ASIC
Australian Securities & Investments Commission

REGULATORY GUIDE 10

Compulsory acquisitions and buyouts

March 2024

About this guide

This guide is for persons who are undertaking, or are subject to, a compulsory acquisition under Ch 6A of the Corporations Act. It is also for persons who are required to give, or are entitled to, buyout rights.

This guide:

- discusses the purposes underlying compulsory acquisition and buyout rights and how we administer the provisions of Ch 6A;
- explains the exemptions we have provided and modifications we have made to the relevant requirements, and when we will consider case-by-case relief from the provisions; and
- outlines our process for nominating persons to prepare an expert's report under s667AA.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

This guide was issued in March 2024 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 10, issued June 2013

Disclaimer

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

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

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A Overview

Key points

The compulsory acquisition provisions are intended to balance the interests of the overwhelming owner of an entity with the need to safeguard the interests of minority holders.

Corresponding rights to be bought out ensure that remaining holders can avoid being 'locked-in' to a minority position.

Our role in relation to the compulsory acquisition and buyout rights regimes includes granting relief from the provisions in appropriate circumstances, nominating experts to prepare reports and administering unclaimed proceeds resulting from the process. In some cases, the court may have a role approving the compulsory acquisition or stopping the acquisition.

The compulsory acquisition regime extends to the acquisition of securities of listed and unlisted companies, listed managed investment schemes and listed bodies that are not companies incorporated or formed in Australia.

The objectives of compulsory acquisition and buyout rights

RG 10.1 Chapter 6A of the *Corporations Act 2001* (Corporations Act) gives a person a right to compulsorily acquire securities under certain circumstances, depending on the level of a person's interest in the relevant class of securities or the relevant entity overall.

RG 10.2 Compulsory acquisition can be a necessary and desirable means of corporate rationalisation, providing considerable benefits and flexibility to the full owner: see Legal Committee of the Companies and Securities Advisory Committee (CASAC), *Compulsory acquisitions*, January 1996 (Compulsory Acquisitions Report), paragraph 1.11. Allowing access to these benefits improves the efficiency of businesses, financial markets and the economy overall.

RG 10.3 Providing for the compulsory acquisition of remaining securities also enhances the market for corporate acquisitions. Without the prospect of achieving full ownership, potential bidders may be discouraged from conducting takeovers or other control transactions, to the detriment of security holders generally.

Note: See the report of the Greene Committee, to which the original compulsory acquisition provisions in Australia can be traced: Board of Trade (UK), *Report of the Company Law Amendment Committee*, Cmd 2657, 1926 (Greene Committee Report), paragraph 84. See also CASAC, *Report to the Minister for Financial Services and Regulation on compulsory acquisitions*, March 2000, p. 2.

RG 10.4 However, as the compulsory acquisition process involves the expropriation of existing interests, there is also a need to ensure that minority holders are adequately protected.

The compulsory acquisition regime

RG 10.5 The objective of the compulsory acquisition regime in Ch 6A is to balance the interests of the overwhelming owner of an entity with the need to safeguard the interests of minority holders. This balance involves allowing the overwhelming owner to gain access to the economic, administrative and tax-related benefits of full ownership while ensuring minority interest holders:

(a) are treated fairly;

(b) are given sufficient information relevant to the acquisition and their rights; and

(c) where necessary, have access to external scrutiny through the courts and ASIC's regulatory oversight.

RG 10.6 The compulsory acquisition provisions also help prevent the practice of 'greenmailing', where minority holders seek prices in excess of fair value in exchange for delivering full ownership. This is consistent with the regulatory objective of avoiding both minority oppression and minority dictation.

Note: See Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 (CLERP Bill), para 7.31, the Compulsory Acquisitions Report, paragraphs 1.11–1.13 and the Greene Committee Report, paragraph 84.

The buyout rights regime

RG 10.7 Chapter 6A also provides a buyout right for minority interest holders where a person has acquired an interest in all or most of the securities in a class. This right allows remaining holders and the holders of convertible securities to require the major interest holder to purchase their securities—for example, where the major holder decides not to utilise compulsory acquisition.

RG 10.8 The objective of buyout rights is to ensure that remaining holders have an opportunity to avoid being 'locked-in' as a minority when another person has acquired an interest in the vast majority of the securities in the relevant class (or, in the case of convertible securities, the underlying class) as a result of a scheme or offers made to holders.

Entities subject to the compulsory acquisition and buyout provisions

RG 10.9 As well as securities in a company, compulsory acquisition and buyout rights extend to interests in listed registered managed investment schemes

and securities in listed incorporated bodies that are not companies: s660A and 660B. Similar principles apply to investments in these entities.

RG 10.10 Discussion in this guide that refers to securities in a company should be taken to include equivalent references in the context of listed incorporated bodies and interests in a listed registered managed investment scheme. Adjustments that take account of the different features of managed investment schemes are set out in s660B(1).

RG 10.11 Neither the compulsory acquisition provisions nor the takeover provisions apply to interests in unlisted managed investment schemes: s604. However, the compulsory acquisition provisions do apply to an unlisted registered scheme that was previously listed at the end of a bid or at the time a compulsory acquisition notice is lodged: s660B(2) and (3).

The types of compulsory acquisition under Ch 6A

RG 10.12 There are two types of compulsory acquisition under Ch 6A of the Corporations Act:

(a) compulsory acquisition following a takeover bid under Pt 6A.1 (post-bid compulsory acquisition); and

(b) general compulsory acquisition under Pt 6A.2.

RG 10.13 Table 1 outlines when the right to compulsorily acquire securities arises under Ch 6A and the terms on which the compulsory acquisition may take place. All securities acquired as part of the compulsory acquisition process must be acquired on the same terms: s661C and 664B. Table 1 also includes a cross-reference to the prescribed ASIC form to be used when undertaking the relevant type of compulsory acquisition.

RG 10.14 A court may stop the compulsory acquisition process if it is satisfied that the terms of the acquisition do not give fair value for the securities: s661E(2) and 664F(3).

Table 1: Compulsory acquisition under Ch 6A

Type of acquisition	When securities may be acquired	What a holder must receive	ASIC form
Post-bid compulsory acquisition: s661A(1)	A bidder may compulsorily acquire any remaining securities in the bid class at the end of a full takeover bid if it has met the compulsory acquisition threshold. To meet the threshold the bidder must: • have a relevant interest in 90% of the bid class securities (by number) during or at the end of the bid; and • have acquired 75% of the securities (by number) that the bidder made offers for under the bid. The compulsory acquisition may also extend to: • any bid class securities issued or granted after the offer period up until the time the compulsory acquisition notice is given; • any securities coming into the bid class on exercise or conversion of convertible securities up to six weeks after the notice is given; • certain non-transferable securities that would be in the bid class but for a restriction on transfer in the constitution (see RG 10.69–RG 10.82); and • any other bid class securities in which the bidder already has a relevant interest. Post-bid compulsory acquisition on the basis of the threshold tests must commence with the dispatch of notices no later than one month after the end of the offer period. Alternatively, a court can approve post-bid compulsory acquisition even where the threshold is not met: s661A(3).	The bidder must acquire all of the securities on the terms that apply, or applied, to the bid at the time the compulsory acquisition notice is given. Where alternative forms of consideration are available under the bid, the holder may make an election with a default choice applying if no election is made.	Form 6021
General compulsory acquisition: s664A(3)	Under general compulsory acquisition, any person can compulsorily acquire: • all of the securities in a class if the person (together with any related body corporate) holds full beneficial interests in 90% or more of the securities (by number) in the class; or • all the securities in every class of shares or securities convertible into shares, if the person: – has 90% or more voting power in the company; and – holds, together with any related bodies corporate, full beneficial interests in 90% or more of all the securities (by value) in the company that are either shares or convertible into shares. The right to compulsorily acquire a class expires if the process is not commenced within six months of the right arising: s664AA.	The acquirer must propose to provide a cash sum for the securities. The acquirer must also include with the compulsory acquisition notice an expert report discussing whether the proposed terms of the acquisition are fair value and (where applicable) whether the acquirer has met the test of having full beneficial interests in 90% of all securities by value.	Form 6024

Note: The full titles of the ASIC forms in this table are listed in the 'Related information' section of this guide. You should complete and lodge these forms using the transaction named 'Lodge compulsory acquisition and buy out notices' in the ASIC Regulatory Portal.

When buyout rights arise

RG 10.15 If a bidder has a relevant interest in 90% or more (by number) of the securities in the bid class at the end of a takeover bid, or a person completes general compulsory acquisition of a class of securities, any remaining holders of securities in the class, or securities convertible into the class, may have a right to be bought out under Ch 6A. A summary of when buyout rights of this kind arise is set out in Table 2.

RG 10.16 Under the buyout procedure the bidder or full owner must make buyout offers and notify holders of their right to be bought out. Within one month of this notification, a holder may respond with a notice requiring the bidder to buy them out. The holder's notice gives rise to a contract for sale on the relevant terms set out in Table 2.

Note: For the purposes of calculating when the one-month time limit begins, notices sent by post are taken to be given three days after posting, regardless of when they actually arrive: s662B(3), 663B(3) and 665B(3).

Table 2: Buyout rights under Ch 6A

Type of buyout right	Securities that may be bought out	Offer and contract terms	ASIC form
Buyout rights if the bidder has a relevant interest in 90% of bid class securities (by number) at the end of the bid			
Post-bid buyout of bid-class securities: s662A(1)	Remaining securities in the bid class (except securities issued after the offer period closed, or after a notice of status of conditions was given if the bid was conditional).	Unless the bidder and holder agree on other terms, the terms that applied to the bid at the end of the offer period apply to the buyout contract. Where alternative forms of consideration were offered under the bid, the holder may make an election. Otherwise a default choice specified by the bidder will apply.	Form 6022
Post-bid buyout of convertible securities: s663A(1)	Any securities convertible into bid class securities (unless a post-bid compulsory acquisition notice or buyout notice has already been given for the convertible securities).	Terms must be proposed in the notice. The holder must be given an expert report discussing whether the proposed terms of the acquisition are fair value. If the holder responds with a notice requiring the bidder to buy them out, the terms of the buyout may be either: • terms previously agreed between the bidder and the holder; or • terms determined by a court on application by the holder.	Form 6023

Type of buyout right	Securities that may be bought out	Offer and contract terms	ASIC form
Buyout rights if a person acquires full beneficial interests in all securities in a class through general compulsory acquisition			
Buyout of convertible securities following general compulsory acquisition: s665A(2)	Any securities convertible into the class that was compulsorily acquired (unless a post-bid or general compulsory acquisition notice or a bid class buyout notice has already been given for the convertible securities).	A cash sum must be proposed in the notice. The holder must be given an expert report discussing whether the proposed terms of the acquisition are fair value. If the holder responds with a notice requiring the bidder to buy them out, the terms of the buyout may be either: • terms previously agreed between the acquirer and the holder; or • terms determined by a court on application by the holder.	Form 6025

Note: The full titles of the ASIC forms in this table are listed in the 'Related information' section of this guide. You should complete and lodge these forms using the transaction named 'Lodge compulsory acquisition and buy out notices' in the ASIC Regulatory Portal.

