

Attachment 4 to CP 365: Draft instrument



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Takeover Bids) Instrument 2023/XXX

I, [], delegate of the Australian Securities and Investments Commission,
make the following legislative instrument.

Date

[DRAFT ONLY – NOT FOR SIGNATURE]

[signature]

[insert name]

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Takeover Bids) Instrument 2023/XXX*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsections 655A(1) and 673(1) of the Act.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

Part 2—Declaration

5 Formulating the takeover bid

Chapter 6 of the Act applies to all persons as if the following provisions of Part 6.4 were omitted, modified or varied as follows:

- (a) omit subsection 617(2) (excluding the note), substitute:

“(2) If other securities or derivatives exist or will exist at that date that:

- (a) will convert, or may be converted, to securities in the bid class; or
- (b) confer rights to be issued securities in the bid class;

the bid may extend to securities that come to be in the bid class during the period from the date set by the bidder under subsection 633(2) to the end of the offer period due to a conversion or exercise of the rights.”;

- (b) omit subsection 618(2), substitute:

“Proportional takeover bids—small parcels

- (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.

- (2A) For the purposes of subsection (2), a person accepting a proportional takeover bid for quoted securities would be left with a small parcel of securities if, and only if, the parcel of securities they would be left with is not:

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

the closing price of the securities on any of the prescribed financial markets on which the securities traded on that day.

- (2B) If under paragraph 653B(1)(b) a person (the **holder**) may accept an off-market bid for securities as if a separate offer had been made in relation to:
- (a) one or more parcels of bid class securities that they hold as trustee or nominee for, or otherwise on account of, another person (a **beneficiary**); or
 - (b) a parcel held in the holder's own right;

then subsection (2) applies to the holder in relation to each parcel rather than the aggregate of the parcels, provided the holder has, before or at the same time as an acceptance of the offer extended under subsection (2), given a notice complying with subsection (2C) to the bidder in relation to the parcel.

- (2C) A notice complies with this subsection in relation to a parcel of securities if the notice is signed by the holder of the securities and states:
- (a) as applicable:
 - (i) that the holder holds the parcel in their own right; or
 - (ii) where the parcel is held by the holder as trustee or nominee for, or otherwise on account of, one or more beneficiaries—the name and address of each beneficiary; and
 - (b) if the holder holds the parcel as trustee or nominee for, or otherwise on account of, one or more beneficiaries—the date (and if that date is the same as the date the bid was publicly proposed—the time of day) the holder reasonably believes each beneficiary acquired a beneficial interest in the parcel; and
 - (c) if the holder holds the parcel in their own right—the date (and if that date is the same as the date the bid was publicly proposed—the time of day) the holder acquired a legal interest in the parcel.

- (2D) In subsection (2A):

minimum parcel, in relation to quoted securities, means:

- (a) if a “marketable parcel” or “minimum parcel” is defined in the rules governing the operation of the relevant

prescribed financial market on which the securities are quoted—a marketable parcel or minimum parcel as defined in those rules;

- (b) otherwise—a parcel of the securities valued at not less than \$500 based on the closing price of the securities on the relevant prescribed financial market.”;
- (c) omit subsection 619(3), substitute:

“Foreign holders

- (3) If the consideration for the bid includes an offer of securities, the securities do not need to be offered to foreign holders of the target’s securities, or such of those foreign holders as are specified in the bidder’s statement, if under the terms of the bid:
 - (a) the bidder must appoint a nominee for those foreign holders who is approved by ASIC; and
 - (b) the bidder must transfer to the nominee:
 - (i) the securities that would otherwise be transferred to the foreign holders, or specified foreign holders, who accept the bid for that consideration; or
 - (ii) the right to acquire those securities; and
 - (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.

Small parcels

- (4) If the consideration for the bid includes an offer of quoted securities, the securities do not need to be offered to holders of the target’s securities who would otherwise be offered a small parcel of securities, if under the terms of the bid:
 - (a) where a nominee is appointed under subsection (3)—the bidder and the nominee must follow the procedure in subsection (3) as if a reference to “foreign holders” were a reference to holders of the target’s securities who would otherwise be offered a small parcel of securities; or
 - (b) where a nominee is not appointed under subsection (3)—the bidder must pay to each holder of a small parcel of securities who accepts the bid an amount of cash which is equal to the market value of those securities.

