



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 5

Relevant interests and deemed economic interests

March 2026

About this guide

This guide is for investors who acquire an interest in the securities of a listed entity, and their advisers. It:

- discusses the concept of a 'relevant interest' and various issues a person must consider in determining whether they have a relevant interest in securities under the Corporations Act;
- discusses the concept of a 'deemed economic interest'; and
- outlines ASIC's legislative instrument modifications to the relevant interest and deemed economic interest provisions.

Note: This guide includes guidance about requirements that the [Treasury Laws Amendment \(Strengthening Financial Systems and Other Measures\) Act 2025](#) inserts. Those requirements will commence from 4 December 2026.

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 March 2026 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 5, issued June 2013, reissued November 2013, August 2020 and March 2024.

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.

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A Overview

Key points

The concepts of ‘relevant interest’, ‘deemed economic interest’, and ‘offsetting short position’ define the scope of a number of regulatory requirements under the *Corporations Act 2001* (Corporations Act) relating to corporate control and the disclosure of interests—in particular, the takeover, substantial holding and beneficial ownership tracing provisions.

These provisions are variously concerned with a person’s relevant interest and deemed economic interest in voting shares or voting interests, as well as any arrangements that offset the economic exposure arising from derivatives.

They may require the disclosure of details about a person’s substantial interests, including both relevant interests and deemed economic interests, and any offsetting short positions. They may also regulate the acquisition of interests above levels at which a person may acquire control over certain entities.

This guide discusses the relevant interest, deemed economic interest and offsetting short position concepts, including some of the circumstances in which a person may or may not have such interests or positions. It also discusses some of the modifications to the relevant provisions we have made by legislative instrument.

Purpose of this guide

- RG 5.1 This guide aims to assist investors and their legal advisers to understand and apply the concepts of:
- (a) a ‘relevant interest’ in securities, which is relevant to the takeover, substantial holding and beneficial ownership tracing provisions of the Corporations Act; and
 - (b) a ‘deemed economic interest’ and ‘offsetting short position’ in securities, which are relevant to the substantial holding and beneficial ownership provisions of the Corporations Act.
- RG 5.2 Where a person is required to disclose that they have a relevant interest or deemed economic interest, they may also be required to disclose arrangements that offset the economic exposure arising from any derivative (i.e. the ‘offsetting short position’). A number of people may have a relevant interest, a deemed economic interest or an offsetting short position in the same securities in a variety of different capacities.

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The key concepts

Relevant interests

- RG 5.3 A relevant interest is concerned with a person's capacity to exercise a degree of influence over issued securities. It encompasses connections wider than ownership, including connections giving rise to power or control over the voting or disposal of issued securities.
- RG 5.4 The substantial holding and takeover requirements apply when the votes attached to securities, in which a person and any of their associates have a relevant interest (as a proportion of all voting shares or interests), increase above one of the following two thresholds:
- (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 (see 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 (see Ch 6).

Note 1: The 5% substantial holding threshold is triggered based on a person's combined relevant interests and deemed economic interests. For more information about deemed economic interests, see Section D.

Note 2: In this guide, references to chapters (Chs), parts (Pts), divisions (Divs) or sections (s) are to the Corporations Act (as notionally modified by ASIC relief, where relevant), unless otherwise specified. References to regulations (regs) are to the *Corporations Regulations 2001* (Corporations Regulations), unless otherwise specified.

- RG 5.5 In this guide, we primarily discuss the relevant interest concept as it is applied in the context of the takeover, substantial holding and beneficial ownership tracing provisions. However, the relevant interest concept is used in other contexts and different exceptions may apply to exclude a person having a relevant interest for the purposes of some regulatory requirements but not others.

Deemed economic interests and offsetting short positions

- RG 5.6 A deemed economic interest and offsetting short position is concerned with a person's indirect capacity to influence securities of a listed entity because of an equity derivative. A deemed economic interest is not referable to an identifiable holding of issued securities.
- RG 5.7 The deemed economic interest and offsetting short position requirements apply to persons who acquire economic exposure to voting shares or interests through equity derivatives.

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- RG 5.8 A deemed economic interest arises where a person's exposure to securities is created by a derivative, whether physically or non-physically settleable, and this exposure is not fully reflected in relevant interests that arise. Offsetting short positions must be disclosed where they reduce or hedge any long position arising from a derivative. This includes exposure giving rise to both relevant interests and deemed economic interests.
- RG 5.9 Disclosure is required when a person's combined relevant interest and deemed economic interest—together with those of their associates—cross the 5% substantial holding threshold, or where there is otherwise a disclosable movement in that person's substantial holding.
- RG 5.10 This guide discusses how the deemed economic interest and offsetting short position concepts are applied in the context of the substantial holding and beneficial ownership tracing provisions and outlines relevant legislative modifications.

Note: For information about how relevant interests or deemed economic interests are applied in the context of the director disclosure provisions, see Regulatory Guide 193 *Notification of directors' interests in securities: Listed companies* ([RG 193](#)).

How the key concepts apply

- RG 5.11 The nature of power or control over voting or disposal that may give rise to a relevant interest, a deemed economic interest or offsetting short position is intentionally expressed in wide terms to prevent avoidance of the relevant requirements. A relevant interest, deemed economic interest and offsetting short position can arise from:
- (a) power or control through agreements, arrangements, understandings and practices that are legally unenforceable; and
 - (b) whether or not the power or control is indirect, implied or informal.
- RG 5.12 Table 1 summarises the principal provisions of the Corporations Act that use the relevant interest, deemed economic interest and offsetting short position concepts.

Table 1: Rights and obligations under the Corporations Act depending on a person's relevant interests, deemed economic interests or offsetting short positions in securities

Topic	Provisions	Explanation
Takeovers	Ch 6	<p>Acquisitions of a relevant interest in voting shares or interests that increase a person's voting power to more than 20%, or from a point above 20%, are prohibited under s606 unless:</p> <ul style="list-style-type: none"> • they are made under a takeover bid; • they are authorised under one of the other exceptions in s611; or • the person's voting power is already above 90%. <p>This prohibition also applies to:</p> <ul style="list-style-type: none"> • acquiring legal or equitable interests that result in another person's voting power increasing in the same way; and • offers or invitations that would result in a breach of s606 if accepted. <p>Note: See Regulatory Guide 9 <i>Takeover bids</i> (RG 9) and Regulatory Guide 6 <i>Takeovers: Exceptions to the general prohibition</i> (RG 6).</p>
Post-bid compulsory acquisition and buyouts	Pt 6A.1	<p>The right of a bidder to compulsorily acquire remaining securities following a takeover bid, and the obligation to make buyout offers to remaining holders and convertible security holders, depend on whether the bidder and its associates have relevant interests in at least 90% of the securities in the bid class: see s661A(1), 662A(1) and 663A(1).</p> <p>Note: See Regulatory Guide 10 <i>Compulsory acquisitions and buyouts</i> (RG 10).</p>
Substantial holding disclosure	Pt 6C.1	<p>Persons who, together with their associates, have relevant interests or deemed economic interests in voting shares or interests representing 5% or more of the votes in a listed entity, must disclose details of their relevant interests, deemed economic interests and offsetting short positions. They must also disclose when:</p> <ul style="list-style-type: none"> • there is a disclosable movement in a person's substantial holding; • they cease to have a substantial holding; • they have a substantial holding in an entity at the time it lists; or • they make a takeover bid. <p>Note: See Regulatory Guide 222 <i>Substantial holding disclosure and tracing requirements</i> (RG 222).</p>
Beneficial ownership tracing	Pt 6C.2	<p>The key person for a listed entity or ASIC may direct a person to disclose details of their relevant interests in voting shares or interests in the entity: see s672A and 672B.</p> <p>ASIC may also direct a person to disclose details of their deemed economic interests or offsetting short positions in a listed entity: see s672A.</p> <p>A register of information about relevant interests must be kept by the key person for a listed entity: see s672DA.</p> <p>Note: See RG 222.</p>
Director disclosure	s205F, 205G, 300(11) and (12)	<p>A director of a listed company must provide the relevant market operator with details of their relevant interests and deemed economic interests in any securities of the company or a related body corporate: see s205G.</p> <p>The annual directors' report of a listed company or listed registered scheme must also include similar details: see s300(11) and (12). A director of a company must also give the company any information about the director that is necessary for the company to comply with Ch 6: see s205F.</p> <p>Note: See RG 193.</p>

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- RG 5.13 Relevant interests, deemed economic interests and offsetting short positions arise in relation to voting shares or interests. A voting share or interest is an issued share or interest that carries a right to vote beyond limited matters such as a winding up, buyback or capital reduction, or the variation of rights: see the definitions of ‘voting share’ and ‘voting interest’ in s9.
- RG 5.14 The focus of the provisions on voting rights reflects their underlying objective—to regulate the acquisition of corporate control and the disclosure of significant interests that may dictate or influence the entity’s future direction or affairs.

Association and voting power

- RG 5.15 The takeover, substantial holding and beneficial ownership tracing provisions operate by aggregating the voting power of people who are related or associated in relation to an entity’s affairs, under the ‘associate’ definition set out in s12. As a result, a person must consider not only their own relevant interests, deemed economic interests and offsetting short positions in voting shares or interests, but also those of their associates. This combined voting power forms the threshold trigger for the general takeover prohibition. For the substantial holding and beneficial ownership tracing provisions the trigger is the aggregate of votes connected with a person and their associates through their relevant interests and deemed economic interests.

Note: We discuss the related concepts of association and voting power in Section B of this guide.

Unacceptable circumstances

- RG 5.16 Interests or arrangements relating to securities which do not give rise to a relevant interest, deemed economic interest or offsetting short position may nonetheless result in circumstances that are contrary to the principles and purposes underlying the takeover provisions set out in s602.
- RG 5.17 The Takeovers Panel may make a declaration of unacceptable circumstances under s657A involving interests or arrangements of this kind.

Summary of this guide

- RG 5.18 Table 2 summarises the guidance we have addressed in this guide.

Note: Unless otherwise indicated, our guidance applies with respect to listed registered schemes. Adjustments that take account of the different features of managed investment schemes are set out in s12(3), 604 and 610(5).

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Table 2: Summary of our guidance

Topic	What our guidance covers	Reference
Relevant interests in securities	We discuss three principal aspects of the relevant interest concept that should be considered when applying the definition in s608 and 609: the basic rule, extensions to the basic rule and the exceptions.	Section B
Applying the relevant interest concepts	We discuss how the relevant interest concept is applied in the context of the takeover, substantial holding and beneficial ownership tracing provisions and the related concepts of 'voting power' and 'associates'.	Section C
Deemed economic interests in securities	We discuss three principal aspects of the deemed economic interest concept that should be considered when applying the definition in s671AA and 671AF: the basic rule, extensions to the basic rule and the exceptions.	Section D
Offsetting short positions	We discuss three principal aspects of the offsetting short position concept that should be considered when applying the definition in s671AS: the basic rule, extensions to the basic rule and the exceptions.	Section E
Applying the deemed economic interest and offsetting short position concepts	We discuss how the deemed economic interest and offsetting short position concepts are distinguished from relevant interests and how their application differs across physically settleable and non-physically settleable derivatives.	Section F
Options	We discuss the relevant interests that may arise from options.	Section G
Warrants	We outline the relevant interests that may arise from warrants and the relief we have provided so that relevant interests and associations do not arise in some cases.	Section H
Escrow arrangements	We discuss the relief we have provided for escrow arrangements required under the listing rules of a declared financial market and the individual relief we may provide for voluntary escrows.	Section I

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B Relevant interests in securities

Key points

There are three general tests to consider when determining whether a person has a relevant interest in securities:

- the basic rule;
- the extensions to the basic rule; and
- the exceptions.

The nature of power or control giving rise to a relevant interest is broadly cast to prevent avoidance of the requirements of the Corporations Act. It extends to understandings, arrangements and practices that may be informal or implied.

A person may be deemed to have a relevant interest in securities as a result of:

- having interests in, or control over, a body corporate or managed investment scheme; or
- entering into a conditional agreement.

Exceptions apply so that, in certain circumstances, a person is taken not to have a relevant interest in securities. Some of these exceptions apply when determining relevant interests in a limited context—for example, under the takeover provisions but not the substantial holding provisions. We have modified or extended some of the exceptions by legislative instrument.

Applying the relevant interest definition

RG 5.19 Sections 608–609 define when a person has and does not have a relevant interest in securities. Under these provisions, a person must consider and apply three general tests:

- (a) whether a person has a relevant interest under the *basic rule*;
- (b) whether a person is deemed to have a relevant interest under the *extensions to the basic rule*; and
- (c) whether the situation giving rise to the relevant interest falls within one of the *exceptions*.

RG 5.20 Table 3 summarises these tests, as applied in s608–609, and includes a cross-reference to further discussion of each aspect in this guide.

Note: For a discussion of how the relevant interest tests in s608–609 apply to securities lending, prime broking and agent lending, see Sections D–F of [RG 222](#).

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Table 3: Summary of the relevant interest concept

Test	Description	Reference
1. The basic rule		
The basic rule: s608(1)–(2)	This is the general rule which determines whether a connection a person has with securities gives rise to a relevant interest. Under the rule, a relevant interest is derived from holding securities or having some kind of power or control over voting or disposal.	RG 5.23– RG 5.35
2. Extensions to the basic rule		
Deemed interest through one or more bodies corporate or schemes: s608(3)–(7)	A person is deemed to have the same relevant interest in securities that a body corporate or managed investment scheme has if they have over 20% voting power or control of the body corporate or scheme. A person may have a deemed relevant interest through a chain of companies or schemes.	RG 5.36– RG 5.55
Deemed present interest in anticipation of performance of agreement or understanding, or exercise of right: s608(8) and 608A	<p>A person acquires a relevant interest at the time of entering into an agreement or understanding or being granted enforceable rights or options to acquire securities, regardless of the time for performance or exercise, or whether any conditions are attached. The relevant interest is:</p> <ul style="list-style-type: none"> • with respect to any securities the counterparty has a relevant interest in that are in the same class; and • the counterparty is taken to use the securities they have a relevant interest in to satisfy their obligations on performance, enforcement or exercise: see s608A. <p>Note: We have modified this concept for the purposes of the substantial holding requirements as they apply to securities lending, prime broking and agent lending arrangements: see RG 222.</p>	RG 5.56– RG 5.63
3. Exceptions		
Exceptions: s609	In certain cases, despite the basic rule and the extended rules, a person is taken not to have a relevant interest because of a particular situation or connection with securities. These exceptions apply on their terms and do not prevent a person having a relevant interest on the basis of another connection falling outside the exception.	RG 5.64– RG 5.76

Relevant interests of a body corporate in its own securities

RG 5.21 Under the relevant interest concept, a body corporate may have a relevant interest in its own securities: see s608(9). This means that the takeover, substantial holding and beneficial ownership tracing provisions apply to the body in the same way that they do to any other person who has a relevant interest in the body's securities.

RG 5.22 The body's relevant interest in its own securities may also be relevant to other persons—for example, if the other persons may be deemed to have the same relevant interest in the body's holding in its own securities, or may be an associate of the body.

Note: An interest of this kind may arise, for example, under an escrow agreement with a security holder: see RG 5.324–RG 5.328.

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The basic rule for a relevant interest

- RG 5.23 The basic rule set out in s608(1) is that a person has a relevant interest in securities if they:
- (a) are the holder of the securities;
 - (b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or
 - (c) have power to dispose of—or control the exercise of a power to dispose of—the securities.
- RG 5.24 It does not matter how remote the relevant interest is or how it arises under the basic rule. If two or more people can jointly exercise a power described, each is taken to have the power: see s608(1).

The broad nature of power or control

- RG 5.25 The nature of the power or control over voting or disposal that may give rise to a relevant interest under the basic rule is deliberately cast in wide terms. Under s608(2), it expressly extends to power or control that:
- (a) is indirect, implied or informal;
 - (b) may be exercised alone or jointly with someone else;
 - (c) does not relate to a particular security;
 - (d) may be made subject to restraint or restriction; and/or
 - (e) may be exercised through, or counter to, a trust, agreement or practice (in combination or otherwise and whether enforceable or not).
- RG 5.26 The wide scope of s608(2) derives from the legislature’s concern that the objectives of the regulatory regime should not be circumvented.
- [W]hen dealing with a relevant interest in shares, it is important that the legislation clearly apply to the informal arrangements and gentlemen’s agreements that can so often be arrived at in order to avoid any inconvenient obligations imposed by law.
- The Hon John Waddy MP, *Parliamentary debates*, New South Wales Legislative Assembly, 9 September 1971, p. 913.
- RG 5.27 The breadth of the extended definition of power or control has been acknowledged and applied in a number of cases: see, for example, *TVW Enterprises Ltd v Queensland Press Ltd* (1983) 7 ACLR 821 (*TVW Enterprises*) at 839 and *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 (*Yandal Gold*) at [90]–[92].
- RG 5.28 However, in applying the expanded notion of power or control in s608(2), it is still necessary to consider whether a power exists ‘to exercise some true or actual measure of control’ over voting or disposal: see *Re Kornblums Furnishings Ltd* (1981) 6 ACLR 25 (*Kornblums Furnishings*) at 36;

TVW Enterprises at 838; *Yandal Gold* at [73]; and *Edensor Nominees Pty Ltd v ASIC* (2002) 41 ACSR 325 (*Edensor Nominees*) at [33].

Note: Control that is minor or peripheral, or merely hypothetical, theoretical or notional, may not be included: see *North Sydney Brick & Tile Co Ltd v Darvall (No 2)* (1986) 10 ACLR 837 (*Darvall*) at 844; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 5 ACSR 720 at 747–748; and *Yandal Gold* at [73]. See also *Azumah Resources Ltd* [2006] ATP 34.

Power or control through trusts, practices and relevant agreements

- RG 5.29 Under s608(2)(b), power or control may arise under a trust, agreement or practice (alone or in combination), whether enforceable or not. An agreement in this context means a relevant agreement: see the ‘agreement’ definition in s9. A ‘relevant agreement’ is widely defined in s9 to mean an agreement, arrangement or understanding:
- (a) whether formal or informal or partly formal and partly informal; and
 - (b) whether written or oral or partly written and partly oral; and
 - (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.
- RG 5.30 As defined, a relevant agreement embraces a broad range of relationships that need not necessarily be legal relationships—including understandings from which relevant parties may be free to withdraw.
- RG 5.31 A person may therefore have a relevant interest in securities on the basis of indirect power or control arising from an informal or implied practice, or an understanding with another person that is unenforceable: see *Yandal Gold* at [73]. However, in determining whether some true measure of control exists as part of unenforceable arrangements or understandings of this kind, it must be assumed that the parties act in accordance with, rather than contrary to, their arrangement or understanding: see *Edensor Nominees* at [33].
- RG 5.32 Section 608(8) may also be relevant in considering whether a relevant agreement gives rise to a relevant interest. Under this provision, if a person does not already have a relevant interest on the basis of a relevant agreement, the person would still be deemed to have a present relevant interest if one would arise, were the relevant agreement to be performed: see RG 5.56–RG 5.62.

Example 1: Voting agreements

Shareholder A enters into an agreement with Shareholder B under which Shareholder B agrees, in exchange for a cash sum, to vote in accordance with Shareholder A’s direction on a resolution at an upcoming general meeting of the company.

Shareholder A acquires a relevant interest in Shareholder B’s holding as a result of the voting agreement because Shareholder A will control the power, or the exercise of the power, to vote the securities: see s608(1)(b).

Shareholder B continues to have a relevant interest in the securities as holder under s608(1)(a)—but also as the person with the legal power to vote and dispose of the securities (even if doing so may result in a breach of the agreement): see s608(1)(b) and (c) and 608(2)(b)(ii).

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Example 2: Agreements or understandings about acceptance of a takeover bid

Bid Co Ltd has made a full conditional takeover bid for Target Ltd at \$1.00 a share. A representative of Bid Co Ltd and a major shareholder of Target Ltd agree during a telephone conversation that the major holder will accept the bid and that Bid Co Ltd will increase the offer to \$1.10 and declare it unconditional.

Bid Co Ltd will obtain a relevant interest in the shareholder's shares in Target Ltd as a result of the 'relevant agreement' to acquire the major holder's shares concluded during the telephone conversation—regardless of any practical difficulties there may be in achieving enforceability of this agreement through a court. Because the relevant interest is acquired as a result of the relevant agreement rather than acceptance of the bid (even though it is to be given effect through acceptance of the bid), Bid Co Ltd may breach s606: see *Corebell Pty Ltd v New Zealand Insurance Co Ltd* (1988) 13 ACLR 349.

Bid Co Ltd would also have acquired a relevant interest in the major shareholder's shares if, prior to Bid Co Ltd making the bid, it had an understanding with the major shareholder that it would accept the bid, once made, even if the understanding was unenforceable. However, while an unenforceable understanding from which parties are free to withdraw may constitute a relevant agreement, a consensus of some sort between the parties may still be required: see also *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263 at [37].

