



Law Council
OF AUSTRALIA

Business Law Section

Mr Kim Demarte,
Senior Specialist, Corporations,
Australian Securities and Investments Commission,
Level 24, 120 Collins Street,
Melbourne, Vic 3000.
policy.submissions@asic.gov.au

22 February 2013

Dear Mr Demarte,

Consultation Paper 193: *Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance*

This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia (the “Committee”) in response to ASIC’s Consultation Paper 193: “Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance” (November 2012) (“CP 193”).

The Committee strongly supports ASIC’s proposal to update and reorganise a large part of its guidance on Chs 6-6C into four new consolidated regulatory guides in the manner proposed in CP 193. We believe this will help to make ASIC’s policy more accessible to users and it will also bring ASIC’s published guidance up to date so it reflects current laws and policies. These are both very worthwhile objectives.

In general, the Committee also supports ASIC’s proposed approach of essentially consolidating existing guidance and only proposing additional or amended guidance in limited circumstances. However, the Committee does wish to comment on a number of specific issues in relation to the proposed new regulatory guides. These comments are set out in the Annexure in response to the list of questions asked in CP 193.

In relation to one of the specific issues referred to in the Annexure (see our response to C2Q1), the Committee recently noted that the relevant provisions of one of the draft new regulatory guides as it currently appears on ASIC’s website is now different from the version that was originally released on 14 November 2012 (with no apparent indication anywhere to show a change had been made). We understand this change was made as part of a clean-up of mainly typographical

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS

Office Bearers: *Chair* F D O’Loughlin (VIC) || *Deputy Chair* J S Keeves (SA) || *Treasurer* I D Nosworthy (SA)
Section Administrator: Carol O’Sullivan || email carol.osullivan@lawcouncil.asn.au

errors in the original document. However, in our view, this particular change raised material new issues for consideration and the Committee believes it would have been far preferable if the change had been clearly identified in a schedule of post-release amendments. We understand there have been no other changes to CP 193 since 14 November, 2012 of similar significance, but if there have been we would very much appreciate it if ASIC drew these to our attention and provided us with an opportunity to comment.

The Committee would be pleased to discuss these submissions or answer any queries that ASIC may have. Any enquiries should be directed to the Chairman of the Committee, Marie McDonald on 03 9679 3264 or via email: marie.mcdonald@ashurst.com or to Michael Hoyle on 03 9635 9148 or via email: michael.hoyle@macquarie.com

Yours sincerely,

A handwritten signature in blue ink, appearing to read "O'Loughlin", is enclosed within a thin black rectangular border.

Frank O'Loughlin
Section Chairman

Annexure

1. Introductory Questions.

A1Q1 Are there any other issues on which it would be useful to have ASIC guidance or to expand our existing guidance? If so, please give details.

1.1 Other than as set out below, no.

A1Q2 Are there any other issues that may be appropriate for ASIC to address by way of exemption or modification by class order? Please be specific.

1.2 We have made a number of specific suggestions in our responses below.

2. Questions regarding Attachment 1 – Relevant interests and substantial holding notices.

B1Q1 Do you have any comments on our draft updated guidance on relevant interests?

2.1 As the proposed updated guidance is a consolidation of various RGs issued by ASIC, the Committee has no specific comments on the updated guidance on relevant interests other than as set out below.

2.2 Though we have not done any specific research, we wonder whether there is a more recent note which could be included in RG 000.8.

B1Q2 Are there any other aspects of the relevant interest concept which it may be useful to draw to readers' attention?

2.3 The proposed updated guidance deals with options and warrants (sections D and E). However, cash-settled equity swaps and derivatives have increased in importance and are involved in many control transactions or proposed shareholder activism. In the context of relevant interest, ASIC could give guidance on its view on cash-settled equity swaps and other derivatives. While there is a guidance note issued by the Takeovers Panel, it would assist if ASIC's views on those instruments were also known in the context of relevant interests (and substantial holder notices).

2.4 Example 1 in RG 000.33 refers to voting agreements and RG 128 refers to collective action by institutional investors. If ASIC has a view as to what extent like minded shareholders could act before an association or relevant

interest was created, with shareholder activism on the rise, it would assist if its views were articulated by ASIC in its proposed updated guidance.

2.5 Example 2 in RG 000.33 refers to agreements or understandings about acceptance of a takeover bid. Perhaps the discussion on this topic could also deal with “intentions statements” in light of the Takeovers Panel’s decision in *MYOB Limited* [2008] ATP 27. The Committee believes it would be helpful to clarify that a shareholder can make a statement that attracts the truth in takeovers policy without giving rise to a relevant interest. A bidder should be free to canvass a shareholder on its likely reaction to a bid and the shareholder should be able to inform the bidder that its present intention is to accept and to communicate that intention publicly.