ASIC's role

RG 10.17 ASIC has a number of functions and powers in relation to compulsory acquisitions and buyouts under Ch 6A. We monitor compulsory acquisition and buyout procedures to ensure compliance with the provisions and purposes underlying Ch 6A.

RG 10.18 ASIC also has a general exemption and modification power in relation to Ch 6A: s669. Where appropriate, we may provide case-by-case relief from certain requirements. We have also used ASIC's power to provide relief to clarify and enhance the objectives of the regime. Our legislative instruments, and some of the case-by-case relief we may give, are discussed further in this guide.

RG 10.19 In certain situations, a person utilising compulsory acquisition, or notifying a holder of buyout rights, must provide an expert report with the relevant notice. In these cases, we have a role nominating the persons who may prepare the expert report: s667AA.

RG 10.20 We also administer the proceeds of compulsory acquisition that have not been claimed by security holders. A person completing compulsory acquisition of securities is entitled to pay the relevant consideration to, and be registered as holder of the securities by, the company that issued the securities if they do not settle directly with the holder (e.g. because the holder is uncontactable). The company will retain records of holders' entitlements and publish in the ASIC Gazette, by the end of the following February, details of any entitlements remaining as at the end of December.

The consideration is transferred to ASIC within a month of the anniversary of the records being published—after which we administer the consideration and assess claims from former holders who are entitled to receive the proceeds of the compulsory acquisition.

Note: For further information on unclaimed proceeds held by ASIC, including how to make a claim, visit our consumer website, Moneysmart.

Purpose of this guide

RG 10.21 This guide discusses how we administer the compulsory acquisition and buyout provisions in Ch 6A and the relief we have provided. It also discusses the instances when we may exercise ASIC's discretionary powers to exempt from or modify the relevant provisions of the Corporations Act.

RG 10.22 In this guide we discuss compulsory acquisition under Ch 6A. This guide does not discuss other mechanisms that may be available under the Corporations Act to compulsorily acquire or exclude minority holdings.

RG 10.23 Table 3 summarises our guidance on compulsory acquisitions and buyouts.

Table 3: Summary of our guidance on compulsory acquisitions and buyouts

Topic	What our guidance covers	Reference
Post-bid compulsory acquisition	We discuss the principles underlying post-bid compulsory acquisition and the modifications we have made that have an impact on calculating the threshold tests for its utilisation. We also discuss our modifications to facilitate the acquisition of non-transferable employee securities.	Section B
General compulsory acquisition	We discuss the principles underlying general compulsory acquisition and the relief we may give from the requirement to have a 'full beneficial interest' in securities. We also discuss the relief we may give to stop the six-month period running in certain circumstances, and how you lodge an application for relief.	Section C
Buyout rights	We discuss the buyout provisions and the implications of securities being subject to compulsory acquisition at the same time a holder has a buyout right. We discuss some of the circumstances where we may or may not provide relief from the requirement to follow both processes.	Section D
Expert reports	We discuss when an expert report is required and our process for nominating experts, including how to lodge an application for nominating an expert.	Section E
Lodging compulsory acquisition and buyout documents	We discuss what you should lodge and provide to us as part of the compulsory acquisition and buyout procedures. We also discuss how you lodge these documents.	Section F

Other guidance you may need to consider

RG 10.24 Some of the discussion in this guide relates to compulsory acquisition and buyout rights following a takeover bid. Our guidance on other aspects of takeover bids and the requirements of Ch 6 may also be relevant:

(a) Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5);

(b) Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (RG 6); and

(c) Regulatory Guide 9 *Takeover bids* (RG 9).

RG 10.25 Applicants for case-by-case relief discussed in this guide should also consider our general guidance on applications in Regulatory Guide 51 *Applications for relief* (RG 51).

B Post-bid compulsory acquisition

Key points

Post-bid compulsory acquisition allows a bidder to acquire any outstanding bid class securities during or after a takeover bid if:

- the bidder acquires a relevant interest in 90% of all bid class securities and 75% of the securities for which offers were made; or
- a court otherwise approves the acquisition.

The purpose of the thresholds for post-bid compulsory acquisition is to demonstrate overwhelming acceptance of the terms of a bid. This justifies the compulsory acquisition of remaining holders on those terms.

The requirement to bid for 'all the securities in the bid class' in s661A(1)(a)(i) means a full bid must be made to utilise post-bid compulsory acquisition.

We have modified the 75% acquisition test and 90% relevant interest test to include and exclude certain holdings and acquisitions from the calculation, consistent with the underlying policy of the threshold tests. We have also modified Ch 6A to allow for post-bid compulsory acquisition of non-transferable employee securities in a different class to the bid class in certain circumstances.

Principles underlying post-bid compulsory acquisition

RG 10.26 Under post-bid compulsory acquisition a bidder may compulsorily acquire securities in the bid class on the same terms as under the bid, provided two threshold tests are met:

(a) the bidder and their associates have relevant interests in at least 90% of the securities in the bid class at some point during the offer period (s661A(1)(b)(i)); and

(b) the bidder and their associates have acquired at least 75% of the securities that the bidder offered to acquire under the bid, whether the acquisitions happened under the bid or otherwise (s661A(1)(b)(ii)).

RG 10.27 A bidder may also initiate compulsory acquisition following a takeover bid with court approval: s661A(3).

Post-bid compulsory acquisition on the basis of the threshold tests

RG 10.28 The basic principle underlying post-bid compulsory acquisition is that, where the terms of a takeover bid have received overwhelming acceptance, the bidder should generally be able to acquire any remaining bid class securities on those terms, unless the acquisition is otherwise shown to be unfair.

Note: See Compulsory Acquisitions Report, paragraph 2.27.

RG 10.29 The efficiency and integrity of the takeover bid process under Ch 6 of the Corporations Act is therefore an important part of post-bid compulsory acquisition. The procedures and protections set out in Ch 6 are designed to ensure that:

(a) the acquisition of control under a takeover bid takes place in an efficient, competitive and informed market; and

(b) target holders have sufficient information to assess the merits of the takeover offer and are treated equally (s602).

These procedures and protections underwrite the premise of the post-bid compulsory acquisition provisions, that satisfaction of the thresholds indicates widespread, fully informed and genuinely independent acceptance of the bid terms.

RG 10.30 Accordingly, an additional purpose of Ch 6 is to ensure that an appropriate procedure is followed as a preliminary to compulsory acquisition under the post-bid compulsory acquisition provisions: s602(d). If a bidder satisfies the post-bid compulsory acquisition thresholds in a way that is not appropriate, the Takeovers Panel may make a declaration of unacceptable circumstances: s657A(2)(b).

RG 10.31 The onus is placed on objectors to initiate court action to show the consideration offered is not fair value for the securities under post-bid compulsory acquisition: s661E(1). This is justified because there is already some evidence that the offer price is fair value:

(a) the price has been overwhelmingly accepted by holders independent of the bidder—as demonstrated by satisfaction of the threshold tests; and

(b) these thresholds have been satisfied within the protective framework of Ch 6 and the bid process.

Note: See also Compulsory Acquisitions Report, paragraph 2.81.

Court-approved post-bid compulsory acquisition

RG 10.32 Even where the threshold tests have not been met, a bidder may utilise post-bid compulsory acquisition with the approval of the court.

RG 10.33 The court's approval power provides additional flexibility to the post-bid compulsory acquisition procedure and addresses any arbitrariness in the precise 90% relevant interest threshold: Explanatory Memorandum to CLERP Bill, para 7.127. For example, the court may allow post-bid compulsory acquisition to proceed where:

(a) the bidder is unable to satisfy the threshold tests due to untraceable holdings in the target; or

(b) the bidder achieves a relevant interest in the target that is marginally below the 90% threshold (*Re Sylvania Resources Ltd* (2009) 74 ACSR 29).

The requirement to bid for all securities

RG 10.34 One of the requirements to utilise post-bid compulsory acquisition following an off-market bid is that the bidder must have made its bid for 'all the securities in the bid class': s661A(1)(a)(i).

RG 10.35 We interpret this requirement to mean that the off-market bid must be a full bid, not a proportional bid (i.e. it must be a bid for all the bid class securities on issue at the date set by the bidder under s633(2)). The language 'all the securities in the bid class' in s661A(1)(a)(i) is identical to the language in s618(1)(a), where it is used to refer to a full bid rather than a proportional bid made in accordance with s618(1)(b).

RG 10.36 Requiring a full bid is consistent with the principles underlying compulsory acquisition. Section 661A assists bidders seeking 100% ownership of the target, while balancing the interests of minority holders. A bidder seeking to maximise its chance of obtaining 100% ownership should not make a proportional bid.

RG 10.37 The 75% acquisition test for securities the bidder offered to acquire in s661A(1)(b)(ii) would also be imperfect in demonstrating overwhelming acceptance of the bidder's offer in the case of a proportional bid. The bidder must give holders the opportunity to accept into the bid for their entire holding of bid class securities.

Securities issued after the s633(2) record date

RG 10.38 The language 'all the securities in the bid class' does not mean the bidder must have bid for all possible bid class securities, including those issued after the record date determined by the bidder under s633(2). It means a full bid, rather than a proportional bid, must be made: RG 10.35.

RG 10.39 The view that an 'ordinary' full bid is an offer for all existing securities at the s633(2) date is reinforced by the language of s617 and 618. Under s617(1), a takeover bid relates to securities that exist, or will exist, as at the record date set by the bidder under s633(2). If the language in s618 covered securities issued after the s633(2) date due to the exercise of convertible securities, this would mean that under s618 the bidder must offer to acquire these later issued securities under the bid. This would be inconsistent with the permissive language in s617(2) that the bid *may* extend to later issued securities.

Note: For further discussion of the securities to which a takeover bid relates, see RG 9.52–RG 9.60.

