

Selected ASIC modifications to Chapters 6-6C of the Corporations Act 2001

This has been prepared based on content from the Federal Register of Legislation at 25 May 2020. For the latest information on Australian Government law please go to <https://www.legislation.gov.au>.

It contains Chapters 6-6C of the *Corporations Act 2001* (Cth) (**Corporations Act**) and modified definitions from Chapter 1. The effect of certain widely applicable modifications made by ASIC has been “marked-up” using extracts from ASIC legislative instruments (listed below). For more information on relevant ASIC modifications see ASIC’s Regulatory index on takeovers and reconstructions.

The formatting of the extracts has been changed (which could potentially be relevant to interpretation in some cases). Modifying instruments are named and linked in footnotes (generally located at end of the relevant section name, or at the end of the modification). Some additional information is included in “Added Notes” (bold italics in square-brackets).

All material from the Corporations Act and ASIC legislative instruments is licensed under Creative Commons Attribution 4.0 International (the CC BY 4.0 licence). All added content (including formatting, Added Notes and footnotes) is ©2020 Bruce Dyer and (other than Conisante®) is also licenced under a CC BY 4.0 licence.

Users should note that this compilation does not include all ASIC modifications and no representation is made as to its completeness accuracy or currency. Before relying on this, users must check that the provisions and modifications shown are complete, accurate, current and have not been further modified or amended.

Please advise any errors or omissions to bdyer@conisante.com.au or [Conisante Consulting](#) PO Box 202 Mitcham 3132 Australia.

NOTE: Temporary COVID-19 exemptions and modifications

Act No. 22 of 2020 has inserted a new [section 1362A](#) “Coronavirus known as COVID-19” which gives the Treasurer temporary power until 25 September 2020 to give exemptions/modifications lasting up to 6 months in respect of provisions of the Corporations Act and regulations for classes of persons.

Note that these exemptions/modifications may apply, or otherwise be relevant, to provisions of Chapters 6-6C. Below are links to the determinations made up to 25 May 2020, with brief comments as to potential relevance to Chapters 6-6C:

[Corporations \(Coronavirus Economic Response\) Determination \(No. 1\) 2020 Meetings:](#)

- Seeks to ensure that meetings can be held using technology rather than in

conisante consulting

person and also to allow for information required for the meeting to be circulated and accessed electronically.

– The description of the modified provisions (see s5(2)) is broad enough to include some provisions of Chapters 6-6C (eg s611 item 7, s648C, 648D, 648E, 648G).

Execution of documents:

– Seeks to give certainty that a document (including an electronic document) has been validly executed when company officers sign electronically.

[Corporations \(Coronavirus Economic Response\) Determination \(No. 2\) 2020](#)

– Intended to “temporarily modify the continuous disclosure provisions in the Act to facilitate the continuation of business in circumstances relating to COVID-19” by substituting a temporary test for whether information would have a material effect on price based on the “knowledge, recklessness or negligence” of the entity or its officers.

– Query whether the modification is effective to achieve its purpose.

– The modification does not affect the obligations of bidders and targets (with no LR3.1A carve outs) to disclose material information under sections 636, 638, 643, 644.

– However, the modification may, if considered effective, influence whether targets announce confidential takeover approaches

Table of ASIC legislative instrument modifications incorporated:

<i>Link</i>	<i>Instrument</i>	<i>Amending instruments (incorporated in compilation)</i>
CO 11/272	CO 11/272 Substantial holding disclosure: securities lending and prime broking	CO 13/854 2017/65
CO 12/1209	CO 12/1209 Relevant interests, ASIC and ASIC Chairperson	CO 13/854
CO 13/520	CO 13/520 Relevant interests, voting power and exceptions to the general prohibition	
CO 13/521	CO 13/521 Takeover bids	2018/697
CO 13/522	CO 13/522 Compulsory acquisitions and buy-outs	
CO 13/524	CO 13/524 Bidder giving substantial holding notice	
CO 13/525	CO 13/525 On-sale disclosure relief for scrip bids and schemes of arrangement	
CO 13/526	CO 13/526 Warrants: Relevant interests and associations	2015/963

<i>Link</i>	<i>Instrument</i>	<i>Amending instruments (incorporated in compilation)</i>
<u>CO 13/528</u>	CO 13/528 Changes to a bidder's statement between lodgement and despatch	
<u>CO 13/721</u>	CO 13/721 ETFs	2018/3 2019/784
<u>CO 13/763</u>	CO 13/763 IDPSs	CO 13/1412, CO 14/757, CO 14/1270, 2015/1079, 2016/1158, 2016/1182, 2017/821, 2018/1028
<u>2015/1067</u>	ASIC Corporations (IDPS - Relevant Interests) Instrument 2015/1067	
<u>2015/1068</u>	ASIC Corporations (Minimum Bid Price) Instrument 2015/1068	2017/6
<u>2015/1069</u>	ASIC Corporations (Takeovers - Accelerated Rights Issues) Instrument 2015/1069	
<u>2015/1071</u>	ASIC Corporations (Approved Foreign Financial Markets) Instrument 2015/1071	2017/6
<u>2015/1115</u>	ASIC Corporations (Miscellaneous Technical Relief) Instrument 2015/1115	2017/580
<u>2016/72</u>	ASIC Corporations (Consents to Statements) Instrument 2016/72	2017/6 2017/817
<u>2016/1159</u>	ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159	
<u>2017/669</u>	ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669	2017/1119 2018/98

