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The consultation process

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous, we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our [privacy policy](#) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 23 January 2023 to:

Corporations team
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: asic.takeovers.policy.submissions@asic.gov.au

What will happen next?

| | | |
|----------------|--------------------|--|
| Stage 1 | 30 November 2022 | ASIC consultation paper released |
| Stage 2 | 23 January 2023 | Comments due on the consultation paper |
| Stage 3 | April–October 2023 | Commencement of remade instrument(s) |

A Background

Key points

Legislative instruments, such as class orders, are repealed automatically, or 'sunset', after 10 years, unless action is taken to preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

Purpose of 'sunseting' legislative instruments

- 1 Under the *Legislation Act 2003*, legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the tenth anniversary of its registration on the Federal Register of Legislation. Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument, such as a class order, must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

Our approach to remaking legislative instruments

ASIC's general approach

- 3 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining our vision of a fair, strong and efficient financial system for all Australians.
- 4 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunseting, to ensure that:
 - (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
 - (b) the instrument retains its effectiveness in addressing an identified issue or problem.

ASIC's and Treasury's approach to remaking legislative instruments

- 5 On 23 November 2022, the Government introduced the first tranche of legislation to move nominal modifications of the law currently in legislative instruments made by ASIC directly into the primary Acts and regulations. As those instruments approach their end dates, Treasury and ASIC will progressively review the instruments to determine whether the structure and navigability of the law would be improved if the instruments were instead contained in the primary law or regulations.

- 6 We are seeking feedback on our proposals to remake, with minor amendments, these instruments if they are not incorporated into the primary law as part of a future incorporation process before they are due to expire.

B Remaking ASIC class orders

Key points

We are proposing to remake:

- [Class Order \[CO 12/1209\]](#) *Relevant interests, ASIC and ASIC Chairperson*, which sunsets on 1 April 2023;
- [Class Order \[CO 13/519\]](#) *Changing the responsible entity*, which sunsets on 1 October 2023;
- [Class Order \[CO 13/520\]](#) *Relevant interests, voting power and exceptions to the general prohibition*, which sunsets on 1 October 2023;
- [Class Order \[CO 13/521\]](#) *Takeover bids*, which sunsets on 1 October 2023;
- [Class Order \[CO 13/522\]](#) *Compulsory acquisitions and buyouts*, which sunsets on 1 October 2023;
- [Class Order \[CO 13/524\]](#) *Bidder giving substantial holding notice*, which sunsets on 1 October 2023;
- [Class Order \[CO 13/525\]](#) *On-sale disclosure relief for scrip bids and schemes of arrangement*, which sunsets on 1 October 2023;
- [Class Order \[CO 13/526\]](#) *Warrants: Relevant interests and associations*, which sunsets on 1 October 2023; and
- [Class Order \[CO 13/528\]](#) *Changes to a bidder's statement between lodgement and dispatch*, which sunsets on 1 October 2023.

We have formed the preliminary view that these class orders are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework. We are consulting on minor amendments to the class orders as set out in this consultation paper.

Each class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instruments, which reflect the minor amendments proposed in this paper, are available on our website at www.asic.gov.au/cp under CP 365.

Your feedback

7

You are invited to comment on any of our proposals to remake the ASIC class orders in this section, including whether the class orders are currently operating effectively and efficiently. These proposals are only an indication of the approach we may take and are not our final policy.

Class Order [CO 12/1209] *Relevant interests, ASIC and ASIC Chairperson*

Background

8 Section 608 of the *Corporations Act 2001* (Corporations Act) sets out when a person has a relevant interest in securities of a listed entity. Section 671B sets out when a person must give certain information about their relevant interest in a listed entity when their relevant interest is 5% or more (substantial holding) to the relevant market operator and the listed entity.

Note: In this report, references to chapters (Chs), parts (Pts) and sections (s) are to the Corporations Act, unless otherwise specified.

9 In certain circumstances, ASIC may have a relevant interest in securities because it holds the securities or has power in relation to the voting or disposal of securities. For example, ASIC will generally have a relevant interest in securities if securities are vested in ASIC or if securities are vested in the Commonwealth and ASIC has the power to vote or dispose of the securities on behalf of the Commonwealth.

10 The purpose of [\[CO 12/1209\]](#) is to limit the circumstances in which ASIC will have a relevant interest in securities to circumstances where the securities are vested in, or held by, ASIC or the Commonwealth. [\[CO 12/1209\]](#) also specifies that the Chairperson of ASIC does not have a relevant interest in securities merely because ASIC does.

11 The key effect of these modifications is that the substantial holding requirements in s671B will only apply to ASIC to the extent that securities are vested in or held by ASIC or the Commonwealth.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2023, we propose to continue the relief currently given by [\[CO 12/1209\]](#) in a new legislative instrument without any significant changes: see draft *ASIC Corporations (Relevant Interests, ASIC and ASIC Chairperson) Instrument 2023/XXX* at Attachment 1 to this consultation paper. The only change proposed is to update [Regulatory Guide 5 Relevant interests and substantial holding notices](#) (RG 5) to reflect the updated instrument name.

Your feedback

B1Q1 Is [\[CO 12/1209\]](#) operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?

B1Q2 Should the remade instrument remain in force for five years or for a different period of time?

Rationale

- 12 We have reached the preliminary view that [\[CO 12/1209\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 13 We propose a five-year sunset period as this will provide sufficient certainty for industry.

Class Order [\[CO 13/519\]](#) *Changing the responsible entity*

Background

- 14 Section 601FM sets out the procedural steps by which members of a registered scheme are able to remove the responsible entity of a registered managed investment scheme (registered scheme). Section 601FM(1) states that if members of a registered scheme wish to remove the responsible entity, they may take action by calling a members' meeting to consider and vote on a resolution to remove the current responsible entity and a resolution to choose a new responsible entity. The resolutions must be extraordinary resolutions if the scheme is not listed.
- 15 [\[CO 13/519\]](#) modifies s601FM to make it clear that the resolutions under s601FM(1) are ordinary resolutions if the scheme is listed.

Proposal

- B2** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [\[CO 13/519\]](#) in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft *ASIC Corporations (Changing the Responsible Entity) Instrument 2023/XXX* at Attachment 2 to this consultation paper. The only change proposed is to update [Regulatory Guide 9 Takeover bids](#) (RG 9) to reflect the updated instrument name.

Your feedback

- B2Q1 Is [\[CO 13/519\]](#) operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?
- B2Q2 Should the remade instrument remain in force for five years or for a different period of time?

Rationale

- 16 We have reached the preliminary view that [\[CO 13/519\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part

of the legislative framework. We are not aware of significant issues with the current operation of this class order.

- 17 We propose a five-year sunset period as this will provide sufficient certainty for industry.

Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition*

Background

- 18 Chapter 6 regulates the acquisition of substantial interests in listed companies and bodies, listed schemes and unlisted companies with more than 50 members. The interests with which the takeover provisions are concerned are ‘relevant interests’ which are defined in s608 and 609. Broadly, a person is taken to have a relevant interest in securities if the person holds, or has the power to control voting or disposal of, the security.
- 19 [\[CO 13/520\]](#) provides exemptions from, and modifications to, provisions relating to relevant interests to:
- (a) improve the operation of the provisions in light of developments and innovations observed in the market over time; and
 - (b) address technical issues and anomalies identified in the course of ASIC’s administration of the provisions.
- 20 A summary of the purpose and operation of [CO 13/520] is set out in the Appendix at paragraphs 111–147.

Proposal

- B3** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/520] in a new legislative instrument that reflects current drafting practice, with minor amendments: see draft *ASIC Corporations (Relevant Interests, Voting Power and Exceptions to the General Prohibition) Instrument 2023/XXX* at Attachment 3 to this consultation paper. The only changes proposed are to:
- (a) update [RG 5](#);
 - (b) amend the money lending exception in s609(1) to apply only where the lender does not have other relevant interests in securities of the entity;
 - (c) provide class relief for voluntary escrow arrangements in relation to securities issued to parties selling a business or assets to the entity; and
 - (d) re-enable s609(3) by moving the modification in [CO 13/520] to a new subsection.

Your feedback

- B3Q1 Should the money lending exception in s609(1) be amended to apply only where the lender does not have other relevant interests in securities of the entity?
- B3Q2 Should ASIC provide class relief for non-IPO voluntary escrow arrangements on the same conditions set out in [RG 5](#), particularly in relation to securities issued to parties selling a business or assets to the entity?
- B3Q3 Should the modification to s609(3) be moved into a new subsection and the original relief in s609(3) be re-enabled?
- B3Q4 Should RG 5 be updated to clarify matters following enactment of IPO voluntary escrow relief under the legislative instrument?
- B3Q5 Is [\[CO 13/520\]](#) operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?
- B3Q6 Should the remade instrument remain in force for five years or for a different period of time?

Rationale

- 21 We have reached the preliminary view that [\[CO 13/520\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 22 We propose a five-year sunset period as this will provide sufficient certainty for industry.

Section 609(1) money lending exception

- 23 Section 609(1), as modified by [\[CO 13/520\]](#), provides an exemption from acquiring a relevant interest in securities of an entity where 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. The modifications in [\[CO 13/520\]](#) 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.
- 24 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.

25 However, we may take regulatory action if the person has taken or acquired the security interest for purposes that are otherwise inconsistent with the policy underlying the exceptions.

26 We are considering whether the exemption should not apply where the financier has an equity interest in securities in the entity. Where a financier otherwise has an equity interest in securities in the entity, this may imply that the arrangements are contrary to the ordinary provision of financial accommodation where the financier is assumed to have no interest in the affairs of the entity beyond those that impact its ability to liquidate the secured securities to obtain repayment of its debt. Such arrangements may be a potential misuse of the exception provided in s609(1) and inconsistent with the policy underlying the exceptions.

27 We are consulting on this matter as it arose for consideration in *Donaco International Limited* [2019] ATP 11.

28 We invite submissions as to whether limitations should be placed on the money lending and financial accommodation exceptions in s609(1), as modified by [\[CO 13/520\]](#), such that they do not apply where the financier otherwise has an equity interest in the entity.

Non-IPO voluntary escrow relief

29 A holder may be requested to enter into an escrow agreement on a voluntary basis by a company, underwriter or lead manager where the escrow arrangement relates to securities issued to the holder in return for seed capital, assets or services. We may grant individual relief to a company, underwriter or lead manager to facilitate these voluntary escrow arrangements.

30 We have already provided relief to facilitate listing rule escrow and voluntary escrow in the context of an initial public offering (IPO). We consider the objectives and benefits of voluntary and listing rule escrows to be similar. We currently provide individual relief on a regular basis, as set out in [RG 5](#), to facilitate voluntary escrow arrangements relating to securities issued in return for the provision of seed capital, assets or services. We are considering using ASIC's modification powers in Chs 6 and 6C to provide legislative relief to facilitate these voluntary escrow arrangements.

31 Relief would be provided to similar parties and on similar conditions to that of voluntary escrow relief relating to IPOs.

