ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 171

Anomalies and issues in the takeover provisions

Related instruments [CO 01/1541], [CO 01/1542], [CO 01/1543], [CO 01/1544], [CO 01/1545], [CO 04/0631]

Chapter 6 — Takeovers
Chapter 6A — Compulsory acquisitions and buy-outs
Chapter 6B — Rights and liabilities in relation to Chapter 6 and 6A matters
Chapter 6C — Information about ownership of listed companies and managed investment schemes

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From 5 July 2007, this document may be referred to as Regulatory Guide 171 (RG 171) or Policy Statement 171 (PS 171). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 171.1) or their policy statement number (e.g. PS 171.1).

What this guide is about

RG 171.1 In this guide ASIC addresses issues and anomalies in Chapters 6–6C of the Corporations Act 2001 (the Act). These issues have arisen from practical experience following commencement of the Corporate Law Economic Reform Program Act 1999 (the CLERP Act). The CLERP Act rewrote the takeovers, substantial holding and compulsory acquisition provisions.

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RG 171.2 Significant policies or modifications of the Act explained in this statement include:

(a) that the members of a listed managed investment scheme can call a meeting to change a responsible entity by ordinary resolution: s601FM(1).

see RG 171.6–RG 171.11

(b) That a bidder may risk a declaration of unacceptable circumstances for a downstream acquisition where:

(i) the bidder relies on the exception in item 1 of s611 from s606 for a takeover bid; and

(ii) the downstream acquisition is not merely incidental to the upstream acquisition.

see RG 171.41–RG 171.49

(c) That in a scrip bid, the bidder must disclose prospectus information where it is authorised by the issuer to offer the securities under the bid. This is even if the bidder does not control the issuer: s636(1)(g).

see RG 171.125–RG 171.132

(d) That in determining whether a bidder meets the second limb of the test for compulsory acquisition in s661A(1), the 75% test, securities:

(i) held by the bidder or their associate at the date of the first offer under the bid; or

(ii) issued to an associate of the bidder during the offer period,

are excluded from the number of securities acquired and from the number of securities that the bidder offered to acquire under the bid.

see RG 171.148–RG 171.159

(e) That a registered managed investment scheme or a mortgagor of securities may meet the 90% test for compulsory acquisition although their interest in securities may not constitute “a full beneficial interest”.

see RG 171.160–RG 171.176

(f) That parties to a relevant agreement are not associates merely because the agreement contains a provision giving a party the

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right to dispose of securities in the designated body or to control the exercise of a power to dispose of the securities.

see RG 171.197–RG 171.208

RG 171.3 Class orders [CO 01/1541]–[CO 01/1545] implement much of the policy discussed in this guide.

RG 171.4 Mostly, this guide deals with issues and anomalies identified in our policy proposal paper (September 2000). The guide deals with issues and anomalies in section order.

RG 171.5 Following the CLERP Act, there were two different definitions of "associate" in s9 and s10–17. We proposed to deal with this issue by class order. But the Financial Services Reform Act 2001 addresses the issue, along with other amendments to Chapters 6–6C: Schedule 1 Pt 2 and Schedule 3 Pt 1 of the Act.

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A Changing the responsible entity

Our policy

RG 171.6 Our [CO 01/1541] modifies s601FM to make it clear that the members of a listed managed investment scheme can request or call a meeting of members under Division 1 of Part 2G.4 to consider and vote on ordinary resolutions to change the responsible entity of the scheme.

Underlying principles

RG 171.7 The members of a listed managed investment scheme may change the responsible entity by ordinary resolution, consistent with the position for changing company directors.

Explanation

RG 171.8 Section 601FM(1) says that if the members want to change the responsible entity, they "may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution". It also provides: "The resolution must be an extraordinary resolution if the scheme is not listed".

RG 171.9 However s252B to 252D in Division 1 of Part 2G.4, the machinery provisions for calling a meeting, refer to special or extraordinary resolutions only. In contrast s252L(1A)(c) refers to an ordinary resolution. The paragraph says that if members put to a meeting a resolution to change the responsible entity, it must be an ordinary resolution.

RG 171.10 This issue arises because the CLERP Act s604 extended the takeover provisions to listed managed investment schemes: Explanatory Memorandum for the CLERP Bill.[1] The Explanatory Memorandum states s601FM "mak[es] it clear that the manager of a listed managed investment scheme can be replaced by a simple majority of unit holders who vote at a duly convened meeting".

RG 171.11 Austin J considered s601FM in a recent judgment: *MTM Funds Management Ltd v Cavalane Holdings* (2000) 35 ACSR 440. His Honour found at 452 that:

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[1] Explanatory Memorandum paras 7.54 to 7.56

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The amending legislation systematically changes many provisions to reflect the drafter's view that a resolution to remove the responsible entity should be an ordinary resolution in the case of a listed scheme…Section 252B is, however, not amended. If the consequence of not amending it is that a special or extraordinary resolution is required, then the clear legislative policy enunciated in the explanatory memorandum is thwarted…s601FM(1) provides that the resolution for removal and replacement is to be an ordinary resolution, and s252B merely deals with the machinery for requisitioning the meeting.

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B Relevant interest: financial accommodation — s609(1)

Our policy

RG 171.12 Our class order [CO 01/1542] extends the financiers exclusion in s609(1) to a relevant interest acquired by a person (the security trustee) on ordinary commercial terms, for the benefit of one or more financiers, in relation to financial services provided in the ordinary course of the financier's business of providing financial services. The class order also extends the exception in item 6 of s611 to a security trustee.

RG 171.13 Class order [CO 01/1542] also makes it clear that the exclusion in s609(1) is not limited to the initial financier (or its security trustee), but applies to a purchaser of the mortgage.

RG 171.14 Class order [CO 01/1542] clarifies that s609(1) and item 6 of s611 extend to a relevant interest acquired by a financier because its lending is supported by a negative pledge covering the securities.

Underlying principles

RG 171.15 A person should not have a relevant interest in securities merely because they participate in common commercial arms-length mortgage structures and transactions. The exclusion should extend to:

(a) persons holding a mortgage on trust for a financier in the ordinary course of the financier's business of providing financial services;

(b) purchasers of such a mortgage; and

(c) financiers where their lending is supported by a negative pledge.

Explanation

RG 171.16 Section 609(1) provides an exclusion from the definition of "relevant interest" for a person who takes a mortgage, charge or other security in the ordinary course of the person's business of providing financial services and on ordinary commercial terms. In this context, "financial services" means money lending and other financial accommodation, that is, financing arrangements including

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for example the grant of bill facilities.[2] (Following the commencement of the FSR Act[3], s609(1) will refer to "the provision of financial accommodation by any means" instead of "providing financial services". The new phrase covers the same financing arrangements.)

RG 171.17 There is a corresponding exception under item 6 of s611 from the main takeover prohibition in s606. This exception is for an acquisition that results from an exercise of power under a mortgage or the appointment of a receiver.

Security trustee

RG 171.18 Lending transactions are often structured so that a person (the security trustee) takes and holds the mortgage for the benefit of financiers. The security trustee usually has a relevant interest in the securities covered by the mortgage because it has the power to dispose of those securities. Without our relief, the security trustee may not be covered by the exclusion in s609(1). Section 609(1) may require the mortgage to be taken in the ordinary course of the security trustee's business of providing financial services, lending money or providing other financial accommodation. It is unlikely that the security trustee is in this business.

RG 171.19 Class order [CO 01/1542] also extends the exception in item 6 of s611 to a security trustee because without our relief item 6 requires that the security trustee's business is lending or providing other financial accommodation.

Receiver

RG 171.20 It is likely that the equivalent provision under the old Law covered an acquisition by a receiver appointed by the financier: *Haughton Properties Pty Ltd v Sandridge City Development Co Pty Ltd* (1994) 13 ACLC 1. But, without our relief, the drafting of item 6 of s611 may disturb this result. The item refers to appointment "as a receiver". The item applies to a person appointed as receiver, but only if the person's .ordinary business includes the provision of financial accommodation: item 6(a). A receiver is unlikely to be in this business.

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[2] Legal Committee of CASAC *Anomalies in the takeovers provisions of the Corporations Law Report* (March 1994) p9-10. The Legal Committee suggested "financial accommodation" as a concept broader than money lending.

[3] Pt 2 of Schedule 1, Consequential amendments

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Purchaser of a mortgage

RG 171.21 The exception in s609(1) is limited to a “mortgage, charge or other security taken for the purposes of a transaction entered into by the person”. This may not extend to purchasers of mortgages. It is uncertain whether the purchaser acquires the mortgage for the purposes of a loan “entered into” by the purchaser. While the use of the word “acquired” in s609(1)(a) suggests that the section was intended to cover the secondary mortgage market, our class order is designed to remove any doubt.

Negative pledge

RG 171.22 Negative pledges are used by financiers to protect themselves in corporate debt financing. But there may be uncertainty whether a negative pledge is covered by the reference to “other security” in s609(1). A negative pledge is a contractual promise by a borrower to the financier that the borrower will not create an encumbrance on its assets (the securities) in favour of another financier. A negative pledge may not constitute “security”, because it does not give the financier any proprietary interest in assets of the borrower.

