ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 159

Takeovers, compulsory acquisitions and substantial holding notices

Related instruments [CO 00/343], [CO 00/344], [CO 00/345], [CO 01/1544], [CO 03/633], [CO 03/634], [CO 03/635], [CO 03/636], [CO 04/1413]

Chapter 6 — Takeovers

Chapter 6A — Compulsory acquisitions and buy-outs

Chapter 6B — Rights and liabilities in relation to Ch 6 and 6A matters

Chapter 6C — Information about ownership of listed companies and managed investment schemes

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Previous versions: See Superseded Policy Statement 159C [SPS 159C] (issued 18/11/2004), Superseded Policy Statement 159B [SPS 159B] (issued 23/9/2003), Superseded Interim Policy Statement 159A [SPS 159A] (issued 8/3/2000) in the ASIC Digest on CD-ROM.

***Editor's note**: This guide was updated in April 2008 to remove obsolete references to NCSC documents.*

From 5 July 2007, this document may be referred to as Regulatory Guide 159 (RG 159) or Policy Statement 159 (PS 159). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 159.1) or their policy statement number (e.g. PS 159.1).

What this guide is about

RG 159.1 This guide discusses how we will use our discretionary powers to exempt from or modify the takeover provisions introduced by the *Corporate Law Economic Reform Program Act 1999* ("the CLERP Act").

RG 159.2 Unless otherwise indicated in this guide, these policies apply to listed registered managed investment schemes. Adjustments that take account of the different features of managed investment schemes are set out in s604 of the *Corporations Act 2001* (the "Act").

RG 159.3 This guide replaces Interim Policy Statement 159.

Contents

A 3% creep exemption

Our policy

RG 159.4 We may give relief to allow a substantial holder to rely on the 3% creep exemption (item 9 of s611), when the substantial holder has:

(a) had its voting power diluted to below 19% during the six months immediately before an acquisition; and

(b) not had the opportunity to participate in the diluting issue of securities on terms that are not less favourable than those available to other holders.

Explanations

RG 159.5 Under item 9 of s611 an acquisition by a person is exempt from s606 if:

"(a) throughout the 6 months before the acquisition that person, or any other person, has had voting power in the company of at least 19%; and

(b) as a result of the acquisition, none of the persons referred to in paragraph (a) would have voting power in the company more than 3 percentage points higher than they had 6 months before the acquisition."

RG 159.6 We will give relief to preserve a person's right to creep under item 9 of s611 when that person's voting power has been involuntarily diluted below 19% during the six months before an acquisition. We will not give relief when the person could have maintained a minimum voting power of 19% by taking up an opportunity on terms no less favourable than those available to other holders. For example, we will not give relief if the person chose not to participate in a pari passu offer made under item 10 of s611 or a dividend reinvestment plan under item 11 of s611.

RG 159.7 When calculating the percentage creep in any rolling six month period, acquisitions by underwriters or sub-underwriters in reliance on item 13 of s611 will be counted.

B Approval of nominees

Our policy

RG 159.8 We may approve the appointment of the following persons as nominees to sell securities for the purposes of s615 and 619(3):

(a) a person who is an Australian financial services licensee authorised to provide financial services in relation to the class of securities (or a person who is licensed to deal in the securities as a pre-*Financial Services Reform Act 2001* licensee); or

(b) a nominee subsidiary of a person referred to in paragraph (a).

RG 159.9 We will only approve a person as nominee if we believe it is in a position to fulfil its responsibilities under those provisions. For example, we will not approve its appointment if we are:

(a) investigating the person; or

(b) taking enforcement action against the person.

Underlying principles

RG 159.10 The function of a nominee is to sell securities for the benefit of foreign holders and to distribute the proceeds of sale to the holders. It is our view that nominees should operate under an appropriate standard of professionalism to protect the interests of foreign holders. We consider that:

(a) the obligations of licensees in Pt 7.6 to 7.8 of the Act will generally provide sufficient protection to holders for the purposes of s615 and 619(3); and

(b) it is not generally necessary for the nominee to be independent of the issuing company.

Explanations

RG 159.11 Sections 615 and 619(3) provide that we may approve nominees to sell securities and remit the proceeds to foreign holders, for:

(a) an equal access scheme (item 10 of s611 and 615); and

(b) a scrip bid (s619(3)).

RG 159.12 We consider that persons will generally be suitable as nominees under s615 and 619(3) if they are:

(a) licensed under the Act to provide financial services in relation to the class of securities for which they are the proposed nominee; or are

(b) nominee subsidiaries of such persons.

C Classes of securities

Our policy

Merging classes

RG 159.13 We may give case-by-case relief to allow two or more classes of securities to be treated as the same class in a takeover bid and a compulsory acquisition. Under this relief, the bidder can make one bid for two or more classes, at different prices: but see RG 159.17].

RG 159.14 We will not give relief when the differences between the classes of securities are such that the securities would not be characterised as being in the same class for the purposes of a scheme of arrangement. For example, we will not give relief to treat a class of options as being in the same class as a class of shares.

Example 1: Options

RG 159.15 An example of this relief is that we may give case-by-case relief so that different series of options are not treated as different classes merely because they have different exercise prices and different exercise dates.

Example 2: Different dividend entitlements

RG 159.16 We may also give this relief where securities have different dividend or distribution entitlements: see s619(2)(b).

Equitable offers

RG 159.17 Our relief instrument will require that the bidder's different offers are equitable as between the two merged classes, having regard to the rights and obligations attaching to the classes.

RG 159.18 It is the bidder's responsibility to ensure that this requirement is met. The bidder risks a breach of the Act (because our relief will not apply) or an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances if its offers are not equitable as between the two classes.

RG 159.19 Assessing whether the offers are equitable will involve a valuation of securities in the different classes and any scrip consideration. The question is not whether the bidder offers a fair

value for each class (as in s667C), but whether eg the premium (if any) that the bidder offers for one class is similar to the premium offered for the other class.

RG 159.20 The bidder's relief application should provide evidence that it has assessed whether the offers are equitable as between the two classes: the bidder should provide a worked-out explanation by its financial adviser. This is so that we know the bidder has made the assessment, not so that we can pre-vet whether the bidder has met the requirement.

Partly-paid securities

RG 159.21 Fully and partly-paid securities are in the same class where voting and dividend rights attaching to partly-paid securities are full or proportional to the amounts paid up under s605(2). We do not need to give relief for such securities. We may give case-by-case relief for partly-paid securities with no dividend or voting rights.

RG 159.22 The bidder's offers must be equitable as between the partly-paid and fully-paid securities, having regard to the rights and obligations attaching to the two classes: see RG 159.17. This requirement is imported by s619(2). Section 619(2)(c) requires that differences between the offers must be attributable to the fact the offer relates to securities on which different amounts are paid up or remain unpaid: see RG 159.28 and *Taipan Resources NL (No 11)* (Unreported, Takeovers Panel, 26 June 2001).

RG 159.23 Although partly-paid securities are in the same class as fully-paid securities, a bidder can offer a type of consideration for partly-paid securities different from that offered for fully-paid securities (eg options instead of shares). The offers will not be equitable unless the type of consideration reflects the commercial characteristics of the partly-paid securities.

Underlying principles

RG 159.24 We may allow a bidder to treat two or more classes of securities as being in the same class where the securities are sufficiently similar that the holders have a community of interest.

RG 159.25 We do not require the bidder to treat holders of securities in the two merged classes identically under the bid: *Re Hills Motorway Ltd* (2002) 43 ACSR 101, 104 (concerning a scheme of arrangement). However we do require that the bidder's offers are

equitable as between the two merged classes. This is because the effect of merging two classes is that:

(a) the bidder may compulsorily acquire the holder's securities in one merged class on the basis of acceptances for both merged classes; and

(b) the terms of the bidder's offers may require the holder to accept for all their securities in both merged classes, or none.

RG 159.26 Multiple small classes (eg several different classes of partly-paid shares with different amounts unpaid) may create practical problems for a bid or compulsory acquisition. This has a defensive effect.

Explanations

Bid classes

RG 159.27 Without our relief, s605(1) provides that a takeover bid can be made for securities within a particular class. A bid must relate to securities in a class of securities: s617. A bidder who wishes to bid for two or more classes may concurrently undertake two or more separate bids. All offers for each bid must be the same: s619(1). There is an exception where the different consideration is attributable to different accrued dividend or distribution entitlements or different amounts paid up or remaining unpaid: s619(2)(b) and (c).

RG 159.28 In s619(2) differences in consideration are "attributable to" amounts paid up or dividends accrued if they correlate with or are commensurate with those factors: *Taipan Resources NL (No 11)*.

Valuing options

RG 159.29 In valuing options for the purposes of the equitable offers requirement, a bidder may derive useful guidance from accounting standards in the directors' remuneration context.

Partly-paid securities

RG 159.30 Section 605(2) provides that "securities are not to be taken to be different classes merely because:

(a) some of the securities are fully-paid and others are partly-paid; or

(b) different amounts are paid up or remain unpaid on the securities."

RG 159.31 This means partly and fully-paid securities are in the same class at least where voting and dividend rights attaching to partly-paid securities are full or proportional to the amounts paid up. Section 605(2) is based on the Legal Committee of the Companies and Securities Advisory Committee (now CAMAC) *Anomalies Report* (March 1994) Recommendation 26. The Legal Committee p38 commented:

> "The Corporations Law should provide that partly-paid and fully-paid shares are not, for that reason alone, separate classes of shares for the purpose of Chapter 6. Where there are other differences, for example, partly-paid shares having reduced rights not proportional to the amount paid up, common law principles would determine whether there are separate classes."

RG 159.32 We will consider applications for relief allowing a partly-paid security without voting or dividend rights to be treated as in the same class as a fully-paid security. The Legal Committee anticipated that we could use our discretionary powers in relation to s605(2): p38. However, we note that partly-paid securities quoted on ASX must have proportional voting rights–Listing Rule 6.9.

RG 159.33 If a partly-paid security should be valued as if it included an option over the corresponding fully-paid security, we consider that the bidder should take this option component into account in assessing whether its offers are equitable as between the partly-paid securities and the fully-paid securities. For example, in certain circumstances a partly-paid security may be "out of the money" and could initially be considered as a liability. However, the bidder's valuation of the partly-paid securities may still determine that they have a positive value.

RG 159.34 In *Taipan Resources NL (No 10)* (Unreported, 23 May 2001) and *Taipan Resources NL (No 11)* the Takeovers Panel found that options reflected the value and commercial characteristics of partly-paid shares and could be offered to the partly-paid shareholders in that case.

Consultation

RG 159.35 In deciding whether to give relief, we may consult with the target.

D Securities issued during an off-market bid

Our policy

RG 159.36 We may give relief to allow an off-market bid to extend to bid class securities that are issued during the bid period under circumstances that are not within s617(2). We may give this relief if the bidder's statement discloses that its bid is extended in this way.

RG 159.37 If we give the relief described in RG 159.36, the bid class securities that are issued will be excluded from:

(a) the conditions permitted in item 2(d)(ii) of s611 (ie the happening of events referred to in s652C(1) or (2) relating to on-market acquisitions made during the bid period); and

(b) section 650F(1)(a) (ie freeing off-market bids from defeating conditions that are events referred to in s652C(1) or (2)).

Underlying principles

RG 159.38 We may be prepared to extend the operation of s617(2) to include bid class securities issued during the bid period. This relief is consistent with the application of the compulsory acquisition provisions to securities issued up until the end of the offer period.

Explanations

RG 159.39 Section 617(1) provides that off-market bids must relate to securities that exist or will exist as at the date set by the bidder under s633(2).[1]

RG 159.40 Section 617(2) allows a bidder to extend its bid to securities that come to be in the bid class during the offer period because of the conversion or exercise of rights attached to "other securities". These "other securities" must be securities that exist, or will exist, at the date set by the bidder under s633(2).

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[1] Under s633(3), the date chosen by the bidder must be:
(a) on or after the date on which it gives the bidder's statement or a separate written notice in which the bidder sets the date for determining holders (s633(2)(b)), to the target; and
(b) on or before the date on which the first offers are made to holders of securities.

RG 159.41 Section 617(2) does not apply to bid class securities issued during the bid period:

(a) because of the conversion or exercise of rights attached to other securities that are issued after the date set by the bidder under s633(2); or

(b) under a dividend or distribution reinvestment plan, bonus share plan or an employee share scheme.