Negative power or control

- RG 5.33 Under the basic rule, a relevant interest in securities may arise from a person's power to control 'the exercise' of voting rights or 'the exercise' of a power to dispose.
- RG 5.34 A person may have a power to control the exercise of a power to dispose of, or vote, securities even if they only have a power to prevent or restrain another person from disposing of, or voting, the securities. A relevant interest may therefore arise from a 'negative' power over disposal or voting, which may be exercised in limited circumstances. Examples include:
- (a) the power to restrict the ability of a counterparty to dispose of securities (together with any other assets) that it holds, pending implementation of a merger or other transaction (*Australian Pipeline Limited v Alinta Ltd* [2007] FCAFC 55 (*Alinta Ltd*));
 - (b) escrow arrangements with a security holder, restricting disposal of the securities for a fixed period (see RG 5.324–RG 5.328); and
 - (c) a pre-emptive right, or right of first refusal, over the sale and transfer of securities (*Kornblums Furnishings* at 36 and *TVW Enterprises* at 839).
- RG 5.35 Pre-emptive rights derived from a company, body or scheme's constitution, which are available on the same terms to all members, are taken not to give

rise to a relevant interest under s609(8). However, pre-emptive rights that do not fall within the exception (e.g. because they differ between members or arise under a private agreement) may give rise to a relevant interest in each of the securities that are the subject of pre-emption: see *Darvall*.

Extension to the basic rule: Interests in a body corporate or managed investment scheme

- RG 5.36 In addition to any relevant interests arising under the basic rule, a person may be deemed to have the same relevant interest in any securities that certain connected bodies corporate or managed investment schemes have. Under s608(3), a person is taken to have the same relevant interests as:
- (a) a body corporate, or managed investment scheme, in which the person's voting power is over 20% (s608(3)(a)); or
 - (b) a body corporate, or managed investment scheme, that the person controls (s608(3)(b)).

Note: The 'voting power' referred to in s608(3)(a) is based on the aggregate relevant interest of the person and each of their associates in relation to the entity (if any). We discuss the concepts of voting power and association further at RG 5.95–RG 5.143. See also RG 5.47–RG 5.55.

- RG 5.37 However, s608(3)(a) does not apply to relevant interests that the body corporate, or managed investment scheme, is itself deemed to have merely because of s608(3)(a) (i.e. merely on account of a voting power of more than 20% in another body corporate or scheme). In contrast, s608(3)(b) may be applied repeatedly: see RG 5.42–RG 5.46.

Control under s608(3)

- RG 5.38 Section 608(4) provides that, for the purposes of s608(3)(b), a person controls a body corporate, or managed investment scheme, if they have the capacity to determine the outcome of decisions about the financial and operating policies of that body corporate or scheme.
- RG 5.39 Under this test, a person will generally control a body corporate or scheme if they can command more than 50% of the votes that may be cast at a general meeting because, for example, they would have the capacity to appoint or remove directors. However, the capacity to determine the outcome of decisions about the financial and operating policies of a body corporate may also arise when a person holds less than 50% of the votes that may be cast at a general meeting but otherwise has practical or effective control.
- RG 5.40 Section 608(5) provides that, in determining whether a person has control of a body corporate:
- (a) the practical influence a person can exert (rather than the rights they can enforce) is the issue to be addressed; and

- (b) any practice or pattern of behaviour affecting the body corporate’s financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

RG 5.41 However, a person is not taken to control a body corporate merely because:

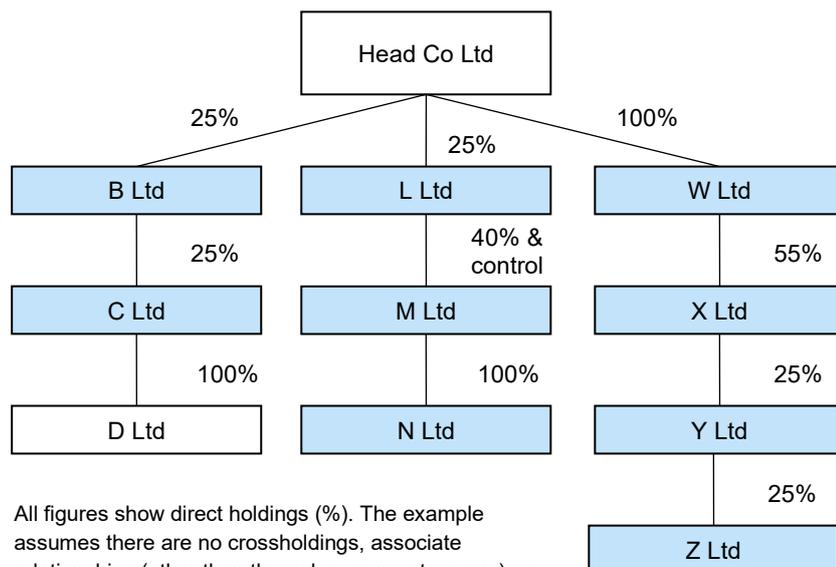
- (a) that person, together with an entity that is not an associate, jointly has the capacity to determine the outcome of decisions about the body corporate’s financial and operating policies (s608(6)); or
- (b) the person has a capacity that they are under a legal obligation to exercise for the benefit of someone else (or, if the person is a body corporate, for the benefit of someone other than the body corporate’s members) (s608(7)).

The operation of the deeming provisions through a chain of bodies corporate or managed investment schemes

RG 5.42 Section 608(3) may operate in relation to a hierarchy of entities as the relevant interest of each entity is successively imported to the entity immediately above in the chain of interests: see *NCSC v Brierley Investments Ltd* (1988) 14 ACLR 177 at 190. However, the 20% interest limb in s608(3)(a) can only be applied once in the chain, while the controlled entity limb in s608(3)(b) may have unlimited application.

RG 5.43 An example of the operation of s608(3) in relation to a chain of entities is discussed below, based on Figure 1.

Figure 1: Relevant interests arising through interests in a body corporate or managed investment scheme



All figures show direct holdings (%). The example assumes there are no crossholdings, associate relationships (other than through a corporate group), or practical control below 50%, unless indicated.

Note: Figure 1 is explained in RG 5.44–RG 5.46 (accessible version).

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- RG 5.44 Figure 1 shows Head Co Ltd at the top of three chains of entities.
- (a) In the left chain, Head Co Ltd has 25% direct ownership interest in B Ltd, and in turn B Ltd has a 25% direct ownership interest in C Ltd. At the end of the left chain, D Ltd is wholly owned by C Ltd.
 - (b) In the middle chain, Head Co Ltd has a 25% interest in L Ltd, and in turn L Ltd has a 40% direct interest and control of M Ltd. At the bottom of the middle chain, N Ltd is wholly owned by M Ltd.
 - (c) In the right chain, W Ltd is wholly owned by Head Co Ltd, and has 55% direct interest in X Ltd, which in turn has 25% direct interest in Y Ltd. At the end of the right chain, Y Ltd has a 25% direct interest in Z Ltd.

RG 5.45 In Figure 1, the companies in which Head Co Ltd has a relevant interest under s608(3) are shaded in blue. In the left chain, Head Co Ltd has a relevant interest in B Ltd and C Ltd, but not D Ltd. In the middle chain, Head Co Ltd has a relevant interest in L Ltd, M Ltd and N Ltd. In the right chain, Head Co Ltd has a relevant interest in W Ltd, X Ltd, Y Ltd and Z Ltd. The following explains why Head Co Ltd does, or does not, have a relevant interest in securities in each of the companies at the bottom of the three chains (i.e. D Ltd, N Ltd and Z Ltd):

- (a) C Ltd has a relevant interest in 100% of D Ltd securities through a direct holding. B Ltd also has a relevant interest in 100% of D Ltd by virtue of its 25% holding (and voting power) in C Ltd: see s608(3)(a). However, because s608(3)(a) can only apply once, Head Co Ltd is not deemed to also have the relevant interest in 100% of D Ltd that B Ltd has, even though it has voting power of more than 20% in B Ltd. Head Co Ltd therefore has no relevant interest in D Ltd shares (but does have a relevant interest in B Ltd's holding of C Ltd securities: see s608(3)(a)).
- (b) M Ltd has a relevant interest in 100% of N Ltd securities through a direct holding. L Ltd has a voting power of 40% in M Ltd, but also has practical control of M Ltd, so it is deemed to have the same relevant interest in 100% of N Ltd under s608(3)(b). As Head Co Ltd has a voting power of over 20% in L Ltd, and s608(3)(a) has not yet been applied, Head Co Ltd is deemed to also have a relevant interest in the 100% stake in N Ltd.
- (c) Y Ltd has a direct relevant interest in 25% of Z Ltd. X Ltd is deemed to have a relevant interest in the 25% stake in Z Ltd: s608(3)(a). W Ltd is also deemed to have a relevant interest in the 25% stake in Z Ltd on account of X Ltd's deemed relevant interest and its controlling holding in X Ltd: see s608(3)(b). As Head Co Ltd controls W Ltd, it also has a relevant interest in the 25% stake in Z Ltd as s608(3)(b) has successive operation.

RG 5.46 This example assumes there are no cross-holdings, associate relationships (other than through a corporate group), or practical control below 50% (other than where specified)—however, in applying s608(3), all relevant circumstances must be taken into account. For example, if Head Co Ltd had effective control of B Ltd, even though it holds only a direct 25% stake, it would have a relevant interest in D Ltd.

Association by control and s608(3)(a)

RG 5.47 The deeming provision in s608(3)(b) overlaps to some extent with the definition of ‘associate’. Two bodies corporate may be associates where one controls, or is controlled by, the other, or where both are controlled by the same entity (whether the entity is a natural person, body corporate, partnership or trust): see s12(2)(a) and 64A. A similar test for control applies in this context: see s50AA.

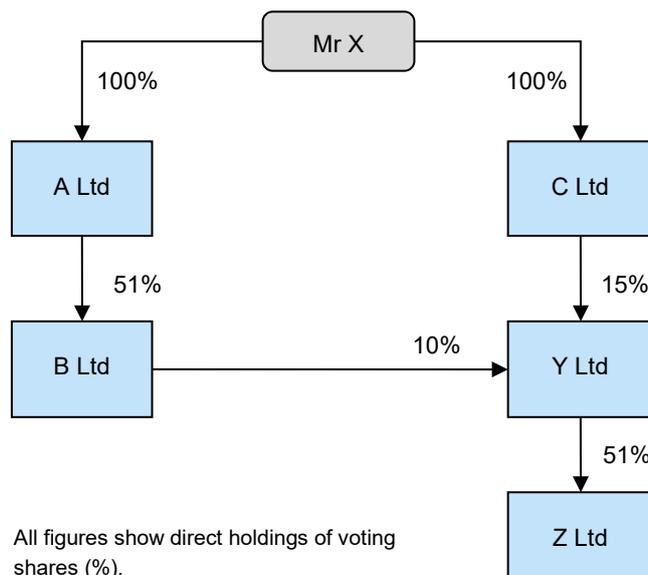
Note: Persons may also be associates for other reasons. We discuss the concept of association further at RG 5.115–RG 5.143.

RG 5.48 This overlap means that, where one body corporate controls another body corporate, the parent will both:

- (a) have a relevant interest in any securities the subsidiary has a relevant interest in under s608(3)(b); and
- (b) be associated with the subsidiary under s12(2)(a).

RG 5.49 Associations, such as those arising from control within a corporate group, are relevant in applying s608(3)(a). This is because a person’s voting power in a body or scheme depends on the relevant interests both the person and their associates have in voting shares or interests in the body. As a result, a person may be deemed to have the relevant interests in securities a body corporate has under s608(3)(a) entirely, or in part, on the basis of an associate’s holding (or other relevant interests) in that body corporate. The diagram in Figure 2 illustrates this concept.

Figure 2: Deemed relevant interests through holdings of associates under s608(3)(a)



Note: Figure 2 is explained in RG 5.50–RG 5.54 (accessible version).

- RG 5.50 In Figure 2, Mr X holds 100% of the shares in both A Ltd and C Ltd. On the left side of the chain, A Ltd holds 51% of shares in B Ltd, which in turn holds 10% of shares in Y Ltd. On the right side of the chain, C Ltd holds 15% of shares in Y Ltd, which in turn holds 51% of shares in Z Ltd.
- RG 5.51 Y Ltd holds (and therefore has a relevant interest in) 51% of the shares in Z Ltd. However, each of the other companies listed and Mr X also have the relevant interest in 51% of Z Ltd that Y Ltd has due to the operation of s608(3)(a). This is because their ‘voting power’ in Y Ltd is greater than 20%, even though some of them do not have relevant interests in more than 20% of Y Ltd shares.
- RG 5.52 The relevant interests of each person in Y Ltd are as follows:
- (a) A Ltd and B Ltd each have a relevant interest in 10% of Y Ltd (B Ltd as holder and A Ltd because it controls B Ltd (s608(3)(b)));
 - (b) C Ltd has a relevant interest in 15% of Y Ltd as holder; and
 - (c) Mr X has a relevant interest in 25% of Y Ltd as a result of his control over B Ltd and C Ltd, which collectively hold this number of shares (s608(3)(b)).
- RG 5.53 However, A Ltd, B Ltd and C Ltd are all associates of each other under s12(2)(a)(iii) because they are all controlled by the same entity—Mr X. The voting power they each have in Y Ltd is therefore the aggregate of the votes attached to both the shares they have a relevant interest in and the shares each of the others has a relevant interest in (as their associates). This means each of A Ltd, B Ltd and C Ltd have voting power of 25% in Y Ltd and are therefore deemed to have the same relevant interest that Y Ltd has in Z Ltd under s608(3)(a).
- Note: A Ltd and B Ltd are also associates of each other because they control, or are controlled by, each other: s12(2)(a)(i) and (ii).
- RG 5.54 The fact that A Ltd, B Ltd and C Ltd are associates of each other does not affect the *relevant interests* they each have in Y Ltd shares (as it does with respect to Z Ltd due to s608(3)(a)). While an associate’s relevant interests in securities are in effect aggregated with a person’s own to determine the person’s voting power in an entity, this does not mean the person themselves has a relevant interest in the securities in which the associate has a relevant interest merely because of the association. Whether a person has a relevant interest depends on the application of the tests in s608 and 609. As noted at RG 5.47–RG 5.49, the relevant interest tests may overlap with (or, in the case of s608(3)(a), require the application of) the test for association, but any relevant interest that arises still arises by virtue of the tests in s608–609.
- RG 5.55 We discuss the concepts of voting power and association further at RG 5.103–RG 5.114.

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Extension to the basic rule: Anticipation of performance of agreement or exercise of right or option

RG 5.56 The relevant interest concept is further extended by s608(8). This provision applies to transactions and arrangements relating to securities to bring back to the earliest point in time the moment at which a person will be treated as having a relevant interest in the securities: see *Re Adelaide Holdings Ltd* (1982) 6 ACLR 675 at 679. The provision is sometimes referred to as the ‘accelerator provision’ because it may cause a relevant interest to arise sooner than it otherwise would.

RG 5.57 Section 608(8) operates when a person has a relevant interest in issued securities and (whether before or after acquiring the relevant interest) the person:

- (a) has entered or enters into a relevant agreement with another person with respect to the securities (s608(8)(b)(i));
- (b) has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition) (s608(8)(b)(ii)); or
- (c) has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities (s608(8)(b)(iii)).

The effect of s608(8) is that the other person is taken to already have a relevant interest in the securities if they would have the relevant interest on performance of the agreement, enforcement of the right or exercise of the option.

RG 5.58 Section 608A further clarifies that there is no need for the other person to ascertain whether the person entering the agreement has set aside particular securities to satisfy their obligations under the agreement or whether they are held for other purposes. The other person is taken to have a relevant interest in securities in which the person entering the agreement has a relevant interest that are in the same class as securities under the agreement. The person entering the agreement is taken to use those securities to satisfy their obligations on performance, enforcement or exercise.

Example 1

A person has a relevant interest in 10 shares in a company and agrees with another person to sell five shares in the company to the other person on a future date. The other person is taken to already have a relevant interest in five of the first person’s 10 shares under s608(8).

Example 2

A person has a relevant interest in 10 shares in a company and gives another person a right to acquire 11 shares in the company from the person in the future. The other person is taken to already have a relevant interest in the first person’s 10 shares under s608(8). The other person might also have a deemed economic interest in one share in the company under Div 2 of Pt 6C.1A.

- RG 5.59 The three subparagraphs in s608(8)(b) are not mutually exclusive: see *Chew v Hamilton* (1985) 13 ACLR 440 at 446. The ambit of a relevant agreement referenced in s608(8)(b)(i) is particularly broad and, in many cases, will also encompass enforceable rights and options of the kind referred to in s608(8)(b)(ii) and (iii): see RG 5.29–RG 5.32.
- RG 5.60 One effect of the accelerator provision is to confirm that a person has a relevant interest even though their connection with a security holding is derived from a conditional transaction, arrangement or right.
- RG 5.61 Of course, in some cases, a conditional transaction or preliminary arrangement may, in any event, have resulted in a relevant interest under the basic rule, given the expansive nature of power or control referred to in s608(2): see for example *Alinta Ltd* at [243]–[246] and *Nicholas v Commissioner for Corporate Affairs (Vic)* (1982) 7 ACLR 45 at 54–55.
- RG 5.62 The accelerator provision only operates where the person who enters into the agreement, gives the enforceable right or grants the option has a relevant interest in securities themselves. If the person acquires a relevant interest in the securities subsequently, the provision will operate in relation to those securities from that time: see s608(8)(b) and 608A.

Further applications

- RG 5.63 We discuss further the application of the relevant interest concept, including the accelerator provision, as it applies to options and warrants in Section G and Section H.

Exceptions to the basic rule and exceptions

- RG 5.64 Section 609 sets out a number of situations in which a person is taken not to have a relevant interest. These exceptions only apply to relevant interests arising merely because of the particular situation or circumstance. A person may still have a relevant interest because of other connections, or aspects of relevant arrangements or affairs falling outside the specified situation or circumstance. Not all the exceptions in s609 apply in the context of the substantial holding disclosure requirements: see s671E and the definition of ‘substantial holding’ in s9.
- RG 5.65 We have modified some of the s609 exceptions by legislative instrument to clarify their operation. We have also introduced a number of new situations that are taken not to give rise to a relevant interest by way of modification. In some cases, the modified and extended exceptions under our relief only apply when considering certain requirements under the Corporations Act (e.g. the takeover provisions but not the substantial holding provisions).

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- RG 5.66 Where a person does not have a relevant interest in securities because of s609, no other person will be deemed to have a relevant interest in those securities through the application of s608(3).
- RG 5.67 Table 4 outlines the exceptions (including relief) that should be taken into account in determining whether a person has a relevant interest in securities for the purposes of the takeover, substantial holding and beneficial ownership tracing provisions. The table also includes cross-references to further discussion and guidance, where applicable.

Note: Table 4 sets out the exceptions to the relevant interest concept for the purposes of the takeover, substantial holding and beneficial ownership tracing provisions only. Some of ASIC's legislative instruments included in the table apply only to Chs 6 and 6C. When considering relevant interests in other contexts, readers should carefully consider the applicability of the exceptions introduced or modified by legislative instrument.

