ASIC
Australian Securities & Investments Commission

REGULATORY GUIDE 71

Downstream acquisitions

Chapter 6 — Acquisition of shares

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From 5 July 2007, this document may be referred to as Regulatory Guide 71 (RG 71) or Policy Statement 71 (PS 71). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 71.1) or their policy statement number (e.g. PS 71.1).

Headnotes

Section 33; s615; s623; s625; s629; s698; downstream acquisitions; comparability of regulatory and stock exchange controls and protection; conditions of relief; foreign mergers; disclosure to market; international comity; policy for granting relief; listed companies; prohibition on breach of "20% threshold"; schemes of arrangement; takeovers; unacceptable circumstances; unlisted companies.

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Purpose

RG 71.1 In this guide, the ASC sets out the extent to which it will use its discretionary power under s730 of the Corporations Law (Law) to modify s629. Modification is needed for it to apply to the acquisition of shares in an Australian company (downstream acquisition) as a result of the acquisition of shares in a foreign body corporate, listed overseas or in Australia (upstream acquisition). It also discusses how it will consider applications in relation to downstream acquisitions as a result of the acquisition of shares in an unlisted foreign body corporate.

RG 71.2 The ASC has settled its policy on s629 as a result of a review of the area, particularly including its experience in the BTR Plc takeover offer for Hawker Siddeley Group Plc in late 1991. The amended ASC policy supersedes NCSC Release 157.

Background

RG 71.3 Section 629 provides a limited exception to the prohibition set out in s615 against deemed downstream acquisitions which would breach the 20% threshold. Section 629 provides that:

> "Section 615 does not apply in relation to an acquisition of shares in a company as a result of the acquisition of shares in another body corporate if:
>
> (a) at the time of the last-mentioned acquisition, the other body corporate is incorporated in Australia and is a listed body; and
>
> (b) the acquisition of the shares in the other body corporate:
>
> (i) results from the acceptance of an offer to acquire those shares that was made under a takeover scheme or takeover announcement; or
>
> (ii) would, but for subsection 620(1) or s620(2), contravene section 615."

Policy for granting relief

International comity

RG 71.4 The prime reason for granting relief to offerors for foreign upstream bodies corporate is to ensure that Australia meets its obligations

in relation to international comity. Where the purpose of the upstream acquisition is not to avoid the provisions of the Law, Australian legislation should not impede a bona fide, and otherwise lawful, takeover offer for a listed foreign body corporate. International comity requires Australia to strive for economic efficiency in international as well as Australian capital markets. Australian regulatory requirements should not impose excessive costs or obstacles on primarily foreign business transactions unless there is clear need for Australian investor protection. International comity requires the ASC to ensure that Australian securities regulation is not used as an improper takeover defence by foreign bodies corporate. International comity also requires that Australian securities regulation similarly does not inhibit the liquidity and efficiency of foreign securities markets.

Extrinsic material

RG 71.5 The structure and history of Ch 6 of the Law do not imply that s629 sets out the only circumstances in which shareholders in a downstream company are not entitled to participate in the premium for control arising out of a takeover of an upstream body corporate. They do not imply that there is any general rule that a bid is required or that s629 is an anomalous exception to it. In particular, and of crucial importance, where there is a downstream acquisition in breach of s615, the breach is not removed by making a concurrent, let alone a subsequent, bid for the downstream company.

RG 71.6 The only solution contemplated by the Law in such a case is for the bidder for the upstream body corporate to acquire the shares that the upstream body corporate holds in the downstream company in a manner permitted by the Law. To comply, the offeror would either have to make the downstream acquisition prior to making the upstream acquisition for example, under a s623 resolution, or persuade the upstream corporation to dispose of the downstream shares prior to the upstream acquisition. In a hostile takeover of the upstream body corporate both are impractical and in other takeovers would still impose unjustifiable costs and delays.

