



ASIC

Australian Securities & Investments Commission

## REGULATORY GUIDE 10

# Classes of shares

## Chapter 6 — Acquisition of shares

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*From 5 July 2007, this document may be referred to as Regulatory Guide 10 (RG 10) or Practice Note 32 (PN 32). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 10.1) or their practice note number (e.g. PN 32.1).*

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## Purpose

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RG 10.1 This guide replaces NCSC Release 350. It is issued for the guidance of persons involved in acquisitions of shares and their advisers.

RG 10.2 In this guide the ASC sets out the views on the meaning of the references to a class of shares in Chapter 6 of the Corporations Law (Law), on the basis of which it will administer Chapter 6.

## Background

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RG 10.3 Section 615 of the Law prohibits an acquisition of shares in a company which would lead to a person becoming entitled to over 20% of the voting shares in the company. It is subject to a number of exceptions. The exceptions created by s616 and 617 permit acquisitions under takeovers of various kinds. It is a common element of these that offers are made for all (or a proportion) of each parcel of shares in a class of shares in the target company and relate only to shares in that class.

RG 10.4 If an offeror offers for or purchases shares included in different classes, it will not comply with s620, 634 or 674, as the case may be, with the result that its offers or acquisitions will contravene s615. For its part, the ASC has to decide if shares are in the same class when assessing takeover documentation and when deciding whether acquisitions apparently made under a takeover scheme or announcement or under s620 are lawful. The Law does not, however, define a class of shares except that s57 provides that: “The shares in a body corporate, if not divided into two or more classes, constitute a class.”

## Summary

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RG 10.5 For the reasons set out below, in the administration of its powers and functions under Chapter 6, the ASC will generally act on the view that two shares are included in the same class of shares only where they are effectively interchangeable, ie where:

- (a) precisely the same rights, obligations and other incidents are attached to each of them; or
- (b) any differences in rights, obligations or other incidents are temporary and can be compensated by a simple and certain adjustment in cash.

RG 10.6 Classes of shares are distinguished only by differences in rights and obligations attaching to the shares in question rather than by differences in how particular persons can use the rights when the shares come into their hands. Differences in the rights exercisable by particular shareholders are not differences between classes of shares,

even if, for some purposes, they distinguish classes of shareholders. Such differences include inability to vote shares which are held in escrow or which are held by a subsidiary in its holding company.

[*Historical note:* RG 10.6 replaced 3/12/2003. The paragraph formerly read: “RG 10.6 Classes of shares are distinguished only by differences in rights and obligations arising from the issuing company’s constituent documents and the terms of issue of the shares in question. Other differences in the rights exercisable by shareholders are not differences between classes of shares, even if, for some purposes, they distinguish classes of shareholders. Such differences include inability to vote shares which are held in escrow or which are held by a subsidiary in its holding company.”.]

## Case law on classes

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RG 10.7 The only case directly in point is *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 6 ACLC 389, concerning very similar provisions in the Companies (Acquisition of Shares) (Tasmania) Code (CASA). Neasey J of the Tasmanian Supreme Court stated at 393:

“The expression ‘class of shares’ has no special meaning in s16(2) of [CASA]. It is a simple English expression, commonly used by text writers on company law. It refers to a category of shares which differs sufficiently in respect of rights, benefits, disabilities, or other incidents, as to make it distinguishable from any other category of shares, if there are any, in the capital structure of the company.”

This passage was applied in a different context by Jacobs J of the South Australian Supreme Court in *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 7 ACLC 309 at 318.

RG 10.8 In *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, a case concerning a scheme of arrangement, Bowen LJ said:

“It seems plain that we must give such a meaning to the term class as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.”

RG 10.9 The principle is applicable to takeovers because there is as much scope for confiscation and injustice in takeovers as in schemes of arrangement. In either case, a person may lose property or rights because of a decision made by others. The law facilitates this outcome

in some instances where the decision will be made by a majority of the persons affected in the same way by the proposal.

## Statutory framework

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RG 10.10 One of the aims of the regulation of takeovers, set out in s731(d), is to ensure that:

“as far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company”.

RG 10.11 To implement this principle fully would mean that persons with strictly similar rights would be treated strictly equally and persons with different rights would be treated fairly, having regard to the differences in their rights.