RG 159.42 In those circumstances s617(2) will not apply because these securities are not issued on the conversion of, or exercise of, rights attached to "other securities" that exist, or will exist, at the date set by the bidder under s633(2).

E Unmarketable parcels

Our policy

RG 159.43 When a bidder offers quoted scrip as consideration in a takeover bid they may have to offer an unmarketable parcel of securities to a holder. We have given Class Order relief (see [CO 00/343]) to allow a bidder to deal with offers of unmarketable parcels of securities as follows:

(a) if a nominee is appointed under s619(3) — the nominee may sell the unmarketable parcel of securities offered as consideration and distribute the proceeds to the holders in accordance with s619; or

(b) in other circumstances — the bidder may offer cash (based on the highest closing price of the securities during the bid period) to the holders.

Underlying principles

RG 159.44 When a bidder offers quoted scrip as a form of consideration under a bid, they can take advantage of our class order relief when the bidder would otherwise be offering an unmarketable parcel of securities to holders as consideration for their securities. Our class order allows the bidder to offer a cash amount to holders that is equal to the market value of the unmarketable parcel of securities that would be offered as consideration but for this relief: see RG 159.46.

RG 159.45 Given the costs associated with appointing a nominee, our class order does not require a bidder to appoint a nominee to sell the unmarketable parcel of securities and forward the cash proceeds to the holder. However, if a bidder intends to use the procedure in s619(3), this procedure should also be used when dealing with unmarketable parcels.

RG 159.46 The number of securities that constitute an unmarketable parcel should be determined by applying the definition of "marketable parcel" in the operating rules of the prescribed financial market (eg the ASX Business Rules) based on the highest closing price published by the financial market operator during the bid period.

Explanations

RG 159.47 A bidder may offer quoted scrip as consideration for bid class securities under an off-market bid. In some circumstances the securities offered as consideration to a particular holder may be an unmarketable parcel.

F Changes to a bidder's statement between lodgment and dispatch

Our policy

RG 159.48 Where a supplementary bidder's statement is lodged before dispatch of the bidder's statement, we have given relief by Class Order [CO 00/344] to allow a bidder to dispatch a replacement bidder's statement (which includes the changes made in the supplementary bidder's statement) instead of:

(a) where the bid class securities are quoted — the original bidder's statement (see item 6 of s633(1) and item 6 of s635); and

(b) where the bid class securities are not quoted — the original bidder's statement and the supplementary bidder's statement: see item 6 of s633(1) and 647(3)(c).

RG 159.49 Relief in Class Order [CO 00/344] is subject to the following conditions:

(a) as soon as practicable the bidder lodges with us and sends to the target and, if the target is listed, to the operator of the prescribed financial market, a copy of:

  (i) the replacement bidder's statement; and

  (ii) a replacement bidder's statement marked up to show the changes from the original bidder's statement; and

(b) the bidder dispatches the replacement bidder's statement:

  (i) where the bid is an off-market bid — 14 to 28 days after the replacement bidder's statement is lodged with us and served on the target (and the operator of the prescribed financial market), unless the target or ASIC agree in writing to a shorter period of time; or

  (ii) where the bid is a market bid — within 14 days after the replacement bidder's statement is lodged with us and served on the target (and the operator of the prescribed financial market);

(c) the replacement bidder's statement is dated with the day on which the bidder lodges the replacement bidder's statement; and

(d) the replacement bidder's statement:

(i) explains that it replaces the original bidder's statement lodged with us; and

(ii) gives the date that the original bidder's statement was lodged.

Underlying principles

RG 159.50 When the original bidder's statement has been amended before it has been dispatched, it is preferable for a holder to receive a single replacement bidder's statement rather than:

(a) where the bid class securities are not quoted:

(i) the original bidder's statement and a separate supplementary bidder's statement; or

(ii) a supplementary bidder's statement, before receiving the original bidder's statement; and

(b) where the bid class securities are quoted — an original bidder's statement which has been amended by a supplementary bidder's statement that has been sent to the operator of the prescribed financial market.

Explanations

RG 159.51 Section 647(3) requires that, as soon as practicable, a supplementary statement be:

(a) lodged with us (s647(3)(a));

(b) if the bid class securities are quoted — sent to the operator of the prescribed financial market (s647(3)(b)); and

(c) if the bid is an off-market bid and bid class securities are not quoted — sent to all holders of bid class securities who have not accepted an offer under the bid: s647(3)(c).

RG 159.52 Section 646 provides that if a supplementary bidder's statement is lodged, the bidder's statement is taken "to be the original statement together with the supplementary bidder's statement". For off-market bids, item 6 of s633(1) requires that the bidder's statement be dispatched to holders "within 14–28 days after the bidder's statement is sent to the target". For market bids, item 6 of s635 provides that the bidder must send the bidder's statement to each holder of bid class securities within 14 days after the announcement is made.

RG 159.53 Where bid class securities are quoted and a supplementary statement is lodged with us, the combined operation of item 6 of s635, 646 and 647(3)(b) is to require the bidder to send the original bidder's statement to holders, to lodge the supplementary statement with us and to send a copy to the operator of the prescribed financial market. Where bid class securities are not quoted, and a supplementary bidder's statement is lodged with us before the bidder's statement is dispatched to holders, it is uncertain whether the combined operation of item 6 of s633, 646 and 647(3)(c) requires that:

(a) the supplementary bidder's statement must be dispatched as soon as practicable and potentially before dispatching the original bidder's statement; or

(b) the supplementary bidder's statement must be dispatched with the original bidder's statement; or

(c) the supplementary bidder's statement must be dispatched before dispatch of the original bidder's statement but must be dispatched again with the original bidder's statement.

RG 159.54 To remove any doubt, Class Order [CO 00/344] relieves the bidder of their obligation under s647(3)(c) to dispatch a copy of the bidder's supplementary statement to holders before and/or when dispatching the bidder's statement if the bidder dispatches a replacement bidder's statement. (The bidder's obligations under s647(3)(a) and (b) are unaffected.)

RG 159.55 The class order provides that the timetables for an off-market bid (s633(1)) and a market bid (s635) recommence following the service of the replacement bidder's statement on the target, so that the target has the following period of time to consider any changes made by the bidder:

(a) where the bid is an off-market bid — at least 14 days and no more than 28 days, unless ASIC or the target agree in writing to a shorter period of time; or

(b) where the bid is a market bid — 14 days.

RG 159.56 We may consent in writing to shorten the period after consulting with the target, if the changes to the bidder's statement are:

(a) not substantial; or

(b) a result of negotiations with the target.

RG 159.57 Class Order [CO 00/344] does not require the bidder to prepare a replacement bidder's statement whenever a supplementary statement is lodged with us. However, it should be noted that in some

cases it may be misleading to holders if a bidder's statement and a comprehensive supplementary bidder's statement are dispatched to holders at the same time (see *Pancontinental v Goldfields* (1995) 16 ACSR 463, 472) or if a holder receives a supplementary statement prior to receiving the statement it is intended to supplement.

RG 159.58 Small typographical changes can be made to a bidder's statement without relief: see Regulatory Guide 23 *Updating and correcting prospectuses and application forms* at RG 23.37.

RG 159.59 Our Class Order [CO 01/1543] allows the bidder to omit from the version of the bidder's statement lodged information unavailable at that time (eg the date of the offer). It also allows the bidder to give standard information as at the date lodged (eg details of the bidder's relevant interest). The bidder must fill in or update the information before it dispatches the bidder's statement. The requirements in RG 159.49(c) and (d), for example, to date the bidder's statement with the day on which the replacement statement is lodged, do not apply. This is because these are standard changes made under Class Order [CO 01/1543] rather than under our replacement bidder's statement policy.

G Supplementary statements and unacceptable circumstances

Our policy

RG 159.60 If the bid class securities are quoted and the target is listed, we may refer a bidder or a target to the Takeovers Panel if their failure to dispatch a supplementary statement to holders appears to constitute unacceptable circumstances. We may refer a person to the Takeovers Panel in these circumstances despite their compliance with s647(3). We may also refer a person to the Takeovers Panel if they lodge or dispatch a supplementary statement either before or with the original bidder's statement, if it has the tendency to mislead holders in the circumstances.

RG 159.61 In deciding whether to refer a matter to the Takeovers Panel, we will consider the content of, and the extent of the publicity given to, the supplementary statement.

Underlying principles

RG 159.62 In some circumstances, sending a supplementary statement to holders either before or with the original bidder's statement, or failing to send a supplementary statement to holders, may be contrary to the purposes of Ch 6 set out in s602 (particularly s602(b)(iii) and 602(c)).

Explanations

RG 159.63 When the target is listed and the bid class securities are quoted, s647(3) requires a supplementary statement prepared by either the bidder or the target to be lodged with us (s647(3)(a)) and sent to the prescribed financial market (s647(3)(b)) as soon as practicable, but does not require that it be dispatched to the holders (compare s647(3)(c)). Despite compliance with s647(3), in some circumstances, a failure to send a supplementary statement to holders may constitute "unacceptable circumstances" under s657A. For example, a failure to dispatch a supplementary statement to holders may be contrary to the purposes of Ch 6 as set out in:

(a) s602(b)(iii), which provides that one of the purposes of Ch 6 is to ensure that holders are given enough information to enable them to assess the merits of the proposal; and

(b) s602(c), which requires, as far as practicable, that holders all have reasonable and equal opportunities to participate in any benefits accruing to holders.

RG 159.64 To counteract a misleading or confusing statement sent to holders during the offer period, it may be appropriate to send a supplementary statement to holders: Regulatory Guide 25 *Takeovers: false and misleading statements* at RG 25.66.

H Extension of time for bidder's statement

Our policy

RG 159.65 We may give relief to extend the 28 day period which a bidder has after sending its bidder's statement to a target under an off-market bid, to send its bidder's statement to holders if:

(a) the bidder could not reasonably be expected to dispatch the bidder's statement within 28 days after lodging it with us; or

(b) it would be advantageous to holders if the bidder's statement were sent to them at a later time.

RG 159.66 We will only consider giving this relief if the time constraints and other conditions imposed by s631 will be met.

Underlying principles

RG 159.67 If the time constraints imposed by s631 are met, holders under an off-market bid should not generally be adversely affected by an extension of time for dispatching the bidder's statement.

Explanations

RG 159.68 A delay in dispatching the bidder's statement may result in the need to prepare a supplementary bidder's statement. In these circumstances, relief may be conditional on Class Order [CO 00/344] being utilised for any supplementary bidder's statement required before dispatch.

RG 159.69 If it appears that the time constraints imposed by s631 will not be met, we may grant relief in circumstances when we would be prepared to give an extension to the time constraints in s631: see Regulatory Guide 59 *Announcing and withdrawing takeover bids (s653 and s746)* at RG 59.71–RG 59.76.

I Extension of time for target's statement

Our policy

RG 159.70 We may give relief to extend the time in which the target must send its target's statement to holders under an off-market bid. We will consider giving this relief if:

(a) the factors that lead to delay in preparing the target's statement are beyond the target's control;

(b) the target's statement is sent to holders more than ten business days before the offers are scheduled to close; and

(c) if the target is listed, the target informs the market of the extension of time and recommends that holders do not accept offers until they have received the target's statement.

Underlying principles

RG 159.71 A common reason given by a target for the delay in preparing the target's statement is the lack of ready access to information that may be material to a holder's decision to accept an offer under the bid. For example, delays may result from the need to compile up-to-date information on the performance of mining tenements or on subsidiaries located outside Australia.

Explanations

RG 159.72 Under an off-market bid, a target must send its target's statement to holders no earlier than the day on which it sends the target's statement to the bidder and no later than 15 days after the target receives a notice from the bidder that all offers have been sent to holders (item 12 of s633(1)). Our relief will be conditional on the target informing the market of the extension of time. We may also require the target to immediately inform the market of significant information which is already in the target's possession and which holders require to decide whether to accept offers under the bid.

RG 159.73 We will not give relief to extend the time for dispatch of the target's statement if we consider that the target already has all material information that a holder needs in assessing the merits of a bid.

RG 159.74 If the target cannot reasonably be expected to dispatch its target's statement to holders more than ten business days before the close of the bid:

(a) the target may ask the bidder to extend its bid[2]; or

(b) the target may apply for relief to dispatch an incomplete target's statement.