Insertions and deletions are marked-up as shown in the table below. The changes:

- apply to all persons (unless otherwise indicated) and
- only modify the Chapter of the Corporations Act in which they appear (unless otherwise indicated or marked in colour, as below)

<i>Modification</i>	<i>Marking</i>
Words deleted in Chapter (modifies that chapter only)	deletion
Words inserted in Chapter (modifies that chapter only)	<u>insertion</u>
Modifies Chapters 6, 6A and 6C	deletion <u>insertion</u>
Modifies Chapters 6 and 6C	deletion <u>insertion</u>
Modifies only Part 6C.1	deletion <u>insertion</u>

Corporations Act 2001

No. 50, 2001

Compilation No. 98

Compilation date: 25 March 2020

Includes amendments up to: Act No. 22, 2020

Registered: 22 April 2020

Contents

Part 1.2—Interpretation

Division 1—General

...

9 Dictionary

Division 2—Associates

10 Effect of Division

11 Associates of bodies corporate

12 References in Chapters 6 to 6C, and other references relating to voting power and takeovers etc.

13 References in Chapter 7

15 General

16 Exclusions

17 Associates of composite person that carries on a financial services business

53 Affairs of a body corporate

Chapter 6—Takeovers

602 Purposes of Chapter

602A Substantial interest concept

603 Chapter extends to some listed bodies that are not companies

604 Chapter extends to listed registered schemes

605 Classes of securities

conisante consulting

605A Chapter does not apply to MCIs

Part 6.1—Prohibited acquisitions of relevant interests in voting shares

606 Prohibition on certain acquisitions of relevant interests in voting shares

607 Effect on transactions

608 Relevant interests in securities

609 Situations not giving rise to relevant interests

610 Voting power in a body or managed investment scheme

Part 6.2—Exceptions to the prohibition

611 Exceptions to the prohibition

612 Effect of non-compliance with takeover rules for exceptions 1 to 4

613 Bidder not to exercise voting rights if failure to send bids for off-market acquisition—exception 2 or 3

615 Treatment of foreign holders under equal access issue—exception 10

Part 6.3—The different types of takeover bid

616 Off-market bids and market bids

Part 6.4—Formulating the takeover offer

Division 1—General

617 Securities covered by the bid

618 Offers must be for all or a proportion of securities in the bid class

619 General terms of the offer

620 Off-market bid (offer formalities)

Division 2—Consideration for the offer

621 Consideration offered

622 Escalation agreements

623 Collateral benefits not allowed

Division 3—The offer period

624 Offer period

Division 4—Conditional offers

625 Conditional offers—general

626 Maximum acceptance conditions in off-market bids

627 Discriminatory conditions not allowed for off-market bids

conisante consulting

- 628 Conditions requiring payments to officers of target not allowed in off-market bids
- 629 Conditions turning on bidder's or associate's opinion not allowed in off-market bids
- 630 Defeating conditions

Part 6.5—The takeover procedure

Division 1—The overall procedure

- 631 Proposing or announcing a bid
- 632 Overview of steps in an off-market bid
- 633 Detailed steps in an off-market bid
- 633A Off-market bid – Replacement bidder's statement: lodging supplementary statement before sending original statement
- 634 Overview of steps in a market bid
- 635 Detailed steps in a market bid
- 635A Market bid – Replacement bidder's statement: lodging supplementary statement before sending original statement

Division 2—The bidder's statement

- 636 Bidder's statement content
- 637 Bidder's statement formalities

Division 3—The target's response

- 638 Target's statement content
- 639 Target's statement formalities
- 640 Expert's report to accompany target's statement if bidder connected with target
- 641 Target must inform bidder about securities holdings
- 642 Expenses of directors of target companies

Division 4—Updating and correcting the bidder's statement and target's statement

- 643 Supplementary bidder's statement
- 644 Supplementary target's statement
- 645 Form of supplementary statement
- 646 Consequences of lodging a supplementary statement
- 647 To whom supplementary statement must be sent

