



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 9

# Relevant interests in shares

**Chapter 1 — Introductory and general topics**

**Chapter 6 — Acquisition of shares**

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*From 5 July 2007, this document may be referred to as Regulatory Guide 9 (RG 9) or Practice Note 25 (PN 25). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 9.1) or their practice note number (e.g. PN 25.1).*

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## Introduction

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This guide is issued for the guidance of persons involved in share acquisitions and their advisers. It discusses various issues relating to determining a person's relevant interest in shares and includes material which corresponds to NCSC Releases 301, 302 and 342, which it replaces.

Other regulatory guides which consider relevant interests in shares are Regulatory Guide 5 (RG 5) (relevant interests in unissued shares) and Superseded Practice Note 6 (SPN 6) (relevant interests arising from proxies).

*[Historical note: RG 9, Introduction, second para amended 23/1/1995 by deleting the last sentence.]*

In this guide a reference to a paragraph, subsection, section, Division, Part or Chapter is a reference to a paragraph, subsection, section, Division, Part or Chapter of the Corporations Law (Law).

## Relevant interest and entitlement distinguished

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RG 9.1 Chapter 6 of the Law contains provisions relating to the acquisition of shares. In particular, there are thresholds for disclosure of interests in voting shares in listed companies and for restrictions on acquisitions of voting shares in companies. Those thresholds refer to the percentage of voting shares in a company to which a person is entitled.

RG 9.2 Section 609 sets out the basis on which a person's entitlement to shares is calculated. A person is entitled to shares in which the person has a relevant interest: shares in which certain associates have relevant interests and shares which are the subject of certain relevant agreements. A person will be entitled to all of the shares in which the person has a relevant interest but will not necessarily have a relevant interest in all of the shares to which the person is entitled.

## Relevant interests in shares: basic concepts

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RG 9.3 Section 9 provides that a reference to a relevant interest in shares or securities has the meaning given by Div 5 of Pt 1.2. A person only has a relevant interest in a share as provided in Div 5 of Pt 1.2 (s45(2)).

RG 9.4 The fundamental section is s31; the other sections of Div 5 of Pt 1.2 expand and define the concepts of power and relevant interest. Under s31 a person has, for the purposes of Ch 6, a relevant interest in a share if:

- (a) the share is a voting share and the person has power to vote in respect of the share; or
- (b) the person has power to dispose of the share.

RG 9.5 A relevant interest in a share is not to be disregarded merely because of its remoteness or how it arose (s36(2)). A body corporate may be taken or deemed to have a relevant interest in a share in itself (s37).

RG 9.6 Section 30 and 32–36 contain a number of interpretative and deeming provisions which extend the meaning of relevant interest. In particular, “power” to vote in respect of a voting share or to dispose of a share includes power that is:

- (a) power to exercise or control the exercise of the right to vote attaching to the share or over the disposal of the share (s30(2) and 30(3));
- (b) direct or indirect or is or can be exercised as a result of, by means of, in breach of or by revocation of trusts, relevant agreements (see RG 9.24–RG 9.26) and practices, or any of them, whether or not they are enforceable (s30(4), see RG 9.12);
- (c) exercisable by a person alone or jointly with any other person or persons (s30(5) and 36(1)(b));
- (d) express, implied, formal or informal (s36(1)(a));
- (e) power which cannot be related to a particular share (s36(1)(c));
- (f) or can be made, subject to restraint or restriction (s36(1)(d)); and
- (g) deemed to exist by operation of s32 or 33: see RG 9.9–RG 9.19.

RG 9.7 A person is deemed to have a relevant interest in certain shares where s34 or 35 applies: see RG 9.20–RG 9.30.

RG 9.8 Sections 38–43 prescribe a number of circumstances in which a relevant interest is to be disregarded. For example, s41 provides that in limited circumstances a relevant interest arising by virtue of being a proxyholder is to be disregarded (see Superseded Practice Note 6 [SPN 6]) and s39 provides that the relevant interest of a trustee is, in certain circumstances, to be disregarded (see Regulatory Guide 88 at RG 88.9–RG 88.12).

*[Historical note: RG 9.8 amended 23/1/1995.]*

## Section 32

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RG 9.9 Broadly speaking, s32 deems a person to have power to vote or dispose of a share where a body corporate has such power and the body is, or its directors are, controlled by the person.