RG 159.75 We may grant relief to allow a target to dispatch an incomplete target's statement. For example, we may grant relief on the condition that the target:

(a) advises its holders of the nature, extent and significance of the relevant deficiencies in the target's statement; and

(b) undertakes to provide a supplementary target's statement which remedies all the deficiencies mentioned in (a) as soon as practicable.

[2] If a bidder does not agree to extend the bid in these circumstances we may refer the matter to the Takeovers Panel for a finding of "unacceptable circumstances" under s657A.

J Relevant interests of foreign associates and trustees

Our policy

Dealings and relevant interests of foreign associates of the bidder

RG 159.76 We may give relief from:

(a) the disclosure obligations in s636(1)(h), 636(1)(k), 636(1)(l) and 654C; and

(b) the minimum bid price requirement in s621(3),

to a bidder in relation to dealings and relevant interests of its "foreign associates".

RG 159.77 A bidder's "foreign associates" are related bodies corporate of the bidder that meet all of the following requirements:

(a) they operate and are managed outside Australia;

(b) they are associates of the bidder only because of s12(2)(a);

(c) they are not involved in the planning or progress of the bid; and

(d) they are not investment companies.

RG 159.78 Relief will be granted subject to the conditions outlined in RG 159.82 and RG 159.83, as the case requires.

RG 159.79 We only propose to give the relief in RG 159.76 if the aggregate relevant interests in the bid class securities acquired, disposed of or held by the foreign associates are less than 5% of the bid class securities.

Interests of trustees of bidder superannuation funds

RG 159.80 We may give relief from:

(a) the disclosure obligations in s636(1)(h), 636(1)(k), 636(1)(l) and 654C; and

(b) the minimum bid price requirement in s621(3),

to a bidder in relation to dealings and relevant interests of the trustees of externally managed superannuation funds of the bidder. The relief will only be given if the relevant interests or acquisitions arise from

dealings effected on behalf of trustees of externally managed superannuation funds, by fund managers acting independently of, and without notification to, the trustee. Relief will be granted subject to the conditions outlined in RG 159.82 and RG 159.83, as the case requires.

RG 159.81 We may give the relief referred to in RG 159.80 to any related body corporate of the bidder if:

(a) it acts as the trustee of a superannuation fund established for the benefit of employees of the bidder or of any of its related bodies corporate; and

(b) in the four months preceding the bid, the aggregate number of bid class securities in each superannuation fund, which all such trustees have relevant interests in, is less than 5% of the bid class securities.

RG 159.82 We will tailor the conditions we impose on the relief in RG 159.76 and RG 159.80 to the case. In most cases when granting relief to a bidder from the disclosure obligations referred to in RG 159.76(a) and RG 159.80(a), we will impose the following conditions. The bidder must:

(a) make reasonable efforts between lodgment of the bidder's statement with us and the end of the offer period to:

(i) obtain all the information required to be disclosed under s636(1)(h), 636(1)(k) and 636(1)(l); and

(ii) comply with s654C and the supplementary statement provisions in Div 4 of Pt 6.5;

(b) give us details of its efforts to ascertain the information specified in (a) above, including copies of correspondence sent to its foreign associates or trustees, as the case may be;

(c) disclose in the bidder's statement (as supplemented) the effect of any relief; and

(d) include any information obtained under paragraph (a) in a replacement bidder's statement or a supplementary bidder's statement.

RG 159.83 When we grant the relief contemplated in RG 159.76(b) and RG 159.80(b), we will impose the following conditions. The bidder must:

(a) make reasonable efforts to find out whether a price higher than the bid price was paid, or agreed to be paid, for bid class

securities during the four months preceding the bid by a foreign associate or a trustee of the bidder's superannuation fund. This obligation applies after lodging the bidder's statement with us and throughout the offer period;

(b) increase the price to be paid under the bid as soon possible after it discovers that a higher price was paid for bid class securities by a foreign associate of the bidder or a trustee of a superannuation fund of the bidder, during the four months preceding the bid;

(c) give us details of efforts made to obtain the information specified in (a) above, including copies of correspondence sent to its foreign associates or trustees, as the case may be; and

(d) disclose in the bidder's statement (as supplemented) the effect of any relief.

Underlying principles

RG 159.84 We recognise that:

(a) the costs and time involved in collating the information required to comply with the relevant sections may be significant; and

(b) there is a significant risk that, by seeking the relevant information before announcing the takeover, the bidder may disclose the pending bid (which should remain confidential until it is announced) to persons who may use the information to trade.

Explanations

RG 159.85 A bidder's statement must disclose particulars of dealings by the bidder and its associates in bid class securities during the four months preceding the date of the bid: s636(1)(h).

RG 159.86 The bidder's statement must disclose the number of bid class securities the bidder has a relevant interest in immediately before the first offer is sent: s636(1)(k)(ii). The bidder's statement must disclose the bidder's voting power in the target: s636(1)(l).

RG 159.87 The consideration offered under a bid must equal or exceed the maximum consideration that the bidder or its associate provided or agreed to provide, for a bid class security under any purchase or agreement during the four months before the date of the bid ("the relevant period"): s621(3). A bidder may discover that bid class securities have been purchased or agreed to be purchased during the relevant period at a higher price than the bid price by the following people:

(a) a foreign associate of the bidder; or

(b) a trustee of the bidder's superannuation fund.

RG 159.88 If a bidder discovers this before it dispatches its bidder's statement, it must comply with s621(3).

RG 159.89 Section 654C requires a bidder for an unlisted target to disclose to the target when its voting power in the target rises from below the following percentages to that percentage or higher:

(a) 25%;

(b) 50%;

(c) 75%; and

(d) 90%.

RG 159.90 Disclosure under s654C must be as soon as practicable, and in any event within two business days after the prescribed rise in the voting power occurs: s654C(2). We will not give relief from Ch 6C or s654B because disclosure in these cases is required when a person becomes aware of the change in relevant interest, but s654C requires disclosure regardless of the person's actual knowledge.

K Receivers and managers may assume obligations of target directors

Our policy

RG 159.91 We may give relief to allow a receiver and manager to assume all of the functions of the directors in relation to a target's statement where:

(a) the receiver and manager lodges with us a statutory declaration stating that they have been validly appointed; and

(b) the directors are no longer in a position to carry out their obligations as directors of the target.

Underlying principles

RG 159.92 There is no reason why a receiver and manager should be denied the same powers in this situation as are given to a liquidator or an administrator.

Explanations

RG 159.93 Section 638(4) covers circumstances when a target is being wound up or is under administration. However, s638 does not address how the obligations of target directors will best be fulfilled if a receiver and manager has been appointed to manage the affairs of the target: see s90.

L Adding scrip consideration to an off-market bid

Our policy

RG 159.94 We may give relief to allow a bidder to add fully-paid scrip consideration to its off-market cash bid if the bidder:

(a) lodges a supplementary bidder's statement that complies with the disclosure obligations in s636(1)(g) or (ga) and any other necessary disclosure obligations;

(b) sends a copy of the supplementary bidder's statement to each holder, to the target and to the prescribed financial market if the target is listed; and

(c) lodges a copy of the notice of variation required under s650D and sends a copy to the target, to the prescribed financial market if the target is listed, and to holders: s650D(1)(c)(ii).

Underlying principles

RG 159.95 Under an off-market bid, a bidder may offer a combination of cash and scrip as consideration under its bid from the commencement of the bid. There is no policy reason for refusing to grant the relief in RG 159.94 if the target board and holders have sufficient information and time to consider a significant change to the terms of the offer.

Explanations

RG 159.96 Under s650B(1) a bidder is not expressly permitted to improve the consideration offered under an off-market bid by offering scrip in addition to a cash offer (as opposed to a scrip alternative to a cash offer). This is implied from the context in s650B(1)(a), (f) and (h) and from s650B(2), which requires an election to be made as to the form of consideration to be taken.

M Variation to allow conditional increase in consideration

Our policy

RG 159.97 We may give case-by-case relief to allow a bidder to send a notice of variation during an off-market bid which offers an increase in consideration that is subject to a minimum acceptance condition where the bidder:

(a) does not require that the minimum acceptance condition be met at a point in time before the close of the bid; and

(b) pays the increased consideration, even if the minimum acceptance condition is waived.

RG 159.98 We may also give relief to delay the time for paying that part of the consideration representing the increase. We will give relief where the increase is still conditional at the time the original consideration becomes payable. Under our relief, the time for paying the increase will be analogous with s620 and [CO 01/1543]. For example where the bidder is given the necessary transfer documents with the acceptance and the increase is still conditional, the bidder must pay the increase by the end of whichever of the following periods ends earlier:

(a) 1 month after the increase becomes unconditional; or
(b) 21 days after the end of the offer period — see s620(2)(a).

Underlying principles

RG 159.99 We consider that an increase in consideration during the bid period, which is conditional on a minimum acceptance condition, is not contrary to the principles in s602. However, there should be sufficient disclosure of the effect of the conditional increase.

Explanations

RG 159.100 It is arguable that a bidder could, without seeking relief, announce that it will increase its off-market bid if it receives a certain level of acceptances. Therefore, in order to remove doubt, we will grant relief to allow a bidder to increase the consideration offered on the above terms. We will not grant relief if the bidder applies pressure on holders to accept the bid prior to the close of the bid by requiring that the minimum acceptance condition be satisfied at a point in time prior to the close of the bid.

N Approving notices of variation

Our policy

RG 159.101 Our Class Order [CO 03/633] exempts the bidder from s650D(3) on condition that it *approves* a notice of variation to offers under its takeover bid in any of the ways a bidder's statement can be approved under s637. This is so that the directors of the bidder do not have to *sign* the notice.

Lodging with ASIC: s351

RG 159.102 As with a bidder's statement, a notice of variation lodged with us must still comply with s351. Section 351(1) states that a director or secretary of the company must sign the notice. If it is a foreign company, the notice may be signed by:

(a) its local agent; or

(b) if the local agent is a company — a director or secretary of the company: s351(1).

RG 159.103 Class Order [CO 03/633] does not affect the requirement in s351. We do not have a power to give relief from this requirement. However we note that a bidder's statement or notice of variation may be signed by an individual using a power of attorney from the person required to sign it: s52A.

Underlying principles

RG 159.104 We consider that it is appropriate for a bidder to have the option of approving a notice of variation in any of the ways a bidder's statement can be approved under s637.

Explanations

RG 159.105 Section 637 does not require a bidder's statement to be signed by directors of the bidder. Section 637 requires that the copy of the bidder's statement that is lodged with us must be *approved* by:

(a) for a bidder that is a body corporate:

  (i) for cash consideration only — a resolution passed by the directors; or

(ii) otherwise — a unanimous resolution passed by all the directors; or

(b) for a bidder who is an individual — the bidder: s637(1).

RG 159.106 In contrast to s637, a notice of variation where the bidder is a body corporate must be *signed*:

(a) if the bidder has two or more directors — by at least two directors of the bidder who are authorised to do so by a resolution passed at a directors' meeting; or

(b) if the bidder has only one director — that director: s650D(3).

O Expert's reports and compulsory acquisition

Our policy

Panels of experts

RG 159.107 For the purpose of nominating independent experts under s667AA, we will maintain the following two registers of experts:

(a) a register of experts who are able to prepare reports for "Large Companies". A "Large Company" (including its controlled entities) is one with a consolidated gross operating revenue of more than $10 million or consolidated gross assets of more than $5 million for the past financial year; and

(b) a register of experts who are able to prepare reports for companies that meet neither of the criteria in paragraph (a) ("Small Companies").

RG 159.108 We will appoint to the registers only experts with an Australian financial services licence authorising it to give financial product advice on securities (or with a pre-*Financial Services Reform Act* licence).

Application for nomination of experts

RG 159.109 A person applying to us to nominate experts must include in their application:

(a) the name of the company that issued the securities to be compulsorily acquired;

(b) a copy of that company's previous year's financial statements (including details of all segment reporting);

(c) details of any unusual aspects of the company's operations and of its main activity (including geographic locations of operations);

(d) identification of the class of securities to be reported on;

(e) the name and address of the applicant and contact details;

(f) identification of any expert who may have a conflict of interest or is otherwise requested not to be nominated; and

(g) any other relevant information (eg an applicant may specifically request that experts be nominated from the "Large Company" register).

RG 159.110 We will not allow an applicant to suggest a particular expert to prepare the report except in very unusual circumstances, including when no suitable expert is on the register. Cost savings to the applicant are not usually regarded as a matter that would constitute very unusual circumstances.