2.6 ASIC could perhaps include a diagram in RG 000.43.

B2Q1 Do you agree with our proposals to retain and update our modification to s609(1) in [CO 01/1542]?

2.7 The Committee supports ASIC’s proposals to retain and update its modification to CO 01/1542.

2.8 The Committee understands ASIC has given case by case relief to deal with variations to lending arrangements covered by CO 01/1542 (e.g. where the entity acquiring the security interest is a subsidiary of a financier). On at least some occasions, this relief has omitted the normal requirement that the security interest be taken or acquired “in the ordinary of the person’s business of the provision of financial accommodation” under section 609(1) (as modified) (see for example Instrument 08-0924 referred to in Report 150). While there may be certain technical difficulties in imposing this requirement where the security interest is taken by a subsidiary, the Committee believes ASIC should ensure this important protection is not omitted.

2.9 More generally, ASIC may wish to make it clear that it may apply to the Takeovers Panel for a declaration of unacceptable circumstances if it becomes apparent that a financier has a purpose of gaining control of the company in question in relying on this exemption. This will most clearly be the case where a strategic investor uses a financing vehicle to acquire a security interest over a significant parcel of shares in a company prior to proposing a transaction that would give it a controlling interest in that company.

2.10 Subject to these qualifications, ASIC may wish to consider extending the class order so that wholly-owned subsidiaries of a financier entering into a lending transaction on ordinary commercial terms do not have to apply for case-by-case relief.

B2Q2 Do you agree with our proposal to update and amalgamate our relief for brokers in [CO 01/1542] and [CO 01/1599]?

2.11 We agree with ASIC' proposals to update and amalgamate in relief for brokers.

B2Q3 Should there be any additional limitations to our class order relief for persons purchasing security interests in the secondary market?

2.12 There is potentially a greater risk that a financier may have a control purpose if it purchases a security interest in the secondary market (particularly if it does when there has already been an event of default). We do not suggest that there should be additional limitations in the class order relief to reflect this, but ASIC may wish to highlight the potential for an application to the Takeovers Panel in these circumstances.

B3Q1 Do you have any comments on our draft updated guidance on substantial holding notices?

2.13 The regulatory regime governing the filing of substantial holder notices is complex. The regulatory balance between keeping the market informed about important shareholder information and cost of compliance seems to have tilted to such an extent that the preparation of a substantial holder notice by a non-legal practitioner is difficult even with the updated guidance.

2.14 While the guidance on substantial holder notices substantially replicates ASIC's current policies, perhaps ASIC could take the opportunity to simplify elements of compliance. For example, it seems not particularly useful to include a list of an entity's related bodies corporate as associates (if they do not hold shares). This provides no additional useful information. Similarly, the obligation to file another notice on the acquisition of a subsidiary in a group seems unnecessarily burdensome.

B3Q2 Are there any other aspects of substantial holding disclosure that we should give guidance on?

2.15 Certain of our comments above in relation to relevant interest would also be applicable to substantial holder notices e.g. derivatives.

3. Questions regarding Attachment 2 – Exceptions to the general prohibition.

C1Q1 Do you have any comments on our updated guidance on the 3% creep exception in draft Regulatory Guide 000 Takeovers: Exceptions to the general prohibition?

3.1 RG 000.59: ASIC should consider clarifying that an ‘opportunity’ in this context means a clear right to participate (such as the examples given in the paragraph of a rights issue or a dividend reinvestment plan) and does not extend to informal discussions between an issuer and a holder in relation to participation in a potential share placement.

3.2 We consider there will need to be flexibility to apply for and be granted ASIC relief in circumstances where a substantial holder has had the opportunity and wished to participate in an issue, but has not be able to for reasons outside its control. For instance, where prior FIRB or foreign regulatory approvals are required and there has not been sufficient time for the substantial holder to obtain such approvals, or where market conditions or an inability to obtain financing may have prevented participation.

3.3 RG 000.60: We believe that six months is a reasonable time limit. However, ASIC may wish to make explicit that it may grant relief where the dilution occurred more than six months prior to the proposed acquisition in exceptional circumstances, where the dilution is not readily apparent for reasons outside the holder’s control (e.g. where a company inadvertently fails to lodge an Appendix 3B upon the issue of new shares).

3.4 RG 000.55: We presume that ASIC would exercise its discretion to apply to the Takeovers Panel, with considered caution, having regard to the materiality of the failure to comply and any surrounding circumstances.