Section 609(3) financial services licensees

- 32 [\[CO 13/520\]](#) overrides the original exemption provided in s609(3) for financial services licensees who hold securities on behalf of someone else in the ordinary course of their financial services business. [\[CO 13/520\]](#) modifies the exemption so that a financial services licensee does not have a relevant interest in the securities of its client merely because it receives specific instructions from the client directing the licensee (in the ordinary course of its financial services business) to dispose of the securities or to enter into a sold position in relation to the securities through a dealing in a warrant (or a financial product that would be a warrant but for it being transferable). The modification recognises that a securities dealer does not generally hold securities on behalf of its client but rather acts as an agent of its client authorised to exercise powers of the holder without actually holding the securities. It also extends the operation of the provision to recognise derivatives trading and to cover managed discretionary accounts where the dealer has a broader discretion to control the disposal of the client's securities.
- 33 However, due to the amendments to the original exemption in s609(3), there may be no exemption to s606 for financial services licensees who provide custodial or depository services where a financial product, or a beneficial interest in a financial product, is held in trust for or on behalf of the client or another person nominated by the client. Financial services licensees who provide custodial or depository services may otherwise be able to rely on the exemption in s609(3) as originally enacted.
- 34 We seek submissions as to whether there is a need for the original exemption provided in s609(3) to be re-enabled and for the modified exemption provided by [\[CO 13/520\]](#) to be moved to a separate exemption.

RG 5 updates

- 35 We propose to make the following minor amendments to the policy in [RG 5](#) relating to voluntary escrow relief in Section F.
- 36 We propose to update RG 5 to:
- (a) remove guidance that an application for relief for a modification to the substantial holding provisions is required with voluntary escrow relief applications; and
 - (b) clarify that each of the conditions set out in Table 11 in relation to voluntary escrow relief for IPOs applies equally to other types of voluntary escrow for which individual relief is sought.
- 37 We have received feedback that the policy in RG 5 relating to voluntary escrow relief in Section F could be clearer with respect to non-IPO voluntary escrow relief.

- 38 Prior to amendments to [\[CO 13/520\]](#) to provide voluntary escrow relief for IPOs, applicants seeking relief to disregard a relevant interest resulting from an escrow arrangement also needed to apply for a corresponding modification to the substantial holding provisions. This ensured that the parties' obligations under the substantial holding provisions were not affected by the relief to disregard the relevant interest and substantial holder notices were still provided. Following the new instrument, we can grant relief to disregard the relevant interest arising under voluntary escrow arrangements while still maintaining the parties' obligations under the substantial holding provisions.
- 39 The amendments to [\[CO 13/520\]](#) to provide voluntary escrow relief for IPOs also permitted voluntary escrow arrangements to include certain permitted transfers of escrowed securities under the escrow agreements. We propose to clarify [RG 5](#) at RG 5.281 to explain that each of the conditions in Table 11 applies to voluntary escrow relief sought under individual applications. This means that for individual relief applications, the escrow agreement may now allow a holder of escrowed securities to transfer those securities to another holder where there is no change in beneficial ownership or where there is an exercise of security interests over the escrowed securities.

Class Order [\[CO 13/521\]](#) *Takeover bids*

Background

- 40 Chapter 6 sets out the rules and procedures applying to a takeover bid which are designed to promote the principles underlying the takeover provisions set out in s602. It applies to listed companies, unlisted companies with more than 50 members and listed schemes.
- 41 [\[CO 13/521\]](#) provides exemptions from, and modifications to, the takeover provisions to:
- (a) improve the operation of the provisions in light of developments and innovations observed in the market over time; and
 - (b) address technical issues and anomalies identified in the course of ASIC's administration of the provisions.
- 42 A summary of the purpose and operation of [\[CO 13/521\]](#) is set out in the Appendix at paragraphs 148–193.

Proposal

- B4** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [\[CO 13/521\]](#) in a new legislative instrument that reflects current drafting practice,

with minor amendments: see draft *ASIC Corporations (Takeover Bids) Instrument 2023/XXX* at Attachment 4 to this consultation paper. The only changes proposed are to:

- (a) extend the declaration in paragraph 4(a) substituting s617(2) to expressly cover derivatives;
- (b) extend the declaration in paragraph 4(a) substituting s617(2) to include bid class securities issued after the date set under s633(2);
- (c) amend the declaration in paragraph 4(d) to clarify that a bidder can include in its offer terms a shorter period for payment of bid consideration than required under s620(2); and
- (d) update [RG 9](#).

Your feedback

- B4Q1 Should the declaration in paragraph 4(a) substituting s617(2) be extended to expressly cover derivatives? If so, should any form/s of derivatives be expressly excluded from s617(2)?
- B4Q2 Should the declaration in paragraph 4(a) substituting s617(2) be extended to bid class securities issued after the date set in s633(2)?
- B4Q3 Should the declaration in paragraph 4(d) substituting s620(2) be amended to permit the bidder to promise in its offer terms a shorter period of payment of bid consideration than required by s620(2)? If so, should any limitations be imposed on the bidder's choice of a shorter period?
- B4Q4 Is [\[CO 13/521\]](#) operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?
- B4Q5 Should the remade instrument remain in force for five years or for a different period of time?

Rationale

43 We have reached the preliminary view that [\[CO 13/521\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

44 We propose a five-year sunset period as this will provide sufficient certainty for industry.

Extension to derivatives

45 We are proposing to amend paragraph 4(a) of [\[CO 13/521\]](#) to extend s617(2) to derivatives. Our proposed amendment addresses an ambiguity where certain performance rights may not meet the definition of 'securities' under s92(3) and therefore fall outside the scope of s617(2).

46 Performance rights are usually ‘securities’ when they can be classified as
‘options’ under s92(3)(f). We consider a performance right may be classified
as an option where its terms contain a mechanism requiring the holder to
exercise their right to obtain securities to which the right relates.

47 However, where the performance rights have other characteristics, they may
not meet the definition of ‘security’ in s92(3).

48 For example, if a performance right does not have an exercise mechanism,
but vests automatically, it is unlikely to provide the holder with an ‘option’
and therefore is unlikely to be classified as a security under s92(3)(f).
Rather, such performance rights are likely to be a derivative under s761D(1).
Derivatives are expressly excluded by s92(3)(g) from the definition of
securities in s92(3).

49 Accordingly, we have granted case-by-case relief extending s617(2) to
performance rights which, by their terms, vest automatically and in the
absence of an exercise mechanism.

50 To ensure such performance rights and other derivatives fall within the scope
of s617(2), we propose to amend paragraph 4(a) to allow a bidder to choose
to extend its offer to securities that come to be in the bid class due to a
conversion or exercise of rights of a derivative. A consequential amendment
will also be required to s641(1)–(1A) to require the target to provide the
bidder with information relating to the holders of derivatives that are
convertible into securities in the bid class and to s636(1)(j) in relation to the
statement required to be made in the bidder’s statement.

51 The purpose of our proposal is to ensure performance rights that are not
defined as securities, and other derivatives, are covered by s617(2) where
those derivatives will convert into securities in the bid class or confer rights
to be issued securities in the bid class. We take the view that it is the act of
conversion into bid class securities, and not the legal characterisation and
classification of the derivatives prior to conversion, that is the focus of
s617(2).

Extension to bid class securities issued after the date set under s633(2)

52 We are proposing to amend s617(2) to permit a bidder to extend its offer to
bid class securities issued after the date set by the bidder under s633(2).

53 Section 617(2), as presently modified, does not extend to bid class securities
issued after the date set by the bidder under s633(2):

- (a) on the conversion of, or exercise of rights attached to, other securities
where those other securities are issued after the date set by the bidder
under s633(2); or

(b) otherwise—for example, under a dividend or distribution reinvestment plan, bonus share plan or employee share scheme.

54 We have granted case-by-case relief to allow an off-market bid to extend to bid class securities issued after the date set under s633(2) in circumstances that are not within s617(2). This relief is consistent with the application of the compulsory acquisition provisions to securities issued up until the end of the offer period.

55 Our relief requires the bidder to disclose that the bid has been extended in this way in the bidder’s statement or by way of supplementary disclosure. We also require that a bidder seeking this relief does not rely on any defeating conditions of its bid that are triggered only because of circumstances relating to the issue of the target securities to which the bidder extends its bid.

Whether the bidder can promise a shorter time for payment of bid consideration in its offer terms

56 Section 620(2), as modified by [\[CO 13/521\]](#), requires the bidder to provide in its offer that it will pay the consideration under the off-market bid within a specified period, generally the earlier of one month or 21 days depending on the particular circumstances: see s620(2)(a) and [\[CO 13/521\]](#) at paragraph 4(d).

57 In certain bids, a bidder will include in the terms of its offer a shorter time period for the payment of the bid consideration. Generally, the bidder’s rationale for reducing this time period is to make accepting the bid more attractive to shareholders who will receive the bid consideration sooner.

58 We do not consider that offering shorter payment terms generally raises policy concerns or offends the principles in s602. However, having regard to the requirement of s620(2) as modified by [\[CO 13/521\]](#), we have received feedback that it may be unclear whether it is open for a bidder to provide offer terms that depart from the payment period set in s620(2) in the absence of relief. Bidders often choose to pay bid consideration earlier than the time period specified in s620(2). However, uncertainty may arise where a bidder wishes to specify a shorter period as a term of their offer.

59 Relevantly, the High Court in *Price v Spoor* [2021] HCA 20 has recently affirmed when parties can effectively contract out of statutory rights, where Kiefel CJ and Edelman J at [12] stated:

In *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 it was accepted that a person upon whom a statute confers a right may waive or renounce that right unless it would be contrary to the statute to do so. Most clearly this may be the case where the statute contains an express prohibition against “contracting out” of rights or where the statute, properly construed, is inconsistent with a person’s power to forgo statutory rights. The joint judgment continued:

“It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void.”

- 60 The practice of bidders offering to pay bid consideration earlier than required under s620(2) may also be relevant in respect of proportional bids, and whether a particular holding constitutes a small parcel under s618(2).
- 61 We are consulting on whether [\[CO 13/521\]](#) should be amended to expressly clarify that a bidder has the right to include in its offer terms a shorter time period for payment of bid consideration than set in s620(2).

Class Order [\[CO 13/522\]](#) *Compulsory acquisitions and buyouts*

Background

- 62 Chapter 6A gives a person a right to compulsorily acquire securities under certain circumstances depending on the level of the person’s interest in the relevant class of securities or the entity overall. [\[CO 13/522\]](#) provides exemptions from, and modifications to, the compulsory acquisition provisions to:
- (a) improve the operation of the provisions in light of developments and innovations observed in the market over time; and
 - (b) address technical issues and anomalies identified in the course of ASIC’s administration of the provisions.
- 63 A summary of the purpose and operation of [\[CO 13/522\]](#) is set out in the Appendix at paragraphs 194–210.

Proposal

- B5** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [\[CO 13/522\]](#) in a new legislative instrument that reflects current drafting practice, with minor amendments: see draft *ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/XXX* at Attachment 5 to this consultation paper. The only changes proposed are to:
- (a) provide that securities acquired on-market by the bidder in reliance on the exemption provided in item 2 of s611 are included for the purposes of the 75% calculation in s661A(1)(b)(ii); and
 - (b) update [Regulatory Guide 10](#) *Compulsory acquisitions and buyouts* (RG 10).