Nomination of experts

RG 159.111 When nominating experts, we will ask the next three experts on the appropriate register, in rotational order, if they have a conflict or do not want to be nominated in relation to a particular application. We will expect a response from each expert within two business days of telling them the identities of the applicant and the body the securities of which are to be acquired. The three experts who first confirm their willingness to take the assignment will generally be nominated to the applicant. Experts will be required to undertake to maintain the confidentiality of the information provided to them in relation to possible nominations.

RG 159.112 An expert who has been characterised as a "specialist" will not be nominated until they are within the next three on rotation and the applicant is in an industry within their speciality.

RG 159.113 All three nominated experts will then rotate to the bottom of the register list.

Underlying principles

RG 159.114 We are of the view that the intention of Parliament in enacting s667AA was to ensure that a company seeking to compulsorily acquire securities did not have an unfettered discretion to appoint an expert of their choice.

RG 159.115 Nominating three experts by rotation from a list of experts ensures that:

(a) there are enough experts to choose from so that there is some competition between experts;

(b) there is a limit on the applicant's ability to select the expert of their choice; and

(c) the system is fair and transparent.

Explanations

RG 159.116 The three circumstances when we may be required to nominate an expert are:

(a) After a bid, when the bidder has a relevant interest in 90% or more of the bid class securities, the bidder must advise the holders of convertible securities of their right to be bought out. If the bidder decides to propose terms for acquiring these convertible securities, it must send an expert's report to the holders of those convertible securities: s663A.

(b) Outside a bid when a person has a full beneficial interest in 90% or more of a class of securities, that person may send out notices to compulsorily acquire those securities. Those notices must be accompanied by a report by an independent expert: s664A.

(c) When a person uses the compulsory acquisition procedure in paragraph (b), they must advise the holders of convertible securities of their right to be bought out. If the person decides to propose terms for acquiring these convertible securities, they must send an expert's report to the holders of those convertible securities: s665A.

RG 159.117 We are required to nominate from one to five experts within 14 days after receiving an application.

RG 159.118 An expert may refuse nominations without disclosing the reason. However, an expert who consistently declines nomination will be expected to justify their continued inclusion on the register.

P Notice by 85% holder

Our policy

RG 159.119 Our Class Order [CO 00/345] exempts all persons from s665D(3) and 665D(4) of the Act to the extent that those provisions would otherwise require a person to give a notice to a company which has only one member or which is a wholly-owned subsidiary.

Underlying principles

RG 159.120 Sections 665D(3) and 665D(4) are in Div 3 of Pt 6A.2. Division 3 of Pt 6A.2 is intended to put members of a company on notice of the existence of an 85% holder and the right of that holder to compulsorily acquire securities in a particular class if they become a 90% holder. The underlying policy concern that this Division seeks to address does not apply to companies that have only one member or that are wholly-owned subsidiaries.

Explanations

RG 159.121 A person is an "85% holder" in relation to a class of securities if they hold, either alone or with a related body corporate, full beneficial interests in at least 85% of the securities (by number) in that class or the person's voting power is at least 85%. Therefore, a person who holds all of the voting securities in the company on that basis (a "100% holder") is also an 85% holder.

RG 159.122 Division 3 of Pt 6A.2 requires:

(a) a person to notify the company in writing that they have become an 85% holder, within 14 days of becoming aware that they are an 85% holder (s665D(3));

(b) an 85% holder who continues to be an 85% holder on any anniversary of their having become an 85% holder, to notify the company in writing within 14 days after that anniversary (s665D(4)); and

(c) a company which receives a notice under s665D to notify its members that:

(i) a person has become, or continues to be, an 85% holder; and

(ii) this person will be able to compulsorily acquire the securities in the relevant class under Pt 6A.2 after they become a 90% holder in relation to that class of securities.

RG 159.123 This Division applies anomalously for one member companies and wholly-owned subsidiaries as, without relief, it would require:

(a) a 100% holder of a company to send a notice in writing to the company of its 100% holding after it has become aware that it has become an 85% holder and on every anniversary on which it continues to be an 85% holder; and

(b) the company to notify the 100% holder of its own holding and its right to compulsorily acquire securities which it already holds.

RG 159.124 We give other relief from the 85% holder provisions, for example so that an 85% holder does not have to notify the company that they have become an 85% holder if they have given a compulsory acquisition notice or a buy-out notice to members: see Regulatory Guide 171 *Anomalies and issues in the takeover provisions* at RG 171.190.

Q Escrows

Our policy

Listing rule escrows

RG 159.125 Our Class Order [CO 03/634] modifies s609 so that a listed company does not have a relevant interest in securities merely because the company must apply restrictions on the disposal of the securities under the ASX Listing Rules Ch 9 ("listing rule escrow"). This relief is for the purposes of the takeover provisions in Ch 6, but not the substantial holding provisions in s671B.

RG 159.126 For certainty, our Class Order [CO 03/634] modifies s609 so that ASX does not have a relevant interest merely because it has the power to control disposal of securities the subject of a listing rule escrow. This includes ASX's power to consent to the release of securities from the escrow in the case of a takeover bid or scheme of arrangement: Listing Rule 9.17. This relief is for the purposes of both the takeover provisions in Ch 6 and the substantial holding provisions in s671B.

Voluntary escrows

RG 159.127 We may give case-by-case relief modifying s609 so that:

(a) a company; or

(b) an underwriter or lead manager,

does not have a relevant interest merely because it requires a holder to enter into an escrow that is not a listing rule escrow ("voluntary escrow"). This is for the purposes of the takeover provisions in Ch 6, but not the substantial holding provisions in s671B.

Company

RG 159.128 Our voluntary escrow relief will apply to a company where it issues securities to the holder as promoter or in return for seed capital, assets or services.

Underwriter

RG 159.129 Our voluntary escrow relief will apply to an underwriter or lead manager where it enters into an escrow with a holder referred

to in RG 159.128 or a company's controller or other substantial holder. The underwriter or lead manager must underwrite or manage in the ordinary course of its business of underwriting or managing offers of securities.

Requirements

RG 159.130 The voluntary escrow must:

(a) restrict disposal and not voting;

(b) terminate no later than:

(i) in the case of a company escrow, two years; and

(ii) in the case of an underwriter escrow, one year;

after the parties enter into the voluntary escrow;

(c) allow the holder to accept into a successful takeover bid and allow the securities to be transferred or cancelled as part of a merger by scheme of arrangement: this is similar to ASX Listing Rules 9.17–18. A successful bid is a bid where holders of at least half of the bid class securities that are not subject to escrow to which the offer under the bid relates have accepted. The escrow agreement must require that the securities be returned to escrow if the bid does not become unconditional.

RG 159.131 If the securities are issued under a prospectus, we will require details of the voluntary escrow to be disclosed in the prospectus. If the issue of the securities is approved at a meeting of holders, the details must be disclosed in the notice of meeting or explanatory statement accompanying the notice.

Takeover defence

RG 159.132 We will not give relief for a voluntary escrow if we consider that a purpose of the escrow may be to construct a defence against a takeover.

RG 159.133 An escrow employed as a defence may be subject to challenge before the Takeovers Panel or court by a bidder, holder or us on the basis that it constitutes unacceptable circumstances or is inconsistent with the duties of the target directors.

Underlying principles

Listing rule escrow

RG 159.134 A listed company entering into a listing rule escrow cannot acquire control over itself, in contrast to a holder acquiring securities to which the escrow applies.

RG 159.135 Our class order relief for a listing rule escrow facilitates the "fair, orderly and transparent market" benefits of these requirements: s792A.

RG 159.136 The listing rule escrow is designed to align:

(a) the interests of a vendor of an asset to the company, a seed capitalist, a promoter or a provider of professional services rewarded with securities; and

(b) the interests of other holders.

RG 159.137 ASX states:

> "For example, escrow delays the time in which a vendor can realise the value of the securities. The delay allows the value of assets or services sold to an entity to become more apparent, and for the market price of the entity's securities to adjust before the vendor receives full consideration. In that way, the business risk is shared between the vendor and other investors": ASX Guidance Note 11 *Restricted Securities and Voluntary Escrow*, para 2.

RG 159.138 The escrow may promote an orderly market in the securities by preventing a sell-down of a substantial number of securities immediately after the securities are issued.

Voluntary escrow

RG 159.139 A company or underwriter entering into a voluntary escrow cannot acquire control.

RG 159.140 Voluntary escrows may have a similar effect to listing rule escrows by aligning the interests of the holders subject to escrow with those of other holders and promoting an orderly market for the shares. A company or underwriter may require a voluntary escrow to promote investor confidence in the offer of securities. Relief for professional underwriters also promotes capital raising and reorganisation by allowing them to protect themselves from an early sell-down. A sell-down may depress the price of the securities.

RG 159.141 But the terms of a voluntary escrow should be limited: see the requirements in RG 159.130. The benefits of an escrow must be balanced against the potential defensive effect of an escrow.

Period of voluntary escrow

RG 159.142 The period of a voluntary escrow should be limited. Even where holders are free under the voluntary escrow to accept into a successful takeover bid, it may have a defensive effect. A potential bidder may be discouraged because they are unable to build a pre-bid stake or to obtain over 50% of securities other than those subject to escrow.

RG 159.143 Our relief limits the period of the voluntary escrow to 1 year for underwriter escrow and 2 for company escrow. These periods provide a balance between the following considerations:

(a) sufficient delay for the market to value goods and services provided by the holder and to prevent a sell-down immediately after the securities are issued; and

(b) minimising the period during which the holder is restrained from further selling. A prolonged escrow may affect the market for control over the company.

RG 159.144 These periods are also consistent with periods for listing rule escrows.

Explanations

Relevant interest

RG 159.145 Without our relief, a person who enters into an escrow with a holder has a relevant interest in the securities subject to the escrow because the person controls the exercise of a power to dispose of the securities: s608(1)(c). Section 609(7) underlines that a person has a relevant interest in securities if they may restrict the disposal of the securities. The subsection states that a person does not have a relevant interest in securities because of an agreement if the agreement does not restrict disposal of the securities for more than three months from the date when the agreement is entered into: s609(7)(c).

RG 159.146 Section 608(9) states that s608 may result in a body corporate having a relevant interest in its own securities. This confirms that a company may have a relevant interest in its own securities to which an escrow applies.

ASX Listing Rules

RG 159.147 Under the ASX Listing Rules certain listed companies must apply restrictions on disposal to holders of restricted securities and enter into a restriction agreement (escrow), so that the holder may not deal with the securities for a specified time of either one or two years: see Listing Rules 9.1 and 9.2. The company must also take steps to restrict transfer of the securities either by lodging certificates with a bank or applying a holding lock in CHESS: Listing Rules 9.5 and 9.14.

New securities

Company

RG 159.148 Our relief for companies will apply only where the securities that are the subject of a voluntary escrow are newly issued. This is because the rationale of allowing time for the value of assets and services to become apparent applies only to new securities: see RG 159.137.

Underwriter

RG 159.149 Our relief for underwriters or lead managers may extend to voluntary escrows over existing securities of a controller or substantial holder. An underwriter in requiring an escrow is less likely to have a defensive purpose.

Substantial holdings

RG 159.150 Our relief for companies and underwriters or lead managers that enter into listing rule or voluntary escrows does not extend to the substantial holding provisions. This means substantial holding information given to the relevant market operator must be accompanied by the escrow agreement and any other documents setting out the terms of a relevant agreement contributing to the creation of the escrow: s671B(4).

Applications

RG 159.151 Applications for voluntary escrow relief should explain the purposes of the escrow.

R Rights issues and underwriting

Our policy

RG 159.152 We will carefully consider any rights issue or underwriting that falls within the legal terms of the exemption but appears to be designed to avoid the purposes of Ch 6: see s602. We will consider the commercial nature of the transaction rather than the legal form.

RG 159.153 For example, a rights issue or other fundraising may be structured so that control of a company may pass to an underwriter or sub-underwriter of the rights issue without a takeover bid. We may look at whether the circumstances surrounding the transaction are more consistent with a bona fide agreement to assume the risk of the shortfall, or with a placement.

Relevant circumstances

RG 159.154 We discuss circumstances that may suggest the rights issue or underwriting is designed to avoid Ch 6 at RG 159.169. An example is where a rights issue is priced at or above the market price, so that a substantial shortfall is more likely.