Differences between s12(k) of Companies (Acquisition of Shares) Act and Codes and s629 of the Law

RG 71.7 Paragraph 12(k) of the *Companies (Acquisition of Shares) Act* and Codes (CASA) excepted from the 20% threshold in s11 of CASA, a downstream acquisition which resulted from an acquisition in a *corporation* listed on an exchange recognised by CASA that is,

Australian Stock Exchange Ltd (ASX). The definition of "corporation" in s5(1) of the Companies Act and Codes meant an Australian *or a foreign* company.

RG 71.8 As stated in the Explanatory Memoranda to CASA and the Law, both s12(k) and s629 were designed to strike at undesirable defence tactics against a takeover. That purpose was not removed or changed by the legislature in the change to the Law. The ASC considers that the differences between s629 and s12(k) are not due to a policy decision by the legislature that downstream acquisitions are acceptable only where they result from takeovers under Australian law. Rather they represent a recognition that:

(a) the Listing Rules of ASX no longer regulate takeovers of listed foreign companies, as they did at the introduction of CASA in 1980. Therefore, simply restricting the relief to acquisitions in *listed* bodies would no longer ensure that the upstream acquisition is subject to appropriate takeovers regulation and not simply a device to avoid regulation; and

(b) because of the wide definition of corporation used in s12(k), the paragraph was capable of allowing a downstream acquisition where the upstream acquisition was regulated by neither Australian nor foreign takeover laws. An example of this was the acquisition of approximately 50% of the shares in North Flinders Mines Ltd (an Australian company listed on the predecessor to ASX) as a result of the acquisition of a controlling interest in Paringa Mining and Exploration Co Plc (a UK company that was also listed on ASX's predecessor).

Paragraph 12(k) permitted the downstream acquisition because the upstream acquisition was of a company which was listed on the predecessor to ASX. However, the acquisitions were effectively unregulated because:

(i) the UK companies regulatory system left the regulation of takeovers to the City Code on Takeovers and Mergers under the London Stock Exchange's Takeovers and Mergers Panel;

(ii) the London Stock Exchange considered that it should not regulate companies whose primary listing was not on it but on other exchanges;

(iii) after the introduction of CASA, the ASX's predecessor had removed those of its Listing Rules which regulated takeovers; and

(iv) the drafting of s12(k) assumed that the acquisition in the upstream corporation was regulated so the downstream acquisition could be allowed on that presumption.

Section 629 avoids such a result by requiring the upstream body corporate to be incorporated in Australia and for the bid to be regulated by Ch 6 of the Law.

RG 71.9 The ASC considers that the legislature did not intend in either s629 or s12(k) to prohibit entirely relief for bona fide upstream foreign acquisitions. The sections reflect a policy decision by the legislature that it is not appropriate for the Law to set out which overseas jurisdictions provide shareholder protection comparable to Ch 6 of the Law. It is more appropriate for that to be done at the administrative level, in relation to particular foreign laws as they apply to particular cases from time to time.

RG 71.10 The legislature also narrowed the Australian operation of s12(k) which also extended to acquisitions other than by way of a bid, for example, an acquisition authorised by a resolution under s12(g) of CASA (s623 of the Law). Section 629 requires the acquisition to have taken place under a takeover bid.

Eggleston principles

RG 71.11 Section 731(d) of the Law does not support the proposition that an offeror for a foreign listed body corporate should be required to make a takeover offer for Australian subsidiaries of the target. Section 731(d) requires the ASC to have regard to the need to ensure "that, as far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company". The policy of s731(d) is not defeated by a downstream acquisition as a result of a bona fide foreign takeover, because there is no unequal treatment of shareholders. The vendors into an upstream bid do not directly hold shares in the downstream company, and cannot be regarded as shareholders in the downstream company in any extended sense, unless the foreign takeover is an artifice and the downstream acquisition is one of its main objects.