C2Q1 Do you have any comments on our draft updated guidance on rights issue and underwriting?

3.5 RG 000.91-93: It may be helpful for ASIC to provide additional guidance on what information it expects to be disclosed on underwriters and sub-underwriters, particularly where they are related parties, and whether a

similar level of disclosure is required for sub-underwriters to that required for underwriters.

- 3.6 We consider it may be helpful to include in the guidance a discussion of how it may be commercial and acceptable for related party underwriting akin to the discussion in existing ASIC RG 159.170-172.
- 3.7 We note that the version of Attachment 2 currently on the ASIC website now suggests that ASIC will only approve a nominee for foreign holders under rights issues (s615(a)) if the person holds an AFSL that authorises it “to provide financial services **to retail investors** in relation to the relevant class of securities”. In contrast, the version originally attached to CP 193 omitted any requirement for the nominee to hold a retail AFSL. The Committee does not support this change. There are many precedents where ASIC has previously approved nominees who hold a wholesale AFSL and we believe this provides adequate protection for shareholders. A nominee under s615(a) is appointed by a wholesale client (the company) and performs a very limited function under the legislation, namely to sell (or, as noted below, manage the sale of) securities that would otherwise have been issued to ineligible foreign holders and to distribute the net proceeds to those ineligible foreign holders. In our view, this function does not require the nominee to hold a retail AFSL.
- 3.8 A corresponding issue also arises in relation to Attachment 3 – RG 000.73 – which suggests a person will generally only be suitable as a nominee under s619(3) if it holds a retail AFSL. For essentially the same reasons, we believe a person who holds a wholesale AFSL should be eligible to be appointed as a nominee under this provision as well.
- 3.9 In addressing this issue, we would also like to suggest that it would be helpful if CO 01/1542 were updated to remove the requirement for securities or rights to be “issued” to the nominee in relation to non-traditional rights issues under item 10A of the table in s611. In a non-traditional rights issue, the “entitlement” of ineligible foreign holders will often not be assignable and the role of the nominee will be to manage the sale of the securities that would otherwise have been issued to those ineligible foreign holders through a book build (rather than to directly sell any securities or rights itself) and then distribute the proceeds of sale (if any) to them. These arrangements are more adequately reflected in s9A

(as modified) than s615 and it would be helpful if s615 were also modified to reflect this.

- 3.10 We would also like to suggest the requirement for nominee under s615 in the context of an accelerated non-renounceable offer is redundant. In that context, the securities that would otherwise have been issued to ineligible foreign holders can only be sold in the book build at the offer price and accordingly there will never be proceeds in excess of the offer price to distribute to those foreign holders. Consequently, the nominee has no meaningful role to perform.

C2Q2 Besides those in Table 4 of draft Regulatory Guide 000 Takeovers: Exceptions to the general prohibition, are there any other factors that we should take into account when considering whether regulatory action may be warranted in relation to a rights issue or underwriting arrangement?

- 3.11 As a general comment, given it is the Takeovers Panel which has the power to make a declaration of unacceptable circumstances under section 657A, it may be more appropriate for the Takeovers Panel to provide the definitive guidance on factors that may give rise to unacceptable circumstances in a rights issue or underwriting. Although the proposed restatement of ASIC's guidance and the Panel's Guidance Note 17 are largely consistent, in our view having GN17 as the sole statement of guidance would provide the market with a clearer understanding of the policy issues, remove the potential for any inconsistencies between forms of guidance and ensure that the upgrading of either form of guidance does not render the other obsolete.
- 3.12 In the event ASIC decides to retain the proposed guidance, set out below are our comments on that guidance.
- 3.13 Given that RG 000.89 provides that the factors in Table 4 are not an exhaustive list of the relevant matters, we believe no other factors need to be added to Table 4.
- 3.14 Renounceability: In listing renounceability as a factor, we query whether ASIC has gathered any recent data regarding the volume of rights trading in renounceable issues to support the premise that entitlements are less likely to be taken up in a non-renounceable offer? If not, ASIC should consider clarifying that non-renounceability may not be a significant factor in all circumstances, for example where commercial underwriters discourage renounceability due to the longer underwriting period. This would be

consistent with the approach in the Takeovers Panel's Guidance Note 17 (paragraph 18).

C2Q3 Do you agree with our draft guidance on arrangements that constitute underwriting? Are there any other practices which have developed that should not be considered 'underwriting' for the purposes of the exceptions?