Controller as underwriter

RG 159.155 We will normally closely examine a proposed rights issue or other fundraising underwritten by a person who already controls or is likely after the transaction to control the company: see RG 159.170.

Holder approval

Item 7 of s611

RG 159.156 Where holders have approved acquisitions by the underwriter as a result of shortfalls under item 7 of s611, we would not normally have cause to examine the matter.

Related party underwriter

RG 159.157 Where the underwriter is a related party, the company should carefully consider obtaining holder approval of the underwriting under Pt 2E.2: see RG 159.173.

Regulatory action

RG 159.158 A person who abuses the exemptions under items 10 or 13 risks an application to the Takeovers Panel by us or another party for a declaration of unacceptable circumstances or other regulatory action by us.

Underlying principles

RG 159.159 Any arrangement that falls within the terms of the exemptions in s609 or 611, but is designed to avoid the intent of Ch 6, risks an application to the Takeovers Panel or other regulatory action.

RG 159.160 A transaction designed to give control to a holder or the underwriter that is presented to the holders and the market as a rights issue will offend the purposes in s602. In this case:

(a) other holders and the market are not fully informed about the acquisition of control by the holder or underwriter – s602(a) and (b); and

(b) other holders may not have a reasonable or equal opportunity to participate in the benefits accruing through a proposal under which the holder or underwriter acquires a substantial interest in the company – s602(c).

Related party underwriter

RG 159.161 Holder approval is generally required where a public company enters into a transaction with a related party (including an underwriter) that is given favourable terms. This is a vital part of corporate governance.

Explanations

Item 10 of s611

RG 159.162 Item 10 of s611 provides an exemption from the takeovers prohibition in s606 for rights issues. The exemption expressly extends to an acquisition by a person as underwriter or sub-underwriter to the rights issue.

RG 159.163 Item 10 of s611 gives an exemption for rights issues on the basis that:

(a) each holder has an equal opportunity to avoid dilution of their existing holding by participating in the offer; and

(b) it is less likely than for other issues of securities that any one holder's percentage holding will increase substantially.

RG 159.164 The exemption covering acquisitions by an underwriter allows for the possibility that there is a substantial shortfall in subscriptions under a bona fide rights issue.

RG 159.165 The exemption covering the underwriter in item 10 does not apply to acquisitions by the underwriter before agreements to issue securities are entered into. An acquisition prior to this time would not result from an issue of securities that satisfies the condition that agreements to issue are not entered into until a specified time for acceptances of offers has closed: item 10(d). This means that a form of underwriting where an intermediary acquires shares before the offer to holders would not be covered by the exemption. We also consider the application of underwriting exemptions under items 10 and 13 to different forms of underwriting in Regulatory Guide 61 *Underwriting–application of exemptions* (RG 61).

Item 13 of s611

RG 159.166 Item 13 of s611 exempts an acquisition by an underwriter that results from an issue of securities under a disclosure document.

RG 159.167 The exemption in item 13 applies to acquisitions by the underwriter after the issue of the disclosure document only. An acquisition prior to this time is not an "acquisition that results from an issue under a disclosure document". This means that a form of underwriting where an intermediary acquires shares before the issue of the disclosure document would not be covered by item 13.

RG 159.168 In the case of a rights issue, the underwriter may rely on both items 10 and 13.

Relevant circumstances

RG 159.169 Objective circumstances may suggest that the rights issue or other fundraising has been designed to give control to a holder or underwriter without a takeover bid. In examining a rights issue we may have regard to circumstances such as:

(a) the pricing of the rights issue — pricing at or above the current market price is more likely to lead to a substantial shortfall, so that holders who take up their rights and the underwriter are more likely to significantly increase their voting power. On the other hand, a deep discount may be associated with a high ratio of new securities for old: see paragraph (b);

(b) the ratio of the rights issue — the larger the number of new shares for old, the more dilutive the rights issue. A high ratio may suggest an abuse of item 10 (ASX Listing Rule 7.11.3 states the ratio must not be greater than one for one. But renounceable rights issues at or below the market price are exempt);

(c) the financial situation of the company — for example, if the company is financially distressed, it will have an urgent and compelling need for fresh capital and will be less likely to find an underwriter that is not the controller, substantial holder or their associate (see RG 159.170);

(d) the purpose of the rights issue or other fundraising — if the company cannot clearly identify a need for the capital, this may suggest an abuse of items 10 or 13;

(e) whether the underwriter has entered into the underwriting in the ordinary course of its business of underwriting (but see RG 159.170);

(f) in the case of an underwriting by the controller, the company has conducted discussions with potential underwriters that are not the controller, a substantial holder or their associate (see RG 159.181);

(g) whether the company has explored other options for raising capital;

(h) the terms of the underwriting;

(i) the shareholding structure of the company — for example, a substantial holder who is underwriter may be close to control;

(j) the response of substantial holders to the issue;

(k) recent variations to capital — for example, a company may need to satisfactorily explain why it had completed a buy-back although shortly afterwards it decided that it needed additional capital: *Re Phosphate Resources Limited* (Unreported, Takeovers Panel, 3 April 2003);

(l) whether the company has disclosed to holders the identities of sub-underwriters;

(m) dealings by the underwriter or sub-underwriter (or an associate) in securities of the company before or during the rights issue. Acquisitions of securities may suggest the underwriter is seeking control;

(n) dealings by the underwriter or sub-underwriter (or an associate) in renounceable rights;

(o) any associations between the underwriter or sub-underwriter and a controller or one or more substantial holders or a group of substantial holders;

(p) whether the underwriter or sub-underwriter is associated with the company's directors; and

(q) any role of the underwriter or sub-underwriter in the making of the offer and its influence on the affairs of the company (but see RG 159.170).

Controller as underwriter

RG 159.170 We realise that circumstances may sometimes be such that:

(a) the company has a compelling need for a capital injection;

(b) the most favourable means of raising the funds is through a rights issue; and

(c) the success of the issue without substantial shortfalls may not be assured.

RG 159.171 In these circumstances persons who already control or are likely after the rights issue to emerge with control of the company should not necessarily be precluded from underwriting or sub-underwriting the issue.

RG 159.172 We will normally closely examine a rights issue under these circumstances.

Holder approval: related party underwriter

RG 159.173 Where the underwriter is a related party, the underwriting may need approval by members under Pt 2E.2. A company that gives a *financial benefit* to a *related party* must obtain member approval unless the underwriting is on *arm's length terms*: s208 and 210.

"Related party"

RG 159.174 An underwriter will be a "related party", for example, where it controls the company or they are a director of the company: s228(1) and (2). The underwriter will also be a related party where it believes or has reasonable grounds to believe that it is likely to become a related party at any time in the future: s228(6). This may be the case if:

(a) the underwriter is close to control; or

(b) a substantial shortfall is likely.

"Financial benefit"

RG 159.175 An underwriting is a "financial benefit" because the company receives underwriting services from the underwriter and issues securities to the underwriter: s229(3)(d) and (e). The underwriter may receive fees.

"Arm's length"

RG 159.176 Member approval is not needed to give a financial benefit if the benefit is on terms that:

(a) would be reasonable in the circumstances if the public company or entity and the related party were dealing at arm's length; or

(b) are less favourable to the related party than these terms: s210.

RG 159.177 A benefit on arm's length terms would be on terms produced by real bargaining with a non-related underwriter: *Trustee for the Estate of the Late AW Furse No 5 Will Trust v Federal Commissioner of Taxation* (1990) 21 ATR 1123, 1132.

RG 159.178 In assessing whether an underwriting is on arm's length terms we will consider the commercial nature of the underwriting rather than the legal form. We will consider the underwriting in all the circumstances of the transaction.

RG 159.179 If a purpose of the underwriting is to give the underwriter control, the underwriting will not be on arm's length terms. This means that the factors discussed in RG 159.169 will also be critical to the question whether holder approval is required under Pt 2E.2.

RG 159.180 The following may also suggest that the underwriting is not on arm's length terms:

(a) an excessive or undisclosed underwriting fee or other benefit; or

(b) the underwriter will benefit from the company's proposed use of the capital raised (other than as holder).

RG 159.181 Another factor is whether the company sought to engage a non-related underwriter and what terms were discussed with potential underwriters.

RG 159.182 See also Media Release [MR 00/435] "ASIC acts on related party underwriting".

Disclosure

RG 159.183 The company must disclose in the explanatory statement accompanying the notice of meeting for holder approval information about the terms of the underwriting. The company may need to disclose circumstances mentioned in RG 159.169 so that holders have all information that is material to the decision how to vote on the resolution: item 7 of s611 (see also Regulatory Guide 76 *Related party transactions* at RG 76.46).

RG 159.184 An explanatory statement must also disclose:

(a) the identity of the underwriter; and

(b) the maximum increase in voting power of the underwriter — item 7(b) of s611.

RG 159.185 Item 13 of s611 requires the disclosure document to explain the effect that the acquisition would have on the underwriter's voting power in the company.

Unacceptable circumstances

RG 159.186 The Takeovers Panel may declare circumstances to be unacceptable whether or not the circumstances constitute a contravention of the Act: see s657A(1). It may declare that a rights issue or underwriting constitutes unacceptable circumstances although it falls within the legal terms of items 10 or 13 of s611.

General

RG 159.187 This policy replaces NCSC Policy Statement 112 *Arrangements contrary to the purpose of the Takeovers Code s60*.

S Exercising options acquired under bid

Our policy

RG 159.188 We may give case-by-case relief to a bidder from the takeovers prohibition in s606 for an acquisition of voting shares by the bidder that results directly from exercise of convertible securities acquired under an off-market bid for the convertible securities.

Requirements

RG 159.189 The following requirements will apply to our relief:

(a) the bidder makes a takeover bid for all voting shares in the bid class (a full bid);

(b) the bid for the convertible securities is subject to a non-waivable defeating condition that the bid for the shares is:

  (i) unconditional; or

  (ii) subject only to conditions relating to either or both of the prescribed circumstances in s652C(1) or (2) and the condition in s625(3);

(c) the bidder sends its first offers to holders under the bids for the convertible securities and voting shares on the same day;

(d) the bidder's statement that the bidder sends to holders discloses that the bidder has received our relief together with a brief description of the terms of the relief; and

(e) the bidder discloses its intentions concerning exercise of convertible securities in its bidder's statement.

Equitable offers

RG 159.190 Our relief instrument will also require that the bidder's offer for the convertible securities is equitable compared to the offer for the voting shares, having regard to the rights and obligations attaching to the two classes: eg the bidder must not make an offer at a premium for convertible securities and an offer at market or a discount for shares.

RG 159.191 It is the bidder's responsibility to ensure that the offers are equitable as between the convertible securities and the voting shares. Assessing whether the offers are equitable will involve a

valuation of the convertible securities and shares: see further RG 159.17].

RG 159.192 The bidder's relief application should provide evidence that it has assessed whether the offers are equitable as between the convertible securities and the voting shares: the bidder should provide a worked-out explanation by its financial adviser. This is so that we know the bidder has made the assessment, not so that we can pre-vet whether the bidder has met the requirement.

Applications

RG 159.193 We will not give this relief unless the bidder applies for it in good time before the date that it sends its offers to holders.

Underlying principles

RG 159.194 A bidder making a full, unconditional bid for voting shares should be allowed to acquire all other securities in a company: item 3 of s611. In these circumstances, the bidder has fully committed to completing its bid for every voting share in the bid class. This also means that control of the company does not pass through a bid for convertible securities without holders of voting shares having the opportunity to have all their shares acquired by the bidder.

RG 159.195 Where a bidder acquires convertible securities under a takeover bid, it should not be prevented by s606 from converting or exercising the convertible securities and acquiring the underlying voting shares. A prohibition on exercise may be a disincentive for bidders to bid for convertible securities.

RG 159.196 The Corporations Act expressly recognises that the bidder may make "simultaneous takeover bids for different classes of securities in the target": s623(3)(c). The Explanatory Memorandum to the CLERP Bill indicated that a purpose of the reforms is to better facilitate the acquisition of all securities in the target: "the [old] provisions limit[ed] a bidder to making a takeover bid for the shares in the bid class — that is, not including securities convertible into the bid class".

RG 159.197 If bidders are discouraged from making a bid for convertible securities, holders seeking to access the benefits of the bid will be forced to pay the exercise price, await issue of the shares and accept the takeover bid.