Your feedback

- B5Q1 For the purposes of the 75% calculation in s661A(1)(b)(ii), should securities acquired on-market by the bidder between the date of announcement of the bid and the start of the offer period in reliance on the exemption provided in item 2 of s611 be included?
- B5Q2 Is [\[CO 13/522\]](#) operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?
- B5Q3 Should the remade instrument remain in force for five years or for a different period of time?

Rationale

64 We have reached the preliminary view that [\[CO 13/522\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

65 We propose a five-year sunset period as this will provide sufficient certainty for industry.

Inclusion of securities acquired under item 2 of s611

66 Section 4(2A)(a) of [\[CO 13/522\]](#) amends the 75% Acquisition Test in s661A(1)(b)(ii) to exclude, from the number of securities acquired and from the number of securities that the bidder offered to acquire under the bid, securities in which the bidder or their associate has a relevant interest at the date of the first offer under the bid.

67 The modification to s661A(1)(b)(ii) in [\[CO 13/522\]](#) was intended to ensure that the underlying policy of the 75% Acquisition Test was preserved by ensuring that securities in which the bidder or its associates already had a relevant interest were excluded. This ensures that the compulsory acquisition process is only available to a bidder where the threshold is satisfied by acceptances of independent holders.

68 However, the operation of s661A(1)(b)(ii) as modified by [\[CO 13/522\]](#) means that any securities acquired by the bidder prior to the first offer under the bid being made are excluded from the 75% Acquisition Test. This includes securities acquired by the bidder on-market after the bid period has commenced but before the offer period has commenced in reliance on the exemption provided in item 2 of s611.

69 We have granted relief to bidders varying the operation of s661A(1)(b)(ii) as modified by [\[CO 13/522\]](#) so that securities acquired on-market by the bidder between the date of the announcement of an on-market bid and the start of the offer period, in reliance on the exemption in item 2 of s611 are included in the calculation of the 75% Acquisition Test under s661A(2A)(a)(ii). We

consider that the inclusion of securities acquired on-market by the bidder during the bid period but prior to commencement of the offer period in reliance on the exception in item 2 of s611 in the 75% Acquisition Test upholds the underlying policy described above.

- 70 We propose to amend the modification of s661A(1)(b)(ii) in [\[CO 13/522\]](#) to include in the 75% Acquisition Test any securities acquired on-market by the bidder during the bid period but prior to commencement of the offer period in reliance on the exception in item 2 of s611.

Class Order [CO 13/524] Bidder giving substantial holding notice

Background

- 71 Part 6C.1 imposes an obligation on a person to disclose details of their substantial holdings in listed entities. It is designed to ensure that investors have access to information about the identity, interests and dealings of persons who may be in a position to influence or control a listed entity.
- 72 Throughout a takeover bid, a bidder will generally acquire relevant interests in securities in respect of which the holders accept the bid and, as such, will be required to provide substantial holding notices in relation to the acceptances.
- 73 The purpose of [\[CO 13/524\]](#) is to remove the requirement for a bidder under a regulated takeover bid to disclose certain matters in a substantial holding notice.
- 74 In particular, [\[CO 13/524\]](#) provides relief to a bidder under a takeover bid so that a bidder:
- (a) does not need to give copies of the bidder's statement, offer document and acceptance forms with a substantial holding notice for acquisitions under the bid; and
 - (b) does not need to specify in the substantial holding notice the name and address of a person who has accepted an offer under the takeover bid and who, at the time the substantial holding notice is given, remains a registered holder of the securities.

Proposal

- B6** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [\[CO 13/524\]](#) in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft *ASIC Corporations (Bidder Giving Substantial Holding Notice) Instrument 2023/XXX* at Attachment 6 to this consultation paper. The only change proposed is to update [RG 5](#) to reflect the new legislative instrument name.

Your feedback

B6Q1 Is [\[CO 13/524\]](#) operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?

B6Q2 Should the remade instrument remain in force for five years or for a different period of time?

Rationale

- 75 We have reached the preliminary view that [\[CO 13/524\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 76 We propose a five-year sunset period as this will provide sufficient certainty for industry.

Class Order [\[CO 13/525\]](#) *On-sale disclosure relief for scrip bids and schemes of arrangement***Background**

- 77 Generally, an offer of securities for issue must be made under a prospectus that complies with Ch 6D, and an offer of interests in a registered scheme for issue must be made under a PDS under Pt 7.9 of the Corporations Act.
- 78 An offer of securities for sale and an offer of interests in a registered scheme for sale will, in certain circumstances, also require disclosure by way of prospectus or PDS respectively under the on-sale provisions: s707(3) and 1012C(3).
- 79 The on-sale provisions are designed to ensure that retail investors receive adequate disclosure regardless of whether securities or interests were issued to them directly by the issuer, or through an intermediary (such as a wholesale client who in turn offers the securities or interests for sale to retail investors).
- 80 The operation of the on-sale provisions raises practical difficulties in circumstances where the operator of a sale facility or a nominee acquires securities or interests in relation to a takeover bid or a scheme of arrangement under Pt 5.1 with the intention of on-selling those securities or interests.
- 81 [\[CO 13/525\]](#) operates so that neither a prospectus nor a PDS is required to be given for sale offers of securities or interests made in the following circumstances:
- (a) in respect of ‘scrip’ takeover bids—where a bidder appoints a nominee to sell securities or interests and remit the proceeds to:
 - (i) persons who elect to participate in a sale facility;

Class Order [CO 13/526] Warrants: Relevant interests and associations

Background

- 84 Warrants are financial products, primarily issued by financial institutions, which provide a level of exposure to an underlying asset, instrument or index.
- 85 In some cases, a person who issues, holds or acts as trustee in relation to a warrant that relates to an underlying security can have a ‘relevant interest’ in the underlying security as a result of the warrant. 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, [\[CO 13/526\]](#) allows warrant issuers and holders to disregard, in some cases, a relevant interest underlying securities arising from warrants quoted on ASX or Cboe Australia Pty Ltd.
- 86 A summary of the purpose and operation of [\[CO 13/526\]](#) is set out in the Appendix at paragraphs 211–225.

Proposal

- B8** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [\[CO 13/526\]](#) in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft *ASIC Corporations (Warrants: Relevant Interests and Associations) Instrument 2023/XXX* at Attachment 8 to this consultation paper. The only changes proposed are to:
- (a) update references to Chi-X Australia Pty Ltd to Cboe Australia Pty Ltd; and
 - (b) update [RG 5](#) to reflect the new legislative instrument name.

Your feedback

- B8Q1 Is [\[CO 13/526\]](#) operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?
- B8Q2 Should the remade instrument remain in force for five years or for a different period of time?

Rationale

- 87 We have reached the preliminary view that [\[CO 13/526\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 88 We propose a five-year sunset period as this will provide sufficient certainty for industry.

Class Order [CO 13/528] *Changes to a bidder's statement between lodgement and dispatch*

Background

- 89 In a takeover, the bidder must lodge a copy of the bidder's statement with ASIC and then send a copy of the bidder's statement to holders of bid class securities in the target within the prescribed timeframe.
- 90 It may be necessary or desirable for the bidder to amend its bidder's statement after it has been lodged with ASIC, but before it is dispatched to holders. Generally, Pt 6.5 provides for amendments to be made by way of a supplementary bidder's statement. However, there may be issues in making amendments by way of a supplementary bidder's statement before it has been dispatched.
- 91 [\[CO 13/528\]](#) provides a regime to permit bidders to lodge and dispatch a replacement bidder's statement with changes from the bidder's statement lodged with ASIC.
- 92 A summary of the purpose and operation of [\[CO 13/528\]](#) is set out in the Appendix at paragraphs 226–230.

Proposal

- B9** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [\[CO 13/528\]](#) in a new legislative instrument that reflects current drafting practice, with minor amendments: see draft *ASIC Corporations (Changes to a Bidder's Statement between Lodgment and Dispatch) Instrument 2023/XXX* at Attachment 9 to this consultation paper. The only changes proposed are to:
- (a) update [RG 9](#);
 - (b) remove the requirement to lodge a supplementary bidder's statement in order to lodge and dispatch a replacement bidder's statement;
 - (c) retain the minimum 14-day period before a replacement bidder's statement may be dispatched to target holders;
 - (d) allow the lodgement and dispatch of a replacement target's statement; and
 - (e) clarify the timing for dispatch of the target's statement in a market bid where a replacement bidder's statement is lodged.

Your feedback

- B9Q1 Should ASIC remove the requirement that a supplementary bidder's statement needs to be lodged as a prerequisite for relying on the relief in [\[CO 13/528\]](#) to lodge and dispatch a replacement bidder's statement?

- B9Q2 Should ASIC reduce or remove the minimum 14-day period before a replacement bidder's statement can be dispatched to target holders?
- B9Q3 Should ASIC extend the relief under [\[CO 13/528\]](#) to allow for a similar regime relating to the lodgement of replacement target's statements?
- B9Q4 Should ASIC amend item 13 of s635(1) to clarify that, in a market bid where a bidder relies on s635A, the target must send its target's statement no later than the time for sending the replacement bidder's statement, rather than within 14 days of the original announcement (and bidder's statement)?
- B9Q5 Is [\[CO 13/528\]](#) operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?
- B9Q6 Should the remade instrument remain in force for five years or for a different period of time?

Rationale

93 We have reached the preliminary view that [\[CO 13/528\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order—however, we are consulting on a number of minor amendments as set out below.

94 We propose a five-year sunset period as this will provide sufficient certainty for industry.

Requirement to lodge a supplementary bidder's statement

95 In order to lodge and dispatch a replacement bidder's statement, [\[CO 13/528\]](#) requires that the bidder must have lodged the following documents:

- (a) an original bidder's statement; and
- (b) a supplementary bidder's statement before the original bidder's statement has been dispatched.

96 Often, when a bidder wishes to amend a bidder's statement prior to its dispatch, the bidder will decide whether it wishes to make those amendments by lodging a supplementary bidder's statement or by relying on the replacement bidder's statement relief provided in [\[CO 13/528\]](#) to lodge a replacement bidder's statement. Where a bidder wishes to rely on the replacement bidder's statement relief in [\[CO 13/528\]](#), there may be no reason for a bidder to lodge a supplementary bidder's statement before lodging a replacement bidder's statement. However, under the current settings of the relief, a bidder must lodge a supplementary bidder's statement to enliven the replacement bidder's statement regime.

97 We consider that the requirement to lodge a supplementary bidder's statement is unnecessary. In practice, many bidders lodge a first supplementary bidder's statement that includes a copy of the marked-up replacement bidder's statement to meet this requirement.

98 We propose that the relief in [\[CO 13/528\]](#) be modified to permit the lodgement of a replacement bidder's statement without the requirement to lodge a supplementary bidder's statement first. Bidders wishing to rely on the replacement bidder's statement relief would still need to lodge a replacement bidder's statement, and a marked-up copy of the replacement bidder's statement showing all changes from the original bidder's statement, no later than the time allowed for sending the original bidder's statement.