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C Relevant interest: dealer—s609(3)

Our policy

RG 171.23 Our class order [CO 01/1542] modifies s609(3) so that a securities dealer does not have a relevant interest in securities of its client merely because the dealer has received:

(a) specific instructions from the client directing the dealer to dispose of the securities;

(b) in the ordinary course of the dealer's securities business.

Our class order [CO 01/1542] also clarifies that the exception does not cover dealer-managed discretionary accounts.

Underlying principles

RG 171.24 A securities dealer should not have a relevant interest in securities where it is merely acting under specific instructions from its client to dispose of the client's securities. This is because:

(a) the dealer has limited discretion in disposing of the securities; and

(b) the dealer's power to dispose is for a limited period.

Explanation

RG 171.25 Section 609(3) provides an exclusion from the relevant interest concept for a securities dealer that holds securities on behalf of its client in the ordinary course of its securities business. (Following the commencement of the FSR Act[4], s609(3) will refer to:

(a) a "financial services licensee" instead of a securities dealer; and

(b) a "financial services business" instead of a securities business.)

Dealer "holds" the securities

RG 171.26 Without our relief, the exclusion applies only when the dealer *holds* the securities for the client. Normally, a dealer does not hold securities on behalf of its client. A dealer is normally agent of its client rather than trustee. The old Law equivalent did not require that

[4] Pt 2 of Schedule 1, Consequential amendments

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the dealer held the securities. Section 40 of the old Law merely referred to "authority to exercise powers as the holder of the relevant interest only because of instructions given to the person…, to dispose of the share on another person's half". A dealer is authorised to exercise powers as the holder (specifically, the power to dispose) without actually holding the securities.

Managed discretionary accounts

RG 171.27 The exclusion in s609(3) was intended to cover only relevant interests of a dealer that arise as a result of specific instructions from a client directing the dealer to dispose of the securities. The exclusion does not cover managed discretionary accounts, where the dealer has a broader discretion to control the disposal of the client's securities.

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D Voting power: acquisition within group — s610(3)

Our policy

RG 171.28 Our class order [CO 01/1542] gives relief from s610(3) for a subsidiary to acquire securities from its holding company. Under our relief, the subsidiary's voting power is not taken to have increased under s610(3) as a result of the acquisition.

RG 171.29 Our relief does not apply where as a result of the acquisition, the voting power of a person outside the group increases: see RG 171.34. A person is outside the group if they are not a subsidiary of the ultimate holding company.

Underlying principles

RG 171.30 In general, a person should not be free to acquire a relevant interest in voting shares from its associates without triggering s606. Commercially, there may be a significant difference between a person having a relevant interest in shares in a company and the person's associate having a relevant interest. The main takeover prohibition in s606 addresses a change of control over a company: s602. An acquisition from an associate may change control over a company.

RG 171.31 But an acquisition of securities by one group company from another should not trigger s606, unless it increases the voting power of a person outside the group in the issuer of the securities. Unless the transfer increases the voting power of a person outside the group, it cannot change ultimate control over the issuer.

Explanation

RG 171.32 In the absence of s610(3), the voting power of a person who:

(a) does not have a relevant interest in voting shares; and

(b) acquires voting shares from its associate,

would not increase. This is because the associate's votes are already counted in the person's voting power: s610(1). Section 610(3) deems that a person's voting power has increased so that s606 may be triggered.

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RG 171.33 Section 610(3) applies to acquisitions from associates. Members of a corporate group are associates of each other: see paragraph (a) of "associate" definition in s12.[5] There may be a problem where s610(3) deems that the voting power of a group company has increased because it acquires securities from another group company.

Person outside the group

RG 171.34 Our class order does not apply where as a result of an acquisition by a subsidiary from its ultimate holding company, the voting power in the issuer of a person outside the group increases.

RG 171.35 This underlines the existing position in the Act that an acquisition by a subsidiary from its holding company can result in a breach of s606 where the subsidiary, or a group company in another part of the group:

(a) has a holder outside the group with above 20% voting power or with control–s608(3); or

(b) has an agreement with a person outside the group for the purposes of controlling the issuer of the securities.

Relevant interests through bodies: s608(3)

RG 171.36 Section 610(3) is not triggered where s608(3) applies to give a person a relevant interest. Section 610(3) operates only where the person does not have a relevant interest before the transaction.

Acquisition from sibling

RG 171.37 Section 610(3) is not triggered by an acquisition of securities from a sibling company because s608(3) will have deemed the acquirer to have a relevant interest in the securities of its sibling. Section 608(3)(a) deems a person to have the relevant interest of a body corporate in which the person's voting power is above 20%. The acquirer has over 20% voting power in its sibling because their holding company's votes in the sibling are counted in the acquirer's voting power: s610(1). The holding company is the acquirer's associate.

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[5] Introduced by the FSR Act Pt 1 of Schedule 3

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Acquisition by a subsidiary from intermediate company

RG 171.38 Nor is s610(3) triggered by an acquisition of securities by a subsidiary from its holding company, if the holding company is an intermediate company in the group. The subsidiary already has the relevant interest that the intermediate company has in the securities because of s608(3). The subsidiary has voting power above 20% in the intermediate company. The subsidiary has the voting power of the ultimate holding company in the intermediate company. The ultimate holding company is the subsidiary's associate.

Acquisition by subsidiary from ultimate holding company

RG 171.39 But s610(3) is triggered where a subsidiary acquires securities from the ultimate holding company. Section 608(3) does not apply. A subsidiary does not have voting power above 20% in its ultimate holding company: s608(3)(a). Nor does the subsidiary control its ultimate holding company: s608(3)(b).

RG 171.40 For simplicity, our class order applies to any transfer from a holding company (not just an ultimate holding company).

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E Exception: downstream acquisitions under bid — item 1

Our policy

RG 171.41 A bidder may risk a declaration of unacceptable circumstances for a downstream acquisition where the bidder relies on item 1 of s611, acquisitions as a result of acceptances under a takeover bid. A bidder may risk a declaration where the downstream acquisition is not merely incidental to the upstream acquisition. The downstream acquisition is not incidental where:

(a) the shares in the downstream company comprise a substantial part of the assets of the upstream body corporate (in most circumstances, over 50%); or

(b) control of the downstream company is one of the main purposes of the upstream acquisition.

RG 171.42 A bidder would rely on item 1 only if the upstream body is not listed on a stock exchange or an approved foreign exchange: see the downstream acquisition exception in item 14 of s611.

Underlying principles

RG 171.43 If a bidder makes a bid where the downstream acquisition is not incidental to the main purpose of acquiring the upstream company, holders in the downstream company should have a reasonable and equal opportunity to participate in any benefits accruing through the proposal: s602(c).

Explanations

RG 171.44 Item 1 of s611 says an acquisition that results from the acceptance of an offer under a takeover bid is exempt from the main takeover prohibition in s606(1) and (2). We doubt that item 1 of s611 covers downstream acquisitions where a bidder acquires voting shares in the upstream body corporate under a takeover bid. But we recognise that there are differing views on this issue.

RG 171.45 A downstream acquisition is an acquisition of voting shares in a downstream company resulting indirectly from an acquisition of shares in an upstream body corporate.

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RG 171.46 There is a separate exception for downstream acquisitions under item 14 of s611. Item 14 provides an exception for an acquisition that results from another acquisition of relevant interests in voting shares in a body corporate listed on:

(a) a stock exchange; or

(b) a foreign exchange approved by us.

We have approved a list of foreign exchanges for the purposes of item 14: see class orders [CO 01/53], [CO 00/2375] and [CO 01/921] and Information Release [IR 01/03].

RG 171.47 The rationale behind item 14 of s611 is that a downstream acquisition merely incidental to the main objective of acquiring the upstream body corporate should not inhibit the upstream acquisition. Without this kind of exception, a company could acquire strategic parcels in a series of companies as a takeover defence.[6]

RG 171.48 If the downstream acquisition is not merely incidental, an acquirer may risk a declaration of unacceptable circumstances by the Panel even where the upstream body corporate is listed on an approved foreign exchange: see [IR 01/03]. We discuss our modification to item 14 addressing acquisitions in bodies corporate that have a secondary listing on a securities exchange or approved foreign exchange at RG 171.62.

RG 171.49 Consistent with item 14, if an acquirer relies on item 1 of s611 to cover downstream acquisitions, the downstream acquisition should be merely incidental to the upstream acquisition. The downstream acquisition is not merely incidental if a main purpose of the acquirer was control of the downstream company. For example, a recent unsuccessful takeover bid for shares in the downstream company or offer to purchase a business of the downstream company may indicate such a purpose: see also Regulatory Guide 71 *Downstream acquisitions* at RG 71.18.

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[6] Legal Committee of CASAC *Anomalies in the takeovers provisions of the Corporations Law* (March 1994) 29

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F Exception: on-market purchase — items 2 and 3

Our policy

RG 171.50 Our class order [CO 01/1542] modifies items 2 and 3 of s611 to make it clear that the bidder may buy on-market during a bid although the bid:

(a) has a condition that relates only to an event in s652C(1) and (2), entitling the bidder to withdraw its bid if an event occurs; or

(b) is subject to the statutory condition for scrip bids, where the bidder's statement states or implies that the securities are to be quoted: s625(3).