- 3.15 We query ASIC's use of the phrase "...over which the 'underwriter' may have *some control* ..." (emphasis added) in RG 000.146(a). Similar policy considerations would seem to arise in the context of defeating conditions in a takeover bid. The test applied under section 629(1)(b) specifically refers to "sole control" of the bidder or its associates: in that context, if the fulfilment of a condition is partially but not wholly under the bidder's control, the condition will not be invalid (*Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 187 at 212). We submit that this would be a more appropriate test in the application of ASIC's assessment of arrangements which attract the benefit of the underwriting exceptions.
- 3.16 Given the potential uncertainty of the phrase "some control", in the event that ASIC retains this phrase, it would need to provide guidance on what level of control constitutes "some control". ASIC should also provide examples of circumstances or events over which it considers an underwriter may have "some control".
- 3.17 It would also be helpful for ASIC to clarify that, notwithstanding that the principal underwriters in circumstances described in RG 000.147 will not be able to rely on the exception, where a sub-underwriter in that circumstance legitimately bears the shortfall risk and does not have a right to be relieved of its obligations, the underwriting exceptions will apply to the sub-underwriter.
- 3.18 ASIC should consider providing additional examples of arrangements or practices that it does not consider to be "underwriting".
- 3.19 Given that the new regulatory guide takes a comprehensive and inclusive approach, we believe it would be helpful to include in RG 000.133 a discussion of 'pre-lodgement underwriting' akin to the discussion in existing ASIC RG 61.22; that is, to clarify that notwithstanding the inapplicability of the exceptions, such pre-lodgement issues may still be legal on the basis that the prohibition in s606 does not apply to an acquisition of shares in an unlisted company that has 50 members or less.

3.20 Paragraph 38 of CP 193 indicates that ASIC's guidance on underwriting may also be relevant in other contexts (e.g. when describing an arrangement as 'underwriting' in a disclosure document or public announcement). It would be helpful for ASIC to clarify what other contexts this definition will apply to, given the potential implications for the disclosure obligations of issuers.

C3Q1 Do you agree that our existing class order modification for accelerated rights issues should be amended to also apply to PAITREOs? Is there a need to extend our modification in this way?

3.21 We agree. We believe there is a need to extend ASIC's modification to include PAITREOs as the structure provides retail holders with the opportunity to recover value from early trading of their entitlements. This encourages retail participation (as noted by ASIC in ASIC Report 252), facilitates the efficient trading of rights and thus reduces the potential for control effects.

3.22 We consider that an extension of ASIC's modification would be consistent with its rationale in granting Class Order [CO 09/459]. The differences in offer terms permitting rights trading only by retail holders in the PAITREO structure would not offend the equal opportunity principle as the offer terms would otherwise be the same for retail and institutional holders. Extending the modification would encourage the use of PAITREOs and remove an unnecessary impediment to capital raising.

3.23 We note that ASIC has previously granted relief extending the definition of "rights issue" in s9A to accommodate the PAITREO structure (e.g. ASIC instrument 11/0238).

C4Q1 Is there a need for further guidance on items 8 and 12 of s611? Is the scope and operation of the exceptions sufficiently clear?

3.24 We note the definition of "carrying on business in Australia or a State or Territory" in Division 3 of Part 1.2 of the Corporations Act and the guidance in ASIC RG 121.42 - 50, and consider it may be helpful for ASIC to clarify how it will interpret the phrase "carry on any business" in the context of Item 8 of s611.

4. Questions regarding Attachment 3 – Takeover bids.

Introductory Comments.

- 4.1 Unless they are updated and incorporated into the proposed new regulatory guides, we believe it would be desirable to refer to RG 7 and RG 55 in Table 2 as “other ASIC guidance that may be relevant”. In relation to RG 7, our preference would be to update the takeovers examples and incorporate them into the proposed new Takeover Bids Regulatory Guide. We have also made some suggestions regarding RG 55 in response to D14Q1.
- 4.2 As noted in our response to **C2Q1**, we submit that RG 000.73 should be amended to delete the requirement for a nominee under s619(3) to hold a retail AFSL.

D1Q1 Do you agree with our proposal to amend the definition of ‘market value’ in [CO 00/343]?

- 4.3 Yes.

D1Q2 Is the period of five trading days before the first date for payment appropriate? Would a time closer to the date for payment be more appropriate?

- 4.4 Yes.

D2Q1 Do you agree with our proposed reference period for determining small parcels in the scheme context? If not, what would be a more appropriate period?

- 4.5 Yes.

D3Q1 Do you agree with our proposal to issue a class order to prevent share splitting in a proportional takeover bid? If not, why not?

- 4.6 Yes.

D3Q2 Are there any other conditions or requirements that should apply to our modification?

- 4.7 No.

