REGULATORY GUIDE 6

Takeovers: Exceptions to the general prohibition

March 2024

About this guide

This guide is for listed and unlisted entities, investors and their advisers seeking to rely on certain exceptions to the general prohibition in s606 of the *Corporations Act 2001* (Corporations Act) in connection with a transaction, acquisition or corporate action.

It explains how we administer the exceptions and how we may exercise our discretionary powers in relation to the exceptions—including modifying their operation and granting exemptions where appropriate.

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 for 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 version:

- Superseded Regulatory Guide 6, issued in June 2013 and reissued in October 2020

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 takeover provisions in Ch 6 of the *Corporations Act 2001* (Corporations Act) impose a general prohibition restricting a person's ability to acquire further voting power above a 20% threshold—subject to certain exceptions set out in s611. The objectives of the takeover provisions are set out in s602.

ASIC reviews and monitors acquisitions and corporate actions involving reliance on the exceptions. ASIC also has the power to supplement and modify the exceptions by way of legislative instruments and case-by-case relief.

This guide outlines the requirements of, and principles underlying, a number of the exceptions, and discusses our regulatory approach to the administration of the provisions and ASIC's discretionary powers.

Purpose of this guide

RG 6.1 This guide aims to assist investors and their advisers seeking to rely on certain exceptions in s611 or to make acquisitions that otherwise attract the operation of s606. It discusses:

(a) the requirements and principles underlying some of the exceptions;

(b) our regulatory approach to the administration of the exceptions—including common issues we may consider when deciding whether to apply to the Takeovers Panel for a declaration of unacceptable circumstances or to take other regulatory action in relation to an acquisition or transaction; and

(c) the exemptions and modifications we have made to certain provisions of Ch 6 and some of the circumstances in which ASIC may exercise its discretionary powers on a case-by-case basis.

RG 6.2 This guide is one of a number of guides we have published relating to the exceptions in s611. Table 1 summarises each of the exceptions and sets out which of the exceptions are discussed in this guide and which are discussed in more detail in other guides.

The general prohibition in s606

RG 6.3 The takeover provisions in Ch 6 of the Corporations Act regulate acquisitions that may have an effect on the control of certain entities. They apply to acquisitions in:

(a) listed companies;

(b) listed registered managed investment schemes;

(c) other listed bodies incorporated or formed in Australia; and

(d) unlisted companies with more than 50 members (s603, 604 and 606).

RG 6.4 Central to the structure of the takeover provisions is the 'general prohibition' set out in s606. Subject to certain exceptions, s606(1) prohibits a person acquiring a relevant interest in voting shares or interests through a transaction in relation to securities that increases that person's, or someone else's, voting power in a regulated entity:

(a) from 20% or below to more than 20%; or

(b) from a starting point that is above 20% and below 90%.

Note: For further discussion on the concepts of relevant interests, association and voting power see Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5).

RG 6.5 Subject to the same exceptions, s606(2) prohibits a person acquiring a legal or equitable interest in securities that results in another person acquiring a relevant interest in voting shares or interests and increases someone's voting power above the same levels referred to in s606(1) and RG 6.4.

RG 6.6 The general prohibition in s606 underpins the regulatory framework of the takeover provisions by ensuring that acquisitions of voting power above the 20% level can occur only in the manner or circumstances permitted under Ch 6. The overall objective of these regulatory controls is to ensure that:

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

(b) the holders of shares or interests, and the directors of the company, body or responsible entity:

(i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme;

(ii) have a reasonable amount of time to consider the proposal; and

(iii) are given enough information to enable them to assess the merits of the proposal;

(c) as far as practicable, the holders of voting shares and interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and

(d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares, interests or any other kind of securities under Pt 6A.1 (see s602).

The takeover threshold

RG 6.7 As the initial point at which the general prohibition comes into operation, the 20% voting power level is often referred to as the 'takeover threshold'. The takeover threshold is intended to reflect a level of voting power that generally falls short of the point beyond which control of the entity could be said to have passed. The setting of the takeover threshold recognises that 'practical' or 'effective' control of an entity may pass well below majority voting power.

> Note: See the Explanatory Memorandum to the Companies (Acquisition of Shares) Bill 1980, para 46. See also Companies and Securities Law Review Committee, *Report on the takeover threshold* (Report to the Ministerial Council No. 1), November 1984.

RG 6.8 The takeover threshold is based on the concept of 'voting power', which encompasses the votes attached to voting shares or interests in which a person has a relevant interest and in which any associates of the person have a relevant interest. In this way, the takeover provisions apply to the acquisition of control both by persons acting alone and by groups of people associated by their relationship, common interests or concerted objectives with respect to an entity. The concepts of relevant interests, associates and voting power are discussed further in RG 5.

RG 6.9 Although the general prohibition in s606 applies above the takeover threshold, it does not operate to prohibit acquisitions that increase a person's voting power from a point between 90% and 100%. A person acquiring further voting power in this range is likely to be seeking the benefits of full ownership and may be entitled to acquire outstanding shares or interests under the compulsory acquisition provisions: see Regulatory Guide 10 *Compulsory acquisitions and buyouts* (RG 10).

Offers and invitations

RG 6.10 The general prohibition extends to offers and invitations that may lead to a prohibited acquisition. Under s606(4), a person is prohibited from making, or causing to be made, an offer or invitation that would contravene s606(1) or (2) if accepted (or if an offer were made in response and that offer accepted).

Exceptions to the general prohibition

RG 6.11 Section 611 of the Corporations Act sets out an itemised table of exceptions to the general prohibition in s606. A summary of these exceptions is included in Table 1.

> Note: In this guide, references to items (e.g. item 10, item 10A) are references to items in s611 (as notionally modified by legislative instrument, where relevant), unless otherwise specified.

RG 6.12 The exceptions apply to a variety of procedures and circumstances and the particular principles and purposes underlying each of the exceptions vary accordingly. However, the exceptions form part of the legislative scheme of Ch 6 and the overall objectives of the chapter are relevant to the underlying policy of each individual exception.

RG 6.13 For example, the exceptions for acquisitions under or during a takeover bid are designed to permit the acquisition of control through procedures that accord with the principles set out in s602. Other exceptions may provide for acquisitions under specified procedures or circumstances:

(a) on the basis that the particular procedures or circumstances provide some justification for relaxing or altering the application of one or more of the principles in s602; and/or

(b) to ensure the takeover provisions do not legally prevent certain corporate actions or acquisitions, many of which are not typically concerned with control.

RG 6.14 Even though the general prohibition does not apply to acquisitions made in accordance with an exception in s611, acquisitions of this kind may still give rise to unacceptable circumstances when considered in light of the principles and purposes underlying the particular exception and Ch 6 overall: s657A.

> Note: Given the variety of principles underlying the individual exceptions, acquirers should be cautious when seeking to rely on the exceptions in combination. See Regulatory Guide 74 *Acquisitions approved by members* (RG 74) at RG 74.97–RG 74.103, and RG 6.45–RG 6.48.

ASIC exemptions and modifications

RG 6.15 ASIC has a general power to provide exemptions from, or modifications to, the provisions of Ch 6—including the general prohibition in s606 and the exceptions in s611: s655A. If a proposed acquisition does not fall within the terms of an existing exception, a person may request that ASIC provide relief under this power on a case-by-case basis. ASIC has also issued a number of legislative instruments under this power that apply generally to all or specified persons.

RG 6.16 ASIC's exemption and modification powers provide further flexibility to the regulatory framework for takeovers while maintaining consistency with its overall objectives. When deciding whether to make an exemption or declaration, ASIC considers the purposes of Ch 6 set out in s602: s655A(2).

RG 6.17 The summary of the exceptions in Table 1 includes the various exceptions to the general prohibition and modifications made by legislative instrument. The table also includes cross-references to further guidance, relevant to each exception, in this and other ASIC regulatory guides.

Table 1: Summary of the exceptions to s606

Exception	Reference	Description	Guidance
Takeover bids and related acquisitions			
Acceptance of a takeover offer	Item 1	An acquisition of bid class securities resulting from the acceptance of an offer under a takeover bid.	Regulatory Guide 9 *Takeover bids* (RG 9)
On-market purchase during bid period	Item 2	An on-market acquisition by or on behalf of a bidder during the bid period for a full takeover bid that is unconditional or subject only to certain 'prescribed' conditions.	RG 6.30–RG 6.40
Convertible securities purchased on-market during the bid period	Item 3	An acquisition resulting from the exercise of convertible securities acquired by or on behalf of a bidder during the bid period for a full takeover bid that is unconditional or subject only to certain 'prescribed' conditions.	RG 6.40
Target holder acquiring bidder scrip under a bid	Item 4	An acquisition resulting from acceptance of an offer under a takeover bid where the consideration includes voting shares or interests. Note: This exception may be relied on in a 'reverse takeover'.	In the context of schemes, Regulatory Guide 60 *Schemes of arrangement* (RG 60) at RG 60.36–RG 60.38
Acquisitions by approval			
Schemes of arrangement	Item 17	An acquisition resulting from a compromise or arrangement approved by the court under Pt 5.1 of the Corporations Act.	RG 60
Acquisitions approved by members	Item 7	An acquisition previously approved by a resolution passed at a general meeting by members of the entity independent of the acquisition, where the members have been given all information material to the decision on how to vote on the resolution—including certain prescribed information.	RG 74
Creeping acquisitions			
3% creep in six months	Item 9	If a person has maintained voting power of at least 19% for six months, acquisitions increasing their voting power to a point no more than 3% higher than it was six months prior are permitted.	RG 6.41–RG 6.61

Exception	Reference	Description	Guidance
Fundraising related acquisitions			
Traditional rights issues	Item 10 and s615	An acquisition under identical pro rata offers where a reasonable opportunity for acceptance has been given and agreements to issue are entered into after the specified closing time of the offer. This includes underwriting and sub-underwriting.	RG 6.62–RG 6.162
Accelerated rights issues	Item 10A (inserted by ASIC Corporations (Takeovers – Accelerated Rights Issues) Instrument 2015/1069) and s615	An acquisition under an offer that would fall within the traditional rights issue exception in item 10, except that the offer to certain investors occurs on an accelerated basis, or incorporates a retail-only rights trading component, provided the securities are issued to the accelerated investors no more than two months earlier than other investors.	RG 6.62–RG 6.162
Dividend/ distribution reinvestment plans, bonus share plans and switching facilities	Item 11	An acquisition under a dividend reinvestment plan, bonus share plan, distribution reinvestment plan or switching facility that is made available to all members (excluding foreign holders where appropriate).	RG 6.163–RG 6.171
Issue to promoter under first prospectus	Item 12	An acquisition resulting from issues to a promoter under the first disclosure document issued by the company where the effect of the acquisition on voting power is disclosed.	
Acquisitions by underwriters	Item 13	An acquisition resulting from issues under a disclosure document to a person as underwriter or sub-underwriter where the effect of the acquisition on voting power is disclosed.	RG 6.75–RG 6.93 and RG 6.127–RG 6.162
Buybacks			
Buybacks	Item 19	An acquisition resulting from a buyback authorised by s257A.	Regulatory Guide 110 *Share buy-backs* (RG 110) at RG 110.58
On-market buybacks by ASX-listed schemes	Item 19A (inserted by ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159)	An acquisition resulting from the responsible entity of a registered scheme buying interests in the scheme in accordance with Pt 5C.6A of the Corporations Act, as notionally inserted by ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159.	Regulatory Guide 101 *Managed investment scheme buy-backs* (RG 101)

Exception	Reference	Description	Guidance
Downstream acquisitions			
Downstream acquisition through listed body corporate	Item 14, ASIC Corporations (Approved Foreign Markets—Buy-backs and Takeovers) Instrument 2015/1071	An acquisition resulting from another acquisition of relevant interests in a body corporate where the body corporate is listed on a prescribed financial market or a foreign market approved by ASIC.	Regulatory Guide 71 *Downstream acquisitions* (RG 71)
Acquisitions in other circumstances			
Acquisitions by will or operation of law	Item 15	An acquisition of shares or interests through a will or through operation of law.	
Forfeited shares	Item 16	An acquisition resulting from an auction of forfeited shares conducted on-market. See also s254Q.	
Newly formed companies	Item 8	An acquisition resulting from the issue of securities in a company that has not started to carry on any business and has not borrowed any money.	
Acquisitions relating to enforcement of security interests	Item 6, s609(1)	An acquisition resulting from the exercise by a person of a power, or appointment as a receiver and/or manager under an instrument or agreement creating a security interest—provided: • the ordinary business of the person who took the security interest, or for whose benefit the security interest was taken, is the provision of financial accommodation; and • the security interest was taken in the ordinary course of that business and on ordinary commercial terms.	RG 5.69–RG 5.77
Arrangement in liquidation	Item 18	An acquisition of securities made under an arrangement entered into by a liquidator under s507.	
Prescribed exceptions	Item 20, regs 6.2.01–6.2.02, and Sch 3 of the Corporations Regulations 2001	An acquisition made in a manner, or in the circumstances, prescribed. Acquisitions of relevant interests in certain types of body corporate and acquisitions resulting from a person holding certain public offices are prescribed.	