Explanation

RG 171.51 Section 611 provides exceptions from the main takeover prohibition in s606 for an acquisition by the bidder of bid class securities:

(a) that results from an on-market transaction during the bid period: item 2; and

(b) that results directly from the exercise of convertible securities, if the bidder acquired the convertible securities through an on-market transaction during the bid period: item 3.

Withdrawal events

RG 171.52 Without class order [CO 01/1542], the exception applies only where the bid is unconditional or conditional on "the happening of an event referred to in subsection 652C(1) or (2)": see paragraph (d)(ii) of items 2 and 3. This reference to s652C may cause uncertainty. Section 652C(1) and (2) list:

(a) events entitling the bidder to withdraw unaccepted offers, rather than

(b) events requiring the bidder to proceed to acquire the securities (ie making the bid conditional on the event happening).

Sections 652C(1) and (2) have similar effect to offers conditional on events *not* happening.

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Quotation condition

RG 171.53 Without our relief in [CO 01/1542], the exceptions in items 2 and 3 of s611 may not apply where the bid is subject to the quotation condition in s625(3). The bidder may not be able to fulfil the quotation condition during the bid period. Under s625(3), the offer must be subject to a condition that permission for admission to quotation will be granted no later than 7 days after the bid period. We have also modified s625(3) to make it clear that the quotation condition in s625(3) is not a defeating condition: see RG 171.108.

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G Exception: resolution of target — item 7

Our policy

RG 171.54 We may give case-by-case relief for an acquisition approved by a resolution passed at a general meeting of the company under item 7 of s611. This relief would be from the requirement to give all information known to an associate of the person proposing to acquire in item 7(b). The acquirer must show that they have requested information from their associate, but cannot reasonably obtain it.

Underlying principles

RG 171.55 It is important that members are given all information material to the decision so that their decision is an informed one. But the acquirer should not effectively be prevented from relying on the exception in item 7 if they cannot reasonably obtain information from the associate.

Explanation

RG 171.56 An acquisition approved previously by a resolution passed at a general meeting of the company in which the acquisition is made is exempt from the prohibition in s606: item 7 of s611. For the exception to apply, the members of the company must be given all information known to the acquirer *or their associates* that was material to the decision on how to vote on the resolution: item 7(b).

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H Exception: 3% creep in 6 months — item 9

Our policy

RG 171.57 For the purposes of the 3% creep exception in item 9 of s611, voting shares acquired under a rights issue covered by item 10 are counted. We will not give relief to allow a holder to exclude such shares from the calculation.

Underlying principles

RG 171.58 The 3% creep exception is not cumulative with the other exceptions in s611. The 3% creep is designed to allow a major holder to gradually increase its relevant interest in a company's voting shares without making a takeover bid. Allowing a holder to acquire another 3% immediately following an acquisition under an exception in s611 does not promote this policy.

Explanation

RG 171.59 The Legal Committee of CASAC recommended that acquisitions under the exceptions from the main takeover prohibition for:

(a) rights issues–now item 10; and

(b) underwriters–now item 13,

should not be counted in the 3% calculation.[7] Parliament did not accept this recommendation.

RG 171.60 Under the old Law equivalent of the 3% creep exception, there was an express exclusion from the 3% calculation of shares acquired under a rights issue: old Law s618 and 621. This did not survive in the CLERP Act. Mathematically, a pari passu offer had more impact under the formula in old Law s618 than under the percentage calculation required by item 9 of s611.

RG 171.61 This policy is consistent with our policy on the interaction of item 13, underwriters, and item 9: see Regulatory Guide 159 *Takeovers: Discretionary powers* at RG 159.6.

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[7] Legal Committee of CASAC *Anomalies in the takeovers provisions of the Corporations Law* (March 1994) 13-15

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I Exception: downstream acquisitions — item 14

Our policy

RG 171.62 Our class order [CO 01/1542] modifies item 14 of s611 so the exception does not apply to a downstream acquisition that results from an acquisition of relevant interests in voting shares in a body corporate if the body has a secondary listing on:

(a) a stock exchange; or

(b) a foreign exchange approved by us,

but its primary listing is not on such an exchange.

Underlying principles

RG 171.63 Where the upstream body corporate is listed on a stock exchange or an approved foreign exchange, it is less likely that the upstream acquisition is an artifice to gain control of the downstream company without complying with Australian takeovers regulation.

RG 171.64 In our Information Release [IR 01/3], we discuss requirements applying to bodies corporate listed on a stock exchange or approved foreign exchange that reduce the risk that the upstream acquisition is an artifice. These requirements are:

(a) listing rule spread and size requirements. If the upstream body corporate is listed, the upstream acquisition is likely to be a serious bid involving the acquisition of a substantial body corporate with a large number of shareholders;[8] and

(b) the upstream acquisition is likely to comply with Chapter 6 or similar takeovers regulation overseas.

A body corporate that has a secondary listing on a stock exchange or an approved foreign exchange may not meet these requirements if its home exchange is not such an exchange.

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[8] Legal Committee of CASAC *Anomalies in the takeovers provisions of the Corporations Law* (March 1994) 29

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Explanation

RG 171.65 Item 14 of s611 permits a downstream acquisition resulting from the acquisition of shares in a body corporate listed on a stock exchange or an approved foreign exchange. We have approved a list of foreign exchanges for the purposes of item 14: see [CO 01/53], [CO 00/2375] and [CO 01/921].

RG 171.66 Our modification means that the exception does not apply to an acquisition in a body that has a secondary listing on a stock exchange or approved foreign exchange. (In the case of the ASX, such a body is referred to in the Listing Rules as an "exempt foreign entity"). Different listing rule admission requirements may apply to a body that has a secondary listing on an exchange. And the body's jurisdiction of incorporation, not the jurisdiction of the exchange, may determine what takeovers regulation applies.

RG 171.67 We may give case-by-case relief for an acquisition in a body corporate that has a non-approved home exchange: see [IR 01/03].

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J Breach of the provisions in s612

Our policy

RG 171.68 We may give case-by-case relief to a bidder so that if the bidder has or may have breached the provisions listed in s612 because of:

(a) the bidder's inadvertence or mistake;

(b) the bidder not having been aware of a relevant fact or occurrence; or

(c) circumstances beyond the control of the bidder,

the breach does not give rise to a breach of the main takeover prohibition in s606 by the operation of s612.

RG 171.69 We will not give relief from s612 after the bidder sends its offers and bidder's statement to holders because generally we cannot give retrospective relief.

RG 171.70 Our relief will cover the breach of s606 as a result of the operation of s612, but will not provide relief for the primary breach of a provision listed in s612. Third parties will retain a cause of action for the original breach, subject to s659C.

RG 171.71 We expect that applications for this relief will be exceptional.

Underlying principles

RG 171.72 Where a bidder inadvertently breaches the takeover provisions, s612 should not automatically elevate the seriousness of that breach. Uncertainty that the bidder faces about whether its takeover bid may be unwound by a remedial order of the court following the bid should be reduced.

Explanations

RG 171.73 We may give this relief because under s659B a bidder is prevented before the end of the bid period from applying to the court under s1325D for an order validating an inadvertent breach of the Act. The object of this limitation is to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended: s659AA.

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RG 171.74 The bidder may face uncertainty as to whether its takeover bid will be unwound by a remedial order of the court following the bid. This is a particular issue where a breach is elevated to a breach of s606 by operation of s612. The provisions listed in s612 include s621, minimum bid price principle, and the procedural steps in a bid, s633. So a failure to dispatch offers in time will lead to a breach of s606.

Serious breaches

RG 171.75 Section 612 states that the exceptions in items 1–4 of s611 from the main takeover prohibition do not apply if the takeover bid is carried out in breach of provisions listed in s612. This has the effect of elevating the seriousness of the breach of the provisions listed in s612. The penalty for breach of s606 may include a prison term.

RG 171.76 A court may perceive a breach of s606 as more serious than other breaches. A court may be more likely to give a remedial order for a breach of the provisions listed in s612 than for other breaches. A breach of s606 may have a more serious impact on the reputation of the bidder.

Court proceedings after bid period

RG 171.77 If the Panel has considered the issue and refused to make a declaration of unacceptable circumstances, the type of order a court may make is limited under s659C to an order to pay compensation, rather than a remedial order.

RG 171.78 The limitation in s659C cannot apply unless there has been an application to the Panel for a declaration of unacceptable circumstances. Without our relief, a bidder that discovers it has made an inadvertent breach may be placed in the situation of wanting the Panel to consider the bidder's conduct and refuse to make the declaration.

Timing

RG 171.79 If an application to the Panel under s657A for a declaration concerning the circumstances amounting to the breach has been made or is likely to be made, we will not give the relief before considering the decision of the Panel. If the Panel refuses to make a declaration, there is no need for the relief. The bidder does not face uncertainty whether its takeover bid may be unwound by a remedial order of the court following the bid: s659C.