RG 9.10 Section 32 deems a person to have the same power as a body corporate to vote in respect of or dispose of a share in two circumstances where the body corporate has such power. It may operate to deem a person to have the same power to vote or dispose of a share that a body corporate has notwithstanding the interposition of a number of other bodies corporate: *NCSC v Brierley Investments Ltd (Brierley Investments)* (1988) 6 ACLC 995; 14 ACLR 177.

RG 9.11 The first situation in which s32 deems a person to have power to vote or dispose of a share is where the directors of the body corporate which has such power are accustomed or under an obligation to act in accordance with the directions, instructions or wishes of the person in relation to such matters (s32(c)). The obligation need not be formal and the courts have been prepared to infer such an obligation (see *Brierley Investments*). However, the custom or obligation must be in relation to the exercise of the power to vote or dispose of the share.

RG 9.12 The second situation in which s32 deems a person to have power to vote or dispose of a share is where the person has a “controlling interest” in a body corporate which has such power (s32(d)). In *Brierley Investments* Hodgson J considered the meaning of controlling interest and the operation of s9(3) of *Companies (Acquisition of Shares) Act* (CASA) which is the predecessor of s30(4). Subsection 9(3) of CASA was in similar terms to s30(4) of the Law which provides:

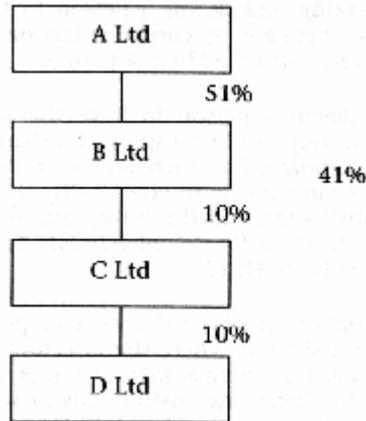
“A reference to power or control includes a reference to power or control that is direct or indirect or is, or can be, exercised as a result of, by means of, in breach of, or by revocation of, trusts, relevant agreements and practices, or any of them, whether or not they are enforceable.”

RG 9.13 In *Brierley Investments* Hodgson J inferred an immediate factual power to control, even though in terms of enforceable legal rights the person concerned only had a potentiality to obtain control of the body corporate concerned.

RG 9.14 In *British American Tobacco Co Ltd v Inland Revenue Commissioners* [1943] 1 All ER 13 the House of Lords considered the meaning of “controlling interest” for the purposes of the *Finance Act 1937* and held that a controlling interest might be made up of two or

more blocks of shares, the votes attached to which were subject to a person through different chains of control.

RG 9.15 Example of the operation of s32:



A Ltd owns 51% of the voting shares in B Ltd and 41% of the voting shares in C Ltd. B Ltd owns 10% of the voting shares in C Ltd. C Ltd owns 10% of the voting shares in D Ltd.

A Ltd has a 51% controlling interest in B Ltd by virtue of its direct holding of B Ltd voting shares and, further, a 51% controlling interest in C Ltd voting shares through the aggregation of B Ltd's 10% holding in C Ltd (because A Ltd controls B Ltd) and A Ltd's 41% direct holding in C Ltd. A Ltd is deemed by s32 to have the same power to vote or dispose of a share as B Ltd or C Ltd has in relation to the share.

Accordingly, A Ltd is deemed to have the same power to vote or dispose of B Ltd's shares in C Ltd as has B Ltd. Similarly, A Ltd is also deemed to have the same power to vote or dispose of the shares in D Ltd held by C Ltd as has C Ltd itself.

## Section 33

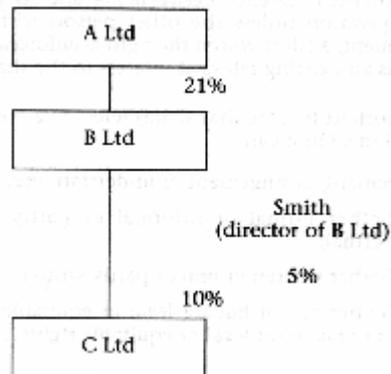
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RG 9.16 Section 33, in general terms, deems a person to have the same power with respect to voting or disposal of a share that a 20% or more owned body corporate and its associates have if that person (together with that person's associates) has or is deemed to have power to vote more than 20% of the voting shares in the body corporate.