D3Q3 Are there any ways the administrative burden of the notification requirements could be reduced while still providing sufficient evidentiary support to allow conduct contrary to the underlying purpose of the class order to be identified?

- 4.8 We are not aware of any.

D4Q1 Do you have any comments on our updated guidance on collateral benefits in draft Regulatory Guide 000 Takeover bids?

4.9 As noted in our response to C2Q2, we are of the view that it is more appropriate for the Takeovers Panel to provide guidance on the factors that may give rise to unacceptable circumstances since it is the body responsible for determining whether unacceptable circumstances exist. Accordingly, we believe it would be better if only the first sentence of proposed RG 000.198 were retained with a cross reference to Panel Guidance Note 21.

D4Q2 Do you agree that the factors listed in Table 3 of draft Regulatory Guide 000 Takeover bids may be relevant when considering whether a benefit is likely to induce acceptance or disposal? Are there any other factors that will often suggest, or may be relevant in considering, inducement?

4.10 We believe the list of factors is adequate as an indication of matters that may suggest a benefit is likely to induce acceptance or disposal.

D5Q1 Do you agree that we should only grant relief from the collateral benefits prohibition in limited cases?

4.11 Yes.

D5Q2 Should we continue to grant relief from s623 for benefits given to a controlling holder by a bidder when substituting as guarantor or acquiring a debt?

4.12 Yes. However, we believe the limits on the relief contemplated by RG 000.226-9 may effectively penalise a holding company for having been unduly generous to minority shareholders in the past by providing intra-group finance on favourable terms to a partly-owned subsidiary. While RG 000.226 provides for general relief to allow a bidder to substitute itself in place of a controlling holder as a guarantor of the target's debts, the corresponding relief for the bidder to acquire or replace a loan the target owes to a controlling shareholder is only available if ASIC is satisfied there is no value transfer to the controlling holder. As a matter of principle, we believe it is difficult to justify differential treatment of loans and guarantees. In the context of a takeover bid (which must implicitly attribute value to the target's equity securities), we believe ASIC should be willing to give relief in both cases. Any other approach can only serve to discourage controlling shareholders providing finance on favourable terms to their partly-owned subsidiaries.

D5Q3 Should we continue to grant case-by-case relief for benefits given in connection with the bidder's arrangements for funding a takeover bid, even

if the prohibition on collateral benefits no longer applies in the pre-bid period? If so, should this relief instead be provided by way of class order?

4.13 Yes. We believe case-by-case relief is appropriate in these circumstances.

D6Q1 Do you have any comments on our updated guidance on disclosure of the bidder's intentions in draft Regulatory Guide 000 Takeover bids?

4.14 RG 000.266 suggests a bidder is required to disclose intentions on acquiring less than 100% even if it has a 90% minimum acceptance condition, which it has no intention of waiving, and proposes to proceed to compulsory acquisition. In our view, that disclosure is not required and would not be useful to target shareholders. The Panel's decision in *Australian Leisure & Hospitality Group Limited 01* concerned a bid subject to a 50% minimum acceptance condition and provides no authority for such an approach.

D7Q1 Do you have any comments on our updated guidance on bid funding in draft Regulatory Guide 000 Takeover bids?

4.15 No.

D8Q1 Do you agree with our proposed modification to s624(2) regarding the time of day an offer period ends? If not, why not?

4.16 Yes.

D9Q1 Do you agree with our proposal to modify Ch 6 to clarify the time of acceptances of offers through clearing and settlement facilities? If not, why not?

4.17 Yes.

D10Q1 Do you agree with our proposal to provide class order relief confirming that a bidder does not acquire a relevant interest through an acceptance facility? If so, should we provide this relief on a case-by-case basis rather than by class order? If you disagree, please explain why.

4.18 Yes. In our view, this relief should be provided by class order.

D10Q2 Will our proposed modification provide an opportunity for bidders to improve the legal certainty associated with the operation of an acceptance facility by strengthening the current structure of facilities? If so, which aspects of the facility arrangements could be improved?

4.19 We believe the modification would assist in removing any uncertainty as to whether an acceptance facility may technically give rise to a relevant

interest. However, we do not believe this will materially alter current facility arrangements.

D10Q3 Do you agree with our proposal to limit participation in institutional acceptance facilities to institutions that are actually restricted by their mandates? Is there a benefit in having other holders participate regardless? If so, why should all holders not be eligible to participate? What are the most common restrictions found in investment mandates that inhibit institutional holders' ability to accept a bid?

4.20 We do not agree that participation in institutional acceptance facilities should not be limited to institutions that are actually restricted by their mandates.