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RG 171.80 We will not give the relief after the bidder sends its bidder's statement and offer document because, in general, we cannot give relief concerning breaches of the Act that have already taken place: see Regulatory Guide 51 *Applications for relief* at RG 51.63. The bidder only breaches s606 because it has breached a provision listed in s612 (eg the procedural requirements in s633) when it makes its offers. Under s606(4) a person must not make an offer where they would contravene the main takeover prohibition if the offer were accepted.

Consultation

RG 171.81 We will normally consult with directors of the target before granting this relief.

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K Offers to foreign holders: s615 and 619(3)

Our policy

RG 171.82 Our class order [CO 01/1542] modifies s615 to clarify that the company issuing securities does not have to use the nominee procedure in respect of *all* foreign holders for the rights issue exception in item 10 of s611 from the main takeover prohibition to apply. The company may choose to use the nominee procedure only for foreign holders it has specified in the prospectus.

RG 171.83 Class order [CO 01/1543] makes a similar modification to s619(3). That section provides, in the case of a scrip offer to foreign holders, an exception to the usual rule that all the offers must be the same.

Underlying principles

RG 171.84 The exception in item 10 of s611 is limited to an offer to issue securities made to all holders. This limitation is so that:

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

(b) it is unlikely that any one holder’s proportionate holding will increase substantially.

RG 171.85 As far as practicable, all offers under a takeover bid must be the same, because holders should have an equal opportunity to participate in the benefits of the bid: s619(1) and 602(c).

RG 171.86 The issuer may be constrained by foreign securities regulation from making an offer of securities to a foreign holder. It may be impractical to comply with foreign regulation. The exceptions in item 10 of s611 and s619(3) should be available even if such foreign holders do not receive an offer of securities, but cash realised from sale of the securities. The policy behind item 10 and s619(1) in RG 171.84–RG 171.85 requires the issuer to offer the securities to each foreign holder where it is not constrained by regulation from doing so.

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Explanation

RG 171.87 Sections 615 and 619 establish a nominee procedure so that foreign holders can receive cash instead of the securities. These sections may imply that if an issuer uses the nominee procedure, it must use it in respect of *all* foreign holders.

RG 171.88 Our modification allows the issuer to specify in the disclosure document the foreign holders to whom the nominee procedure applies, for example by reference to the place of the foreign holder’s registered address.

RG 171.89 The bidder, acquirer or issuer may risk an application to the 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.

RG 171.90 ASX Listing Rule 7.7 contains conditions that a listed entity must meet if it does not offer securities to foreign holders under a pro rata offer.

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L Convertible securities

Our policy

RG 171.91 Our class order [CO 01/1543] modifies s617(2) so that the bidder may extend the bid to convertible securities that come to be in the bid class from the date set by the bidder under s633(2) until the end of the offer period. We have made a corresponding modification to s636(1)(j).

RG 171.92 Class order [CO 01/1543] also modifies the definition of "convertible securities" in s9 to make it clear that it includes a security the rights attaching to which may change, so that the security transforms into a security of another class.

Underlying principles

RG 171.93 Section 617 was introduced to better facilitate the acquisition of securities under a takeover bid, including securities that come into existence upon conversion of convertible securities.

Explanation

Securities covered by the bid

RG 171.94 Without our relief, if convertible securities exist at the date set by the bidder under s633(2), the bid may extend to bid class securities that come into existence *during the offer period* due to conversion of the convertible securities. Our class order means that the bid may extend to securities that come into existence after the date under s633(2) but before the offer period. The date under s633(2) is the date for determining to whom offers will be sent. It must be between the date that the bidder serves the bidder's statement on the target and the date of the first offer: s633(3). If the bid extends to securities under s617(2), the bidder's statement must include a statement to this effect: s636(1)(j).

Convertible securities

RG 171.95 Without our relief, the definition of "convertible securities" may be limited to securities that give a right to be *issued* with securities in another class. It may exclude securities that *transform* into securities in another class upon exercise. The mechanism for conversion is not relevant to policy on convertible securities.

[*Historical note*: RG 171.95 amended 3/12/2003 by deleting from the first sentence the words ", for example renounceable rights" after the words "to be *issued* with securities in another class".]

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M Paying consideration: s620

Our policy

RG 171.96 Our class order [CO 01/1543] modifies s620(2)(b). Under our modification, the bidder must provide in its offer that where the bidder is given the necessary transfer documents after acceptance by the holder and before the end of the bid period, the bidder is to pay the consideration:

(a) if at the time the bidder is given the necessary transfer documents the offer is subject to a defeating condition, by the earlier of 1 month after the takeover contract becomes unconditional or 21 days after the end of the offer period; and

(b) if the offer is unconditional, by the earlier of 1 month after the bidder is given the necessary transfer documents or 21 days after the end of the offer period.

RG 171.97 Class order [CO 01/1543] also modifies s620(2)(c) so that if:

(a) the bidder is given the necessary transfer documents after the acceptance and after the end of the bid period; and

(b) at the time the bidder is given the transfer documents, the offer is subject to a condition which relates to the occurrence of an event referred to in s652C(1) or (2),

the offer must provide that the bidder is to pay the consideration within 21 days after the takeover contract becomes unconditional.

Underlying principles

RG 171.98 The period for the bidder to pay consideration should run from the time that the necessary transfer documents are given to the bidder. The "necessary transfer documents" are the takeover contract consideration provided by the holder: definition s9.

RG 171.99 But in the case of an offer subject to a defeating condition, the period for the bidder to pay consideration should run from the time the takeover contract becomes unconditional. At this time, the contract is binding and will not be rescinded: see "defeating condition" definition s9.

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Explanation

RG 171.100 Section 620(2) requires the offer under an off-market bid to provide that the bidder must pay the consideration under the bid within a period specified in the subsection. Without our relief, the period for the bidder to pay consideration in s620(2)(b) and (c) runs from the time that the bidder receives the transfer documents, even if the bid remains subject to a defeating condition. This is in contrast to s620(2)(a)(i).

RG 171.101 We have modified s620(2)(c) because the bidder may free offers from a condition in relation to an event or circumstance referred to in s652C(1) or (2) not later than 3 business days after the end of the offer period: s650F(1)(a) and see RG 171.145 on s650G. We discuss another related subsection, the quotation condition, s625(3) at RG 171.108.

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N Market bids and collateral benefits: s623

Our policy

RG 171.102 Our class order [CO 01/1543] modifies s623 so that for a market bid, the collateral benefit prohibition applies during the bid period rather than the offer period.

Underlying principles

RG 171.103 The collateral benefit prohibition in s623 is intended to pick up where the minimum bid price principle in s621(3)–(5) leaves off. They both extend the equality principle in s602(c) beyond consideration that the bidder offers under the takeover bid.

Explanation

RG 171.104 For a market bid, there is a gap between the time at which the minimum bid price principle in s621(3)–(5) stops applying, and the collateral benefits prohibition in s623 starts applying. In theory, the bidder could offer more consideration in the interim than it offers under the takeover bid. There would be no automatic increase in the bid consideration under s651A, which is limited to off-market bids.

RG 171.105 The collateral benefits prohibition in s623 applies during the offer period. “Offer period” means the period for which offers under the takeover bid remain open: s9. For a market bid, the offer starts 15 days after the bidder makes the announcement: item 14 of s635.

RG 171.106 The minimum bid price principle requires that the bid consideration at least equals the consideration for purchases of bid class securities made by a bidder during the 4 months before the date of the bid: s621. In the case of a market bid, “date” of a bid means the date of the announcement: s9. We discuss s621(3)–(5) further in Regulatory Guide 163 *Takeovers: minimum bid price principle* (RG 163).

RG 171.107 The gap between the operation of s621(3)–(5) and s623 for a market bid is filled if the collateral benefits prohibition applies during the bid period rather than the offer period. For a market bid, the “bid period” starts when the bid is announced to the securities exchange and ends at the end of the offer period: s9.

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O Quotation condition: s625(3)

Our policy

RG 171.108 Our class order [CO 01/1543] modifies s625(3) to make it clear that the quotation condition under s625(3)(c)(ii) is not a "defeating condition". It is a statutory condition, different to a defeating condition. The quotation condition requires that if the bidder's statement states or implies that scrip consideration will be quoted, the bidder must obtain quotation no later than 7 days after the end of the bid period. Because the quotation condition is not a "defeating condition", for example:

(a) the condition is not relevant for the purposes of determining the time by which the bidder must provide the consideration for the offer under s620(2);

(b) the bidder may extend the offer period after the publication of the notice under s630(3) despite s650C(2); and

(c) if the bidder extends the offer in a way that postpones for more than 1 month the time when the bidder has to meet their obligations under the bid, a holder who has accepted the offer may not withdraw the offer despite s650E(1).