Minimum 14-day period

99 Where a bidder lodges a replacement bidder's statement in reliance on s633A as inserted by [\[CO 13/528\]](#), a bidder may not dispatch the replacement bidder's statement to target holders until at least 14 days after the replacement bidder's statement and marked-up replacement bidder's statement are lodged with ASIC and sent to the target (and, if applicable, the operator of the prescribed financial market).

100 We understand that the effective reset of the minimum 14-day period between lodgement and dispatch of the bidder's statement that arises where a replacement bidder's statement is lodged may deter bidders from relying on the replacement bidder's statement regime. This is because to do so effectively extends the time of opening of the bidder's offer.

101 Reducing the 14-day period to a shorter period may encourage bidders to use the replacement bidder's statement regime. In turn, this may reduce the potential for misleading conduct that might arise where a bidder, instead of lodging a replacement bidder's statement, dispatches a bidder's statement and comprehensive supplementary bidder's statement at the same time, or dispatches a supplementary bidder's statement before the original bidder's statement it is intended to supplement is dispatched.

102 However, we consider that the minimum 14-day period should be retained for the following reasons:

- (a) without the 14-day period operating in default, a bidder could potentially make significant changes shortly before dispatch, leaving the target, ASIC and others with insufficient time to review the replacement bidder's statement and/or apply to the Takeovers Panel to prevent dispatch of disclosures that may be misleading or deceptive;
- (b) under the current setting, the bidder is able to obtain the target or ASIC's consent to waive the 14-day period. This mechanism is specifically designed to address those cases where the delay is unjustified and is commonly used in the process of negotiating issues or concerns with the target or ASIC during the 14-day period;

- (c) although the bidder is able to dispatch a supplementary bidder's statement together with the original bidder's statement in some circumstances, there is a natural limit in this approach inherent in the general requirement not to dispatch misleading takeover documents; and
- (d) allowing a bidder to automatically lodge a replacement bidder's statement without resetting the period for dispatch may lead to bidders lodging poorer quality original bidder's statements on the basis that any issues can be dealt with by lodging a replacement bidder's statement at a later time during the 14-day period.

103 Although we consider that there are significant reasons to retain the 14-day minimum period, we are inviting feedback on whether the 14-day notice period should be shortened for replacement bidder's statements. We are also inviting feedback on whether there are other amendments to the replacement bidder's statement regime that should be considered to facilitate its use.

Extension of regime to include replacement target's statements

104 Without individual relief, a target cannot lodge a replacement target's statement to amend its target's statement in the period after giving the target's statement to the bidder and lodging the target's statement with ASIC (see items 11–13 of s633 and items 10–12 of s635), but before dispatch to holders. A target may wish to amend its target's statement in this period as a result of issues raised by ASIC or the bidder.

105 While this issue may only occur infrequently, we are inviting feedback on whether we should modify [\[CO 13/528\]](#) so that a target, if the bid class securities are quoted, may lodge with ASIC and send to the prescribed market operator and the bidder a replacement target's statement. The target would also need to provide a marked-up copy of the replacement target's statement showing all changes from the original target's statement. Lodgement of the replacement target's statement and marked-up replacement target's statement would be required to occur no later than the time for dispatch of the original target's statement. Lodgement of a replacement target's statement may also require a short extension to the timeframe normally provided for sending the target's statement to holders of bid class securities.

Clarifying the timing for dispatch of the target's statement

106 Section 635A provides a mechanism for a bidder in a market bid to provide a replacement bidder's statement in specific circumstances. Where this occurs, the timetable for dispatch of the replacement bidder's statement in s635 is amended to take into account the new disclosure in the replacement bidder's statement.

- 107 However, we consider that [\[CO 13/528\]](#) may be unclear regarding the impact of a replacement bidder's statement on the timeframes for a target's statement under a market bid, including item 13 of s635(1).
- 108 We propose to amend item 13 of s635(1) to clarify that, in a market bid where a bidder has lodged with ASIC and given to the relevant market operator and the target, a replacement bidder's statement in reliance on s635A, the target must send its target's statement no later than the time for sending the replacement bidder's statement, rather than 14 days after the original announcement of the bid.
- 109 We consider that clarifying the timeframe that targets are expected to comply with when a replacement bidder's statement has been lodged is necessary to ensure an outcome that is fair, pragmatic and consistent with the intended purpose of the relief.

Appendix: Operation of ASIC class orders

110 This appendix provides information about the operation of ASIC Class Orders [\[CO 13/520\]](#), [\[CO 13/521\]](#), [\[CO 13/522\]](#), [\[CO 13/526\]](#) and [\[CO 13/528\]](#).

Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition*

Background

Definition of acceptance facility and acceptance facility operator

111 Paragraph 4(a) of [\[CO 13/520\]](#) notionally inserts a definition of an acceptance facility (including definitions of various elements of an acceptance facility including a ‘facility participant’, ‘acceptance facility operator’, ‘facility acceptances’ and ‘triggering conditions’) for the purposes of new s608(8A) inserted by paragraph 6(c) and discussed below at paragraphs 125–128.

Modification to the definition of ‘convertible securities’

112 Section 617 provides that an off-market takeover bid must relate to securities in a class of securities that exist or will exist as at a date set by the bidder. A bid may extend to securities that come to be in the bid class during the offer period due to a conversion or exercise of other securities existing at that date.

113 Section 617(2)(a) refers to securities that ‘will convert, or may be converted, to securities in the bid class’. Without modification, the definition of ‘convertible securities’ in s9 may be limited to securities providing a right for the issue of securities in the bid class and may exclude the kind of securities that transform into securities in the bid class upon exercise.

114 [\[CO 13/520\]](#) expands the definition of ‘convertible securities’ in s9 to include a convertible security that may upon conversion (on the exercise of rights attached to those securities) transform into securities of the bid class. This modification recognises that the mechanism for conversion is not relevant to the policy on convertible securities in the context of takeovers.

Modification to definition of ‘substantial holding’

115 A person with a substantial holding must make certain disclosures about that holding under Pt 6C.1. In determining whether a person and their associates exceed the 5% threshold above which a person is defined to have a

substantial holding, certain relevant interests which are exempt for the purposes of the takeover provisions are required to be counted—specifically:

- (a) relevant interests arising because of market-traded options or rights to acquire securities under a derivative; and
- (b) 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 (see subparagraphs (a)(i) and (ii) of the definition of ‘substantial holder’ in s9).

116 [\[CO 13/520\]](#) amends the definition of a substantial holding to further require that a listed entity’s relevant interests in its own securities arising from restrictions on disposal of a holding of restricted securities applied under the listing rules of a prescribed financial market (e.g. ASX) are counted in determining whether the 5% threshold is exceeded despite the modification in paragraph 6(d) of [\[CO 13/520\]](#) discussed below at paragraphs 129–131.

117 The purpose of the modification in paragraph 4(c) is to ensure that share and interest holders, and potential investors, continue to have access to information relating to restricted securities, including the terms of restriction and details of the relevant agreements which apply to restrict disposal of the restricted securities.

Amendments to the association concept

118 When calculating a person’s voting power and when determining if a person has a substantial holding in a listed entity, it is necessary to consider the relevant interests that both a person and any associates have in securities of the body through the association definition in s12.

119 [\[CO 13/520\]](#) modifies s12 to make it clear that parties to a relevant agreement will not be associates merely because an agreement contains a provision giving a party the right to dispose of securities in the designated body or control the exercise of a power to dispose of the securities: see s12(2A) as notionally inserted by [\[CO 13/520\]](#).

120 The modification is consistent with the underlying objective of the associate concept in s12 and recognises that the existence of a mere 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 to a relevant agreement involving a disposal right may not be seeking to achieve any more together than simply the acquisition and disposal of securities.

The financial accommodation exception

121 Section 609 sets out situations that do not give rise to a relevant interest. Section 609(1) relates to situations involving money lending and financial accommodation. Under the s609(1) exception, security interests taken or acquired in the ordinary course of a non-associated person's business of providing financial accommodation on ordinary commercial terms do not give rise to a relevant interest.

122 [\[CO 13/520\]](#) modifies s609(1) by:

- (a) extending the operation of the exception to persons holding a security interest (e.g. a mortgage) on trust for the benefit of a financier who would otherwise themselves have the benefit of the exception;
- (b) expanding the exception to cover purchasers of security interests; and
- (c) clarifying that a negative pledge that is not a security interest falls within the ambit of the exception.

Securities held by financial services licensee

123 Section 609(3) provides that a financial services licensee does not have a relevant interest in securities merely because it holds securities on behalf of someone else in the ordinary course of their financial services business.

124 [\[CO 13/520\]](#) modifies s609(3) so that a financial services licensee does not have a relevant interest in the securities of its client merely because it receives specific instructions from the client directing the licensee (in the ordinary course of its financial services business) to dispose of the securities, or to enter into a sold position in relation to the securities through a dealing in a warrant (or a financial product that would be a warrant but for it being transferable).

Relevant interests arising from acceptances facilities

125 Paragraph 6(c) of [\[CO 13/520\]](#) provides relief for bidders who establish an acceptance facility in relation to a takeover bid. Under an acceptance facility a person accepting an offer under a bid is able to provide a facility operator with a completed acceptance form, or instructions to another person who holds the securities on their behalf to accept the bid. The facility operator holds the acceptances or instructions until certain conditions relating to the conditionality or level of acceptances the bidder receives are met, at which point the acceptances and instructions are forwarded to their final recipients. The facility operator reports regularly to the bidder about the number of securities in respect of which acceptances and instructions are being held.

126 An acceptance facility allows participants in the facility to indicate their willingness to accept the bid without accepting. The advantage from a participant's point of view is that the acceptances or instructions they provide can be withdrawn at any time until satisfaction of the conditions for

release of the acceptances or instructions. More broadly, an acceptance facility can assist in overcoming difficulties a bidder may have in achieving a requisite level of acceptances due to the conditionality of a bid.

127 It is possible a bidder will acquire a relevant interest in target securities as a result of target holders providing acceptances or custodial instructions to a facility operator, due to the broad definition of a relevant agreement under s9. The bidder may therefore acquire a relevant interest in facility participants' securities outside the takeover bid and in contravention of s606 by virtue of the accelerator provision in s608(8).

128 [\[CO 13/520\]](#) notionally inserts s609(8A) which confirms that a bidder does not acquire a relevant interest in securities tendered into an acceptance facility provided the facility complies with certain terms and the bidder makes regular disclosures about the level of facility acceptances. We have given this relief because acceptance facilities established on appropriate terms and operated in an appropriate manner may improve the efficiency and competitiveness of the bid process by removing structural impediments to the success of bids. The relief removes uncertainty that a bidder who has established such a facility may be liable for a contravention of s606 (which prohibits certain acquisitions of relevant interests in voting shares) as a result.

Securities escrowed under listing rules

129 Under the listing rules of various prescribed financial markets, listed companies and companies seeking listing may be required to apply restrictions on disposal by holders of certain restricted securities, and enter into a restriction agreement placing the securities in escrow, so that the holder may not deal with the securities for a specified time.