4.21 In our view, the Takeovers Panel was correct in its analysis of institutional acceptance facilities in *Patrick Corporation Patrick Corporation Limited 03* [2006] ATP 12, where it said:

The Panel found that the answer to both issues was that the IAF was a procedural mechanism which addressed problems which, although they concerned institutional acceptances, affected the relevant institutions, the bidder and the market at large, without providing discriminatory benefits or unequal opportunities to participating shareholders. It did not confer on participating shareholders benefits such as a higher price, earlier payment or an absence of conditions. [36]

4.22 Consistently with this view, we submit there is no policy need to restrict access to institutional acceptance facilities in the manner proposed. Retail holders should not be prejudiced by not being able to participate in an institutional facility.

4.23 Indeed, in some circumstances, it may be preferable for facilities not to be open to retail holders given the complexity and confusion that such arrangements may create. For example, if a facility is designed to assist a bidder to satisfy a 90% minimum acceptance condition but can be triggered by the bidder declaring its bid free from all conditions, retail holders may not fully understand the consequences of participation (which may be material if the bidder is offering scrip consideration). Similarly, if the practice of both the bidder and the target establishing competing facilities becomes more common (as in *Dulux/Alesco*), there may be even greater scope for confusion.

4.24 We also believe institutional facilities would be unlikely to be used if subject to the proposed restriction (since it would effectively force all facilities to be retail facilities). There may be considerable uncertainty as to whether and in what circumstances institutions will be prevented from accepting a conditional bid because of a restriction in their investment mandate. Hence

bidders will typically not know which institutions will be eligible to participate in a restricted facility and therefore will not be able to judge whether any meaningful level of support for their bid will be able to be demonstrated through the facility. Perversely, this could result in the restriction denying the market useful information about the intentions of some significant institutions that would otherwise be available.

D10Q4 Do you agree with the other proposed requirements of the class order relief and associated guidance in draft Regulatory Guide 000 Takeover bids, including the requisite terms on which acceptance facilities need to be established? Are there any other conditions or terms that may be appropriate?

4.25 Subject to the deletion of RG 000.476(b), we believe the requirements are appropriate.

D11Q1 Do you agree with the proposed draft guidance and our proposed case-by-case relief on when bidders have voting power in securities in an acceptance facility?

4.26 We believe it would be more appropriate for this relief to be given by class order rather than on a case-by-case basis. It is difficult to see any disadvantage resulting from class order relief and the policy of s624(2)(b) is consistent with acceptances in the acceptance facility being counted once the bidder has given the notice triggering release of acceptances.

D12Q1 Do you agree with our proposal to amend our policy on joint bids to take account of schemes of arrangement?

4.27 Yes.

D12Q2 Do you agree with the conditions we are proposing to apply when relief is sought for joint proponents of a scheme of arrangement?

4.28 Yes. However, we believe it would be helpful to clarify whether any paragraphs other than RG 000.503 are intended to apply to schemes where no joint bid relief is required. A number of specific requirements in Section L would not appear to be applicable if the joint bidders rely on an item 7 approval instead of joint bid relief and it would be helpful to state this explicitly.

4.29 Since joint bidders could avoid the requirement referred to in RG 000.506 by making their bidding agreement conditional on item 7 approval (which would be subject to a lower threshold than the scheme anyway) and relying on s609(7), we query whether it is appropriate to impose this requirement in any event.

D13Q1 Do you agree with our proposal to amend our policy on the match or accept condition in joint bid relief in this way? Are the circumstances in which we propose to provide this concession appropriate?

4.30 Yes.

D13Q2 Do you consider the 3% limit appropriate?

4.31 Yes. We assume this does not depend on whether the first bidder has creep capacity. If this is correct, it would be better for that to be stated.

D14Q1 Do you have any comments on any other aspects of our updated guidance in draft Regulatory Guide 000 Takeover bids?

4.32 Yes.

Bids for multiple classes – exercising convertible securities acquired under a bid.

4.33 We believe the requirements proposed RG 000.120 – 141 are too detailed and prescriptive and compare unfavourably with the comparable requirements proposed in RG 000.142 – 143 (in relation to renounceable rights). In our view, the guidance should be more general and principles-based. Otherwise, there is a material risk that inappropriate outcomes may be produced. And, in the worst case, this may result in convertible shares being used as a “poison pill” to prevent a takeover.

4.34 By way of illustration, we think it is far from clear whether relief would be available if a target had issued convertible shares on which dividends were suspended. In those circumstances, the convertible shares may well be trading at a significant discount to the target’s ordinary shares (due to no dividends being paid) even though they will be convertible into ordinary shares when a takeover for the ordinary shares is announced. In these circumstances, the requirement for “equitable” treatment may be contentious and difficult to satisfy.