Underlying principles

RG 171.109 The condition under s625(3) should not be treated as a defeating condition because, unlike other conditions:

(a) the bidder does not have a choice whether its offer is subject to the condition under s625(3);

(b) s625(3) expressly contemplates that the condition may be satisfied after the bid period has ended (because for example the bidder may meet holder spread requirements only at the end of the bid);

(c) the bidder cannot free the offer from the condition: s625(3)(d);

(d) the condition in s625(3) is for the protection of holders who accept on the basis that the consideration will be quoted securities. The bidder uses other conditions to protect itself from having to proceed with the bid in specified circumstances; and

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(e) the court has an express power to make orders if the bidder fails to apply for and obtain quotation within the time required by the condition: s1325A(2).

Explanation

RG 171.110 Without our relief, it is possible that the condition in s625(3) is a “defeating condition”: s9. Our modification under [CO 01/1543] gives certainty.

Extending the offer: s650C and 650E

RG 171.111 If a bid is subject to a defeating condition:

(a) the bidder may extend the offer period after the publication of the notice in s630(3) only if a rival bid occurs or consideration under a rival bid is improved: s650C(2); and

(b) a holder may withdraw their acceptance if the bidder varies the offers under the bid in a way that postpones for more than 1 month the time when the bidder must pay the consideration: s650E.

RG 171.112 These restrictions and consequences for the bidder apply to offers subject to a defeating condition because whether and when the bidder will pay for an accepting holder’s securities is uncertain. In the absence of section 650E, an accepting holder could not accept a rival offer until the end of the offer period. The restriction in s650C(2) is qualified only to encourage an auction for control. But these concerns do not apply to the s625(3) condition because:

(a) the bidder does not impose and cannot waive the condition; and

(b) the condition is for the protection of holders: see RG 171.109.

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P Information not available at lodgment: s633(1)

Our policy

RG 171.113 Our class order [CO 01/1543] modifies s633 so that the bidder need not include the following information in the version of the offer document and bidder's statement that the bidder lodges with us and sends to the target and the securities exchange:

(a) the date that the bidder will send its first offer, or any date that relates to or depends on that date, including:

(i) the last date on which the offer is open–see s624; and

(ii) the date for giving notice on the status of a defeating condition–see s630(1); and

(b) the name and address of holders of bid class securities to whom the bidder will send the offers.

The bidder must include the information in the version of the bidder's statement and offer document ultimately sent to the holders.

RG 171.114 Similarly, [CO 01/1543] modifies s633 so that in the version of the bidder's statement and offer document lodged and sent to the target and the securities exchange, the bidder may disclose the following information as at the date of lodgment:

(a) details of consideration for bid class securities or benefits that the bidder provided in the four months before the date of lodgment — see s636(1)(h) and (i);

(b) the number of securities in the class that the bidder had a relevant interest in — see s636(1)(k)(ii); and

(c) the bidder's voting power in the company — see s636(1)(l).

The bidder must update the information in the version of the bidder's statement and offer document sent to the holders. The bidder must disclose the information as at the date of the bid. It must disclose consideration paid for bid class securities in the four months before the date of the bid. The date of the bid is the date on which offers are first made under the bid: s9.

[*Historical note*: RG 171.114 amended 3/12/2003 by inserting in the last paragraph the sentence: "It must disclose consideration paid for bid class securities in the four months before the date of the bid.".]

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RG 171.115 If the bidder relies on our relief in RG 171.113(a) to omit information relating to the date of the offer, and RG 171.114 to disclose information as at the date of lodgment, the bidder must send to the target and the securities exchange, and to us, a copy of the offer and bidder's statement sent to the holders.

Underlying principles

RG 171.116 The bidder should not be required to disclose information at the time of lodgment if:

(a) the information is not available, or to disclose it would unreasonably fetter the bidder's discretions; and

(b) the information is not critical until the start of the offer period.

The bidder should provide information that is up-to-date at the time that it sends the bidder's statement and offer document to holders.

Explanation

RG 171.117 Section 644(1) of the old Law provided that a person must register a copy of a Part A statement and a copy of one of the offers, being a copy that need not include:

(a) the name or address of the holder;

(b) the date of the proposed offer or any other date that is related to or dependent upon that date; or

(c) the total number of shares, and the number to which the bidder was entitled.

Bid dates

RG 171.118 Section 624 provides that offers under a takeover bid must be open for the period stated in the offer. Without our relief, the bidder cannot specify the date on which the offer period will end without committing itself to a timetable that it may have difficulty meeting.

RG 171.119 Under s630(1) the bidder must specify in its offer a date (not more than 14 days and not less than seven days before the end of the offer period) for giving a notice on the status of a defeating condition. Without our relief, the bidder in specifying a date under s630(1) at the time of lodgment may effectively commit itself to a timetable.

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Pre-bid benefits

RG 171.120 Section 636(1)(h) and (i) require that the bidder discloses in the bidder's statement details of consideration for bid class securities and benefits that it provided in the four months before the date of the bid. Information about consideration and benefits provided after lodgment and before the date of the bid may not be available at the date of lodgment. Under our relief, the bidder may disclose details of consideration paid during the four months before the date of lodgment. The version of the bidder's statement sent to holders must disclose details for the four months before the date of the bid, so that details for the period after lodgment are included.

Disclosing bidder's voting power

RG 171.121 The bidder must disclose in the bidder's statement for an off-market bid:

(a) the number of bid class securities in which the bidder had a relevant interest immediately before the first offer is sent — s636(1)(k)(ii); and

(b) the bidder's voting power in the company — s636(1)(l).

Without our relief, it is unclear how the bidder would disclose in the bidder's statement movements in its relevant interest or voting power after lodgment. Sections 636(1)(k)(ii) and (l) may create uncertainty for a bidder acquiring further bid class securities after lodgment and before the date of the bid.

RG 171.122 In any event, the bidder must give substantial holding information if:

(a) the bidder makes a takeover bid for securities of the company — s671B(1)(c); or

(b) the bidder begins to have a substantial holding or there is a movement of at least 1% in its holding — –s671B(1)(b).

The bidder must give the information by 9.30am on the next trading day after it becomes aware of the information during the bid period: s671B(6).

Disclosure time

RG 171.123 In RG 163 we discuss our relief from s621(4) allowing the bidder to value non-cash bid consideration as at a time up to five business days before the time of the first offer: RG 163.10–RG 163.24. Without our relief, the bidder would have to value

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consideration as at the time of the first offer, so that it would have no time for printing the bidder's statement: s621(4).

RG 171.124 Our relief in [CO 01/1543] where information is not available at lodgment does not include a similar provision. It does not allow the bidder's statement sent to holders to disclose the information as at a time up to five business days before the first offer. Normally, it is not onerous eg for the bidder to cease increasing its voting power and relevant interests by ceasing to buy bid class securities on-market under item 2 of s611, for the period of printing until the first offer. Also, at the time the bidder is finalising its bidder's statement for printing, the bidder should have set the dates of its bid: see RG 171.113(a).

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Q Scrip bid: prospectus information — s636(1)(g)

Our policy

RG 171.125 Our class order [CO 01/1543] modifies s636(1)(g) so that a bidder that offers securities as consideration under a bid must disclose prospectus information about the securities in the bidder's statement if the issuer of the securities agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the securities. Under our modification, the bidder must disclose prospectus information even if the bidder does not control the issuer.

RG 171.126 Under [CO 01/1543], the bidder must disclose all material that would be required for a prospectus for an offer of the securities *by the issuer*, rather than by the bidder, under s710–713.

Underlying principles

RG 171.127 Where the bidder offers securities, holders and directors of the target should be given prospectus information to enable them to assess the merits of the bid: s602(b)(iii). If an issuer authorises the bidder to offer its securities as consideration, the bidder should be in the position to obtain from the issuer the information needed for prospectus disclosure.

Explanation

RG 171.128 Section 636(1)(g) requires a bidder to include prospectus information about the securities offered under a takeover bid where the bidder is the issuer or the bidder controls the issuer.

RG 171.129 Without our modification, where an issuer (that the bidder does not control) authorises the bidder to offer securities, s636(1)(g) does not require the bidder to include prospectus information about the securities offered. There is no disclosure requirement in the common situation where a bidder offers securities in its holding company. Commonly a holding company will use a subsidiary as a single purpose bid vehicle.

Bidder and issuer's knowledge

RG 171.130 Our modification means that if:

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(a) the bidder does not have knowledge of prospectus information; and

(b) the issuer authorised the bidder to offer the securities,

the bidder must obtain the information from the issuer.

RG 171.131 Section 636(1)(g) imports the disclosure requirements in s710–713. Section 710(1)(b) limits information that must be disclosed in a prospectus by reference to a person whose knowledge is relevant. Under s710(3)(a), a person's knowledge is relevant if they are "the person offering the securities". For the purposes of s636(1)(g), the person offering the securities is the bidder. Without our modification, a bidder that does not control the issuer may not have knowledge of matters concerning the issuer. This may mean the bidder is not required to disclose information necessary for holders to make an informed decision.

RG 171.132 This problem does not arise where a person who does not control the issuer offers securities in a fundraising rather than a takeover bid. This is because under s700(3) the person who offers securities is the person who has the capacity to issue the securities if the offer is accepted. In a fundraising, the issuer is a person offering the securities, so that its knowledge is relevant for the purposes of s710(1)(b). Without our modification, it is unclear that s700(3) has the same effect for a takeover bid. This is because s636(1) requires disclosure of "all material that would be required for a prospectus for an offer of those securities *by the bidder*".

