REPORT 773

Response to submissions on CP 365 Remaking ASIC class orders on takeovers, compulsory acquisitions and relevant interests

September 2023

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 365 *Remaking ASIC class orders on takeovers, compulsory acquisitions and relevant interests* (CP 365) and details our responses to those issues.

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.

Disclaimer

This report 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.

This report does not contain ASIC policy. Please see our regulatory guidance, including:

- Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5);
- Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (RG 6);
- Regulatory Guide 9 *Takeover bids* (RG 9);
- Regulatory Guide 10 *Compulsory acquisitions and buyouts* (RG 10);
- Regulatory Guide 60 *Schemes of arrangement* (RG 60); and
- Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173).

We intend to update our regulatory guides to reflect the new legislative instruments consulted on in CP 365.

Contents

A Overview

1 In Consultation Paper 365 *Remaking ASIC class orders on takeovers, compulsory acquisitions and relevant interests* (CP 365), we consulted on proposals to remake a number of our class orders on takeovers, compulsory acquisitions and relevant interests into new legislative instruments.

2 In CP 365, we proposed to continue the relief given by:

(a) Class Order [CO 12/1209] *Relevant interests, ASIC and ASIC Chairperson*, without any substantive changes;

(b) Class Order [CO 13/519] *Changing the responsible entity*, without any substantive changes;

(c) Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition*, with changes to:

(i) amend the money lending exception in s609(1) of the *Corporations Act 2001* (Corporations Act) to apply only when the lender does not have other relevant interests in securities of the entity;

(ii) provide class relief for voluntary escrow arrangements for securities issued to parties selling a business or assets to the entity; and

(iii) re-enable s609(3) by moving the modification in [CO 13/520] to a new subsection;

(d) Class Order [CO 13/521] *Takeover bids*, with changes to:

(i) extend the declaration in paragraph 4(a) substituting s617(2) to expressly cover derivatives;

(ii) extend the declaration in paragraph 4(a) substituting s617(2) to include bid class securities issued after the date set under s633(2); and

(iii) amend the declaration in paragraph 4(d) to clarify that a bidder can include in its offer terms a shorter period for payment of bid consideration than required under s620(2);

(e) Class Order [CO 13/522] *Compulsory acquisitions and buyouts*, with changes to provide that securities acquired on-market by the bidder in reliance on the exemption provided in item 2 of s611 are included for the purposes of the 75% calculation in s661A(1)(b)(ii);

(f) Class Order [CO 13/524] *Bidder giving substantial holding notice*, without any substantive changes;

(g) Class Order [CO 13/525] *On-sale disclosure relief for scrip bids and schemes of arrangement*, without any substantive changes;

(h) Class Order [CO 13/526] *Warrants: Relevant interests and associations*, with a minor change to update references to Chi-X Australia Pty Ltd to Cboe Australia Pty Ltd; and

(i) Class Order [CO 13/528] *Changes to a bidder's statement between lodgement and dispatch*, with changes to:

(i) remove the requirement to lodge a supplementary bidder's statement in order to lodge and dispatch a replacement bidder's statement;

(ii) allow the lodgement and dispatch of a replacement target's statement; and

(iii) clarify the timing for dispatch of the target's statement in a market bid when a replacement bidder's statement is lodged.

3 The consultation was open for eight weeks, between 30 November 2022 and 23 January 2023.

4 We received four non-confidential responses to CP 365. We are grateful to respondents for taking the time to send us their submissions.

5 For a list of the non-confidential respondents to CP 365, see the appendix. Copies of these submissions are currently on the CP 365 page on the ASIC website.

6 This report highlights the key issues that arose out of the submissions received on CP 365 and our responses to those issues.

7 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 365. We have limited this report to the key issues.

Incorporation of [CO 13/520] into the Corporations Act

8 In CP 365, we noted that on 23 November 2022 the Government introduced the first tranche of legislation to move nominal modifications of the law currently in legislative instruments made by ASIC directly into the primary Acts and regulations. On 21 September 2023, Schedule 5 of the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* (Treasury Laws Amendment Act) commenced and moved the relief contained in [CO 13/520] into the Corporations Act, to improve navigability of the law and provide industry and consumers with greater certainty and clarity. The Treasury Laws Amendment Act also provides new voluntary escrow relief for arrangements relating to securities issued to parties selling a business similar to the relief that ASIC proposed in CP 365.

9 Since the relief provided in [CO 13/520] is now contained in the Corporations Act, it is unnecessary for ASIC to remake [CO 13/520]. However, this report addresses our proposals in CP 365 for modifications we proposed to [CO 13/520], submissions received on those proposals, and our response to those submissions.

10 In remaking the instruments, we have updated references to notional sections inserted by [CO 13/520] so they reflect the corresponding sections created by the Treasury Laws Amendment Act: see *ASIC Corporations (Relevant interests, ASIC and ASIC Chairperson) Instrument 2023/194* at s5(1), and *ASIC Corporations (Takeover Bids) Instrument 2023/683* at s5(h).

Responses to consultation

11 Respondents were largely supportive of our proposals in CP 365.

12 We have remade each class order, with the exception of [CO 13/520], into a new legislative instrument with the majority of the changes proposed in CP 365 for a period of five years: see paragraph 17. We consider that this period will provide sufficient certainty for industry and, if required, allow progress to be made in amending the primary law or regulations.