RG 10.40 Also, if the bidder were required to bid for later issued securities as a precondition to compulsory acquisition under s661A, this would indicate a policy that all holders must receive an offer under the bid before their

securities can be compulsorily acquired. This is inconsistent with s661A(4), which allows the bidder to elect whether to compulsorily acquire securities issued after the end of the offer period.

The 90% relevant interest threshold

RG 10.41 Under s661A(1)(b)(i), a bidder seeking to engage post-bid compulsory acquisition must have, together with its associates, a relevant interest in 90% of the securities in the relevant class during or at the end of the offer period. A bidder who meets the 90% relevant interest test at some time during the offer period is not disqualified if it ceases to satisfy the test because of the issue of further securities in the bid class.

ASIC modification: Deemed relevant interests

RG 10.42 Under s661A(2), any relevant interests that the bidder has 'merely because of the operation of subsection 608(3) (relevant interest by 20% interest in body corporate)' must be disregarded in determining whether the 90% relevant interest threshold for post-bid compulsory acquisition has been met.

RG 10.43 ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/684 modifies s661A(2) to:

(a) clarify that deemed relevant interests arising from a controlling interest in a body corporate or managed investment scheme are not excluded (i.e. deemed interests under s608(3)(b)); and

(b) extend the operation of the provision so that deemed relevant interests of the bidder's associates under s608(3)(a) are excluded.

RG 10.44 The 90% relevant interest test is a test of overwhelming ownership of the relevant class of securities. Where a person's only interest in securities arises under s608(3)(a) as a result of their ownership of 20% or more of a body corporate or managed investment scheme with a relevant interest in the securities, it may be artificial to count those securities for the purposes of determining whether the person has overwhelming ownership of the entity. Deemed holdings of this kind are therefore excluded under s661A(2): see Compulsory Acquisitions Report, paragraphs 2.21–2.26.

Note: The operation of s661A(2) means, for example, that where a bidder has 20% voting power in, but not control of, another entity that holds bid class securities, the entity may need to accept into the bid for the bidder to be able to count the relevant interests it has in the bid class securities for the purposes of the 90% relevant interest test.

Deemed relevant interests on the basis of controlled entities

RG 10.45 Section 661A(2) refers to s608(3), under which a person is deemed to have the relevant interests in securities that another body corporate or managed investment scheme has if:

(a) their voting power in the entity is above 20% (s608(3)(a)); or

(b) they control the entity (s608(3)(b)).

RG 10.46 We have modified s661A(2) to clarify that the exclusion from the 90% relevant interest test only applies to deemed relevant interests arising under the 20% limb in s608(3)(a). Our modification is consistent with the underlying purpose of the provision and the legislative intention evident from:

(a) the parenthetical reference in s661A(2) to deemed relevant interests on the basis of a 20% or greater holding; and

(b) the recommendation in the Compulsory Acquisitions Report, on which the CLERP amendments were largely based (see Explanatory Memorandum to the CLERP Bill at para 7.118 and the Compulsory Acquisitions Report at paragraphs 2.21–2.26, which refer to s33 of the old Corporations Law).

Deemed relevant interests of associates

RG 10.47 Our modification also extends the s661A(2) exclusion to the relevant interest holdings of associates of the bidder. The 90% relevant interest test is based on the interests of both bidders and their associates.

RG 10.48 We have made this modification because the policy underlying the exclusion of deemed relevant interests under s608(3)(a) applies equally to the interests of the bidder's associates.

RG 10.49 Without our modification it may be possible for a bidder to avoid the exclusion in s661A(2) by seeking to rely on deemed relevant interests held by associates to satisfy the 90% relevant interest test.

The 75% acquisition threshold

RG 10.50 As well as satisfying the 90% relevant interest test, a bidder and its associates must have acquired 75% of the securities the bidder offered to acquire under the bid in order to utilise post-bid compulsory acquisition: s661A(1)(b)(ii). The purpose of this additional test is to ensure that overwhelming acceptance of the bid terms is demonstrated even in cases where the bidder and its associates started the bid with a significant holding in the target.

Note: See Compulsory Acquisitions Report, paragraph 2.53.

RG 10.51 The 75% acquisition test requires that the bidder and its associates 'acquire' the bid class securities, rather than simply obtain a relevant interest in the securities. The acquisitions need not be made under the bid. However, the prohibition in s623(1) on the bidder and its associates offering collateral benefits means that, generally, the only acquisitions the bidder and its associates will make outside the bid during the offer period will be through on-market purchases: s623(3)(b).

Note: See RG 6.31.

ASIC modification: Excluded acquisitions

RG 10.52 ASIC Instrument 2023/684 modifies s661A to ensure that, when calculating whether the 75% acquisition test has been met, the following are excluded:

(a) securities in which the bidder or their associates had a relevant interest as at the date of the first offer under the bid, other than securities acquired before that date in reliance on item 2 of s611; and

(b) securities issued to an associate of the bidder during the offer period.

RG 10.53 Under our modification, these securities are excluded from being counted both as part of the number of securities 'acquired' 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 we did not also exclude them from the number the bidder 'offered to acquire'. The securities are therefore excluded from both the numerator and denominator in the percentage calculation.

RG 10.54 We have modified the 75% acquisition test in this way to:

(a) clarify its operation with respect to securities in which the bidder or its associates had a relevant interest at the start of the offer, including acquisitions by the bidder from an associate (see RG 10.55–RG 10.62); and

(b) ensure that it is consistent with the underlying principle that the bidder should only be able to utilise post-bid compulsory acquisition if its offer received overwhelming acceptance from independent holders.

Securities acquired from associates

RG 10.55 The 75% acquisition test applies to acquisitions during the offer period by 'the bidder and their associates', regardless of how the acquisition takes place. It may be unclear whether a bidder can satisfy the 75% acquisition test by acquiring an associate's securities.

RG 10.56 The wording of s661A(1)(b)(ii) suggests that to be counted in the test, securities must be acquired from persons other than the bidder or their

associates. The test treats the bidder and their associates as a group, with the holdings of group members to be aggregated.

RG 10.57 Under this approach, shares acquired by the bidder from an associate are not 'acquired' under the test because they were already held by 'the bidder and their associates'. This also means the bidder cannot double count securities acquired by an associate during the offer period that the bidder acquired in turn.

RG 10.58 ASIC Instrument 2023/684 clarifies this approach by expressly excluding any securities in which the bidder's associates have a relevant interest from the 75% acquisition test.

Securities acquired under s611 item 2

RG 10.59 ASIC Instrument 2023/684 modifies the operation of s661A(1)(b)(ii) to expressly exclude, from the 75% acquisition test, any securities in which the bidder or their associates have a relevant interest at the date of the first offer under the bid.

RG 10.60 As part of that modification, ASIC Instrument 2023/684 also clarifies that relevant interests acquired in reliance on s611 item 2 during the bid period are nevertheless included in the calculation of the 75% acquisition test: see s661A(2A)(a)(i) inserted by ASIC Instrument 2023/684. Our modification ensures any securities a bidder may acquire under s611 item 2 before offers are made are treated in the same way as acquisitions under the bid for the purposes of the 75% acquisition test, irrespective of whether the relevant acquisitions are made during the bid period prior to the commencement of the offer period. This upholds the underlying policy that the compulsory acquisition process should be available to a bidder where the threshold is satisfied by acceptances of independent holders.

Securities in which the bidder already has a relevant interest

RG 10.61 There is a question whether a bidder is able to 'acquire' securities in which it already has a relevant interest for the purposes of s661A(1)(b)(ii). Our modification excludes acquisitions of this kind from the 75% acquisition test, as the holder of the securities would not be clearly independent of the bidder.

RG 10.62 Our modification also ensures that the narrower 'relevant interest' concept in s661A(2) does not apply to the 75% acquisition test (only the 90% relevant interest test). This means that the usual test for a relevant interest in s608 (including the deeming provision in s608(3)(a)) applies for the purposes of determining whether securities are excluded from the 75% acquisition test under our modification in ASIC Instrument 2023/684, due to the bidder having had a relevant interest in the securities at the date of the first offer under the bid.

Securities issued to the bidder's associates

RG 10.63 If the target issues securities to the bidder's associates during the offer period, it is possible that the securities are 'acquired' for the purposes of the 75% acquisition test. Without our modification, these securities may be counted towards meeting the test if the bidder has offered to purchase them under the takeover bid.

RG 10.64 Our modification excludes these securities because acquisitions by the bidder's associates of shares issued directly by the target may be unrelated to the bid, and counting them would not promote the aim of the 75% acquisition test of measuring acceptance of the bid by independent holders.

ASIC modification: Bids for convertible securities

RG 10.65 ASIC Instrument 2023/684 also modifies s661A(1)(b)(ii) to provide relief from the 75% acquisition test when the bid class for a takeover offer is convertible securities. Under our modification, convertible securities that are exercised or converted between the date under s633(2) and the end of the offer period will be excluded from the number of convertible securities that the bidder offered to acquire under the bid.

Note: The date under s633(2) is the date set by the bidder for determining to whom offers under the bid will be sent.

RG 10.66 Holders may exercise their convertible securities after the bidder has determined to whom it must send its offers for convertible securities—often to accept a simultaneous offer by the bidder for the underlying securities. The bidder's offer for underlying securities may extend to securities that come into existence following conversion or exercise of the convertible securities or derivatives: s617(2), ASIC Corporations (Takeover Bids) Instrument 2023/683, and RG 9.51–RG 9.63.

RG 10.67 Our modification is consistent with the underlying purpose of the 75% acquisition test of determining whether holders overwhelmingly accepted the offer under the takeover bid. If a holder exercises their convertible securities rather than accepting the offer for the convertible securities under the bid, the holder will neither have accepted nor directly rejected the bidder's offer. The holder may have exercised the convertible securities for other reasons. Even if the holder preferred an offer by the bidder for the underlying securities, the exercise of convertible securities itself does not show that the bidder's offer for the convertible securities was unfair.

RG 10.68 Without our modification, if a substantial proportion of holders exercise their convertible securities after the offer under 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).

Compulsory acquisition of employee and other non-transferable securities

RG 10.69 Some target companies may have issued to employees non-transferable securities as part of an employee incentive plan.

RG 10.70 A company issues 'non-transferable employee securities' with the purpose of remunerating employees while aligning their interests with those of the company. Non-transferable employee securities prevent employees from taking profits immediately and reinforce the interdependence of the company and the employee.

