudent or desirable; and
- (b) the balance of convenience normally favours requiring the offeror to bid because:
 - (i) if the offeror does not make a bid, offerees lose the chance to sell at the bid price. However, they will have no effective recourse if it later emerges that the bid should have proceeded; and
 - (ii) if the bid proceeds despite a possibility that contracts resulting from acceptances will be voidable, the offeror can protect itself by applying for court orders setting aside the contracts. In most cases, the cost of applying for those orders will be less than the overall opportunity cost to offerees of the offers being abandoned.

The ASC will therefore not be easily persuaded that the offeror can prove the second element of the defence in s746(10). This is relevant when it is considering whether to take enforcement proceedings.

Part VI: When is it unreasonable to expect an offeror to proceed?

RG 59.53 There are four classes of cases in which it is unreasonable to expect an offeror to proceed with an announced bid. This is the second element of the defence in s746(10) (para 51 and 52).

Making the bid would be futile

RG 59.54 The first class of cases is where it would be futile to make offers under the bid because enforceable contracts would not result from acceptances of the offers. Examples are when the contracts would be frustrated or subject to unsatisfied defeating conditions. In those situations, the cost of making the offers would be thrown away without any corresponding benefit to offerees.

Contracts would be frustrated

RG 59.55 The City Panel on Takeovers and Mergers (the body responsible for administering the City Code) “would normally require some circumstance of an entirely exceptional nature, and amounting to something of the kind that would frustrate a legal contract” to justify an offeror failing to bid in accordance with a public announcement. Similarly, s684 deems offers under a Part C bid to be withdrawn if the offeror is:

- (a) a natural person who dies, becomes bankrupt or is declared incapable of managing his or her affairs; or
- (b) a company which has been put into certain kinds of external administration.

The ASC will apply this policy by analogy to s746(10) as the occasion arises.

Contract would be subject to unsatisfied conditions

RG 59.56 An offeror can use the defence in s746(10) if:

- (a) an event occurs between the public announcement of a takeover bid and the making of offers under that bid, which triggers a

specified precondition or specified defeating condition (see para 35);

- (b) the event was not caused by the offeror (eg, failing to take action required to fulfil the conditions); and
- (c) the condition and its failure are sufficiently certain (eg, the condition is not of the type mentioned in s662(2)).

RG 59.57 The condition must generally be specified in the public announcement. However, the offeror can fail to make the bid without breaching s746(4) if:

- (a) the announcement makes it possible for the offeror to make a bid which is conditional as to prescribed occurrences (see para 36–38); and
- (b) a prescribed occurrence occurs before the bid is made.

Illegality

RG 59.58 The second class of cases is where it would be illegal for the offeror to proceed with the bid, either within the two month time limit or at all.

RG 59.59 For example, it may be illegal because permission is not available under a statute which otherwise prohibits the bid (eg, the *Foreign Acquisitions and Takeovers Act 1975* (Cth)). The offeror must still establish the first element of the defence in s746(10) (para 49). It must therefore establish that the permission was not available because of:

- (a) a change in circumstance after the public announcement was made, over which the offeror had no control (the offeror will not be able to establish this if it failed to get permission because of its own fault or improvidence); or
- (b) circumstances existing when the announcement was made, of which the offeror was not aware and could not reasonably have been expected to have been aware.

If the offeror should have known that permission was required and did not make this a condition of its public announcement, the defence will not be available (see para 41–43).

RG 59.60 Alternatively, it may be illegal because a court order has been made or an undertaking given to prevent the making of an order. In this situation, however, the offeror will not have a defence if it can

comply with the court's requirements simply by providing additional information.

Overbid

RG 59.61 The third class of cases is where the offeror can no longer get control of the target company; eg, because it has been *clearly* overbid. However, the mere public announcement of a rival bid at a higher price will not be sufficient for this purpose.

RG 59.62 The ASC will not require an offeror to make unnecessary offers where it has been clearly overbid (see *Hasbro Ltd UK v Harris & Anor* [1994] BCC 839). The offeror is not under an obligation to cap a better offer. Further expenditure in pursuit of a bid at the lower price would therefore be money thrown away. It is not part of the policy of s746 that an underbidder must give a successful bidder the opportunity to off load the target company. On the contrary, s686 allows one bidder to sell out to a later (normally higher) bidder.