13 As noted in CP 365, our proposals represented a preliminary stage only, with the possibility that our conclusions and views may change as a result of the submissions received, or as other circumstances change. Following the submissions received to CP 365, and as a result of our further assessment, we have decided not to proceed with, or to otherwise vary, two of our original proposals in CP 365:

(a) We have decided not to proceed with our proposed change to amend the money lending exception in s609(1) for the relief previously contained in [CO 13/520].

(b) In remaking [CO 13/521], we have decided not to extend s617(2) to include bid class securities issued after the date set under s633(2) due to the potential difficulties that may arise from such an amendment.

14 Each of these matters is addressed further in this report.

15 The main issues raised by respondents related to remaking [CO 13/519], [CO 13/520], [CO 13/521] and [CO 13/528]. The issues related to the following topics:

(a) relief for corporate collective investment vehicles (CCIVs);

(b) the s609(1) money lending exception;

(c) non-initial-public-offering (IPO) voluntary escrow relief;

(d) acceptance facilities;

(e) extension of s617(2) to derivatives;

(f) extension to bid class securities issued after the date set under s633(2);

(g) the definition of 'securities' in s92(3);

(h) whether the bidder can promise a shorter time for payment of bid consideration in its offer terms;

(i) acceptances of a proportional takeover bid leaving a small parcel;

(j) the treatment of paper acceptances for securities registered in the clearing house electronic settlement system (CHESS);

(k) the use of the phrase 'entitled to be registered';

(l) replacement bidder's statements minimum 14-day period; and

(m) replacement bidder's and target's statements.

16 We have sought to address each of these matters in this report. As noted above, this report is not meant to be a comprehensive summary of all responses received or on every question from CP 365. We have not provided further comment on the changes we proposed to [CO 12/1209], [CO 13/522], [CO 13/524], [CO 13/525] and [CO 13/526] because they were supported by the respondents and have been made into new legislative instruments.

17 The class orders consulted on in CP 365 have been remade, with relevant changes, into the following new instruments:

(a) [CO 12/1209] has been remade in *ASIC Corporations (Relevant interests, ASIC and ASIC Chairperson) Instrument 2023/194*;

(b) [CO 13/519] has been remade in *ASIC Corporations (Changing the Responsible Entity) Instrument 2023/681*;

(c) [CO 13/521] has been remade in *ASIC Corporations (Takeover Bids) Instrument 2023/683*;

(d) [CO 13/522] has been remade in *ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/684*;

(e) [CO 13/524] has been remade in *ASIC Corporations (Bidder Giving Substantial Holding Notice) Instrument 2023/685*;

(f) [CO 13/525] has been remade in *ASIC Corporations (On-Sale Disclosure Relief for Scrip Bids and Schemes of Arrangement) Instrument 2023/686*;

(g) [CO 13/526] has been remade in *ASIC Corporations (Warrants: Relevant Interests and Associations) Instrument 2023/687*; and

(h) [CO 13/528] has been remade in *ASIC Corporations (Replacement Bidder's and Target's Statements) Instrument 2023/688*.

B Remaking [CO 13/519]

Key points

We considered it unnecessary to extend the relief in [CO 13/519] to CCIVs. We do not consider that the uncertainty for unlisted schemes under s601FM(1) arises for CCIVs under s1224U.

CCIV relief

18 One respondent supported the continuation of the relief given by [CO 13/519] in a new legislative instrument. However, they encouraged ASIC to consider whether it would be desirable to give corresponding relief for members of a CCIV voting at a meeting of members on a resolution to remove the corporate director of a listed CCIV under s1224U of the Corporations Act.

ASIC's response

We have remade [CO 13/519] into ASIC Instrument 2023/681.

We considered it unnecessary to extend the relief in [CO 13/519] to CCIVs. We do not consider that the uncertainty for unlisted schemes under s601FM(1) arises for CCIVs under s1224U.

C Sunsetting [CO 13/520]

Key points

The relief contained in [CO 13/520] is now contained in the Corporations Act.

We have decided not to place limitations on the money lending and financial accommodation exceptions in s609(1) such that they would not apply when the financier otherwise has an equity interest in the entity.

We have extended our voluntary escrow relief to securities issued as consideration for the acquisition of a business.

We have decided to retain our relief in respect of acceptance facilities.

Incorporation of [CO 13/520] into the Corporations Act

19 As noted above at paragraph 8, the relief previously contained in [CO 13/520] is now contained in the Corporations Act. It is therefore unnecessary for ASIC to remake the relief contained in [CO 13/520]. We have addressed our proposals from CP 365 regarding [CO 13/520] below.

Section 609(1) money lending exception

20 Section 609(1), as previously modified by [CO 13/520], and as contained in the Corporations Act following the Treasury Laws Amendment Act, provides an exemption from acquiring a relevant interest in securities of an entity when security interests are taken or acquired in the ordinary course of a non-associated person's business of providing financial accommodation on ordinary commercial terms.

21 In CP 365, we questioned whether the exemption should not apply when the financier has an equity interest in securities in the entity. When a financier otherwise has an equity interest in securities in the entity, this may imply that the arrangements are contrary to the ordinary provision of financial accommodation when the financier is assumed to have no interest in the affairs of the entity beyond those that impact its ability to liquidate the secured securities to obtain repayment of its debt. Such arrangements may be a potential misuse of the exception provided in s609(1) and inconsistent with the policy underlying the exception.

22 We invited submissions as to whether limitations should be placed on the money lending and financial accommodation exception in s609(1), as

modified by [CO 13/520], such that the exception would not apply when the financier otherwise has an equity interest in the entity.