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R Consent to use statement: s636(3)

Our policy

RG 171.133 Our class order [CO 01/1543] modifies s636(3) and 638(5) so that the bidder's or target's statement may include a statement by a person without the person's consent. Our relief applies where the statement was made in a document that has been lodged with a securities exchange by a listed company in compliance with the listing rules or with us. For the relief to apply:

(a) the bidder's or target's statement must:

- (i) fairly represent the statement; or
- (ii) include, or be accompanied by, a correct and fair copy of the document or part of the document that contains the statement;

(b) if the bidder's or target's statement is not accompanied by a copy of the document or part of document that contains the statement:

- (i) the bidder or target must provide the document or part if requested by a holder during the bid period free of charge; and
- (ii) the bidder's or target's statement must:
  - (A) identify the document or the part of the document; and
  - (B) inform holders of their right to obtain a copy of the document (or part).

RG 171.134 Class Order [CO 03/635] exempts bidders and targets from s636(3) and 638(5) so that the bidder's or target's statement may include a statement by an official person or author without their consent: see RG 159.215. We may also give case-by-case relief similar to that given for expert's consents in prospectuses: see Regulatory Guide 55 *Prospectuses — citing experts and statement of interests* (RG 55) and s716(2).

[*Historical note*: RG 171.134 replaced 3/12/2003. The paragraph formerly read:

"RG 171.134 We may also give case-by-case relief similar to that given for expert's consents in prospectuses: Regulatory Guide 55 *Prospectuses — citing experts and statement of interests* (RG 55), [CO 01/53] and see s716(2). We will consider giving class order relief similar to that in [CO 00/193] before June 2002.".]

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Underlying principles

RG 171.135 The bidder or target should obtain the consent of the person who makes a statement before using it so that the person can:

(a) control or limit their liability; and

(b) control the overall effect of the statement: see RG 55.6–RG 55.7.

RG 171.136 But where a person makes a statement in a document lodged with the securities exchange under the listing rules or with us, they do so in a regulated context for the purpose of informing holders and the market. The person should be mindful of potential liability. It is readily foreseeable that the statement may be quoted in the context of a takeover bid.

Explanation

RG 171.137 Particularly in a hostile takeover bid, it may be difficult to obtain a person's consent to include their statement. For example, it may be difficult for a bidder to obtain the consent of the target's chairman to include their statement in a bidder's statement.

RG 171.138 Our relief does not protect a bidder or target that uses the statement from liability if the statement is presented in a misleading or deceptive manner.

RG 171.139 Where possible, our policy on s636(3) and 638(5) seeks to be consistent with our policy on the equivalent fundraising provision: s716(2). We may give case-by-case relief for:

(a) government experts' statements;

(b) certain text book or journal statements;

(c) citing ratings of ratings agencies; and

(d) statements where it is impracticable to obtain the expert's consent: see RG 55.

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S Freeing offer from condition: s650F

Our policy

RG 171.140 Our class order [CO 01/1543] modifies s650F(1)(a), freeing an offer from a defeating condition, so that this paragraph:

(a) is consistent with the definition of "defeating condition" under s9; and

(b) does not imply that defeating conditions allow bidders to withdraw unaccepted offers.

Explanation

RG 171.141 Our modification cures a drafting error in s650F. The drafting of s650F(1)(a) suggests that a "defeating condition" is a condition that allows the bidder to *withdraw unaccepted* offers. Under s9 a "defeating condition" is a condition that:

(a) will, in circumstances referred to in the condition, result in the rescission of, or entitle the bidder to rescind, a takeover contract; or

(b) prevents a binding takeover contract resulting from an acceptance unless the condition is fulfilled.

RG 171.142 A defeating condition does not allow the bidder to withdraw unaccepted offers. Offers may be withdrawn only with our written consent: s652B.

RG 171.143 In the absence of our consent, a bid should run its full course. Withdrawing unaccepted offers brings forward the end of the offer period. This accelerates the operation of s650G, which makes takeover contracts and acceptances in a conditional bid void. Although unfulfilled defeating conditions will be an important factor in determining whether we will give our consent: see our Regulatory Guide 59 *Announcing and withdrawing takeover bids* (RG 59).

RG 171.144 The reference to withdrawing unaccepted offers sits uneasily with the rest of s650F(1)(a), under which the bidder may free offers from a condition that relates to a circumstance in s652C(1) and (2) up to three business days after the end of the offer period. There is no need to withdraw unaccepted offers after the offer period. Unaccepted offers have lapsed at that time.

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T Condition not fulfilled: s650G

Our policy

RG 171.145 Our class order [CO 01/1543] modifies s650G(b) to refer to:

(a) the notice under s650F(1), freeing offers from a defeating condition; rather than

(b) the notice under s630(1) or (2), status of defeating condition.

Explanation

RG 171.146 Section 650G says that takeover contracts and acceptances are void if a defeating condition is not fulfilled or the bidder does not declare the offers to be free from the condition. Section 650G(b) is concerned with the notice under s650F(1), not the notice under s630(1) or (2).

RG 171.147 Without our relief, s650G refers to the date applicable under s630(1) or (2) as the date by which the bidder must declare offers to be free from the condition. This would mean the bidder has to free offers from the condition at a time not less than seven days before the end of the offer period. This is inconsistent with the terms of s650F. Section 650F(1)(a) allows the bidder to free offers from a condition that relates to circumstances in s652C(1) or (2) not later than three business days after the end of the offer period. This three day period allows bidders sufficient time to consider circumstances up to the end of the offer period in making its decision whether to free offers of the condition.[9]

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[9] Legal Committee of CASAC *Anomalies in the takeovers provisions of the Corporations Law* (March 1994) 46-7

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U Compulsory acquisition following bid: s661A

Our policy

RG 171.148 Class order [CO 01/1544] modifies the second limb of the test for compulsory acquisition following a takeover bid, the 75% test: s661A(1)(b)(ii). We have modified the test to clarify that the bidder may not meet the test by acquiring bid class securities in which it or its associates had a relevant interest at the start of the offer period.

RG 171.149 At the same time we have modified the test to exclude securities in which it or its associates had a relevant interest from the number of securities that the bidder offered to acquire. Otherwise, it may be impossible for the bidder to meet the test.

RG 171.150 Under our modification, in calculating the 75%, securities:

(a) in which the bidder or their associate had a relevant interest at the date the first offer under the takeover bid is made; or

(b) issued to an associate during the offer period,

are excluded from the number of securities acquired and the number of securities that the bidder offered to acquire under the bid.

Underlying principles

RG 171.151 A bidder may compulsorily acquire securities in the bid class only if the bidder's offer under its bid received overwhelming acceptance from independent holders.

Explanation

RG 171.152 The bidder under a takeover bid may compulsorily acquire securities in the bid class if during or at the end of the offer period the bidder and their associates:

(a) have relevant interests in at least 90% (by number) of the securities in the bid class — s661A(1)(b)(i); and

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(b) have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid (whether the acquisitions happened under the bid or otherwise) — s661A(1)(b)(ii).

RG 171.153 Under our modification of the 75% test, securities in which the bidder or their associates have a relevant interest or issued to the associates are excluded from both the numerator and denominator in the percentage calculation.

Bidder's relevant interest

RG 171.154 Our modification clarifies that where the bidder has a relevant interest in securities at the start of the bid, they should not be counted in the 75% test. Without our modification, there is question whether the bidder could "acquire" securities in which it already has a relevant interest for the purposes of s661A(1)(b)(ii). The holder of the securities would not be independent of the bidder.

RG 171.155 Section 661A(2) excludes from the "relevant interest" concept for the purposes of s661A(1) a relevant interest under s608(3). This subsection is intended to exclude a deemed relevant interest under s608(3)(a) in meeting the 90% test: s661A(1)(b)(i). Under the 90% test, the bidder is qualified to compulsorily acquire only if it has overwhelming control of the company. It is not appropriate that deemed relevant interests are counted towards the 90%.

RG 171.156 Under our modification, the narrower "relevant interest" concept in s661A(2) does not apply to the 75% test in s661A(b)(ii).

Acquisition from associate

RG 171.157 Without our modification, it may be unclear whether the bidder can meet the 75% test by acquiring an associate's securities (and, in theory, by an associate acquiring the bidder's securities). Our modification is merely to clarify the operation of s661A(1)(b)(ii).

RG 171.158 The subparagraph already suggests that to be counted in the 75% test the securities must be acquired from persons other than the bidder or their associates by focusing on acquisitions made by "the bidder and their associates". The test treats the bidder and their associates as a group, with the holdings of group members to be aggregated. This also means the bidder cannot double count securities acquired by an associate during the offer period that the bidder acquired in turn.

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Securities issued to bidder's associate

RG 171.159 If the target issues securities to the bidder's associates during the offer period, they may "acquire" the securities for the purposes of the 75% test in s661A. If the bidder has offered to acquire the securities, they may be counted towards meeting the 75% test. Our [CO 01/1544] excludes securities issued to the associates during the offer period from the percentage calculation. Counting such securities would not promote the aim of the 75% test: to measure acceptance of the bid by independent holders.