Note: Full titles of the legislative instruments referred to in this table are listed in the related information section of this guide.

ASIC's role

RG 6.18 ASIC has a broad regulatory role in relation to the administration of both Ch 6 and many of the transactions to which the exceptions in s611 relate.

RG 6.19 We regularly review and monitor transactions to ensure compliance with the provisions and the purposes of Ch 6—including transactions involving reliance on an exception. If we are concerned that a transaction or proposal does not comply, or may be contrary to the principles and purposes underlying a particular exception or Ch 6 generally, we may make inquiries of the parties. If we are unable to resolve our concerns we may take further action, including applying to the Takeovers Panel for a declaration of unacceptable circumstances.

RG 6.20 Our broad regulatory role means that we may raise Ch 6 issues when we are aware of, or are considering, the transaction for another reason. For example, we may consider whether the terms or structure of a fundraising might give rise to unacceptable circumstances when a prospectus or Product Disclosure Statement (PDS) for the offer is lodged with us under Ch 6D or Pt 7.9.

RG 6.21 As part of our role in administering Ch 6 we also provide regulatory guidance and make determinations on the exercise of ASIC's discretionary powers, consistent with the principles set out in s602. In addition to ASIC's general exemption and modification power discussed at RG 6.15–RG 6.17, ASIC also has specific approval and consent powers relating to particular exceptions: s615(a), 619(3)(a) and item 14(b).

RG 6.22 Our regulatory role and approach under Ch 6 are further discussed (in the context of the takeover bid procedure) at RG 9.5–RG 9.25.

Summary of our guidance

RG 6.23 Table 2 sets out a summary of the issues addressed in this guide, together with cross-references to the relevant section discussing each issue.

Table 2: Summary of our guidance in this guide on the exceptions to the general prohibition in s606

Topic	What our guidance covers	Reference
On-market purchases during the bid period	We discuss the exceptions for acquisitions made by a bidder on market during the bid period of a market or off-market bid and our relief modifying the conditions that must apply to the bid.	Section B
Creeping acquisitions	We discuss the operation of the 3% creep exception in item 9 and the principles underlying the exception. We also explain when we may give relief to rely on the exception in the case of an involuntary dilution.	Section C

Topic	What our guidance covers	Reference
Rights issues	We discuss the rights issue exception in item 10 and our extension of the exception to cover certain non-traditional rights issues. We also discuss: • when we may consider applying to the Takeovers Panel (or taking other regulatory action) on the grounds that the terms, structure or arrangements associated with a rights issue may give rise to unacceptable circumstances; • the case-by-case relief we may give for shortfall facilities; and • the nominee procedure for foreign holders, including our relief clarifying which holders the procedure may apply to, our case-by-case relief from the procedure for certain non-renounceable offers and our approach to determining requests for ASIC approval of nominees under s615(a).	Section D
Underwriting	We outline our views on the types of arrangements that constitute underwriting for the purposes of the rights issue exceptions in items 10 and 10A and the exception in item 13. We also discuss: • when underwriting arrangements may give rise to unacceptable circumstances and may require approval under the related party provisions in Ch 2E; and • when we may give Ch 6 relief for underwriting a dividend reinvestment plan.	Section E
Acquisitions by brokers as principal	We discuss the case-by-case relief we may provide for acquisitions by brokers acting as principal for client facilitation purposes.	Section F
Share transfers under s444GA of the Corporations Act	We discuss the operation of s606 for share transfers under s444GA and explain when we may grant case-by-case relief from the general prohibition	Section G

Application to listed registered managed investment schemes

RG 6.24 Chapter 6 applies to listed registered managed investment schemes as well as companies. Adjustments to the provisions in Ch 6 that take account of the different features of managed investment schemes are set out in s12(3), 604 and 610(5).

RG 6.25 Discussion in this guide should be taken to apply to both companies and listed registered managed investment schemes, unless otherwise indicated.

Other guidance you may need to consider

RG 6.26 This guide discusses various aspects of the general prohibitions and the exceptions which apply. Some of our other guidance relating to the takeovers and substantial holding provisions may also be relevant to issues raised in this guide—in particular:

(a) RG 5;

(b) RG 9; and

(c) Regulatory Guide 111 *Content of expert reports* (RG 111).

RG 6.27 In addition to the relief discussed in this guide, we may also consider relief from the general prohibition to allow holders of parcels of shares greater than 20% to conduct a sale of the parcel through a tender process, subject to certain conditions. Our policy on relief for tender offers is set out in Regulatory Guide 102 *Tender offers by vendor shareholders* (RG 102).

RG 6.28 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).

RG 6.29 Investors and their advisers should also consider any guidance issued by the Takeovers Panel about the relevant exceptions.

B On-market purchases during the bid period

Key points

Item 2 allows a bidder to make on-market purchases of bid class securities during the bid period in certain circumstances, even if these purchases may result in acquisitions above the takeover threshold. Item 3 allows acquisitions resulting from the exercise of convertible securities acquired in similar circumstances.

We have modified items 2 and 3 to make it clear that these exceptions apply even if the bid is subject to:

- a condition that an event in s652C(1) and (2) does not occur; or
- the statutory quotation condition in s625(3).

The exceptions for on-market purchases of bid class securities and convertible securities

RG 6.30 Where a bidder has made a full takeover bid that is unconditional, or subject only to certain 'prescribed' conditions, the bidder is exempt from the general prohibition in s606 when acquiring relevant interests in bid class securities:

(a) as a result of an on-market transaction during the bid period (item 2); or

(b) as a direct result of the exercise of convertible securities acquired through an on-market transaction during the bid period (item 3).

RG 6.31 A bidder in this situation may therefore make on-market purchases of bid class securities during the bid period for a market bid or an off-market bid, even if it may acquire relevant interests above the takeover threshold. On-market purchases are exempt from the prohibition on collateral benefits, which may prevent many other kinds of purchases by the bidder and its associates outside the takeover bid during the offer period (or the bid period in the case of market bids): s623(1), (2) and (3)(b) and ASIC Corporations (Takeover Bids) Instrument 2023/683.

> Note: A bidder may not be able to make on-market purchases of bid class securities at a price other than the bid price until an announcement has been made in accordance with the market integrity rules applicable to the relevant financial market. See Rule 5.13.1 of the ASIC Market Integrity Rules (Securities Markets) 2017 (Securities Markets Rules).

RG 6.32 A transaction is 'on market' if it is effected on a prescribed financial market in a way defined as such in rules governing the operation of the relevant market: s9. In the case of trading on prescribed financial markets, the transactions taken to be 'on market' transactions for the purposes of the exceptions are those defined in Rule 1.4.3 of the Securities Markets Rules.

> Note: In the case of markets where there is no relevant definition, a transaction is 'on market' if effected in the ordinary course of trading on the market. See definition of 'on-market' in s9.

RG 6.33 The restriction to 'on market' transactions reflects a general principle that transactions should not fall within the exceptions, even if they are effected through a prescribed financial market, if they have been 'pre-arranged' between the principals.

Timing of acquisitions

RG 6.34 Items 2 and 3 apply to securities purchased during the bid period. The bid period:

(a) for an off-market bid, runs from the time the bidder's statement is given to the target under item 3 of s633(1) until the end of the offer period (unless no offers are ultimately made, in which case it ends after one month); and

(b) for a market bid, runs from the time the bid is announced to the relevant financial market until the end of the offer period (s9).

RG 6.35 If the exceptions in items 2 or 3 apply to an acquisition, but the bidder fails to send offers within 28 days of giving the bidder's statement to the target as required by item 6 of s633(1), the bidder is not entitled to exercise voting rights attached to the shares or interests: s613.

The effect of on-market purchases on the bid terms

RG 6.36 On-market purchases made by a bidder may affect the consideration that must be offered under the bid.

RG 6.37 Under s621(3), the consideration offered under a bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for bid class securities in the four months before the date of the bid. In the case of an off-market bid this is the date on which the offers are first made.

Note: See RG 9.

RG 6.38 Additionally, when on-market purchases are made during the bid period for an off-market bid the terms of the offers and any takeover contracts will automatically be varied under s651A, unless the consideration (or one of the alternative forms of consideration) on offer under the bid is 'all cash' and the on-market purchases are made at or below that cash sum.

RG 6.39 Unaccepted offers that include a form of consideration consisting solely of a cash sum are varied under s651A so that the cash sum is increased to the higher purchase price paid on-market. Holders who have already accepted an offer for all cash, or an all cash alternative, are entitled to receive the higher cash sum.

RG 6.40 Where non-cash consideration is offered, any holder who has accepted the non-cash consideration, or who accepts the non-cash consideration during the bid period (whether an all cash alternative is available or not) may elect after the offer period to receive instead a cash sum equivalent to the on-market purchase price per security.

Note: The bidder must give the holder written notice of their right to make the election within 14 days of the end of the offer period, and the election must be made by return written notice within one month of the notice being received: s651A(4)(c) and 651B.

C Creeping acquisitions

Key points

Item 9 provides an exception to the general prohibition that permits acquisitions that increase a person's voting power to a point no greater than 3% higher than it was six months before, provided the person's voting power has been 19% or higher since that time. Increases under item 9 are not cumulative with other exceptions in s611.

The exception allows a person to gradually increase their voting power over time. A key premise underlying the exception is that persons affected by the increase should have sufficient time to consider its impact.

Where a person has failed to comply with requirements to publicly disclose their voting power, reliance on the exception may give rise to unacceptable circumstances.

We may give relief to preserve a person's ability to rely on item 9 when that person's voting power has been involuntarily diluted to a point below 19% during the previous six months.

The 3% creep exception

RG 6.41 Under item 9 an acquisition by a person is exempt from s606 if:

(a) throughout the six months before the acquisition that person, or any other person, has had voting power in the company of at least 19%; and

(b) as a result of the acquisition, none of the persons referred to in RG 6.41(a) would have voting power in the company more than 3% higher than they had six months before the acquisition.

RG 6.42 This exception to the general prohibition is often referred to as the '3% creep exception'. The 3% creep exception was originally introduced as an alternative procedure to a takeover bid—allowing persons who may be seeking to acquire a level of control over an entity to do so through gradual increases in their interests over time. The purpose of the exception at the time of its introduction was to limit the speed with which control of companies could be acquired other than by formal takeover or similar procedures that ensure equality of opportunity. A key premise underlying the rationale for permitting only gradual increases in voting power under the exception is that any change in control should occur slowly enough for those affected to make informed decisions in response: see also RG 6.49–RG 6.52.