RG 159.198 Our relief is consistent with the exemption for acquisitions of voting shares on exercise of convertible securities

bought on-market: item 3 of s611. Acquisitions of convertible securities under a takeover bid are at least as well-regulated, transparent and equitable as on-market acquisitions: *Re Pinnacle VRB Ltd (No 3)* (2001) 37 ACSR 346, 353.

Equitable offers

RG 159.199 If the offers for the convertible securities and the shares are not equitable:

(a) there is a risk that the bidder is targeting shareholders who are also convertible security holders with a collateral benefit (s623); and

(b) the bidder may acquire a key parcel of voting shares on exercise of convertible securities eg having paid a significant premium for the convertible securities and discount for the shares.

RG 159.200 The requirement that the offers are equitable as between the convertible securities and the shares is analogous to the requirement in item 3(b) of s611. This allows a bidder to exercise convertible securities acquired through an "on-market transaction" (in the ordinary course of trading): s9. Item 3(b) ensures the bidder acquires the convertible securities at a price that reflects the open market and does not reflect any pre-arrangement. It limits the risk that the bidder can direct the benefit of the on-market offer to certain convertible security holders who are also shareholders: s623.

RG 159.201 Section 623(3)(c) gives an exemption from the collateral benefit prohibition for "simultaneous takeover bids for different classes of securities in the target". This means a bidder does not breach s623 because of the mere fact that it bids for a different class. It does not mean a bidder may make an offer for convertible securities likely to induce shareholders who are also convertible security holders to accept for their shares.

Disclosure

RG 159.202 Holders and the market should be informed about the treatment of convertible securities under the bid, and the bidder's intentions concerning exercise: s602(a).

Explanations

Requirements

Full bid for shares

RG 159.203 Our relief will require that the bidder has made a bid for all the voting shares in the bid class (ie a full bid). This is consistent with item 3(c) of s611. This requirement follows from the policy that a bidder who has made a full, unconditional bid for the voting shares should be allowed to acquire all other securities in the company: see RG 159.194.

Unconditional bid for shares

RG 159.204 Our relief will require that the bid for the convertible securities is subject to a non-waivable condition that the bid for the shares is:

(a) unconditional; or

(b) subject only to conditions relating to either or both of the prescribed circumstances in s652C(1) or (2) and the condition in s625(3) (see [CO 01/1542]).

RG 159.205 If the announced shares bid was not unconditional (except for prescribed circumstances conditions and the condition in s625(3)), the bidder must declare it unconditional if this convertible securities bid condition is to be fulfilled.

RG 159.206 Under s650F(1)(b) the bidder may waive a condition of the bid for the shares only if it does so not less than seven days before the end of the offer period. This means that where the bidder waives conditions of the share bid so that the bid for the convertible securities proceeds, shareholders will have at least a week to accept the offer for the shares.

RG 159.207 This is consistent with item 3(d) of s611, which requires that the share bid is unconditional (except for prescribed circumstances conditions and the condition in s625(3)) at the time the bidder acquires the convertible securities on-market. We equate the time that the bid for the convertible securities becomes unconditional with the time that a bidder "acquires" convertible securities on-market under item 3.

RG 159.208 This requirement follows from the policy discussed in RG 159.194.

Simultaneous offers

RG 159.209 Our relief will require that the bidder sends its first offers to holders under the bids for the convertible securities and the voting shares on the same day. This is similar to the requirement in item 3(b) of s611 that shares are acquired during the bid period.

Disclosure about our relief

RG 159.210 The bidder should apply for this relief in good time before the date that it makes its offers. The bidder should not refer in its announcement to a defeating condition that we give this relief unless it has discussed the relief with us first.

RG 159.211 Our relief will require the bidder to disclose in the bidder's statement it sends to holders that we have given relief together with a brief description of the terms of the relief. Other than in exceptional circumstances, we will not give this relief after the bidder has sent its offers to holders.

Bidder's intentions concerning exercise

RG 159.212 Our relief will require the bidder to disclose its intentions concerning exercise of convertible securities in its bidder's statement. The bidder should set out its intentions in the case of particular contingencies (eg various levels of acceptances for the convertible securities and shares). Regulatory Guide 25 *Takeovers: false and misleading statements* (RG 25) deals with statements of intention during the course of a bid.

Renounceable rights

RG 159.213 We would also consider applications for relief so that a bidder may exercise renounceable rights acquired under an offer to all rights holders. It is doubtful that rights are "securities" to which Ch 6–6C apply under s92(3). Our relief would require that the offer for the rights complies as far as practicable with Ch 6 and 6C as if the offer were a takeover bid.

RG 159.214 Issues raised in *Re Anaconda Nickel Ltd (No 09), Re Anaconda (No 8)* and *Re Anaconda (No 02–05)* (Unreported, Takeovers Panel, 14 July 2003) may be relevant to such an application.

T Consent to quote officials and publications

Our policy

RG 159.215 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 and without stating that they have given their consent.

RG 159.216 Class Order [CO 03/635] allows the inclusion of a statement that:

(a) fairly represents a statement by an official person; or

(b) is a correct and fair copy of, or extract from:

  (i) a public official document; or

  (ii) a statement that has already been published in a book, journal or comparable publication.

RG 159.217 The class order does not apply where the original statement was made in connection with the takeover bid or the bidder or target or any business, property or person the subject of the bidder's or target's statement.

RG 159.218 We may give case-by-case relief where a statement by an official person or in a public official document was made in connection with the bid, bidder, target or their businesses. We would not give the relief where:

(a) the Commonwealth's interests are involved (eg in the context of a privatisation); or

(b) the statement was made for the purpose of being included in the takeover document.

Liability is more likely in these cases.

Underlying principles

RG 159.219 A bidder or target should obtain the consent of the person who makes a statement before using it in the bidder's or target's statement so that the person can:

(a) control or limit their liability; and

(b) control the overall effect of the statement.

RG 159.220 A bidder or target may wish to include a statement that is not specific to the bid, bidder, target or their businesses. This may be useful in meeting the requirement that the bidder's or target's statement contains all information that holders would reasonably require to make an informed decision whether to accept the offer.

RG 159.221 To obtain the consent of government to use such a general statement may be onerous for the bidder or target and government in view of the low risk of liability for government.

RG 159.222 It is generally impractical for the bidder or target to obtain the consent of the author of a statement in a book, journal or other comparable publication where the statement is not specific to the bid, bidder, target or their businesses. There is also a low risk of liability for the author in this case.

Explanations

RG 159.223 Case law indicates that in general the author of a statement will not be civilly liable for its inclusion in a bidder's or target's statement (or a statement based on it) if the original statement was not made for the purpose of being included in the bidder's or target's statement: *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148; *Bride as Trustees for the Pinwernying Family Trust v KMG Hungerfords* (1991) 109 FLR 256; and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 142 ALR 750.

Government official

RG 159.224 Without our relief bidders or targets would be required to obtain consent to refer to statements of government officials and government publications (eg the Australian Bureau of Statistics, the Commonwealth Bureau of Meteorology).

RG 159.225 The Crown in right of the Commonwealth may be exposed to civil liability for damages for a misleading statement included in a bidder's or target's statement: s5A(3) and (5). But liability is unlikely where the statement was not made for the purpose of being included in the bidder's or target's statement.

RG 159.226 Guidance as to the meaning of the phrase "public official document" used in RG 159.216(b)(i) can be found in cases that have considered the term "public document" in an evidentiary context. A public document is one made by a public official as a result

of a public inquiry and available to the public: Lord Blackburn in *Sturla v Freccia* [1874–80] All ER Rep 657. Documents do not become public official documents merely because they have been lodged with a government department or statutory authority and are maintained for public access on a registry by the department or authority.

Publications

RG 159.227 The phrase "book, journal *or comparable publication*" in RG 159.216(b)(ii) includes reference to statements in a form and of a standard similar to that normally contained in a book or journal, but made available through the internet or other electronic means. This excludes, for example, references to statements made in internet chat rooms, news groups and home pages with unaccountable content (with anonymous participants or without editorial control).

General

RG 159.228 Our relief does not protect a bidder or target that uses a statement from liability if it knows the statement is misleading or it presents the statement in a misleading or deceptive way.

RG 159.229 Our policy on s636(3) and 638(5) seeks to achieve consistency with our policy on the equivalent fundraising provision: s716(2), see Regulatory Guide 55 *Disclosure documents and PDS: Consent to quote* (RG 55) and Class Order [CO 00/193].

RG 159.230 We give other relief from the requirement of consent to use statements in takeovers: see Regulatory Guide 171 *Anomalies and issues in the takeover provisions* at RG 171.133 and Class Order [CO 01/1543].

U Compulsory acquisition: non-transferable securities

Our policy

RG 159.231 Class Order [CO 03/636] gives relief from s661A(1) so that if a bidder compulsorily acquires bid class securities it may also compulsorily acquire non-transferable employee securities. The class order applies where:

(a) the employee securities are in a different class to the bid class merely because they are non-transferable, for example employee shares that would be ordinary shares if they were transferable; and

(b) if the employee securities were bid class securities, they would not exceed 10% of the securities in the bid class (by number worked out at the end of the offer period).

RG 159.232 Without our relief, the bidder could not acquire the non-transferable employee securities under its bid. If the employee securities are in a different class, it is impossible for the bidder under a bid for the employee securities to meet the compulsory acquisition test of:

(a) 90% of all securities in the bid class; and

(b) 75% of all securities that the bidder offered to acquire under the bid: s661A(1)(b).

Our relief treats employee securities similarly to bid class securities issued during or after the offer period: s661A(4)(b) and (c). The bidder may elect to compulsorily acquire later issued securities if it acquires bid class securities.

RG 159.233 A security is "non-transferable" where the constitution of the company or the terms of issue of the security restrict their transfer. An "employee security" is a security issued under a scheme to or for the benefit of employees or non-executive directors of the company or a related body corporate in relation to their employment or services.

RG 159.234 Under Class Order [CO 03/636] we also approve a form of compulsory acquisition notice for use where the bidder acquires non-transferable employee securities as well as bid class securities. For the avoidance of doubt, we also modify s661A(5), s664A(4) and Pt 6A.3 of Ch 6A so that non-transferable employee securities can be transferred in completion of a compulsory acquisition despite any

restraint under the terms of issue of the securities as well as the constitution of the company.

Underlying principles

RG 159.235 A bidder or 90% holder should not be prevented from acquiring 100% ownership of a company merely because employee securities are non-transferable. The Explanatory Memorandum to the CLERP Bill paragraph 7.8 stated:

> "Compulsory acquisition of each class of securities can be difficult …where there are restrictions on transferring some securities (for example, securities issued under employee share schemes)."

RG 159.236 Our relief for compulsory acquisition counters the possible defensive effect of non-transferable employee securities. Many bidders seek 100% ownership of the target. Uncertainty about whether a bidder can compulsorily acquire non-transferable securities may be a factor in discouraging takeover bids.

RG 159.237 Compulsory acquisition processes should be as similar as is practicable as between non-transferable employee securities and other securities.

Explanations

RG 159.238 We consider our relief in Class Order [CO 03/636] is appropriate because of indications that the compulsory acquisition provisions were intended to cover non-transferable securities:

(a) the Explanatory Memorandum to the CLERP Bill suggests that Ch 6A was intended to cover non-transferable securities: see RG 159.235;

(b) the compulsory acquisition provisions "apply despite anything in the constitution of the company": s661A(5) and 664A(4); and

(c) the definition of "convertible securities" in s9 states that: "An option may be a convertible security even if it is non-renounceable". The language "non-renounceable" suggests that the definition covers non-transferable options. Compulsory acquisitions extend to "convertible securities".

Classes

RG 159.239 A non-transferable security will be in a different class to other securities if it "differs sufficiently in respect of rights, benefits,

disabilities, or other incidents, as to make it distinguishable from any other category of shares": *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 13 ACLR 90, 93.

RG 159.240 In the case of a share that differs from ordinary shares only because of restrictions on transfer, it is most likely that the share is in a different class if the constitution or terms of issue of the share provide that the share is non-transferable. In this case, it is clear the disability of non-transferability is attached to the share.

RG 159.241 In some employee share schemes, shares are purchased on-market and transferred into trust for the benefit of the employee: see RG 159.242. The share will not be in a separate class if it cannot be transferred merely because in the case of an employee it is subject to a trust. This disability is not attached to the shares but to the employee.