RG 9.17 An important difference between s33 and its predecessor under CASA is that it operates to deem a person to have the same power in relation to a share that a body corporate or an *associate* of the body corporate has where the person (together with the person's associates) has power to vote not less than 20% of the voting shares in the body.

RG 9.18 The qualifying words “(other than this section)” in s33 are to make it clear that the section does not operate successively.

RG 9.19 Example of the operation of s33:



A Ltd owns 21% of the voting shares in B Ltd which owns 10% of the voting shares in C Ltd. Smith, a director of B Ltd, owns 5% of the voting shares in C Ltd. A Ltd has power to vote in respect of more than the 20% prescribed percentage in B Ltd and so is deemed by s33 to have the same power to vote and dispose of shares as have B Ltd and its associates (who include Smith). Accordingly, A Ltd is deemed to have power to vote and dispose of 15% of the voting shares in C Ltd.

## Section 34

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RG 9.20 Section 34 is one of the sections which extend the meaning of relevant interest by deeming a person to have a relevant interest in certain circumstances.

RG 9.21 Section 34 applies to certain transactions affecting shares to bring back to the earliest point in time the moment at which a person will be treated as having a relevant interest in the shares: *Re Adelaide Holdings Ltd* (1982) 1 ACLC 543 at 546; 6 ACLR 675 at 679 per Helsham CJ. For this reason the section is referred to by some as the “accelerator provision” (it may cause a relevant interest to arise sooner than it otherwise would).

RG 9.22 The paragraphs of s34 are not mutually exclusive: *Chew v Hamilton* (1985) 3 ACLC 205 at 211; 13 ACLR 440 at 446 per Burt CJ. The ambit of s34(a) (which relates to relevant agreements) is particularly broad and may encompass and subsume s34(b) and 34(c).

RG 9.23 An important difference between s34 and its predecessors is that s34 has no operation unless the other person with whom there is a relevant agreement, against whom the right is enforceable, or who granted the option, has an existing relevant interest in the shares.

RG 9.24 It is important to note that s34(a) refers to a “relevant agreement”. This is defined in s9 to mean:

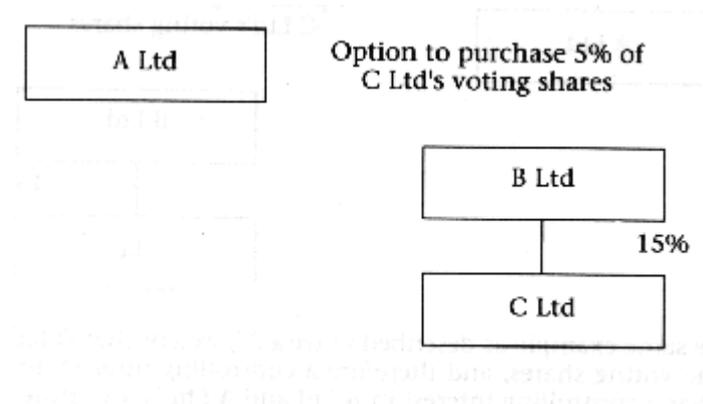
“an agreement, arrangement or understanding:

- (a) whether formal or informal or partly formal and partly informal;
- (b) whether written or oral or partly written and partly oral; and
- (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights”.

RG 9.25 The deeming effect of s34 in relation to relevant agreements is an important departure from the corresponding provisions under CASA which only applied to *agreements*, rights and options. By comparison, s34 of the Law applies to *relevant agreements* (as noted above, defined to include agreements, arrangements and understandings, whether having legal force or not), rights and options. By virtue of the expansive definition of relevant agreement the operation of s34 is wider than its predecessors.

RG 9.26 The term “relevant agreement” should not be taken to suggest a requirement for a legally enforceable agreement. The definition embraces a broad range of relationships that need not necessarily be legal relationships.