130 [\[CO 13/520\]](#) modifies s609 so that a listed company does not have a relevant interest in securities merely because it must apply restrictions on the disposal of restricted securities: see s609(11) as notionally inserted by [\[CO 13/520\]](#).

131 [\[CO 13/520\]](#) also modifies s609 so that the operator of a prescribed financial market does not have a relevant interest in relation to restricted securities. Relief for the operator is available in respect of both the takeover and the substantial holding provisions: see s609(12) as notionally inserted by [\[CO 13/520\]](#).

Acquisitions within a corporate group and voting power

132 Under s610(3) a person's voting power may be taken to have increased when acquiring securities from an associate in which they did not already have a relevant interest. This provision seeks to address the potential that a person who makes an acquisition from an associate is not caught by s606 because their voting power already incorporates their associates' relevant interests and therefore does not otherwise increase as a result of the acquisition.

Section 610(3) recognises that commercially there may be a significant difference between a person having a relevant interest and their associate having the relevant interest in terms of the control of an entity.

133 One effect of s610(3), however, is that 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 prohibition on acquisitions of relevant interests in voting shares.

134 [\[CO 13/520\]](#) modifies the voting power provision under s610(3) 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 modification recognises that an acquisition of securities by one group company from another should not necessarily give rise to takeover concerns.

On-market purchases during a bid

135 Section 611 sets out a number of exceptions to s606. Two exceptions relate to on-market purchases during the currency of a bid:

- (a) item 2 of s611 permits on-market acquisitions of bid class securities by a bidder during the bid period; and
- (b) item 3 of s611 permits a bidder to acquire bid class securities as a result of the exercise of convertible securities purchased on-market during the bid period.

136 [\[CO 13/520\]](#) modifies items 2 and 3 of s611 to correct a drafting error which requires the relevant bid to be either unconditional or conditional only on the happening of an event referred to in s652C(1) or (2) (events which, if they occur, permit a bidder under a market bid to withdraw their offers). A bid will generally be conditional on events of this kind *not* happening. The modification also clarifies that items 2 and 3 of s611 may be relied on even when the bid is subject to the statutory condition in s625(3).

Exercise of a security interest

137 Item 6 of s611 contains an exception from s606 which corresponds with the exception from the relevant interest concept in s609(1). The exception permits 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.

138 As a result of the modifications to the exception in s609(1) (see paragraph 6(a) of [\[CO 13/520\]](#)), [\[CO 13/520\]](#) makes corresponding modifications to item 6 of s611 so that:

- (a) the exception applies to security trustees (without the 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.

139 [\[CO 13/520\]](#) also includes a technical modification of item 6 of s611 to clarify its operation in relation to receivers when a security interest is exercised. The item is expressed to apply to a person appointed ‘as a receiver’ but only if the person’s ordinary business includes providing financial accommodation: item 6(a) of s611. A receiver is unlikely to be in this business. We have modified item 6 of s611 so that it applies to acquisitions resulting from the appointment of a receiver.

Downstream acquisitions: Secondary listings

140 Item 14 of s611 permits the downstream acquisition of a relevant interest that results from a person acquiring another relevant interest in voting shares or interests in a body listed on a prescribed financial market or a foreign market approved in writing by ASIC. ASIC has approved a list of foreign exchanges for the purposes of item 14 in [ASIC Corporations \(Approved Foreign Markets—Buy-backs and Takeovers\) Instrument 2015/1071](#).

141 A downstream acquisition occurs because of the operation of s608(3) which deems a person to have the same relevant interests in securities that another body corporate has where the person has voting power of over 20% in, or controls, that body corporate.

142 [\[CO 13/520\]](#) modifies item 14 of s611 so that it only applies to primary listings—thereby excluding secondary listings from the scope of the exemption. This modification reflects that the place of incorporation and the listing rules of the exchange on which the upstream entity has its primary listing may not satisfy the policy behind the exemption in item 14. The item 14 exemption will consequently not apply if the upstream entity only has a secondary listing on a prescribed financial market or on an approved foreign exchange.

Specifying foreign holders to which the nominee procedure applies

143 Two exceptions to s606 include:

- (a) the exception for acquisitions as part of a rights issue (and associated underwriting arrangements) under item 10 of s611; and
- (b) the exception for acquisitions as part of an accelerated rights issue (and associated underwriting arrangements) under item 10A of s611, notionally inserted by [ASIC Corporations \(Takeovers—Accelerated Rights Issues\) Instrument 2015/1069](#) (ASIC Instrument 2015/1069).

144 One of the limitations on the rights issue and accelerated rights issue exceptions is that offers to issue securities must be made to every person who holds securities in the relevant class. However, foreign laws and regulations may constrain the issuer from making an offer of securities to a foreign holder.

- 145 Section 615 (and [ASIC Instrument 2015/1069](#) which incorporates s615 in the case of accelerated rights issues) recognise that the relevant rights issue exception should be available even if foreign holders do not receive an offer of securities or rights, but cash realised from the sale of the securities or rights. Section 615 sets out a procedure that allows foreign holders to participate in the benefits flowing from a rights issue that has control implications and seeks to minimise those control effects, while permitting non-foreign holders to rely on the relevant exceptions to s606 notwithstanding foreign holders do not receive offers.
- 146 [\[CO 13/520\]](#) modifies s615 to clarify that an issuer does not need to use the nominee procedure for all foreign holders of the issuer for the rights issue exception or the accelerated rights issue exception to apply. The modification allows the issuer instead to specify in its offers the foreign holders to whom the nominee procedure applies and extend offers to foreign holders in those foreign jurisdictions it is able to. For example, an issuer could do so by specifying the place of the foreign holder's registered address.

Relevant interests counted for the purposes of the substantial holding provisions

- 147 Paragraph 6(j) of [\[CO 13/520\]](#) makes modifications to s671(7) which correspond with modifications made in paragraph 4(c) of [\[CO 13/520\]](#) to the definition of 'substantial holding' in s9.

Class Order [\[CO 13/521\]](#) *Takeover bids*

Background

Exercise or conversion before the offer period begins

- 148 A takeover bid may only be made for securities within a particular class: s605(1) and 617. Under s617, off-market bids must relate to securities that exist, or will exist, as at the date set by the bidder under s633(2). This is the date for determining to whom offers will be sent.
- 149 A bid may extend to securities that come to be in the bid class during the offer period because of the conversion, or the exercise of rights attached to 'other securities': s617(2). These other securities must be securities that exist, or will exist, as at the date set by the bidder under s633(2).
- 150 However, s617 does not permit the bid to extend to securities issued on the conversion of other securities before the offer period begins. [\[CO 13/521\]](#) modifies s617(2) so that the bid extends to bid class securities issued on conversion or exercise from the date set by the bidder under s633(2) until the

end of the offer period. In effect, this extends the operation of s617(2) to bid class securities that come into existence *before* the beginning of the offer period. [CO 13/521] also makes a corresponding modification to s636(1)(j): see paragraph 194.

Share splitting in proportional bids and small parcels

151 Where a bidder makes an off-market bid for a specified proportion of the securities in the bid class, the proportion must be the same for all holders of securities in the bid class (proportional bid): s618(1)(b). If accepting a proportional bid would leave a shareholder with a small parcel, s618(2) provides that the offer extends to the whole parcel.

152 [CO 13/521] modifies s618(2) so that it does not apply to parcels of securities that have come into existence, or increased in size, because of a transaction entered into after the proportional bid was publicly proposed. This prevents target security holders from abusing s618(2), while preserving its operation in the case of holders who have not modified their holdings in response to the bid.

Acceptances by trustees and nominees

153 Our modification in [CO 13/521] also applies to restrict reliance on s618(2) when there is a change to a parcel for which an offer is deemed to have been made under s653B(1)(b)—for example, increases or transfers of a person’s beneficial interests in securities that form part of a larger registered holding: see new s618(2B). In this way, [CO 13/521] also seeks to deter target holders from taking advantage of s618(2) by splitting holdings through the creation of trusts or similar arrangements.

Meaning of minimum parcel and small parcels

154 [CO 13/521] also clarifies that the small parcel exception applies when the residual parcel is less than a ‘marketable’ or ‘minimum’ parcel (or, if neither term is defined in the rules of the relevant prescribed financial market, a parcel of at least \$500 in value) using:

- (a) if, on the most recent day before the date of acceptance that bid class securities were traded on a prescribed financial market, the securities were only traded on one prescribed financial market—the closing price of the securities on that prescribed financial market on that day; or
- (b) if bid class securities were traded on more than one prescribed financial market on that day—the closing price of the securities on any of the prescribed financial markets on that day.

Specifying foreign holders to which s619(3) applies and small parcels offered as consideration under a bid

Foreign holders

155 As far as practicable, all offers under a takeover bid must be the same because holders should have an equal opportunity to participate in the benefits of the bid: s619(1) and 602(c). However, where the bid consideration includes securities, the bidder may be constrained by foreign laws and regulations from making an offer of securities to a foreign holder. Alternatively, it may be highly impractical to comply with foreign regulations.

156 Section 619(3) allows the bidder to include terms in its bid that establish a ‘nominee procedure’ so that foreign holders can receive cash instead of the securities offered under the bid. Section 619(3) may be read to require that, if a bidder uses the nominee procedure, it must use it for *all* foreign holders. [\[CO 13/521\]](#) modifies s619(3) to clarify that the bidder may specify in the bidder’s statement the foreign holders to whom the nominee procedure applies.

Small parcels offered as consideration under a bid

157 When a bidder offers quoted scrip as consideration in an off-market bid, the number of securities they are required to provide to some target holders may be less than a ‘marketable parcel’ or a ‘minimum parcel’ as defined in the rules of the market on which they are quoted or a related clearing and settlement facility. In some cases, these rules restrict the creation of new parcels through securities that are not ‘marketable parcels’ or ‘minimum parcels’.

158 [\[CO 13/521\]](#) inserts a new s619(4) to allow a bidder to deal with offers of small parcels in the following ways:

- (a) if a nominee is appointed under s619(3) for foreign holders—the nominee may also be a nominee for other holders and sell the small parcel of securities offered as consideration and distribute the proceeds to the holders in accordance with that provision; or
- (b) in other circumstances—the bidder may offer cash (based on the highest closing price of the securities during a specified reference period) to the holders.

159 If a bidder intends to appoint a nominee and use the procedure in s619(3) for foreign holders, this procedure must also be used when dealing with small parcels.

Timing of payment in conditional offers

160 Each offer that a bidder makes must set out when the bidder will make payment under the takeover contract. Under s620(2), the period for a bidder to pay consideration runs from the time the necessary transfer documents are given to the bidder.

161 [\[CO 13/521\]](#) modifies s620(2)(b) so that the bidder must provide in its offer that, if the bidder is given the necessary transfer documents after acceptance by the holder and before the end of the bid period, the bidder is to pay the consideration:

- (a) if the offer is subject to a defeating condition when the bidder is given the necessary transfer documents—by the earlier of one month after the takeover contract becomes unconditional or 21 days after the end of the offer period; and
- (b) if the offer is unconditional—by the earlier of one month after the bidder is given the necessary transfer documents or 21 days after the end of the offer period.