Note: See the Explanatory Memorandum to the Companies (Acquisition of Shares) Bill 1980, paras 13, 45 and 46, and the second reading speech for the Bill: Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980, p. 1633 (Victor Garland) at p. 1635.

RG 6.43 In the absence of any other changes to a person's voting power and the voting capital of a company, the 3% creep exception allows a person to increase their holding by 3% every six months from a starting point above 19%. However, the exception is not designed to automatically allow a person to make unrestricted acquisitions of 3% every six months irrespective of the circumstances. The exception is cast in terms of two basic features, which depend on voting power over time:

(a) voting power must have been maintained above 19% for a continuous period of six months prior to any acquisition in reliance on the exception; and

(b) the extent to which a person may increase their interests under the exception depends on the voting power of the relevant person or persons as at the date six months prior to the acquisition.

RG 6.44 An example of the application of the 3% creep exception is set out below.

Example: The 3% creep exception

On 1 January, a major shareholder agrees to purchase a number of shares in ABC Ltd from another shareholder. As a result the major holder's voting power increases from 18.0% to 19.9%. On 1 March, ABC Ltd issues new shares under a placement to a third party. This dilutes the major holder's voting power back to 19.0%.

On 5 July, the major holder makes on-market purchases totalling 3.9% of ABC Ltd. These acquisitions are permitted under the 3% creep exception (even though they relate to more than 3% of ABC Ltd) because the major holder's resulting voting power of 22.9% is no more than 3% higher than their voting power of 19.9% exactly six months before.

Combining the 3% creep exception with other exceptions

RG 6.45 One result of the particular formulation of the 3% creep exception is that it is not cumulative with the other exceptions in s611. For example, to determine today how far a person's voting power is above the level it was six months prior (and therefore how much further a person may be able to 'creep'), the following must be counted:

(a) any voting shares or interests acquired in the previous six months under a rights issue to which the exception in item 10 applied; and

(b) any other securities contributing to voting power.

Similarly, acquisitions as an underwriter or sub-underwriter in reliance on item 13 must also be counted.

RG 6.46 We will not give relief to allow a holder to exclude from the 3% calculation in item 9(b) securities or interests acquired in reliance on other exceptions in s611. Allowing a holder to acquire a further 3% immediately following an

acquisition under another exception in s611 does not promote the policy underlying the 3% creep exception, which is premised on a gradual increase in voting power over time.

RG 6.47 This position is also consistent with changes made under the *Corporate Law Economic Reform Program Act 1999* (CLERP Act). Under the pre-CLERP Act equivalent of the 3% creep exception there was an express exclusion from the 3% calculation of shares or interests acquired under a rights issue: see s618 and 621 of the old Corporations Law. This was not continued following the CLERP Act amendments.

> Note: Arithmetically, a *pari passu* offer (i.e. an offer that is proportionally equal to all shareholders, based on their existing holding) had more impact under the formula in s618 of the old Corporations Law than under the percentage calculation required by item 9.

RG 6.48 Although the Legal Committee of the Companies and Securities Advisory Committee (CASAC) recommended that acquisitions under the exceptions for rights issues and underwriters (now in items 10 and 13 respectively) should be excluded from the 3% calculation, Parliament did not accept this recommendation in implementing the CLERP Act.

> Note: See Legal Committee of CASAC, *Anomalies in the takeovers provisions of the Corporations Law*, March 1994, pp. 13–15.

The 3% creep exception and the efficient market principle

RG 6.49 One of the purposes of Ch 6 of the Corporations Act is to ensure that acquisitions of control over voting shares and interests take place in an efficient, competitive and informed market: s602(a).

RG 6.50 If a person has made, or may be in a position to make, acquisitions in a listed entity in reliance on the 3% creep exception, the market should generally be aware of that fact as a result of the substantial holding disclosure requirements in Pt 6C.1 (and, in some circumstances, other market or public disclosure requirements).

RG 6.51 Creeping acquisitions and strategies may have a significant impact on the market for securities in the relevant entity and the decision making of other investors and interested parties. Full and ongoing compliance with the substantial holding and other disclosure requirements is therefore essential to ensuring that acquisitions under the 3% creep exception take place:

(a) as far as practicable, in an efficient, competitive and informed market: s602(a); and

(b) in accordance with the underlying policy of the 3% creep exception, which is premised on gradual and open increases in voting power occurring slowly enough for those affected to make informed decisions (see RG 6.42).

RG 6.52 Acquisitions made in reliance on the 3% creep exception may give rise to unacceptable circumstances if a failure by the acquirer to comply with their disclosure or other obligations means that the acquisition may not have occurred in a fully informed market. We may apply to the Takeovers Panel if an acquirer purports to rely on the 3% creep exception in these circumstances.

Note: See *World Oil Resources Limited* [2013] ATP 1 at [229]–[230], *CMI Limited* [2011] ATP 4 at [128] and *Orion Telecommunications Limited* [2006] ATP 23 at [117]. See also *The President's Club Limited* [2012] ATP 10 at [100]–[101].

Dilution below 19% voting power

RG 6.53 A person's voting power must have been at 19% or above in the previous six months to rely on the 3% creep exception: item 9(a). If a person's voting power has fallen below 19% at any point in the previous six months, they will no longer be able to rely on the exception.

ASIC relief: Involuntary dilution

RG 6.54 We may give relief to allow a substantial holder to rely on the 3% creep exception if the substantial holder:

(a) has had its voting power diluted to below 19% during the six months immediately before an acquisition; and

(b) did not have the opportunity to participate in the diluting issue of securities on terms no less favourable than those available to other holders.

RG 6.55 Our relief preserves a substantial holder's ability to make the further acquisitions under the 3% creep exception even with the involuntary dilution of their voting power.

When we will not give relief

RG 6.56 We will not give relief if the substantial holder could have maintained a minimum voting power of 19% by taking up an opportunity on terms no less favourable than those available to other holders. For example, we will not give relief if the substantial holder chose not to participate in a rights issue made in accordance with item 10 or a dividend reinvestment plan complying with item 11.

RG 6.57 We will also not give relief to allow a substantial holder to rely on the 3% creep exception if the holder's voting power was diluted more than six months before the proposed acquisition. This time limit is designed to minimise uncertainty for the market in understanding when a substantial

holder might be able to rely on the 3% creep exception and to ensure that creeping acquisitions take place as far as possible in an efficient, competitive and informed market: s602(a). In the absence of a specified time limit, a person may be able to seek relief for an involuntary dilution indefinitely. The six-month period mirrors the rolling reference period in item 9 and provides a reasonable opportunity for the substantial holder to consider and act upon the consequences of the involuntary dilution.

RG 6.58 We may also refuse to grant relief where the proposed acquirer has failed to disclose to the market details of their voting power or other information relating to their holding required under the Corporations Act: see RG 6.49–RG 6.52.

Involuntary dilution above 19% voting power

RG 6.59 The 3% creep exception allows for net increases of 3% in a person's voting power every six months, as the extent of a person's ability to make further acquisitions under the exception depends on the level of voting power six months prior.

RG 6.60 Provided a substantial holder's voting power remains at or above 19% at all times, an immediate reduction in voting power (through disposal, involuntary dilution or otherwise) will not:

(a) affect the next date from which the substantial holder is able to increase their voting power under the exception; or

(b) reduce the level of voting power the substantial holder may attain under the exception on that date.

This aspect of the 3% creep exception is illustrated in the example at RG 6.44.

RG 6.61 Our relief for involuntary dilution is intended to facilitate a 'threshold creep' rather than a 'continuing creep' situation. Where a person's voting power has been diluted to a level of 19% or above, we will not generally give relief to allow the person to rely on the 3% creep exception in the future as if the dilution had not occurred (i.e. so that the level to which the person is able to creep in six months' time is unaffected).

D Rights issues

Key points

Item 10 provides an exception for acquisitions under a rights issue that complies with certain requirements. It extends to acquisitions under an associated underwriting arrangement. We have modified s611 by giving relief to introduce item 10A for accelerated rights issues that meet certain requirements.

We may examine rights issues and underwriting arrangements to see whether they may be designed to avoid the purposes of Ch 6 or have an unacceptable control effect. If we have concerns we will raise them with the relevant parties and may take regulatory action—including making an application to the Takeovers Panel for a declaration of unacceptable circumstances.

We will consider case-by-case relief to allow acquisitions under a shortfall facility offered in connection with a rights issue.

We approve nominees for foreign holders excluded from a rights issue under s615(a), and will consider both the appropriateness of the nominee and the circumstances of the rights issue. We have provided relief clarifying that the nominee procedure need not be applied to exclude all foreign holders from the rights issue and that we will consider case-by-case relief from the procedure in non-renounceable offers.

The rights issue exception

RG 6.62 Item 10 provides an exception from the general prohibition for acquisitions resulting from pro rata rights issues that comply with certain requirements. These requirements are set out in Table 3.

Table 3: Requirements of the rights issue exception: item 10

Requirement	Summary
Terms	Offers must be to issue securities in a particular class on issue in the entity. Offers must be made to every person who holds securities in the class to issue them with the percentage of the securities (to be issued) being the same as the percentage in the class they hold before the issue. The terms of all the offers must be the same.
Timing	All holders must have a reasonable opportunity to accept the offers. Agreements to issue must not be entered into until a specified time for acceptances of offers has closed.

RG 6.63 The rights issue exception ensures that the regulatory framework governing control transactions does not overly inhibit an entity's ability to raise capital under a rights issue. The nature of a rights issue is key to the underlying policy basis for the exception. Under a rights issue:

(a) each holder has an equal opportunity to avoid dilution of their existing holding by participating in the offer; and

(b) compared to other issues of securities, it is less likely that any one holder's percentage holding will increase substantially.

Underwriting

RG 6.64 The rights issue exception expressly extends to an acquisition by a person as underwriter or sub-underwriter (see RG 6.127–RG 6.162 for further discussion of underwriting and sub-underwriting) to the rights issue. This allows for the possibility that there is a substantial shortfall in subscriptions under a bona fide rights issue.

RG 6.65 If the rights issue is offered under a disclosure document, an underwriter or sub-underwriter may also have the benefit of the exception in item 13 for acquisitions resulting from the underwriting arrangement (the underwriting exception): RG 6.127–RG 6.134.

RG 6.66 An underwriter or sub-underwriter seeking to rely on the rights issue exception or the underwriting exception should ensure that the arrangements they have entered into are properly characterised as 'underwriting'. We discuss this and other issues associated with underwriting in Section E.

Accelerated rights issues

RG 6.67 The exception in item 10 applies to offers made under a traditional rights issue structure rather than a non-traditional structure such as an accelerated rights issue.

RG 6.68 In an accelerated rights issue, offers generally proceed in two tranches: institutional and retail. Institutional holders are required to deal with their pro rata entitlement before other holders and are generally allotted their securities first. This allows issuers to receive a significant proportion of the offer proceeds from their institutional holders in a very short timeframe.

RG 6.69 For a person to rely on the rights issue exception, agreements to issue must not be entered into until a specified time for acceptances of offers has closed and the terms of all the offers must be the same.

RG 6.70 An accelerated rights issue falls outside the rights issue exception because:

(a) the different offer periods and dates of allotment for institutional and retail holders mean the offers are not made on the same terms to each relevant holder;

(b) in some accelerated offers retail holders, but not institutional holders, may be allowed to trade their rights for a period; and

(c) allotments for the institutional offer may occur before the retail offer has closed.

However, these timing and tradability differences of themselves do not necessarily offend the equal opportunity principle in s602(c) as long as the differences are not abused for control purposes.

ASIC modification: Accelerated offers

RG 6.71 ASIC Corporations (Takeovers – Accelerated Rights Issues) Instrument 2015/1069 introduces a new exception for persons who will exceed the takeover threshold in s606 as a result of participating in an accelerated rights issue (the accelerated rights issue exception).