Non-transferable securities as a separate class

RG 10.71 In some cases, non-transferable employee securities will be in a separate class to the bid class. A non-transferable security will be in a different class to other securities if it 'differs sufficiently in respect of rights, benefits, disabilities, or other incidents, as to make it distinguishable from any other category of shares': *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 13 ACLR 90, 93.

RG 10.72 In the case of a share that differs from ordinary shares only because of restrictions on transfer, it is most likely that the share is in a different class if the constitution or terms of issue of the share provide that the share is non-transferable. In this case, it is clear the inability to transfer is attached to the share.

RG 10.73 In some employee share schemes, shares are purchased on-market and transferred into trust for the benefit of the employee. The share will not be in a separate class if it cannot be transferred merely because, in the case of an employee, it is subject to a trust. In this case, the inability to transfer is not attached to the shares but to the employee.

Note: For further discussion on class distinction in the takeover context, see RG 9.36–RG 9.48.

ASIC modification: Non-transferable employee securities

RG 10.74 The restrictions on non-transferable employee securities mean that they cannot be acquired by the bidder under a bid. If the employee securities are in their own class, it is impossible for the bidder to meet the post-bid compulsory acquisition threshold tests under a bid for the employee securities, by:

(a) achieving a 90% relevant interest in all securities in the bid class; and

(b) acquiring 75% of all securities that the bidder offered to acquire under the bid: s661A(1)(b).

Note: A person may, however, compulsorily acquire non-transferable employee securities, even if they are unable to acquire full beneficial interests in 90% of them, if the requirements for general compulsory acquisition in s664A(2) are met.

RG 10.75 ASIC Instrument 2023/684 modifies s661A(1) so that if a bidder compulsorily acquires bid class securities it may also compulsorily acquire non-transferable employee securities where:

(a) the employee securities are in a different class to the bid class merely because they are non-transferable (e.g. employee shares that would be ordinary shares if they were transferable); and

(b) the employee securities, if included in the bid class, would not exceed 10% of all bid class securities (by number worked out at the end of the offer period).

RG 10.76 We have made this modification to ensure a bidder or 90% holder is not prevented from acquiring 100% ownership of a company merely because employee securities are non-transferable. As noted in the Explanatory Memorandum to the CLERP Bill at para 7.40:

> Compulsory acquisition of each class of securities can be difficult … where there are restrictions on transferring some securities (for example, securities issued under employee share schemes).

RG 10.77 Our modification counters the possible defensive effect of non-transferable employee securities. Many bidders seek 100% ownership of the target. Uncertainty about whether a bidder can compulsorily acquire non-transferable securities may be a factor in discouraging takeover bids.

RG 10.78 Our modification in ASIC Instrument 2023/684 is supported by various indications that the compulsory acquisition provisions were intended to cover non-transferable securities:

(a) the Explanatory Memorandum to the CLERP Bill suggests that Ch 6A was intended to cover non-transferable securities (see RG 10.76);

(b) the compulsory acquisition provisions 'apply despite anything in the constitution of the company' (s661A(5) and 664A(4)); and

(c) the definition of 'convertible securities' in s9 states that: 'An option may be a convertible security even if it is non-renounceable'. The language 'non-renounceable' suggests that the definition covers non-transferable options. Compulsory acquisitions extend to 'convertible securities'.

How our modification operates

RG 10.79 Our modification treats non-transferable employee securities similarly to bid class securities issued during or after the offer period. The bidder may elect to compulsorily acquire later issued securities if it acquires bid class securities: s661A(4)(b) and (c).

RG 10.80 For the purposes of our modification, securities are 'non-transferable' when the constitution of the company or the terms of issue of the securities restricts their transfer. An 'employee security' is a security issued under a scheme to,

or for, the benefit of employees or non-executive directors of the company (or a related body corporate) in relation to their employment or services.

> Note: Our modification is unnecessary in the case of securities that are non-transferable only because they are held in trust under an employee share scheme. A trustee cannot resist compulsory acquisition merely because of the terms of a trust. In a compulsory acquisition the securities will be transferred regardless of the trust under the procedure for transfer in s666B.

RG 10.81 Form 6021 *Notice of compulsory acquisition following takeover bid* includes a section for use when the bidder acquires non-transferable employee securities as well as bid class securities. For the avoidance of doubt, we also modify s661A(5), 664A(4) and Pt 6A.3 of Ch 6A so that non-transferable employee securities can be transferred in completion of a compulsory acquisition, regardless of any restraint under the terms of issue of the securities as well as the constitution of the company.

RG 10.82 The terms of our relief seek to ensure that compulsory acquisition processes are as similar as is practicable between non-transferable employee securities and other securities that would be in the same class except for the employee securities being non-transferable.

ASIC relief: Other cases of non-transferable securities

RG 10.83 We may give case-by-case relief to allow post-bid compulsory acquisition of non-transferable securities in circumstances where ASIC Instrument 2023/684 does not apply.

Employee securities exceeding 10% of combined bid class

RG 10.84 A requirement of our modification in ASIC Instrument 2023/684 is that if the employee securities were bid class securities, they would not exceed 10% of the bid class securities: see RG 10.75(b). Under our relief, the bidder does not have to meet the 90% relevant interest and 75% acquisition tests for the employee securities, as this would be impossible. This is more justifiable where the employee securities are a minor class.

RG 10.85 We will consider case-by-case relief in the unusual circumstance that the employee securities exceed 10%. We will take into account the circumstances of the issue of this number of securities under the employee share scheme, including any indication that the scheme was administered with a defensive purpose.

Other non-transferable securities

RG 10.86 We may consider applications for case-by-case relief to compulsorily acquire non-transferable securities other than employee securities. In considering relief of this kind we will take into account the nature and purpose of the restriction on transfer.

How you lodge an application for relief

RG 10.87 You should submit your application for relief through the ASIC Regulatory Portal. Your application for relief should address the requirements set out in RG 51. You will need to pay fees for your application. We have provided details about payment options in the portal. For more information, see how you apply for relief.

C General compulsory acquisition

Key points

General compulsory acquisition allows an overwhelming owner of a class of securities, or the voting rights and value of an entity, to compulsorily acquire the remaining securities, regardless of whether they have made a takeover bid for the relevant class.

We may give case-by-case relief so that a registered managed investment scheme, or a person who has granted a security interest over their holding, can meet the 90% full beneficial interest test for general compulsory acquisition in s664A(1) or (2).

We may grant case-by-case relief to stop the six-month time period for commencing general compulsory acquisition running during court proceedings or when a person's holding is involuntarily diluted below the 90% full beneficial interest threshold.

Principles underlying general compulsory acquisition

RG 10.88 Under general compulsory acquisition, a person who is a 90% holder in relation to a class of securities may compulsorily acquire all the remaining securities in that class in which neither the person nor any related bodies corporate have full beneficial interests: s664A(3).

RG 10.89 A person is a 90% holder in relation to a particular class of securities if the person (together with any related bodies corporate) holds full beneficial interests in at least 90% of the securities (by number) in that class: s664A(1).

RG 10.90 Additionally, a person is a 90% holder in relation to all classes of shares, or securities convertible into shares, in a company if:

(a) the person's voting power in the company is at least 90%; and

(b) the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% by value of all the securities of the company on issue that are either shares or convertible into shares (s664A(2)).

RG 10.91 Like post-bid compulsory acquisition, general compulsory acquisition facilitates access by the overwhelming owner of an entity to the benefits of full ownership.

RG 10.92 The test in s664A(1) extends compulsory acquisition rights to the holder of an overwhelming majority of the securities in a class even when a takeover bid has not been made. When an overwhelming owner has acquired full beneficial interests in over 90% of each class of securities on issue, the

owner will be able to obtain full ownership of all securities in the entity by utilising general compulsory acquisition on the basis set out in s664A(1).

RG 10.93 The alternative test for general compulsory acquisition in s664A(2) is designed to ensure that the holder of an overwhelming economic and control interest in an entity is able to access the advantages of full ownership regardless of the capital or ownership structure of the entity. Section 664A(2) overcomes the difficulties of class-by-class compulsory acquisition that may arise when there are a large number of classes on issue, a small number of holders in one or more classes, or restrictions on transferring or acquiring securities in a particular class.

Note: See Explanatory Memorandum to the CLERP Bill, paras 7.40–7.42.

RG 10.94 Because general compulsory acquisition applies whether or not a takeover bid has been made, the procedure to be followed includes additional protections for minority shareholders:

(a) the 90% holder must have a 'full beneficial interest' rather than a relevant interest to meet the 90% threshold (s664A);

(b) the 90% holder must offer a cash sum (s664B);

(c) the 90% holder must provide an independent expert report addressing whether the consideration is fair value with its compulsory acquisition notice and (to the extent not covered by the expert report) include disclosure of any other information material to deciding whether to object to the acquisition (s664C(1)); and

(d) if holders of 10% or more of the securities covered by the notice object to the compulsory acquisition, the 90% holder must apply to the court for approval of the acquisition, and bear the cost of court proceedings, if it wishes to proceed with the compulsory acquisition (s664F).

RG 10.95 Further, in contrast to post-bid compulsory acquisition, if court proceedings are commenced, the onus is on the 90% holder to establish that their offer represents fair value: s664F(3).

Full beneficial interests

RG 10.96 General compulsory acquisition operates by reference to an overwhelming owner's full beneficial interests in securities.

RG 10.97 An overwhelming owner relying on s664A(1) must have full beneficial interests in at least 90% of the securities in the class.

RG 10.98 An overwhelming owner relying on s664A(2) must have full beneficial interests in 90% of all securities in the entity by value. An owner of this kind must provide an independent expert report that states whether, in the expert's

opinion, the owner meets the test in s664A(2)(c): s667A(2). Section 667A(2) refers to the expert stating their opinion on the owner's 'full beneficial ownership'.

RG 10.99 The phrase 'full beneficial interest' is not defined. The Explanatory Memorandum to the CLERP Bill suggests a full beneficial interest is:

(a) direct ownership; or

(b) ownership through a nominee.

RG 10.100 Case law indicates that a 'full beneficial interest' is directed towards equitable ownership: see *Austrim Nylex Ltd v Kroll and Others (No 2)* (2002) 42 ACSR 18 at [90]. In some cases the scope of what constitutes a 'full beneficial interest' may be unclear.

When we may give relief

RG 10.101 We may give case-by-case relief so that a person can meet the 90% full beneficial interest test for compulsory acquisition in s664A(1) or (2) even if the overwhelming owner's interest may not constitute a full beneficial interest. We may give this relief when:

(a) the holding is scheme property of a registered managed investment scheme (this relief treats the registered managed investment scheme as a single entity that owns the securities); or

(b) the owner has granted a mortgage, charge or other security interest over the holding.