- (5) For the purposes of subsection (4):

market value of securities means the highest closing price for the securities published by any prescribed financial market on which the securities are quoted during the period beginning on the first day of the bid period, and ending on the earlier of:

- (a) 5 trading days before the first day on which the bidder must pay or provide the consideration to a holder of bid class securities under terms of the offers; and
- (b) the end of the bid period.

minimum parcel, in relation to quoted securities, means:

- (a) if a “marketable parcel” or “minimum parcel” is defined in the respective rules governing the operation of more than one prescribed financial market on which the securities are quoted—a marketable parcel or minimum parcel as defined in whichever of the rules the bidder specifies in the bidder’s statement;
- (b) if a “marketable parcel” or “minimum parcel” is defined in the rules governing the operation of only one prescribed financial market on which the securities are quoted—a marketable parcel or minimum parcel as defined in those rules;
- (c) otherwise—a parcel of the securities valued at not less than \$500 based on the closing price of the securities on the relevant prescribed financial market.

small parcel, in relation to securities, means a parcel of securities which is not a minimum parcel calculated using the market value of those securities.”;

- (d) omit paragraphs 620(2)(b) and (c), substitute:

“(b) if the bidder is given the necessary transfer documents after the acceptance and before the end of the bid period and the offer is subject to a defeating condition at the time that the bidder is given the necessary transfer documents—by the end of whichever of the following periods ends earlier:

- (i) 1 month after the takeover contract becomes unconditional; or
- (ii) 21 days after the end of the offer period; or

(ba) if the bidder is given the necessary transfer documents after the acceptance and before the end of the bid period and the offer is unconditional at the time that the bidder is given the

necessary transfer documents—by the end of whichever of the following periods ends earlier:

- (i) 1 month after the bidder is given the necessary transfer documents; or
 - (ii) 21 days after the end of the offer period; or
- (c) if the bidder is given the necessary transfer documents after the acceptance and after the end of the bid period:
- (i) if at the time the bidder is given the necessary transfer documents the takeover contract is unconditional—within 21 days after the bidder is given the necessary transfer documents; or
 - (ii) if at the time the bidder is given the necessary transfer documents the takeover contract is subject to a defeating condition that relates only to the happening of an event or circumstance referred to in subsection 652C(1) or (2)—within 21 days after the takeover contract becomes unconditional.”;
- (e) omit subsection 623(1), substitute:
- “(1) A bidder, or an associate, must not, during:
- (a) for an off-market bid—the offer period; or
 - (b) for a market bid—the bid period;
- give, offer to give or agree to give a benefit to a person if:
- (c) the benefit is likely to induce the person or an associate to:
 - (i) accept an offer under the bid; or
 - (ii) dispose of securities in the bid class; and
 - (d) the benefit is not offered to all holders of securities in the bid class under the bid.”;
- (f) omit subsection 624(2) (excluding the heading and the note), substitute:
- “(2) If, within the last 7 days of the offer period:
- (a) for an off-market bid—the offers under the bid are varied to improve the consideration offered; or
 - (b) in any case—the bidder’s voting power in the target increases to more than 50%;

the offer period is extended so that it ends 14 days after the event referred to in paragraph (a) or (b) at the following times:

- (c) for a market bid—the close of ordinary trading; and
- (d) for an off-market bid—the time of day the offer period would have ended if it had not been extended under this subsection.

The bidder must give each of the persons specified in paragraph 650D(1)(c) (other than those who have accepted an offer under the bid) written notice that the extension has occurred within 3 days after that event.”;

- (g) after subsection 624(3) insert:

“(4) For the purposes of this section, *close of ordinary trading*, in relation to a particular day, means the latest time specified in the rules governing the operation of each prescribed financial market on which bid class securities are quoted (or as otherwise determined by the relevant market operator) as the time after which no further on-market transactions may be effected on that day.

Treatment of acceptances in an acceptance facility

- (5) If:
 - (a) a bidder has established an acceptance facility;
 - (b) subsection 609(8A) applies with respect to securities the subject of facility acceptances provided to the acceptance facility operator under the terms of the acceptance facility; and
 - (c) the bidder has included in the notice given under subsection 630(3):
 - (i) a statement that the bid remains subject to one or more defeating conditions (other than defeating conditions of the kind referred to in paragraph 650F(1)(a));
 - (ii) a statement that the bidder has elected that this subsection is to apply; and
 - (iii) a description of the effect of this subsection;

then, in determining the bidder’s voting power for the purposes of paragraph (2)(b), the bidder is taken to acquire a relevant interest in facility acceptances in relation to the

acceptance facility at the time the triggering conditions are satisfied.”;

Note: *ASIC Corporations (Relevant Interests, Voting Power and Exceptions to the General Prohibition) Instrument 2023/XXX* notionally inserts subsection 609(8A) of the Act and definitions of *acceptance facility* and *acceptance facility operator* in section 9 of the Act.

- (h) at the end of subsection 625(3) insert on a new line:

“The condition referred to in this subsection is not a defeating condition.”;

- (i) omit subsection 630(4), substitute:

“Bidder to give notice if defeating condition fulfilled

- (4) If the condition is fulfilled (so that the offers become free of the condition) during the bid period but before the date for giving the notice on the status of the condition, the bidder must give as soon as practicable a notice that states that the condition has been fulfilled.”.