Table 4: Exceptions to the relevant interest concept—takeovers, substantial holdings and beneficial ownership tracing provisions

Exception	Situation not giving rise to a relevant interest	Reference
Exceptions applying for the purposes of the takeover, substantial holding and beneficial ownership tracing provisions		
Moneylenders' security interests	Security interests taken or acquired in the ordinary course of a non-associated person's business of providing financial accommodation on ordinary commercial terms. Note: A 'security interest' is defined in s9.	s609(1)
Bare trustees	Bare trustees (including nominees) where a beneficiary under the trust has a relevant interest because of a presently enforceable and unconditional right.	s609(2)
Australian financial services (AFS) licensees acting for clients	Relevant interests an AFS licensee has, merely because in the ordinary course of their financial services business, they: <ul style="list-style-type: none"> hold securities on behalf of someone else; or receive specific instructions from a client to dispose of securities or enter into a sold position through a dealing in derivatives. 	s609(3)–(3A)
Buybacks	Relevant interests arising merely because a company has entered into a buyback agreement.	s609(4)
Single meeting proxies	Proxy holders or corporate representatives appointed for a single meeting for no consideration.	s609(5)
Pre-emptive rights in constitution	Pre-emptive rights in a company, body or managed investment scheme's constitution which are on the same terms for all members.	s609(8)
Directorship	Directorship of a body corporate which, in itself, does not give rise to a relevant interest in securities in which the body corporate has a relevant interest.	s609(9)

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Exception	Situation not giving rise to a relevant interest	Reference
Market and facility operators	Operating a clearing and settlement (CS) facility. Note: See also a further exception for the operators of declared financial markets in relation to restricted securities: s609(9C).	s609(9A)
Acceptance facilities	A bidder establishes an acceptance facility in compliance with s609A.	s609A
Investor directed portfolio services (IDPSs)	Operating, or being involved as an AFS licensee or representative in the operation of, an IDPS. Note 1: The IDPSs and operators to which the exception applies are defined in notional s912AD(42) inserted by ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669 . Note 2: For further guidance, see also Regulatory Guide 148 <i>Platforms that are managed investment schemes and nominee and custody services</i> (RG 148).	notional s609(17A)–(17C) (inserted by ASIC Corporations (IDPS – Relevant Interests) Instrument 2015/1067)
Warrant issuers and trustees	Relevant interests arising merely as a result of securities held on trust by: <ul style="list-style-type: none"> put warrant issuers (including where securities are held in trust on certain terms to secure the holder’s obligations); call warrant issuers where securities are held in trust; and warrant trustees retaining certain limited discretions for the purpose of satisfying rights or obligations of the issuer or holder. 	notional s609(6A)–(6F) (inserted by ASIC Corporations (Warrants: Relevant Interests and Associations) Instrument 2023/687); see also Section H
ASIC	Any relevant interest ASIC may have in securities, except where securities are vested in, or held by: <ul style="list-style-type: none"> ASIC for and on behalf of the Commonwealth; or the Commonwealth on trust. Any interest the chairperson of ASIC has by virtue of that office merely because ASIC has a relevant interest.	notional s609(9D)–(9F) (inserted by ASIC Corporations (Relevant interests, ASIC and ASIC Chairperson) Instrument 2023/194)

Exceptions applying for the purposes of the takeover provisions only

Prime broking and custodial service providers	A relevant interest arising from a right to borrow securities at some future time under certain prime broking or custodial arrangements complying with ASIC Instrument 2021/821 . The exception ceases when the prime broker or custodian exercises the borrowing right (i.e. the acquisition of the relevant interest is deferred).	notional s609(10A)–(10B) and (10E) (inserted by ASIC Corporations (Securities Lending Arrangements) Instrument 2021/821); see also RG 222
Agent lending	A relevant interest arising from a right to: <ul style="list-style-type: none"> negotiate and arrange securities lending arrangements for a lender with a borrower; and transfer securities on behalf of a lender to a borrower pursuant to a securities lending arrangement. The exception ceases when the agent lender transfers securities to a borrower.	notional s609(10C)–(10E) (inserted by ASIC Instrument 2021/821). See also RG 222

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Exception	Situation not giving rise to a relevant interest	Reference
Exceptions applying for the purposes of the substantial holding provisions only		
Exchange-traded options, call warrants and derivatives	Relevant interests arising because of market-traded options or rights to acquire securities under a derivative. The exception applies until the time to make or take delivery. Note: We have extended this exception to include relevant interests arising from a right to acquire securities, or require securities to be held in trust, under a call warrant quoted on ASX or Cboe: see Section H.	s609(6); s671E; and ASIC Instrument 2023/687 . See also RG 5.261–RG 5.266 and RG 5.270–RG 5.323
Agreements subject to holder approval or ASIC relief	Relevant interests arising because of agreements that are conditional on holder approval under item 7 of s611, or ASIC relief, which do not confer influence over voting rights and do not restrict disposal for more than three months. The exception applies until approval or relief is given.	s609(7); s671E; see also Section E of Regulatory Guide 74 <i>Acquisitions approved by members</i> (RG 74)
Listing rule escrow agreements	A listed company's relevant interest in its own securities arising from restrictions on disposal of a holding of restricted securities applied under the listing rules of a declared financial market.	s609(9B); s671E
Voluntary escrow agreements	Relevant interests arising because a company, underwriter or lead manager applies restrictions on disposal of the company's securities under an escrow agreement in connection with an initial public offer of securities or the acquisition of a business.	s609B; s671E
Exchange-traded funds (ETFs)—acquisition and withdrawal facilities	Relevant interests that certain authorised participants of an ETF have in securities forming part of the ETF as a result of an acquisition and withdrawal facility where: <ul style="list-style-type: none"> the investment strategy of the ETF is to track a published index of securities that will not lead to any security to which Ch 6 applies representing more than 10% (by value) of the ETF's assets; and the authorised participant has not made a withdrawal request under the facility. 	notional s671AA (inserted by ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/147)

The financial accommodation exception

RG 5.68 Section 609(1) provides an exception from the definition of 'relevant interest' for a person who takes a security interest in the ordinary course of their business of providing financial accommodation and on ordinary commercial terms. The exception does not apply if the security interest relates to the property of an associate.

RG 5.69 The exception in s609(1) also extends to:

- persons holding a security interest (such as a mortgage) on trust for a financier in the ordinary course of the financier's business of providing financial accommodation;
- purchasers of a security interest of this kind; and
- financiers, where their lending is supported by a negative pledge.

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RG 5.70 These exceptions ensure that a person does not have a relevant interest in securities merely because they participate in common commercial ‘arm’s length’ mortgage structures and transactions.

Corresponding operation in item 6

RG 5.71 Item 6 of s611 contains an exception from the general prohibition in s606 which corresponds with the exception from the relevant interest concept in s609(1). The exception in item 6 is for an acquisition that results from an exercise of power, or appointment as receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest.

RG 5.72 Item 6 of s611 also operates so that:

- (a) the exception applies to security trustees (without our relief, the security trustee’s business would have to be lending or providing other financial accommodation); and
- (b) for the exception, a security interest includes a negative pledge.

RG 5.73 Item 6 of s611 is also expressed to apply to a person appointed ‘as a receiver’ but only if the person’s ordinary business includes providing financial accommodation: see item 6(a) of s611. A receiver is unlikely to be in this business. Item 6 applies to acquisitions resulting from the appointment of a receiver.

Security interests taken or acquired with a purpose inconsistent with the policy underlying the exceptions

RG 5.74 The exception in s609(1) recognises that persons in the business of providing financial accommodation will, in the ordinary course of their business, commonly take security interests over shares and other securities in connection with financing transactions for the particular purpose of securing the funds they have lent against default, and not with a view to obtaining dominion or influence over the securities in a way that is designed to affect control of the issuer of the securities. The corresponding exception in item 6 of s611 seeks to ensure that the takeover provisions do not unduly restrict the exercise of the financier’s security interest.

RG 5.75 ASIC may take regulatory action, including applying to the Takeovers Panel for a declaration of unacceptable circumstances, if a person seeks to rely on the exceptions in s609(1) or item 6 of s611 where it appears that:

- (a) the security interest does not fall within the exceptions (e.g. because a relevant person does not in fact provide financial accommodation in the ordinary course of their business); or
- (b) the person has taken or acquired the security interest for purposes that are otherwise inconsistent with the policy underlying the exceptions.

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- RG 5.76 Situations where reliance on the exceptions may be excluded or inconsistent with their underlying policy include where:
- (a) the financier has taken or acquired the security interest, entirely or in part, for the purpose of influencing whether, to whom or how the securities are to be disposed of following an event of default; or
 - (b) the financier has taken or acquired the security interest in anticipation of, or in connection with, a proposal by the financier or its associates to acquire control, or a substantial interest in, the issuer of the securities.

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C Takeovers: Applying the relevant interest concept

Key points

The takeover provisions operate by reference to thresholds depending on a person's relevant interest in voting shares or voting interests combined with that of any associates, while the substantial holding and relevant beneficial ownership tracing provisions take into account the relevant interests, deemed economic interests and offsetting short positions of a person and any of their associates in voting shares or interests.

Acquisitions from an associate may be deemed to involve an increase in voting power under s610(3). We have modified Ch 6 so that, in certain cases, an acquisition by a subsidiary from its ultimate holding company does not involve a deemed increase in voting power, consistent with the treatment of other intra-group transfers.

A person may be an associate on the basis that they have, or propose to enter into, a relevant agreement, or propose to act in concert in relation to a body. Bodies corporate may also be associates on the basis of a relationship of control or common control.

The takeover and substantial holding thresholds

- RG 5.77 The relevant interest concept is central to the framework of the takeover, substantial holding and beneficial ownership tracing provisions because it defines the connections that are taken into account when applying the principal thresholds triggering the requirements of Ch 6 and Pt 6C.1, being:
- (a) the general prohibition in s606 in relation to takeovers; and
 - (b) the definitions of a 'substantial holding' in s9 and the definition of 'disclosable movement' in s671BK.

Pt 6C.1 also takes into account deemed economic interests and offsetting short positions of a person and any of their associates: see s671BD.

Note: For further discussion about when a person is an associate, see RG 5.115–RG 5.143.

- RG 5.78 The takeover, substantial holding and beneficial ownership tracing provisions require similar calculations of relevant interests, which involve 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.

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RG 5.79 These elements reflect the underlying concern of the respective regimes 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 5.80 For the purposes of the takeover provisions, both elements are incorporated through the definition of a person's 'voting power' in s610. In the substantial holding context, the elements are found in the definitions in s9 and 671BL(2), which are similar to the 'voting power' definition. Both definitions incorporate the concept of an 'associate' set out in s12.

Application of the provisions

RG 5.81 The entities with respect to which the takeover, substantial holding and beneficial ownership tracing provisions apply are similar but not identical. The provisions apply to a person's interests in:

- (a) listed companies;
- (b) listed registered schemes; and
- (c) listed bodies that are not companies but are incorporated or formed in Australia.

However, the takeover provisions also apply to a person's interests in unlisted companies with more than 50 members. The substantial holding and beneficial ownership tracing provisions also apply to listed notified foreign passport funds and listed bodies that are not incorporated or formed in Australia and not otherwise captured by the provisions: see s602, 602A, 603–604, 671A–671B, 672A, 672B and 672DA.

RG 5.82 With respect to bodies not incorporated or formed in Australia, the beneficial ownership tracing provisions only apply to shares in listed entities that are incorporated or formed outside Australia that are quoted on a declared financial market: see s672DE.

The substantial holding disclosure threshold

RG 5.83 A person must comply with the substantial holding provisions by providing a substantial holding notice to the key person for a listed entity and the relevant market operator if they:

- (a) begin to have, or cease to have, a substantial holding in the listed entity;
- (b) have a substantial holding in the entity at the time it lists on the declared financial market;
- (c) have a substantial holding in the listed entity and there is a disclosable movement in their holding; or
- (d) make a takeover bid for securities of the listed entity: see s671B(1).

RG 5.84 A person has a substantial holding if the total votes attached to voting shares or interests in which they and their associates have relevant interests

(including interests they would have but for exceptions in s609) and deemed economic interests is 5% or more of the total votes attached to all voting shares or interests in a listed entity: see the ‘substantial holding’ definition in s9 and s671D.

RG 5.85 A person also has a substantial holding throughout the period between making a takeover bid and the end of the bid period: see the ‘substantial holding’ definition in s9.

The general takeover threshold

RG 5.86 The acquisition of corporate control is regulated by way of a general prohibition on offers, invitations, acquisitions and transactions that result in a breach of the takeover threshold (s606), subject to a number of permitted exceptions (s611).

Note: For information about exceptions to the general prohibition, see [RG 6](#).

RG 5.87 The general prohibition prohibits a person from acquiring a relevant interest in issued voting shares or interests through a transaction relating to those shares or interests if the transaction results in that person’s, or someone else’s, voting power in a relevant entity increasing:

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

RG 5.88 A person is also prohibited from acquiring a legal or equitable interest in securities if another person acquires a relevant interest in those securities and this results in a breach of the same threshold: see s606(2). A person must not make an offer or invitation that would result in the person breaching the prohibitions in s606(1) or (2), upon acceptance of the offer or a resulting offer.

RG 5.89 Two principal aspects of the general prohibition are the requirements that:

- (a) the person must acquire a relevant interest through a *transaction*; and
- (b) the person’s, or someone else’s, *voting power* must increase: see s606(1).

Note: The prohibition in s606(2) also requires the acquisition of a relevant interest in voting shares (or interests) but not necessarily through a transaction.

RG 5.90 We discuss voting power further at RG 5.95–RG 5.114.

Acquiring a relevant interest through a transaction

RG 5.91 A person acquires a relevant interest if they *obtain* a relevant interest, even if the relevant interest they obtain arises as a result of the deeming provisions in s608(3) and (8): see *Yandal Gold* at [82]–[100] and *Edensor Nominees* at [34]–[39]. A person is also taken to acquire a relevant interest when:

- (a) securities in which the person already had a relevant interest become voting shares in the company (e.g. the conversion of non-voting securities); or

- (b) there is an increase in the number of votes that may be cast on a poll attached to voting shares, in which the person already had a relevant interest (e.g. when partly paid securities with proportional voting rights are paid up in full): see s606(6).

RG 5.92 Under the general prohibition, a transaction giving rise to the acquisition of the relevant interest must have been entered into by, or on behalf of, the person and must be in relation to securities: see s606(1). Under s64, and the definition of ‘enter into’ in s9, entry into a transaction in relation to shares and other securities includes:

- (a) entering into, or becoming a party to, a relevant agreement in relation to the shares or securities (see RG 5.29–RG 5.32); and
- (b) exercising an option to have the shares or securities allotted, issued or granted.

RG 5.93 The general prohibition may therefore apply to prevent a person from entering into, or becoming a party to, a relevant agreement (including an unenforceable arrangement or understanding, or an agreement that does not necessarily involve the sale or purchase of any securities) if the person would obtain a relevant interest in breach of the takeover threshold: see, for example, *Flinders Diamonds Ltd v Tiger International Resources Inc* (2004) 49 ACSR 199 at [40].

RG 5.94 The general prohibition may also prevent a person from exercising options to be issued voting shares or interests unless the resulting acquisition falls within an exception to the prohibition in s611.

Voting power

RG 5.95 The general prohibition operates when a person’s ‘voting power’ increases above the takeover threshold.

RG 5.96 Under s610(1), a person’s voting power in a body is the total number of votes attached to all the voting shares in the body that the person or an associate has a relevant interest in as a percentage of the total votes attached to all voting shares:

$$\text{Voting power} = \frac{\text{Person's and associates' votes}}{\text{Total votes in designated body}} \times 100$$

RG 5.97 The same calculation applies to determine a person’s voting power in a managed investment scheme by reference to voting interests in the scheme.

RG 5.98 Votes attached to voting shares, in which a person and their associates have a relevant interest, are counted in calculating a person’s voting power even if the person’s relevant interest arises from the person’s power or control over disposal rather than voting.

Votes attached to voting shares or interests

- RG 5.99 For the takeover provisions, voting power can only be derived from relevant interests in voting shares or interests and the general prohibition only applies where a person acquires a relevant interest in voting shares or voting interests in a registered scheme. The substantial holding requirements are concerned with voting power derived from relevant interests, deemed economic interests and offsetting short positions in voting shares and interests: see s671BL and s671BM.
- RG 5.100 A voting share is defined in s9 as an issued share in a body that carries any voting rights beyond the right to vote on the following:
- (a) a proposal to reduce the body's share capital;
 - (b) a resolution to approve the terms of a buyback agreement;
 - (c) a proposal that affects the rights attached to the share;
 - (d) a proposal to wind up the body;
 - (e) a proposal to dispose of the whole of the body's property, business and undertaking; and
 - (f) a resolution put during a winding up or while a dividend (or part of a dividend) for the share is unpaid.
- RG 5.101 Under the formula in s610, a person's voting power depends on the number of votes attached to the relevant voting shares. The focus on votes rather than absolute holdings provides the most accurate reflection of a person's power to influence decision making at a general meeting.
- RG 5.102 Section 610(2) refines the formula by providing that, in determining voting power, the number of votes attached to a voting share is the number of votes that can be cast in respect of the share on:
- (a) a poll on the election of a director; or
 - (b) if director election is not determined through voting, the adoption or amendment of the constitution.

Deemed increase in voting power: Acquisitions from an associate

- RG 5.103 A person's voting power includes the votes attached to voting shares in which both the person and their associates have a relevant interest.
- RG 5.104 Because an associate's votes are already counted, a person's voting power would not increase under the definition in s610(1) when the person acquires voting shares from their associate. This is the case even if the person did not have a relevant interest in the associate's voting shares before the acquisition.

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Because there is no increase in voting power, a transaction of this kind would not be caught by the general prohibition: see s606(1)(c) and 606(2)(b).

- RG 5.105 However, it is generally accepted that a person should not be free to acquire a relevant interest in voting shares from their associate without triggering the general prohibition. Commercially, there may be a significant difference between a person having a relevant interest in shares in a company and the person's associate having a relevant interest. An acquisition from an associate may effect a change of control of a company—a matter with which s606 is concerned.
- RG 5.106 Section 610(3) addresses this situation by deeming that, for the purposes of the general prohibition, a person's voting power increases when they acquire a relevant interest in voting shares if, before the acquisition, an associate had a relevant interest in the shares but the person did not. This brings the acquisition within the scope of the prohibition.

Corporate groups

- RG 5.107 Members of a corporate group are generally associates of each other: see s12(2)(a). As such, under s610(3), the voting power of a group company may be deemed to have increased because it acquires securities from another group company.
- RG 5.108 However, s610(3) only operates when the person acquiring the relevant interest does not have a relevant interest before the transaction. Because of the overlap between the definition of 'associate' in s12(2)(a) and the deeming provision in s608(3), in many cases, the group company acquiring the voting shares will already have a relevant interest in the voting shares: see RG 5.47–RG 5.55. Section 610(3) will not be triggered if s608(3) applies, such that the acquiring group company already has a relevant interest.
- RG 5.109 Table 5 demonstrates how s608(3) and 610(3) apply to acquisitions within a corporate group.

Table 5: Acquisitions within a corporate group: s608(3) and 610(3)

Acquisition	Application of s608(3) and 610(3)
Acquisition from a sibling company	<p>Section 610(3) is not triggered by an acquisition of securities from a sibling company because, under s608(3), the acquirer will be deemed to have a relevant interest in the securities of its sibling.</p> <p>Under s608(3)(a), a person is deemed to have the relevant interest of a body corporate in which the person's voting power is over 20%. The acquirer has voting power of over 20% in its sibling because its holding company's votes in the sibling are counted in the acquirer's voting power: see s610(1). The holding company is the acquirer's associate.</p>

Acquisition	Application of s608(3) and 610(3)
Acquisition by a subsidiary from an intermediate company	<p>Section 610(3) is not triggered by an acquisition of securities by a subsidiary from its holding company, if the holding company is an intermediate company in the group.</p> <p>The subsidiary already has the relevant interest in the securities that the intermediate company has because of s608(3). The subsidiary has voting power of over 20% in the intermediate company. The subsidiary has the voting power of the ultimate holding company in the intermediate company. The ultimate holding company is the subsidiary's associate.</p>
Acquisition by a subsidiary from its ultimate holding company	<p>Section 610(3) is triggered when a subsidiary acquires securities from the ultimate holding company.</p> <p>Section 608(3) does not apply. A subsidiary does not have voting power of over 20% in its ultimate holding company: see s608(3)(a). Nor does the subsidiary control its ultimate holding company: see s608(3)(b).</p>

Acquisitions within a group

- RG 5.110 As set out in Table 5, an acquisition by a subsidiary from its ultimate holding company will generally result in the subsidiary's voting power increasing for the purposes of the general prohibition threshold because of the operation of s610(3).
- RG 5.111 However, an acquisition of securities by one group company from another should not trigger the general prohibition threshold. Unless the transfer increases the voting power of a person outside the group, it cannot change ultimate control over the issuer of the securities.
- RG 5.112 Section 610(3A) operates so that a subsidiary that acquires securities from its holding company is not taken to have increased its voting power as a result of the acquisition. The exception effected by s610(3A) applies to any transfer from a holding company (not just an ultimate holding company).
- RG 5.113 Section 610(3A) does not apply where, as a result of the acquisition, the voting power of a person outside the group increases. A person is outside the group if they are not a subsidiary of the ultimate holding company.
- RG 5.114 This underlines the existing position under the Corporations Act that an acquisition by a subsidiary from its holding company can result in a breach of the general prohibition threshold if the subsidiary, or a group company in another part of the group:
- (a) has a holder outside the group with voting power of over 20% or with control (s608(3)); or
 - (b) has an agreement with a person outside the group for the purpose of controlling the issuer of the securities.

Associates

- RG 5.115 A number of people may be taken to be associates for the purposes of the takeover, substantial holding and compulsory acquisition provisions.
- RG 5.116 The associate concept is applied in a variety of contexts in Chs 6–6C where the objective of a relevant provision necessitates that persons are treated as a group on the basis of their relationship, common interests or concerted objectives.
- RG 5.117 The relevant interests of associates must be considered when calculating a person’s voting power: see s610. The relevant interests and deemed economic interests of associates must be considered when determining whether a person has a substantial holding that must be disclosed in a substantial holding notice: see s9, 671D and 671BB. Persons who collectively acquire securities cannot avoid the general prohibition, or the requirement to disclose details of substantial holdings, because all voting shares are treated as a single bloc.
- RG 5.118 Further, associates of a person are excluded from taking certain actions that the person themselves cannot take—including giving an escalating or collateral benefit (s622 and 623) or voting on a resolution to approve an acquisition under item 7 of s611. The actions of a person’s associate are also equated to those of the person in some cases—for example, the minimum bid price rule in s621(3) and the prohibition on certain defeating conditions in s629. The associate is grouped with the person, in these circumstances, because they may not be acting independently.

Relationships giving rise to an association

- RG 5.119 Section 12 defines the relationships and circumstances giving rise to an association for the purposes of Chs 6–6C and related references. Table 6 sets out the bases on which a person may be an associate under s12.

Table 6: Relationships giving rise to an association under s12

Relationship	Details
Bodies corporate—control or common control: s12(2)(a)	A body corporate is an associate of another body corporate if it controls, or is controlled by, the other body corporate, or both bodies corporate are controlled by the same entity (including a natural person).
Relevant agreement: s12(2)(b)	A second person is associated with the first person if the second person is a person with whom the first person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body’s board or the conduct of the designated body’s affairs.

Relationship	Details
Acting in concert: s12(2)(c)	A second person is associated with the first person if the second person is a person with whom the first person is acting, or proposing to act, in concert in relation to the designated body's affairs.

Note: The defined relationships apply to managed investment schemes with the necessary modifications to references to voting shares and to controlling or influencing the composition of the board: see s12(3).