RG 10.102 We provide this relief because, even where they may not have a full beneficial interest in securities, an overwhelming owner should be treated as a 90% holder if in a commercial sense they own 90% of the securities. In our view, a person owns securities in a commercial sense if they have both the benefit and risk attached to the securities.

RG 10.103 Our relief will also mean that if the holding is scheme property or the overwhelming owner has given a mortgage, this will not prevent an expert from stating an opinion that the owner has full beneficial ownership in at least 90% (by value) of all the securities in the company for the purposes of s667A(2).

RG 10.104 When we give this relief, we will make corresponding modifications so that s665A will apply to a holding that is scheme property or a holder who has given a mortgage although there may be no full beneficial interest. This preserves the operation of the buyout rights regime for convertible security holders following general compulsory acquisition.

ASIC relief: Registered managed investment schemes

RG 10.105 Where securities are held by a registered managed investment scheme, it is unlikely that the 90% full beneficial interest test in s664A(1) for general compulsory acquisition can be met by:

(a) the responsible entity (or any custodian) of the scheme; or

(b) the members of the scheme.

Note: Ch 6A extends to the acquisition of interests in a listed registered managed investment scheme: s660B. This problem is likely to become particularly apparent in a case where a registered managed investment scheme seeks to gain 100% ownership of a listed registered managed investment scheme.

RG 10.106 It is unlikely that a managed investment scheme or its responsible entity (or any custodian) can be a 90% holder under s664A(1), because the responsible entity does not have a full beneficial interest in securities that are scheme property.

RG 10.107 It is also unlikely that a member of a managed investment scheme has a full beneficial interest in such securities. A member would have a beneficial interest in particular scheme property only if they have rights against the responsible entity that are closely related to the property. This is unlikely for a scheme in the nature of an equity fund. Such a beneficial interest may not be 'full'. Even if the members did have a full beneficial interest, their interests could not be aggregated for the purposes of s664A(1) unless they were related bodies corporate.

RG 10.108 We may give case-by-case relief to treat a registered managed investment scheme as a single entity that owns the securities, so that the registered managed investment scheme can meet the 90% full beneficial interest test in s664A(1) and the scheme can utilise general compulsory acquisition.

No aggregation with other holdings

RG 10.109 When we give relief for a registered managed investment scheme, normally it will be a term of our relief that the responsible entity cannot meet the 90% full beneficial interest test in s664A by aggregating its interest in securities that are property of a scheme with:

(a) securities held by related bodies corporate of the responsible entity; and

(b) the responsible entity's interest in securities that are scheme property of another scheme.

RG 10.110 Under s664A(1) and (2), a person's full beneficial interests can be aggregated with those of their related bodies corporate for the purposes of meeting the 90% full beneficial interest test. This concept of group ownership of the securities is not appropriate for a registered scheme. The responsible entity has a legal obligation to exercise rights and benefits

attaching to securities that are scheme property for the benefit of members of the scheme rather than the responsible entity's corporate members. Similarly, it may be inappropriate to aggregate holdings that are scheme property of different schemes with a common responsible entity.

ASIC relief: Mortgaged or charged holdings

RG 10.111 A person who gives a mortgage, charge or other security interest may not be able to meet the 90% full beneficial interest test in s664A. Some commentators have suggested that a beneficial interest would not be 'full' if any other person has a vested or contingent beneficial interest in the securities. On this view, a holder who gave a mortgage, charge or other security interest would not have a full beneficial interest in the securities. There is an alternative view that the problem arises for equitable mortgages only.

RG 10.112 For certainty, we may give case-by-case relief so that s664A applies where the overwhelming owner has given any mortgage, charge or other security interest over the holding. Our relief for an owner that has given a mortgage will require that:

(a) the financier took or acquired the mortgage in the ordinary course of their business of providing financial accommodation and on ordinary commercial terms; and

(b) the financier is not an associate of the owner.

In these circumstances it is clearer that the overwhelming owner who gave the mortgage remains owner of the holding in the commercial sense. These requirements are the same as those applying to the exception from the relevant interest concept for money lending and financial accommodation: s609(1).

The six-month time limit for general compulsory acquisition

RG 10.113 A person who becomes entitled to compulsorily acquire securities in a class under s664A may only do so if they lodge a compulsory acquisition notice within the period of six months after becoming a 90% holder.

RG 10.114 The six-month period for lodging a compulsory acquisition notice protects minority holders from ongoing uncertainty about the status of their holding. At the same time, Pt 6A.2 aims to give the 90% holder a reasonable opportunity to compulsorily acquire remaining securities and access the benefits of full ownership.

Note: See Parliamentary Joint Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Law Economic Reform Program Bill 1998*, May 1999, paragraph 3.60.

Reckoning the six-month period

RG 10.115 The six-month period for commencing general compulsory acquisition applies when a person first becomes a 90% holder in relation to the relevant class. If a 90% holder ceases to meet the test and then meets it again, the six-month period does not stop running until, or restart when, the holder becomes a 90% holder again.

RG 10.116 If this were not so, the 90% holder could sell down to retain its ability to rely on s664A and repurchase when it is ready to compulsorily acquire the remaining securities.

ASIC relief: Stopping the six-month period

RG 10.117 We may provide case-by-case relief from s664AA to stop the six-month period running in the following circumstances:

(a) where the 90% holder has applied to a court under s664F(1) for approval of the acquisition (see RG 10.121); and

(b) where the 90% holder ceases to meet the 90% full beneficial interest test in s664A for reasons beyond its control (see RG 10.125).

RG 10.118 We consider that relief in these circumstances strikes a balance between:

(a) the interests of minority holders; and

(b) ensuring the overwhelming owner has access to the advantages of the compulsory acquisition provisions, including better management of company groups, reduction of administrative reporting requirements and discouraging minority shareholders from demanding a price for their securities that is above a fair value.

RG 10.119 A 90% holder should consider compulsory acquisition soon after becoming a 90% holder, because our relief merely stops time running under s664AA. For example, holders should leave sufficient time to improve the terms of the compulsory acquisition if necessary after any proceedings under s664F.

RG 10.120 A 90% holder should apply for relief from s664AA well within the six-month period. We will not give relief after the six-month period has passed.

Court proceedings

RG 10.121 We may provide relief to stop the six-month period running during the time that the 90% holder applies to the court under s664F(1) for approval of the acquisition until the end of all proceedings in relation to the application (including appeals).

RG 10.122 The court does not have the power to substitute a higher cash sum for that stated by the 90% holder in its compulsory acquisition notice (except in exceptional circumstances under s1350). Under s664F(3), the court must either:

(a) approve the acquisition of the securities on the terms in the compulsory acquisition notice; or

(b) confirm that the acquisition will not take place.

RG 10.123 A 90% holder should be able to improve the terms of its compulsory acquisition in a second compulsory acquisition notice within a reasonable period after court proceedings under s664F. Section 664C(6)(b) contemplates giving a further notice, and the second notice will also be subject to objections by minority holders and court approval.

RG 10.124 Our relief ensures a 90% holder is able to improve the terms of the compulsory acquisition if it failed to establish to the court that its notice gives fair value under s664F. Without our relief, the six-month period under s664AA may have passed by the time the proceedings are concluded.

Ceasing to be a 90% holder involuntarily

RG 10.125 A 90% holder may cease to meet the 90% full beneficial interest test in s664A(1) if its holding falls below 90% of the securities in the class. In some cases, this may be due to events beyond the control of the 90% holder. For example, a 90% holder may cease to meet the 90% full beneficial interest test due to the exercise by others of convertible securities.

RG 10.126 We may give case-by-case relief from s664AA to stop the period running after a 90% holder ceases to meet the 90% full beneficial interest test until it meets the test again. We will only give this relief if the 90% holder ceases to meet the test for reasons beyond its control.

Employee performance rights

RG 10.127 A company or listed registered managed investment scheme will sometimes issue to its employees rights or entitlements to be issued with new shares or interests contingent on the achievement of a particular performance measure or milestone (employee performance rights).

RG 10.128 Depending on their particular terms and the rules of the plan under which they were issued, some employee performance rights may not fall within the ambit of the general compulsory acquisition provisions because they are not 'securities' as defined in s92(3). In particular, certain employee performance rights may not fall within the definition of an 'option' to acquire by way of issue a share or interest in a managed investment scheme: s92(3)(e). These performance rights may instead be a derivative: see s761D(1), the definition of 'security' in s761A and s92(3)(f).

RG 10.129 If the employee performance rights that are on issue are not securities, a 90% holder in relation to the shares or interests that may be issued under the employee performance rights will not be able to compulsorily acquire the employee performance rights themselves under s664A(3) because a person can only be a 90% holder in relation to a class of securities. This is the case even if the person holds full beneficial interests in at least 90% by value of the securities in the company that are either shares or interests or convertible into shares or interests.

ASIC relief: General compulsory acquisition of employee performance rights

RG 10.130 We may give relief to allow a person who is, under s664A(2), a 90% holder in relation to each class of shares or interests that may be issued under an employee performance right, to utilise general compulsory acquisition to acquire any outstanding employee performance rights.

RG 10.131 However, we will only grant relief where, under the terms of the employee performance rights, the employee is able to require the company or scheme to issue it with shares or interests. Relief will not generally be required where the bidder is able, for example, to procure the company or scheme to satisfy its obligations under the employee performance rights by way of payment of a cash sum.

RG 10.132 We may be prepared to give this relief because, without the ability to acquire employee performance rights that will result in the issue of new shares or interests, a 90% holder seeking to acquire 100% control may be unable to acquire or extinguish all outstanding obligations of the company or scheme to issue securities in the relevant class. A 100% holder may therefore be at risk of being diluted below 100% and unable to secure the benefits of full ownership.

RG 10.133 Our relief is consistent with the principles underlying general compulsory acquisition discussed at RG 10.93 and the application of the test in s664A(2)(a) to securities that are convertible into shares (or interests).

How you lodge an application for relief

RG 10.134 See RG 10.87 for information on how you lodge an application for relief.

D Buyout rights

Key points

Buyout rights are designed to afford remaining holders an opportunity to avoid being left as part of a 'locked-in' minority.

We have provided relief so that a bidder who has dispatched post-bid compulsory acquisition notices to all remaining holders does not need to make post-bid buyout offers for bid class securities under Div 2 of Pt 6A.1.