RG 6.72 The accelerated rights issue exception is similar to the rights issue exception but allows for:

(a) timing differences between the offer periods and dates of allotment for retail and institutional holders, to accommodate accelerated rights issue structures; and

(b) differences in the offers resulting from the ability of retail holders, but not institutional holders, to trade their rights.

The exception only applies where the retail allotment of the accelerated rights issue occurs within two months of the allotment to institutional investors.

RG 6.73 Our modification does not extend to shortfall offers or mean that an offeror does not have to comply with the nominee process in s615. We will consider applications for relief relating to these matters on a case-by-case basis: see RG 6.94–RG 6.103 and RG 6.119–RG 6.126.

RG 6.74 As with traditional rights issues, we will closely examine any rights issue that falls within the terms of the accelerated rights issue exception but appears to be an abuse of the relief for control purposes. For example, we expect that entities will not schedule a general meeting during the period between allotment to institutional investors and allotment to other investors, if the early allotment to institutional investors would distort voting. We may make an application to the Takeovers Panel if we have control concerns: see RG 6.75–RG 6.93.

Rights issues and underwriting: Unacceptable circumstances

RG 6.75 The Takeovers Panel may declare unacceptable circumstances in relation to the affairs of a company. The Panel may make a declaration on the basis of a contravention of Ch 6, but may also do so where circumstances are unacceptable having regard to the purposes of Ch 6 (as set out in s602), or the effect of the circumstances on control or the acquisition of a substantial interest: s657A(2).

RG 6.76 Accordingly, a rights issue or underwriting arrangement may give rise to unacceptable circumstances even though it falls within the legal terms of items 10, 10A (inserted by ASIC Corporations (Takeovers – Accelerated Rights Issues) Instrument 2015/1069) or 13. This would include, for example, a rights issue or underwriting arrangement that has been devised to enable a holder or underwriter to obtain control of the issuer through the fundraising, in reliance on the exceptions.

Our general approach

RG 6.77 We will carefully consider a rights issue or underwriting that falls within the terms of the rights issue, accelerated rights issue or underwriting exceptions but that appears to be:

(a) designed to avoid the requirements of Ch 6; or

(b) otherwise unacceptable, having regard to the purposes of Ch 6 set out in s602.

A rights issue of this kind risks an application to the Takeovers Panel or other regulatory action.

RG 6.78 For example, a rights issue may be structured so that control of a company would pass to an underwriter or sub-underwriter of a rights issue without a takeover bid. We may look at whether the objective circumstances surrounding the rights issue and underwriting arrangements are more consistent with a bona fide agreement to assume the risk of the shortfall or with a placement.

RG 6.79 We may also make inquiries of the directors, underwriter and others to determine whether all reasonable options have been explored, and steps put in place, to minimise the potential effect of the rights issue on control of the issuer. This is because a key consideration in determining whether the circumstances of a rights issue are unacceptable is whether the control effect of the rights issue exceeds what is reasonably necessary for the fundraising purpose.

> Note: See Takeovers Panel Guidance Note 17 *Rights issues* (GN 17) at paragraph 5; *Bisalloy Steel Group Limited* [2008] ATP 29 at [21]–[23] and *Dromana Estate Limited 01R* [2006] ATP 8 at [43].

RG 6.80 Our broad regulatory role means that we may examine whether a rights issue or underwriting arrangement might be unacceptable while also considering the bearing on the rights issue or underwriting of other requirements of the Corporations Act (including any interaction between the principles in s602 and those requirements): see RG 6.18–RG 6.22. This may include the disclosure obligations in Ch 6D and the related party provisions in Ch 2E: see RG 6.151–RG 6.162.

RG 6.81 If we examine a rights issue or underwriting arrangement and have concerns, we may raise these with the issuer or underwriter. In some cases we may request the parties take further action, such as:

(a) offering other parties the opportunity to underwrite some of the shortfall;

(b) modifying the terms or structure of the rights issue; or

(c) seeking member approval under item 7 (see RG 6.91–RG 6.93).

RG 6.82 Some of the circumstances we will generally take into account when considering a rights issue or underwriting arrangement are discussed at RG 6.86–RG 6.90.

Substantial holder as underwriter

RG 6.83 We will normally examine a proposed rights issue or other fundraising particularly closely if it is underwritten by a person who already controls, or is likely after the transaction to control, the company.

RG 6.84 A transaction designed to give control to a holder or underwriter that is presented to the holders and the market as a rights issue will generally be contrary to the purposes in s602. In such a case:

(a) other holders and the market are not fully informed about the acquisition of control by the holder or underwriter (s602(a) and (b)); and

(b) other holders may not have a reasonable or equal opportunity to participate in the benefits accruing through a proposal under which the holder or underwriter acquires a substantial interest in the company (s602(c)).

Relevant aspects we may consider

RG 6.85 Table 4 sets out some of the matters that we will generally consider when examining a rights issue or underwriting arrangement.

RG 6.86 The factors listed in the table are not an exhaustive list of the matters that may be relevant in any particular case, and no particular factor should be considered to provide a ‘safe harbour’. We will take into account the overall circumstances of a rights issue in considering whether regulatory action may be warranted.

RG 6.87 Issuers, underwriters and their advisers should also consult the Takeover Panel's guidance on rights issues in GN 17.

Table 4: Factors that may contribute to unacceptable circumstances in a rights issue or underwriting arrangement

Aspect	Details
Circumstances and effect of the rights issue	
Purpose of the fundraising and issuer's financial situation	If the issuer cannot clearly identify a need for the capital to be raised under a rights issue, this may suggest an abuse of items 10, 10A or 13. The purpose of the capital raising may also be relevant in considering the reasonableness of the potential control effect. While the issuer's financial situation may affect the reasonableness of certain aspects of the fundraising, financial distress is not a 'safe harbour'. For example, if an issuer is financially distressed, it may have an urgent and compelling need for fresh capital and will be less likely to find an underwriter that is not a controller or a substantial holder (or an associate of either). However, the potential control effect of the rights issue in the circumstances may be such that it is still unreasonable.
Inconsistent corporate actions	Recent corporate actions and capital variations may contradict a fundraising purpose. For example, an issuer may need to satisfactorily explain why it completed a buyback when shortly afterwards it decided that it needed additional capital. Note: See *Phosphate Resources Limited* [2003] ATP 3.
Other options	A fundraising may have an unnecessary control effect, given the other options open to the issuer. In considering the commercial rationale for the rights issue we may consider whether the issuer has explored other options for raising capital, what alternatives are open to the issuer and how those options compare.
Likely response	The control effect of the rights issue may be unacceptable, given the likely response of substantial (and other) shareholders. Also, the composition of the issuer's register may affect the overall impact of the rights issue on control of the issuer. For example, a substantial holder who is underwriting may acquire control even if there is only likely to be a minor shortfall.
Terms and structure of the rights issue	
Pricing	Pricing at or above the market price is more likely to lead to a substantial shortfall, so holders who take up their rights and/or the underwriter are more likely to significantly increase their voting power. On the other hand, a deep discount may be associated with a high ratio of new securities for old which may deter participation.
Rights issue ratio	The larger the number of new shares for old, the more dilutive the rights issue. A high ratio may suggest an abuse of the rights issue exception. Note: ASX Listing Rule 7.11.3 states the ratio of a rights issue must not be greater than one for one—however, renounceable rights issues at or below the market price are exempt.

Aspect	Details
Renounceability	If an offer is non-renounceable, it may be less likely that entitlements are taken up. The non-renounceability of an offer may contribute to unacceptable circumstances—particularly in cases where there would likely be an active market for rights. Buyers of rights are likely to take securities under the offer, reducing the shortfall overall. Note: The significance of non-renounceability as a factor in any particular offer will vary, having regard to the advantages and disadvantages associated with making that offer renounceable.
Shortfall dispersion	A failure to implement a reasonable dispersion strategy, or the implementation of an ineffectual dispersion strategy, may contribute to unacceptable circumstances: see, for example, *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7. A dispersion strategy may include: • a 'shortfall facility' under which holders can subscribe for securities not taken up by others; or • a back-end book-build of the shortfall securities. These strategies may reduce the shortfall and any resulting effect on control (including by reducing flow-through to an underwriter). If an effective dispersion strategy is not implemented, this could suggest that the control effect of the rights issue may exceed what is reasonably necessary for the fundraising purpose. Note: Acquisitions under shortfall facilities and back-end book-builds generally fall outside the rights issue and underwriting exceptions. We may provide relief in some circumstances: see RG 6.96–RG 6.103.
Underwriting arrangements	
Identity and business of underwriter	Aspects of an underwriting arrangement may contribute to the likelihood that the arrangement is designed to avoid Ch 6 or may have an unnecessary control effect if: • the underwriter has not entered into the underwriting in the ordinary course of its business of underwriting; • the issuer has not disclosed to holders the identities of sub-underwriters; • there are associations between the underwriter or sub-underwriter and a controller or one or more substantial holders or a group of substantial holders; • the underwriter or sub-underwriter is associated with the issuer's directors; or • the underwriter or sub-underwriter has some role in the making of the offer or some influence over the affairs of the issuer.
Terms of underwriting	The terms of the underwriting arrangements may tend to support an inference that aspects of the arrangement are for a control purpose—for example, if they are unusual or uncommercial. The terms may also be relevant in considering whether shareholder approval for a related party benefit is required: see RG 6.151–RG 6.162.

Aspect	Details
Choice and spread of underwriters and sub-underwriters	If directors and their advisers unreasonably exclude, do not fully consider or do not make genuine and reasonable attempts to procure alternative underwriting arrangements that may reduce the potential impact on control, this may indicate that the underwriting arrangements will have an unnecessary or intentional control effect. In the case of an underwriting by a person who already controls or who is likely after the rights issue to emerge with control of the issuer, we may closely examine whether the issuer has explored or conducted discussions with other potential underwriters. If the issuer has made a number of approaches to potential underwriters, we may also consider the scope, terms and circumstances of those approaches.
Recent dealings	Any dealings by the underwriter or sub-underwriter (or an associate) in renounceable rights, or dealings in the issuer's securities before or during the rights issue, may suggest the underwriter is seeking control.

Disclosure

RG 6.88 It is important that investors receive adequate disclosure about the potential effect and consequences a rights issue or underwriting arrangement may have on control of an entity, to allow them to make an informed decision in response. Information of this kind will generally be required under the disclosure regime applying to the entity and/or the relevant offer. It is not limited to the bare facts and possible scenarios, but may also include details such as the rationale for the fundraising, underwriting arrangements and the potential impact any change in control may have on the entity's future direction and prospects.

> Note: Consider s710, 713(2)(a) and 708AA(7)(e) and our guidance in Regulatory Guide 66 *Transaction-specific disclosure for PDSs* (RG 66) at RG 66.35–RG 66.41 and in Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) at RG 228.146–RG 228.148.

RG 6.89 Adequate disclosure is necessary to satisfy the requirements and objectives of the fundraising and continuous disclosure provisions. However, it is also necessary to address key objectives of Ch 6, such as ensuring that:

(a) any acquisition of control takes place in an efficient, competitive and informed market consistent with the objectives of Ch 6 (s602(a)); and

(b) holders know the identity of any person who may acquire a substantial interest and are given enough information to enable them to assess the overall merits of the transactions (s602(b)(i) and (iii)).

Inadequate disclosure may also adversely impact existing holders' willingness to participate, potentially exacerbating any control effect.

RG 6.90 We refer to some of the information issuers should disclose further in RG 228: see RG 228.129–RG 228.138 (disclosure of interests and benefits), RG 228.160 (allocation policy) and RG 228.166–RG 228.168 (disclosure of

underwriting and sub-underwriting arrangements). When an underwriting arrangement involves a related party, our guidance in Regulatory Guide 76 *Related party transactions* (RG 76) may also be relevant: see RG 76.141–RG 76.148.