23 Three respondents opposed or questioned our proposed amendment for s609(1) to apply only when the lender does not have any other relevant interests in securities of the entity. These respondents raised the following points:

(a) Two respondents noted that such a change would have adverse impacts on financiers and credit markets in Australia. One respondent stated that the proposed amendment may negatively impact the availability of credit, impose a material compliance burden on lenders and create significant inefficiency, and increase volatility in the market.

(b) Two respondents noted that the proposed change would have an unintended broad effect beyond the purposes of addressing arrangements that may misuse the exception.

(c) One respondent did not believe that there was a sound policy justification for such a change, while another stated that such a change would be inconsistent with the policy objectives of Ch 6 of the Corporations Act.

(d) Two respondents stated that the Takeovers Panel provides the appropriate mechanism for regulating and preventing circumstances when market participants may seek to rely on s609(1) in a manner inconsistent with its policy basis.

ASIC's response

We have closely considered the comments of the respondents and have decided not to modify s609(1) to apply only when the lender does not have any other relevant interests in securities of the entity.

We agree that there are mechanisms for regulating the circumstances should they arise, including the Takeovers Panel.

We will continue to monitor the use of the exception in s609(1) by money lenders to ensure its use is not abused in a way contrary to the Eggleston principles in s602 underpinning Ch 6 of the Corporations Act.

Acceptance facilities

24 [CO 13/520] provides relief for bidders who establish an acceptance facility for a takeover bid. Under an acceptance facility a person accepting an offer under a bid can provide a facility operator with a completed acceptance form, or instructions to another person who holds the securities on their behalf to accept the bid. The facility operator holds the acceptances or

instructions until certain conditions relating to the conditionality or level of acceptances the bidder receives are met, at which point the acceptances and instructions are forwarded to their final recipients. The facility operator reports regularly to the bidder about the number of securities for which acceptances and instructions are being held.

25 An acceptance facility allows participants in the facility to indicate their willingness to accept the bid without accepting. The advantage from a participant's point of view is that the acceptances or instructions they provide can be withdrawn at any time until satisfaction of the conditions for release of the acceptances or instructions. More broadly, an acceptance facility can assist in overcoming difficulties a bidder may have in achieving a requisite level of acceptances due to the conditionality of a bid.

26 One respondent raised concerns about the use of acceptance facilities, noting that they can lead to poor outcomes because insufficient information is available to all responsible parties, and there is a high risk that an acceptance and report of that acceptance will not be reliable.

27 The respondent suggested that uncertainty in respect of acceptance facilities is increased when the target is subject to two or more competing bids, or a bid that has not yet been declared unconditional. They stated that a shareholder might commit their securities to multiple bids, which could be counted twice by each bidder. They noted that the target is also unaware of any overcommitted state.

ASIC's response

The relief in [CO 13/520] principally confirms that a bidder does not acquire a relevant interest in securities at the time they are tendered into an acceptance facility established by the bidder in connection with the bid. The relief does not permit or prohibit acceptance facilities, other than to impose conditions on them that the bidder must comply with in respect of relevant interests arising from acceptance facilities. Bidders established acceptance facilities before we introduced the relief in [CO 13/520], and the Takeovers Panel in *Patrick Corporation Limited 03* [2006] ATP 12 considered that an appropriately constituted institutional acceptance facility did not offend the equality principle in s602(c).

We consider that the benefits of acceptance facilities outweigh the possible risks raised by the respondent, which can be addressed if and when such risks arise. As noted above, an acceptance facility allows participants in the facility to indicate their willingness to accept the bid without accepting, but to also retain the right to withdraw an indicated acceptance. Bidders relying on such indications understand that such indications are not final acceptances.

Acceptance facilities established on appropriate terms and operated in an appropriate manner improve the efficiency and competitiveness of the bid process by removing structural impediments to the success of bids.

We will continue to monitor acceptance facilities to ensure the terms, structure and operation of acceptance facilities are consistent with the principles underlying Ch 6 of the Corporations Act.

D Remaking [CO 13/521]

Key points

We have extended s617(2) to derivatives to ensure performance rights that are not defined as securities, and other derivatives, are covered by s617(2) when those derivatives will give rise to securities in the bid class. We have also made consequential amendments to s633(1) items 6 and 12, 633(2), 636(1)(j), 641(1)–(1A), 648B, 648C, 650D(1)(c)(ii), 650D(3), 661A(4)(c) and 661B(1)(c)(ii) to ensure those sections operate in respect of derivatives in the same manner as they operate over securities under s617(2).

We have decided not to amend s617(2) to permit a bidder to extend its offer to bid class securities issued after the date set by the bidder under s633(2). We consider the amendment may pose risks associated with funding certainty and consistency with the principles in s602. We will continue to consider granting this relief on an individual basis.

We received a submission suggesting that we amend s92(3) to expressly clarify that references to 'securities' in Chs 6 and 6A include rights to acquire bid class securities, including all types of performance rights. In light of the complexities and consequences of such a change, we consider that such a change would be more appropriately made following a wider consultation.

We have clarified that bidders may offer to pay bid consideration earlier than the latest time for payment required under s620(2). However, we expect that if a bidder promises to pay the bid consideration within a particular period, it will have a reasonable basis to believe it can fulfil its promise.

We have decided to retain our relief substituting s618(2) in respect of proportional takeover bids and small parcels.

We have decided to retain our relief inserting s653AA, which supplements when an offer is taken to have been accepted in respect of securities registered in a clearing and settlement facility.