RG 59.63 In particular, the ASC may decide not to require an offeror to proceed with a scrip bid if:

- (a) the offeror has been overbid; and
- (b) forcing the offeror to proceed would enable the successful bidder to make a reverse takeover of the underbidder. The ASC will generally treat this as unacceptable if it is clear that control would pass to the successful bidder (see para 85).

RG 59.64 If a rival bidder makes offers at a higher price but with other features which are less attractive (eg, scrip consideration, defeating conditions or a partial offer), the ASC may require the first bidder to proceed. This is so that the choice between the offers is left to the market and not made by the ASC (see para 84 and 85).

Change in commercial circumstances

RG 59.65 The fourth class of cases is when there is a change (or a newly discovered change) in the commercial circumstances making it unreasonable to require the offeror to proceed with a bid. This must be a change which directly affects either the offeror or the target company. One example is where intervention by a government authority destroys the commercial benefits to the offeror of an otherwise successful bid. Another example is where there has been a

change in the fundamental nature of the target or the fundamental basis for the target's attractiveness to the offeror.

Is a material change in target's financial position sufficient?

RG 59.66 It will usually be reasonable to expect an offeror to proceed with its bid even if a material adverse change in the target's financial position has occurred or is reported. This is because the offeror voluntarily assumes the risk of an adverse change in the target's financial position, when publicly announcing the bid (para 52).

RG 59.67 An offeror has access to at least as much information about the target company as most shareholders in the target, and probably has greater skills in interpreting that information. This suggests that the offeror and not the shareholders should accept the risk that the target company may be worth less than it seems to be. This will particularly be the case if the offeror has special access to information about the target.

RG 59.68 However, it may be unreasonable to expect the offeror to proceed with its bid if it had announced that the bid would be conditional on there being no such change (see *Garden City Shopping Centre Pty Ltd v Woolworths Ltd* (1983) 1 ACLC 801) and either:

- (a) no-one could have foreseen the relevant change; or
- (b) the offeror ignored the risk of the change on reasonable grounds (eg, because of information given to it by the target company).

This is an example of the general position regarding conditional announcements (see para 32–43).

Part VII: When will the ASC give relief from s746?

Relief from obligation to bid

RG 59.69 The ASC doubts that a proper case will ever arise to justify relief from s746(2). This is because the policy of the subsection is to prevent the manipulation or disruption of the market by irresponsible or deceptive announcements (para 3–5).

RG 59.70 The ASC will not grant relief under s728 or s730 or extend time under s746(4), if an offeror merely claims that it cannot reasonably be expected to make a bid at all. The reason is that the offeror already has a defence under s746(10). While relief would bolster that defence, it would also deprive an offeree of a possible civil action under s746(8). The ASC would also be imposing its judgement on a matter which should properly be determined by the Court.

Extension of time limit in s746(4)

RG 59.71 The ASC can extend the two month time limit under s746(4), s728 or s730. This can even be done after the two month time limit expires if relief is given under s746(4) (s70). The ASC may impose conditions on the relief. These may be conditions imposed on an exemption (s728), preconditions (s746(4)), or obligations written into a modification (s730).

RG 59.72 The ASC will not extend the time limit when it is reasonable to require the offeror to proceed without delay. This is because the policy of s746(4) is to prevent a bid being withheld for an unreasonably long time after it is publicly announced (ie, more than two months), while prospective offerees take or abstain from action in reliance on the announcement.

RG 59.73 However, the ASC will generally extend the time limit if an offeror is held up due to reasons beyond its control and not its own fault or improvidence. For example, the offeror may be prevented from dispatching offers by an interim injunction which will continue until a court challenge to the Part A statement is resolved. If the offeror can get the interim injunction lifted by making additional disclosures, the ASC will only extend the time limit for long enough

to enable the offeror to include those disclosures in the Part A statement.

RG 59.74 The ASC may also extend the time limit if this would benefit offerees by allowing them to have all of the relevant information given to them at the same time. For example, it may give relief to enable a Part B statement or other additional information to be dispatched with, or included in, the Part A statement.

RG 59.75 If takeover documents have been registered, an extension of time under s746(4) does not affect the time allowed for their dispatch. The time allowed is up to seven weeks from registration: three weeks to serve (s637(1)). See Superseded Policy Statement 57 [SPS 57.32]–[SPS 57.35] for when the ASC will extend that time.