Bodies corporate—Control or common control

RG 5.120 Under s12(2)(a), a body corporate is an associate of another body corporate if:

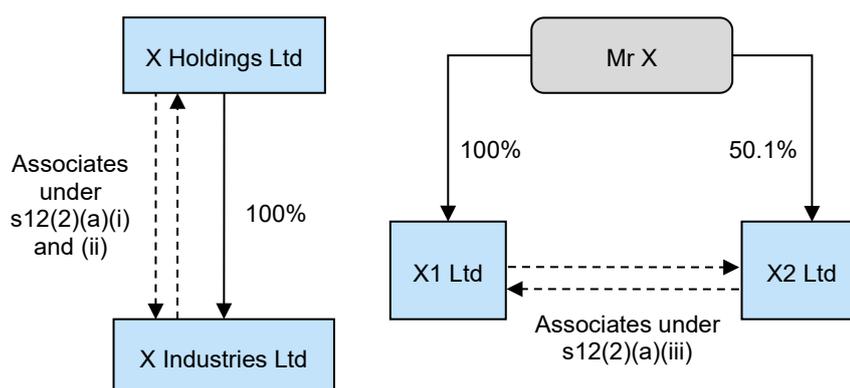
- it controls, or is controlled by, the other body corporate (s12(2)(a)(i) and (ii)); or
- both bodies corporate are controlled by the same entity (s12(2)(a)(iii)).

Note: Section 50AA defines when an entity controls another.

RG 5.121 The 'entity' in common control of the two bodies corporate for the purposes of s12(2)(a)(iii) may be either a natural person, another body corporate (other than an exempt public authority), a partnership or a trust (and in the case of a trust, may include the trustee of the trust): see s64A.

RG 5.122 Figure 3 illustrates how some associate relationships may arise between bodies corporate under s12(2)(a).

Figure 3: Associations arising from control and common control of bodies corporate



All figures show direct holdings of voting shares (%).

Note: Figure 3 is explained in RG 5.123–RG 5.124 (accessible version).

RG 5.123 Figure 3 shows X Holdings Ltd has 100% direct shareholdings in X Industries Ltd. X Holdings Ltd and X Industries Ltd are associates under s12(2)(a)(i) and (ii) because X Holdings Ltd controls X Industries Ltd. It also shows Mr X has 100% direct shareholdings in X1 Ltd and 50.1% direct

share holdings in X2 Ltd. X1 Ltd and X2 Ltd are associates under s12(2)(a)(iii) because they are both controlled by Mr X.

- RG 5.124 Although Mr X controls X1 Ltd and X2 Ltd, he is not an associate of these entities on the basis of s12(2)(a) as this provision only operates to define bodies corporate as associates. However, Mr X would be deemed to have the relevant interests that X1 Ltd and X2 Ltd have due to the operation of s608(3): see RG 5.36–RG 5.55.

Note: Despite the fact that Mr X is not an associate on the basis of s12(2)(a), he may still be associated with X1 Ltd and X2 Ltd under s12(2)(b) or (c) (i.e. if he has entered into a relevant agreement or is acting in concert with those entities): see RG 5.125–RG 5.132.

Relevant agreements and acting in concert

- RG 5.125 Under s12(2), a person may be an associate of another person with respect to a body if:

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

Note: In relation to a matter relating to securities in a body or managed investment scheme, the person may be an associate of the issuer of the securities and vice versa: see s12(4).

- RG 5.126 The circumstances in which an association may arise on the basis of a 'relevant agreement' under s12(2)(b) and 'acting in concert' under s12(2)(c) will often involve a significant overlap. This is because a 'relevant agreement' is defined broadly to include any agreement, arrangement or understanding, whether formal or informal, written or oral, and regardless of whether it is enforceable at law or in equity: see s9. An understanding of this kind will often form a necessary part of concerted action: see *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No 4)* (1984) 2 ACLC 829 at 832.

- RG 5.127 'Acting in concert' connotes knowing conduct the result of communication between the parties—not simultaneous actions which occur spontaneously (or coincidentally).

Note: See *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 373; *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501 (*Bank of Western Australia*) at 524; *Bateman v Newhaven Park Stud Ltd* (2004) 49 ACSR 597 at [33]; and *Perpetual Custodians Ltd v IOOF Investment Management Ltd* (2012) 91 ACSR 530 at 542–543.

- RG 5.128 It contemplates a consensus between parties as to a common purpose or objective. As with a 'relevant agreement', the understanding need not be formal or enforceable, and it is not essential that parties are committed to it or bound to support it—but there must be some adoption of it: see *Bank of Western Australia* at 542 and RG 5.29–RG 5.32.

RG 5.129 It is also unnecessary for a person to be doing or performing any physical or overt act to be ‘acting in concert’. A person need only be ‘engaged in a concert’: see *Industrial Equity Ltd v Commissioner for Corporate Affairs (Vic)* (1989) 1 ACSR 153 at 159.

Affairs of a body corporate

RG 5.130 An association under s12(2)(b) and (c) is concerned with the affairs of a body or managed investment scheme. The affairs of a body corporate extend, but are not limited, to the wide variety of affairs referred to in s53: see reg 1.0.18 of the Corporations Regulations. These include:

- (a) the promotion, formation, membership, control, business, trading, transactions and dealings, property, liabilities, profits and other income, receipts, losses, outgoings and expenditure of the body;
- (b) the internal management and proceedings of the body;
- (c) the ownership of shares, debentures and interests in a managed investment scheme made available by the body; and
- (d) the power of persons to exercise, or control the exercise of, voting or disposal of shares.

Drawing inferences from indicia of an association

RG 5.131 The nature and basis of many associate relationships mean that, in considering whether a relevant agreement exists, or whether parties are acting in concert, it will often be necessary to draw inferences from matters such as partial evidence, patterns of behaviour and a lack of a commercially viable explanation for the impugned circumstances: see *Winepros Ltd* [2002] ATP 18 at [27] and *Dromana Estate Ltd OIR* [2006] ATP 8 at [25].

RG 5.132 Circumstances that may be relevant in determining whether an association is likely to exist include:

- (a) a shared goal or purpose of the parties involved;
- (b) prior collaborative conduct;
- (c) structural links (including trust arrangements, common directorships, family ties and business relationships);
- (d) common investments and dealings;
- (e) common knowledge of relevant facts; and
- (f) actions or dealings that are uncommercial.

Note: See *Viento Group Ltd* [2011] ATP 1 at [120], considering factors in *Mount Gibson Iron Limited* [2008] ATP 4. See also *CMI Limited* [2011] ATP 4.

Exclusions from the definition of ‘associate’

- RG 5.133 Section 16(1) excludes from the definition of ‘associate’ in s12, associate relationships arising merely because:
- (a) one person gives advice to the other or acts on the other’s behalf in the proper performance of the functions attaching to a professional capacity or a business relationship;
 - (b) one person (a client) gives to another person, whose ordinary business includes dealing in financial products on the client’s behalf (broker), specific instructions to acquire financial products on the client’s behalf in the ordinary course of that business;
 - (c) one person has sent, or proposes to send, to the other an offer under a takeover bid for shares held by the other; or
 - (d) one person has appointed the other (other than for valuable consideration given by the other person or by an associate of the other person) to vote as a proxy or representative at a meeting of members, or a class of members, of a body corporate.
- Note: See also [ASIC Instrument 2023/194](#), which modifies s12(2) so that the ‘associate’ concept does not apply where one of the persons in an associate relationship or arrangement is ASIC (e.g. where ASIC and another person enter into a relevant agreement that would otherwise give rise to an association).

- RG 5.134 The exclusions only apply to associate relationships that would arise ‘merely because’ of the particular circumstances described. A person may still be an associate on account of understandings, arrangements or other connections falling outside those specified in s16(1).

Disposal rights giving rise to an association

- RG 5.135 It is possible that a person who enters into an agreement that includes a disposal right may become associated with the counterparty under s12(2)(b) or (c), taking into account the definition of ‘affairs of a body corporate’ in s53. Examples of agreements that contain disposal rights are:
- (a) an on-market or off-market share acquisition agreement;
 - (b) an agreement for the acquisition of an equity derivative, whether entered into or acquired on-market or off-market;
 - (c) a pre-bid acceptance agreement (under which the bidder agrees with a holder that the holder will accept the bidder’s offer);
 - (d) a listing rule or voluntary escrow; and
 - (e) a pre-emptive right or right of first refusal.
- RG 5.136 Section 53 was originally intended to apply in the insolvency context and some of the paragraphs are more difficult to apply in the associate context. Other paragraphs are easier to read with s12. A disposal right may create an

association because of references in s53 to the ‘ownership of shares’ or the ‘power of persons to dispose of or exercise control over the disposal of shares’: see s53(e) and (f).

- RG 5.137 If the definition of ‘associate’ applies to a disposal right, a party would be taken to have voting power not only in the securities that are the subject of the disposal right, but all securities held by the other party.

Relevant agreements for disposal

- RG 5.138 Section 12(2A) modifies the definition of ‘associate’ in s12(2)(b) and (c) to make it clear that parties to a relevant agreement are not associates merely because the agreement contains a provision giving a party the right to dispose of securities in the designated body or to control the exercise of a power to dispose of the securities.
- RG 5.139 The ‘associate’ concept groups together persons with a common purpose in relation to a company. It aims to ensure that a person is not treated as acting independently from a person with whom they are in fact cooperating.
- RG 5.140 A disposal right is not, in itself, an indication that the parties have a common purpose or objective in relation to the broader direction or destiny of the company. The parties may not be seeking to achieve any more together than to simply acquire and dispose of securities.

Relevant interests

- RG 5.141 A disposal right gives rise to a relevant interest for the person who has the ability to dispose, or control the disposal of, the securities that are the subject of the right: see s608. Section 12(2A) affects only the potential association between the parties, and not the relevant interest arising from the disposal right. As a result, a party’s voting power may still increase—but only on the basis of the acquisition of a relevant interest in the securities that are the subject of the agreement.

Circumstances where the disposal right exception does not apply

- RG 5.142 Section 12(2A) only relates to a disposal right. It does not operate in relation to any other provision of an agreement or any other relevant agreement between the parties that indicates the parties have a common purpose in relation to a company or otherwise gives rise to an association.
- RG 5.143 Examples of circumstances where s12(2A) would not apply are when there is another term in the agreement or another agreement that:
- (a) the parties will seek to remove one or more of the directors;
 - (b) one party will vote for the appointment of a director nominated by the other party;

- (c) the disposal right is conditional on such board changes;
- (d) is concerned with dividend policy;
- (e) is concerned with the future sale or acquisition of an asset by the company to or from a party;
- (f) a party will vote in favour of, or against, a corporate action (e.g. in favour of the issue of options or against liquidation);
- (g) the parties will consult on voting; or
- (h) the person who disposes of securities under the relevant agreement will continue to play a role in directing the company, whether through representation on the board or otherwise.

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D Derivatives: Deemed economic interests in securities

Key points

Equity derivatives are financial arrangements where the value of the arrangement, or the consideration that is to be provided at a future date, is at least partly derived from one or more underlying equity securities.

A deemed economic interest may be deemed to arise where:

- equity securities in a listed entity underlie the derivative; and
- the derivative is either physically settleable or non-physically settleable.

There are three general tests to consider when determining whether a person has a deemed economic interest that must be disclosed to the market:

- the basic rule;
- the extensions to the basic rule; and
- the exceptions.

What are equity derivatives?

RG 5.144 Equity derivatives are financial arrangements where the value of the arrangement—or the consideration that must (or may) be provided at a future date under the arrangement—is partly determined in reference to underlying equity securities. They include instruments such as swaps, forwards, futures and options.

RG 5.145 Typically, equity derivatives are either:

- (a) physically settled—meaning that one party has a right to purchase or take delivery of the actual underlying securities; or
- (b) non-physically settled (e.g. cash-settled)—meaning that one party is entitled to receive a payment linked to the value of the underlying securities.

Equity derivatives may also be structured to allow a party to elect whether the arrangement will be physically or non-physically settled or specify different settlement methods for part of the arrangement.

RG 5.146 Parties to an equity derivative are generally referred to as:

- (a) the writer—the person who agrees to provide the derivative by entering into the agreement, often in exchange for a fee or premium (e.g. an investment bank); and
- (b) the taker—the person for whose benefit, or at whose request, the derivative was created (e.g. the client).

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RG 5.147 The party to an equity derivative who will benefit from an increase in the price of the underlying security is generally referred to as the person in the *long position*. The party who will benefit from a decrease in the price of the underlying security is referred to as the person in the *short position*. Either the writer or taker may be in the long position under a derivative contract with the other party being in the short position.

RG 5.148 Equity derivatives often create an economic incentive for the writer of a derivative to acquire or maintain a holding of underlying securities as a hedge against their exposure. Even if the equity derivative is not physically settleable, the creation and control of this inherent incentive gives the taker of a derivative a level of indirect influence over the availability and pricing of underlying securities that warrants disclosure to the market.

Note: See the explanatory memorandum for the [Treasury Laws Amendment \(Strengthening Financial Systems and Other Measures\) Bill 2025](#) at paragraphs 1.28–1.30 and Takeovers Panel Guidance Note 20 *Equity Derivatives* ([GN 20](#)) at paragraph 7.

RG 5.149 The indirect influence arising from the use of equity derivatives can have significant implications leading up to or during a control transaction such as a takeover bid or scheme of arrangement. Rather than seeking to secure a pre-bid stake in the securities of a target entity, bidders may enter into equity derivatives such as non-physically settled swaps or call options over the issued securities of the target.

RG 5.150 The reduction in the availability of a target's securities (or free float) when the person in the short position hedges their position can therefore act as an effective blocking stake particularly where the derivative is in respect to a large percentage of the listed entity's securities. This level of indirect influence allows a bidder to prevent other competing bidders from mounting a complete takeover that can proceed to compulsory acquisition and is typically sufficient to vote down a scheme of arrangement.

RG 5.151 The 'deemed economic interest' concept introduced by Pt 6C.1A of the Corporations Act captures a person's indirect influence over a listed entity's securities and specifies how those interests should be calculated and when they must be disclosed as part of the substantial holding disclosure requirements.

Applying the deemed economic interest definition

RG 5.152 Sections 671AA–671AQ define when a person has and does not have a deemed economic interest in securities because of:

- (a) a physically settleable derivative; and
- (b) a non-physically settleable derivative.

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- RG 5.153 Under these provisions, a person must consider and apply three general tests:
- (a) whether a person has a deemed economic interest under the *basic rule*;
 - (b) whether a person is considered to have a deemed economic interest under the *extensions to the basic rule*; and
 - (c) whether the situation giving rise to the deemed economic interest falls within one of the *exceptions*.
- RG 5.154 Table 7 summarises these tests for physically settleable and non-physically settleable derivatives, as applied in s671AA–671AJ, and includes a cross-reference to further discussion of each aspect in this guide.

Table 7: Summary of the deemed economic interest concept for physically settleable and non-physically settleable derivatives

Test	Description	Reference
1. The basic rule		
The basic rule for physically settleable derivatives: s671AA	<p>This is the general rule which determines whether a connection a person has with an interest in a physically settleable equity derivative gives rise to a deemed economic interest.</p> <p>Under the rule, the taker of an equity derivative is considered to have a deemed economic interest in the number of securities that is equivalent to:</p> <ul style="list-style-type: none"> • the number that they would have at the time of settling a physically settleable equity derivative; and • excluding the number that they already have a relevant interest in under s608(8). 	RG 5.157
The basic rule for non-physically settleable derivatives: s671AF and 671AK	<p>This is the general rule which determines whether a connection a person has with an interest in a non-physically settleable equity derivative gives rise to a deemed economic interest.</p> <p>Under the rule, the taker of an equity derivative is considered to have a deemed economic interest in the number of securities specified in or calculated in accordance with the method specified in <i>ASIC Corporations (Listed Entities Enhanced Beneficial Ownership) Instrument 2026/XXX</i>.</p>	RG 5.158
2. Extensions to the basic rule		
Deemed economic interests where a person has control or the power to dispose of a derivative: s671AB and 671AG	A person is considered to have a deemed economic interest because of a derivative if they have the power to dispose of—or control the exercise of the power to dispose of—that derivative.	RG 5.175–RG 5.179

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Test	Description	Reference
Deemed economic interests held through bodies corporate: s671AC and 671AH	A person is considered to have the same deemed economic interest that a body corporate or managed investment scheme has if they have over 20% voting power or control of the body corporate or scheme. A person may have a deemed economic interest through a chain of companies or schemes.	RG 5.180–RG 5.182
Deemed economic interest in anticipation of performance of agreements etc: s671AD and 671AI	If a person (the <i>first person</i>) acquires a deemed economic interest because of a derivative and: <ul style="list-style-type: none"> enters into an agreement or understanding in relation to the derivative; or is granted enforceable rights or options in relation to the derivative, regardless of the time for performance or exercise, that would later give another person a deemed economic interest if the agreement was performed, right enforced or option exercised—then that other person’s offsetting short position is brought forward to the present time.	RG 5.183–RG 5.185
No double counting: s671AE and 671AJ	To avoid double counting, the extension provisions do not confer a deemed economic interest if a person already has a relevant interest in the securities that would be provided under the equity derivative at settlement. This ensures any deemed economic interest is only counted once when applying the basic rules in combination with the extension provisions.	RG 5.186–RG 5.188
3. Exceptions		
Exceptions: s671AL–671AQ	In certain cases, despite the basic rule and the extended rules, a person is taken not to have a deemed economic interest because of a particular situation. These exceptions apply on their terms and do not prevent a person having a deemed economic interest because of another connection falling outside the exception.	RG 5.189–RG 5.191
Exceptions supplemented by ASIC: s655, 671AK and 673	The exceptions can also be supplemented by ASIC through: <ul style="list-style-type: none"> our existing exemption and modification powers (s655A and 673); and our ability to prescribe that in certain circumstances the number of deemed economic interests arising under a non-physically settleable derivative—or the extension provisions relating to a non-physically settleable derivative—is zero: see s671AK and ASIC Instrument 2026/XXX. 	None

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Convertible notes and options to issue securities

- RG 5.155 Certain financial instruments such as convertible notes or options to acquire a security ‘by way of issue’ will not give rise to a deemed economic interest as they are not considered to be ‘derivatives’ due to the combined effect of s92(5)(d), 761D(3)(c) and 764A(1)(a). Section 671AA(2)(b) further clarifies that securities issued as part of the consideration under a derivative are not counted for the purposes of determining a person’s deemed economic interest.
- RG 5.156 These financial instruments will generally be excluded from the operation of the deemed economic interest provisions discussed below and would follow the historical treatment of options for the issue of new securities discussed at RG 5.246.

The basic rule for deemed economic interests

Physically settleable derivatives

- RG 5.157 For physically settleable derivatives, the basic rule in s671AA is that a person has a deemed economic interest in securities in a listed entity where:
- (a) a person (the *first person*):
 - (i) enters an agreement with another person;
 - (ii) gives another person an enforceable right, or is given an enforceable right (regardless of the time for performance or exercise); or
 - (iii) grants an option to, or is granted an option by, another person; and
 - (b) the agreement, enforceable right or option is or relates to a derivative;
 - (c) under the derivative, the first person is required to provide at some future point in time consideration that would result in the other person having a relevant interest in securities of a listed entity: see s671AA.

Note: To ensure there is no double counting, a person is taken to have a deemed economic interest in the securities (described in RG 5.186– RG 5.188) to the extent that the other person already has a relevant interest, or securities that would be issued as, or as part of, the consideration: see s671AA(2).

Non-physically settleable derivatives

- RG 5.158 For non-physically settleable derivatives, the basic rule in s671AF is that a person has a deemed economic interest in securities in a listed entity where:
- (a) a person (the *first person*) enters an arrangement with another person;
 - (b) the arrangement is a derivative;

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- (c) the consideration that the first person is to provide someone under the derivative at some future point in time—or the value of the derivative—is ultimately determined by, or varies by reference to, the value of the underlying securities; and
- (d) the other person either:
 - (i) obtains, in economic substance, the financial benefits of holding, for a period, securities in a class of securities (being the securities that the derivative references); or
 - (ii) might otherwise benefit if the value of the securities the derivative references increases (typically, the person would benefit by being in the equivalent of the long position in relation to the derivative).

RG 5.159 In relation to a non-physically settleable derivative, the taker of that derivative will generally receive a cash pay-off referable to the value of underlying securities but has no express right or option to receive the underlying securities themselves at settlement. In this situation, the basic rule will typically result in the taker of the derivative acquiring a deemed economic interest in a theoretical holding of underlying securities in the relevant class.

Note: Section 671AF can also apply to non-physically settleable derivatives over other derivatives (e.g. a non-physically settleable derivative the underlying of which is either a physically settleable derivative or another non-physically settleable derivative).

RG 5.160 The number of underlying securities a person is taken to have a deemed economic interest in, in relation to a non-physically settleable derivative, is specified and calculated in accordance with sections 6–16 of ASIC Instrument 2026/XXX.

RG 5.161 Table 8 sets out the calculative method for the number of issued securities in which a person has a deemed economic interest.