4.35 We also suggest that “(or free from all conditions except for the prescribed circumstances and the statutory quotation condition)” be inserted after the second “unconditional” in proposed RG 000.127

Conditional offers – extension of a conditional bid after the notice of status of conditions has been given.

4.36 In light of the requirement that a bidder effectively give a second s630(3) notice following an extension under s624(2) or s650c(2)(a)-(d), we believe it would be helpful if ASIC also provided class order relief to effectively disregard the first s630(3) notice for the purposes of s650C(2) (so further

voluntary extensions of the offer period would then be permissible). There are divergent views as to whether further voluntary extensions are currently permissible in these circumstances and ASIC class order relief would help resolve this uncertainty. Once it is clear equivalent disclosure of the status of conditions is required in the terms proposed in RG 000.158, there seems no policy reason to prevent further extensions in accordance with s650C as if this were the notice under s630(3).

- 4.37 We also believe it would be more logical if proposed RG 000.157 and RG 000.158 were transposed. The opening words of what is now paragraph 157 seem to refer to paragraph 158 rather than paragraph 156.

Conditional offers – minimum acceptance conditions that relate to only one form of consideration.

- 4.38 We note that ASIC has provided relief in a number of transactions to facilitate “mix and match” facilities in off-market bids (notably the Transurban offer for Sydney Roads Group and the Southern Cross offer for Austereo). In light of this, we suggest it would be helpful for ASIC to refer to the principles adopted in these transactions in the context of proposed RG 000.175-8.

The bidder’s statement – replacement bidder’s statements and the bid timetable.

- 4.39 We do not believe there is usually any need for a replacement bidder's statement to recommence the timetables for market or off-market bids. In most cases, there is no reason to further delay dispatch of the bidder's statement after the initial 14 day waiting period has expired. Delay can, in any case, be avoided by sending the original bidder's statement and a supplementary (without a replacement bidder's statement). In the event of rare cases where dispatch should be further delayed, application can be made to the Panel to require that. Accordingly, we recommend the class order be amended to reflect this

The target’s statement – extension of time for sending the target’s statement.

- 4.40 We note RG 000.360 refers only to the timetable for sending out copies of the target’s statement for an “off-market bid”. This is curious since relief is even more likely to be required in the case of a market bid because the target's statement must be sent within 14 days after the announcement of the bid to the market and the target does not have the benefit of the minimum 14 day pause between lodgement and dispatch of the bidder’s statement under the timetable for an off-market bid (s633(1) item 6).

- 4.41 If s640 applies to require an independent expert's report, our experience is that relief will almost invariably be necessary (see e.g. IAMA Ltd re bid by Nufarm Investments [00/2320]).

Consents.

- 4.42 We note RG 000.371-93 do not provide for class order relief to cite geological reports or trading data. This contrasts with the relief currently available under RG 55.60-55.70 (ASIC Class Order 07/429 as amended by ASIC Class Order 09/422). We assume this is simply an oversight since this relief is commonly relied on by bidders and targets.
- 4.43 It may also be useful to include a cross-reference to Panel GN 18.17-24 in relation to broker valuations.

Variation of offers – withdrawal rights.

- 4.44 We understand ASIC has, at times, suggested that s650E operates to confer withdrawal rights on all persons who have accepted the offer before the extension which triggers the operation of s650E so that in Example 4 a person who accepts the offer immediately before the second extension will have withdrawal rights even though the bidder's obligations under the offer as they stood at the time of acceptance by that person have not been postponed for more than 1 month. In our view, it is doubtful whether this is correct and there seems no policy justification for mandating that a withdrawal right be given to someone who has not had their payment obligation extended by more than 1 month. However, it would be helpful if ASIC clarified that this is at least permissible.

Non-compliant bids – addressing a non-compliant bid.

- 4.45 It may be useful to refer to the suggestion in *In the matter of Venturex Resources Limited (ACN 122 180 205)* [2009] FCA 677 that s659B does not prevent a bidder from applying to the court for remedial orders under s1325A to remedy technical defects before the end of the bid period.

5. Questions regarding Attachment 4 – Compulsory acquisitions and buyouts.

Introductory Comments.

ASIC's role.

- 5.1 We believe it would be helpful to append a note to RG 000.18 reading as follows:

“Note: Decisions by ASIC using this power are not subject to review by the Takeovers Panel, but are subject to review by the Administrative Appeals Tribunal under section 1317B.”

The meaning of “acquired”.