Case law

RG 71.12 In *BTR Plc v Westinghouse Brake and Signal Co (Australia) Ltd* (1992) 106 ALR 35 (*BTR* case) the Federal Court analysed how the ASC should deal with an application for relief where the applicant proposes that relief be conditional on it making a

takeover bid for the remaining shares in the downstream companies (downstream bid). The ASC considers the decision may properly be distinguished from a case where the upstream offeror applies for unrestricted relief and control of the downstream shares is not the purpose of the upstream acquisition.

Unrestricted relief

RG 71.13 The ASC may modify s629 to extend its relief to a downstream acquisition in an Australian company resulting from a takeover of, or a merger involving, a foreign, listed body corporate. The ASC will grant the relief without any acquisition or voting restrictions and without a requirement for the applicant to make a downstream bid ("unrestricted" relief) if:

(a) the applicant does not propose such restrictions or such a condition;

(b) the shares in the downstream company do not comprise a substantial part of the assets of the upstream body corporate;

(c) control of the downstream company is not one of the main purposes of the takeover or merger of the upstream body corporate;

(d) the upstream acquisition is by way of a takeover or merger which is legal in the jurisdiction in which it takes place; and

(e) the jurisdiction in which the upstream takeover or merger is made, or the stock exchange on which it is made, affords a comparable level of investor protection to that under the Law and the rules of ASX.

RG 71.14 The relief will be conditional on appropriate market disclosure but it will not be conditional on the offeror making a downstream bid and will have no voting or acquisition restrictions.

RG 71.15 The ASC will normally regard 50% as the threshold for determining whether the downstream shares constitute "a substantial part of the assets of the upstream body corporate". If the market value of the downstream shares constitutes more than 50% of the market value of the assets of the upstream body corporate, it is likely that the downstream shares are the purpose of the upstream acquisition.

RG 71.16 Where control over the downstream shares is one of the main purposes of the upstream acquisition, the offeror will usually be affording a benefit to the upstream shareholders in relation to the shares in the downstream company. This benefit would usually be in

the form of a takeover or control premium. The policy of s731(d) requires other shareholders in the downstream company to have equal opportunity to share in any such benefit. Therefore, the ASC will consider whether control of the downstream company is one of the main purposes of the upstream offer as a criterion for determining whether a benefit is being afforded to the upstream shareholders. Such a test may be used even if, because of the difficulty in determining which portion of the upstream price is attributable to the downstream shares, the benefit is not transparently discernible or quantifiable.

RG 71.17 Under paragraph 13(c) above, the ASC will consider in relation to each application:

(a) any association or aggregation of relevant interests or entitlements caused by the downstream acquisition; and

(b) cross shareholdings or board memberships between any of, the offeror, the upstream body corporate, the downstream company and their associates.

RG 71.18 Applicants must demonstrate to the ASC the intrinsic value of the other assets of the upstream target to the offeror where there is doubt as to whether control over the downstream shares is one of the main purposes of the upstream acquisition. Applicants should always give the ASC a clear breakdown of the assets of the upstream target with absolute and percentage values for the major items and for the downstream shares. Where the assets of the upstream body corporate, other than the shares in the downstream company, are highly liquid, or readily procurable or saleable commodities, the ASC may infer that the shares in the downstream company are the purpose of the upstream acquisition.

RG 71.19 The ASC will not modify s629 where it appears to the ASC that unacceptable circumstances (within the meaning of s732) may occur in relation to the proposed acquisition.

RG 71.20 Where the ASC grants unrestricted relief, it will normally modify s629 in its application to the relevant bidder and case, so that:

(a) the reference to a body corporate which is a listed body and incorporated in Australia, includes a reference to any body corporate which is listed on a specified foreign stock exchange; and

(b) the acquisition of the shares in the other body corporate may be by way of a takeover, or under foreign regulatory provisions similar in effect to s620(1) or 620(2).

The terms of relief are set out in Pro Forma 82.