Table 8: Overview of calculative methods for deemed economic interests

Derivative type	Summary of calculative method
Where a person holds a non-physically settleable derivative referencing issued securities in a listed entity with a linear, symmetric pay-off profile	The deemed economic interest is equal to the full notional amount of securities underlying the derivative.
Where a person holds a non-physically settleable derivative referencing issued securities in a listed entity that does not have a linear, symmetric pay-off profile	The deemed economic interest is equal to the delta of the derivative as calculated under a generally accepted standard pricing model multiplied by the full notional amount of securities underlying the derivative. Note: A 'generally accepted standard pricing model' is defined in section 7 of ASIC Instrument 2026/XXX. See also RG 5.166–RG 5.169 for further information.

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Derivative type	Summary of calculative method
Where the benefit under a derivative is determined by reference to a basket or index of assets that includes securities	<p>The deemed economic interest must be calculated based on the weight of the relevant security in the basket or index out of the total value of securities in the basket or index.</p> <p>The number of issued securities in a class of underlying issued securities in which a person has a deemed economic interest is zero if:</p> <ul style="list-style-type: none"> • the number of issued securities in that class in which the person has a deemed economic interest represents less than 5% of the total securities in that class that are on issue; or • the securities in that class in the basket or index represent less than 20% of the total value of securities in the basket or index.
RG 5.162	<p>In calculating a person's deemed economic interest for a non-physically settleable derivative, section 8(2) of ASIC Instrument 2026/XXX clarifies that only benefits where the value of the underlying securities increases (rather than decreases) as referred to in s671AF(1)(d) are to be counted. When read together with s671AF(2)–(4), the effect is that deemed economic interest must not be netted against a person's offsetting short position.</p>
RG 5.163	<p>Section 16 of ASIC Instrument 2026/XXX further provides that the number of issued securities a person has a deemed economic interest or offsetting short position in must be:</p> <ol style="list-style-type: none"> (a) calculated daily; and (b) if the derivative does not have a linear, symmetric payoff profile—calculated: <ol style="list-style-type: none"> (i) using a single generally accepted standard pricing model that is applied consistently; and (ii) based on the most recent closing price of the underlying issued securities as published by the operator of the declared financial market on which the listed entity is included in the official list as a primary listing. <p>Note: While daily calculation is required, reporting may only be triggered where there is a disclosable movement of more than 1% or the person begins or ceases to have a substantial holding.</p>
RG 5.164	<p>In addition, where a derivative is partially non-physically settleable and partially physically settleable, the calculation method outlined in this section applies only to the non-physically settleable portion.</p>
RG 5.165	<p>However, where a derivative includes a right to be physically settled, it will generally be captured by the operation of s671AA(1)(c) and must be treated as a physically settleable derivative. The derivative should be treated as</p>

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physically settled to the maximum extent of the available right to settle the derivative in physical securities.

Generally accepted standard pricing model

RG 5.166 A generally accepted standard pricing model in relation to a non-physically settleable derivative means a pricing model that is generally accepted in the Australian financial services industry as a model used to price the type of derivative and that takes into account the following matters to the extent they are relevant to the pricing of the derivative:

- (a) an interest rate;
- (b) dividend payments in relation to the underlying issued securities;
- (c) time to maturity of the derivative;
- (d) the volatility of the price of the underlying issued securities; and
- (e) the price of the underlying issued securities (see section 7 of ASIC Instrument 2026/XXX).

RG 5.167 This principles-based approach is intended to set out minimum criteria that must be considered when selecting a pricing model while preserving sufficient flexibility to accommodate the diverse constellation of equity derivatives in the market. This approach also ensures that professional investors who already possess the means to undertake these calculations can apply familiar methods already in place.

RG 5.168 We expect that for the vast majority of non-physically settleable derivatives (including vanilla cash-settled options, swaps and market traded futures) determining the generally accepted pricing model will remain uncontroversial and be assisted by well-established industry consensus. For example:

- (a) the Black-Scholes Model, and its extensions, are often used to price European-style options (i.e. options that may only be exercised at an agreed expiration date);
- (b) the Monte Carlo simulations model is often used to price American-style options (i.e. options that may be exercised at any point up to their expiration); or
- (c) a binomial model may be used to value either type of option.

This list is not exhaustive, and other exotic derivatives may require more complex models or adjustments to the above models to properly account for their structure.

RG 5.169 Market participants seeking to depart from typical pricing models to account for more complex financial instruments should consider whether there is sufficient basis to adopt their selected model in light of industry practice.

Model inputs

- RG 5.170 ASIC expects market participants to ensure that the inputs and information relied on for the purposes of using the selected pricing model:
- (a) aligns with industry practice;
 - (b) properly accounts for the characteristics of the derivative; and
 - (c) maintains consistency to achieve accurate pricing under the model.
- RG 5.171 For both observable and unobservable inputs, we expect market participants to use the best information available, including up-to-date market data.
- RG 5.172 Market participants should not select a pricing model that is less suitable for the type of derivative or introduce variations to the model that depart from generally accepted industry practice to avoid sourcing appropriate information required for a model's inputs that would otherwise enable accurate pricing.
- RG 5.173 It is not sufficient to merely rely on freely available public information where additional information is required to accurately price a derivative under a generally accepted pricing model, such as access to appropriate indexes and financial benchmarks. These may not be publicly available and may require professional vendor access or the payment of licensing fees.

Other provisions

- RG 5.174 For the avoidance of doubt, the deemed economic interest provisions in the Corporations Act may result in a body having a deemed economic interest in its own securities: see s671AR.

Extension to the basic rule: Controlling disposal of derivatives

- RG 5.175 In addition to any deemed economic interests arising under the basic rule, a person may be considered to have a deemed economic interest in securities because of a derivative where they have the power to dispose, or to control the exercise of a power to dispose, of the derivative: see s671AB(1)–(3) and 671AG(1)–(3).
- RG 5.176 If two or more people can jointly exercise a power described, each are taken to have the power: see s671AB(1) and 671AG(1).

The broad nature of power or control

- RG 5.177 The nature of the power or control over disposal that may give rise to a deemed economic interest is deliberately cast in wide terms to ensure that the disclosure requirements are not circumvented.

- RG 5.178 Sections 671AB(3) and 671AG(3) extend to power or control that:
- (a) is indirect;
 - (b) may be exercised alone or jointly with someone else;
 - (c) does not relate to a particular derivative;
 - (d) may be made subject to restraint or restriction; and/or
 - (e) may be exercised through, or counter to, a trust, agreement or practice (in combination or otherwise and whether enforceable or not).
- RG 5.179 For further guidance about the broad nature of the power or control over disposal, see RG 5.25–RG 5.32.

Extension to the basic rule: Interests in a body corporate or managed investment scheme

- RG 5.180 In addition to any deemed economic interests arising under the basic rule, a person may be considered to have the same deemed economic interest in any securities that certain connected bodies corporate or managed investment schemes have.
- RG 5.181 Under s671AC(3) and s671AH(3), a person is taken to have the same deemed economic interest as:
- (a) a body corporate, or managed investment scheme, in which the person's voting power is over 20% (s71AC(1)(a) and s671AH(1)(a)); or
 - (b) a body corporate, or managed investment scheme, that the person controls (s671AC(1)(b) and s671AH(1)(a)).
- Note: For more information about the meaning of 'control', see s671AC(4)–(7) and RG 5.38–RG 5.41. For more information about the operation of the deeming provisions through a chain of bodies corporate or managed investment schemes, see RG 5.42–RG 5.62.
- RG 5.182 However, the voting power requirements in s671AC(1)(a) and 671AH(1)(a) do not apply to deemed economic interests that the body corporate, or managed investment scheme, is itself deemed to have merely because of this provision (i.e. merely on account of a voting power of more than 20% in another body corporate or scheme): see s671AC(2) and 671AH(2).

Extension to the basic rule: Anticipation of performance of agreement or exercise of right or option

- RG 5.183 The deemed economic interest concept is extended by s671AD and 671AI. Under these sections, a person is taken to have a deemed economic interest in issued securities where:
- (a) another person (the *first person*) has a deemed economic interest in the issued securities of a particular class of a listed entity because of a derivative;

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- (b) whether before or after acquiring the deemed economic interest, the first person has:
 - (i) entered or enters into a relevant agreement with another person with respect to the derivative;
 - (ii) given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the derivative (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition); or
 - (iii) granted or grants an option to, or has been or is granted an option by, another person with respect to the derivative;
- (c) the person is taken to already have a deemed economic interest in the securities if they would have the interest on performance of the agreement, enforcement of the right or exercise of the option.

- RG 5.184 In the circumstances described above, the number of securities a person has a deemed economic interest in is determined by:
- (a) for physically settleable securities—the number of issued securities of that class described in RG 5.157; and
 - (b) for non-physically settleable securities—the number of issued securities as determined by ASIC in ASIC Instrument 2026/XXX.
- RG 5.185 The operation of extension provisions for deemed economic interests mirrors the foundational ‘accelerator provisions’ discussed at Section B in respect to relevant interests. As such, s671AD and 671AI only operate where the person who enters into the agreement, gives the enforceable right or grants the option has a deemed economic interest in securities themselves.

Extension to the basic rule: No double counting

- RG 5.186 The extension provisions generally result in a person acquiring deemed economic interests in the same number of underlying securities that arise under the ‘basic rule’ (unless under an agreement, right or option covered by the third extension, the person would acquire a deemed economic interest in a lesser number of securities at settlement or upon exercise or enforcement).
- RG 5.187 ASIC has only determined a method for calculating the number of securities in relation to the basic rule for non-physically settleable derivatives in s671AF. The same method should be applied when calculating the number of securities wherever the extension provisions under s671AG, 671AH or 671AI apply.
- RG 5.188 However, to avoid any double counting, s671AE and 671AJ provide that the extension provisions do not confer a deemed economic interest if that person already has a relevant interest in the securities that would be provided under the equity derivative at settlement. The double-counting provisions also ensure any deemed economic interest is only counted once when applying the basic rules in combination with the extension provisions.

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Exceptions

- RG 5.189 Sections 671AL–671AQ set out a few situations in which a person is taken not to have a deemed economic interest. These are exceptions to the basic rule and extensions described above.
- RG 5.190 These exceptions only apply to deemed economic interests arising merely because of the particular situation or circumstance. A person may still have a deemed economic interest because of other connections, or aspects of relevant arrangements or affairs falling outside the specified situation or circumstance.
- RG 5.191 Table 9 outlines the exceptions that should be taken into account in determining whether a person has a deemed economic interest in securities for the purpose of the substantial holding and director disclosure requirements. The table also includes cross-references to further discussion and guidance, where applicable.

Table 9: Exceptions to the deemed economic interest concept

Exception	Situation not giving rise to a deemed economic interest	Reference
Money lending and financial accommodation	Security interests are taken or acquired in the ordinary course of a non-associated person's business of providing financial accommodation on ordinary commercial terms.	s671AL
Bare trustee	Bare trustees (including nominees) where a beneficiary under the trust has a deemed economic interest because of a presently enforceable and unconditional right of the kind referred to in s671AD or 671AI.	s671AM
Directors of bodies corporate	Directorship of a body corporate, which, in itself, does not give rise to a deemed economic interest in securities in which the body corporate has a deemed economic interest.	s671AN
Market making and client services	ASIC has prescribed that a deemed economic interest in underlying securities does not arise in certain circumstances relating to financial services licensees that are in the business of client facing services and other activities such as market making.	s671AO, sections 17–22 of ASIC Instrument 2026/XXX. See also RG 5.192–RG 5.199 for additional guidance
Arrangements between related bodies corporate	Where the only persons who would have a deemed economic interest under a derivative are all related bodies corporate. Note: For a definition of 'related bodies corporate', see s50 of the Corporations Act.	s671AP
Prescribed exclusions	Where the regulations prescribe circumstances where a person does not have a deemed economic interest.	s671AQ

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Exceptions for market making and client facing services

- RG 5.192 ASIC has prescribed that a deemed economic interest or offsetting short position in underlying securities does not arise in circumstances where any of the following deal with, or enter into, derivatives in the ordinary course of business:
- (a) an AFS licensee authorised to deal in derivatives that does so for the purpose of:
 - (i) facilitating a client obtaining economic exposure to changes in the value of an entity's securities at the client's request;
 - (ii) hedging (on an aggregate basis) an economic position of the licensee that has resulted from the licensee facilitating the obtaining of economic exposure by a client; or
 - (iii) otherwise managing a risk of the licensee that has resulted from the licensee facilitating the obtaining of such an economic exposure by a client;
 - (b) an AFS licensee authorised to make a market in derivatives or securities, that deals with derivatives for the purpose of hedging an economic position of the licensee that has resulted from the licensee making a market in derivatives or securities;
 - (c) a CS facility licensee that enters into a derivative for the purposes of facilitating a client who is a participant in the facility, at the participant's request, obtaining economic exposure to changes in the value of securities in a listed entity; or
 - (d) an entity equivalent under foreign law to the licensees referenced in RG 5.192(a) that deals in derivatives in the circumstances described in those paragraphs.
- RG 5.193 In each case the exempt licensee must have adequate systems to identify the derivatives or transactions to which the exemption applies and dealing with the derivative must not be reasonably capable of giving the licensee capacity to determine or influence the affairs of the listed entity.
- RG 5.194 Financial services entities who engage in the business of client facing services and other activities such as market making, trade in physically settled and cash-settled derivatives very frequently.
- RG 5.195 When financial services entities enter into equity derivative transactions in this context, it is often driven by client or market demand, rather than an interest in obtaining specific exposure to underlying securities.
- RG 5.196 As such, in many cases, these entities will seek to maintain an economically neutral position overall. However, their centralised role in facilitating equity derivative transactions may require them to disclose, in aggregate, a large number of different derivatives resulting in deemed economic interests and corresponding offsetting short positions as well as related agreements (that individually may not otherwise need to be disclosed).

- RG 5.197 AFS licensees (as referred to in RG 5.192(a) and (b)) and foreign equivalent licensees must disclose their exempt interests when their interests reach a significant level. The threshold is determined as when the licensee's holding percentage in the listed entity, calculated as if none of the exceptions referred to in RG 5.192 applied, increases above 20% or decreases to 20% or below. When a licensee reaches this threshold, they must disclose interests falling under any of the relevant exceptions in a separate statement announced to the market. This statement must be updated whenever a further 1% movement occurs in any exempt interest.
- RG 5.198 ASIC Instrument 2026/XXX also provides that exempt licensees must indicate where they do not have a deemed economic interest or offsetting short position because of the exemption when completing a substantial holding notice. This ensures the market remains aware that certain interests have been excluded from the notice.
- RG 5.199 We expect that the vast majority of genuine client serving and other activities, such as market making, of exempt licensees will fall well below this threshold. The additional information requirement ensures the market retains visibility over significant positions taken in listed entities that are capable of influencing control of the listed entity or the prospect of a successful takeover bid.

Note: For more information about the substantial holding disclosure requirements, see [RG 222](#).

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E Offsetting short positions in securities

Key points

Where a person is required to disclose that they have a relevant interest or a deemed economic interest in securities because of a derivative, they must also disclose any arrangements that offset the economic exposure arising from the derivative (i.e. the 'offsetting short position').

There are three general tests to consider when determining whether a person has an offsetting short position that must be disclosed to the market:

- the basic rule;
- the extensions to the basic rule; and
- the exceptions.

Applying the offsetting short position definition

- RG 5.200 Sections 671AS–671AX define when a person has and does not have an offsetting short position in securities because of a derivative.
- RG 5.201 Under these provisions, a person must consider and apply three general tests:
- (a) whether a person has an offsetting short position under the *basic rule*;
 - (b) whether a person is considered to have an offsetting short position under the *extensions to the basic rule*; and
 - (c) whether the situation giving rise to the offsetting short position falls within one of the *exceptions*.
- RG 5.202 Table 10 summarises these tests for offsetting short positions and includes a cross-reference to further discussion of each aspect in this guide.

Table 10: Summary of offsetting short position concept

Test	Description	Reference
1. The basic rule		
The basic rule: s671AS and 671AW	<p>This is the general rule which determines whether a person has an offsetting short position in securities because of a derivative.</p> <p>Under the rule, a person is deemed to have an offsetting short position where:</p> <ul style="list-style-type: none"> • the person has entered into an arrangement with another person that is a derivative; • the consideration the other person must provide in the future is ultimately determined by the value of the underlying securities; and • under the derivative, the person might benefit if the value of the underlying securities decreases. 	RG 5.203– RG 5.205

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Test	Description	Reference
	The number of the underlying securities representing the short position is determined in accordance with the calculative method prescribed in ASIC Instrument 2026/XXX—regardless of the type of derivative (i.e. a physically settleable derivative or a non-physically settleable derivative).	
2. Extensions to the basic rule		
Offsetting short position where person has control or the power to dispose of a derivative: s671AT	A person is considered to have an offsetting short position in securities because of a derivative if they have the power to dispose of—or control the exercise of the power to dispose of—that derivative.	RG 5.209(a)
Offsetting short position held through bodies corporate: s671AU	A person is considered to have the same offsetting short position that a body corporate or managed investment scheme has if they have over 20% voting power or control of the body corporate or scheme.	RG 5.209(b)
Offsetting short position in anticipation of performance of agreements, etc: s671AV	If a person (the <i>first person</i>) acquires an offsetting short position in securities because of a derivative and: <ul style="list-style-type: none"> enters into an agreement or understanding in relation to the derivative; or is granted enforceable rights or options in relation to the derivative, regardless of the time for performance or exercise, that would later give another person an offsetting short position If the agreement was performed, right enforced or option exercised—then that other person’s offsetting short positions is brought forward to the present time.	RG 5.209(c)
3. Exceptions		
Prescribed exceptions: sections 19–22 of ASIC Instrument 2026/XXX and s671AX	ASIC has prescribed: <ul style="list-style-type: none"> a person is not taken to have an offsetting short position for the same situations in which they do not have a deemed economic interest because of the exceptions discussed in Table 9; and an exception where an AFS licensee, CS facility licensee or a foreign equivalent licensee is able to rely on the market makers and client facing services exclusion (described in RG 5.192–RG 5.199. The regulations may prescribe circumstances where a person does not have an offsetting short position.	RG 5.210–RG 5.213

The basic rule for offsetting short positions

- RG 5.203 The basic rule in s671AS is that a person (the *first person*) has an ‘offsetting short position’ in securities in a listed entity where:
- they enter into an arrangement with another person;
 - the arrangement is a derivative;

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- (c) the consideration that the other person must, or may be required to, provide at some future time to someone under the derivative—or the value of the derivative itself—is ultimately determined by the value of the underlying securities; and
- (d) under the derivative, the first person might benefit if the value of the underlying securities *decreases* (rather than increases): see s671AA.

- RG 5.204 The key aspect of this basic rule is that a person is a party to an equity derivative and might benefit in the case of a decrease in the value of the securities underlying the derivative.
- RG 5.205 Because an offsetting short position reduces a person’s economic exposure to the value of the underlying shares, if a derivative-based relevant interest or deemed economic interest is disclosed to the market without also disclosing any offsetting short positions, this may have the effect of misleading other market participants about the person’s position.

Calculative method for determining the offsetting short position

- RG 5.206 The number of underlying securities in which a person is taken to have an offsetting short position must be determined according to the calculative method set out in ASIC Instrument 2026/XXX: s671AS(3), 671AT(2), 671AU(3), 671AV(2) and 671AW.
- RG 5.207 Table 11 sets out the calculative method for the number of issued securities in which a person has an offsetting short position.

Table 11: Overview of calculative methods for offsetting short positions

Derivative type	Summary of calculative method
Where the derivative has a linear, symmetric pay-off profile referencing issued securities in a listed entity	The offsetting short position is equal to the full notional amount of securities underlying the derivative.
Where the derivative does not have a linear, symmetric pay-off profile	The offsetting short position is equal to the delta of the derivative as calculated under a generally accepted standard pricing model multiplied by the full notional amount of securities underlying the derivative. Note: A generally accepted standard pricing model is defined in section 7 of ASIC Instrument 2026/XXX. See also RG 5.166–RG 5.169 for further information.

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Derivative type	Summary of calculative method
Where the benefit under a derivative is determined by reference to a basket or index of assets that includes securities	<p>The offsetting short position must be calculated based on the weight of the relevant security in the basket or index out of the total value of securities in the basket or index.</p> <p>The number of issued securities in a class of underlying issued securities in which a person has an offsetting short position is zero if:</p> <ul style="list-style-type: none"> • the number of issued securities in that class in which the person has an offsetting short position represents less than 5% of the total securities in that class that are on issue; or • the securities in that class in the basket or index represent less than 20%, by value, of all securities in the basket or index.

Other requirements for calculating offsetting short positions

- RG 5.208 In calculating a person's offsetting short position, the general requirements for calculating a person's deemed economic interest and offsetting short position apply as provided for in section 16 of the ASIC Instrument 2026/XXX and discussed at RG 5.163 with respect to deemed economic interests. This includes the requirement that a person's offsetting short position is calculated daily and is not netted against a person's deemed economic interest.

Extensions to the basic rule

- RG 5.209 The same extensions to the basic rule that apply to deemed economic interests also apply to offsetting short positions. That is, the requirement for a person to disclose an offsetting short position applies in circumstances where:
- (a) the person has control or the power to dispose of a derivative;
 - (b) the position is held through a related body corporate or managed investment scheme; and
 - (c) the person enters into an agreement with another person that has an offsetting short position because of a derivative, and the agreement would later give them an offsetting short position.

Note: For further information, refer to the guidance on the extensions to the basic rule for deemed economic interests in Section C.

