



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 6

Variation of takeover offers

Chapter 6 — Acquisition of shares (Part 6.3)

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From 5 July 2007, this document may be referred to as Regulatory Guide 6 (RG 6) or Practice Note 4 (PN 4). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 6.1) or their practice note number (e.g. PN 4.1).

Purpose

This guide is issued for the guidance of persons involved in share acquisitions and their advisers. In it the ASC sets out the basis on which it will deal with a number of questions concerning variations of takeover offers under Div 5 and 6 of Pt 6.3 of the Corporations Law.

[Historical note: Paragraph entitled “Purpose” was amended 29/5/1995 by deleting “Paragraphs 1 to 11 are based on NCSC Release 330; the remainder is new.”]

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Extension of offer period under a takeover scheme

RG 6.1 Question:

When a conditional offer under a takeover scheme subsequently becomes unconditional, may the offeror, after the notice referred to in s663(4) has been published, vary the offer by extending the period during which it remains open?

Example:

An offer under a takeover scheme is made conditional upon 90% acceptances being received. On receiving 85% acceptances the offeror declares the offer free of the condition. One week before close of the offer the notice required by s663(4) is published. On the last business day before close of the offer, the offeror has received 89% acceptances and believes that if the offer period is extended it is likely to receive sufficient acceptances to permit the compulsory acquisition of the remainder.

Answer:

Yes, for the following reasons:

- (a) Acquisitions of more than the prescribed percentage of shares are prohibited unless expressly permitted (s 615). One means by which acquisitions are permitted is pursuant to a takeover scheme (s 616). Acquisitions under a takeover scheme proceed by takeover offer, and the offers must comply strictly with Div 1 of Pt 6.3.
- (b) A requirement of the Div (s 638(5)) is that if the offer is, when made, subject to a defeating condition, then a date must be specified or publication of a s663(4) notice, being a date between seven and 14 days before the last day of the offer period.
- (c) Even though an offer which is conditional when made subsequently becomes unconditional, the s663(4) notice must still be published. Subsection 663(5) requires the notice to be published, if the offer period has been extended, on a date later

than the originally specified date by a period equal to the extension period.

- (d) A s663(4) notice is required in addition to a s663(3) notice because some offerees will be unlikely to see the later notice. The purpose of s663(5) is to ensure that where the period of a conditional offer is extended, offerees are still given a final opportunity to accept on the basis of the latest available information on the status of the condition.
- (e) Subsection 663(5) can only apply to determine, before a s663(4) notice is published, the date upon which that notice must be published. It has no relevance to determination of whether an offer can be extended after the s663(4) notice has been published. That issue must be determined by reference to Div 5.
- (f) Subsection 654(1) appears at first sight to indicate that a purported variation of an offer made otherwise than in accordance with Div 5 would be legally ineffective. However, the only effect of a variation made contrary to the Division would be that any subsequent acquisition would not be made in accordance with the takeover scheme (s 616) and would accordingly contravene s615.
- (g) A contravention of s615 or a failure to comply with Div 5 does not render the acquisition invalid (s 615(6) and 660). The effect of Div 5 is therefore to specify the extent to which variations may be made to offers under a takeover scheme without an acquisition pursuant to the varied offer losing efficacy as a permitted exception to s615.
- (h) Subsection 656(1) permits extension of offers, either before publication of the s663(4) notice, in the case of a conditional offer, or at any time when the offer is open, in the case of an unconditional offer. The question whether the variation by extension is lawful (that is, the variation does not result in a subsequent acquisition contravening s615) must be determined as at the time of variation. If at the time of the variation the offer is open and unconditional, the extension is lawful (s 656(1)(b)). The fact that, when originally made, the offer was subject to a defeating condition, and a s663(4) notice has been published in relation to that condition, is not relevant to the lawfulness of extension of an unconditional offer.
- (i) The suggestion that the time for determining the operation of s656(1) is the time at which the offer was originally made receives no support from the actual words of the subsection, and cannot be sustained when it is seen that the only question is

whether or not the variation is such as to render subsequent acquisitions subject to prosecution.