We consider that the inclusion or exclusion of the phrase 'entitled to be registered' in offer terms is a matter for each bidder to determine.

Extension of s617(2) to derivatives

28 In CP 365, we proposed to amend paragraph 4(a) of [CO 13/521] to extend s617(2) to derivatives. Our proposal addressed an ambiguity when certain performance rights may not meet the definition of 'securities' under s92(3) and therefore fall outside the scope of s617(2).

29 Performance rights are usually 'securities' when they can be classified as 'options' under s92(3)(f). We consider a performance right may be classified as an option when its terms contain a mechanism requiring the holder to exercise their right to obtain securities to which the right relates. However, if the performance rights have other characteristics, they may not meet the definition of 'security' in s92(3). For example, if a performance right does not have an exercise mechanism, but vests automatically, it is unlikely to provide the holder with an 'option' and therefore is unlikely to be classified as a security under s92(3)(f). Rather, such performance rights are likely to be a derivative under s761D(1). Derivatives are expressly excluded by s92(3)(g) from the definition of securities in s92(3).

30 We have therefore frequently granted individual relief extending s617(2) to performance rights which, by their terms, may not meet the definition of a security under s92(3). To ensure such performance rights and other derivatives fall within the scope of s617(2), we proposed in CP 365 to amend paragraph 4(a) to allow a bidder to choose to extend its offer to securities that come to be in the bid class due to a conversion or exercise of rights of a derivative.

31 Two respondents supported our proposed amendment.

32 One respondent supported the amendment to ensure that all kinds of performance rights (and similar instruments) are covered by s617(2), regardless of whether they may be regarded as 'securities' or 'derivatives'. They also supported the consequential amendments we proposed to s636(1)(j) and 641 to facilitate the extension of takeover offers to securities that come to be in the bid class as a result of a conversion of relevant derivatives.

33 The respondent also requested that we clarify that the terms 'convert' and 'convertible' in the modified forms of s617(2) are intended to, and do, cover all of the ways that securities may come into the bid class in satisfaction of relevant rights under performance rights or other applicable derivatives (e.g. through the issue of bid class securities upon satisfaction of the conditions of a performance right).

34 Another respondent observed that certain persons may not always be aware of the need to seek relief to extend s617(2) to performance rights, as well as what disclosure documents should be served on performance rights holders.

ASIC's response

We have enacted our proposed amendment to ensure performance rights that are not defined as securities, and other derivatives, are covered by s617(2) when those derivatives will convert into securities in the bid class or confer rights to be issued securities in the bid class: see ASIC Instrument 2023/683.

We have also acted on respondents' comments to ensure necessary consequential amendments have been made to the new legislative instrument, including to make clear what disclosure documents should be served on performance rights holders. We have also made consequential amendments to s633(2), 636(1)(j), 641(1)–(1A), 648B, 648C, 650D(1)(c)(ii), 650D(3), 661A(4)(c) and 661B(1)(c)(ii) in ASIC Instrument 2023/683, and 633(1) items 6 and 12 in ASIC Instrument 2023/688, to ensure those sections operate in respect of derivatives in the same manner as they operate over securities under s617(2).

One of the respondents suggested ASIC update its regulatory guidance to clarify whether our modification of s617(2) is intended to operate over all of the ways that securities may come into the bid class in satisfaction of relevant rights under performance rights or other applicable derivatives. We agree that the mechanism for conversion is not relevant to the policy on convertible securities or derivatives coming into the bid class and will seek to provide clarity on that issue in our regulatory guidance as requested by the respondent.

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

35 In CP 365, we proposed amending s617(2) to permit a bidder to extend its offer to bid class securities issued after the date set by the bidder under s633(2). Section 617(2), as presently modified, does not extend to bid class securities issued after the date set by the bidder under s633(2):

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

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

36 We made the proposal on the basis that we grant individual relief to allow an off-market bid to extend to bid class securities issued after the date set under s633(2) in circumstances that are not within s617(2). We consider that such relief is consistent with the application of the compulsory acquisition provisions to securities issued up until the end of the offer period.

37 One respondent supported our proposal, noting that adopting such relief on a class basis would ensure that bidders can extend their bids to all securities that come into the bid class during the offer period. This would be to the benefit of both bidders and holders of such securities, who would otherwise be unable to accept the bid.

ASIC's response

We have considered our proposed amendment further against the submissions received, and our previous individual relief instruments, and have decided not to enact this amendment as part of this consultation.

In coming to our decision, we considered the fact that our individual relief instruments in this area will typically contemplate a specific group of known securities, rather than encompassing all possible securities that may be issued after the date set by the bidder under s633(2). We consider that extending our individual relief to class relief in this way may pose risks associated with the bidder being able to provide sufficient disclosure of its funding certainty and consistency with the principles in s602 in certain cases.

We consider that it is more desirable for ASIC to retain oversight of such relief applications, to ensure the facilitation of the relief occurs consistently with the principles underpinning Ch 6 of the Corporations Act.

The definition of 'securities' in s92(3)

38 As noted above, we have enacted our proposed amendment to ensure performance rights that are not defined as securities, and other derivatives, are covered by s617(2). We have also enacted certain consequential amendments to facilitate that change.

39 One respondent stated that, to give full effect to the changes in respect of derivatives in s617(2), we should also modify Chs 6 and 6A to expressly clarify that references to 'securities' include rights to acquire bid class securities, including all types of performance rights. The respondent stated that we should amend s92(3) to clarify that all performance rights, and similar or equivalent rights, are securities, with the result that a bidder would be able to make a takeover bid in relation to performance rights and compulsorily acquire them under Ch 6A of the Corporations Act.