> Note: This information should be disclosed regardless of whether the rights issue is being made under a full prospectus, a transaction-specific prospectus or under s708AA.

Member approval

RG 6.91 An alternative to relying on the rights issue and underwriting exceptions is to have the acquisition by an underwriter of any shortfall, or by a holder under a rights issue, approved by members in accordance with the requirements of item 7. Seeking approval of this kind is one way an issuer can address the potential that a rights issue or underwriting arrangement may have an unacceptable control effect.

RG 6.92 When a rights issue or underwriting arrangement is to be approved under item 7, the entity must disclose information about the terms and circumstances of the rights issue and/or underwriting in the explanatory statement accompanying the notice of meeting for member approval.

RG 6.93 We discuss the disclosure requirements for item 7 resolutions generally in Section B of RG 74. An entity seeking approval for a rights issue or underwriting arrangement may need to disclose the matters and circumstances mentioned in Table 4 in particular, so that members have all information material to their decision on how to vote on the resolution.

Shortfall facilities

RG 6.94 Some rights issues are under-subscribed by holders, resulting in a shortfall. In those circumstances, issuers often want to dispose of the shortfall to raise the full amount sought under the rights issue.

RG 6.95 The rights issue exception and the accelerated rights issue exception do not provide for acquisitions by holders under shortfall facilities. This is because offers under a shortfall facility may not be pro rata or on the same terms as the initial offer.

> Note: In contrast we have provided Ch 6D disclosure relief for rights issue shortfall offers. ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84 modifies s708AA and 1012DAA so that shortfall offers will generally not require a prospectus or PDS: see Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189).

ASIC relief: Acquisitions under a shortfall facility

RG 6.96 In limited circumstances we may grant case-by-case relief to broaden the rights issue exception to enable existing members of the entity to participate in a shortfall facility by allowing them to take up any rights that other members have not exercised, even if by doing so they exceed the takeover threshold.

RG 6.97 Our relief enables a rights issue to incorporate a shortfall facility that may achieve a more equal spread than an underwriting arrangement. This is consistent with the principle in s602(c) of giving all holders an equal opportunity to participate in any benefits.

RG 6.98 However, in considering relief we will closely examine the circumstances of the rights issue overall and the potential effect of the proposed shortfall facility in accordance with our policy at RG 6.75–RG 6.90. We will not grant relief if we are concerned that the rights issue exceptions or the proposed shortfall facility may be used for control purposes or may otherwise be contrary to the purposes set out in s602. There may be cause for concern if:

(a) the shortfall offer price is less than the initial rights offer price;

(b) members do not have an opportunity to participate in the shortfall facility or their ability to participate is somehow restricted; or

(c) the allocation method unfairly favours some participants over others.

Conditions applicable to our relief

RG 6.99 We will generally only grant case-by-case relief on the condition that members have received adequate information concerning:

(a) the terms of the shortfall facility (including the timing of the shortfall offer, the price of the shortfall offer, who will be entitled to participate in the shortfall offer, and how the shortfall will be allocated); and

(b) the potential effect the shortfall facility will have on the control of the entity.

RG 6.100 Disclosure of this kind seeks to ensure that members understand how their voting power may be diluted by:

(a) not participating in the rights issue; and

(b) the shortfall facility.

RG 6.101 If the entity is relying on s708AA or 1012DAA for the rights issue offer, this information must be given to the relevant market operator in the cleansing notice within the 24-hour period before the offer is made. If the entity is preparing a prospectus for the rights issue offer, this information must be included in the prospectus.

Note: Before the offer period for the shortfall starts, entities should consider whether their cleansing notice disclosure needs updating. For example, the effect on control is likely to

be different from that originally contemplated if the first offer was significantly under-subscribed by smaller holders and large holders have indicated they will take up the shortfall.

RG 6.102 We may consider other conditions appropriate in certain circumstances.

Underwritten shortfall facilities

RG 6.103 We understand that in some cases entities may choose to supplement the shortfall facility with underwriting arrangements. Our case-by-case relief does not extend to underwriting the shortfall facility. As such, an underwriter must ensure they have the benefit of an appropriate exception if their underwriting arrangement in relation to the shortfall facility could result in the underwriter acquiring more than 20% in the issuer.

Offers to foreign holders: The nominee procedure

RG 6.104 The rights issue exception and the accelerated rights issue exception are limited to an offer to issue securities made to every person who holds securities in the relevant class. This limitation is imposed so that:

(a) each holder has an equal opportunity to participate in the offer; and

(b) it is less likely that any one holder's proportionate holding will increase substantially.

RG 6.105 However, foreign laws and regulations may constrain the issuer from making an offer of securities to a foreign holder. Alternatively, it may be highly impractical to comply with foreign regulations.

RG 6.106 Section 615 recognises that the rights issue exception and the accelerated rights issue exception should be available even if foreign holders do not receive an offer of securities or rights, but cash realised from the sale of the securities or rights. It provides a procedure that allows foreign holders to participate in the benefits flowing from a rights issue that has control implications and seeks to minimise those control effects. The procedure reflects an underlying policy that all holders should have the opportunity to participate equally in the benefits flowing from a rights issue. The treatment is not the same as that for domestic holders, nor is it intended to be.

RG 6.107 Section 615 extends the rights issue exception so that it applies even if the requirements in item 10 are not satisfied for foreign holders if, under the terms of the offers:

(a) the company must appoint a nominee for foreign holders who is approved by ASIC;

(b) the company must issue to the nominee the securities that would otherwise be issued to the foreign holders who accept the offer or 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 net proceeds of the sale (after expenses).

Note: ASIC Corporations (Takeovers – Accelerated Rights Issues) Instrument 2015/1069 modifies s615 so that it also applies to the accelerated rights issue exception.

Specifying foreign holders to which the procedure applies

RG 6.108 Section 615 may be read to require that if an issuer uses the nominee procedure, it must use it for *all* foreign holders.

RG 6.109 Section 615(2) provides that an issuer does not need to use the nominee procedure for all foreign holders of the issuer for the rights issue exception or the accelerated rights issue exception to apply. Section 615(2) allows the issuer to specify in its offers the foreign holders to whom the nominee procedure applies. For example, an issuer could do so by specifying the place of the foreign holder's registered address.

RG 6.110 However, the nominee procedure is an exception to the general rule that a rights issue offer should be made to every holder. The policy behind the rights issue and accelerated rights issue exceptions, referred to at RG 6.104, requires the issuer to make offers to each foreign holder where it is not constrained by regulation from doing so.

Note: See also ASX Listing Rule 7.7, which requires an entity to make offers under a pro rata issue to all holders with registered addresses in Australia and New Zealand and sets out a number of conditions an entity must meet if it does not offer securities to foreign holders.

RG 6.111 An issuer may risk an application to the Takeovers Panel for a declaration of unacceptable circumstances where:

(a) the nominee procedure is used in respect of a foreign holder; and

(b) the offeror is not legally or practically constrained from making the offer to the holder.

ASIC approval of nominees

RG 6.112 ASIC approves nominees for foreign holders under rights issues: s615(a).

RG 6.113 The function of a nominee is to sell securities for the benefit of foreign holders and to distribute the proceeds of sale to the holders. It is our view that nominees should operate with an appropriate standard of professionalism to protect the interests of foreign holders.

RG 6.114 We consider that a person will generally be suitable as a nominee under s615 if that person is:

(a) an Australian financial services (AFS) licensee authorised to provide financial services in relation to the relevant class of securities; or

(b) a nominee subsidiary of a person referred to in RG 6.114(a).

RG 6.115 This is because the obligations of an AFS licensee in Pts 7.6–7.8 of the Corporations Act will usually provide sufficient protection for foreign holders for the purposes of s615. These obligations also mean that the nominee does not necessarily have to be independent of the issuing company.

RG 6.116 However, before approving a person as a nominee we will also consider whether they are in a position to fulfil their responsibilities under s615. For example, we will not approve a person's appointment as a nominee if we are:

(a) investigating the person; or

(b) taking enforcement action against the person.

Consideration of the rights issue and underwriting arrangements

RG 6.117 If it appears that a rights issue may be designed to avoid the requirements of Ch 6 or may otherwise give rise to unacceptable circumstances, we will generally not provide approval under s615 until any matters of concern have been addressed. This is because we will not facilitate a rights issue or underwriting arrangement that may be inconsistent with the purposes of Ch 6 (set out in s602).

RG 6.118 You may wish to address some of the factors discussed at RG 6.75–RG 6.90 and in GN 17 in your application for approval.

The nominee procedure in non-renounceable rights issues

RG 6.119 It seems that if a rights issue offer is non-renounceable, complying with s615 in practice generally involves:

(a) the nominee subscribing for securities that would have been taken up by the foreign holders at the subscription price;

(b) the nominee selling those securities; and

(c) the nominee then distributing the proceeds of sale (less the subscription price and other costs) to foreign holders.

RG 6.120 The application of s615 to non-renounceable rights issues may be problematic if the non-renounceable rights issue price is close to or exceeds the market price. This is because the nominee may suffer a loss in relation to the securities and no proceeds will flow to the foreign holders.

RG 6.121 In contrast to the eligibility criteria for the rights issue exception and accelerated rights issue exception under the takeover provisions, for disclosure purposes issuers are not required to adopt the nominee process for foreign holders in non-renounceable rights issues when relying on the exceptions in s708AA and s1012DAA: see s9A and RG 189.

ASIC relief: Non-renounceable offers

RG 6.122 We may grant case-by-case relief from s615 for non-renounceable rights issues in limited circumstances. We will generally only grant relief where:

(a) the company has demonstrated an urgent need for capital;

(b) there are only a very small number of foreign holders and they hold only a very small number of shares; and

(c) it is unlikely that any proceeds from the sale of securities will be remitted to the foreign holders.

RG 6.123 Examples of situations where it may be unlikely that any proceeds will be remitted to the foreign holders are where:

(a) there are changes in the market price after the rights issue has been announced so that the sale price of the securities will be less than the subscription price; and

(b) the value of shares held by foreign holders is very small and will be exceeded by the costs of engaging a nominee.

RG 6.124 We may be prepared to grant relief of this kind, taking into account the purpose of s615 of ensuring that all holders have the opportunity to participate equally in the benefits flowing from a rights issue. If no proceeds would be distributed to foreign holders, compliance with s615 would mean that the entity would incur costs at a time when it is seeking to raise equity capital and the foreign holders would still not benefit. Relief may be appropriate in these circumstances.

RG 6.125 However, we will not grant relief if we are concerned that the rights issue exception or accelerated rights issue exception may be being used for control purposes: RG 6.75–RG 6.90. Any application for relief would need to address the criteria at RG 6.122 and include monetary estimates supporting the assertion that it is unlikely that any proceeds will be remitted to the foreign holders.

RG 6.126 An alternative solution to the nominee subscribing for securities under s615 is for the entity to structure the rights issue as a renounceable rights issue. Any application for relief would also need to address why it is not possible or appropriate to do so.

Note: For example, this may be because of the time and expense involved or the illiquidity of the entity's shares.

E Underwriting

Key points

Acquisitions by a person as underwriter or sub-underwriter to certain offers of securities are exempt from the general prohibition under the exceptions in items 10, 10A and 13.

These exceptions only apply to arrangements properly characterised as underwriting. Underwriting in the fundraising context involves the assumption of risk that investors do not take up all of the securities on offer. It does not include 'taking firm', market making, or underwriting arrangements to the extent they are contingent on sub-underwriting or 'lower tier' underwriting.

When the underwriter is a related party, an issuer should carefully consider whether holder approval is needed under Ch 2E. If a purpose of the underwriting arrangement is to give a related party underwriter control, the underwriting will not fall within the 'arm's length' exception.