Securities held in trust

RG 159.242 Our relief is unnecessary in the case of securities held in trust under an employee share scheme. A trustee cannot resist compulsory acquisition merely because of the terms of a trust. In a compulsory acquisition the securities will be transferred irrespective of the trust under the procedure for transfer in s666B.

Employee securities

RG 159.243 A company issues non-transferable employee securities with the purpose of remunerating employees while aligning their interests with those of the company. Non-transferable employee securities prevent employees from taking profits immediately and reinforce the interdependence of the company and the employee.

Non-employee securities

RG 159.244 We may consider applications for case-by-case relief to compulsorily acquire non-transferable securities other than employee securities. We will take into account the nature and purpose of the restriction on transfer.

Employee securities do not exceed 10%

RG 159.245 A requirement of our relief from s661A(1) in [CO 03/636] is that if the employee securities were bid class securities, they would not exceed 10% of the bid class securities: see RG 159.231(b). Under our relief, the bidder does not have to meet the 90% and 75% tests in respect of the employee securities because this

would be impossible. This is more justifiable where the employee securities are a minor class. We will consider case-by-case relief in the unusual case that the employee securities exceed 10%. We will take into account the circumstances of the issue of this number of securities under the employee share scheme including any indication that the scheme was administered with a defensive purpose.

Section 664A(2)

RG 159.246 A person may compulsorily acquire non-transferable employee securities even if they are unable to acquire full beneficial interests in 90% of them, where the requirements in s664A(2) are met.

V Compulsory acquisition: full bid

Our policy

RG 159.247 We interpret s661A(1)(a)(i) as requiring for compulsory acquisition that the bid was full, not proportional — a bid for all the bid class securities on issue at the date set by the bidder under s633(2).

RG 159.248 The language "all the securities in the bid class" used in s661A(1)(a)(i) does not mean the bidder must have bid for all possible bid class securities (ie those issued up to the end of the offer period). The same language is used in s618(1) to refer to a full, not proportional, bid.

RG 159.249 No relief is necessary to make this clear.

Underlying principles

RG 159.250 A bidder may compulsorily acquire securities following an off-market bid for the securities only if it made a full bid. This is because a bidder seeking to maximise its chance of obtaining 100% should not make a proportional bid. Section 661A assists bidders seeking 100% ownership of the target, while balancing the interests of minority holders.

RG 159.251 To compulsorily acquire, the bidder and its associates must have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid: s661A(1)(b)(ii) and Class Order [CO 01/1544]. This test of overwhelming acceptance of the bidder's offer would be imperfect in the case of a proportional bid. The bidder must give holders the opportunity to accept into the bid for their entire existing parcel of bid class securities.

Explanations

RG 159.252 To compulsorily acquire bid class securities under s661A following an off-market bid, the bidder must have made a bid for "all the securities in the bid class". This language has caused some confusion. Some bidders have suggested that the bidder must have bid for all possible bid class securities, including those issued during the offer period.

RG 159.253 We disagree with this interpretation. Under s618(1) an "offer for securities under an off-market bid must be an offer to buy:

(a) all the securities in the bid class; or

(b) a specified proportion of the securities".

RG 159.254 The language "all the securities in the bid class" in s618(1)(a) is identical to the language in s661A(1)(a)(i). It means a full, not proportional, bid.

RG 159.255 If the language in s618 covered securities issued during the offer period due to the exercise of convertible securities, this would mean that under s618 the bidder must offer to acquire these later issued securities. This would be inconsistent with the permissive language in s617(2): the bid *may* extend to later issued securities. That s617(2) refers to *extending* a bid to later issued securities reinforces the idea that an "ordinary" full bid is an offer for all existing securities.

RG 159.256 If the bidder were required to bid for later issued securities as a precondition to compulsory acquisition under s661A, this would indicate a policy that all holders must receive an offer under the bid before their securities can be compulsorily acquired. But the bidder may elect to compulsorily acquire securities issued after the offer period: s661A(4).

W Compulsory acquisition: exercised options

Our policy

RG 159.257 Our Class Order [CO 01/1544] gives relief for a bidder from the 75% compulsory acquisition test in s661A(1)(b)(ii) where the bidder offered to acquire convertible securities under its bid. Under our class order, convertible securities that are exercised or converted from the date under s633(2) to the end of the offer period will be excluded from the number of convertible securities that the bidder offered to acquire under the bid.

> *Note*: The date under s633(2) is the date set by the bidder for determining to whom offers under the bid will be sent.

Underlying principles

RG 159.258 The 75% test in s661A(1)(b)(ii) is a test whether holders overwhelmingly accepted the offer under the takeover bid. If a holder exercises their convertible securities rather than accepting the offer for the convertible securities under the bid, the holder will neither have accepted nor directly rejected the bidder's offer. The holder may have exercised the convertible securities for other reasons. Even if the holder preferred the bidder's offer for the shares, this does not show that the offer for the convertible securities was unfair.

Explanations

RG 159.259 The 75% test is one limb of the test for compulsory acquisition following a bid. The bidder may compulsorily acquire any securities in the bid class if during or at the end of the bid the bidder and its associates have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid: s661A(1)(b)(ii), Class Order [CO 01/1544] and Regulatory Guide 171 *Anomalies and issues in the takeover provisions* at RG 171.148.

RG 159.260 If a substantial proportion of holders exercise their convertible securities after the offer under the bid, it may be impossible for the bidder to meet the 75% test. The bidder cannot count convertible securities that are exercised as securities acquired by it (the numerator in the percentage calculation). But, without our relief, these convertible securities will be counted as securities that the bidder offered to acquire (the denominator).

RG 159.261 Holders may exercise their convertible securities after the bidder has determined to whom it must send its offers for convertible securities, usually to accept the bidder's offer for the shares. The bidder's offer for shares may extend to shares that come into existence following conversion or exercise of convertible securities: s617(2) and Class Order [CO 01/1543].

X Substantial holding notices

Our policy

Full disclosure

RG 159.262 A person who gives a substantial holding notice must give full rather than minimal or technical disclosure. A notice should fully, specifically and accurately disclose the identity of the substantial holder, the details of the substantial holding or the change in holding and the nature of any relevant association: s671B(3). The notice must describe the relevant transaction in clear commercial and legal terms.

Net movements in substantial holdings

RG 159.263 Where the substantial holding requirement is triggered by a movement of a holding in one direction followed by a movement in the opposite direction, the holder must disclose the movement in each direction. The holder must not merely disclose the net movement between one notice and the next.

Time for giving notice

RG 159.264 A person must give a substantial holding notice within 2 business days of becoming or ceasing to be a substantial holder or moving at least 1% (or by 9.30 am next business day during a takeover bid), whether or not they have completed a larger investment move or unwound their investment position within that time: s671B(6)(a).

Documents to accompany notice

RG 159.265 The substantial holder must give to the company and the relevant market operator copies of all agreements, arrangements or understandings that contribute in some way to the situation giving rise to the need to provide the notice: s671B(4). The quality or degree of contribution to the situation is irrelevant.

Takeover bid acceptances

RG 159.266 Class Order [CO 04/1413] modifies s671B(4) so that a bidder does not need to give copies of the bidder's statement, offer document and acceptance forms with a substantial holding notice for acquisitions under the bid.

The bidder is still required to lodge the bidder's statement and offer document with us and the relevant market operator under s633(1).

Joint notices

RG 159.267 Where two or more persons have similar or related relevant interests or are associates, so that they acquire or change their substantial holding because of the same transaction, they may give a single joint notice. A joint notice will satisfy s671B for each person, provided that it clearly identifies each person and the details of their relevant interest or the nature of their association: s671B(3). No relief from us is necessary in these circumstances.

RG 159.268 The person giving the notice must have the authority to bind other persons on whose behalf the notice is given.

Underlying principles

RG 159.269 The purpose of the substantial holding requirement is that holders, directors and the market have access on a timely basis to sufficient information to know:

(a) who the controllers of substantial blocks of voting shares are;

(b) who the associates of substantial holders are;

(c) details of any consideration or special benefits a person received for disposing of their relevant interest; and

(d) details of any agreements or special conditions or restrictions that may affect the disposal of shares or the way in which they are voted.

RG 159.270 The substantial holding requirement originates from the recommendations of the Cohen Committee:

> "…the intention thereof is to enable a shareholder to know who his co-adventurers are and the public to find out who controls the business to which they are contemplating investment or to which they are considering granting credit": *Report of the Committee on Company Law Amendment* UK (1945) p39.

RG 159.271 The substantial holding requirement promotes the principle that the acquisition of control takes place in an efficient, competitive and informed market: s602(a). But the purpose of the requirement is not limited to identifying bidders or potential bidders. The general purpose is to maintain an informed market in quoted securities.

RG 159.272 The short deadlines for giving notices are designed "to compel, in fast-moving markets, the immediate disclosure of the identity of the persons who become substantial security holders": *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 511.

Explanation

RG 159.273 A person must provide a substantial holding notice if they:

(a) begin to have, or cease to have a substantial holding in the body; or

(b) have a substantial holding in the body and there is a movement of at least 1% in their holding; or

(c) make a takeover bid for securities of the body: s671B(1).

A person has a "substantial holding" if, together with their associates, they have a relevant interest in voting shares carrying 5% of votes: s9. Certain relevant interests exempt for takeover purposes are counted for substantial holding purposes: e.g. market traded options (s9, 609(6) and 671B(7)). Prescribed forms for substantial holding notices are Forms 603, 604 and 605.

Full disclosure

RG 159.274 A notice lacking sufficient information for an investor to understand the nature of the substantial holding or the change in holding does not promote the purposes of the substantial holding requirement. That a notice must include full rather than minimal disclosure is reinforced by the fact s671B(3) requires the substantial holder to disclose "details" of:

(a) their relevant interest;

(b) any relevant agreement; and

(c) the nature of any association and the associate's relevant interest.

It is not sufficient that a notice describes the nature of the substantial holding or association generically or describes its bare legal nature by reference to the provisions of the Act: e.g. the holder must not merely say "X and Y are associated because X is acting in concert with Y in relation to the affairs of Company Z". The substantial holder must disclose any qualifications to their power to vote or dispose of the securities. They must disclose all benefits given for the acquisition or

change in substantial holding. If the transaction took place on a prescribed financial market, the notice should say so. The holder should use attachments to the form if there is insufficient room to explain the transaction or association in full. The substantial holder should define or explain acronyms, shorthand or codes (e.g. generated by the holder's compliance system) used in the notice.

Net movements in substantial holdings

RG 159.275 A substantial holder must not merely disclose a net movement in their holdings. They must give the information required by s671B(3) *whenever* there is a movement of at least 1% in their holdings in each direction: s671B(1)(b). Note 2 to s671B(1) says information must be given even if the situation changes by the time that the information is required to be given. Forms 604 and 605 require the holder to disclose particulars of each change in a relevant interest since they were last required to give a notice.

RG 159.276 For example, where offers under a bid close subject to defeating conditions (except a prescribed circumstances condition: s650F(1)(a)), the bidder must disclose both its increased substantial holding as a result of acceptances, and its reduced holding immediately on close. Under s671B(6)(b)(ii) the bidder must disclose this information by 9.30 am the next business day because it will be "aware of" the level of acceptances "during the bid period": RG 159.16]. It should be carefully monitoring acceptances at the close.

Time for giving notice

RG 159.277 Where there is a takeover bid for a listed company, if the substantial holding requirement is triggered during the bid period, notices must be given by 9.30 am the next business day: s654B and 671B(6)(b). This applies to all substantial holders, not just bidders.

RG 159.278 Where there is a takeover bid for an unlisted company, the bidder must give the target a notice if its voting power rises to 25%, 50%, 75% and 90%. The bidder must give the notice as soon as practicable and in any event within 2 business days after the rise occurred: s654C.

Documents to accompany notice

RG 159.279 Substantial holding notices must be accompanied by documents setting out the terms of any relevant agreements that contributed to the situation giving rise to the person needing to provide the notice: s671B(4).

In *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263, at p271–272, Wicks J recognised that:

> "All there has to be is a reasonable nexus between the agreement on the one hand and the relevant interest on the other…the expression 'contribution' is used because the draftsman recognised that there might well be more than one relevant agreement in the situation concerned and that any contribution, even if it duplicates what has been said elsewhere, would be regarded as relevant for the purposes of s671B(4). Once a relevant agreement is found to have made a contribution, the quality or degree of that contribution is beside the point."

Joint notices

RG 159.280 Where large groups of persons have similar relevant interests or are associates, if each person were to lodge a separate notice there would often be unnecessary duplication.