ASIC's response

We recognise the rationale for the respondent's submission. However, to give effect to the changes in respect of adding derivatives to the operation of s617(2), we have sought to give effect to our amendment through consequential amendments to specific sections of the Corporations Act, rather than amending the definition of securities in s92(3) for the entirety of Chs 6 and 6A.

We have closely considered a potential amendment to the securities definition in s92(3), and its impact on the takeovers and compulsory acquisition regimes, and note that such an amendment is likely to have significant consequences to the operation of Chs 6 and 6A.

As noted in CP 365, we sought feedback on our proposals to remake, with minor amendments, the instruments if they are not incorporated into the primary law as part of a future incorporation process before they are due to expire. We consider that such an amendment to the securities definition in s92(3) is a significant and broad change to the scope of takeover bids and should occur in response to a broader consultation. Further, it may be more appropriate for such a change to be made by way of primary law reform.

In reaching our decision not to amend the definition of securities at this time, we have also had regard to the fact that we have not identified any relief applications under Ch 6A to permit compulsory acquisition to extend to performance rights that may not be securities (as per the relief described in Regulatory Guide 10 *Compulsory acquisitions and buyouts* (RG 10) at RG 10.128–RG 10.131).

The respondent observed that a change to the securities definition in s92(3) is particularly desirable to clarifying its operation specifically over performance rights. Given the classification of rights as securities is a complex matter on which minds may differ, and as derivatives are expressly excluded from the definition of securities under s92(3)(g), a clarifying amendment to s92(3) would need to make expressly clear what is meant by a performance right.

Alternatively, it may need to potentially change what is meant by an option in s92(3)(f) or (g) to ensure that the definition captures such rights, while also ensuring that Chs 6 and 6A do not place a burden on the market by operating over derivatives that are otherwise expressly excluded.

In light of these complexities and consequences, we consider that such a change should be the subject of wide consultation to ensure the public and stakeholders have an opportunity to comment on a specific draft amendment, and on the extent to which, if any, such an amendment may impact each section of Chs 6 and 6A, as well as ASIC policies and those of relevant stakeholders such as the Takeovers Panel.

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

40 Section 620(2) requires the bidder to provide in its offer that it will pay the bid consideration under an off-market bid within a specified period, generally the earlier of one month or 21 days depending on the particular circumstances. However, in certain bids, a bidder will include in the terms of its offer a shorter period for the payment of the bid consideration. Generally, the bidder's rationale for reducing this time period is to make accepting the bid more attractive to holders who will receive the bid consideration sooner.

41 In CP 365, we proposed whether in remaking [CO 13/521] an amendment should expressly clarify that a bidder has the right to include in its offer terms a shorter time period for payment of bid consideration than set in s620(2). We noted that we did not consider that offering shorter payment terms generally raises policy concerns or offends the principles in s602. We also noted that we have received feedback that it may be unclear whether it is open for a bidder to provide offer terms that depart from the payment period set in s620(2) in the absence of relief.

42 Two respondents addressed our proposal. One respondent agreed with our proposal that to the extent that there is any doubt as to whether it is possible for a bidder to commit to a shorter consideration payment period as a term of its offer, it considers that it would be appropriate, and would be to the benefit of target holders, for the amendment to be made.

43 Another respondent observed that it is common for bidders to offer consideration earlier than is otherwise required under the Corporations Act. The respondent noted that bidders' registries are often managing a wide range of tasks, and cautioned that bidders should not promise an overly ambitious accelerated payment regime when practical functions of the takeover bid undertaken by the registry may be compromised as a result.

ASIC's response

We have clarified that bidders may offer to pay bid consideration earlier than the latest time for payment required under s620(2): see ASIC Instrument 2023/683. Without this clarification, it may be unclear whether s620(2) allows bidders to offer to pay the consideration sooner.

We agree with the submission that the necessary logistics required to facilitate takeover bids, acceptances and payments of consideration should not be compromised by an overly ambitious accelerated payment regime. In that respect, if a bidder promises to pay the bid consideration within a particular period of time, it should have a legitimate basis to believe that it can fulfil that promise. Otherwise, it may breach its offer terms. We expect bidders to closely engage with their agents to ensure promises to pay bid consideration early will be achieved.

Acceptances of a proportional takeover bid leaving a small parcel

44 One respondent referred to our relief in [CO 13/521] substituting s618(2) in respect of proportional takeover bids and small parcels, which provides:

> (2) If accepting an offer under a proportional takeover bid for quoted securities would leave a person with a parcel of the securities that is a small parcel, the offer extends to that parcel.
>
> This subsection (including the application of this subsection to the circumstances specified in subsection (2B)) does not apply to

> a parcel of securities, whether held beneficially or otherwise, that has come into existence or increased in size because of a transaction entered into (including the creation of one or more trusts) after the bid was publicly proposed.
>
> …

45 The respondent rightly observed that the amendment to s618(2) followed the Takeovers Panel decisions of *GoldLink IncomePlus Limited 04R* [2009] ATP 3 and *GoldLink IncomePlus Limited 04* [2009] ATP 2 (GoldLink proceedings). The modification is intended to prevent target security holders from abusing s618(2), while preserving its operation in the case of holders who have not modified their holdings in response to the bid. However, the respondent stated that the relief is an overreaction to the GoldLink proceedings, suggesting the issue of parcel splitting rarely occurs.