RG 9.27 Example of the operation of s34:



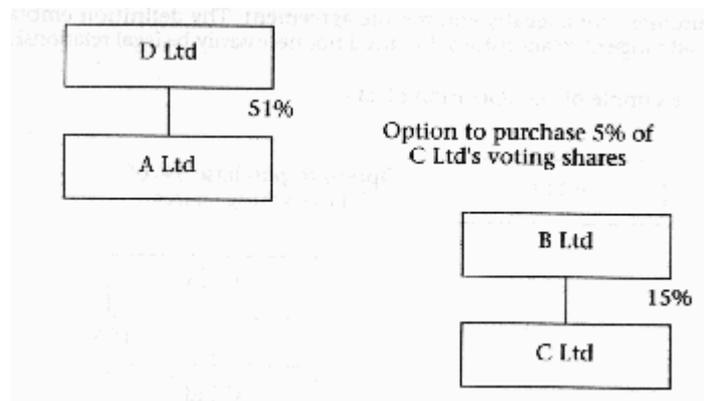
B Ltd owns 15% of the voting shares in C Ltd. B Ltd enters into an option contract with A Ltd under which A Ltd can acquire 5% of the voting shares in C Ltd which are owned by B Ltd. As on exercise of the option A Ltd would have a relevant interest in the 5% of C Ltd shares the subject of the option, pursuant to s34(c), A Ltd is deemed to have a relevant interest in those C Ltd shares.

## Section 35

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RG 9.28 Section 35 only operates where a body corporate is deemed by s34 to have a relevant interest in a share. Paragraphs 35(a), 35(b) and 35(c) correspond to s32(c), 32(d) and 33 respectively. (Note that s33 extends to associates but s35(c) does not.)

RG 9.29 Where s32 and 33 operate they deem a person to have power to vote in respect of a share or to dispose of a share, as the case may be. By virtue of s31, a person who is deemed to have such power will have a relevant interest in the share. By way of contrast, s35 deems a person to have a relevant interest without specifying whether the person is deemed to have a particular power to vote or dispose of the share.



RG 9.30 Example of the operation of s35:

This is the same example as described in RG 9.27], except that D Ltd holds 51% of the voting shares, and therefore a controlling interest, in A Ltd. As D Ltd has a controlling interest in A Ltd and A Ltd is, by virtue of s 34, deemed to have a relevant interest in 5% of the voting shares in C Ltd, D Ltd is deemed, by s 35, to also have a relevant interest in 5% of the voting shares in C Ltd.

## Nature of pre-emptive rights

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RG 9.31 A right of pre-emption confers upon a person (the taker) a right to purchase property offered for sale from another person (the writer) in preference to other persons who do not have such a right. It restricts the power of the writer to dispose of the subject property by prohibiting the writer from disposing of the property to a person who does not hold the pre-emptive right unless an offer has been declined by the taker. Thus a pre-emptive right does not require the writer to dispose of the property but is only triggered by the writer placing the subject property for sale.

RG 9.32 A pre-emptive right can be distinguished from a call option. The taker of a pre-emptive right has the right to purchase the property from the writer only where the subject property is offered for sale by the writer. By contrast, the taker of a call option has the right to purchase from the writer the property covered by the option agreement at a time or times specified in, or ascertained in accordance with, the option.

RG 9.33 A company's articles of association may contain provisions giving existing members pre-emptive rights by prohibiting any shareholder from disposing of shares in the company without having first offered them for sale to the company's other shareholders. Similar rights may also be granted under a separate agreement between individual shareholders.

## **Pre-emptive rights and articles of association**

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RG 9.34 Where a company's articles of association give a member pre-emptive rights over the transfer of shares in a company to a non-member, each member, other than the intending transferor, has an individual right sufficient to entitle that member to maintain a suit against the company to restrain the transfer of the shares to non-members in breach of the articles of association: *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at 29 per Williams J. Section 180 gives statutory force to the contract formed by a company's articles of association.

RG 9.35 The power to maintain a suit for the enforcement of a pre-emptive right in a company's articles of association constitutes a power to exercise control over disposal of the shares within the terms of s31(2) notwithstanding that it can only be exercised by taking proceedings for enforcement: *North Sydney Brick & Tile Co Ltd v Darvall (Norbrik case)* (1986) 4 ACLC 539; 10 ACLR 837 and *Zytan Nominees Pty Ltd v Laverton Gold NL* (1988) 7 ACLC 153; 14 ACLR 524.