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Exception

- RG 5.210 Notional s671AY, as inserted by section 24 of ASIC Instrument 2026/XXX, sets out circumstances in which a person is taken not to have an offsetting short position. The circumstances mirror those for deemed economic interests in s671AL–671AQ in respect to money lending and financial accommodation, bare trustees, directors of bodies corporate and arrangements between related bodies corporate as outlined in Table 9.
- RG 5.211 As an exception to the basic rule and extensions described above, where a financial services licensee is able to rely on the market makers and client services exclusions in sections 19–21 of ASIC Instrument 2026/XXX in relation to a derivative, the offsetting short position that arises under that derivative is also excluded under notional s671AY(4), as inserted by section 24 of the instrument. See the discussion at RG 5.192 for a further explanation on the market maker and client services exclusion.
- RG 5.212 The regulations may also prescribe circumstances where a person does not have an offsetting short position: see s671AX.

F Applying the deemed economic interest and offsetting short position concept

Key points

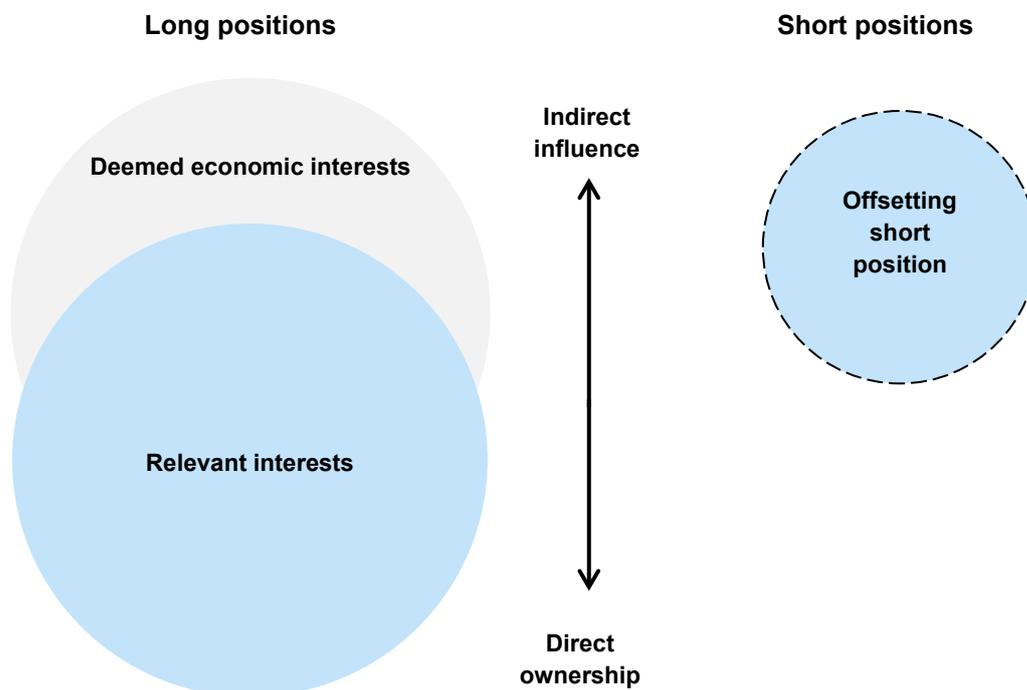
'Deemed economic interests' and 'offsetting short positions' only affect a person's substantial disclosure obligations where that person has entered into, or has a connection with, a derivative in respect to a listed entity.

A 'deemed economic interest' is not relatable to an identifiable holding of securities. If the person's interest can be linked to an identifiable holding, they may have a relevant interest.

Whether a person holds a 'deemed economic interest' or 'relevant interest' under a derivative may change depending on whether the writer of the derivative also holds a relevant interest in the underlying securities.

Distinguishing relevant interests from deemed economic interests

Figure 4 Interaction of different interests under a derivative



Note: Figure 4 is explained in RG 5.213 (accessible version).

RG 5.213 Figure 4 illustrates the overlapping relationship between the relevant interests and deemed economic interest concepts. It emphasises that generally where a relevant interest arises, no deemed economic interest is reportable as represented by the occluded circle. The two-point arrow in Figure 4 signifies that relevant interests arise in circumstances closer to direct ownership, while deemed economic interests arise where a person has

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an indirect influence over securities. Separately, the concept of an offsetting short position appears in a dashed circle on the right-hand side under the title, ‘short positions’ indicating that it is used to mirror the ‘long position’ concepts on the left-hand side.

- RG 5.214 Unlike the concept of a relevant interest, a deemed economic interest is not relatable to an identifiable holding of equity securities.
- RG 5.215 Rather, a deemed economic interest recognises that equity derivatives often create an economic incentive for a party to the derivative to acquire or maintain a holding of underlying securities as a hedge to their exposure, which gives the other party a level of influence over the underlying securities.
- RG 5.216 The application of the deemed economic interest provisions in Ch 6C closely mirrors that of the relevant interest concept but remains separate to the provisions underlying Ch 6 of the Corporations Act.
- RG 5.217 For this reason, a deemed economic interest alone only triggers the substantial holding reporting obligations in Ch 6C in respect of a listed entity and does not enliven the prohibition against certain acquisitions of relevant interests under s606.
- RG 5.218 However, a person that has entered into an equity derivative should ensure they have identified (and continue to monitor) whether their interest in underlying securities is relatable to an identifiable holding of securities that may give rise to a relevant interest and be subject to the prohibition under s606.

Whether a derivative is relatable to an identifiable holding

- RG 5.219 Whether a person’s interest arising under an equity derivative is relatable to an identifiable holding of securities will depend on whether:
- (a) the derivative can be physically settled; and
 - (b) the person in the short position has a relevant interest in the underlying equity securities.
- RG 5.220 Where a person holds an interest in the underlying securities of a listed entity through an equity derivative that is relatable to an identifiable holding, the effect of the accelerator provisions under s608(8) is that the person has a relevant interest in the number of securities for that holding.
- Note: For further guidance on the accelerator provisions, see RG 5.56. Options may be treated as a security for the purposes of Ch 6. For specific guidance on the exercise of options, see RG 5.258.
- RG 5.221 Whether an equity derivative gives rise to either a deemed economic interest or a relevant interest, or both, will therefore depend on whether the person in the short position also has a relevant interest in underlying securities in the listed entity (e.g. when purchasing securities to hedge their position).
- RG 5.222 The person in the short position under a physically settleable derivative will generally be required to hold an exercisable and unconditional right to vest

the underlying securities (e.g. under a securities lending arrangement) in order to comply with the prohibition against naked short selling under s1020B—however, there are exceptions. This means that not all underlying securities linked to a physically settleable derivative will automatically result in the person in the long position having a corresponding relevant interest in those securities.

Note: See Regulatory Guide 196 *Short selling* ([RG 196](#)) for further guidance on short selling.

- RG 5.223 Where the person in the short position has a relevant interest that meets or exceeds the total number of securities underlying the derivative (e.g. fully hedged), the person in the long position:
- (a) will have a relevant interest in the securities they would have if the derivative was physically settled; and
 - (b) will not have a deemed economic interest in relation to that derivative as they already have a relevant interest covering all the securities underlying the derivative.
- RG 5.224 Where the person in the short position has a relevant interest in a number of securities that is less than the total number of securities underlying the derivative (e.g. partly hedged), the person in the long position will:
- (a) have a relevant interest in securities up to the number in which the person in the short position has a relevant interest; and
 - (b) hold a deemed economic interest for the remaining number of securities in excess of the number of securities in which the person in the short position has a relevant interest.
- RG 5.225 The type and combination of interests held by the taker of a derivative in underlying securities may therefore change from time to time and will also vary depending on how the writer's relevant interest in underlying securities changes.
- RG 5.226 Changes in the interests held by the taker of the derivative will need to be reflected in a substantial holding notice that requires the reporting of relevant interests, deemed economic interests and offsetting short positions that arise under a derivative as separate holding percentages wherever the disclosable movement in the type of holding is greater than 1%.

Note: For more information about the substantial holding disclosure requirements, see [RG 222](#).

Specific parcel of securities not required

- RG 5.227 Section 608A clarifies that there is no need for the person in the long position of an equity derivative to determine whether the person in the short position or counterparty to an agreement, right or option has set aside a particular parcel of securities to satisfy their obligations under the derivative.

- RG 5.228 The person in the long position may simply assume that they will have a relevant interest in at least the number of securities held by the person in the short position. The person in the long position does not need to inquire whether that relevant interest is held for the purposes of that particular equity derivative, agreement, right or option.
- RG 5.229 Multiple persons that have a long position under one or more derivatives may therefore have a relevant interest in the same parcel of underlying securities held by the same counterparty.
- RG 5.230 Table 12 outlines when a relevant interest or deemed economic interest arises depending on the settlement method available under the derivative and if the person in the short position already holds a relevant interest in a number of underlying securities.

Note: For further guidance on determining a person's relevant interests, see Section B of this guide.

Table 12: Summary of derivative-based interests

Derivatives with physical settlement

	Interests in underlying securities of person in the <i>short position</i>		
	Relevant interest in underlying securities matches or exceeds economic interest under derivative (e.g. fully hedged)	Relevant interest in underlying securities is less than economic interest under the derivative (e.g. partly hedged)	No relevant interest in any underlying securities
Will the person in the <i>long position</i> have any relevant interests?	The person in the long position has the relevant interest in the securities that they would have if the derivative was physically settled (by delivery of securities in which the person in the short position has a relevant interest).	The person in the long position has a relevant interest in the number of underlying securities in which the person in the short position has a relevant interest from time to time.	No
Will the person in the <i>long position</i> have any deemed economic interests?	No	The person in the long position has a deemed economic interest in the remaining number of underlying securities they would have if the person in the short position presently had sufficient relevant interests in the underlying securities to effect physical settlement.	The person in the long position has a deemed economic interest in the remaining number of underlying securities they would have if the person in the short position presently had sufficient relevant interests in the underlying securities to effect physical settlement.

Derivatives with no physical settlement

The person in the long position only has a deemed economic interest in the number of underlying securities that reflects the economic exposure created by the derivative (irrespective of the person in the short position's interest) in underlying securities). The calculation method for non-physically settleable derivatives is discussed above at RG 5.162.

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Comparison with non-physically settleable derivatives

- RG 5.231 For derivatives that do not allow for physical settlement, the person in the long position will only have a deemed economic interest in the underlying securities consistent with the basic rule for non-physically settleable derivatives in s671AF. This is the case even where the person in the short position has a relevant interest in the underlying securities of the listed entity (e.g. because of hedging activity).
- RG 5.232 This is because the person in the long position at no time enjoys the right to take delivery of the underlying securities even if their influence over the securities in a listed entity is capable of affecting the free float of securities, such as when entering into a non-physically settled swap to secure a blocking stake.
- RG 5.233 ASIC Instrument 2026/XXX prescribes the calculation method for determining the number of securities in which a person has a deemed economic interest as a result of a non-physically settleable derivative. This is discussed further at RG 5.162.

Applying the offsetting short positions concept to derivatives

- RG 5.234 The requirement to report an offsetting short position arises where a person holds a short position and either a relevant interest or deemed economic interest, or both, in underlying securities of a listed entity under a derivative.
- RG 5.235 The offsetting short position concept does not distinguish between whether the derivative is physically settleable or non-physically settleable.
- RG 5.236 In assessing whether a person has a long or a short position, the focus remains on a person's relative exposure to the underlying securities in the listed entity arising from a particular derivative rather than the isolated effect of holding the derivative.
- RG 5.237 This means that, for example, where a person sells a call option, they will have an offsetting short position in respect to the call option as they will receive a benefit if the value of the underlying securities decreases. Inversely, a person that sells a put option will have a deemed economic interest, as they will benefit from any increase in the value of underlying securities.

Note: For specific guidance in relation to options, see Section G.

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- RG 5.238 Offsetting short positions must be considered separately from deemed economic interests or relevant interests. An offsetting short position must not be netted against a deemed economic interest or simply be reported on a ‘portfolio’ basis as Ch 6C treats long and short positions as discrete holdings.
- RG 5.239 ASIC Instrument 2026/XXX prescribes that the offsetting short positions under a derivative are calculated on the same basis as deemed economic interests. See Section E for further guidance on the calculation methodology.

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G Options

Key points

An option is a security for the purposes of Chs 6–6C and can be the subject of a takeover bid and compulsory acquisition.

Because options are generally not voting shares, the requirements of Chs 6–6C will not apply directly to a person's relevant interests in options. However, options may give rise to a relevant interest or deemed economic interest in the securities underlying the option, which may be voting shares.

Call options and put options

RG 5.240 An option is a contract under which one party (the option taker) has the right, but not the obligation, to buy or sell an asset from another (the option writer) at a set price on or before a specified future time.

RG 5.241 There are two basic types of options over securities: call options and put options. Table 13 summarises the position of the respective parties to a call option and a put option—in this guide, we refer to these parties as having either a long position or short position.

Table 13: Call and put options

Option type	Party	Right/obligation	Position
Call option	Taker	Exercisable right to buy underlying securities	Long
	Writer	Agrees to sell underlying securities if the taker exercises the option	Short
Put option	Taker	Exercisable right to sell underlying securities	Short
	Writer	Agrees to buy underlying securities if the taker exercises the option	Long

RG 5.242 Options may be granted over existing shares or other securities. In addition, a company may grant call options that give option holders the right to be issued new shares in the company. Options of this kind are sometimes referred to as 'company options' or 'options over unissued shares'.

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Options as a security

- RG 5.243 Options may give rise to a relevant interest in the securities underlying the option, which may be voting shares.
- RG 5.244 However, an option may also be a security itself (distinct from its underlying security) for the purposes of Chs 6–6C and may therefore be made the subject of a takeover bid and compulsory acquisition: see s92(3)(e). However, because options are not voting shares, the general prohibition in s606 and the substantial holding requirements will generally not apply directly to a person’s relevant interests in options. This does not mean that options (other than options for the issue of new securities) are excluded from being derivatives to which the deemed economic interests apply as the relevant definition of securities for that purpose is the one applicable to Ch 7: see s92(5).

Note 1: A market-traded option is not a security for the purposes of Chs 6–6C: see s92(3)(h).

Note 2: For more information about the substantial holding disclosure requirements, see [RG 222](#).

Options for the issue of new securities

- RG 5.245 Options to acquire new shares or other securities may be granted by the company that issues the underlying class of securities. Options for the issue of new shares may be listed on a financial market alongside the underlying shares.
- RG 5.246 Options for the issue of new shares do not give rise to a relevant interest in shares before shares are issued following exercise of the option. Although options for the issue of new shares may be said to relate to ‘unissued shares’, this reference should not be understood to imply that unissued shares exist. Shares are created at the time they are issued: see *Re VGM Holdings Ltd* [1942] 1 All ER 224 and *Exicom Pty Ltd v Futuris Corporation Ltd* (1995) 18 ACSR 404.
- RG 5.247 Additionally, the takeover and substantial holdings provisions do not account for unissued shares. Even if an option to have a share issued could be described as a power to control the future disposal of that share, the definition of ‘voting share’ in s9 only includes issued shares. Further, the accelerator provision (which brings forward the time for recognising a relevant interest under options and other agreements) only applies when the counterparty has a relevant interest in issued shares: see s608(8)(a). Section 671AA(2)(b) also excludes the number of securities that would be issued as, or as part of, consideration under a physically settleable derivative for the purposes of determining a person’s deemed economic interest under Pt 6C.1.

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Acquiring a relevant interest on exercise

- RG 5.248 The earliest time that the holder of an option for the issue of shares can acquire a relevant interest in the shares is when they are issued. On issue, the person to whom they are allotted will acquire a relevant interest in those shares for the purposes of the takeover, substantial holding and beneficial ownership tracing provisions.
- RG 5.249 The acquisition of shares resulting from the exercise of an option to be issued shares is a transaction to which the general prohibition in s606 applies: see RG 5.92(a). The holder of an option over unissued shares may therefore be prevented from exercising the option if doing so would result in a breach of the takeover threshold, unless an exception to the general prohibition applies to the resulting acquisition.

Options over issued securities

- RG 5.250 Under the basic rule, a person has a relevant interest in securities, for the general prohibition in s606 and the substantial holding requirements, if they:
- (a) are the holder of the securities;
 - (b) have a power to exercise, or control the exercise of, a right to vote attached to the securities; or
 - (c) have a power to dispose of—or control the exercise of a power to dispose of—the securities: see s608(1).
- RG 5.251 For most options over issued shares, the person in the long position may not have a direct relevant interest in the underlying shares that derives from control over the voting or disposal of the shares underlying the option: see s608(1)(b) and (c).
- RG 5.252 However, if the person in the short position has an existing relevant interest in the underlying securities to which the options relate, the person in the long position is deemed to acquire a relevant interest in the underlying securities before the options are exercised under s608(8)(b)(i)–(iii).
- RG 5.253 This is because a call taker has the right to purchase the number of underlying securities covered by the option agreement from the call writer. On performance of the agreement, enforcement of the right or exercise of the option, the call taker would have a relevant interest in the underlying shares. The accelerator provision in s608(8) brings back to the earliest possible point in time (i.e. when the option itself is granted) the moment at which a person is treated as having a relevant interest in the underlying shares: see RG 5.56–RG 5.63.
- RG 5.254 Similarly, a put taker has the right or option to require the put writer to purchase the number of securities covered by the option agreement. The put writer acquires a relevant interest in the underlying shares if the put taker has an existing relevant interest in those shares: see s608(8)(b)(i)–(iii).

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RG 5.255 As a result, the person in the long position acquires a relevant interest in the securities underlying call and put options if the person in the short position has a relevant interest in underlying securities (whether acquired before or after the option is issued).

Note: For exchange-traded options, see also RG 5.261–RG 5.263.

RG 5.256 The person in the long position may also have a deemed economic interest in the securities underlying an option over issued securities that must be reported separately for the purposes of the substantial holding provisions under Pt 6C.1: see RG 5.223.

Changing interests in underlying shares

RG 5.257 If, while options are current, a person in the short position has a relevant interest in fewer shares than are required to satisfy the exercise of all the options, the person in the long position only has a relevant interest in the lesser number of shares: see s608A. The person in the long position will have a deemed economic interest for any shares in excess of the number of shares in which the person with a short position has a relevant interest: see RG 5.223. Every time the number of shares in which the person in the short position has a relevant interest changes, the number of shares in which the person in the long position has a relevant interest or deemed economic interest changes accordingly. For further guidance on the effect of s608A: see RG 5.227.

Position on exercise of options

RG 5.258 A person in the long position may have already acquired a relevant interest in the underlying shares as a result of entering into an option agreement. In this situation, the existence of their relevant interest in the underlying shares, and any voting power based on that interest, for the purposes of s606 and Pt 6C.1, will not change when the person purchases the underlying shares on exercising the call or put option. However, this is subject to a possible change in the level of relevant interest, voting power or deemed economic interest during the life of the option as discussed above.

Person in the short position

RG 5.259 The person in the long position acquires a relevant interest in the underlying securities when the option is written (if the person in the short position has a relevant interest in the underlying securities at the time). However, the person in the short position does not cease to have a relevant interest merely as a result of entering into the option agreement. The person in the short position will often retain their relevant interest until the option is exercised and the underlying securities transferred.

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- RG 5.260 The person in the short position will be required to report an offsetting short position for the purposes of the substantial holding provisions under Pt 6C.1 if they are also required to report a deemed economic interest in the securities of the listed entity and are unable to rely on an exception: see RG 5.234.

Exchange-traded options

- RG 5.261 Exchange-traded options are standardised series of options that ASX has determined may be traded through its financial market. Exchange-traded options are options over issued shares.
- RG 5.262 Through a process of novation under the ASX Clear Operating Rules, exchange-tradeable option contracts are split in two on registration—with the effect that the operator of the CS facility becomes a central counterparty standing between the taker and writer of the option. Each party’s obligation is then owed directly to the operator of the CS facility. Delivery obligations on exercise of the option are also randomly assigned by the CS facility operator within an option series.
- RG 5.263 While the application of s608(8) is complicated by the novation of option contracts on registering with the operator of the CS facility, we consider that the provision operates so that a person in the bought position under an exchange-traded option is deemed to have a relevant interest in the underlying shares. This view is supported by the existence of the exemption in s609(6) and the policy underlying s671E and paragraph (a)(ii) of the definition of ‘substantial holding’ in s9.

The partial exception

- RG 5.264 Section 609(6) operates as an exception to s608(8), so that a person does not have a relevant interest in securities merely because of:
- (a) a market-traded option over the securities (i.e. exchange-traded options); or
 - (b) a right to acquire the securities given by a derivative.
- RG 5.265 The exception does not apply, however, when considering a person’s relevant interest for the purposes of the substantial holding provisions: see s671E and the definition of ‘substantial holding’ in s9. As such, a person must take into account any relevant interests or deemed economic interests they or their associates may have in considering their disclosure obligations under the substantial holding provisions.

- RG 5.266 Where the exception in s609(6) applies, for the purposes of the takeover provisions, it ceases to apply when the obligation to make or take delivery of the securities arises.

Association

- RG 5.267 It is possible that an option agreement may result in an association between the parties under s12(2). If parties to an option are associates, they need to account for the relevant interests held by the counterparty in considering their obligations under the takeover, substantial holding and beneficial ownership tracing provisions—including any relevant interests that are not the subject of the option agreement.