We will not generally give relief from the requirement to make post-bid buyout offers for convertible securities under Div 3 of Pt 6A.1 on the basis that a bidder is proceeding to general compulsory acquisition of the convertible securities.

Principles underlying the buyout provisions

RG 10.135 Under the buyout provisions in Ch 6A, certain minority interest holders are able to require a bidder concluding a takeover bid, or a person who has completed general compulsory acquisition of a class of securities, to acquire their security holding.

RG 10.136 Where a bidder has a relevant interest in 90% of the bid class securities (by number) at the end of the offer period, the bidder must make offers to buy out:

(a) the remaining holders of bid class securities (s662A(1)); and

(b) the holders of securities that are convertible into bid class securities: (s663A(1)).

RG 10.137 Where a person has successfully completed general compulsory acquisition of a class of securities, they must make offers to buy out the holders of any securities that are convertible into the relevant class: s665A(1).

RG 10.138 Within one month after the bidder or full owner gives notice of the buyout offers, a holder may respond with a notice requiring acquisition of their securities. The holder's notice gives rise to a contract for the sale of the securities:

(a) in the case of bid class securities—on the terms offered under the bid immediately before the end of the offer period, unless the bidder and holder otherwise agree to other terms (s662C(2)); or

(b) in the case of convertible securities—either on terms agreed between the bidder and holder or terms determined by a court on application by the holder (s663C(2) and 665C(2)).

RG 10.139 The policy underlying the buyout provisions recognises that, apart from the overwhelming interest holder who is close to deriving the benefits of full ownership, the standpoint of remaining interest holders is also affected if a person has, as a result of a scheme or offers, acquired interests in the vast majority of the securities in a class.

RG 10.140 As noted by the Cohen Committee, the position of the remaining holders 'as a small minority in a subsidiary company may be anything but satisfactory': Board of Trade (UK), *Report of the Committee on Company Law Amendment*, Cmd 6659, 1945 (Cohen Committee Report), paragraph 141.

Note: The Cohen Committee Report recommended the enactment of the regime on which the original buyout provisions introduced in Australia were based.

RG 10.141 By providing a statutory right to require the overwhelming interest holder to acquire their securities, the buyout provisions afford minority interest holders (including holders of securities convertible into the relevant class) an opportunity to avoid potentially being locked-in as a minority: see also Explanatory Memorandum to the Companies (Acquisition of Shares) Bill 1980, para 43.

Concurrent post-bid compulsory acquisition and buyout rights relating to bid class securities

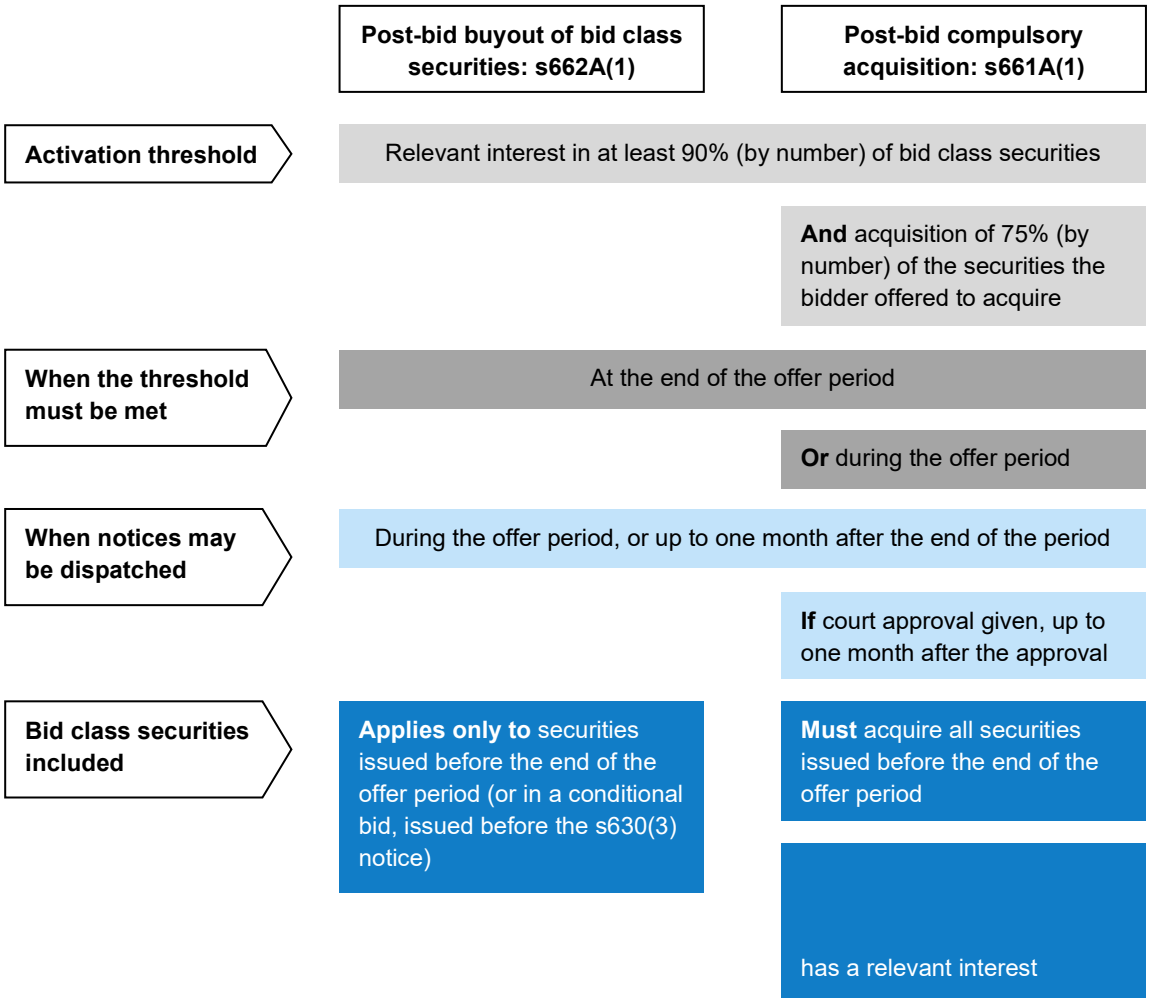
RG 10.142 The post-bid compulsory acquisition provisions and the post-bid buyout provisions apply to bid class securities in similar, but not identical, circumstances. The result of a takeover bid may mean that both:

(a) the bidder is entitled to compulsorily acquire certain bid class securities under s661A(1); and

(b) the minority holder is entitled to require the bidder to acquire the securities under s662A(1).

RG 10.143 Figure 1 sets out some of the overlapping features of the buyout and compulsory acquisition processes in s661A and s662A.

Figure 1: Comparative requirements of the post-bid buyout and compulsory acquisition provisions



Note: See Table 7 in Appendix 2 for a text alternative for this figure (accessible version).

The exception for giving buyout notices

RG 10.144 The potential overlap between the compulsory acquisition and buyout rights regimes for bid class securities is recognised in s662B(1)(c)(ii), which states that a bidder undertaking post-bid compulsory acquisition does not need to give buyout notices to those holders it has already sent compulsory acquisition notices. If all holders of remaining securities at the end of the offer period are given a compulsory acquisition notice prior to the time for giving a buyout notice (no later than one month after the end of the offer period), no buyout notices will need to be dispatched.

RG 10.145 However, even when no remaining holder is to be given a buyout notice because of s662B(1)(c)(ii), the provisions still require 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: s662B(1)(b) and (d).

Section 662A does not include an express exclusion of the kind found in s663A(1), which makes it clear that none of the requirements in s663A apply if a compulsory acquisition notice has already been given.

RG 10.146 It may therefore be unclear whether holders still have buyout rights under s662C(1) following the notification process. If no person had a buyout right, it would be unnecessary to lodge a notice with ASIC and provide the notice to the relevant market operator.

ASIC modification: Concurrent compulsory acquisition and buyout rights relating to bid class securities

RG 10.147 ASIC Instrument 2023/684 modifies s662B 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.

RG 10.148 Our modification means that a bidder does not have to offer buyout rights, including by lodging a notice with ASIC or providing that notice to a relevant market operator, if every remaining holder has been given a compulsory acquisition notice.

RG 10.149 A buyout right under s662C allows remaining holders to have their securities purchased on the terms that applied to the bid immediately before the end of the offer period, unless a different price is agreed with the bidder. Compulsory acquisition notices given to remaining holders will generally provide for compulsory acquisition on the same terms that applied to the bid immediately before the end of the offer period.

RG 10.150 We have made this modification because, in the case described, there is no difference between the terms on offer under the buyout right and the compulsory acquisition. Although the buyout procedure allows for the possibility of negotiation of a different price, there is no right to be bought out on terms other than the bid terms. It is also possible that s661C(1) restricts a bidder's ability to acquire the securities subject to compulsory acquisition on different terms. Once given, post-bid compulsory acquisition notices cannot be withdrawn: s661B(2).

RG 10.151 Our modification clarifies the interaction of the post-bid compulsory acquisition and buyout rights regimes consistent with:

(a) the scheme of the buyout provisions, which contemplates that where a person has a buyout right at a relevant time they should be given notice of it directly; and

(b) the previous buyout provisions, which provided for buyout rights only for holders who were given a notice: s703(1) and (2) of the old Corporations Law.

Note: See also discussion at paragraph 3.26 of the Compulsory Acquisitions Report that, in recommending increasing the timeframe for providing post-bid buyout notices from one to two months (consistent with the timeframe for post-bid compulsory acquisition notices), made note of submissions that the time difference could otherwise create very different consequences given that buyout rights at the time allowed for court appraisal of the value of the shares. The change reflects an assumption of the framework that post-bid buyout rights do not arise where post-bid compulsory acquisition notices have been given.

General compulsory acquisition and post-bid buyouts of convertible securities

RG 10.152 Where a bidder has a relevant interest in 90% or more of the bid class securities on issue at the end of a takeover bid, the holders of securities that are convertible into bid class securities have the right to be bought out under s663C—unless a bid was also made for the convertible securities and the bidder has instead given:

(a) a post-bid compulsory acquisition notice under s661B; or

(b) a post-bid buyout notice under s662B (s663A(1)).

RG 10.153 However, when a bidder seeks to rely on the general compulsory acquisition process to acquire the convertible securities following a takeover bid, the buyout obligation under s663C remains. The bidder will therefore be required to conduct both processes.