RG 9.36 The power that may be exercised by a shareholder in such a situation is, in a sense, negative rather than positive. It allows the shareholder to prevent another shareholder from disposing of shares other than in accordance with the articles of association. However, such a power constitutes sufficient control to give rise to a relevant interest. The power given to an existing shareholder to exercise control over disposal of shares in a company by virtue of pre-emptive rights gives rise to a relevant interest in all of the shares which are subject to the pre-emptive rights.

RG 9.37 It may be that the particular power or restriction which may be exercised by virtue of enforcement of a company's articles of association is

“minor or peripheral” and so does not give rise to sufficient control to constitute a relevant interest: *Norbrik* case 4 ACLC 539 at 545; 10 ACLR 837 at 844 per Mahoney JA. If the imposing of the restriction would not constitute control over the voting or disposal of a share then the right to enforce such a restriction cannot give rise to a relevant interest in that share.

RG 9.38 In *Foodland Associated Ltd v Garina Pty Ltd* (1989) it was held by Commissioner Murray QC, initially on an interlocutory application (7 ACLC 175; 14 ACLR 739) and then at the final hearing (7 ACLC 866; 15 ACLR 530), that the relevant articles of association did not give a shareholder the requisite degree of control to constitute a relevant interest in all the shares subject to the rights. In that case the articles of association provided that shares could only be transferred to another member, to a purchaser of the member’s business, upon retirement to anyone approved by the directors or, if no person satisfying those criteria could be found within eight months, to any person.

RG 9.39 An application made to the Full Supreme Court of Western Australia for a stay of the orders made by Commissioner Murray QC was dismissed: *Garina Pty Ltd v Foodland Associated Ltd* (1989) 7 ACLC 1,182; 15 ACLR 745. Kennedy J was of the view that to hold that the articles of association under consideration gave rise to a relevant interest “would involve a substantial extension of the decision” in the *Norbrik* case and that the prospect of a successful appeal from Commissioner Murray QC’s decision on this issue was not more than “slight” (7 ACLC 1,182 at 1,188; 15 ACLR 745 at 750).

RG 9.40 Where the pre-emptive rights extend over all of the shares in the company, a person who is not a member cannot acquire any shares in a company without acquiring a relevant interest in all the company’s issued shares. An acquisition of shares in such a company by a person who is not a member will breach s615(1) unless made pursuant to one of the specific exceptions in Pt 6.2. It also follows that any further purchase of, or subscription for, shares in the company by an existing member will not increase the entitlement to shares in the company of the acquiring member or the member’s associates.

RG 9.41 A breach of s615(1) could nevertheless occur where, as a result of a purchase of shares by a member from another member, a third party acquired a relevant interest in the shares concerned. For example, s615(1) would be contravened by a member where the third party did not have an entitlement to the shares concerned immediately before acquiring the relevant interest as a result of the purchase by that member of another member’s shares. This would occur where a member, on purchasing the shares held by another member, became a party to a relevant agreement under which the third party was, for example, conferred with a right to purchase the shares concerned.

RG 9.42 If shareholders wish the ordinary protections of Chapter 6 to apply to transfers of shares between members of their company it will be necessary to remove any provision in the company's articles of association giving members a pre-emptive right over the transfer of shares. However, such a measure would have its own legal ramifications.

RG 9.43 Where a person relies on being entitled to all of the voting shares in a company in order to purchase a substantial interest in a company rather than relying on an exception to s615 contained in Pt 6.2, this may constitute unacceptable circumstances under s732.

## Pre-emptive rights and separate agreements

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RG 9.44 A separate agreement which contains pre-emptive rights over shares in a company may operate in the same way, and have similar consequences under Ch 6, as pre-emptive rights in a company's articles of association. Where an agreement gives a person a pre-emptive right over the transfer of shares of any member of a company, the person has power to exercise control over the shares giving rise to a relevant interest: *Re Kornblums Furnishings Ltd* (1981) CLC 40-718; 6 ACLR 25; [1982] VR 123 and *TVW Enterprises Pty Ltd v Queensland Press Ltd (No 2)* (1983) 1 ACLC 875; 7 ACLR 821.

RG 9.45 It follows that if entry into such an agreement would increase the person's entitlement to voting shares in the company to a figure in excess of 20%, then that transaction would result in an acquisition of shares in contravention of s615, unless undertaken in accordance with one of the exceptions to the s615 prohibition.