- (j) There are no policy grounds why an unconditional offer which was originally conditional should not be extended after the s663(4) notice has been published.

[*Historical note:* RG 6.1, para (g) amended 29/5/1995 by deleting the number “600” and inserting “660” after the words “(s615(6) and”.]

Subsection 663(4) notice where offers declared unconditional

RG 6.2 Question:

Must a notice of variation which extends the closing date of offers specify a new date for publication of a notice under s663(4) (the “prescribed date”), although the offers have been declared unconditional?

Examples:

- (a) O makes conditional takeover offers for shares in T Ltd. O declares the offers free from all conditions prior to the prescribed date and publishes the notices required by s663(3) and 663(4). O subsequently varies the offers by extending them again.
- (b) Similarly, except that the offers are extended after publication of the s663(3) notice and before publication of the s663(4) notice.

Answer:

- (a) Only one notice under s663(4) need be published, and a new prescribed date must be specified in a notice of variation if, but only if, the notice is registered on or before the prescribed date.
- (b) Subsection 663(4) requires the offeror to publish a notice on the date specified for the purpose in accordance with s638(5). Subsection 663(5) provides that where the closing date of the offers has been extended, the prescribed date is extended by an equal period. Because the prescribed date is one of the particulars of the offer which is affected by the variation, a notice of variation which is registered before the prescribed date must disclose the new prescribed date.
- (c) Subsection 663(4), however, requires one notice to be published, on the prescribed date, and the function of s663(5) is to determine what the date is. Where the offers are varied after the prescribed date and after the offeror has already complied with s663(4), the

operation of that subsection is exhausted and s663(5) does not confer on it a fresh operation.

Variation of offer before dispatch

RG 6.3 **Question:**

May takeover offers be varied pursuant to Div 5 after registration but before dispatch?

Example:

O has registered a Part A statement and offer and served them on T Ltd, but has not yet dispatched offers and copies of the Part A statement to shareholders in T Ltd. O decides to offer a higher price than is provided for by the registered documents and to make offers which are not subject to a defeating condition which is included in the registered offer.

Answer:

No, for the following reasons:

- (a) For an offer to have been made under a takeover scheme, s637(1)(b) requires a copy of the proposed offer to have been served on the target company and s644(1) requires a copy to have been registered. Although s637(1)(b) and 644(1)(b) allow the offeror to omit certain particulars from the copies which are registered and served and fill them up at the time of dispatch, no exception is made for variations to the offer made pursuant to Div 5. While Div 5 enables an offeror to vary a takeover offer, no takeover offers have been made until offer documents have been dispatched to shareholders.
- (b) Division 5 does not refer to mere proposed offers and the procedure it lays down is not appropriate to variations in the terms proposed to be offered, as it requires copies of the notice of variation to be dispatched immediately to offerees (who are by hypothesis unascertained and who would in any case derive little benefit from a notice varying an offer they have not seen) and it does not provide for the target to be given an opportunity to respond to the varied offer in its Part B statement. For similar reasons, a Part A statement may not be varied and offers may not be declared free of defeating conditions under s663, before offers are dispatched.

[Historical note: RG 6.3, para (b) amended 29/5/1995 by the deletion of the last sentence, "Similar reasons apply variations to the Part A statement and to notices under s663 declaring offers free of defeating conditions." and replacing it with "For

similar reasons, a Part A statement may not be varied and offers may not be declared free of defeating conditions under s663, before offers are dispatched.”]

Comment:

Relief is normally available under s728 or 730 to allow documents to be dispatched which differ from the documents which were registered, where the altered documents could have been accepted for registration and where the target company’s opportunity to make a pertinent response in its Part B statement is not prejudiced. The circumstances which led to the alteration may call for notice in the Part A statement.

Variation on prescribed day

RG 6.4 Question:

May an offer which remains subject to a defeating condition be varied on the day specified for publication of the s663(4) notice, if the notice has not been published?

Example:

Takeover offers are made, subject to a defeating condition. The offeror decides to extend the offers and cancels publication of the notice. On the date specified for publication of the s663(4) notice, the offeror seeks to register a notice of extension.