Restricted relief

RG 71.21 Where an applicant does not meet the criteria for unrestricted relief, the ASC may grant restricted relief. In considering restricted relief the ASC will take into account in all cases, the shares in the downstream company to which the offeror is already entitled at the time of the application as well as the shares to be acquired.

Voting and disposal standstill

RG 71.22 If the downstream shares constitute less than 50% of the voting shares in the downstream company, the relief may be an exemption from s615 which is conditional on the offeror:

(a) not acquiring any more shares in the downstream company; and

(b) not exercising the power to vote attaching to any of the shares in the downstream company it acquired pursuant to the upstream acquisition;

for a period equivalent to the minimum period of time within which the applicant could have acquired the same number of voting shares, using the exception in s618 of the Law, that the applicant would acquire pursuant to the upstream acquisition. An applicant may prefer that the relief be conditional on the applicant making a downstream bid, instead of standstill and voting conditions applying.

Downstream bid

RG 71.23 If the downstream shares constitute more than 50% of the voting shares in the downstream company; and an applicant does not meet the criteria for unrestricted relief, any relief would normally be conditional on the offeror or a subsidiary making a downstream bid on similar terms to those considered by the Federal Court in the BTR case.

RG 71.24 The ASC has chosen 50% as evidence of absolute control over the downstream company. Where it appears to the ASC that effective control over the downstream company, such as is envisaged under s32(c) or the accounting standards dealing with controlling entities, may be exercised with control of less than 50% of the voting shares, the ASC will choose a lower figure as the test for requiring a downstream bid. Therefore, an applicant should provide a list of the top 20 shareholders of the downstream company, and any associations between them and the applicant, in its application.

RG 71.25 If the price effectively being offered to the upstream shareholders for the shares in the downstream company held by the upstream body corporate can be clearly and accurately determined from the upstream bid price (that is, the upstream bid price is "see-through"), the ASC will allow the downstream bid to be made at the "effective" price.

RG 71.26 The ASC reserves the right in such "see through" cases to alter the pricing mechanism for the downstream bid if later information indicates that the effective price paid for the downstream shares is not as transparent as asserted to the ASC in the application. Applicants who do not wish to accept this degree of uncertainty about the downstream bid price must accept that the ASC will not decide the application unless it can give third parties, who may be affected by the decision, an opportunity to make submissions to the ASC before it determines the relief to be given. These submissions would be on the mechanism for determining the price of the downstream bid.

RG 71.27 If the upstream bid price is "see through" and is increased during the course of the upstream bid, the increase must be reflected in an increase in the downstream bid price.

RG 71.28 The ASC will normally require a downstream bid to meet the following conditions:

(a) duration — the legislature has determined that one month is the minimum period to satisfy s731(b). However, if an offeror makes its downstream bid before the upstream acquisition becomes unconditional the offeror must ensure that its downstream bid remains open long enough for shareholders to consider that bid in light of significant events in the upstream bid. The downstream bid should remain open for at least two weeks after the offeror becomes unconditionally entitled to more than 20%[1] of the voting shares in the upstream target or the upstream bid becomes unconditional (whichever is the later);

(b) dispatch — offers must be dispatched no later than four weeks after the offeror becomes entitled to more than 20% of the voting shares in the upstream target or the upstream bid is declared unconditional, whichever is the earlier; and

(c) consideration — the consideration must be cash or include a cash alternative which is not less than the fair value ascribed to the

[1] The ASC may increase this, and other references to 20%, in the case of an upstream offer made in a foreign jurisdiction where the takeover threshold is greater than 20%.

shares in the downstream company by an independent valuer approved by the ASC:[2]

(i) the valuer must determine the value per share regardless of percentage ownership, as this valuation method, by definition, distributes any control premium equally between all shareholders;

(ii) the offeror must ensure that when determining a value for the shares in the downstream company, the valuer is provided with all information concerning the downstream company that was available to the offeror when the offeror was fixing the price of the upstream bid;

(iii) the valuer should only take into account confidential (non-public) information about the downstream company where the upstream offeror had that information available to it when determining the consideration for the upstream bid;

(iv) the upstream offeror must pay the valuer's fees;[3] and

(v) the valuer's report must be included in the downstream offeror's Part A or Part C statement.