RG 9.46 Much less formal arrangements may also give rise to a person acquiring a relevant interest in shares. Such arrangements and understandings are discussed below.

## Directors

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RG 9.47 In *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 6 ACLC 383; 13 ACLR 90, Neasey J held that the directors of a company had a relevant interest in shares which the company held in another company. This result followed in Neasey J's opinion as the directors acting together (as a board) had power to vote and dispose of the shares in the other company, each director had such power by virtue of s9(2) of CASA (to which s30(5) of the Law corresponds) and so a relevant interest in the shares.

RG 9.48 In *Zytan Nominees Pty Ltd v Laverton Gold NL* (1989) 7 ACLC 153; 14 ACLR 524, Malcolm CJ held that “the theoretical possibility that one director, being a member of a board of two or more directors acting jointly with others who with him [or her] constitute a majority of the directors would have the power to exercise or control the exercise of the disposal of shares, does not mean that such a director should be regarded as presently having that power, unless facts are proved which show that on a balance of probability the other director or directors would in fact act jointly with the first-mentioned director”.

RG 9.49 In the ASC’s view, the decision of Malcolm CJ is to be preferred over that of Neasey J on this point.

## Acquisitions of shares

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RG 9.50 Subsection 615(1) prohibits a person from acquiring shares in certain circumstances. Section 51 provides that for the purposes of Ch 6:

“a person acquires shares in a body corporate if, and only if:

- (a) the person acquires a relevant interest in those shares as a result of a transaction entered into by or on behalf of the person in relation to those shares, in relation to any other securities of that body corporate or in relation to securities of any other body corporate; or
- (b) the person acquires any legal or equitable interest in securities of that body corporate or in securities of any other body corporate and, as a result of the acquisition, another person acquires a relevant interest in those shares”.

RG 9.51 Under s64 a reference in s51 to entering into a transaction in relation to shares or securities includes a reference to entering into, or becoming a party to, a relevant agreement (as defined in s9, see RG 9.24) in relation to shares or securities and exercising an option to have the shares or securities allotted.

## Arrangements and understandings

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RG 9.52 Arrangements and understandings “can be formed in very simple ways, with nods, winks, smiles, roundabout and evasive language and non-verbal sounds”: *ICAL Ltd v County NatWest Securities Australia Ltd* (1988) 6 ACLC 467 at 493; 13 ACLR 129 at 156 per Bryson J. There may be many circumstances in which a person forms arrangements or understandings in relation to the voting or transfer of shares. For

example, a person contemplating making a takeover offer or takeover announcement may wish to enter into an understanding, enforceable or otherwise, with a shareholder to the effect that the shareholder will accept a takeover offer if it is made. The entering into of such arrangements or understandings has important consequences under the Law.

RG 9.53 The Law is similar to CASA in that an unenforceable arrangement or understanding may lead to a person increasing their entitlement to shares. Under the Law, the forming of an unenforceable arrangement or understanding may give rise to an entitlement in two separate ways under:

- (a) s 609(1)(a) — the arrangement or understanding may be a relevant agreement to which s34 applies, deeming a person to have a relevant interest in the shares to which the relevant agreement relates; and
- (b) s 609(2)(b) — the arrangement or understanding may be an agreement (s9 defines “agreement” in Ch 6 to mean a relevant agreement) under which a person may acquire shares.

RG 9.54 An important difference between the Law and CASA is that under the Law a person may obtain a relevant interest in a share by virtue of an unenforceable arrangement or understanding and therefore “acquire” the share for the purposes of the Law. As noted above, a person will acquire a share, in terms of s51, by acquiring a relevant interest in the share as the result of an unenforceable arrangement or understanding (a “relevant agreement”) to which s34 applies. Determining whether a person has acquired shares is important as s615(1) prohibits a person from acquiring shares in certain circumstances.

RG 9.55 Previously under CASA an arrangement or understanding which fell short of being an agreement which was enforceable, either presently or at some future time, gave rise to an entitlement to shares but did not give rise to a relevant interest. The operation of s9(6) of CASA was not attracted by an unenforceable arrangement or understanding but rather only by an agreement, right or option. However, the formation of an unenforceable arrangement or understanding may have increased a person’s entitlement by virtue of making them an associate of another person who had a relevant interest in shares (s7(4)(b) of CASA).