162 [\[CO 13/521\]](#) also modifies s620(2)(c) so that the bidder is to pay the consideration within 21 days after the takeover becomes unconditional if:

- (a) the bidder is given the necessary transfer documents after both the acceptance of the offer and the end of the offer period; and
- (b) when the bidder is given the necessary transfer documents, the offer is subject to a condition that relates to the occurrence of an event referred to in s652(1) or (2).

Collateral benefits in market bids

163 Section 623(1) prohibits certain collateral benefits being offered or given to target holders outside the bid process.

164 [\[CO 13/521\]](#) modifies s623(1) so that, for a market bid, the prohibition applies during the ‘bid period’ rather than the ‘offer period’. This modification has been made because, without it, there would be a gap between the time at which the minimum bid price principle (in s621(3)–(5)) stops applying and the time that the prohibition on collateral benefits starts applying.

165 We consider that this extension is appropriate because the collateral benefits prohibition in s623 is intended to pick up where the minimum bid price principle leaves off. Both extend the equality principle in s602(c) beyond the consideration that the bidder offers under the takeover bid.

Closing time for automatic extensions of the offer period

166 Under s624(2), an offer period is automatically extended if, during the final seven days of the offer period, the bidder's voting power in the target increases to more than 50% or, in an off-market bid, the offers under the bid are varied to improve the consideration offered. If either of these events occurs, the offer period is extended so that it ends 14 days after the triggering event.

167 [\[CO 13/521\]](#) provides relief so that an automatically extended offer period for an off-market bid is not required to remain open until midnight on the closing day. The relief reduces the potential that confusion may arise because of the operation of this provision and ensures that the bid will still close at a time of day that is commercially suitable for the bidder.

Treatment of acceptances in an acceptance facility

168 [CO 13/521] modifies s624 so that, where a bidder has established an acceptance facility, it may elect, for the purposes of s624(2)(b) only, to be taken to obtain the voting power in securities that are the subject of the facility as soon as it gives the notice triggering the release of the acceptances and instructions by the facility agent. Our modification in [CO 13/521] improves certainty associated with operating an acceptance facility by clarifying when the bid will be extended, where the bidder satisfies the conditions for release of acceptances from an acceptance facility before the close of an offer, and its voting power in the target will increase to above 50% once the bidder receives actual acceptances for the securities tendered into the facility.

Admission to quotation condition

169 Section 625(3) imposes a statutory condition on off-market bids. If the consideration offered under such a bid is, or includes, securities, and the offer or the bidder's statement states or implies that the securities are to be quoted on a financial market (in Australia or elsewhere), the offer is subject to a condition that:

- (a) an application for admission to quotation will be made within seven days after the start of the bid period; and
- (b) permission for admission to quotation will be granted no later than seven days after the end of the bid period.

170 [CO 13/521] modifies s625(3) to clarify that the condition it imposes is a statutory condition and not a 'defeating condition' within the meaning of that term in s9. This technical modification recognises that the mandatory condition differs from other conditions the bidder may choose to apply to its bid and overcomes potential anomalies that may otherwise result.

Giving a notice on the status of conditions

- 171 Section 630(4) requires a bidder, in circumstances where a condition of the offer is fulfilled during the bid period but before the date for publishing the notice on status of the condition, to publish as soon as practicable a notice that states a defeating condition has been fulfilled.
- 172 [\[CO 13/521\]](#) modifies s630(4) to remove the references to ‘publishing’ and ‘publish’ and replace them with references to ‘giving’ and ‘give’. The modification serves to clarify the operation of the provision and ensure consistency with the language adopted in other parts of s630: see s630(1) and (2).

Information required in the bidder’s statement lodged with ASIC

- 173 In many cases a bidder will need to lodge the bidder’s statement with ASIC some time before dispatch: see items 2 and 6 of s633(1). [\[CO 13/521\]](#) modifies s633 so that in the copies of the bidder’s statement that the bidder lodges with ASIC, sends to the target and sends to any relevant financial market operator, the bidder may omit or provide modified disclosure in relation to the following:
- (a) the holders’ names and addresses;
 - (b) bid timing;
 - (c) particulars of the purchases made and benefits given by the bidder and its associates in the four months before the date of the bid; and
 - (d) the bidder’s relevant interest in bid class securities and voting power in the target.

- 174 The modification is necessary because a bidder should not be required to disclose information at the time of lodgement if the information is not available or the information is not critical until the start of the offer period. However, [\[CO 13/521\]](#) requires the updated disclosure in the bidder’s statement dispatched to holders to be current as at the date that offers are first made.

Bidder must disclose prospectus or PDS information about non-controlled issuer

- 175 Section 636(1)(g) and (ga) require a bidder to include in the bidder’s statement prospectus information and PDS information about the securities offered under a takeover bid if the bidder is the issuer or the bidder controls the issuer of the scrip consideration.
- 176 [\[CO 13/521\]](#) modifies s636(1)(g) and (ga) so that a bidder that offers securities or managed investment products as consideration under a bid must also disclose prospectus or PDS information in the bidder’s statement where the

bidder is not the issuer and does not control the issuer. We have extended the operation of s636(1)(g) and (ga) because, when a bidder offers securities or managed investment products, target holders and directors should be given prospectus or PDS information to enable them to assess the merits of the bid.

Exercise or conversion before the offer period begins

- 177 [\[CO 13/521\]](#) amends s636(1)(j) so that if the bid is to extend to securities issued during the offer period under s617(7), because of the conversion or exercise of rights attached to ‘other securities’, the bidder’s statement must include a statement to this effect. This is a consequential modification to the amendment referred to above in relation to paragraph 4(a) of [\[CO 13/520\]](#): see paragraphs 121–122.

Consent to use a lodged statement

- 178 If a bidder or target wishes to include a statement by another person in the bidder’s statement or the target’s statement, they must obtain the person’s consent: s636(3) and 638(5). However, it may be difficult to obtain a person’s consent to include in a bidder’s or target’s statement a public statement they have made in a lodged document.
- 179 [\[CO 13/521\]](#) modifies s636(3) and 638(5) so that the bidder’s or target’s statement may include a statement by a person without the person’s consent, if the statement was made in a document that has been lodged with ASIC or the operator of a prescribed financial market.
- 180 This modification has been made because, if a person makes a statement in a document lodged with a securities exchange under the listing rules or with ASIC, they do so in a regulated context for the purpose of informing holders and the market.

Clarification of s650B(1)(h)

- 181 Section 650B sets a number of ways that the bidder may vary offers to improve the consideration offered—including by offering an ‘additional alternative form of consideration’: see s650B(1)(h). Our modification clarifies that this provision is not intended to operate only when there is already more than one form of consideration on offer under the bid—by omitting ‘or’ between ‘additional’ and ‘alternative’.

Clarification of operation of s650C(2)

- 182 Section 650C(2) enables the bidder to extend the offer period after ‘publication’ of a notice about the status of the defeating condition. Similar to the modification contained in paragraph 4(i) of [\[CO 13/521\]](#), paragraph 6(b) also modified s650C(2) to omit the references to ‘publication’ of the notice and replace them with references to ‘giving’ the notice.

Notices of variation of offers

- 183 If the bidder varies offers under an off-market bid, they must send a notice of the variation to everyone to whom offers were made under the bid: s650D(1)(c)(ii). However, at the time of the variation, some persons to whom offers were made may no longer hold bid class securities because they have disposed of their holding.
- 184 [\[CO 13/521\]](#) modifies s650D(1)(c)(ii) and 650D(1)(c) so that the bidder must send the notices of variation to those persons shown on the most recent copy of the register obtained by the bidder and any other person who has accepted the offer under the bid.
- 185 [\[CO 13/521\]](#) also modifies s624(2) to align the persons to whom the bidder must dispatch a written notice that an automatic extension has occurred with the modified requirements in s650D(1)(c), excepting persons who have accepted the offer.
- 186 These modifications recognise that bidders will commonly obtain copies of the target register throughout the bid period. It seeks to ensure that the bidder's notices regarding variation of its offers are, as far as practicable, sent to persons for whom the variation is likely to be relevant, based on the most up-to-date information available to the bidder.

Signing a notice of variation

- 187 A notice of variation of an offer under an off-market bid must be signed by the relevant person or persons: s650D(3). [\[CO 13/521\]](#) modifies s650D by removing the signing requirement as long as the notice has been approved by the bidder.
- 188 We have provided this relief because it is appropriate for a bidder to have the option of approving a notice of variation in the same way as a bidder's statement rather than signing the notice.

Clarification of s650F(1)(a)

- 189 Section 650F(1)(a) provides for conditions on which a bidder may 'withdraw' unaccepted offers if an event or circumstances referred to in s652C(1) or (2) occurs. This may cause confusion because a defeating condition does not allow a bidder to withdraw unaccepted offers. Offers may only be withdrawn with ASIC's written consent: see s652B. [\[CO 13/521\]](#) modifies s650F(1)(a) to refer instead to the happening of an event or circumstance referred to in s652C(1) or (2).

Clarification of s650G(b)

190 Section 650G(b) provides that all takeover contracts and acceptances for an off-market bid that is subject to a defeating condition are void if the bidder has not declared the offers to be free from the condition within the period before the date applicable under s630(1) or (2). The reference to s630(1) and (2) is incorrect because offers are permitted to be freed of certain conditions under s650F(1) later than the date applicable under s630(1) or (2): see s650F(1)(a). [\[CO 13/521\]](#) modifies s650G(b) to correct this error and insert a reference to the date applicable under s650F(1).

Acceptances received by the bidder for securities registered in a clearing and settlement facility

- 191 Under s653A and reg 6.8.01 of the *Corporations Regulations 2001* (Corporations Regulations) an acceptance of a takeover offer for quoted securities to which the operating rules of a clearing and settlement facility apply is only effective if made in the way specified in those rules.
- 192 [\[CO 13/521\]](#) modifies the Corporations Act so that, for the purposes of Ch 6 and 6C, an offer is taken to have been accepted in respect of securities registered in a clearing and settlement facility when:
- (a) the bidder has received a written instruction or authority (or both) from a holder entitled to accept the offer (or a person with a right to be registered as holder); and
 - (b) the instruction or authority is given for the purpose, and has the effect, of enabling the bidder to instruct another person through the relevant clearing and settlement facility to effect acceptance of the offer.
- 193 The purpose of the modification is to improve certainty for bidders and holders by clarifying the application of Ch 6 and 6C where a holder seeks to accept a takeover offer for securities registered in a clearing and settlement facility by returning a completed acceptance form to the bidder or its representative. The modification seeks to align the operation of Ch 6 with the expectations of target holders that once they have delivered the bidder a completed acceptance form, they have accepted the offer.

Class Order [CO 13/522] *Compulsory acquisitions and buyouts*

Background

Non-transferable employee securities

194 Companies and other entities, the securities of which are subject to Ch 6A, may issue securities to their employees or non-executive directors under an employee incentive plan or a similar kind of scheme (employee securities). In order to achieve the objectives of the incentive plan the employee securities that are issued may be non-transferable. These restrictions might prevent the bidder from acquiring the employee securities under a takeover bid. The restrictions on transfer may also mean the employee securities are in a different class from the class to which the bid related, meaning the bidder is unable to acquire them under the post-bid compulsory acquisition provisions.