46 The respondent raised the following concerns:

(a) the second paragraph of s618(2) is difficult to comply with due to its technical nature and the access a bidder has to the target register;

(b) the definition of small parcel in s618(2A) is complicated and difficult to understand, and the current method for determining small parcels under s618(2) should be based on the constants of the cash consideration or the security price value the bidder used to calculate the premium to its offer when using scrip consideration; and

(c) custodians of securities face difficulties when accepting bids, and face burdens if they have to physically surrender certificates and the like to accept a bid.

47 The respondent also noted that since the GoldLink proceedings, ASX has become more stringent in its enforcement actions against market participants creating unmarketable parcels. They also noted that a bidder could make an application to the Takeovers Panel to deal with the circumstances.

ASIC's response

We have decided to retain our relief substituting s618(2) in respect of proportional takeover bids and small parcels: see ASIC Instrument 2023/683.

Our modification addresses the potential for security holders in a proportional bid to abuse s618(2)—for example, by:

- splitting large holdings into smaller parcels and then seeking to accept the bid for all of their securities; or
- repeatedly purchasing and accepting into the bid holdings of a sufficiently small size that they attract the operation of s618(2).

These practices create uncertainty for the bidder and the market, undermine the proportional bid mechanism and are contrary to the efficient market and equality principles set out in s602(a) and (c).

While we recognise that the protection in s618(2) requires compliance by holders and custodians, we do not consider that fact alone justifies the removal of the protection for a harm that has been clearly demonstrated to arise.

Our modification also clarifies that the small parcel exception applies when the residual parcel is not a 'marketable' or 'minimum' parcel (or, if neither term is defined in the rules of the relevant prescribed financial market, a parcel of at least $500 in value) using:

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

We consider that the current definition of small parcel for the purpose of s618(2) is more desirable and consistent with the principles of Ch 6 than the respondent's alternative suggestion, which would involve identifying small parcels by reference to the value of the cash consideration or the value the bidder used to calculate the premium for the bid. That approach would not reflect the actual and most up-to-date value of the particular security, which would be contrary to the principle of efficiency in s602 of the Corporations Act.

Further, there are practical difficulties in adopting the respondent's suggested approach, such as when the bidder provides multiple calculations of the value of scrip consideration it is offering.

The treatment of paper acceptances for securities registered in a clearing and settlement facility

48 One respondent commented on s653AA as inserted by [CO 13/521], which modifies the Corporations Act so that, for the purposes of Chs 6 and 6C, an offer is taken to have been accepted in respect of securities registered in a clearing and settlement facility when:

(a) the bidder has received a written instruction or authority (or both) from a holder entitled to accept the offer (or a person with a right to be registered as holder); and

(b) the instruction or authority is given for the purpose, and has the effect, of enabling the bidder to instruct another person through the relevant clearing and settlement facility to effect acceptance of the offer.

49 The respondent raised a concern that CHESS only allows the bidder to 'request' an acceptance by CHESS Takeover Acceptance message from the controlling participant for a registered and unencumbered shareholder to accept the offer, but not 'instruct'. The respondent noted that there are two distinct CHESS External Interface Specification messages for each process and stakeholder, and they are not interchangeable.

50 The respondent stated that the results for target holders with CHESS holdings would improve substantially if, instead of encouraging delivery of a completed acceptance form to the bidder, the holders deliver a completed acceptance form and/or written instruction to accept the offer to their controlling participant. They stated that if this direct course of action were taken, the investor would have more flexible point-to-point delivery options, requiring the controlling participant to act within the scheduled times carried in ASX Settlement Operating Rules. The respondent also noted that the warranties and indemnities in the rules and remedies would be much more in favour of the investor.

ASIC's response

We have decided to retain our relief inserting s653AA, which supplements when an offer is taken to have been accepted in respect of securities registered in a clearing and settlement facility: see ASIC Instrument 2023/683.

We understand the respondent's first point to refer to the fact that CHESS uses the language of 'request' rather than 'instruct' when a bidder 'requests' an acceptance in CHESS. We do not consider that distinction to be material for the relief in s653AA, because it does not require the bidder to either 'request' or 'instruct', but rather only provides that an offer is taken to have been accepted when the bidder has 'received' a written instruction or authority.

The relief does not contemplate the manner in which the bidder is required to facilitate receiving the written instruction or authority through CHESS, only that it is received. Additionally, our relief is not intended to operate for CHESS only, but all relevant clearing and settlement facilities that may exist now or during the operation of ASIC Instrument 2023/683.

Our modification also does not affect the requirements of s653A—including that the acceptances must be processed in accordance with the rules of the relevant clearing and settlement facility. It is also not designed to affect the common law position on offer and acceptance, only the application of Chs 6 and 6C.

However, we understand the respondent's second point to suggest that the concept of CHESS electronic messages and the common law view of acceptance should be modified or extended by a regime in which offers and acceptances are effectively facilitated by controlling participants, rather than the bidder as the counterparty.

As noted above, our relief is not designed to affect the common law position on offer and acceptance. We consider that counting an offer as having been accepted because the holder delivers an acceptance form to its controlling participant raises a range of complicated issues in the law of contract—for example, on the scope of a controlling participant's agency to bind a bidder to an acceptance.