RG 10.12 Chapter 6 implements the first limb of this policy by:

- (a) restricting offers to shares in the same class (s634 and 674);
- (b) forbidding collateral offers and benefits (s698); and
- (c) requiring the consideration under all of the offers to be exactly the same, with minor exceptions (s636 and 674 and the settlement adjustments required by the Business Rules of the Exchange).

RG 10.13 In effect, equality is achieved by requiring offerees to be dealt with purely as holders of identical securities. Chapter 6 makes no systematic attempt to achieve fairness as between classes, but s703 and 732 have some tendency to do so.

## Relevant provisions of Chapter 6

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RG 10.14 The policy of equal treatment is implemented in detail in s636(1) and 641(1), 665, 666 and 674(1), 676(1) and 677(2). The price which may be offered under a bid for shares included in a class of shares must be equal to the best price paid otherwise for shares in the same class. These provisions reflect an assumption that each share included in a class is of equal value, which is unreasonable unless all of the shares making up the class have precisely the same rights, benefits, disabilities and other incidents attached to them.

RG 10.15 The assumption does not appear to have been made by an oversight. The exceptions to the rule governing the minimum bid price (s636(1)(b) and 641(1)(d) and 681(1)) reveal that Parliament

was aware that the value of shares in a class may change over time. These provisions also indicate, however, that transient differences in rights and obligations should be disregarded in delineating classes. For instance, the identity of a class is not lost because a dividend is paid or a call made on the shares included in the class.

RG 10.16 This conception of a class of shares agrees with the homogeneity required between shares traded on a stock exchange. Even the departures from strict equality reflect the same commercial model, such as the provision in s636(1)(b) that the prices offered for shares may differ by amounts attributable to differences in amounts paid up and in accrued dividends. These price differences are similar to the adjustments required by the business rules governing settlement of on-market purchases (including purchases under takeover announcements and s620). This applies where, for instance, shares in a class are bought cum dividend and delivery is made of shares in the same class, but ex dividend.

## Partly paid shares

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RG 10.17 We discuss whether fully and partly-paid securities are in the same class in light of s605(2) and 619(2) in Regulatory Guide 159 *Takeovers: discretionary powers* at RG 159.21.

[*Historical note:* RG 10.17 replaced 3/12/2003. The paragraph formerly read: “RG 10.17 The ASC does not accept the view that the reference in s636(1)(b) to differences in amounts paid up on shares included in the same class implies that partly paid shares are included in the same class of shares as they will be when fully paid.”.]

[*Historical note:* RG 10.18 deleted 3/12/2003. The paragraph formerly read: “RG 10.18 The ASC does not accept the view that the reference in s636(1)(b) to differences in amounts paid up on shares included in the same class implies that partly paid shares are included in the same class of shares as they will be when fully paid.”.]

[*Historical note:* RG 10.19 deleted 3/12/2003. The paragraph formerly read: “RG 10.19 On this reading, s 636(1)(b) is an extension of the policy of s641(1)(d). If it is extended to longer-term differences, it gives rise to consequences which are commercially unreasonable (such as “prices” for partly-paid shares which are negative quantities) and administratively unworkable (such as prices differing by amounts not open to straightforward calculation).”]

[*Historical note:* RG 10.20 deleted 3/12/2003. The paragraph formerly read: “Although the decision in *Clements Marshall* concentrates on differences in the rights attached to shares, it is entirely consistent with the reasoning in that case to distinguish classes of shares on the basis of differences in liabilities.”]

## Relief

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RG 10.21 We may give case-by-case relief to allow two or more classes of securities to be treated as the same class in a takeover bid and a compulsory acquisition: see Regulatory Guide 159 *Takeovers: discretionary powers* at RG 159.13.

[*Historical note:* RG 10.21 replaced 3/12/2003. The paragraph formerly read: “Where a company subject to a change of control has on issue several classes of shares or other securities, those securities cannot be dealt with under one takeover scheme unless relief is granted. Relief may be available under NCSC Release 160, to allow offers for different classes of shares and other securities to be dispatched together.”.]

## Alternative procedure

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RG 10.22 The ASC will shortly issue a release concerning the cases in which it is appropriate to use a scheme of arrangement to take control of a company in which there are a number of classes of interests.