We may also grant case-by-case relief to broaden the dividend reinvestment plan exception in item 11 to extend to acquisitions by an underwriter.

The exceptions for underwriting

RG 6.127 A number of exceptions to the general prohibition apply to acquisitions by a person in their capacity as an underwriter or sub-underwriter of an offer of securities:

(a) the rights issue exception in item 10;

(b) the accelerated rights issue exception in item 10A (inserted by ASIC Corporations (Takeovers – Accelerated Rights Issues) Instrument 2015/1069); and

(c) the underwriting exception in item 13.

Note 1: ASIC may also provide case-by-case relief for underwriting a dividend reinvestment plan: see RG 6.163–RG 6.171.

Note 2: For a discussion on arrangements we do and do not consider 'underwriting', see RG 6.135–RG 6.150.

RG 6.128 The rights issue exception in item 10 extends to acquisitions by a person acting as underwriter or sub-underwriter to a rights issue that complies with the requirements discussed at RG 6.62 and set out in Table 3. The accelerated rights issue exception in item 10A (inserted by ASIC Corporations (Takeovers – Accelerated Rights Issues) Instrument 2015/1069) similarly extends to underwriters and sub-underwriters: see RG 6.67–RG 6.74.

RG 6.129 The underwriting exception in item 13 applies to acquisitions that result from an issue of securities to a person as underwriter or sub-underwriter when:

(a) the issue is made under a disclosure document; and

(b) the effect of the acquisition on the person's voting power is disclosed in the disclosure document.

A disclosure document for this purpose is defined in s9 as a prospectus, profile statement or an offer information statement regulated under Ch 6D: see s9 and 709.

> Note: The exception in item 13 refers to a 'disclosure document'. Although this term is defined in s9 to mean documents of the kind used for offers of securities regulated by Ch 6D, we take the view that s604 applies such that the exception is also available for underwriters of offers of interests in a listed registered managed investment scheme under a PDS: s604(1). This is consistent with the purpose of s604, which is to ensure that the takeover provisions in Ch 6 apply as similarly as possible to listed registered managed investment schemes as they do to companies.

RG 6.130 The exceptions do not apply to acquisitions by an underwriter:

(a) in the case of rights issues, before agreements to issue securities are entered into (items 10(d) and 10A(d)); and

(b) in the case of fundraising under a disclosure document, before the issue of the disclosure document (item 13).

This means, for example, that a form of underwriting where an intermediary acquires securities before the offer to holders under the rights issue, or the issue of the disclosure document respectively, would not be covered by the exceptions.

The underlying policy and application of the exceptions

RG 6.131 Underwriting provides a level of certainty to an issuer that the funds sought under an offer will be raised. To the extent they apply to underwriting, the exceptions reflect an underlying policy that the takeover provisions should not unduly prevent an issuer from using underwriting arrangements to manage the risk of a shortfall in a capital raising. A key premise of the exceptions is that investors should have access to adequate disclosure about the potential control effect any underwriting arrangements may have: see RG 6.88–RG 6.90 and item 13(b).

RG 6.132 The exceptions only apply to 'underwriting'. In considering whether an arrangement is properly characterised as underwriting, we consider the commercial nature of the transaction rather than its legal form. We will regard seriously any attempt to construct agreements that purport to be underwriting agreements in order to avoid the provisions of Ch 6. We discuss our views on what constitutes underwriting for this purpose at RG 6.135–RG 6.150.

> Note: Our guidance on underwriting may also be relevant in other contexts, such as when considering whether an arrangement is properly described as 'underwriting' in a

disclosure document or when a person is seeking to rely on s708A(12). For example, it may be misleading to state that an offer is underwritten by a commercial underwriter where the underwriter's commitment is fully sub-underwritten by a related party of the company and may be terminated if the sub-underwriter defaults: see RG 6.144.

RG 6.133 We will also consider whether underwriting arrangements may give rise to unacceptable circumstances. This may include arrangements that appear to be designed to avoid Ch 6, and arrangements where the potential control effect of the overall arrangement exceeds what is reasonably necessary. Our approach is discussed at RG 6.75–RG 6.93.

RG 6.134 In some cases, underwriting arrangements entered into with related parties may also require shareholder approval: see RG 6.151–RG 6.162.

What is underwriting?

RG 6.135 In general, underwriting means assuming a risk. When used in a fundraising context, it means assuming the risk that the intended investors will not take up all of an offer of securities. An underwriter of an offer of securities agrees to take up any securities not taken up by the intended investors. If the whole offer is taken up by the market, the underwriter takes up none of the securities as underwriter.

Note: See *Australian Investment Trust Ltd v Strand and Pitt Street Properties Ltd* (1931) 31 SR (NSW) 266 *(Australian Investment Trust)*, reversed in the absence of a provision such as s258C in [1932] AC 735. As to the assumption of risk as an essential element of underwriting, see also *Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 187 at 205 *(Aberfoyle)*.

RG 6.136 Under the form of underwriting traditionally employed in Australia, the underwriter legally assumes the shortfall risk by agreeing to subscribe for, or procure subscriptions for, securities not otherwise subscribed for under a public offer: see *Re Licensed Victuallers' Mutual Trading Association; Ex parte Audain* (1889) 42 Ch D 1, *Australian Investment Trust* and *Anemtech Ltd v Eyres Reed McIntosh Ltd* (1986) 10 ACLR 780.

Note: See also Australian Securities Commission, *Underwriting practices*, Report on Public Hearing, ASC Digest 1993, vol 3, PH 52-110, 5 January 1993.

Sub-underwriting

RG 6.137 Section 9 defines 'underwrite' to include 'sub-underwrite'. The Corporations Act does not define 'sub-underwrite'.

RG 6.138 A sub-underwriter assumes some or all of the obligations of the underwriter. That is, the sub-underwriter agrees with the underwriter to subscribe for or buy a certain portion of the shares that the underwriter is obliged to take in the case of a shortfall.

RG 6.139 The underwriting agreement will normally provide that the underwriter must subscribe for, or nominate other persons to subscribe for, shares the subject of a shortfall. The sub-underwriting agreement will normally provide that the sub-underwriter must subscribe for an agreed number or percentage of shares for which the underwriter must ultimately subscribe or obtain subscriptions. The obligation of the sub-underwriter is therefore to the underwriter. The sub-underwriter is not contractually bound to the issuer, although it will usually subscribe for shares directly from the issuer.

Lower-tier underwriting

RG 6.140 There is no self-evident reason why 'underwrite' should not also include 'lower-tier underwriting' (i.e. underwriting below sub-underwriting). The definition in s9 is not exhaustive; as there is no definition of 'sub-underwrite', this term may encompass all tiers of underwriting other than first-tier underwriting.

RG 6.141 Lower-tier underwriting is relatively uncommon. Like a sub-underwriter, lower-tier underwriters would subscribe for shares directly from the issuing company. Like the underwriting agreement, the sub-underwriting agreement may provide that the sub-underwriter will subscribe for, or will nominate another person to subscribe for, shares for which the underwriter is bound to subscribe. Lower-tier underwriting agreements may contain similar provisions. Generally, a lower-tier underwriter is contractually bound only to the underwriter directly above it in the underwriting chain. It would have no contractual obligation to the issuing company.

Arrangements not considered underwriting

Termination rights in underwriting arrangements

RG 6.142 A central element of underwriting is the assumption of risk by the underwriter—in particular the obligation to subscribe for, or nominate other persons to subscribe for, shares in the event of a shortfall: RG 6.135.

RG 6.143 Where an arrangement does not, in substance, involve the assumption of this risk, we take the view that the arrangement is not underwriting. This includes arrangements:

(a) incorporating terms or conditions that, in the circumstances, effectively give the 'underwriter' a general discretion to terminate the underwriting arrangement from the outset (e.g. terms or conditions giving the underwriter a termination right if one or more events over which the underwriter has effective control occur); or

(b) that may otherwise be terminated in circumstances that mean that the 'underwriter' does not, in effect, bear the risk of the shortfall.

RG 6.144 For example, arrangements that permit the underwriter to be relieved of its obligations following a default by a sub-underwriter—either entirely through termination of the agreement, or by reducing the amount of the underwriting commitment by the amount in default—seek to relieve the underwriter of their obligation to subscribe for securities in the event of a shortfall. Accordingly, we do not consider such arrangements to constitute 'underwriting'.

> Note: See *Aberfoyle*. Where an arrangement between the issuer and a principal underwriter is not 'underwriting', any sub-underwriter will also not be able to rely on the underwriting exceptions. This is because sub-underwriting can only exist where there is in fact a principal underwriting, through which the sub-underwriter assumes a portion of the underwriter's shortfall risk. A sub-underwriter does not contract directly with the issuer: RG 6.139.

RG 6.145 Further, arrangements that permit the underwriter to terminate on the basis of an event that is certain, or near certain, to occur (such as a token fall in a relevant market index) are also likely to mean that the underwriter has an option to underwrite and does not, in substance, assume shortfall risk.

RG 6.146 In contrast, arrangements that permit the underwriter to terminate following the occurrence of particular events over which the underwriter does not have effective control (e.g. a materially adverse event such as a deterioration in economic or political circumstances, or an adverse change in the financial position or prospects of the company) will generally not be considered a termination right within the effective control of the underwriter *solely* because the underwriter need only have a reasonable or bona fide view as to matters such as the materiality or effect of the event to invoke the termination clause.

Taking firm

RG 6.147 Taking firm (or 'underwriting firm') can mean an agreement under which a person agrees to subscribe for a specific number of securities that are the subject of a public issue, which the person does not intend to on-sell. The agreement holds whether or not the issue is fully subscribed. This activity:

(a) is not underwriting; and

(b) does not attract the operation of the exceptions.

RG 6.148 An agreement to subscribe for a specific number of securities that is subject to a provision that the issuer (or the underwriter, in the case of an agreement between an underwriter and a sub-underwriter) can recall the securities to satisfy the public demand, is not 'taking firm'. If some of the securities are not subject to recall, they have been taken firm and those securities are not offered or acquired under an underwriting arrangement.

RG 6.149 If the agreement involves an intermediary agreeing to assume the risk of the shortfall, any securities taken by the intermediary as part of the shortfall are taken under an underwriting arrangement. However, to the extent that the same agreement involves the intermediary taking firm from the outset, any securities so taken will not be taken under an underwriting arrangement.

Market making

RG 6.150 Underwriting does not include market making activities or trading as principal by brokers. This is because the risk inherent in such activities does not relate to taking up a shortfall on a bona fide offer to intended investors of all the securities of the offer or issue.

Related party underwriting: Member approval

RG 6.151 Where the underwriter is a related party, an underwriting arrangement may need approval by members under Pt 2E.1. A company that gives a financial benefit to a related party must obtain member approval unless the underwriting is on arm's length terms: s208 and 210. This is a vital part of corporate governance.

RG 6.152 A company should carefully consider obtaining holder approval of the underwriting under Pt 2E.1 where the underwriter is a related party.

Related parties and financial benefits

RG 6.153 An underwriter that controls or is a director of a company will be a related party: s228(1) and (2). The underwriter will also be a related party if it believes, or has reasonable grounds to believe, that it is likely to become a related party at any time in the future: s228(6). This may be the case if:

(a) the underwriter is close to control; or

(b) a substantial shortfall is likely.

RG 6.154 An underwriting is a 'financial benefit' because the company receives underwriting services from the underwriter and may issue securities to the underwriter: s229(3)(d) and (e). The underwriter may receive fees.

Note: See, for example, *Westgold Resources NL v Precious Metals Australia Ltd* (2002) 41 ACSR 672.

The arm's length exception

RG 6.155 Member approval is not needed to give a financial benefit if the benefit is on terms that:

(a) would be reasonable in the circumstances if the public company or entity and the related party were dealing at arm's length; or

(b) are less favourable to the related party than these terms (s210).