Answer:

Yes, for the following reasons:

- (a) If the extension is effected before the end of the day for publication of the notice, it is effected in accordance with s656(1)(a), which allows a conditional offer to be extended “before the publication of a notice pursuant to s663(4) in relation to offers under the takeover scheme”.
- (b) The extension of the offer before the close of that day also enables the offeror to avoid contravening s663(4), which will then require that the notice be published on a date later by a period equal to the extension. It would not be acceptable for the offeror to vary the offer on a later day, in reliance on its failure to publish the notice, and the ASC would decline to register a notice submitted after that day.

Registration of notices of variation by consent

RG 6.5 Question:

Where a variation is made by the ASC's consent, as required in many cases by s654(1)(c), is the offeror obliged to effect the variation in the manner described in s657 to 659?

Answer:

Yes, for the following reasons:

(a) Subsection 654(1) provides that:

“An offeror may not vary a takeover offer except:

(a) in accordance with this Division;

(b) in accordance with the regulations; or

(c) with the written consent of the ASC and in accordance with any conditions specified by the ASC in the consent.”

Subsection 657(1) provides that “Variations of offers under a takeover scheme shall be made by” following a procedure set out in s657 and 659. Subsections 655(1) and 655(3) and 656(1) provide that “An offeror may vary an offer” in specified ways.

(b) It might be inferred from these provisions that it is only necessary to comply with the procedure set out in s657 and 659 where an offer is varied in a way contemplated by s655(1), 656(3) or 656(1) (ie without the ASC's consent). Such an inference would be unjustified, because it does not give effect to the clear words of s657(1) quoted above.

(c) In providing that the ASC's consent (which is discretionary) is not required to vary an offer in a way contemplated in s655(1), 656(3) or 656(1), s654(1) does not detract from the requirement that every variation be registered and dispatched in accordance with the procedure laid down in s657 and 659.

Comment:

To remove any doubt, the ASC's instruments of consent to variations of offers under s654(1)(c) are expressed to be conditional on the offers being varied in accordance with the provisions of Div 5.

Copies of notices of variation

RG 6.6 **Question:**

Must a copy of every notice of variation be dispatched to each person to whom a takeover offer under the relevant scheme was dispatched?

Answer:

No, for the following reason:

Subsection 657(3) differs from s27(10) of the Companies (Acquisition of Shares) Act and Codes (CASA) in providing that a notice which merely extends an offer which is unconditional as at the time of service on the target company (whether it was unconditional, when first made or has since become unconditional) need not be sent to a person who has accepted the offer.

Comment:

Since under s638(7) the time for provision of consideration under an unconditional contract resulting from acceptance of a takeover offer runs from acceptance of the offer or from the contract becoming unconditional, whichever happens later, an extension of offers which have not been accepted does not affect the rights of offerees who have already accepted. Where the variation affects terms of the offers other than the offer period, however, an offeree needs to be notified of the variation, even if the offer is unconditional and has been accepted, because the offeree may be entitled to additional or alternative consideration under s655(2) or 655(4).

Variations to allow offerees to retain a dividend

RG 6.7 **Question:**

Does s655 enable an offeror to vary an offer to acquire shares cum dividend to the effect that the shares will be acquired ex dividend ie so as to allow offerees to retain a dividend?

Answer:

No, for the following reason:

So far as is relevant, s655(1) deals with a cash sum added to the consideration moving from the offeror. Although the effect on an offeree of allowing him to retain a cash dividend is much the same as

paying him an additional cash amount, the cash is provided by the target company and the variation consists of a reduction in the consideration moving from the offeree, not an increase in the consideration moving from the offeror.

Comment:

While consent is readily granted to a variation to allow offerees to retain a dividend, consent to such a variation (and to any other variation which improves the terms on which shares are to be acquired) will in general be subject to a condition that the offeror extends the additional benefit to persons who have already accepted offers or coupled with a modification varying those contracts to that effect, on the analogy of the statutory escalator in s655(2), which applies where offers are varied under s655(1).