No-action letter

RG 59.76 The offeror may apply to the ASC for a no-action letter if it has not made or will not be making a bid within the two month limit (s746(4)). The ASC will only consider giving a no-action letter if the offeror clearly makes out that:

- (a) it has kept the market informed; and
- (b) s746(10) applies.

No-action letters will rarely be given (see Regulatory Guide 108).

Part VIII: Withdrawal of offers (s653)

RG 59.77 Parts I–VII of this guide have concerned the conduct of a potential offeror before it makes a takeover bid; ie, before it makes offers to offerees. This part is about how an offeror making a Part A bid can withdraw takeover offers after they have been sent to offerees. This guide does not specifically address how an offeror can withdraw offers made under a Part C bid (see s684). However, if the offeror applies for ASC consent to the withdrawal under s684(7), the ASC will consider similar policy to that discussed in para 80–83.

RG 59.78 A purported withdrawal of a takeover offer is ineffective unless the ASC has given its written consent (s653). That consent may be given subject to any conditions specified. The ASC considers that the offeror has a positive obligation to meet these conditions if it purports to rely on the consent (s104 and 653). If the offeror does not meet the conditions, the ASC may apply to the Court for orders (s739(2)).

RG 59.79 Withdrawing outstanding offers brings forward the close of the offer period. If the offers are still conditional, this will accelerate the application of s663(9) and invalidate contracts resulting from accepted offers. Whether or not the offers are conditional, it will also bring forward the end of the restriction imposed by s686. Section 653 does not appear to change the common law position that an offer cannot be withdrawn after acceptance.

When will the ASC give consent under s653?

RG 59.80 Before giving consent, the ASC will consider similar matters to those discussed above as to when an offeror can avoid having to make offers in accordance with the public announcement of a bid (s746(10)). Those matters are set out in para 47–68 (especially note para 52).

RG 59.81 The weight to be given to those matters in the context of s653 is much the same as in the context of a public announcement. However, even *more* market disruption may result from the withdrawal of offers which have already been made than from a failure to make offers in accordance with a public announcement. The reason is that if unconditional offers are withdrawn, offerees who accept before the withdrawal are better off than offerees who do not.

This is because an offer cannot be withdrawn after it has been accepted. However, that is a difference of degree and not of kind. If a false market results from the public announcement of a bid which does not eventuate, some shareholders may receive a similar windfall by selling on market.

RG 59.82 The balance of convenience (see para 52(b)) is strongly against the ASC consenting to the withdrawal of offers when the application for relief is based on the fact that the cost to the offeror of continuing the bid would be thrown away. The ASC will only consent to a withdrawal of offers in that situation if:

- (a) it is a practical certainty that the cost to the offeror of continuing the bid would be thrown away; and
- (b) significant costs are still accruing to the offeror while the bid continues.

Otherwise, the ASC would be imposing its judgment on a matter which should properly be determined by the Court.

RG 59.83 The ASC may make its consent to the withdrawal of offers conditional on the offeror disposing of any shares it has acquired under either the bid or s620.

Will the ASC give consent if the offeror is overbid?

RG 59.84 The ASC may consent to the withdrawal of offers which have been overbid (see also para 61–64). If the offers are still conditional, the relief will:

- (a) bring forward the close of the offer period and accelerate the application of s663(9); and
- (b) in turn, allow scrip in the target company to be returned to accepting shareholders in time for them to accept the higher rival bid.

RG 59.85 In particular, the ASC may consent where the consideration under the original offers is shares in the underbidder. This is so as to prevent unacceptable changes in the underbidder's own register.

How should an offeror withdraw takeover offers?

RG 59.86 The legislation does not directly regulate the withdrawal of a takeover offer (compare s21 of CASA as originally enacted). Under common law principles, the offeror must undoubtedly bring the withdrawal to the attention of offerees. The ASC will also impose conditions specifying how the offeror must deal with the consequences of the withdrawal as regards offerees, the target company and the market.

RG 59.87 The ASC will normally require a notice of withdrawal to be given in the same way as a notice of a variation (see s657(1)). It will also require the offeror to send a copy of the notice to the Exchange if either the offeror or the target company is listed.

Applications

RG 59.88 An application under this release may be lodged with any Regional Office. If a bid has already been made, the application will normally be referred on to the Regional Office handling that takeover. In most cases, this will be the office where the offeror lodged the takeover documents. It will therefore be quicker to apply directly to that office.