195 [\[CO 13/522\]](#) modifies s661A(1) so that a bidder who has met the requirements for post-bid compulsory acquisition in relation to the bid class is not prevented from acquiring 100% ownership merely because employee securities, that would otherwise be in the bid class, are non-transferable. The bidder may acquire the non-transferable employee securities where, if they were included in the bid class, they would not exceed 10% of all bid class securities (by number worked out at the end of the period for which offers under the takeover bid remain open).

196 A number of consequential amendments are also made to s661A(5), 661B(1)(c) and 661D(1).

Exclusion of target securities controlled by the bidder or their associates from the 75% Acquisition Test

197 Before a bidder may compulsorily acquire securities under s661A(1) following or during a takeover bid, the bidder and their associates must, during, or at the end of, the offer period under the bid:

- (a) have relevant interests in at least 90% (by number) of the securities in the bid class; and
- (b) have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid.

198 [\[CO 13/522\]](#) clarifies when the 75% Acquisition Test in s661A has been met by excluding the following securities from the calculation:

- (a) securities in which the bidder or their associates had a relevant interest as at the date of the first offer under the bid; and
- (b) securities issued to an associate of the bidder during the offer period.

199 The underlying policy of the 75% Acquisition Test is to ensure that sufficient acceptances of the bid terms by independent holders is demonstrated before a bidder is entitled to proceed to compulsory acquisition on those terms. Counting acquisitions of this kind towards the 75% Acquisition Test is likely to be inconsistent with this underlying policy.

200 The securities excluded under s661A(2A)(a), as notionally inserted by [\[CO 13/522\]](#), are excluded from being counted both as part of the number of securities ‘acquired’ by the bidder and their associates and as part of the number of securities ‘the bidder offered to acquire under the bid’. Having excluded securities from the number ‘acquired’, it may otherwise be impossible for the bidder to meet the 75% Acquisition Test if the provision did not also exclude them from the number the bidder ‘offered to acquire’.

201 [\[CO 13/522\]](#) amends s661A(2) to ensure that the narrower ‘relevant interest’ concept in the provision does not apply with respect to the 75% Acquisition Test.

Convertible securities and the 75% Acquisition Test

202 [\[CO 13/522\]](#) also notionally inserts s661A(2A)(b) to provide relief from the 75% Acquisition Test when the bid class for a takeover offer is convertible securities.

203 If a substantial proportion of holders to whom offers are made under the bid exercise their convertible securities instead of accepting the bid, it may be impossible for the bidder to meet the 75% Acquisition Test. This is because the bidder cannot count convertible securities that are exercised as securities acquired by it (the numerator in the percentage calculation) but these convertible securities would still be counted as securities that the bidder offered to acquire (the denominator) under the 75% Acquisition Test.

204 Section 661A(2A)(b), as notionally inserted by [\[CO 13/522\]](#), excludes from the denominator convertible securities that are exercised or converted in the relevant time period. This is because a holder who exercises their convertible securities rather than accepting the offer for the convertible securities under the bid has neither accepted nor directly rejected the terms of the bidder’s offer. The holder may have exercised the convertible securities for other reasons.

Amendments to the 90% Relevant Interest Test

205 Under the 90% Relevant Interest Test for post-bid compulsory acquisition, a bidder and their associates must have, during, or at the end of, the offer period, relevant interests in at least 90% (by number) of the bid class securities. Section 661A(2) states that in calculating the bidder’s relevant interest, the bidder must disregard relevant interests that the bidder has merely because of the operation of s608(3).

206 [\[CO 13/522\]](#) modifies s661A(2) to:

- (a) clarify that only securities in which the bidder has a relevant interest merely because it has voting power of more than 20% in another entity are excluded from the 90% Relevant Interest Test. Relevant interests the bidder has because it controls another entity are included in the 90% Relevant Interest Test; and
- (b) ensure that relevant interests of the bidder's associates by virtue of the associates having voting power of 20% or more in another entity do not contribute to the bidder satisfying the 90% Relevant Interest Test.

Concurrent buyout and compulsory acquisition rights in relation to bid class securities

207 The right of remaining holders of bid class securities to be bought out following a bid arises when the bidder acquires a relevant interest in at least 90% of the bid class securities. The right to compulsorily acquire arises when the bidder additionally satisfies the similar (but not identical) 90% Relevant Interest Test and additionally the 75% Acquisition Test.

208 This may therefore mean that:

- (a) the bidder is entitled to compulsorily acquire certain bid class securities under s661A(1); and
- (b) minority holders are entitled to require the bidder to acquire the securities under s662A(1).

209 A bidder undertaking post-bid compulsory acquisition does not need to give buyout notices to those holders to whom it has already sent compulsory acquisition notices: s662B(1)(c)(ii).

210 However, even when no remaining holder is to be given a buyout notice because of s662B(1)(c)(ii), there is still a requirement that buyout offers are made in accordance with s662B and 662C by lodging a notice with ASIC and giving the notice to each relevant market operator. [\[CO 13/522\]](#) modifies s662A to confirm that a person does not need to make buyout offers if they have given a post-bid compulsory acquisition notice to every remaining holder, and the terms applying to the compulsory acquisition notice are the same as the terms of the bid immediately before the end of the offer period.

Class Order [CO 13/526] Warrants: Relevant interests and associations

Background

Call warrant holders relief

211 Call warrants generally 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.

212 [\[CO 13/526\]](#) provides relief to holders of call warrants so that holders are able to disregard a relevant interest arising from a warrant in a similar way that relevant interests are disregarded under s609(6).

213 [CO 13/526] gives effect to the relief by notionally inserting s609(6F) which extends the exclusion in s609(6) to a security or derivative that:

- (a) confers on the holder a right, but not the obligation, to acquire securities by way of a transfer; and
- (b) is issued under a PDS; and
- (c) is admitted to quotation on the financial market operated by ASX Limited or Cboe Australia Pty Ltd.

214 The result of the relief is that no relevant interest arises, for the purposes of the takeover provisions, as a consequence of holding a call warrant. However, any relevant interest that would arise, but for the relief, must still be taken into account for the purposes of the substantial holding provisions.

Call warrant issuer relief

215 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, even when it places underlying securities in trust for holders.

216 [CO 13/526] enables issuers of covered call warrants to disregard any relevant interest that may arise in relation to underlying securities held in trust as cover against the rights of the holders and the obligations of the issuer.

217 [CO 13/526] gives effect to the relief by notionally inserting s609(6A). The exclusion only applies under s609(6A) 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 or disposal of the securities, 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.

Put warrant issuer relief

- 218 Put warrants give the holder the right, but not the obligation, to sell the underlying securities to the issuer.
- 219 [\[CO 13/526\]](#) notionally inserts s609(6C) which ensures that the put warrant issuer does not have a relevant interest in securities underlying the put warrant merely because:
- (a) the put warrant holder has an option to require the issuer to acquire the securities; or
 - (b) the put warrant issuer can exercise power to control voting or disposal of the underlying security under a put warrant (or a trust securing obligations under a put warrant) in certain circumstances following exercise, expiry, default of the holder or enforcement of the trust by the issuer.
- 220 [\[CO 13/526\]](#) also clarifies that when s609(6C) ceases to apply, the put warrant issuer is taken to acquire a relevant interest in the underlying securities by a transaction occurring in relation to the underlying securities: see s609(6D), as notionally inserted by [\[CO 13/526\]](#).

Warrant trustees relief

- 221 In certain circumstances, a warrant agreement may make provision for the creation of a trust. One of the statutory situations not giving rise to a relevant interest relates to bare trustees: see s609(2).
- 222 A warrant trustee may be unable to rely on the Bare Trustee Exception, however, and may therefore have a relevant interest in the underlying securities held in trust because:
- (a) the discretions conferred under the relevant trust deed may mean that the trustee is not a bare trustee; or
 - (b) although they are a bare trustee, the warrant holder does not have a presently enforceable or unconditional right of the kind referred to in s608(8).
- 223 [\[CO 13/526\]](#) provides relief to warrant trustees by notionally inserting s609(6E) which operates by applying the Bare Trustee Exception to the relevant interests a warrant trustee may have because they either hold the securities underlying the warrant or would hold them but for having lent them under a securities lending arrangement.

Associations

- 224 [\[CO 13/526\]](#) also, for the purposes of certainty, provides relief in certain circumstances in respect of any ‘association’ that may arise between the issuer of a warrant and the holder of a warrant merely because of the terms of the warrant.
- 225 [\[CO 13/526\]](#) notionally inserts s16(1A) which provides an exception from the associate concept in s12(2) in relation to warrant holders and issuers. This modification recognises that, for quoted warrants, the aggregation of voting power of issuers and holders by s608(3)(a) is inappropriate.

Class Order [\[CO 13/528\]](#) *Changes to a bidder’s statement between lodgement and dispatch*

Background

- 226 [\[CO 13/528\]](#) modifies Ch 6 to allow a bidder to lodge with ASIC, and dispatch to holders, a replacement bidder’s statement, instead of dispatching the bidder’s statement and a supplementary bidder’s statement. The replacement bidder’s statement incorporates the substantive information from both the original and each subsequent supplementary bidder’s statement.
- 227 [\[CO 13/528\]](#) also provides relief so that a supplementary bidder’s statement in a bid for unquoted securities only needs to be dispatched if the bidder has already sent the original bidder’s statement to all holders of bid class securities who have not accepted an offer under the bid. This removes the requirement to dispatch the supplementary bidder’s statement to target holders ‘as soon as practicable’ under s647(3)(c) where the supplementary bidder’s statement is lodged before dispatch of offers.
- 228 As a result of the modification, a bidder who lodges a supplementary bidder’s statement in relation to an offer for unquoted securities before dispatch must either:
- (a) send the supplementary statement with the original bidder’s statement at the time of dispatch; or
 - (b) if the conditions for the use of a replacement statement are satisfied—dispatch a replacement statement.

Replacement bidder’s statement and the bid timetable

- 229 [\[CO 13/528\]](#) provides that the timetables for market and off-market bids recommence after the replacement bidder’s statement and marked-up replacement has been lodged with ASIC and sent to the target and each relevant market operator.

230

The bidder must dispatch the replacement statement to holders:

- (a) in an off-market bid—within 14 to 28 days after the replacement statement and marked-up replacement is lodged with ASIC and sent to the target (and, if applicable, the operator of each prescribed financial market on which the target’s securities are quoted), unless one of the following three scenarios applies (in which case it may be dispatched in less than 14 days):
 - (i) the target provides written agreement to the shorter period, where that agreement has been approved in any of the specified ways a target’s statement must be approved under s639(1); or
 - (ii) ASIC agrees in writing to a shorter period of time; or
 - (iii) the only change from the original bidder’s statement is an update on the valuation of securities offered as bid consideration since the date of lodgement of the original bidder’s statement; and
- (b) in a market bid—within 14 days after the replacement statement and marked-up replacement is lodged with ASIC and sent to the target and the operator of each prescribed financial market on which the target’s securities are quoted.