How the buyout and compulsory acquisition processes interact

RG 10.154 Under the buyout procedure, convertible security holders are able to require the bidder to acquire their securities either on the terms agreed, or terms determined by a court on application by the holder: s663C(2). Buyout notices must be dispatched within one month after the end of the offer period and holders have one month to provide a notice requiring the buyout.

RG 10.155 Under the general compulsory acquisition procedure the bidder has six months from the time that they become a 90% holder to lodge a notice offering a cash sum and the notice cannot be withdrawn: s664C. However, if objections are received in respect of more than 10% of the securities covered by the notice, the bidder has a choice of either abandoning the acquisition or applying to court for approval of the acquisition: s664E(4).

Consideration

RG 10.156 The consideration available under the general compulsory acquisition and buyout rights may differ. Under the compulsory acquisition the consideration will be a cash sum determined by the bidder. Under the buyout right the holder will be entitled to sell the securities on terms agreed with the bidder or terms determined by a court. Both the compulsory acquisition notices and the buyout notices must be accompanied by any expert reports prepared under s667A.

RG 10.157 Before, during and after the objection period for general compulsory acquisition, the bidder must not offer, give, or agree to give a benefit to a person not provided for in the compulsory acquisition notice if the benefit is likely to induce the person to dispose of convertible securities, or to not object to the acquisition: s664D. The bidder therefore is restricted in its ability to offer better consideration under its buyout notice than that proposed under the general compulsory acquisition notice, or to agree a different price for the purposes of s663C(2)(a). However, in practice the convertible security holder will still have access to the right to be bought out at a court-determined price: s663C(2)(b).

Disclosure

RG 10.158 General compulsory acquisition notices for convertible securities following a bid should fully inform holders about their corresponding buyout rights: s664C(1)(e). Whether the compulsory acquisition and buyout notices are sent to holders together or otherwise, the bidder should include an explanation of the reason for, and the effect of, the two notices to ensure holders are not misled: s670A.

Why we will not grant relief from the buyout provisions

RG 10.159 Generally, we will not give relief from the requirement to make buyout offers for convertible securities in Div 3 of Pt 6A.1, on the basis that the bidder is utilising general compulsory acquisition following a takeover bid. To do so may deprive minority holders of valuable rights under the buyout provisions that are not fully reflected in the general compulsory acquisition procedure.

Note: Contrast this with the comparison between post-bid compulsory acquisition and buyouts discussed at RG 10.150.

RG 10.160 The purpose of the buyout right is to enable convertible security holders to avoid being left as a locked-in minority (including where an overwhelming interest holder may not exercise an available compulsory acquisition right) while protecting their right to fair compensation.

RG 10.161 The buyout right under s663C may be valuable to a convertible security holder when a bidder is proceeding under general compulsory acquisition following a bid because:

(a) under the general compulsory acquisition process, if holders representing 10% or more of the convertible securities object, the bidder can determine not to proceed with the compulsory acquisition (s664E(4)(a)). Even if a bidder proceeds to court under s664F(1), if the terms offered are found to be unfair, the court is generally unable to substitute improved terms. The court can only order that the acquisition not proceed under s664F(3);

(b) without the right to be bought out at a court-determined price as provided for in s663C, convertible security holders may be forced to accept the terms offered under the compulsory acquisition notice to avoid the potential that they remain a locked-in minority; and

(c) a bidder may have less incentive to offer favourable terms where there is no corresponding buyout right—particularly if the bidder is prepared not to proceed with compulsory acquisition if they receive objections in respect of 10% or more of the convertible securities.

RG 10.162 Our approach is consistent with comments in the Explanatory Memorandum to the CLERP Bill that state that the different buyout right regime for convertible security holders in s665C was in part proposed ‘so as not to denigrate the existing rights of holders of convertible securities in a post-bid acquisition’: para 7.125.

E Expert reports

Key points

A person who proposes to obtain an expert report for the purposes of s663B, 664C or 665B must write to ASIC to request nomination of a person to prepare the expert report(s): s667A.

We maintain two registers of independent experts that we will use when nominating an expert: see RG 10.173. This is to ensure that a company seeking to compulsorily acquire securities does not have an unfettered discretion to appoint an expert of their choice.

When an expert report is required

RG 10.163 In some cases, notices of compulsory acquisition and buyout rights must be accompanied by at least one report by an independent expert that states whether, in the expert's opinion, the terms proposed in the notice give a fair value for the securities and the reasons for forming that opinion.

RG 10.164 The circumstances in which an expert report is required under Ch 6A are set out in Table 4.

Table 4: Chapter 6A procedures requiring an expert report

Procedure	Requirement
General compulsory acquisition	Notices issued for general compulsory acquisition under Pt 6A.2 must be accompanied by an independent expert report: s664C(2)(b).
Buyout of convertible security holders following bid	If the bidder and their associates have a relevant interest in 90% or more of the bid class securities following a bid, the bidder must generally offer to buy out the holders of convertible securities. Among other things, the bidder must send an expert report to the holders of those convertible securities: s663B(1)(c).
Buyout following general compulsory acquisition	If a person holds 100% of securities in a class as a result of compulsory acquisition under Pt 6A.2, the person must generally offer to buy out the holders of convertible securities. Among other things, the person must send all of the expert reports that have been prepared to the holders of those securities convertible into this class: s665B(1)(c).

RG 10.165 The expert is required to determine whether the proposed terms in the buyout or compulsory acquisition notice give a fair value for the securities and set out the reasons for their opinion: s667A. Section 667C prescribes how an expert is to determine fair value for the securities being acquired or bought out. Regulatory Guide 111 *Content of expert reports* (RG 111)

discusses this approach further at RG 111.47–RG 111.50. RG 111 also discusses more broadly the principles that should be applied, and the information that should be provided, in an expert report.

RG 10.166 In addition to the opinion on fair value, an expert report accompanying a general compulsory acquisition notice that is given in reliance on s664A(2) must include an opinion on whether the acquirer and related bodies corporate have full beneficial ownership in at least 90% (by value) of all securities in the entity that are shares or convertible into shares: s667A(2).

RG 10.167 Under s667B(1), the expert who provides the report must not be an associate of the person giving the relevant notice or the company that issued the securities. The report must also disclose prior dealings and relationships: s667B(2). For further discussion of the need for an expert to be independent see Regulatory Guide 112 *Independence of experts* (RG 112).

Applying for nomination of experts

RG 10.168 If an expert report must accompany a notice under Ch 6A, the person sending the notice must write to ASIC to request nomination of one or more experts to prepare the report: s667AA. The report must be prepared by an expert we nominate: s667A(1)(a).

RG 10.169 You should submit an application for a nomination or consent of an expert through the ASIC Regulatory Portal.

RG 10.170 Within 14 days of receiving a request for nomination we will nominate from one to five experts: s667AA(2).

RG 10.171 We are of the view that the intention of Parliament in enacting s667AA was to ensure that a company seeking to compulsorily acquire securities did not have an unfettered discretion to appoint an expert of their choice.

RG 10.172 A person applying to ASIC to nominate experts must include in their application:

(a) the name of the company that issued the securities to be compulsorily acquired;

(b) a copy of that company's previous year's financial statements (including details of all segment reporting);

(c) details of any unusual aspects of the company's operations and of its main activity (including geographic locations of operations);

(d) identification of the class of securities to be reported on;

(e) the name and address of the applicant and contact details;

(f) identification of any expert who may have a conflict of interest or is otherwise requested not to be nominated together with the reason why the request has been made; and

(g) any other relevant information—for example, an applicant may specifically request that experts be nominated from a particular register (see RG 10.173).

Our registers of experts

RG 10.173 For the purpose of nominating independent experts under s667AA, we maintain two registers of experts:

(a) a register of experts who are able to prepare reports for 'large companies'. A large company (including its controlled entities) is one with a consolidated gross operating revenue of more than $25 million or consolidated gross assets of more than $12.5 million for the past financial year; and

(b) a register of experts who are able to prepare reports for 'small companies'. A small company is one that meets neither of the criteria in RG 10.173(a).

RG 10.174 We appoint to the registers only experts with an Australian financial services (AFS) licence authorising the giving of financial product advice on securities.

Note: Experts who are interested in being placed on either the large companies register or small companies register should contact ASIC.

How we nominate experts

RG 10.175 When nominating experts, we will ask the next three experts on the appropriate register, in rotational order, if they have a conflict or do not want to be nominated in response to the particular application. We will expect a response from each expert within two business days of telling them the identities of the applicant and the body that has issued the securities to be acquired. The experts must undertake to maintain the confidentiality of the information provided to them in relation to possible nominations.

RG 10.176 An expert may refuse nominations without disclosing the reason. However, an expert who consistently declines nomination will be expected to justify their continued inclusion on the register.

RG 10.177 The three experts who first confirm their willingness to take the assignment will generally be nominated to the applicant. However, in some circumstances we may decline to nominate one or more of these experts. For example, we may decline to nominate an expert on the basis that the expert

may be inappropriate given the nature of the company being valued. This is an issue we must consider under s667AA(3).

RG 10.178 An expert who has been characterised as a 'specialist' will not be nominated until they are within the next three on rotation and the applicant is in an industry within their speciality. All three nominated experts will then rotate to the bottom of the register list.

RG 10.179 Nominating three experts by rotation from a list of experts ensures that:

(a) there are enough experts to choose from so that there is some competition between experts;

(b) there is a limit on the applicant's ability to select the expert of their choice; and

(c) the system is fair and transparent.

RG 10.180 We will not allow an applicant to suggest a particular expert to prepare the report except in very unusual circumstances, such as when no suitable expert is on the register. Cost savings to the applicant are not usually regarded as a matter that would constitute very unusual circumstances.

F Lodging compulsory acquisition and buyout documents

Key points

Our prescribed forms allow for standardised notices for compulsory acquisitions and buyouts to be lodged and sent to individual holders. It is not necessary to lodge a notice for each and every holder who is to receive the notice.

We review documents provided to holders as part of the compulsory acquisition and buyout process. Lodging parties should provide any documents that will accompany a compulsory acquisition or buyout notice at the time of lodgement.

Form of notices to be lodged with ASIC and provided to the relevant market operator and company

RG 10.181 Under the procedure for compulsory acquisition and buyout rights, a person must prepare a notice in the prescribed form. We have approved the forms in Table 5 for the purposes of compulsory acquisition and buyout notifications under s350(1)(b). These are the prescribed forms you must use under the provisions listed in the table (the notification provisions).