6 Procedural steps in a takeover bid

Chapter 6 of the Act applies to all persons as if the following provisions of Part 6.5 were omitted, modified or varied as follows:

- (a) after subsection 633(1) insert:

“(1A) Despite any other provision of this Chapter, the copy of the bidder’s statement and offer document that the bidder lodges with ASIC under item 2 of the table in subsection (1), sends to the target under item 3 of the table and sends to the operator of each relevant prescribed financial market under item 5 of the table may omit the following information:

- (a) the date of the proposed offer or any other date that is related to or dependent on that date; and
- (b) the name and address of the holders of securities referred to in item 6 of the table.

The bidder must include the information in the bidder’s statement and offer document sent to the holders of securities under item 6 of the table in subsection (1).

- (1B) Despite subsection 636(1), the copy of the bidder’s statement and offer document that the bidder lodges with ASIC under item 2 of the table in subsection (1), sends to the target under item 3 of the table and sends to the operator of each relevant

prescribed financial market under item 5 of the table may include the following information:

- (a) details of the bidder's relevant interest and voting power referred to in paragraphs 636(1)(k) and (l) as at the date of lodgment; or
- (b) details of the consideration and benefits referred to in paragraphs 636(1)(h) and (i) for the period of 4 months before the date of lodgment.

The bidder's statement and offer document sent to holders of securities under item 6 of the table in subsection (1) must be updated to include the information in paragraph (a) as at the date of the bid and the information in paragraph (b) for the period of 4 months before the date of the bid.

(1C) If the bidder's statement and offer document:

- (a) omits information under subsection (1A); or
- (b) includes information under subsection (1B),

the bidder must:

- (c) send to the target and the operator of each relevant prescribed financial market at the time that the bidder sends its first bidder's statement and offer document to holders; and
- (d) attach to the notice lodged with ASIC under item 9 of the table in subsection (1);

a copy of the bidder's statement and offer document as sent to holders.”;

(b) omit paragraphs 636(1)(g) and (ga), substitute:

“(g) if any securities (other than managed investment products, foreign passport fund products, or securities in a CCIV) are offered as consideration under the bid and:

- (i) the bidder is the body that has issued or will issue the securities; or
- (ii) the bidder is a person that controls that body; or
- (iii) that body agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the securities;

all material that would be required for a prospectus for an offer of those securities by the bidder, or, if

subparagraph (iii) applies, the body, under sections 710 to 713;

- (ga) if any managed investment products are offered as consideration under the bid and:
- (i) the bidder is the responsible entity of the managed investment scheme to which those managed investment products relate; or
 - (ii) the bidder is a person that controls the responsible entity of the managed investment scheme to which those managed investment products relate; or
 - (iii) the responsible entity agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the managed investment products;

all material that would be required by section 1013C to be included in a Product Disclosure Statement given to a person in an issue situation (within the meaning of section 1012B) in relation to those managed investment products;

- (gaa) if any foreign passport fund products are offered as consideration under the bid and:
- (i) the bidder is the operator of the notified foreign passport fund to which those foreign passport fund products relate; or
 - (ii) the bidder is a person that controls the operator of the notified foreign passport fund to which those foreign passport fund products relate; or
 - (iii) the operator agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the foreign passport fund products;

all material that would be required by sections 1013C and 1013GA to be included in a Product Disclosure Statement given to a person in an issue situation (within the meaning of section 1012B) in relation to those foreign passport fund products;”;

- (c) omit paragraph 636(1)(j), substitute:
- “(j) if the bid is to extend to securities that come to be in the bid class during the period from the date set by the bidder under subsection 633(2) to the end of the offer period due to the conversion of or exercise of rights attached to other securities

or derivatives (see subsection 617(2))—a statement to that effect.”;

- (d) at the end of subsection 636(3) and on a new line, insert:

“But the bidder’s statement may include or be accompanied by a statement without the requirements in paragraphs (a) to (c) being met where:

- (d) the statement was made in a document lodged with:
- (i) ASIC; or
 - (ii) the operator of a prescribed financial market by a listed company, managed investment scheme, notified foreign passport fund or other body in compliance with the listing rules of the prescribed financial market;
- (e) the bidder’s statement:
- (i) fairly represents the statement; or
 - (ii) includes, or is accompanied by, a correct and fair copy of the document or the part of the document that contains the statement; and
- (f) if the bidder’s statement is not accompanied by a copy of the document or part of the document that contains the statement—the bidder’s statement:
- (i) identifies the document or the part of the document that contains the statement; and
 - (ii) states that the bidder, on request during the bid period, will provide within 2 business days of the request, a copy of the document (or part) free of charge to any holder of bid class securities.”;

- (e) at the end of subsection 638(5) and on a new line, insert:

“But the target’s statement may include or be accompanied by a statement without the requirements in paragraphs (a) to (c) being met where:

- (d) the statement was made in a document lodged with:
- (i) ASIC; or
 - (ii) the operator of a prescribed financial market by a listed company, managed investment scheme or other body in compliance with the listing rules of the prescribed financial market;

- (e) the target's statement:
 - (i) fairly represents the statement; or
 - (ii) includes, or is accompanied by, a correct and fair copy of the document or the part of the document that contains the statement;
- (f) if the target's statement is not accompanied by a copy of the document or part of the document that contains the statement—the target's statement:
 - (i) identifies the document or the part of the document that contains the statement; and
 - (ii) states that the target, on request during the bid period, will provide within 2 business days of the request, a copy of the document (or part) free of charge to any holder of bid class securities.”;
- (f) omit paragraph 641(1) (excluding the heading), substitute:

“(1) If the bidder has given a bidder's statement to the target and requested the target to give the bidder information in accordance with this section, the target must inform the bidder of:

 - (a) the name and address of each person who, at a time specified by the bidder under subsection (2), held:
 - (i) securities in the bid class; or
 - (ii) securities or derivatives convertible into securities in the bid class; and”
 - (b) the type, and number of each type, of those securities or derivatives held by the person at the specified time.”;
- (g) omit paragraph 641(1A) (excluding the note), substitute:

“(1A) However, the target does not need to give information to the bidder about a person or their holding of securities or derivatives unless the target knows the person's name.”.

7 Varying a takeover bid

Chapter 6 of the Act applies to all persons as if the following provisions of Part 6.6 were omitted, modified or varied as follows:

- (a) omit paragraph 650B(1)(h), substitute:

“(h) by offering an additional or alternative form of consideration.”;

- (b) in subsection 650C(2) omit “the bidder may extend the offer period after the publication of the notice under subsection 630(3) only if one of the following happens after the publication:”, substitute “the bidder may extend the offer period after the bidder has given the notice under subsection 630(3) only if one of the following happens after the bidder has given the notice:”;
- (c) omit subparagraph 650D(1)(c)(ii), substitute:
- “(ii) in respect of each class of securities the holders of which the bidder sent offers under item 6 of subsection 633(1) and for which the bidder has obtained a copy of a register including the name and address of each person who, at a time subsequent to the time specified by the bidder under subsection 633(2), held securities in the class—the following persons:
- (A) each person (other than the bidder) on the most recent register obtained by the bidder to whom the bidder would have had to send the bidder’s statement and offers under item 6 of subsection 633(1) if the date set by the bidder under subsection 633(2) had been the date at which holdings are recorded on that register; and
- (B) any other person who has accepted the offer in respect of securities in the class; and
- (iii) in respect of any other class of securities the holders of which the bidder sent offers under item 6 of subsection 633(1)—each person to whom offers were made under the bid because they held securities in that class.”;
- (d) after subsection 650D(3) insert:
- “(3A) Notwithstanding subsection (3), a notice under subsection (1) need not be signed if the notice is approved by:
- (a) for a bidder that is a body corporate:
- (i) if the consideration offered under the bid is a cash sum only—a resolution passed by the directors of the bidder; or
- (ii) otherwise—a unanimous resolution passed by all the directors of the bidder; or
- (b) for a bidder who is an individual—the bidder.”;

- (e) omit paragraph 650F(1)(a), substitute:
 - “(a) if the condition relates only to the happening of an event or circumstance referred to in subsection 652C(1) or (2)—not later than 3 business days after the end of the offer period; or”;
- (f) omit paragraph 650G(b), substitute:
 - “(b) the bidder has not declared the offers to be free from the condition within the period before the date applicable under subsection 650F(1); and”.

8 Acceptances for securities registered in a clearing and settlement facility

Chapter 6 of the Act applies to all persons as if Part 6.8 were modified or varied by, after section 653A, inserting:

“If, under an off-market bid for quoted securities, a bidder receives a written instruction or authority, or both, that:

- (a) is from a holder of securities registered in a clearing and settlement facility or a person with a right to be registered as a holder of such securities; and
- (b) is provided for the purpose, and has the effect, of enabling the bidder to effect acceptance of the offer by instructing another person, in accordance with the operating rules of a clearing and settlement facility, to accept, in accordance with section 653A, an offer made under the bid on behalf of the holder or person mentioned in paragraph (a);

the offer is taken, for the purposes of this Chapter apart from section 653A, to have been accepted in relation to the securities covered by the instruction or authority when it is received by the bidder.”.

9 Bidder’s relevant interest in control transactions

Chapter 6 of the Act applies to all persons as if section 608 were modified or varied by, after subsection (10), inserting:

“(11) A bidder has a relevant interest in securities if, under section 653AA, an offer is taken to have been accepted in relation to the securities.”.