RG 159.281 A substantial holder should take care in presenting complex information in a joint notice e.g. about associations, so that it does not contravene s671B(3) or 1041H (misleading or deceptive conduct).

General

RG 159.282 This policy replaces NCSC Policy Statement 110 *Substantial shareholding notices*, Interim Policy Statement 109 *Substantial shareholder notices* and Practice Note 26 *Takeovers: Offerors and substantial shareholders.*

Y Which existing policies apply?

Continuing policies

RG 159.283 The regulatory guides in Table 1 continue to apply after the commencement of the CLERP Act ("continuing policies").

RG 159.284 The policies and interpretations contained in these regulatory guides continue to the extent that they are not inconsistent with the Act and their underlying rationale remains relevant.

Table 1: Continuing policies

RG 25	Takeovers — false and misleading statements
RG 31	Acquisitions and disposals by a broker acting as principal
RG 60	Schemes of arrangement: s411(17)
RG 61	Underwriting — application of exemptions
RG 71	Downstream acquisitions
RG 74	Acquisitions agreed to by shareholders
RG 75	Independent expert reports to shareholders
RG 86	Beneficial ownership notices
RG 102	Tender offers by vendor shareholders
RG 128	Collective action by institutional investors
RG 142	Schemes of arrangement and ASIC review
RG 143	Takeovers provisions: Warrants

RG 145	Collateral benefits — (except that the section relating to crossings (RG 145.43–RG 145.49) is superseded following the repeal of s698(2) and 698(4))
RG 5	Relevant interests in unissued share capital
RG 9	Relevant interests in shares
RG 27	Takeovers: minimum acceptance conditions
RG 11	Disclosure of offerors' intentions in takeover documents
RG 37	Takeovers — financing arrangements
RG 42	Independence of experts' reports — (to be reviewed in light of Pt 6A.4)
RG 12	Valuation reports and profit forecasts — (to be reviewed in light of Pt 6A.4)
RG 48	Takeovers aspects of options over shares
RG 59	Announcing and withdrawing takeover bids (s653 and s746)

Interim policies

RG 159.285 The regulatory guides in Table 2 continue after the commencement of the CLERP Act on an interim basis ("interim policies").

RG 159.286 In the interim, the policies and interpretations contained in them continue only to the extent that they are not inconsistent with the Act and their underlying rationale remains relevant. We expect that our policy in the interim will continue to develop in the light of the practical effect of the CLERP Act takeover provisions on the efficiency of the market and the promotion of the Eggleston principles: s602. The interim policies will be marked in italics in Table 2 from the time that they are replaced.

Table 2: Interim policies

RG 35	Collateral benefits in takeovers — our general views on collateral benefits will continue to apply where these are not inconsistent with s623
RG 88	Trustee and nominee companies — those parts of the guide dealing with trustees will apply: see also RG 136.56. The remainder of the guide will be withdrawn
RG 6	Variation of takeover offers
RG 10	Classes of shares
[SPN 40]	Reconstruction meetings — replaced by Regulatory Guide 188 *Disclosure in reconstructions* (RG 188)

Superseded policies

RG 159.287 The regulatory guides in Table 3 generally do not apply to takeovers started after the CLERP Act commenced. Therefore the documents referred to in Table 3 are withdrawn because they cease to be relevant ("superseded policies").

Table 3: Superseded policies

[SPS 3]	Dividend reinvestment schemes — (now see item 11 of s611(1))
[SPS 57]	Takeovers
[SPS 59]	Extension of time for dispatch of Part B statement
[SPS 62]	Takeovers: disclosure of interests of overseas and trustee associates
[SPS 69]	Entitlement where relevant interest disregarded — (the anomaly affecting former s609(2) of the Act will not apply under the CLERP Act)
[SPS 98]	Compulsory acquisition
[SPS 109]	Interim policy statement: Substantial shareholder notices
[SPS 113]	Identified anomalies in takeovers provisions

[SPS 126]	Compulsory acquisition of shares issued after the close of a takeover bid
[SPN 1]	Share acquisition: administration of Chapter 6
[SPN 6]	Relevant interests arising from proxies
[SPN 7]	Shares to which takeover offers must relate
[SPN 8]	Takeover bids for non-voting shares
[SPN 26]	Takeovers — offerors and substantial shareholders
[SPN 31]	Creep after rights issue
[SPN 33]	Dispatch of Part B statements
[SPN 56]	Takeovers — Part C announcements

Z Joint bids

Our policy

RG 159.288 We may give relief to facilitate joint bids where s606 may have prohibited the bidders coming together to make the bid. Our relief will generally be subject to all the following conditions:

Table 1: Conditions of relief for joint bids

(a) Acceptance by non-associated shareholders The joint bid must be subject to a condition that there are acceptances by holders of a minimum of 50.1% of the bid class securities that the joint bidders do not have voting power in at the beginning of the offer period. The bidder's statement must state that they will not waive this condition (see further explanation at RG 159.293)	**(c) Expert's report** The joint bidders must use their best endeavours to have the target engage an independent expert to prepare a report on whether the joint bid is fair and reasonable to target shareholders who are not associates of the bidders (see further explanation at RG 159.298)
(b) Higher rival bid The joint bidders must accept a rival bid that is higher than their bid unless they match the rival bid (see further explanation at RG 159.294 to RG 150.297)	**(d) Termination of joint bid** The joint bidders must immediately terminate any relevant agreements or arrangements relating to the joint bid, if the bid for which relief was obtained does not proceed or fails because of a defeating condition that has neither been satisfied nor waived (see further explanation at RG 159.299)

Underlying principles

RG 159.289 Entering into joint bid arrangements may increase the joint bidders' collective pre-bid stake in the target and will give each joint bidder the voting power of the collective pre-bid stake. Any increased pre-bid stake, or even the fact of the parties joining forces, may discourage rival bids and any ensuing auction for control of the target.

RG 159.290 The conditions of our relief address these concerns by helping to ensure that the price offered is acceptable to the majority of holders of securities in which the joint bidders and their associates do not have voting power. The conditions also reduce any effect that the joint bid agreement might have on the efficient and competitive market for voting securities in the target company.

Explanation

RG 159.291 Where two or more parties agree to make a bid for a company this is called a 'joint bid'. Under s608(1), when the parties

agree to exercise power over voting or disposal of securities jointly to facilitate the bid for joint control, each of those persons is taken to have a 'relevant interest' in the others' securities and to be an associate of the others under s12. This means that a joint bidder's voting power in a company may increase from 20% or below to above 20% or increase from a level between 20% and 90% as a result of entering into the joint bid arrangements. In this case, joint bidders may need relief from s606(1) to enter into the joint bid arrangements.

RG 159.292 We will grant relief to allow a joint bid to proceed subject to conditions that address the concern that the joint bid arrangements might deter rival bids. The absence of a rival bid could deprive non-associated security holders in the target of a fair and reasonable price for their securities.

Acceptance by non-associated shareholders

RG 159.293 This condition addresses the concern that the increased voting power of the joint bidders determines the outcome of the bid. It provides the non-associated shareholders with a collective power of veto over the terms of the offer.

Higher rival bid

RG 159.294 This condition requires joint bidders to accept or match a higher rival bid to address the risk that the increased stake held by the joint bidders under the joint bid arrangements may deter a rival bidder from launching a higher bid and any ensuing auction for control.

RG 159.295] A higher bid is a bid offering more than 105% of the value of the joint bidders' bid consideration. We will require joint bidders to accept a higher rival bid unless they increase their bid to match the rival bid within 7 days after the start of the offer period of the rival bid. We will only require joint bidders to accept a higher rival bid once that bid has become unconditional except for prescribed occurrence conditions.

RG 159.296] Either bid may offer consideration in the form of cash, listed or unlisted scrip or a combination of cash and listed or unlisted scrip. If either bid offers scrip or a combination of cash and scrip, we will consider whether to require the joint bidders to accept the rival bid on a case-by-case basis, taking into account factors such as the liquidity of the scrip and any expert's report assessing the value of the scrip. We may consider what the net cash proceeds would be on a sale by the joint bidders of the scrip within a reasonable period.

RG 159.297 We may not impose this condition if a bidder with a relevant interest in the target securities enters into the arrangements with a second bidder that has no relevant interest in the target securities, unless we are concerned that a rival bidder would still be deterred by these joint bid arrangements.

Expert's report

RG 159.298] This condition is designed to help the non-associated security holders determine whether the price offered by the joint bidders is fair and reasonable. This is similar to the requirement in s640(a) that a target's statement include an expert's report about whether the offer is fair and reasonable where the bidder's voting power in the target is 30% or more.

Termination of joint bid

RG 159.299 This condition confines the relief to the joint bid itself. Relief is not intended to facilitate joint bidders to retain the increased voting power acquired under any agreements or arrangements relating to the joint bid, when they have not proceeded with the joint bid or where a defeating condition of the bid has not been satisfied or waived.

Key terms

RG 159.300 In this guide, a reference to:

"Act" means the *Corporations Act 2001*

"ASX" means Australian Stock Exchange Ltd

"CLERP Act" means the *Corporate Law Economic Reform Program Act 1999*

"discretionary powers" means ASIC's powers to give exemptions or grant modifications under s655A, 669 and 673

"dispatch" refers to sending the bidder's statement or supplementary bidder's statement, or target's statement or supplementary statement, to holders

"employee security" is a security issued under a scheme to or for the benefit of employees or non-executive directors of the company or a related body corporate in relation to their employment or services

"ITAA 1936" means the *Income Tax Assessment Act 1936*

"listing rule escrow" means restrictions on disposal through a restriction agreement with the holder of restricted securities under Ch 9 of the ASX Listing Rules

"non-transferable" security means a security where the constitution of the company or the terms of issue of the security restrict their transfer

"s606" for example, means a section of the Act

"voluntary escrow" means an escrow that:

(a) a company requires a person to enter into that is not a listing rule escrow; or

(b) an underwriter or a lead manager requires a person to enter into.

Some expressions used in this guide are defined in the Act.

Related information

RG 159.301

Headnotes

Takeover bid, compulsory acquisition, bidder's statement, target's statement, supplementary statement, classes, 3% creep, expert's report, escrows, rights issue, underwriting, unacceptable circumstances, convertible securities, 85% holder, foreign associates, consent to quote, substantial holding notices

Class orders

[CO 00/343], [CO 00/344], [CO 00/345], [CO 01/1544], [CO 03/633], [CO 03/634], [CO 03/635], [CO 03/636], [CO 04/1413]

Regulatory guides

RG 23 *Updating and correcting prospectuses and application forms*

RG 25 *Takeovers: false and misleading statements*

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

RG 59 *Announcing and withdrawing takeover bids (s653 and s 746)*

RG 61 *Underwriting–application of exemptions*

RG 76 *Related party transactions*

RG 171 *Anomalies and issues in the takeover provisions*

RG 172 *Australian market licences: Australian operators*

Legislation

Corporate Law Economic Reform Program Act 1999, Financial Services Reform Act 2001, Corporations Act 2001 Chapters 2E, 6, 6A, 6B, 6C, s5, 5A, 9, 12, 52A, 90, 92, 208, 210, 228, 229, 351, 411, 602, 605, 606, 608, 609, 610, 611, 615, 617, 618, 619, 620, 621, 623, 625, 631, 633, 635, 636, 637, 638, 646, 647, 650B, 650D, 650F, 652C, 653, 654C, 657A, 661A, 661B, 663A, 664A, 665A, 665D, 666B, 667AA, 667C, 671B, 716, 746 and 792A

Cases

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Clements Marshall Consolidated Ltd v ENT Ltd (1988) 13 ACLR 90

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Morgan Crucible Co plc v Hill Samuel Bank Ltd [1991] 1 All ER 148

Pancontinental v Goldfields (1995) 16 ACSR 463

Re Anaconda Nickel Ltd (No 02–05) (Unreported, Takeovers Panel, 14 July 2003)

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Re Anaconda Nickel Ltd (No 19) (Unreported, Takeovers Panel 14 July 2003

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Simplification Task Force *Proposal on Takeovers* (January 1996)

Media and information releases

[MR 00/435] ASIC acts on related party underwriting

[IR 03/4] ASIC calls for comment on takeover relief

[MR 03/202] Valuing options for directors and executives

[IR 03/25] New ASIC policy on takeover relief

[IR 04/59] ASIC releases policy on substantial holdings