RG 71.29 The relief will normally limit the defeating conditions which the offeror may place on the downstream bid.

Permissible defeating conditions of downstream bid

RG 71.30 Provided that it undertakes in its offer to use its best endeavours to satisfy them, an offeror may impose the following defeating conditions on its downstream bid:

(a) that the upstream takeover be successful (providing that success is defined as being unconditionally entitled to more than 20% of the voting shares in the upstream body corporate);

(b) that no prescribed occurrence occurs. The condition may relate to events which occur from the date of the announcement of the upstream bid but must be worded to lapse once the offeror has achieved control of the downstream company via the upstream

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[2] Where the expert gives a range of values, calculated by one valuation methodology, the price shall be the mid point of the range. Where the expert gives different values or different mid points, calculated by different methodologies, the highest value or highest mid point will be used. The ASC may consider applications to vary the terms of the instrument in these circumstances and will consider the expert's advice in determining these applications.

[3] The target may agree to pay half the valuer's fees to the offeror in consideration for the offeror consenting to the ASC taking into account the target's views on which valuer should be appointed, when the ASC approves the valuer.

takeover. (For this type of condition, control is defined as the directors of the downstream company becoming under an obligation, whether formal or informal, to act in accordance with the directions or wishes of the upstream offeror); and

(c) the gaining of requisite regulatory approval (for example, Foreign Investment Review Board or Australian Competition and Consumer Commission).

RG 71.31 The ASC will not normally allow a downstream bid to be subject to a defeating condition relating to minimum acceptances or that the offeror achieve the thresholds for compulsory acquisition set out in s701. The Federal Court, in the BTR case, said that the downstream bid should not be subject to a compulsory acquisition condition.

RG 71.32 The ASC has not developed a proforma instrument for restricted relief because the circumstances where it would consider granting restricted relief are unlikely to be uniform or predictable. The ASC will not consider an application for restricted relief to be a *standard* ~~streamlined~~ application. An application for restricted relief should therefore contain a more careful explanation of the circumstances surrounding the proposed acquisitions: see Regulatory Guide 51 *Applications for relief* (RG 51).

[1/7/1996]

Expert's report — s648

RG 71.33 A s648 expert's report may be required to be provided by the downstream target solely because of the upstream acquisition by the offeror. In these circumstances, the ASC may exempt the downstream target from the provisions of s648 because the offeror will not have been a major shareholder of the downstream target at the time of making its upstream bid. Under these circumstances, the protection of a s648 expert's report is not required. Also the price for the bid is determined by an independent expert and should be able to be regarded as a fair price by the downstream offerees.

RG 71.34 This relief may be inappropriate if material changes to the target company occur between the date of the expert's report and the date for dispatch of the Part B statement.

RG 71.35 The ASC will not grant this relief where the offeror has been a major shareholder of the upstream target. In these circumstances the upstream offeror may be assumed to have had access to confidential information about the downstream company and

to have been in a position to control the actions and responses of both of the target boards for the duration of the offer.

Schemes of arrangement and mergers

RG 71.36 The policy and international comity reasons for granting relief for downstream acquisitions which occur under takeovers of listed foreign bodies corporate apply equally to granting relief for downstream acquisitions which occur as part of mergers or schemes of arrangement where the foreign company which holds the downstream Australian shares is listed. The ASC may grant downstream relief for such acquisitions. Its concerns in examining applications for relief in relation to upstream mergers and schemes are similar to those it has when examining applications for relief for takeovers of upstream targets, that is, to prevent artifices designed to avoid Australian takeovers legislation.