General

RG 171.159A Class Order [CO 01/1544] also gives relief from the 75% test where the bidder offered to acquire convertible securities under its bid. Under the relief a bidder may exclude convertible securities that are exercised: see RG 159.257.

[*Historical note*: RG 171.159A inserted 3/12/2003.]

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V Compulsory acquisition by 90% holder: full beneficial interest

Our policy

RG 171.160 We may give case-by-case relief so that a person can meet the 90% holder test for compulsory acquisition in s664A(1) or (2) although a holder's interest may not constitute a "full beneficial interest". We may give this relief where:

(a) the holding is scheme property of a registered managed investment scheme. This relief treats the registered managed investment scheme as a single entity that owns the securities; or

(b) the holder has given a mortgage, charge or other security over the holding.

RG 171.161 Our relief will also mean an expert is not prevented from stating an opinion for the purposes of s667A(2) that the holder has full beneficial ownership in at least 90% by value of all the securities in the company merely because the holding is scheme property or the holder has given a mortgage.

RG 171.162 Where we give this relief we will make corresponding modifications so that the following provisions apply to a holding that is scheme property or a holder who has given a mortgage although there may be no "full beneficial interest":

(a) 100% holder — s665A; and

(b) 85% holder — s665D.

Requirements of our relief

RG 171.163 Normally it will be a term of our relief for a registered managed investment scheme that the responsible entity cannot meet the 90% holder test by aggregating its interest in securities that are property of a scheme with:

(a) securities held by related bodies corporate of the responsible entity; and

(b) the responsible entity's interest in securities that are scheme property of another scheme.

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RG 171.164 Our relief for a holder that has given a mortgage will require that:

(a) a person took or acquired the mortgage in the ordinary course of their business of providing financial services and on ordinary commercial terms; and

(b) the person is not an associate of the holder.

Underlying principles

RG 171.165 Even if the holder may not have a “full beneficial interest” in securities, a holder should be treated as a “90% holder” if in a commercial sense they own 90% of the securities. A holder owns securities in a commercial sense if they have both the benefit and risk attached to the securities.

Explanation

RG 171.166 Under s664A(1), a person is a 90% holder if the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% of the securities (by number) in the class. If a holder relies on s664A(2) to compulsorily acquire, s667A(2) requires that the expert’s report under s664C must state whether, in the expert’s opinion, the holder meets the test in s664A(2). Section 667A(2) refers to the holder’s “full beneficial ownership”.

RG 171.167 The phrase “full beneficial interest” is not defined. The Explanatory Memorandum for the CLERP Act suggests full beneficial ownership is:

(a) direct ownership; or

(b) ownership through a nominee.

RG 171.168 The scope of the concept “full beneficial interest” or “full beneficial ownership” may be unclear.

Registered managed investment scheme

RG 171.169 Our relief treats a registered managed investment scheme as a single entity that owns the securities, because it is unlikely that:

(a) the responsible entity (or any custodian); or

(b) the members,

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can meet the 90% holder test in s664A(1) for the scheme to compulsorily acquire securities.

RG 171.170 It is unlikely that a managed investment scheme or its responsible entity (or any custodian) can be a 90% holder under s664A(1) because the responsible entity does not have a full beneficial interest in securities that are scheme property.

RG 171.171 It is also unlikely that a member of a managed investment scheme has a full beneficial interest. A member would have a beneficial interest in particular scheme property only if they have rights against the responsible entity that are closely related to the property. This is unlikely for a scheme in the nature of an equity fund. Such a beneficial interest may not be "full".

RG 171.172 Even if the members did have a full beneficial interest, their interests could not be aggregated for the purposes of s664A(1) unless they were related bodies corporate.

RG 171.173 Chapter 6A extends to the acquisition of interests in a listed registered managed investment scheme (s660B). The problem described in RG 171.169 is likely to become particularly apparent in a case where a registered managed investment scheme seeks to gain 100% ownership of a listed registered managed investment scheme.

RG 171.174 Under s664A(1) and (2), a person's full beneficial interests can be aggregated with those of their related bodies corporate for the purposes of meeting the 90% test. This concept of group ownership of the securities is not appropriate for a registered scheme. The responsible entity has a legal obligation to exercise rights and benefits attaching to securities that are scheme property for the benefit of members of the scheme rather than the responsible entity's corporate members: see s50AA(4). Similarly, it may be inappropriate to aggregate holdings that are scheme property of different schemes with a common responsible entity.

Mortgage over a holding

RG 171.175 A person who gives a mortgage, charge or other security may not be able to meet the 90% holder test. Some commentators have suggested that a beneficial interest would not be "full" if any other person has a vested or contingent beneficial interest in the securities. On this view a holder who gave a mortgage, charge or other security would not have a full beneficial interest in the securities. (There is an alternative view that the problem arises for equitable mortgages only.) For certainty, we may give case-by-case relief so that s664A applies where the holder has given any mortgage, charge or other security over the holding.

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RG 171.176 To be eligible for relief, the financier must have taken or acquired the mortgage in the ordinary course of their business of providing financial services[10] and on ordinary commercial terms. And the person must not be an associate of the holder. In these circumstances it is clearer that the holder who gave the mortgage remains owner of the holding in the commercial sense. These requirements are the same as conditions on the exception from the relevant interest concept for money lending and financial accommodation: s609(1).

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[10] Following the commencement of the FSR Act, "the provision of financial accommodation": Pt 2 of Schedule 1.

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W Compulsory acquisition: six month limit — s664AA

Our policy

RG 171.177 We may provide case-by-case relief from s664AA. Under our relief the six month period from the time a person becomes a 90% holder for lodgment of a compulsory acquisition notice, stops running. Time stops running for the period:

(a) from the time that the 90% holder applies to the court under s664F(1) for approval of the acquisition;

(b) until the end of all proceedings in relation to the application (including appeals).

This relief allows the 90% holder to lodge a second compulsory acquisition notice, if it failed to establish to the court under s664F that its notice gives a fair value.

RG 171.178 We may also give case-by-case relief from s664AA to stop time running for the period after a 90% holder ceases to meet the 90% test in s664A, until it meets the test again. The 90% holder would cease to meet the 90% test in s664A(1) if its holding fell below 90% of the securities (by number) in the class. We will give this relief only if the 90% holder ceases to meet the 90% test for reasons beyond its control.

Underlying principles

RG 171.179 The 6 month period for lodging a compulsory acquisition notice protects minority holders from ongoing uncertainty about the status of their holding.

RG 171.180 At the same time, Part 6A.2 aims to give the 90% holder a reasonable opportunity to compulsorily acquire. Our relief strikes a balance between:

(a) the interests of minority holders; and

(b) the advantages of the compulsory acquisition provisions: better management of company groups, reduction of administrative reporting requirements and discouraging minority shareholders from demanding a price for their securities that is above a fair value.

RG 171.181 A 90% holder should be able to:

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(a) improve the terms of its compulsory acquisition in a second compulsory acquisition notice within a reasonable period after court proceedings under s664F; and

(b) give a compulsory acquisition notice after meeting the 90% test again, if it ceased to meet the test for reasons beyond its control.

Explanation

Second compulsory acquisition notice

RG 171.182 The court does not have the power to substitute a higher cash sum for that stated by the 90% holder in its compulsory acquisition notice (except in unusual circumstances under s1362BA). Under s664F(3) the court must either:

(a) approve the acquisition of the securities on the terms in the compulsory acquisition notice; or

(b) confirm that the acquisition will not take place.

Our relief allows a 90% holder to improve the terms of the compulsory acquisition notice if necessary after any proceedings under s664F by lodging a second notice. Otherwise, by the time the proceedings finish the 6 months under s664AA may have passed.

RG 171.183 Section 664C(6)(b) contemplates giving another notice. This lends support to our relief. The second notice will also be subject to objections by holders and court approval.

RG 171.184 Our relief would stop time running during any appeal from a court's decision under s664F.

Person ceases to meet the 90% test

RG 171.185 Without our relief, if a 90% holder ceases to meet the 90% test and then meets it again, time does not stop running until it becomes a 90% holder again. If this were not so, the 90% holder could sell down to keep alive its right to compulsorily acquire and repurchase when it is ready to acquire.

RG 171.186 An example of how a 90% holder may cease to meet the 90% test for reasons beyond their control is the exercise by others of convertible securities.

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Timing

RG 171.187 A 90% holder should consider compulsory acquisition soon after becoming a 90% holder because our relief merely stops time running. For example, holders should leave sufficient time to improve the terms of the compulsory acquisition if necessary after any proceedings under s664F.

RG 171.188 90% holders should apply for relief from s664AA well within the six month period. We will not give relief after the six month period has passed.

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X 85% holder notice: s665D and 665E

Our policy

RG 171.189 Our class order [CO 01/1545] gives relief from s665D so that an 85% holder does not have to notify the company that they have become an 85% holder in relation to a class of securities if they have given to:

(a) each of the company's members; and

(b) each holder of securities in that class who is not a member,

a compulsory acquisition notice or a buy-out notice.