Note: For example, the option may be a relevant agreement entered into for the purpose of controlling or influencing the conduct of share ownership or the power of persons to dispose of, or exercise control over the disposal of, shares: see s12(2)(b), reg 1.0.18, s53(e) and (f), and RG 5.115–RG 5.143.

- RG 5.268 However, under the exception in s12(2A), no association arises between the parties merely because an option agreement contains a right to dispose of underlying securities, or to control the exercise of a power to dispose: see RG 5.138–RG 5.141.
- RG 5.269 As such, most option agreements will not give rise to an association between the parties to the option. However, if the option agreement contains other terms (e.g. an agreement to consult on voting), the parties may be associated: see RG 5.142–RG 5.143.

H Warrants

Key points

We have given relief so that parties to call and put warrants that are quoted on ASX or Cboe do not have a relevant interest in securities underlying the warrant in certain circumstances.

Under our relief, the holders of quoted call warrants do not have a relevant interest before exercise of the warrant. However, this does not apply for the purposes of the substantial holding requirements. Our relief extends to issuers of covered call warrants who have lodged the underlying securities with a trustee and have limited control over the securities.

Issuers of quoted put warrants are also able to disregard their relevant interests under our relief, provided that they do not exercise control over voting or disposal of the underlying securities.

Our relief extends to warrant trustees with certain discretions under a warrant trust deed. We have also given relief so that parties to a quoted warrant are not associates under s12.

What are warrants?

- RG 5.270 Warrants are financial products, primarily issued by financial institutions, which provide a level of exposure to an underlying asset, instrument or index. The terms of warrants vary as they are agreed between the issuer and holder. However, a warrant series that meets the requisite criteria may be admitted to trading on a market.
- RG 5.271 Many deliverable warrants are similar to options over issued shares—providing a right to the holder to buy or sell a share at a set price (the strike price) until a date in the future (the expiry date). Table 14 summarises some of these types of warrants.
- RG 5.272 As with options, warrants can give rise to a relevant interest in underlying securities, which may need to be taken into account when determining a person's obligations under the takeover, substantial holding and beneficial ownership tracing provisions.

Table 14: Characteristics of some deliverable warrants commonly relating to shares

Type of warrant	Key characteristic
Regular call warrant	Entitles the holder to buy a fixed quantity of the underlying shares from the issuer.
Regular put warrant	Entitles the holder to sell a fixed quantity of the underlying shares to the issuer.

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Type of warrant	Key characteristic
Instalment warrant	Following payment of an initial instalment, the holder is entitled to specified rights, such as dividends, distributions and franking credits, paid by an underlying share. The holder may make an optional final payment later to purchase the share in full. The 'unpaid amount' for the share is often treated as a loan from the warrant issuer.
Endowment warrant	Typically, a long-term warrant carrying the right to purchase a share by payment of an outstanding amount which fluctuates over time. The outstanding amount will generally increase with the application of regular interest payments and decrease when dividends and other distributions from the share are applied.

Note: This table includes a general description of the common features of each type of warrant. Individual warrant terms may vary significantly from those described.

General characteristics and similarities with options

RG 5.273 Warrants have the following characteristics that are similar to options and that distinguish them from shares:

- (a) they are frequently designed to give an investor financial exposure to the performance of the underlying entity or commodity—rather than, necessarily, control over the company;
- (b) they do not give direct control over the underlying securities until they are exercised; and
- (c) they generally have relatively short, fixed lives, compared with equities.

RG 5.274 The rights and obligations of warrant issuers are often very similar to those of option writers. Likewise, the rights and obligations of warrant holders are very similar to those of option takers.

Quoted warrants

RG 5.275 Warrants that are quoted generally have these additional characteristics:

- (a) an overall limit to the proportion of the underlying securities over which exercisable quoted warrants may be issued (except for fully covered warrants);
- (b) specific disclosure regimes for warrant issuers;
- (c) within a series, their terms are standardised, fully disclosed and are not variable by the issuer or holder;
- (d) they are primarily marketed to, and acquired and traded by, retail investors; and
- (e) in general, they have relatively longer lives than exchange-traded options (except for long-life flex options).

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- RG 5.276 Unlike exchange-traded option writers, who are anonymous except to the operator of the relevant CS facility, the issuer of a quoted warrant is a single entity that is always readily identifiable, so the application of s606 and the substantial holding provisions to warrants is more focused.

Our approach to warrants and relief

- RG 5.277 The terms of warrant agreements set out the rights and obligations of the holders and writers of warrants in relation to the underlying securities. Given the variety of terms on which warrants may be issued, the appropriate consequence of issuing or acquiring a warrant under the takeover, substantial holding and beneficial ownership tracing provisions will necessarily differ between warrant series.
- RG 5.278 Accordingly, as a general principle, we base our regulatory treatment of warrants on the rights and obligations that different persons have in relation to particular warrants, regardless of the type of warrant. The criteria we use for determining relief for warrants are the specific mechanisms by which particular warrants deal with the issues of ownership, disposal power and voting rights of the underlying shares, and the timing and nature of exercising rights, rather than the structure or form of the warrants.

ASIC relief: Relevant interests arising from quoted warrants

- RG 5.279 We recognise that, for many warrants, the rights and obligations in relation to underlying securities are sufficiently remote or tenuous that they are unlikely to be used as a means of gaining control of a company. For this reason, we have provided relief allowing warrant issuers and holders (and, where applicable, trustees) to disregard, in some cases, a relevant interest in underlying securities arising from warrants quoted on ASX or Cboe. Table 15 contains a summary of the relief that is contained in [ASIC Instrument 2023/687](#).

Note: Given the variety of terms on which warrants are issued, a particular warrant series may give rise to a relevant interest in underlying securities on a basis other than those listed in Table 15.

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Table 15: Summary of ASIC’s relevant interest relief for quoted warrants under ASIC Instrument 2023/687

Party	Relevant interest	Treatment of relevant interest	Reference
Call warrants			
Holder	Accelerated relevant interest arising from the right to acquire securities underlying the warrant from the issuer: see s608(8) Relevant interest arising from a right to require the securities are held in trust under the warrant	Substantial holding disclosure—no relief provided. The relevant interest must be counted. Takeovers—relief provided to disregard the relevant interest if no power exists under the warrant to control voting or disposal.	RG 5.287– RG 5.292
Issuer	Relevant interest arising from holding underlying securities	No relief provided. The relevant interest must be counted.	RG 5.293– RG 5.297
	Relevant interest in underlying securities held in trust by a trustee under the terms of the warrant	Relief provided to disregard the relevant interest until expiry, provided that the issuer has no power to control voting or disposal other than to enforce certain terms of the trust.	RG 5.293– RG 5.297
Trustee	Relevant interest arising from holding the securities on trust (or having lent securities held in trust) where, under the trust, the trustee has certain discretions that may be exercised for the purposes of satisfying the rights or obligations of the issuer or holder	Relief provided to disregard the relevant interest in the trust securities, provided that: <ul style="list-style-type: none"> discretions under the terms of the trust deed are limited to specified matters and exercised on ordinary commercial terms or like manner; or the trustee is a bare trustee that cannot rely on s609(2). 	RG 5.305– RG 5.310
Put warrants			
Holder	Relevant interest arising from holding underlying securities	No relief provided. The relevant interest must be counted.	RG 5.298– RG 5.299
Issuer	Accelerated relevant interest arising from the acquisition of securities from the holder on exercise of the holder’s right to put	Relief provided to disregard the relevant interest if no power exists under the warrant to control voting or disposal.	RG 5.300– RG 5.304
	Relevant interest in underlying securities arising from the rights given to the issuer under the terms of the warrant, or a trust securing the obligations of the warrant holder (and/or issuer)	Relief provided to disregard the relevant interest until expiry, provided that the issuer has no power to control voting or disposal other than to enforce certain terms of the trust on exercise, expiry or default by the warrant holder.	RG 5.300– RG 5.304
Trustee	Relevant interest arising from holding the securities on trust (or having lent securities held on trust) where, under the trust, the trustee has certain discretions that may be exercised for the purposes of satisfying the rights or obligations of the issuer or holder	Relief provided to disregard the relevant interest in the trust securities, provided that: <ul style="list-style-type: none"> discretions under the terms of the trust deed are limited to specified matters and exercised on ordinary commercial terms or like manner; or the trustee is a bare trustee that cannot rely on s609(2). 	RG 5.305– RG 5.310

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Association relief

- RG 5.280 As with options, in addition to giving rise to a relevant interest in underlying securities, a warrant may also result in the issuer and holder becoming associates: see also RG 5.267–RG 5.269.
- RG 5.281 The nature of the relationship between most issuers and holders of quoted warrants means that the mere fact of entering into a warrant agreement should not constitute an association that the law recognises for tracing requirements—provided that the association does not give a call warrant holder either a direct or indirect power over the voting shares.
- RG 5.282 For certainty, we have provided relief to disregard any association between warrant issuers and holders arising merely because of the warrant: see RG 5.311–RG 5.315.

Reliance on ASIC relief

- RG 5.283 We are of the view that warrant issues should not be used to abuse the policy underlying our relief for warrants through sham transactions.
- RG 5.284 If a person does anything that is not within the spirit of our relief, or uses the relief in a way that is contrary to the principles and purposes set out in s602, we may apply to the Takeovers Panel for declarations and orders. Any party seeking to use warrants in a control transaction is advised to seek our advice before embarking on any such course of conduct.
- RG 5.285 We may also consider taking injunctive or other action against parties that act outside the relief and contravene Chs 6 and/or 6C. We may also review the suitability for licensing of any AFS licensee who breaches, or facilitates the breach of, any of the takeover, substantial holding or beneficial ownership tracing provisions (including by failing to comply with the requirements of the relief).

Call warrants

- RG 5.286 Call warrants over underlying shares can give rise to a relevant interest in some cases. We have provided relevant interest relief in certain circumstances.

Holder's relevant interests

- RG 5.287 Call warrants give the holder of a warrant the right, but not the obligation, to acquire the underlying securities under the terms of the warrant agreement. Therefore, a call warrant holder has a relevant interest in the securities that are the subject of the warrant agreement and in which the warrant issuer has a relevant interest.

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- RG 5.288 Section 608(8) will accelerate that relevant interest to the point of entry into the warrant agreement, even if the warrant or the right is only exercisable in the future. The call warrant holder has a relevant interest in the underlying securities even if the exercise of the warrant is subject to strict conditions: see s608(2).
- RG 5.289 Under s609(6)(b), a person does not have a relevant interest merely because they have a right to acquire the securities given by a derivative. Some warrants are derivatives—however, others may not be because they are securities: see s761D(3)(c), 764A(1)(a), reg 7.1.04(7) and the definition of ‘security’ in s92(5). See also the definition of ‘warrant’ in reg 1.0.02.
- RG 5.290 Additionally, s609(6)(b) only applies to a relevant interest that the holder has because of their right to acquire the securities. Without relief, the holder may, additionally or alternatively, have a relevant interest because of a right under the warrant to require the securities to be held in trust.
- RG 5.291 [ASIC Instrument 2023/687](#) provides relief to the holders of call warrants that may be securities, or otherwise fall outside s609(6) on their terms, so that the holders are able to disregard a relevant interest arising from a warrant in a similar way that relevant interests are disregarded when s609(6)(b) applies: see notional s609(6)(c), as inserted by ASIC Instrument 2023/687.
- RG 5.292 Although the result of the relief is that no relevant interest arises for the purposes of the takeover provisions from holding a call warrant, any relevant interest that would arise, but for the relief, must still be taken into account for the purposes of the substantial holding provisions. This is consistent with the treatment of derivatives under the definition of ‘substantial holding’ in s9 and 671E.

Issuer’s relevant interests

- RG 5.293 The issuer of a covered call warrant normally retains a relevant interest in securities that it holds as cover for its obligations under the warrant. It retains the relevant interest, even when it places underlying securities in trust for holders. This is because the warrant is only a conditional agreement. If the holder does not exercise the warrant, or defaults in some way, the effect of the basic warrant agreement is that the securities remain the property of the issuer or return to the issuer out of the trust arrangements. Therefore, it will actually be very difficult for the issuer to dispose of these securities while the warrant exists, in a way that results in the issuer ceasing to have a relevant interest.
- RG 5.294 For an issuer to dispose of the underlying securities, it must first transfer its rights and obligations in relation to the securities to another person. The onus will lie squarely on any issuer of covered call warrants, who asserts that it no longer has a relevant interest in the cover securities, to convince ASIC that its arrangements relating to the cover securities mean that it has disposed of those securities.

- RG 5.295 We have issued [ASIC Instrument 2023/687](#) for issuers of covered call warrants to disregard any relevant interest that may arise from holding the underlying securities as cover against the rights of the holders and the obligations of the issuer.
- RG 5.296 The relief only applies if:
- (a) the underlying securities are held in trust under the terms of the call warrant; and
 - (b) the call warrant issuer does not have the power to control voting—other than to enforce the terms of the trust, or to retain ownership if the call warrant expires unexercised or the call warrant holder defaults: see notional s609(6A) and (6F), as inserted by ASIC Instrument 2023/687.
- RG 5.297 If a call warrant issuer has ensured that the underlying securities are lodged with a nominee company or trustee, and it has no power to control voting or disposal of the underlying securities (other than requiring the trustee or nominee to comply with the provisions of the trust or warrant agreement), the relevant interest that a call warrant issuer may have in the underlying securities is sufficiently remote for it to be disregarded.

Put warrants

Holder's relevant interests

- RG 5.298 We will not grant relief to put warrant holders from the takeover, substantial holding or beneficial ownership tracing provisions—except to disregard an association formed solely by entry into a quoted put warrant agreement.
- RG 5.299 There is no reason for granting relief to put warrant holders, because holding the warrant does not affect their control over any underlying securities.

Issuer's relevant interests

- RG 5.300 Put warrants give the holder the right, but not the obligation, to sell the underlying securities to the issuer. Therefore, a put warrant issuer has a relevant interest in the securities that are the subject of the warrant agreement, and in which the put warrant holder has a relevant interest. Section 608(8) will accelerate that relevant interest to the point of entry into the warrant agreement, even if the warrant or the right is only exercisable by the warrant holder, and only at some time in the future.
- RG 5.301 A warrant issuer may also have a relevant interest in the underlying securities because the holder, under the terms of the warrant (or the trust securing the obligations under the warrant), has given the issuer a right in relation to the securities.

- RG 5.302 In particular, this may arise in relation to instalment or endowment warrants with a loan component. Under such warrants, the holder may be required to place the underlying securities in trust to secure their obligations. Without relief, the issuer may have a relevant interest under s608(8)(b)(ii) because the issuer has a right to dispose of the securities held in trust if the holder does not exercise the put option.
- RG 5.303 We have granted relief under [ASIC Instrument 2023/687](#) so that the relevant interests of put warrant issuers are disregarded in these situations: see notional s609(6C) and (6F), as inserted by ASIC Instrument 2023/687.
- RG 5.304 We have granted this relief because:
- (a) as a result of the secondary trading of quoted warrants, issuers of quoted put warrants will not be able to trace the relevant interests or intentions of the warrant holders; and
 - (b) issuers have no present control over the underlying securities.

Trustees and associations

Warrant trustee relief

- RG 5.305 We have granted relief in [ASIC Instrument 2023/687](#) in relation to the general prohibition in s606 and the substantial holding provisions for a trustee who holds securities on trust to satisfy the obligations of an issuer or holder of warrants: see notional s609(6E)–(6F), as inserted by ASIC Instrument 2023/687.
- RG 5.306 The relief allows the trustee to disregard any relevant interest in the securities it holds as cover that may arise merely because the trustee has certain discretions under the trust deed (including trust securities that have been lent by the trustee under securities lending arrangements). The relief applies when the trustee has certain discretions that might prevent it from being covered by the exception for bare trustees in s609(2).
- RG 5.307 Allowable discretions include:
- (a) discretions available on the default or insolvency of the issuer or holder;
 - (b) discretions in relation to certain transactions affecting share capital, such as rights issues or capital reconstructions;
 - (c) discretions in relation to takeover bids or schemes of arrangement (the relief allows for a discretion to bring forward the time for exercise but not a discretion to decide whether to accept or reject a bid); and
 - (d) discretions to lend the securities.
- RG 5.308 The discretions must be exercised on ordinary commercial terms or in an ordinary commercial manner.

RG 5.309 We have provided the relief for trustees because, in the circumstances in which the relief applies, the trustee's power is tenuous and information about any substantial holding resulting from the trustee's role would likely be immaterial to the market.

RG 5.310 [ASIC Instrument 2023/687](#) recognises that the purpose of the trust may be to secure the obligations of the warrant holder under the warrant as well as the warrant issuer. It recognises that, under the terms of the warrant, a trustee may exercise a range of discretionary powers over the securities in trust. It is unlikely that these powers would be used as a means of gaining control of a company.

Associations

RG 5.311 Entering into a call warrant agreement or put warrant agreement may make the issuer and holder associates under s12(2). This may also have implications in terms of s608(3)(a), under which a person is deemed to have the same relevant interest as another body corporate in which it has voting power of over 20%. An associate's relevant interests in the body corporate are included in calculating a person's voting power.

RG 5.312 For quoted warrants, the aggregation of voting power of issuers and holders by s608(3)(a) is inappropriate because:

- (a) most warrant issuers are financial institutions with widespread and diverse shareholdings and have funds management arms that trade actively in securities. This would make monitoring the issuer's holdings very difficult for warrant holders; and
- (b) most warrant issuers have a wide spread of holders, who are likely to have portfolios of their own, and these would need to be aggregated with the issuer's holdings. This would make monitoring the holders' entitlements very difficult for warrant issuers.

RG 5.313 Because the issuer is so easily identifiable in the case of a warrant, aggregations can readily focus on one person.

RG 5.314 [ASIC Instrument 2023/687](#) gives relief to disregard any association between warrant holders and warrant issuers merely because of the warrant: see notional s16(1A), as inserted by ASIC Instrument 2023/687.

RG 5.315 The remoteness of an association between warrant issuers and holders that arises solely because of a warrant agreement means that the association should not be recognised for the purposes of aggregation under s608(8)(a). Our relief operates so that the association between the issuers and holders will clearly not operate in relation to s608(8)(a).

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Terms and scope of ASIC relief

RG 5.316 Our relief only applies on the strict terms of the relief. There are a number of key limitations on our relief that need to be considered.

RG 5.317 The relief also operates, in some cases, only to defer recognition of a relevant interest to a later event. As a result, a person may be taken to acquire underlying securities at that later time when the relief is no longer applicable.

Control over voting or disposal

RG 5.318 Our relief does not apply if the call warrant holder or put warrant issuer, at any time until the exercise of the warrant, has the power to control voting or disposal of any of the securities underlying the warrant (other than as provided for in the relief).

Quoted warrants

RG 5.319 Our relief only applies to quoted warrants over listed securities. Many of the preconditions for relief—such as standardised contracts, disclosure by issuers, and anonymous markets—apply only to quoted warrants. The continuous disclosure requirements for listed securities also add a desirable level of transparency to trading in warrants.

When our relief ceases to apply

RG 5.320 Our relief for call and put warrants ceases to apply:

- (a) on the exercise, maturing or lapsing of warrants. If a warrant is exercised or allowed to mature, either the call warrant holder or the call warrant issuer obtains control over the underlying securities. Therefore, it is logical to recognise the relevant interests that had previously been deemed to be too remote or tenuous; or
- (b) if the terms of a warrant change, so that either the issuer or the holder acquires the power to control voting or disposal of the underlying securities.

Passive acquisition

RG 5.321 If, under the terms of a warrant, the holder or issuer automatically gains a relevant interest in voting shares or interests on the expiry of a warrant, the person will still legally acquire the shares or interests when it acquires the relevant interest under the terms of the warrant agreement. There will still be an acquisition, even though the person takes no positive action at the time.

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- RG 5.322 On issuing or acquiring the warrant, the person will enter into a transaction in relation to the underlying securities and will acquire the relevant interest in the securities as a result of entering into the warrant agreement. We reject any suggestion that it would be possible to construct a warrant agreement that would give a person a relevant interest in the underlying securities without entering into a transaction at the time of gaining the relevant interest.
- RG 5.323 Similarly, if a person avails themselves of our relief, on the exercise or lapse of the warrant, any relevant interest or voting power that has been disregarded under the relief will commence being counted for the purposes of the Corporations Act, and the person will acquire the relevant interest, and therefore the shares, at the time the relief ceases to have effect. Even though the agreement had been entered into previously, and the relevant interest was only acquired on the lapse of the effect of the relief, the person would acquire the underlying securities at the time of gaining the relevant interest.

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I Escrow arrangements

Key points

A person may acquire a relevant interest in securities as a result of an agreement placing the securities into escrow. In some cases, this may mean an entity has a relevant interest in its own securities. However, s609(9B) provides for certain exemptions in respect of escrow arrangements under the listing rules of a declared financial market. Similarly, s609B provides for certain exemptions from such relevant interests where they arise in connection with an initial public offering or acquisition of a business.

Where the requirements of the Corporations Act are not met in relation to exceptions for voluntary escrow arrangements, where appropriate we may give individual relief, so that a company, underwriter or lead manager does not have a relevant interest in the escrowed securities. These applications will be assessed on a case-by-case basis.