RG 6.156 We discuss the meaning of 'arm's length' and some of the factors to consider in determining whether the exception from the requirement for member approval applies in Section C of RG 76.

RG 6.157 In assessing whether an underwriting is on arm's length terms we will consider the commercial nature of the underwriting rather than the legal form. We will consider the underwriting in all the circumstances of the transaction.

RG 6.158 If a purpose of the underwriting is to give the underwriter control, the underwriting will not be on arm's length terms. This means that the factors discussed in Table 4 will also be critical to the question of whether holder approval is required under Pt 2E.1.

RG 6.159 The following may also suggest that the underwriting is not on arm's length terms:

(a) an excessive or undisclosed underwriting fee or other benefit; or

(b) the underwriter benefiting from the company's proposed use of the capital raised (other than as a holder).

RG 6.160 Another factor is whether the company sought to engage a non-related underwriter and what terms were discussed with potential underwriters: see also RG 6.79.

Disclosure

RG 6.161 Where member approval under Ch 2E is required to enter into underwriting arrangements with a related party, the issuer must disclose in the explanatory statement accompanying the notice of meeting information concerning the underwriting arrangement: s219. We discuss this general requirement at RG 76.97–RG 76.126.

RG 6.162 In particular, the company may need to disclose the circumstances mentioned in Table 4, so that holders have all information that is reasonably required in order to decide whether or not it is in the company's interests to approve the underwriting arrangement, and to meet the other information requirements in s219.

Underwriting a dividend reinvestment plan

RG 6.163 Item 11 provides an exception (dividend reinvestment plan exception) for acquisitions exceeding the takeover threshold as a result of an issue to existing holders of:

(a) shares in a company under a dividend reinvestment plan or bonus share plan; or

(b) interests in a managed investment scheme under a distribution reinvestment plan or switching facility.

The exception only applies where the plan or facility is available to all members (disregarding any unavailability to foreign holders).

RG 6.164 Unlike the rights issue exception, the dividend reinvestment plan exception does not extend to acquisitions by persons as underwriters.

ASIC relief: Acquisitions by an underwriter

RG 6.165 We may grant case-by-case relief to broaden the dividend reinvestment plan exception to enable an underwriter of a dividend reinvestment plan to take up any shortfall under the plan, even if by doing so they exceed the takeover threshold.

RG 6.166 This relief is analogous to the rights issue exception, which extends to underwriting. Our relief for acquisitions by underwriters will give certainty to an entity seeking to raise equity capital. The proposed disclosure requirement would ensure that members understand the control implications of not participating.

RG 6.167 In considering whether relief is appropriate we will take into account whether any of the other exceptions in s611 may be available—for example, the 3% creep exception. If another exception may be relied on, generally we will not grant relief. Applicants should address whether other exceptions are available.

RG 6.168 We will also only grant relief where a person is acting as a bona fide underwriter. We will not grant relief if we are concerned that the exception may be being used for control purposes. For example, due to the small amounts usually raised under a dividend reinvestment plan, we understand that it is more likely that an underwriter will need to rely on this relief when it has a significant pre-existing stake in the entity. Accordingly, we would scrutinise the circumstances closely.

Note: Our policy in RG 6.75–RG 6.93 may provide guidance in this context.

RG 6.169 We may also consider granting relief for acquisitions by underwriters of bonus share plans, distribution reinvestment plans and switching facilities.

Conditions applicable to our relief

RG 6.170 We will generally grant case-by-case relief on the condition that, at the time the dividend reinvestment plan is announced, members have received adequate information about:

(a) the key terms of the underwriting;

(b) the identities of any sub-underwriters; and

(c) any associations between the underwriter or sub-underwriter and a controller or one or more substantial holders.

RG 6.171 We may also consider other conditions appropriate in certain circumstances.

F Acquisitions by brokers: Client facilitation

Key points

We will consider granting case-by-case relief to allow a broker or syndicate of brokers to acquire a large parcel of securities from a single client (or associated clients) as principal for prompt disposal in the course of providing client facilitation services. We will only grant relief if it does not appear to us that the broker has a control purpose.

Any relief we give will be subject to conditions designed to restrict the broker's ability to exert control over the relevant entity and to prevent warehousing.

If relief is granted, the broker will still be required to comply with the obligation to give substantial holding notices in s671B.

Acquisitions by brokers acting as principal for client facilitation purposes

RG 6.172 A broker can buy and sell securities as an agent and not acquire a relevant interest in the securities or have voting power in the relevant entity: see s609(3A) and RG 5.

RG 6.173 Sometimes, instead of acting as agent, a broker will acquire securities directly from its clients and briefly hold the securities as principal for prompt resale. This may occur where the client decides to sell their parcel of securities at a firm price to a broker for on-sale. By selling the whole parcel directly to a broker rather than trying to dispose of it in smaller parcels on market, the holder achieves a firm price. Brokers, as professional share traders, may be better placed to handle the sale of a large parcel of securities without causing the share price to fall. The broker assumes the risk the share price will fall in the period between acquisition from their client and on-sale, but also secures business and has the opportunity to profit. This is a form of 'client facilitation'.

RG 6.174 A broker is prohibited by s606 from acquiring securities as principal if as a result it will increase its voting power in a Ch 6 entity from 20% or below to more than 20%, or from a starting point that is above 20%. This will occur where the parcel of securities acquired by the broker from its client is large (over 20% of the entity's issued share capital). An example of where a client may wish to dispose of a large parcel of securities within a short period of time is where the client has made an unsuccessful bid for the entity—that is, the client has acquired over 20% of the entity's securities on issue but not a large enough stake to give them control.

ASIC relief: Client facilitation where there is no control purpose

RG 6.175 We may grant case-by-case relief from s606 to allow a broker or syndicate of brokers to acquire a large parcel of securities from a single client (or associated clients) as principal for prompt disposal in the course of providing client facilitation services. A large parcel is generally a parcel of more than 20%, but may be less depending on the initial voting power of the broker. This relief is known as 'large parcel relief'.

RG 6.176 Syndicates of brokers cooperating to acquire and dispose of a large parcel of securities may also need relief from s606 if they are acting as associates and, as a result of the acquisition, their voting power exceeds 20% (even if individual relevant interests are 20% or less).

RG 6.177 The rationale for granting relief to permit a broker to provide client facilitation services is that its role in providing these services is similar to a broker's role in buying and selling securities as an agent. In these circumstances, the broker will generally be seeking to profit from ordinary broking activities, rather than attempting to obtain or increase control over a Ch 6 entity. Accordingly, where a broker does not have a control purpose, we consider that the commercial benefits to the broker and the broker's clients are likely to outweigh any risk that the purposes of Ch 6 will be undermined.

What we will consider

RG 6.178 We will only grant large parcel relief where we are satisfied that the broker is genuinely providing client facilitation services and it does not appear to us that the broker has a control purpose.

RG 6.179 In exercising our discretion to grant large parcel relief and in considering whether the broker is acting for genuine client facilitation purposes and does not have a control purpose, we will consider the following factors:

(a) whether the broker is acquiring the securities with the purpose of on-selling them, rather than the purpose of holding or voting any of the securities;

(b) the broker's voting power in the entity. We consider that there is a greater risk of our relief being used for control purposes if the broker has a significant voting power in the entity. This is because the broker is less likely to be neutral in their disposal of the securities and may be tempted to use the relief for warehousing. For example, they may do this by helping a potential friendly bidder to build a pre-bid stake in the hope of an attractive offer for their holding; and

(c) how long the broker has had that voting power. We will apply more scrutiny if the broker or its associates have recently been acquiring securities in the entity.

RG 6.180 Even where we do give relief, we will continue to monitor the situation to make sure we have no ongoing control concerns. If we do have concerns that the relief is being used for control purposes, we may apply to the Takeovers Panel for a declaration of unacceptable circumstances. We will look for any indication that, contrary to their initial intention, the broker appears to be holding the securities for control purposes rather than trying to dispose of the securities—for example, where the broker or an associate subsequently makes a bid.

RG 6.181 We suggest that brokers retain records of all disposals made, as we may ask to see this information if we have any control concerns. This information will also assist brokers to demonstrate compliance with their substantial holding obligations: see RG 6.190–RG 6.191.

RG 6.182 Brokers should also be mindful of:

(a) the prohibition against insider trading in s1043A of the Corporations Act (appropriate information barriers should be put in place); and

(b) the disclosure requirements under Ch 6D that apply to a controller offering securities for sale, and subsequent offers for on-sale (s707(2) and 707(5)).

Conditions for our large parcel relief

RG 6.183 Large parcel relief will generally be granted subject to conditions that the broker:

(a) must reduce its voting power in the relevant entity to 20% or less within 14 days of acquiring the relevant securities;

(b) must not exercise any voting rights attached to those securities in excess of 20% without our consent; and

(c) in selling any securities acquired under the relief, must use its best endeavours to obtain as wide a placement as practicable, for the highest practicable price.

RG 6.184 These conditions are designed to restrict the broker's ability to exert control over the relevant entity and to prevent warehousing.

RG 6.185 We are only imposing voting restrictions and a requirement to sell down within 14 days on securities above 20%. This is because the broker could acquire up to 20% without relief. It is also because it may be difficult to dispose of the entire parcel in such a short time frame. However, in the ordinary course, in keeping with the purpose of our relief, we would expect a broker to sell down all of the securities acquired within a reasonable period of time after the acquisition.

RG 6.186 In considering whether to give our consent to permit a broker to exercise votes attached to the securities acquired, we will take into account all the relevant circumstances. However, given the policy underlying our relief (i.e. that the broker does not have a control purpose), we are likely to give our consent only in very rare circumstances.

RG 6.187 In selling down any securities obtained in reliance on our relief (not just the securities above 20%), the broker must attempt to find a balance between obtaining as wide a placement and as high a price as practicable. We will ordinarily interpret 'as wide a placement as practicable' to have been met if, in ordinary market conditions, no person acquires more of the relevant securities from the broker than would constitute 5% of the securities of the relevant entity. Selling securities into a takeover offer would not breach the condition.

RG 6.188 We will not give large parcel relief between the announcement and the holding of any general meeting of the relevant entity's security holders. This will assist in preventing the vote being distorted as a result of a large portion of securities being restricted from voting.

RG 6.189 Applications for large parcel relief should confirm that the broker:

(a) will be acquiring the relevant securities in the course of providing genuine client facilitation services and that the broker does not have any control purpose; and

(b) can meet the conditions for relief in RG 6.183.

Substantial holding disclosure

RG 6.190 Where large parcel relief is granted, the broker will still be required to comply with the obligation to give substantial holding notices under s671B. We will not give relief from this requirement.

RG 6.191 Compliance with the substantial holding provisions will promote the principle that the acquisition of control takes place in an efficient, competitive and informed market: s602(a). It will also provide information to us and the market about the process by which the relevant parcel has been sold down, including whether there have been any off-market transfers. This will assist us if we are concerned that the relief is being used for control purposes.

G Share transfers under s444GA

Key points

Section 444GA allows shares of a company in administration to be transferred by an administrator as part of a deed of company arrangement (DOCA). The transfer may occur without any compensation when the court is satisfied it does not 'unfairly prejudice' the interests of shareholders.

Where a transfer under s444GA will result in a person acquiring a relevant interest in voting shares in a company subject to Ch 6 above 20%, relief from s606 must be applied for and granted by ASIC. We will generally grant relief to facilitate a s444GA transaction where:

- explanatory materials have been provided to shareholders at least 14 days before the s444GA hearing—including an independent expert report (IER) prepared consistent with guidance in RG 111;
- the IER is prepared by an expert other than the administrator or a member from the same firm as the administrator;
- the IER concludes that there is no residual equity value in the company for shareholders; and
- the court grants leave under s444GA.