RG 10.182 You should prepare and lodge notices in the prescribed form through the ASIC Regulatory Portal, using the transaction named 'Lodge compulsory acquisition and buy out notices'. You must complete all relevant information set out in this transaction, which will then generate the notice in the prescribed form.

RG 10.183 When you have prepared your notice, you must then:

(a) lodge the notice with ASIC. If you have prepared your notice using the portal transaction, you should lodge the notice through the portal;

(b) give the notice to each other holder;

(c) give a copy of the notice to each relevant market operator; and

(d) in the case of general compulsory acquisition notices and buyout notices following general compulsory acquisition, give a copy of the notice to the company that issued the securities.

Table 5: Approved forms for compulsory acquisition and buyouts

Type of compulsory acquisition or buyout	Provision	ASIC form
Post-bid compulsory acquisition	s661B(1)	Form 6021
Post-bid buyout of bid class securities	s662B(1)	Form 6022
Post-bid buyout of convertible securities	s663B(1)	Form 6023
General compulsory acquisition	s664C(1)	Form 6024
Buyout of convertible securities following general compulsory acquisition	s665B(1)	Form 6025

Note: The full titles of the ASIC forms in this table are listed in the 'Related information' section of this guide. You should complete and lodge these forms using the transaction named 'Lodge compulsory acquisition and buy out notices' in the ASIC Regulatory Portal. For more information, see how you lodge fundraising and corporate finance documents.

Standard notice to be lodged

RG 10.184 The notification provisions for compulsory acquisition and buyout rights allow for a notice in standard form to be lodged with ASIC, provided to individual holders and (where relevant) market operators and the issuing company.

RG 10.185 It is unnecessary to lodge a notice in respect of each and every holder who is to receive the notice which includes individual details of each holding—in particular the holder's name and address. The principal purpose of the lodgement requirement is to notify interested parties that a compulsory acquisition or buyout process is in progress and the relevant basis and details of that process. A standard notice is sufficient for this purpose. Accordingly, ASIC's forms do not prescribe name and address details or other information that may vary from holder to holder.

RG 10.186 To the extent that holders may find individual details in each notice useful—for example, for the purpose of collectively resisting a compulsory acquisition—the Corporations Act already makes specific provision for holders' rights. In a post-bid compulsory acquisition, holders may ask the bidder for the names and addresses of each other holder that has been given a notice and the notice of compulsory acquisition must inform them of this right: see s661B(1)(a)(ii)(A) and 661D. In a general compulsory acquisition, the notice must inform holders of their right under s173 to obtain the names and addresses of other remaining holders from the company register: s664C(1)(c)(i).

Providing accompanying documents to ASIC

RG 10.187 We regularly review expert reports and other disclosures made as part of the compulsory acquisition and buy out process.

RG 10.188 At the time of lodging a compulsory acquisition or buyout notice, we strongly encourage you to provide us with any documents that are to accompany the notice sent to remaining holders for our review. We may seek a copy of these documents from you where they are not provided.

RG 10.189 You can attach electronic copies of accompanying documents when lodging the notice through the ASIC Regulatory Portal.

Appendix 1: Superseded guidance

RG 10.190 This guide discusses compulsory acquisitions and buyout notices. Additional updated guidance on other aspects of Chs 6–6C is provided in:

(a) RG 5 *Relevant interests and substantial holding notices*;

(b) RG 6 *Takeovers: Exceptions to the general prohibition*; and

(c) RG 9 *Takeover bids*.

RG 10.191 Together these four guides consolidate and replace a number of pre-existing regulatory guides, taking into account changes in the law since the guides were first published. The guides replaced by this guide on compulsory acquisitions and buyout notices are listed in Table 6.

Table 6: Superseded regulatory guides

Number	Name of guide
SRG 159	*Takeovers, compulsory acquisitions and substantial holding notices* Note: Parts of SRG 159 have been replaced by other guides.
SRG 171	*Anomalies and issues in the takeover provisions* Note: Parts of SRG 171 have been replaced by other guides.

Appendix 2: Accessible version of Figure 1

RG 10.192 This appendix is for people with visual or other impairments. It provides a text alternative for Figure 1.

Table 7: Comparative requirements of the post-bid buyout and compulsory acquisition provisions

Requirement	Post-bid buyout of bid class securities: s662A(1)	Post-bid compulsory acquisition: s661A(1)
Activation threshold	Relevant interest in at least 90% (by number) of bid class securities	Relevant interest in at least 90% (by number) of bid class securities **And** acquisition of 75% (by number) of the securities the bidder offered to acquire
When the threshold must be met	At the end of the offer period	At the end of the offer period **Or** during the offer period
When notices may be dispatched	During the offer period or up to one month after the end of the period	During the offer period or up to one month after the end of the period **If** court approval given, up to one month after the approval
Bid class securities included	**Applies only** to securities issued before the end of the offer period (or in a conditional bid, issued before the s630(3) notice)	**Must** acquire all securities issued before the end of the offer period. **May** elect to acquire certain later issued securities and securities in which the bidder has a relevant interest

Note: This table provides a text alternative for Figure 1.

Key terms

Term	Meaning in this document
75% acquisition test	The threshold test for post-bid compulsory acquisition in s661A(1)(b)(ii) of the Corporations Act
90% holder	A holder entitled to acquire remaining securities in a class under general compulsory acquisition as defined in s664A(1) and (2) of the Corporations Act
90% relevant interest test	The threshold test for post-bid compulsory acquisition in s661A(1)(b)(i) of the Corporations Act
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s12 of the Corporations Act
bid class	Has the meaning given in s9 of the Corporations Act
bidder	The bidder under a takeover bid as defined in s9 of the Corporations Act
buyout right	The right of a minority holder of securities or convertible securities to be bought out under s662C, 663C or 665C of the Corporations Act
CASAC	Companies and Securities Advisory Committee
Ch 6A (for example)	A chapter of the Corporations Act (in this example numbered 6A)
class	A class of securities
CLERP Bill	Corporate Law Economic Reform Program Bill 1998
Cohen Committee Report	Board of Trade (UK), *Report of the Committee on Company Law Amendment*, Cmd 6659, 1945
Compulsory Acquisitions Report	Legal Committee of CASAC, *Compulsory acquisitions*, January 1996
convertible securities	Has the meaning given in s9 of the Corporations Act
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
deemed relevant interest	A relevant interest arising under the deeming provisions in s608(3) of the Corporations Act
general compulsory acquisition	Compulsory acquisition under Div 1 of Pt 6A.2 of the Corporations Act
Greene Committee Report	Board of Trade (UK), *Report of the Company Law Amendment Committee*, Cmd 2657, 1926

Term	Meaning in this document
holder	A holder of securities
non-transferable employee securities	Securities issued to employees as part of an employee incentive plan which cannot be freely traded
notification provisions	Sections 661B(1), 662B(1), 663B(1), 664C(2) and 665B(1) of the Corporations Act
old Corporations Law	The law, set out in s82 of the *Corporations Act 1989*, which preceded the Corporations Act. Unless otherwise indicated, a reference to the old Corporations Law is a reference to the law as it stood before implementation of the *Corporate Law Economic Reform Program Act 1999*
post-bid compulsory acquisition	Compulsory acquisition following a takeover bid under Div 1 of Pt 6A.1 of the Corporations Act
Pt 6A.1	A part of the Corporations Act (in this example numbered 6A.1)
relevant interest	Has the meaning given in s608–609B of the Corporations Act
RG 51 (for example)	An ASIC regulatory guide (in this example numbered 51)
s602 (for example)	A section of the Corporations Act (in this example numbered 602), unless otherwise specified
securities	Has the meaning given to that term for the purposes of Ch 6A in s92(3) of the Corporations Act
takeover bid	Has the meaning given in s9 of the Corporations Act
target	Has the meaning given in s9 of the Corporations Act
voting power	Has the meaning given in s610 of the Corporations Act

Related information

Headnotes

75% acquisition threshold, 90% relevant interest threshold, associates, bid class securities, buyout rights, compulsory acquisition provisions, convertible securities, expert reports, fair value, full beneficial interest, minority holder, overwhelming owner

Instruments

ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/684

ASIC Corporations (Takeover Bids) Instrument 2023/683

Regulatory guides

RG 5 *Relevant interests and substantial holding notices*

RG 6 *Takeovers: Exceptions to the general prohibition*

RG 9 *Takeover bids*

RG 51 *Applications for relief*

RG 111 *Content of expert reports*

RG 112 *Independence of experts*

Legislation

Corporations Act, Ch 6, Ch 6A, Pts 6A.1–6A.3, s9, 173, 350, 602, 604, 608(3), 609(1), 617, 618, 630(3), 633(2), 657A(2)(b), 660A, 660B, 661A, 661B, 661C, 661D, 661E(1), 661E(2), 662A, 662B, 662C, 663A, 663B, 663C, 664A, 664AA, 664B, 664C, 664E(4), 664F, 665A, 665B, 665C, 666B, 667A, 667AA, 667B(1), 667B(2), 667C, 669, 670A, 1350; old Corporations Law, s33 and 703(1)–(2)

Explanatory Memorandum to the CLERP Bill, paras 7.31, 7.40–7.42, 7.118, 7.125, 7.127

Explanatory Memorandum to the Companies (Acquisition of Shares) Bill 1980

Cases

Austrim Nylex Ltd v Kroll and Others (No 2) (2002) 42 ACSR 18

Clements Marshall Consolidated Ltd v ENT Ltd (1988) 13 ACLR 90

Re Sylvania Resources Ltd (2009) 74 ACSR 29

ASIC forms

Form 6021 *Notice of compulsory acquisition following takeover bid*

Form 6022 *Notice of right of buy out to remaining holder of securities following a takeover bid*

Form 6023 *Notice of right of buy out to holders of convertible securities following a takeover bid*

Form 6024 *Notice of compulsory acquisition*

Form 6025 *Notice of right of buy out to holders of convertible securities by 100% holder*

Other reports

Board of Trade (UK) (Cohen Committee), *Report of the Committee on Company Law Amendment*, Cmd 6659, 1945

Board of Trade (UK) (Greene Committee), *Report of the Company Law Amendment Committee*, Cmd 2657, 1926

CASAC, *Compulsory acquisitions*, January 1996

CASAC, *Report to the Minister for Financial Services and Regulation on compulsory acquisition*, March 2000

Parliamentary Joint Committee on Corporations and Securities, *Report on the Corporate Law Economic Reform Program Bill 1998*, May 1999