Relevant interests arising from escrow arrangements

- RG 5.324 A holder of securities may enter into arrangements to have those securities held in escrow for a period of time. Under an escrow arrangement, the holder generally agrees not to dispose of the securities, or rights or interests connected with the securities, for the duration of the escrow. An escrow arrangement may contain exceptions which allow the holder to dispose of the securities, or rights or interests connected with the securities, in limited circumstances. For example, holders may be allowed to dispose of their escrow securities under an equal access share buy-back.
- RG 5.325 An entity will commonly enter into escrow arrangements with certain existing security holders in support of a public offering of securities. This may promote investor confidence and an orderly market: see RG 5.343–RG 5.346.

Relevant interests of parties to escrow arrangements

- RG 5.326 A person who enters into an escrow arrangement with a holder has a relevant interest in the securities that are subject to the escrow because the person controls the exercise of a power to dispose of the securities: see s608(1)(c). The power to control disposal includes the ‘negative power’ of restriction: see RG 5.34.

Note: See also s609(7), which provides that a relevant interest does not arise from certain agreements which ‘restrict’ the disposal of securities for no more than three months.

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- RG 5.327 Section 608(9) states that s608 may result in a body corporate having a relevant interest in its own securities. This confirms that a company may have a relevant interest in its own securities if it has entered into an escrow arrangement with a security holder.
- RG 5.328 Companies and other counterparties to an escrow arrangement will generally have to account for their relevant interests in the securities held in escrow in considering their obligations under the takeover, substantial holding and beneficial ownership tracing provisions.

Escrow arrangements under the listing rules of a declared financial market

- RG 5.329 Under the listing rules of various declared financial markets, listed companies and companies seeking listing may be required to apply restrictions on the disposal by holders of certain ‘restricted securities’ so that the holder may not deal with the securities for a specified time: see for example ASX Listing Rules 9.1 and 9.3 and Appendix 9B.

Note: In this guide, we refer to such arrangements as ‘listing rule escrow’.

Escrow arrangements under listing rules

- RG 5.330 Section 609(9B) provides that a listed company does not have a relevant interest in securities merely because the company must apply restrictions on the disposal of the securities as part of a listing rule escrow under the listing rules of a declared financial market. Section 609(9B) applies for the purposes of the takeover provisions in Ch 6, but not the substantial holding requirements in Pt 6C.1: see s671E(c).
- RG 5.331 Section 609(9C) provides that the declared financial market operator does not have a relevant interest merely because it has the power to control the disposal of securities that are the subject of a listing rule escrow. This includes, where relevant, the market operator’s power to consent to the release of securities from the escrow in the event of a takeover bid or scheme of arrangement. Section 609(9C) applies for the purposes of both the takeover provisions in Ch 6 and the substantial holding requirements in Pt 6C.1.

Voluntary escrow arrangements

- RG 5.332 In some cases, a holder may be requested to enter into an escrow arrangement by:
- (a) a company; or
 - (b) an underwriter or lead manager.

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RG 5.333 The company, underwriter or lead manager may require the voluntary escrow to promote investor confidence in an offer of securities in respect of an initial public offer or the acquisition of a business.

Exceptions for certain voluntary escrow agreements

RG 5.334 Under s608 of the Corporations Act, a person who enters into an escrow arrangement with a security holder in relation to securities will have a relevant interest in those securities as they have the power to control the disposal of the securities.

RG 5.335 Section 609B provides three exceptions for relevant interests arising under escrow agreements:

- (a) s609B(1), (2)(a) and (3) provide that a body corporate, and underwriter, lead manager or joint lead manager, will not have a relevant interest in securities merely because they enter into an agreement in connection with an initial public offering (IPO). These exceptions only apply where the escrow securities are in the same class of securities as those that are covered by the IPO; and
- (b) s609B(1) and (2)(b) provide that a body corporate will not have a relevant interest in securities merely because they enter into a voluntary escrow agreement, where the escrow securities are issued as consideration for the acquisition of a business under a separate agreement between the body corporate and the vendor of the business.

RG 5.336 The exceptions in s609B only apply where the agreement relating to the escrow securities satisfies the conditions set out in s609B(5).

RG 5.337 As with the exception for listing rule escrow under s609(9B), the exceptions in s609B apply for the purposes of the takeover provisions in Ch 6, but not the substantial holding requirements in s671B: see s671E(d).

Disclosure of voluntary escrow arrangements

RG 5.338 If the securities that are subject to escrow are issued under a prospectus, we require details of the voluntary escrow to be disclosed in the prospectus. For more information about what needs to be disclosed in a prospectus, see Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* ([RG 228](#)).

RG 5.339 If the issue of the securities is approved at a meeting of holders, the details must be disclosed in the notice of meeting or explanatory statement accompanying the notice. For more information about other disclosures necessary so that holders can make an informed decision to approve issue of the securities, see Section B of [RG 74](#).

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Applying for individual relief

- RG 5.340 The relevant interest exceptions in s609B do not cover all types of voluntary escrow arrangements—for example, voluntary escrow arrangements entered into in connection with an acquisition of an asset. Where the requirements in s609B are not met in relation to a voluntary escrow arrangement, where appropriate we may give relief to modify s609B on a case-by-case basis.
- RG 5.341 Individual escrow relief is generally sought by a company, underwriter or lead manager who requires a holder to enter into a voluntary escrow arrangement in connection with the sale of an asset or other circumstances that are not contemplated by s609B. These are the entities that generally acquire a relevant interest under voluntary escrow arrangements.
- RG 5.342 Voluntary escrow relief will generally only be provided where the relevant escrow agreements meet the restriction, terms and duration requirements in Table 16, which generally mirror the terms of s609B(5).

Why we may consider it appropriate to grant individual escrow relief

- RG 5.343 When providing individual escrow relief, we generally strive to facilitate the benefit of a ‘fair, orderly and transparent market’, which the listing rule escrow requirements seek to achieve: see s792A.
- RG 5.344 Listing rule escrow is designed to:
- (a) reduce the opportunity and incentive for:
 - (i) related parties of the company and promoters to sell assets of dubious value to the company; or
 - (ii) seed capitalists who are likely to have paid a substantially lower price for their securities than incoming investors;

making a windfall profit at the expense of incoming investors; and
 - (b) align the economic interests of a vendor of an asset to the company, a seed capitalist, a promoter or a provider of professional services rewarded with securities for the duration of the escrow with those of the incoming investors.
- RG 5.345 Escrow delays the time in which a vendor can realise the value of the securities. The delay allows the value of assets or services sold to an entity to become more apparent, and for the market price of the entity’s securities to adjust before the vendor receives full consideration. In that way, the business risk is shared between the vendor and other investors.
- RG 5.346 The escrow arrangements may promote an orderly market in the securities by preventing a sell-down of a substantial number of securities immediately after the securities are issued.

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RG 5.347 Voluntary escrow relief is ordinarily made under one head of power, s655A, for a declaration modifying s609B. When our relief modifies s609B, s671E has the consequential effect that the parties' obligations under the substantial holding provisions are not affected, and no modification of Pt 6C.1 is required. If individual escrow relief does not fit within these circumstances, a corresponding application under s673 seeking a modification of Pt 6C.1 may be required.

Escrow arrangements with a defensive purpose

RG 5.348 In deciding whether to grant relief, we will take into account the purpose of the escrow and the potential defensive effect of the escrow arrangement.

RG 5.349 We will not grant relief if we consider that the purpose or effect of the escrow may be to construct a defence against a takeover.

Table 16: Voluntary escrow agreements: Permitted terms for individual escrow relief

Requirement	Details
Restriction	The escrow agreement must restrict disposal and not voting.
Terms relating to takeover bids	<p>The escrow agreement must allow the holder to accept into a successful takeover bid and allow the securities to be transferred or cancelled as part of a merger by scheme of arrangement.</p> <p>A 'successful bid' for this purpose is one where the holders of at least 50% of the bid class securities that are not subject to escrow, and to which the offers under the bid relate, have accepted.</p> <p>The escrow agreement must require the securities to be returned to escrow if the bid does not become unconditional. The wording of the proposed agreement must reflect this requirement as it applies to both a full and a proportional bid.</p>
Duration	<p>The escrow must terminate no later than:</p> <ul style="list-style-type: none"> • for an escrow arrangement with an underwriter or lead manager—one year after the date that the parties enter into the voluntary escrow; or • for an escrow arrangement with the company—two years after the date that the parties enter into the voluntary escrow.

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Requirement	Details
Permitted transfers	<p>Transfers where there is no change in beneficial ownership</p> <p>Where the escrowed securities are beneficially held, the holder may only transfer the escrowed securities to another holder when:</p> <ul style="list-style-type: none"> • the transfer does not result in a change in the beneficial ownership of the escrowed securities; • the transfer does not extend the duration of the escrow under the escrow agreement; and • the transferee agrees to inherit the same restrictions on voting and disposal as under the escrow agreement. <p>Transfers where there is an exercise of security interests over the escrowed securities</p> <p>Where the escrow allows the holder to create a security interest in favour of a financial institution for a loan or other financial accommodation, the holder must not create the security interest unless the financial institution agrees in writing to take or acquire the security interest subject to the terms of the escrow agreement.</p>

No restriction on voting

RG 5.350 An escrow agreement should not restrict a holder's ability to exercise the voting rights attached to securities placed in escrow. A voting restriction is not necessary to achieve the underlying objectives of escrow: see RG 5.343–RG 5.346. An escrow agreement that confers the power to control the exercise of votes attached to securities in escrow may indicate a purpose other than escrow, for which relevant interest relief may not be appropriate.

Carve-out for a successful bid

RG 5.351 Our requirement that an escrow agreement must allow the holder to accept into a successful takeover bid is similar to the requirement in ASX Listing Rule 9.5. It is designed to reduce the defensive effect of the escrow.

RG 5.352 However, even if holders are free to accept a successful takeover bid, an escrow arrangement may still have a defensive effect. A potential bidder may be discouraged because it is more difficult to build a pre-bid stake. There may also be an increased difficulty for a bidder in having to first acquire more than 50% of the available securities (those that are not subject to escrow).

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Duration of voluntary escrow

- RG 5.353 Given the potential defensive effect of escrow arrangements, the maximum duration permitted for the voluntary escrow is one year for underwriter escrow or ‘lead manager escrow’ and two years for company escrow.
- RG 5.354 These periods are consistent with the periods applicable to listing rule escrows, and are designed to provide a balance between the following considerations:
- (a) allowing sufficient delay for the market to value goods and services provided by the holder and to prevent a sell-down immediately after the securities are quoted; and
 - (b) minimising the period during which the holder is restrained from further selling. A prolonged escrow may affect the market for control over the company.

Permitted transfers of escrowed securities

- RG 5.355 Voluntary escrow agreements may contain exceptions which allow the holder to transfer their rights or interests in the securities in limited prescribed circumstances.
- RG 5.356 Where the escrowed securities are held by a trust or a nominee, our individual relief will ordinarily apply even where there is a change of trustee or nominee. Similar to the requirement in ASX Listing Rule 9.6, the escrow securities may only be transferred when:
- (a) the transfer does not involve a change in the beneficial ownership of the escrowed securities;
 - (b) the transfer does not extend the period of the escrow agreement; and
 - (c) the transferee agrees to inherit the same restrictions on disposal of escrowed securities under the escrow agreement.
- RG 5.357 Unlike listing rule escrow, voluntary escrow arrangements may allow the holder to create a security interest in the escrow securities in favour of a financial institution as security for a loan or other financial accommodation. Where this occurs, the financial institution must agree in writing that no escrowed securities may be transferred to the financial institution in connection with the security interests until the expiry of the escrow period.

Note: Under ASX Listing Rule 9.1, the holder of the restricted securities and each ‘controller’ are required to enter into a restriction deed in the form set out in Appendix 9A: see ASX Listing Rule 19.12 for the definition of ‘controller’ under the ASX Listing Rules. Under clause 1 of Appendix 9A, the holder of the restricted securities is prohibited from creating, or agreeing or offering to create, any security interests in the restricted securities. A similar restriction applies to the controller in relation to their controller interests in the holder of restricted securities under clause 2 of Appendix 9A.

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RG 5.358 Where the voluntary escrow arrangement permits the holder to create a security interest over the escrowed securities, our individual relief will generally apply where the bona fide third-party financial institution exercises its security interest over the escrowed securities, resulting in a change in the beneficial ownership in the securities. Our individual relief generally applies where:

- (a) the financial institution is a person that does not acquire a relevant interest in the escrowed securities because of the exception in s609(1): see RG 5.68–RG 5.76; and
- (b) the securities remain in escrow with the holder under the escrow agreement for the outstanding period of the escrow.

RG 5.359 Our relief applies in these circumstances because we consider that these types of transfers do not undermine the purpose of escrow and are unlikely to be used to construct a possible takeover defence. We consider the rationale for voluntary escrow relief is less clear in relation to transfers of escrowed securities outside those prescribed circumstances—for example, in the event of death of the holder or other party who obtains the escrowed securities under a court order. In these cases, the fact that the transfer of the securities has occurred usually indicates that there is no additional need for, or benefit in, permitting the voluntary escrow arrangement to continue.

Substantial holding disclosure

RG 5.360 Our relief for companies and underwriters or lead managers that enter into listing rule escrows, or voluntary escrows, does not extend to the substantial holding provisions. A party will still acquire a relevant interest as a result of entering into an escrow arrangement, for the purposes of s671B, and will be required to notify the relevant company and the market of details of their relevant interests in accordance with the requirements of that provision.

RG 5.361 In particular, substantial holding information given to the relevant market operator must be accompanied by the escrow agreement and any other documents setting out the terms of a relevant agreement contributing to the creation of the escrow: see s671BF.

Note: For more information about the substantial holding disclosure requirements, see [RG 222](#).

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Key terms

Term	Meaning in this document
20% interest limb	Section 608(3)(a) of the Corporations Act, under which a person is deemed to have a relevant interest on the basis of having voting power of greater than 20% in a body corporate or managed investment scheme
accelerator provision	Section 608(8) of the Corporations Act
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s12 of the Corporations Act
ASX	The exchange market operated by ASX Limited
beneficial ownership tracing provisions	Pt 6C.2 of the Corporations Act
bid class	Has the meaning given in s9 of the Corporations Act
bidder	A bidder under a takeover bid, as defined in s9 of the Corporations Act
bid period	Has the meaning given in s9 of the Corporations Act
call	A call option
Cboe	The exchange market operated by Cboe Australia Pty Ltd
Ch 6 (for example)	A chapter of the Corporations Act (in this example numbered 6)
class	A class of securities
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	<i>Corporations Regulations 2001</i>
CS facility	A clearing and settlement facility as defined by s768A of the Corporations Act

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Term	Meaning in this document
declared financial market	Has the meaning given in s9D(1) of the Corporations Act Note: References to 'prescribed financial market' or 'prescribed financial markets' in any ASIC instrument (e.g. ASIC Instrument 2023/688) should apply as if the references are to a declared financial market or declared financial markets, respectively: see s1705G
deemed economic interest	Has the meaning given by Div 2 of Pt 6C.1A of the Corporations Act
director disclosure provisions	Sections 205G, 300(11) and 300(12) of the Corporations Act
disclosable movement	Has the meaning given in s671BK of the Corporations Act
financial market	As defined in s767A of the Corporations Act, a facility through which offers to acquire or dispose of financial products are regularly made or accepted
general prohibition	The prohibitions on offers, invitations, acquisitions and transactions in s606 of the Corporations Act
group company	A member company in a corporate group
holder	A holder of securities
key person	Has the meaning given in s671A of the Corporations Act
listed entity	A Ch 6C body under s671A(a) of the Corporations Act
listing rule escrow	An escrow arrangement entered into in accordance with the requirements of the listing rules of a declared financial market
long position	The party to a derivative that may benefit if the price of the underlying security increases, or the party to a physically settled call or put option that on exercise will acquire the underlying security
notional s671A (for example)	A subsection of the Corporations Act, notionally inserted by legislative instrument (in this example numbered 671A)
old Corporations Law	The law, set out in s82 of the <i>Corporations Act 1989</i> , which preceded the Corporations Act. Unless otherwise indicated, a reference to the old Corporations Law is a reference to the law as it stood before implementation of the <i>Corporate Law Economic Reform Program Act 1999</i>
option	A contractual arrangement under which one party has the right, but not the obligation, to buy or sell an underlying asset from the other at a set price and before a specified future time
Pt 6C.1 (for example)	A part of the Corporations Act (in this example numbered 6C.1)

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Term	Meaning in this document
put	A put option
reg 1.0.18 (for example)	A regulation of the Corporations Regulations (in this example numbered 1.0.18)
relevant interest	Has the meaning given in s608 and 609 of the Corporations Act
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
s602 (for example)	A section of the Corporations Act (in this example numbered 602), unless otherwise specified
securities	Has the meaning given to that term for the purposes of Chs 6–6C in s92(3) of the Corporations Act (unless otherwise stated)
short position	The party to a derivative that may benefit if the price of the underlying security decreases, or the party to a physically settled call or put option that on exercise will dispose of the underlying security
substantial holding	Has the meaning given in s9 of the Corporations Act
substantial holding provisions	Pt 6C.1 of the Corporations Act
takeover provisions	Ch 6 of the Corporations Act
takeover threshold	The level of voting power specified in s606(1)(c) and 606(2)(b), above which the general prohibition operates
target	Has the meaning given in s9 of the Corporations Act
underlying security	The security that is acquired or disposed of when an option is exercised
voluntary escrow	An escrow arrangement that is not required to be entered into under the listing rules of a declared financial market
voting power	Has the meaning given in s610 of the Corporations Act
warrant	A financial product, primarily issued by financial institutions, which provide a level of exposure to an underlying asset, instrument or index

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Related information

Headnotes

acting in concert, associates, corporate groups, deemed economic interest, disclosure, escrow arrangements, exchange traded options, financial accommodation, options, relevant agreements, relevant interests, security interest, takeover threshold, unacceptable circumstances, voluntary escrow, voting interests, voting power, voting shares, warrants

Legislative instruments

[ASIC Corporations \(Disclosure of Directors' Interests\) Instrument 2016/881](#)

[ASIC Corporations \(IDPS – Relevant Interests\) Instrument 2015/1067](#)

[ASIC Corporations \(Investor Directed Portfolio Services\) Instrument 2023/669](#)

[ASIC Corporations \(Relevant interests, ASIC and ASIC Chairperson\) Instrument 2023/194](#)

[ASIC Corporations \(Relief to Facilitate Admission of Exchange Traded Funds\) Instrument 2024/147](#)

[ASIC Corporations \(Securities Lending Arrangements\) Instrument 2021/821](#)

[ASIC Corporations \(Warrants: Relevant Interests and Associations\) Instrument 2023/687](#)

Regulatory guides

[RG 6](#) *Takeovers: Exceptions to the general prohibition*

[RG 9](#) *Takeover bids*

[RG 10](#) *Compulsory acquisitions and buyouts*

[RG 74](#) *Acquisitions approved by members*

[RG 148](#) *Platforms that are managed investments schemes and nominee and custody services*

[RG 193](#) *Notification of directors' interests in securities—Listed companies*

[RG 196](#) *Short selling*

[RG 222](#) *Substantial holding disclosure: Securities lending and prime broking*

[RG 228](#) *Prospectuses: Effective disclosure for retail investors*

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Legislation

Corporations Act 2001, Ch 6–6C; Pt 6A.1, Pt 6C.1A–2; s9, 12, 16, 50AA, 53, 64, 64A, 92, 205F, 205G, 300, 602, 602A, 603–604, 606, 608, 609, 609B, 610, 611, 621, 622, 623, 657A, 661A, 662A, 663A, 671A, 671AA–671AQ, 671AS–671AX, notional 671AY, 671B, 671BB, 671BD, 671BK, 671BL, 671BM, 671C, 671D, 671E, 672A, 672B, 672DA, 672DE, 761D, 764A, 792A, 912AD and 1020B.

Corporations Act 1989, s82 (old Corporations Law)

Corporations Regulations 2001, regs 1.0.02, 1.0.18, 7.1.04(7)

Companies (Acquisition of Shares) Act 1980 and corresponding state codes

Cases

Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No 4) (1984) 2 ACLC 829

ASIC v Yandal Gold Pty Ltd (1999) 32 ACSR 317 (*Yandal Gold*)

Australian Pipeline Limited v Alinta Ltd [2007] FCAFC 55 (*Alinta Ltd*)

Azumah Resources Ltd [2006] ATP 34

Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd (1995) 16 ACSR 501 (*Bank of Western Australia*)

Bateman v Newhaven Park Stud Ltd (2004) 49 ACSR 597

Chew v Hamilton (1985) 13 ACLR 440

CMI Limited [2011] ATP 4

Corebell Pty Ltd v New Zealand Insurance Co Ltd (1988) 13 ACLR 349

Corumo Holdings Pty Ltd v C Itoh Ltd (1991) 5 ACSR 720

Dromana Estate Ltd 01R [2006] ATP 8

Edensor Nominees Pty Ltd v ASIC (2002) 41 ACSR 325 (*Edensor Nominees*)

Exicom Pty Ltd v Futuris Corporation Ltd (1995) 18 ACSR 404

Flinders Diamonds Ltd v Tiger International Resources Inc (2004) 49 ACSR 199

Industrial Equity Ltd v Commissioner for Corporate Affairs (Vic) (1989) 1 ACSR 153

Mount Gibson Iron Limited [2008] ATP 4

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