Variation to extend offers to other shares

RG 6.8 **Question:**

May an offeror vary pursuant to Div 5, so as to extend their scope to include shares to which they did not originally relate?

Examples:

- (a) O has made a proportional takeover bid for 50% of the shares in T Ltd. O now wishes to change those offers into full offers.
- (b) O has made a full bid for T Ltd, which is about to issue shares under its dividend reinvestment plan, shares which O wishes to acquire under its bid.

Answer:

No, for the following reasons:

- (a) To vary an offer which relates to certain shares so that it also relates to additional shares is in effect to make an offer to acquire the additional shares. Because takeover offers must be made in accordance with Div 1 of Pt 6.3, an offeror cannot use Div 5 to vary offers so that they relate to additional shares. The nature of the difficulty is clearest where the original offer has been accepted (and has therefore merged in the contract resulting from the acceptance) before it is varied.
- (b) In particular, where partial offers under s635(b) have been made, s652 makes unlawful any offer by the offeror to acquire the shares

in the relevant class of shares to which the partial offers do not relate, including a Div 5 variation to turn the offers into offers to which s635(a) applies: *Albert v Votaint No 320 Pty Ltd (1987)* 13 ACLR 336. Such a variation could, however, be effected pursuant to a modification under s730.

- (c) The same difficulty arises, however, where the additional shares were issued by the target company after the original offers were made, so that offers in accordance with the unmodified Law would not relate to them (see Superseded Practice Note 7 [SPN 7] and Superseded Policy Statement 57 [SPS 57]).

[*Historical note:* RG 6.8, Answer, para (c) amended 29/5/1995.]

Cumulative extensions — right to withdraw

RG 6.9 **Question:**

Do s657(1)(a)(iii) and 658 apply to a variation extending offers by less than a month which, combined with a previous extension, has the effect of postponing for the period exceeding one month the time for payment for the shares to which the offers relate?

Examples:

- (a) Offers under a takeover scheme remain subject to defeating conditions. They have already been extended once, by three weeks, and are to be extended again by three weeks.
- (b) The same offers are to be extended a third time, again by three weeks.

Answer:

Yes, for the following reasons:

- (a) Section 658 gives an offeree who has accepted a takeover offer which is subject to a defeating condition a right to withdraw his acceptance, where the offers under the scheme are varied so as to “postpone for more than one month the time when the offeror’s obligations under the scheme are to be satisfied”. The date from which the postponement is reckoned is the date for the provision of the consideration under the offers as originally dispatched, no matter how short the extension.
- (b) The alternative reading, that the postponement is measured from the date for provision of consideration under the offers as

previously extended, even if previous extensions have already had the effect of postponing the time for payment, is excluded by both the construction of the provisions and their policy.

- (c) Given that the payment date under the contract resulting from acceptance of a conditional offer is calculated from the date on which the offer closes, the facts that s656(3) requires extensions of the offer period to be taken into account for the purposes of s656(1) and that there is no corresponding provision regarding the date referred to in s658 imply that the date from which the postponement is to be reckoned is the payment date under the original offer.
- (d) The policy of s658 is clearly to enable an offeree who has committed himself to sell his shares, and who may be dependant upon the consideration for that sale arriving within a particular time period, to change his mind where that time period is extended to an unreasonable degree.
- (e) Returning to the examples given above, each notice of extension must comply with s657(1)(a)(iii) and 658 applies to both, although offerees will be able to withdraw until well after the close of the offers.

[Historical note: RG 6.9, Answer, para (c) amended 29/5/1995 by replacing the words “subs (1)” with “s656(1)”.]

Comment:

Where offers have been declared unconditional, an extension does not confer on offerees a right to withdraw, because the time for provision of the consideration under contracts arising from acceptances is not postponed. The same result can be achieved without declaring the offers unconditional, by varying them to abridge the time between their close and the date for payment by a period equal to the extension.

[Historical note: RG 6.9, Comment amended 29/5/1995 by the deletion of the words “of the time between their close and the date for payment” and the insertion of the words “the time between their close and the date for payment” between the words “abridge” and “by” in the last sentence.]