Key terms

| Term | Meaning in this document |
|---|--|
| ASIC | Australian Securities and Investments Commission |
| ASIC Instrument 2015/1069 (for example) | An ASIC instrument (in this example numbered 2015/1069) |
| associate | Has the meaning given in s12 of the Corporations Act |
| ASX | The exchange market operated by ASX Limited |
| 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 |
| bidder's statement | Has the meaning given in s9 of the Corporations Act |
| bid period | Has the meaning given in s9 of the Corporations Act |
| Cboe | Cboe Australia Pty Ltd or the exchange market operated by Cboe Australia Pty Ltd (formerly known as Chi-X Australia Pty Ltd) |
| Ch 6 (for example) | A chapter of the Corporations Act (in this example numbered 6) |
| [CO 13/521] (for example) | An ASIC class order (in this example numbered 13/521) Note: Legislative instruments made from 2015 are referred to as ASIC instruments. |
| Corporations Act | <i>Corporations Act 2001</i> , including regulations made for the purposes of that Act |
| Corporations Regulations | <i>Corporations Regulations 2001</i> |
| general compulsory acquisition | Compulsory acquisition under Div 1 of Pt 6A.2 of the Corporations Act |
| general prohibition | The prohibitions on offers, invitations, acquisitions and transactions in s606 of the Corporations Act |
| IPO | Initial public offering |
| legislative instrument | Legislative instruments are laws on matters of detail made by a person or body authorised to do so by the relevant enabling legislation |
| 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 |

| Term | Meaning in this document |
|-----------------------------|---|
| prescribed financial market | A financial market prescribed in reg 1.0.02A of the Corporations Regulations |
| Pt 7.9 | A part of the Corporations Act (in this example numbered 7.9) |
| reg 6.8.01 (for example) | A regulation of the Corporations Regulations (in this example number 6.8.01) |
| relevant interest | Has the meaning given in s608 and 609 of the Corporations Act |
| RG 5 (for example) | An ASIC regulatory guide (in this example numbered 5) |
| s608 (for example) | A section of the Corporations Act (in this example numbered 608), unless otherwise specified |
| scheme | A compromise or arrangement that gives rise to a scheme of arrangement under Pt 5.1 of the Corporations Act |
| scrip bid | bid under which the consideration offered is new or existing securities |
| securities | Has the meaning given in s608 and 609 of the Corporations Act or the meaning given to that term for the purposes of Ch 6A in s92(3) of the Corporations Act |
| substantial holding | Has the meaning given in s9 of the Corporations Act |
| sunsetting | The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect |
| supplementary statement | A supplementary bidder's statement or supplementary target's statement of the kind referred to in Div 4 of Pt 6.5 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's statement | Has the meaning given in s9 of the Corporations Act |
| voting power | Has the meaning given in s610 of the Corporations Act |

List of proposals and questions

| Proposal | Your feedback |
|---|---|
| <p>B1 To preserve its effect beyond the sunset date of 1 April 2023, we propose to continue the relief currently given by [CO 12/1209] in a new legislative instrument without any significant changes: see <i>draft ASIC Corporations (Relevant Interests, ASIC and ASIC Chairperson) Instrument 2023/XXX</i> at Attachment 1 to this consultation paper. The only change proposed is to update Regulatory Guide 5 <i>Relevant interests and substantial holding notices</i> (RG 5) to reflect the updated instrument name.</p> | <p>B1Q1 Is [CO 12/1209] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B1Q2 Should the remade instrument remain in force for five years or for a different period of time?</p> |
| <p>B2 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/519] in a new legislative instrument that reflects current drafting practice, without any significant changes: see <i>draft ASIC Corporations (Changing the Responsible Entity) Instrument 2023/XXX</i> at Attachment 2 to this consultation paper. The only change proposed is to update Regulatory Guide 9 <i>Takeover bids</i> (RG 9) to reflect the updated instrument name.</p> | <p>B2Q1 Is [CO 13/519] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B2Q2 Should the remade instrument remain in force for five years or for a different period of time?</p> |
| <p>B3 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/520] in a new legislative instrument that reflects current drafting practice, with minor amendments: see <i>draft ASIC Corporations (Relevant Interests, Voting Power and Exceptions to the General Prohibition) Instrument 2023/XXX</i> at Attachment 3 to this consultation paper. The only changes proposed are to:</p> <ul style="list-style-type: none"> (a) update RG 5; (b) amend the money lending exception in s609(1) to apply only where the lender does not have other relevant interests in securities of the entity; (c) provide class relief for voluntary escrow arrangements in relation to securities issued to parties selling a business or assets to the entity; and (d) re-enable s609(3) by moving the modification in [CO 13/520] to a new subsection. | <p>B3Q1 Should the money lending exception in s609(1) be amended to apply only where the lender does not have other relevant interests in securities of the entity?</p> <p>B3Q2 Should ASIC provide class relief for non-IPO voluntary escrow arrangements on the same conditions set out in RG 5, particularly in relation to securities issued to parties selling a business or assets to the entity?</p> <p>B3Q3 Should the modification to s609(3) be moved into a new subsection and the original relief in s609(3) be re-enabled?</p> <p>B3Q4 Should RG 5 be updated to clarify matters following enactment of IPO voluntary escrow relief under the legislative instrument?</p> <p>B3Q5 Is [CO 13/520] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B3Q6 Should the remade instrument remain in force for five years or for a different period of time?</p> |

| Proposal | Your feedback |
|---|--|
| <p>B4 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/521] in a new legislative instrument that reflects current drafting practice, with minor amendments: see draft <i>ASIC Corporations (Takeover Bids) Instrument 2023/XXX</i> at Attachment 4 to this consultation paper. The only changes proposed are to:</p> <p>(a) extend the declaration in paragraph 4(a) substituting s617(2) to expressly cover derivatives;</p> <p>(b) extend the declaration in paragraph 4(a) substituting s617(2) to include bid class securities issued after the date set under s633(2);</p> <p>(c) amend the declaration in paragraph 4(d) to clarify that a bidder can include in its offer terms a shorter period for payment of bid consideration than required under s620(2); and</p> <p>(d) update RG 9.</p> | <p>B4Q1 Should the declaration in paragraph 4(a) substituting s617(2) be extended to expressly cover derivatives? If so, should any form/s of derivatives be expressly excluded from s617(2)?</p> <p>B4Q2 Should the declaration in paragraph 4(a) substituting s617(2) be extended to bid class securities issued after the date set in s633(2)?</p> <p>B4Q3 Should the declaration in paragraph 4(d) substituting s620(2) be amended to permit the bidder to promise in its offer terms a shorter period of payment of bid consideration than required by s620(2)? If so, should any limitations be imposed on the bidder's choice of a shorter period?</p> <p>B4Q4 Is [CO 13/521] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B4Q5 Should the remade instrument remain in force for five years or for a different period of time?</p> |
| <p>B5 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/522] in a new legislative instrument that reflects current drafting practice, with minor amendments: see draft <i>ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/XXX</i> at Attachment 5 to this consultation paper. The only changes proposed are to:</p> <p>(a) provide that securities acquired on-market by the bidder in reliance on the exemption provided in item 2 of s611 are included for the purposes of the 75% calculation in s661A(1)(b)(ii); and</p> <p>(b) update Regulatory Guide 10 <i>Compulsory acquisitions and buyouts</i> (RG 10).</p> | <p>B5Q1 For the purposes of the 75% calculation in s661A(1)(b)(ii), should securities acquired on-market by the bidder between the date of announcement of the bid and the start of the offer period in reliance on the exemption provided in item 2 of s611 be included?</p> <p>B5Q2 Is [CO 13/522] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B5Q3 Should the remade instrument remain in force for five years or for a different period of time?</p> |
| <p>B6 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/524] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft <i>ASIC Corporations (Bidder Giving Substantial Holding Notice) Instrument 2023/XXX</i> at Attachment 6 to this consultation paper. The only change proposed is to update RG 5 to reflect the new legislative instrument name.</p> | <p>B6Q1 Is [CO 13/524] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B6Q2 Should the remade instrument remain in force for five years or for a different period of time?</p> |

| Proposal | Your feedback |
|---|--|
| <p>B7 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/525] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft <i>ASIC Corporations (On-sale Disclosure Relief for Scrip Bids and Schemes of Arrangement) Instrument 2023/XXX</i> at Attachment 7 to this consultation paper. The only change proposed is to update RG 9, Regulatory Guide 60 <i>Schemes of arrangement</i> (RG 60) and Regulatory Guide 173 <i>Disclosure for on-sale of securities and other financial products</i> (RG 173) to reflect the new legislative instrument name.</p> | <p>B7Q1 Is [CO 13/525] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B7Q2 Should the remade instrument remain in force for five years or for a different period of time?</p> |
| <p>B8 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/526] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft <i>ASIC Corporations (Warrants: Relevant Interests and Associations) Instrument 2023/XXX</i> at Attachment 8 to this consultation paper. The only changes proposed are to:</p> <p>(a) update references to Chi-X Australia Pty Ltd to Cboe Australia Pty Ltd; and</p> <p>(b) update RG 5 to reflect the new legislative instrument name.</p> | <p>B8Q1 Is [CO 13/526] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B8Q2 Should the remade instrument remain in force for five years or for a different period of time?</p> |

| Proposal | Your feedback |
|---|--|
| <p>B9 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/528] in a new legislative instrument that reflects current drafting practice, with minor amendments: see draft <i>ASIC Corporations (Changes to a Bidder's Statement between Lodgment and Dispatch) Instrument 2023/XXX</i> at Attachment 9 to this consultation paper. The only changes proposed are to:</p> <ul style="list-style-type: none"> (a) update RG 9; (b) remove the requirement to lodge a supplementary bidder's statement in order to lodge and dispatch a replacement bidder's statement; (c) retain the minimum 14-day period before a replacement bidder's statement may be dispatched to target holders; (d) allow the lodgement and dispatch of a replacement target's statement; and (e) clarify the timing for dispatch of the target's statement in a market bid where a replacement bidder's statement is lodged. | <p>B9Q1 Should ASIC remove the requirement that a supplementary bidder's statement needs to be lodged as a prerequisite for relying on the relief in [CO 13/528] to lodge and dispatch a replacement bidder's statement?</p> <p>B9Q2 Should ASIC reduce or remove the minimum 14-day period before a replacement bidder's statement can be dispatched to target holders?</p> <p>B9Q3 Should ASIC extend the relief under [CO 13/528] to allow for a similar regime relating to the lodgement of replacement target's statements?</p> <p>B9Q4 Should ASIC amend item 13 of s635(1) to clarify that, in a market bid where a bidder relies on s635A, the target must send its target's statement no later than the time for sending the replacement bidder's statement, rather than within 14 days of the original announcement (and bidder's statement)?</p> <p>B9Q5 Is [CO 13/528] operating effectively and efficiently, or are there issues or improvements that should be considered to improve its operation?</p> <p>B9Q6 Should the remade instrument remain in force for five years or for a different period of time?</p> |