RG 71.37 Applicants should set out the process or legal mechanism of the proposed upstream scheme and demonstrate carefully that the process and the regulatory regime governing it embody shareholder democracy and protection provisions comparable to Australian scheme and takeovers legislation.

RG 71.38 This policy does not extend to a downstream acquisition which results from a scheme of arrangement under Australian legislation, because the decision in *Re Stockbridge Ltd* (1993) 11 ACLC 201 established that this type of downstream acquisition does not require relief from the prohibition in s615. In *Re Stockbridge Ltd* Murray J held that a downstream acquisition pursuant to a scheme of arrangement was excepted by s625 from the 20% threshold prohibition in s615. He also held that the legislature has no preference for an acquisition, even a deemed downstream acquisition, to be made by way of Ch 6 rather than by scheme of arrangement.

Unlisted upstream foreign bodies corporate

RG 71.39 The restricted relief set out in this guide may be available for a takeover or merger of an unlisted upstream body corporate which is a public corporation (which is therefore more likely to be subject to regulation which is similar to that under the Law).

RG 71.40 One of the main reasons for the relief for acquisitions of listed upstream bodies corporate is to avoid the transaction costs of

modifying the acquisition proposal or separating the downstream Australian shares from the proposal. If the upstream foreign body corporate is privately owned the connection between its owners and its management on the one hand, and the potential acquirer of that company on the other hand, will be significantly closer than if the upstream target is a public corporation. In that case, negotiation between the acquirer and the vendors to separate the downstream Australian shares from the other assets of the upstream body corporate will be significantly easier. These negotiations will be more difficult and commercially inefficient if the upstream body corporate is a publicly owned entity because of the separation of management and ownership in a public body corporate, and the likely disparate nature and geographical separation of the owners of a public body corporate. Therefore, no relief is contemplated for acquisitions of unlisted, private foreign bodies corporate which hold shares in downstream Australian companies.

RG 71.41 An argument for granting relief for a takeover offer for a listed foreign body corporate which owns downstream Australian shares is that it may be regarded as being analogous to a takeover bid for a listed Australian company which owns shares in another Australian company. The argument is that they should therefore receive similar relief. This analogy with s629 and the relief it provides to the offeror for a listed Australian company does not apply for an offeror for an unlisted foreign body corporate. By this test, the relief should not be extended to an offeror for an unlisted foreign body corporate.

RG 71.42 However, Australian corporate regulation should not be used as a takeover defence by a foreign body corporate be it listed or unlisted. Nor should Australian corporate regulation impose unnecessary costs on essentially foreign transactions where Australian investor protection is not materially adversely affected. The same international comity reasons apply in offers for both listed and unlisted upstream foreign bodies corporate. For these reasons, the ASC may grant to an offeror for a public unlisted foreign body corporate, the restricted relief contemplated in this guide for an offeror for a listed foreign body corporate.

RG 71.43 The ASC will not grant unrestricted relief in such circumstances because the need for liquidity and efficient market operation do not apply in the case of unlisted upstream targets and the analogy with s629 does not apply.

RG 71.44 The ASC may grant restricted relief to the offeror for an unlisted foreign body corporate where:

(a) the upstream acquisition is by way of a takeover or merger which is legal in the jurisdiction in which it takes place; and

(b) the applicant satisfies the ASC that the upstream takeover or merger is subject to disclosure and investor protection requirements which are comparable to those under the Law.

RG 71.45 Because there is less information available about unlisted bodies corporate than about listed bodies corporate, the ASC will not limit the information on which an independent expert should base the fair value of the downstream company to publicly available information. The ASC will only limit the use of information in this way if the applicant is able to satisfy the ASC that it had no access to inside information in relation to the upstream body corporate had when deciding the bid price for the upstream acquisitions.