Disclosure in notice of variation

[Historical note: Heading replaced 29/5/1995.]

RG 6.10 Question:

Should a notice of variation contain disclosures in addition to the terms of the variation of the offers?

Answer:

Frequently it should, for the following reasons.

A notice of variation of takeover offers must contain, not only the terms of the variation of the offers, but also particulars of the modifications of the Part A statement that are made necessary by the variation: s657(1)(a)(ii). That is, the notice must set out any details which are not in the Part A statement, but which would have been required had the offers originally been in the varied terms.

For instance, if the amount of cash to be paid under the takeover offers as varied is greater than the amount already disclosed, to comply with cl 11 of Part A of s750, the notice needs to disclose the source of the additional cash. If cash is being provided by a lender under an agreement which is conditional as to the terms of the offer, the notice should also state whether the lender has approved the variation.

The ASC will not register a notice of variation if this information is not included.

The notice does not have to contain other disclosures which would have been necessary in a new Part A statement unless s657(2) applies. The offeror may include additional information if it is relevant, true and not misleading. The ASC prefers notices of variation to set out information published during a bid that has not been posted to offerees. This might include notices that conditions have been waived or satisfied.

[Historical note: RG 6.10 inserted 15/8/1994 and replaced entirely 29/5/1995.]

Variation of bid involving alternative considerations

RG 6.11 Question:

If a takeover offer allows offerees to choose between alternative considerations for their shares, can the offer be varied under s655(1) (that is, rather than with the ASC's consent under s654(1)(c) or by modification under s730)?

Examples of bids involving alternative considerations are:

- (a) a bid where accepting shareholders may accept for either cash on the one hand or scrip on the other; and

- (b) a bid where accepting shareholders may accept for either a mixture of cash and scrip on the one hand (that is, a mixed consideration), or just cash on the other.

Answer:

No, for the following reasons.

Purpose and policy

- (a) Sections 654-6 provide for variations to takeover offers made under a takeover scheme. Paragraph 654(1)(c) provides that an offer may be varied with the ASC's consent. Sections 654(1)(a), 655 and 656 allow certain variations to be made without consent. These are extensions of time (s 656), the addition of a cash alternative as consideration (s 655(3)), and various increases in the whole or a part of the consideration specified in the offer (s655(1)).
- (b) Section 655(1) and 655(2) does not apply to a bid involving alternative considerations because:
- (i) the references in s655(2) to "the consideration", using the definite article and the singular number, mean that s655(1) does not apply to a bid involving more than one consideration;
 - (ii) the ASC may allow a variation not within s655 by consent under s654(1)(c) or modification under s730; and
 - (iii) s655(1) and 655(2) allows variations as of right in certain cases where the ASC's consent is not required. These variations will have the same effect on all offerees.
- (c) Accordingly, s655(1) and 655(2) allows straightforward variations which do not require the ASC's consent or the imposition of conditions. They apply where the offer is topped up in an easy and uncomplicated way and the top up flows through to offerees who have already accepted. The corollary is that a bid which involves alternative considerations cannot be varied under s655(1) and 655(2). This type of bid may only be varied with the ASC's consent under s654(1)(c) or by modification under s730.

Interpretation of s655(1) and (2)

- (e) The words "part of the consideration" in s655(1):