Share transfers under s444GA

RG 6.192 Section 444GA of the Corporations Act permits a deed administrator to transfer shares under a DOCA either with the written consent of the owner of the shares or where the court grants leave.

RG 6.193 A member of the company, creditor of the company, ASIC or an interested person has the right to oppose an administrator's application for leave. The court may only grant leave under s444GA(3) if it is satisfied that the transfer would not 'unfairly prejudice' the interests of members of the company.

RG 6.194 The interpretation of 'unfairly prejudice' has been the subject of case law, most notably in *Weaver v Noble Resources Ltd* [2010] WASC 182 where Martin CJ at [79] noted that the possibility of prejudice to a shareholder would arise if there were some residual equity in the company:

> … the notion of unfairness only arises if prejudice is established. If the shares have no value, if the company has no residual value to the members and if the members would be unlikely to receive any distribution in the event of a liquidation, and if liquidation is the only alternative to the transfer proposed, then it is difficult to see how members could in those circumstances suffer any prejudice, let alone prejudice that could be described as unfair.

ASIC relief: From s606 for share transfers

RG 6.195 Where a transfer under s444GA will result in a person acquiring a relevant interest in voting shares in a company subject to Chapter 6 above 20%, relief from s606 must be granted by ASIC. This is because there is no statutory exception to the takeover prohibition in s606 for s444GA transfers.

RG 6.196 We may grant case-by-case relief from s606 for s444GA transfers where:

(a) an IER concludes that the shareholders have no residual equity in the company (see RG 111.70 for guidance on the form and content requirements for these reports);

(b) company members are provided with an explanatory statement at least 14 days before the court hearing that:

(i) explains the nature of the application for leave of the court;

(ii) explains members' rights to object;

(iii) explains the requirement for ASIC relief from s606;

(iv) includes a copy or link to the IER;

(v) includes a copy of the originating process documents; and

(c) the court grants leave under s444GA.

RG 6.197 The application for relief and explanatory materials (including the expert's report) should be provided to us at least 14 days before the proposed date of dispatch. We may require additional time for review if further information or clarification is needed to assess the application. Once we are satisfied with the explanatory materials and IER, we will generally provide 'in principle' relief subject to us continuing to monitor the court process and the court making the decision to grant leave to the administrator.

The expert's report

RG 6.198 We generally require an IER prepared in accordance with RG 111 as it provides an independent view on whether there is any equity left for shareholders. This report serves to:

(a) help ASIC in its deliberations on whether to grant relief from s606;

(b) help shareholders decide whether to oppose the application for leave of the court and understand why their shares are being expropriated without any consideration. This assists retail shareholders who would not generally have the resources to engage their own expert; and

(c) may provide further evidence to assist the court in deciding whether to grant leave under s444GA.

RG 6.199 ASIC generally requires that the independent expert report has been authored by:

(a) a suitably qualified expert (see RG 111.134–RG 111.139); and

(b) an expert who complies with the independence requirements in Regulatory Guide 112 *Independence of experts* (RG 112).

RG 6.200 For the purposes of granting relief, we will generally not accept an:

(a) administrator's report prepared under Rule 75-225(3) of the Insolvency Practice Rules (Corporations) 2016 as a substitute for an IER. While there may be some similarities in content, an IER specifically prepared for the purposes of s606 relief in accordance with RG 111 assesses the s444GA transaction from the perspective of shareholders and contains more detailed valuation information; or

(b) IER authored by an administrator or another member of the firm of the administrator. RG 112 sets out our policy on independence and is based on case law establishing the need for an expert to be, and to appear to be, independent.

RG 6.201 Avoiding the perception of a lack of independence may be difficult for an administrator (or another member of their firm or party associated with the administrator's firm) if they do prepare the IER because:

(a) the administrator acts as the agent of the company in administration (s437B) and is deemed an 'officer' of the company with fiduciary responsibilities under s9 of the Corporations Act;

(b) the work they perform is in the nature of 'strategic planning' as they may be involved in assisting the DOCA proponent with formulating the DOCA proposal; and

(c) there is at least the possibility that their ability to recover their fees may be dependent on the success of a DOCA, a situation which may create a heightened appearance of a lack of independence or bias.

RG 6.202 We appreciate that administrators and other insolvency professionals must comply with their statutory and common law duties (and the guidance and professional standards of bodies to which they are a member). However, when considering independence in the context of:

(a) an application for relief from the takeover provisions; and

(b) information for shareholders about a transfer of shares,

our view is that, given the nature of the work, an administrator (or someone else in their firm or associated with their firm) should not prepare 'independent expert' reports as they cannot comply with the concepts of independence outlined in RG 112.

Appendix: Superseded guidance

RG 6.203 This guide discusses the exceptions to the general prohibition in s606. Additional updated guidance on other aspects of Chs 6–6C is provided in:

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

(b) RG 9 *Takeover bids*;

(c) RG 10 *Compulsory acquisitions and buyouts*; and

(d) RG 111 *Content of expert reports*

RG 6.204 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 the exceptions to the general prohibition are listed in Table 5.

Table 5: Superseded regulatory guides

Number	Name of guide
SRG 31	*Acquisitions by a broker acting as principal for client facilitation purposes*
SRG 61	*Underwriting—application of exemptions*
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.
SRG 199	*Broadening the rights issue and dividend reinvestment plan exceptions for takeovers*

Key terms

Term	Meaning in this document
3% creep exception	The exception to the general prohibition in item 9
accelerated rights issue exception	The exception to the general prohibition in item 10A inserted by ASIC Corporations (Takeovers – Accelerated Rights Issues) Instrument 2015/1069
administrator	Has the meaning given in s9 of the Corporations Act Note: It therefore includes both deed administrators and voluntary administrators.
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s9 of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s12 of the Corporations Act
ASX	ASX Limited or the exchange market operated by ASX Limited
bid class	Has the meaning given in s9 of the Corporations Act
bonus share plan	A plan under which holders may elect to forego a dividend and receive instead bonus shares to the value of the dividend at a price set under the plan rules
CASAC	Companies and Securities Advisory Committee
CLERP Act	*Corporate Law Economic Reform Program Act 1999*
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
distribution reinvestment plan	A plan under which holders are able to elect to have any distributions they are entitled to receive automatically re-invested in securities of the issuer
dividend reinvestment plan	A plan under which holders are able to elect to have any dividends they are entitled to receive automatically re-invested in securities of the issuer
DOCA	A deed of company arrangement
DOCA proponent	A person who advocates for the DOCA proposal

Term	Meaning in this document
DOCA proposal	A proposed DOCA or proposed variation of a DOCA
expert	Has the meaning given in s9 of the Corporations Act
financial market	As defined in s767A of the Corporations Act, a facility through which offers to acquire or dispose of financial products are regularly made or accepted
general prohibition	The prohibitions on offers, invitations, acquisitions and transactions in s606 of the Corporations Act
GN 17 (for example)	Takeovers Panel guidance note (in this example numbered 17)
item 10 (for example)	An item of s611 (in this example numbered 10)
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 CLERP Act
pari passu offer	An offer where shareholders are able to participate on a generally equal footing in proportion to their existing holding (e.g. a pro rata rights issue)
prescribed financial market	A financial market prescribed in reg 1.0.02A of the Corporations Regulations 2001
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s9 for the exact definition.
relevant interest	Has the meaning given in s608–609B of the Corporations Act
RG 60 (for example)	An ASIC regulatory guide (in this example numbered 60)
rights issue	Involves an offer by an entity to issue new securities in a class to existing holders of that class in proportion to their holding as at a specified date
rights issue exception	The exception to the general prohibition in item 10
s606 (for example)	A section of the Corporations Act (in this example numbered 606), unless otherwise specified
securities	Has the meaning given to that term for the purposes of Chs 6–6C in s92(3) of the Corporations Act
shortfall	Securities offered but not taken up under an offer
switching facility	A facility through which interest holders are able to switch investments between schemes

Term	Meaning in this document
takeover threshold	The level of voting power specified in s606(1)(c) and 606(2)(b), above which the general prohibition operates
takeover provisions	The provisions of Ch 6 of the Corporation Act that regulate the acquisition of corporate control
taking firm	In the context of underwriting arrangements, an agreement to subscribe for a specific number of securities which the person does not intend to on-sell
underwriting	In the context of a capital raising, broadly the assumption of a risk that investors will not take up all of an offer of securities by agreeing to take up any shortfall
underwriting exception	The exception to the general prohibition in item 13
voting power	Has the meaning given in s610 of the Corporations Act

Related information

Headnotes

3% creep exception, accelerated rights issue exception, acquisitions by brokers, arm's length exception, creeping acquisitions, general prohibition, rights issue exception, takeover threshold, unacceptable circumstances, underwriting exception, voting power

Legislative instruments

ASIC Corporations (Approved Foreign Markets—Buy-backs and Takeovers) Instrument 2015/1071

ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159

ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84

ASIC Corporations (Takeovers – Accelerated Rights Issues) Instrument 2015/1069

ASIC Corporations (Takeover Bids) Instrument 2023/683

Regulatory guides

RG 5 *Relevant interests and substantial holding notices*

RG 9 *Takeover bids*

RG 10 *Compulsory acquisitions and buyouts*

RG 51 *Applications for relief*

RG 60 *Schemes of arrangement*

RG 66 *Transaction-specific disclosure*

RG 71 *Downstream acquisitions*

RG 74 *Acquisitions approved by members*

RG 76 *Related party transactions*

RG 101 *Managed investment scheme buy-backs*

RG 102 *Tender offers by vendor shareholders*

RG 110 *Share buy-backs*

RG 111 *Content of expert reports*

RG 112 *Independence of experts*

RG 189 *Disclosure relief for rights issues*

RG 228 *Prospectuses: Effective disclosure for retail investors*

Legislation

Explanatory Memorandum to the Companies (Acquisition of Shares) Bill 1980, paras 13, 45, 46

CLERP Act

Corporations Act, Ch 2E, 6, 6D, Pt 5.1, Pt 5.3A, 5C.6A, 6A.1, 6C.1, 7.6–7.9, s9, 9A, 228, 229, 444GA, 602, 606, 609, 611, 613, 615, 625(3), 651A, 652C, 655A, 671B

Corporations Regulations 2001, regs 6.2.01, 6.2.02

Insolvency Practice Rules (Corporations) 2016, Rule 75-225(3)

Cases

Aberfoyle Ltd v Western Metals Ltd (1998) 28 ACSR 187 *(Aberfoyle)*

Anemtech Ltd v Eyres Reed McIntosh Ltd (1986) 10 ACLR 780

Australian Investment Trust Ltd v Strand and Pitt Street Properties Ltd (1931) 31 SR (NSW) 266 *(Australian Investment Trust)*

Bisalloy Steel Group Limited [2008] ATP 29

CMI Limited [2011] ATP 4

Dromana Estate Limited 01R [2006] ATP 8

MacarthurCook Property Securities Fund 01 & 02 [2012] ATP 7

Orion Telecommunications Limited [2006] ATP 23

Phosphate Resources Limited [2003] ATP 3

Re Licensed Victuallers' Mutual Trading Association; Ex parte Audain (1889) 42 Ch D 1

The President's Club Limited [2012] ATP 10

Weaver v Noble Resources Ltd [2010] WASC 182

Westgold Resources NL v Precious Metals Australia Ltd (2002) 41 ACSR 672

World Oil Resources Limited [2013] ATP 1

Other documents

Australian Securities Commission, *Underwriting practices*, 5 January 1993

Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980

Companies and Securities Law Review Committee, *Report on the takeover threshold,* 26 November 1984

Legal Committee of CASAC, *Anomalies in the takeovers provisions of the Corporations Law*, March 1994

Takeovers Panel, GN 17 *Rights issues*