5.2 We note that the meaning of "acquired" in subparagraph 661A(1)(b)(ii) is unclear. When this provision was inserted by the *Corporate Law Economic Reform Program Act 1999*, "acquire" was defined in section 51(1) of the *Corporations Law* to include the acquisition of a relevant interest in shares in certain circumstances, but this definition was not applied to the new Chapter 6A. If "acquire" has a narrower meaning than "acquire a relevant interest (other than pursuant to paragraph 608(3)(a))", it will be possible for the 75% test to apply in rare cases, despite the fact that the bidder and its associates do not have a significant (or even any) holding in the target at the start of the bid (see e.g. instrument 08-00778). This is inconsistent with the purpose of the 75% test as stated in RG 000.50 and its intended operation as outlined in recommendation 7 and paragraphs 2.53 to 2.58 of CASAC's Compulsory Acquisitions Report. Accordingly, we submit that ASIC should modify subparagraph 661A(1)(b)(ii) to read "have acquired *relevant interests in* at least 75% ...". If that is done, CO 01/1544's current modification of subsection 661A(2) should be reversed (i.e. to apply, subject to the modifications in E1 and E2, to both the 90% and 75% thresholds). Although the modified relevant interest test may occasionally be too broad for both the 90% and 75% thresholds (see e.g. *LinQ Resources Fund* [2012] ATP 21) it is difficult to see any good policy reason for taking a narrower approach in the 75% threshold alone. Any overreaching by bidders can be adequately addressed by the Panel under sections 602(d) and 657A(2)(b).

Performance rights.

5.3 We understand that ASIC takes the view in other contexts that performance rights may not be securities - but, rather, derivatives. This suggests that performance rights may not be subject to compulsory acquisition under Chapter 6A.2, meaning that a bidder cannot be guaranteed of acquiring 100% - with the adverse effects noted in RG 000.3 - simply because the target company has, for tax reasons, issued its executives performance rights instead of options. We submit that ASIC should address this either by

way of class order or by indicating that it is willing to grant case by case relief to extend the application of Chapter 6A.2 to cover performance rights.

ASIC relief from the buyout provisions.

5.4 The position stated in RG 000.147-150 appears to reflect a change of policy by ASIC since ASIC has been willing to grant this relief in the past. See, for example, ASIC instruments granted to Gem Diamonds Australia/Kimberley Diamond Company [08/17], BHP Billiton/WMC Resources [05/734] and PBL/Burswood [04/1192]. ASIC's proposed approach will mean that holders of convertible securities must be given a form 6023 by way of notice under section 663A as well as a form 6024 Notice of Compulsory Acquisition under section 664C. This is likely to lead to confusion on the part of holders of the securities who receive the two notices and they are likely to have difficulty in understanding what to do. In addition, it is doubtful whether the rights in section 663A have any significant value if a notice is issued under section 664C and the process proceeds. The proposed ASIC position seeks to protect a security holder against a circumstance where either the 90% holder elects, pursuant to section 664E, to not proceed or where a court determines under section 664F that the acquisition should not proceed. It may be a simpler process to modify section 663A(1) to provide that section 663A does not apply where notice is given under section 664C unless and until notice is given under 664E(4)(a) or a court confirms under section 664F(3) that compulsory acquisition will not take place.

E1Q1 Do you agree that our proposed clarification with respect to deemed relevant interests is consistent with the intended operation of s661A(2)? If not, why not?

5.5 Subject to the comments noted above regarding the meaning of "acquired", yes.

E2Q1 Do you agree with our proposal to extend s661A(2) to relevant interests held by the bidder's associates?

5.6 Yes.

E3Q1 Do you agree with our proposed modification regarding simultaneous compulsory acquisition and buyout rights for the reasons outlined? If not, why not?

5.7 We agree with the proposed modification provided it refers to a buy-out offer pursuant to section 662B which is capable of acceptance pursuant to section 662C.

E3Q2 Will class order relief of this kind materially impact on the rights of remaining holders of bid class securities?

5.8 No.

E4Q1 Do you agree with our proposed draft guidance regarding the buyout provisions and compulsory acquisition of convertible securities?

5.9 Not entirely – see comments above.

E4Q2 Do you agree with our policy to not provide relief from the post-bid buyout requirements for convertible securities? If not, why not?

5.10 No – see comments above.

E5Q1 Do you have any comments on our draft guidance on procedures for lodging buyout and compulsory acquisition notices (including our proposal to amend our approved forms)? If not, why not?

5.11 We agree with the draft guidance.

F1Q1 Do you have any comments on the current form of the class orders we are proposing to reissue?

5.12 We believe that CO01/1544 needs to be reconsidered in relation to the operation of section 661A – see comments above.