RG 171.190 At the same time, our class order [CO 01/1545] modifies the requirement in s665E that the company notifies members about the 85% holder so that if it receives a notice from an 85% holder the company must notify:

(a) each member; and

(b) each holder of securities in the 85% holder's class who is not a member,

but only if the 85% holder has not given to the member or holder a compulsory acquisition notice or buy-out notice.

Underlying principles

RG 171.191 Minority holders in a class of securities should have warning that another holder has become an 85% holder in relation to that class. Compulsory acquisition may be imminent.

RG 171.192 Where the 85% holder has lodged a compulsory acquisition notice or buy-out notice in respect of securities in a class, the 85% holder notice is superseded for holders of those securities. Compulsory acquisition and buy-out notices give the information contained in the 85% holder notice.

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Explanation

Other notices

RG 171.193 Before the 85% holder must give a notice under s665D or the company is obliged to notify holders under s665E a person who became an 85% holder may have lodged:

(a) a compulsory acquisition notice under s661B or 664C; or

(b) a buy-out notice under s662B, 663B or 665B.

They will also have given substantial holding information under s671B.

Notify "members"

RG 171.194 Without our modification, s665E requires the company to notify "members" that a person has become an 85% holder. Normally, a "member" is a registered holder of shares and not other securities: s231. But a person may be an 85% holder in relation to a class of securities of a company other than shares: s665D(1) and (2).

RG 171.195 The obligation of the company to notify a member arises only when the company next gives the member a notice or report under another provision of the Act: s665E(2). Under our modification the company has to notify a holder only when the company next gives the holder a report. For this reason, we consider that extending the obligation to holders of securities other than shares is not onerous.

RG 171.196 We also give relief from the 85% holder provisions to the extent that they would require a person to give a notice to a one member company or a wholly-owned subsidiary: see RG 159.88–RG 159.92.

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Y Associates: right to dispose of securities

Our policy

RG 171.197 Our class order [CO 04/0631] modifies the associate definition in s12(2)(b) and (c) to make it clear that parties to a relevant agreement are not associates merely because the agreement contains a provision giving a party the right to dispose of securities in the designated body or to control the exercise of a power to dispose of the securities ("disposal right").

RG 171.198 Our class order does not affect:

(a) any other provision of the agreement; or

(b) any other relevant agreement between the parties,

that creates an association. The class order does not apply to any other provision or agreement that indicates the parties have a common purpose of controlling a company.

Underlying principles

RG 171.199 The concept of "associate" in s12 groups together persons who have a common purpose of controlling a company. It aims to ensure that a person is not treated as acting independently from a person with whom they are in fact cooperating.

RG 171.200 A disposal right is not of itself an indication that the parties have a common purpose of controlling the company. The parties are not together seeking control, but merely to acquire and dispose of securities.

Explanation

RG 171.201 Under s12 an "associate" includes someone with whom:

(a) the person has a relevant agreement for the purpose of controlling or influencing the composition of a designated body's board or the conduct of the designated body's affairs (s12(2)(b)); or

(b) the person is acting in concert in relation to the designated body's affairs (s12(2)(c)).

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RG 171.202 Regulation 1.0.18 has extended the definition of associate in s12 by applying the definition of "affairs of a body corporate" in s53 to "designated body's affairs" in s12(2)(b) and (c).

RG 171.203 Section 53 was originally intended to apply in the insolvency context. Some of the paragraphs in s53 are difficult to apply in the associate context. Other paragraphs are easier to read with s12. A disposal right may create an association because of references in s53 to "ownership of shares" or "power of persons to dispose of or exercise control over the disposal of shares": s53(e) and (f).

Effect of class order

RG 171.204 Without class order [CO 04/0631], a party would have voting power not only in the securities the subject of the disposal right, but all securities held by the other party.

RG 171.205 The legislative history of the associate definition suggests that this result is wider than Parliament intended. This was a problem under the Companies (Acquisition of Shares) Code, rectified under the old Law. The Explanatory Memorandum to the Corporations Bill para 1908 stated:

> "any shares held by an associate of a person (the association arising by virtue of an agreement by the person to acquire particular shares from the other person) which are not subject to the agreement will not be included in the person's entitlement".

RG 171.206 A disposal right gives a relevant interest to the party who has the right to dispose or control the disposal of the securities the subject of the right: s608. Class order [CO 04/0631] affects only any association between the parties and not this relevant interest.

RG 171.207 Examples of agreements that contain disposal rights are:

(a) an on-market or off-market share acquisition agreement;

(b) an agreement for the acquisition of an equity derivative, whether entered into or acquired on–market or off-market;

(c) a pre-acceptance agreement (under which the bidder agrees with a holder that the holder will accept the bidder's offer);

(d) a listing rule or voluntary escrow (see RG 159.125); and

(e) a pre-emptive right or right of first refusal.

Circumstances where relief does not apply

RG 171.208 Our class order [CO 04/0631] affects only a disposal right. It does not cover the whole agreement or any other relevant

agreement indicating the parties have a common purpose of controlling a company. Examples of circumstances where our relief would not apply are where there is another term in the agreement or another agreement:

(a) that the parties will seek to remove one or more directors; or

(b) that one party will vote for the appointment of a director nominated by the other party; or

(c) that the disposal right is conditional on such board changes; or

(d) concerning dividend policy; or

(e) concerning the future sale or acquisition of an asset by the company to or from a party; or

(f) that a party will vote in favor of or against a corporate action (eg in favor of the issue of options or against liquidation); or

(g) that the parties will consult on voting; or

(h) that the person who disposes of securities under the relevant agreement will continue to play a role in directing the company, whether through representation on the board or otherwise.

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Key terms

RG 171.209 In this guide, a reference to:

“Act” means the Corporations Act 2001

“ASIC” means the Australian Securities and Investments Commission

“CASAC” means the Companies and Securities Advisory Committee

“CLERP Act” means the Corporate Law Economic Reform Program Act 1999

“FSR Act” means the Financial Services Reform Act 2001

"disposal right" means a right under a relevant agreement to dispose of securities in the designated body or to control the exercise of a power to dispose of the securities

“old Law” means the Corporations Law before it was amended by Schedule 1 to the CLERP Act

“Panel” means the Takeovers Panel

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Appendix: minor or technical modifications

RG 171.210 Below are minor or technical modifications to the Act in [CO 01/1543] Takeover bids:

(a) Section 630(4) omit the words "publish" and substitute "give".

(b) Section 650B(1) insert the word "or" after the word "additional".

(c) Section 650C(2) omit "publish" and substitute "give".

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Related information

RG 171.211

Headnotes

Takeovers, compulsory acquisition, anomalies, changing the responsible entity, relevant interest, voting power, exceptions to the takeover prohibition, downstream acquisitions, bidder's statement and target's statement, associates

Class orders

[CO 01/1541] *Changing the responsible entity*

[CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition*

[CO 01/1543] *Takeover bids*

[CO 01/1544] *Compulsory acquisition following a takeover bid*

[CO 01/1545] *85% holder notices*

[CO 01/53] *Downstream acquisitions: approved overseas exchanges*

[CO 00/2375] *Downstream acquisitions: London Stock Exchange*

[CO 01/921] *Downstream acquisitions: New Zealand Stock Exchange*

[CO 00/193] *Experts: citing in disclosure documents*

[CO 04/0631] *Associates: right to dispose of securities*

Regulatory guides

RG 51 *Applications for relief*

RG 55 *Disclosure documents and PDS: Consent to quote*

RG 59 *Announcing and withdrawing takeover bids*

RG 159 *Takeovers: discretionary powers*

RG 163 *Takeovers: minimum bid price principle*

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Legislation

Corporations Act 2001 Chapters 6, 6A, 6B, 6C, Part 2G.4, s9, 10-17, 50AA, 53, 252B, 252D, 252L, 601FM, 602, 604, 606, 608, 609, 610, 611, 612, 615, 617, 619, 620, 621, 623, 624, 625, 629, 630, 633, 635, 636, 650C, 650E, 650F, 650G, 651A, 652C, 657A, 659AA, 659B, 659C, 660B, 661A, 661B, 662B, 663B, 664A, 664C, 664F, 665B, 665D, 665E, 667A, 671B, 710, 711 712, 713, 716.

Old Law sections

s618, 621, 644

Cases

MTM Funds Management Ltd v Cavalane Holdings (2000) 35 ACSR 440

Haughton Properties Pty Ltd v Sandridge City Development Co Pty Ltd (1994) 13 ACLC 1

Consultation papers and reports

CP 11 *Anomalies and issues in the takeover provisions of the Corporations Law*

CP 47 *Associates: share acquisition agreements*

Legal Committee of CASAC *Anomalies in the takeovers provisions of the Corporations Law Report* (March 1994)

Media and information releases

[MR 00/398] *ASIC calls for comment on takeover anomalies*

[IR 01/03] *ASIC approves overseas exchanges: safe harbour for downstream acquisitions*

[IR 01/14] *ASIC addresses takeover anomalies and issues*

[IR 04/22] *ASIC gives "associate" and "IDPS" takeover relief*

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