Use of the phrase 'entitled to be registered'

51 One respondent stated that in the context of bid acceptances, the phrase 'entitled to be registered' is an ancient concept that legal advisers frequently insist on including unnecessarily in offer terms, inviting holders who believe they are 'entitled to be registered' to lodge an impaired, makeshift form of acceptance that may be outside the operating terms of the bidder's offer. They noted that it was commonplace up until the 1990s for recent buyers to experience significant delays between buying on market and having evidence of ownership received via a share certificate, so buyer protection processes, like the 'entitled to be registered' concept, were invented.

52 The respondent further stated that if the 'entitled to be registered' protection is inherited from either regulation or law, it should not be in place for a security that is capable of being managed through the clearing and settlement facility, CHESS. There may be a place for this concept in unlisted companies, but not listed companies.

ASIC's response

We consider that the inclusion or exclusion of the phrase 'entitled to be registered' in offer terms is a matter for each bidder to determine. The phrase is used in a number of contexts in the Corporations Act, including in the following sections:

- s236(1) provides that a person may bring or intervene in proceedings if the person is, among other things, 'entitled to be registered' as a member;
- s238(1) provides that a person who is 'entitled to be registered' as a member may seek a substitution order under s237;
- s653B(2) provides, among other things, that a person is taken to 'hold securities' in that section if the person is 'entitled to be registered'; and
- the *Corporations Regulations 2001* (Corporations Regulations), Sch 2, Forms 603–605 require disclosure of registered holders of securities as well as persons 'entitled to be registered' as holder of the securities.

The reasons why a bidder might decide to include the phrase 'entitled to be registered' in their offer terms may vary, but it will typically be used in relation to the right to accept an offer. The practice of including the phrase 'entitled to be registered' in offer documents generally suggests express compliance with the general law and Pt 6.8 of the Corporations Act. Part 6.8 provides for acceptances under off-market bids, and specifically the way s653B(1)(a) enables subsequent purchasers of securities to accept an offer when they are able to 'give good title' to a parcel of securities, and have not already accepted an offer under the bid for those securities.

The phrase 'able to give good title' is not defined in the Corporations Act, but one view is that it is likely to operate over a person who is 'entitled to be registered' as a member—for example, a person who has lodged an executed transfer and accompanying share certificates. See, for example, *Federal Commissioner of Taxation v Patcorp Investments Ltd* (1976) 140 CLR 247 and *Patcorp Investments Ltd v FCT* (1976) 10 ALR 407.

Section 653B(2) also clarifies that, for the purposes of s653B, a person is taken to 'hold securities' if the person is 'entitled to be registered'. Some offer terms may therefore refer to persons 'entitled to be registered' to make expressly clear that such persons may accept the offer within the terms of Pt 6.8 and the general law.

We accept the respondent's view that CHESS may, in practice, lessen the uncertainty as to whether a person is 'entitled to be registered', because the payment and registration of CHESS-approved listed securities generally occurs instantaneously. However, that does not by itself mean that issues relating to whether a person is 'entitled to be registered' may never occur, and bidders may form the view that the phrase remains useful to address potential acceptance risk.

Further, as the respondent observes, the concept may still have a place in respect of unlisted companies that are not regulated by CHESS. The respondent has therefore not suggested that the phrase be removed from the Corporations Act.

The respondent's central submission is that bidders unnecessarily include in offer terms references to the 'entitled to be registered' concept.

We note that it may be difficult to identify, with precision, when the inclusion of the phrase would or would not be necessary because it may refer to the Corporations Act or the general law, the latter of which our relief in this area is not intended to modify: see Regulatory Guide 9 *Takeover bids* (RG 9) at RG 9.599. We also consider that the freedom of a bidder to contract would be abrogated when the phrase may still, from the bidder's perspective, operate for some purpose. We do not consider that freedom should be abrogated when the necessity of the phrase cannot be clearly excluded.

Additionally, even if we formed the view that in certain contexts the phrase 'entitled to be registered' is clearly unnecessary, we have not identified regulatory harm, or inconsistency with Ch 6 principles, arising from a bidder including the phrase in its offer terms, such that we consider it necessary to interfere with a bidder's freedom to contract through our regulatory guidance, or by amending the Corporations Act to prohibit such a term in offer documents.

However, we will continue to monitor the market for potential harms that may arise as a result of the practice.

E Remaking [CO 13/528]

Key points

We have decided to retain the minimum 14-day period before a replacement bidder's statement can be dispatched to target holders.

We have removed the requirement to lodge a supplementary bidder's statement in order to lodge and dispatch a replacement bidder's statement, and created relief to facilitate the lodgement and dispatch of a replacement target's statement.

Replacement bidder's statements minimum 14-day period

53 In CP 365, we asked whether we should reduce or remove the minimum 14-day period before a replacement bidder's statement can be dispatched to target holders. We noted that we considered the minimum 14-day period should be retained.

54 One respondent addressed our question and supported ideally removing, or at a minimum reducing to no more than seven days, the 'reset' period in [CO 13/528]. They said, in most cases, 14 days:

(a) is an excessive, unnecessary delay to target holders receiving the bidder's offer; and

(b) acts as a very strong disincentive for bidders to prepare a replacement bidder's statement.

55 The respondent made the following submissions:

(a) The fact that a target can consent to a shorter period for dispatch of the replacement bidder's statement will in many circumstances be of no assistance to a bidder. For example, in the case of a takeover offer not (yet) recommended by the target's board, the target is highly unlikely to provide such consent—even if only for purely 'tactical' reasons and where there is no real basis for the target having concerns about any changes from the original bidder's statement.