RG 71.46 Applications for relief for acquisitions of unlisted upstream corporations will be significantly more time consuming because of their nonstandard nature. Applicants should allow significantly greater time for consideration of their applications and factor that time into their commercial plans. The time for consideration will be reduced if the application clearly explains the regulatory regime under which the upstream acquisition will take place. The application should especially explain the disclosure regime, the nature of any provisions equivalent to the Eggleston principles and provisions equivalent to s641 and s698 of the Law.

Non scheme or takeover upstream acquisitions

RG 71.47 Because s629(b) requires the upstream acquisition to have taken place under a takeover bid (compare s12(k) of CASA), and s625 requires the upstream acquisition to have taken place under a scheme of arrangement, the ASC will normally only grant relief where the foreign upstream acquisition is by scheme of arrangement or takeover offer.

RG 71.48 The ASC will not grant relief for a downstream acquisition which would occur by virtue of an acquisition of shares in a foreign upstream body corporate where the upstream acquisition is proposed to be made in reliance upon an exception to the foreign legislative scheme which is not analogous to s625 or s629, such as one equivalent to s623 of the Law.

Market disclosure

RG 71.49 The market for shares in the downstream company must be adequately informed in relation to the upstream acquisition. It will be a condition of *all* relief that the bidder for the upstream body corporate disclose to the ASC full details of the proposed acquisition. These include the timing, extent and consideration of the proposed acquisitions (upstream and downstream).

RG 71.50 Where the downstream company is listed, the applicant will be required to disclose similar details of timing, extent etc to ASX immediately the upstream acquisition is announced.

RG 71.51 Where the downstream company is not listed the ASC will require the applicant to inform the company. If the upstream body corporate is the controlling shareholder, the ASC will require the acquirer to inform the minority shareholders also, and to advertise the relevant information in daily newspapers with circulation appropriate to the downstream company's members.

Procedural fairness — confidentiality

RG 71.52 In circumstances that the ASC is prepared to grant unrestricted relief it will respect a request from the applicant for confidentiality of the application prior to granting relief.

RG 71.53 Where the ASC is prepared to grant restricted relief and the only matter of contention between the applicant and the downstream company would be that of determining the downstream bid price, the ASC will consider a request from the applicant that the application remain confidential. The ASC will only agree where the applicant accepts that the ASC reserves the right to vary the mechanism of determination of the downstream bid price after the upstream and downstream proposed acquisitions are publicly announced. The ASC will consider submissions on the pricing mechanism made by interested parties after the acquisitions have been made public.

RG 71.54 An applicant who accepts relief which is subject to those conditions and who acts upon the relief will be unable to complain about any lack of certainty in the decision. Nor will it be able to argue that the mechanism determined for setting the downstream bid price is too uncertain. In any case, the applicant could have achieved certainty in the pricing mechanism for the downstream bid by allowing the

ASC to disclose the application to the downstream company prior to the bid becoming public.

Downstream shareholders' representatives

RG 71.55 The directors of the target company will normally be assumed to be suitable representatives of the interests of the downstream shareholders. This may not be the case where the upstream offeror has been:

(a) a substantial shareholder of the upstream target and the upstream target has been in a position to control or influence the composition of the board of the downstream company; or

(b) where the offeror has been in a position to control the downstream board in any other way.

Applications

RG 71.56 An applicant should set out full particulars of:

(a) any shares and marketable securities of the downstream company and of the upstream body corporate to which it is entitled at the date of its application; and

(b) all acquisitions and disposals, by the applicant and any associate, of securities in the downstream company and in the upstream body corporate in the four months before the date of its application.

RG 71.57 Applicants seeking modification of s629 should approach the ASC before the upstream acquisition takes place as the ASC considers itself unable to grant ex-post modifications or exemptions.

RG 71.58 Where possible, applications should be accompanied by drafts or copies of the relevant upstream takeover or merger documents and other related documents.

RG 71.59 Applicants should refer to RG 51 before deciding upon a course of action or timetable with respect to any acquisition.

RG 71.60 Applications may be lodged, with the relevant fee, at any ASC Regional Office.