- (i) are included for the purposes of a bid involving mixed consideration (for example, a bid offering both a scrip component and a cash component to an accepting offeree); and
 - (ii) should not be read as meaning that s655(1) applies where the bid offers a choice between two or more alternative considerations.
- (f) Section 655(2) provides for the consequences which automatically flow when a “part of the consideration” is varied under s655(1); for example, only the scrip component or only the cash component. Applying s109R so that references to the singular include the plural, s655(1) equally applies where both components are varied.
- (g) It has been argued that s109R also applies to the references in s655(2) to “the consideration” in the singular form, so that s655(2) applies to a bid involving two or more alternative considerations.
- (h) This argument is not correct because s109R only applies “unless the contrary intention appears”; that is, if the use of the plural in place of the singular changes the character of the legislation: *Blue Metal Industries v Dilley* (1969) 117 CLR 651 at 658. That is clearly the case here. The reason is that s655(2) does not contain mechanisms to deal with the issues arising on the variation of a bid involving alternative considerations, where either or both alternatives are topped up. For example:
- (i) Section 655(1) does not expressly prevent an offeror from varying only one of two alternatives. If the subsection applies in the case of a bid involving a choice between cash and scrip (for example), a contract on the basis of the scrip alternative is automatically varied under s655(2) where only the cash alternative is topped up. The consideration under that contract becomes the cash amount as varied under s655(1). On the other hand, if only the scrip alternative is topped up, offerees who accepted the cash alternative could find themselves the unwilling recipients of scrip. This result is incongruous because it would frustrate the choice made by an accepting offeree.
 - (ii) This result could be avoided by reading the words “the consideration” in s655(2) as “the corresponding consideration”. However, this would mean that where an offeror tops up alternative A but not alternative B, the top up flows only to offerees who had already accepted alternative A.

There would be no mechanism for offerees who had already accepted alternative B to reconsider their choice, even though their choice would have been effectively invalidated by the variation. This is in contrast with s655(4) and 667 which provide

that an offeree can choose a cash sum in substitution for another alternative already accepted.

- (i) These results are clearly inconsistent with a policy objective of the Eggleston Committee as reflected in s731(d) and 732(d): limitations should be placed on the freedom of an offeror to ensure “that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered”. In particular, the Committee recommended that “an offeror who increases the price offered in respect of some shareholders must pay the increased price to those who have already accepted”. (See para 18(b) of the Second Interim Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeover Bids, 1970, NSW, p 8.)

[*Historical note:* Heading, “Variation of bid involving alternative considerations” and RG 6.11 inserted 29/5/1995.]

Relief: variation of bid involving alternative considerations

RG 6.12 Question:

When will the ASC give relief to allow the variation of a bid involving alternative considerations?

Answer:

- (a) The ASC will allow the variation of a bid involving alternative considerations only if two requirements are both met. First, offerees who have already accepted that alternative must receive the top up. This is consistent with s655(2).
- (b) Secondly, offerees who have already accepted another alternative must be given:
 - (i) The opportunity to change their minds and accept the alternative which has been increased. This will be required even if the offeree has accepted for a consideration which has also been topped up. Offerees need not, however, be given the opportunity of withdrawing completely.
 - (ii) At least seven days to consider the improved offer, even if this requires an extension of the offer period.
- (c) The second requirement is consistent with s655(4)(b). It is also consistent with the policy that an offeree should be able to reconsider the whole offer when there is a significant change to

the form of consideration. It also avoids the mischief described in para (h) of RG 6.11 that s655(1) and 655(2) should not operate so as to frustrate an accepting offeree's choice between alternative considerations.

- (d) The second requirement will therefore not be imposed where:
 - (i) both alternatives will be varied; and
 - (ii) the ASC is satisfied that the alternatives will be topped up equally, either absolutely (for example, by \$1) or relatively (for example, by 10%).

This is because a variation which does not alter the relative merits of alternative considerations does not invalidate the choice made by an accepting offeree.

- (e) The ASC will normally only give relief to allow the variation of a bid involving alternative considerations if the offeror applies for a modification under s730 in the form of:
 - (i) Pro Forma 114 [PF 114] where para (b) and (c) of RG 6.12 apply; or
 - (ii) Pro Forma 115 [PF 115] where para (d) of RG 6.12 applies.
- (f) The ASC will give relief by modification rather than by consent under s654(1)(c). This is so that the contract between an offeror and offerees who have already accepted is automatically varied by operation of s655(2)(a) as modified. This is consistent with the existing scheme of s655. It will also ensure that contract law remedies are available to an offeree if the offeror breaches the varied contract.
- (g) Where appropriate, the modification will apply s655(4)(c) to shares returned by offerees (see also s195(15)).

[Historical note: RG 6.12 inserted 29/5/1995. Amended 17/6/1996 by deleting the last paragraph.]