(b) While ASIC can also consent to a waiver of the 14-day period, our stated policy is that we may do so only when such changes are 'insubstantial' or 'the result of negotiations with the target'. Again, this will be of little assistance to many bidders. The latter requirement will necessarily (also) be inapplicable in the case of a non-recommended takeover bid (leaving the bidder with no ability to shorten the 14-day period in such a scenario), while the former will be inapplicable when

the bidder has increased the consideration offered under its bid, reduced the period for payment of the consideration offered under the bid, and/or waived or otherwise removed defeating conditions applying to its bid.

(c) In any case, should they have any concerns with the content of a replacement bidder's statement, ASIC and the target would still have the opportunity to immediately raise these concerns with the bidder, and to seek to initiate Takeovers Panel proceedings in relation to the content should that fail to resolve their concerns—as they would for any supplementary bidder's statement.

(d) Again, the general requirement not to issue misleading takeover documents will act as an impediment to bidders deliberately 'lodging [a] poorer quality bidder's statement' and then seeking to use the replacement bidder's statement regime to subsequently 'fix' any defects in the initial version of the bidder's statement.

ASIC's response

We have decided to retain the minimum 14-day period before a replacement bidder's statement can be dispatched to target holders: see ASIC Instrument 2023/688.

We agree with the general proposition that reducing the 14-day period may encourage bidders to use the replacement bidder's statement regime. However, the majority of the respondent's submission was framed as to how the regime may benefit bidders—for example, 'this will be of little assistance to many bidders' or 'will in many circumstances be of no assistance to a bidder'.

While we wish to facilitate takeover bids consistently with the principles of s602, the preferences of bidders are not the only relevant consideration in determining when replacement bidder's statements should be dispatched. The current regime ensures that the views of the target, its holders and ASIC must be considered if the 14-day period is to be waived because such disclosures impact targets, holders and the work of ASIC.

Although we have closely considered the respondent's comments, we consider that the minimum 14-day period should be retained for the same reasons stated in CP 365, as summarised below.

Risk of insufficient time

Without the 14-day period operating in default, a bidder could potentially make significant changes shortly before dispatch, leaving the target, ASIC and others with insufficient time to review the replacement bidder's statement and/or apply to the Takeovers Panel to prevent dispatch of disclosures that may be misleading or deceptive.

Although we note the respondent's comment that ASIC should simply seek to initiate Takeovers Panel proceedings when we hold concerns, we do not consider that the ability to initiate these proceedings appropriately addresses all of the implications of removing or reducing the 14-day period. For example, when significant new disclosure is made in a replacement bidder's statement, a target may require time to address such disclosure in its target's statement.

Ability to shorten the period in appropriate circumstances

Under the current setting, the bidder can obtain the target's or ASIC's consent to shorten the 14-day period. This mechanism is specifically designed to address those cases when the delay is unjustified and is commonly used when negotiating issues or concerns with the target or ASIC during the 14-day period.

Our regulatory guidance sets out that we will consent when the changes are insubstantial or as a result of negotiations with the target. We consider that this setting is appropriate and is designed to facilitate a shorter period when doing so would not adversely impact the target, its holders or the market more broadly.

We disagree with the respondent's view that a target is unlikely to provide its consent, or that we would not be able to exercise our discretion to agree to shorten the period in appropriate circumstances. We have frequently given our consent to shorten the period in appropriate circumstances and we are also aware of instances of targets providing their consent.

Further, we note that a number of the scenarios identified by the respondent are unable to be enacted in a replacement bidder's statement without obtaining individual relief from ASIC, given they are modifications to the terms of the offer—for example, when the bidder has increased the consideration offered under its bid, reduced the period for payment of the consideration offered under the bid, and/or removed defeating conditions applying to its bid.

Requirement not to dispatch misleading takeover documents

Although the bidder is able to dispatch a supplementary bidder's statement together with the original bidder's statement in some circumstances, there is a natural limit in this approach inherent in the general requirement not to dispatch misleading takeover documents: see RG 9 at RG 9.447.

We will continue to closely monitor such conduct and raise concerns if a replacement bidder's statement would be a more appropriate option available to the bidder.

Effect on quality of original bidder's statements

Allowing a bidder to automatically lodge a replacement bidder's statement without resetting the period for dispatch may lead to bidders lodging poorer quality original bidder's statements on the basis that any issues can be dealt with by lodging a replacement bidder's statement at a later time during the 14-day period.

Replacement bidder's and target's statements

56 In CP 365, we proposed remaking [CO 13/528] with changes to:

(a) remove the requirement to lodge a supplementary bidder's statement in order to lodge and dispatch a replacement bidder's statement;

(b) allow the lodgement and dispatch of a replacement target's statement; and

(c) clarify the timing for dispatch of the target's statement in a market bid where a replacement bidder's statement is lodged.

ASIC's response

We have made the changes we proposed in remaking [CO 13/528]: see ASIC Instrument 2023/688.

We have removed the requirement to lodge a supplementary bidder's statement in order to lodge and dispatch a replacement bidder's statement, and created relief to facilitate the lodgement and dispatch of a replacement target's statement.

These changes are expected to be reflected in the ASIC Regulatory Portal in December 2023. If a bidder or target wishes to lodge a replacement statement before the changes are reflected in the Portal it should contact ASIC for assistance with the lodgement process.

Appendix: List of non-confidential respondents

- Australian Financial Markets Association
- Gilbert + Tobin
- Law Council of Australia
- Mr Stephen Dear