Division 5—General rules on takeover procedure

- 648A Experts' reports
- 648B Address at which bidder may send documents to holders of securities

conisante consulting

- 648C** **Manner of sending documents to holders of securities**
- 648D** **Constitution may contain proportional takeover approval provisions**
- 648E** **Resolution to be put if proportional bid made**
- 648F** **Effect of rejection of approval resolution**
- 648G** **Including proportional takeover provisions in constitution**
- 648H** **Effect of Subdivision**

Part 6.6—Variation of offers

Division 1—Market bids

- 649A** **General**
- 649B** **Market bids—raising bid price**
- 649C** **Market bids—extending the offer period**

Division 2—Off-market bids (express variation by bidder)

- 650A** **General**
- 650B** **Off-market bids—consideration offered**
- 650C** **Off-market bids—extension of offer period**
- 650D** **Off-market bids—method of making variation**
- 650E** **Right to withdraw acceptance**
- 650F** **Freeing off-market bids from defeating conditions**
- 650G** **Contracts and acceptances void if defeating condition not fulfilled**

Division 3—Off-market bids (automatic variations)

- 651A** **Off-market bid—effect on bid consideration of purchases made outside bid**
- 651B** **How to make an election for new forms of consideration**
- 651C** **Returning securities as part of election**

Part 6.7—Withdrawal and suspension of offers

- 652A** **Withdrawal of unaccepted offers under takeover bid**
- 652B** **Withdrawal of takeover offers with ASIC consent**
- 652C** **Withdrawal of market bids**

Part 6.8—Acceptances

- 653A** **Acceptance of offers made under off-market bid**
- 653AA** **Acceptances received by the bidder for securities registered in a clearing and settlement facility**
- 653B** **Acceptances by transferees and nominees of offers made under off-market bid**

Part 6.9—Other activities during the bid period

- | | |
|------|---|
| 654A | Bidder not to dispose of securities during the bid period |
| 654B | Disclosures about substantial shareholdings in listed companies |
| 654C | Disclosures about substantial shareholdings in unlisted companies |

Part 6.10—Review and intervention

Division 1—ASIC's power to exempt and modify

- | | |
|------|--------------------------------------|
| 655A | ASIC's power to exempt and modify |
| 655B | Notice of decision and review rights |

Division 2—The Takeovers Panel

- | | |
|-------|--|
| 656A | Review of exercise of exemption or modification powers |
| 656B | Operation and implementation of a decision that is subject to review |
| 657A | Declaration of unacceptable circumstances |
| 657B | When Panel may make declaration |
| 657C | Applying for declarations and orders |
| 657D | Orders that Panel may make following declaration |
| 657E | Interim orders |
| 657EA | Internal Panel reviews |
| 657EB | References by Courts |
| 657F | Offence to contravene Panel order |
| 657G | Orders by the Court where contravention or proposed contravention of Panel order |
| 657H | ASIC may publish report about application to Panel or Court |
| 658A | Power of Panel where a proceeding is frivolous or vexatious |
| 658B | Evidentiary value of findings of fact by Panel |
| 658C | Panel's power to make rules |
| 658D | Inconsistency between Panel rules and ASIC exemption or declaration |

Division 3—Court powers

- | | |
|-------|---|
| 659A | Panel may refer questions of law to the Court |
| 659AA | Object of sections 659B and 659C |
| 659B | Court proceedings before end of bid period |
| 659C | Court proceedings after end of bid period |

Chapter 6A—Compulsory acquisitions and buy-outs

- 660A** Chapter extends to some listed bodies that are not companies
- 660B** Chapter extends to listed registered schemes
- 660C** Chapter does not apply to MCIs

Part 6A.1—Compulsory acquisitions and buy-outs following takeover bid

Division 1—Compulsory acquisition of bid class securities

- 661A** Compulsory acquisition power following takeover bid
- 661B** Compulsory acquisition notice
- 661C** Terms on which securities to be acquired
- 661D** Holder may obtain names and addresses of other holders
- 661E** Holder may apply to Court to stop acquisition
- 661F** Signpost—completing the acquisition of the securities

Division 2—Compulsory buy-out of bid class securities

- 662A** Bidder must offer to buy out remaining holders of bid class securities
- 662B** Bidder to tell remaining holders of their right to be bought out
- 662C** Right of remaining holder of securities in the bid class to be bought out

Division 3—Compulsory buy-out of convertible securities

- 663A** Bidder must offer to buy out holders of convertible securities
- 663B** Bidder to tell holders of convertible securities of their right to be bought out
- 663C** Right of holders of convertible securities to be bought out

Part 6A.2—General compulsory acquisitions and buy-outs

Division 1—Compulsory acquisition of securities by 90% holder

- 664A** Threshold for general compulsory acquisition power
- 664AA** Time limit on exercising compulsory acquisition power
- 664B** The terms for compulsory acquisition
- 664C** Compulsory acquisition notice
- 664D** Benefits outside compulsory acquisition procedure
- 664E** Holder's right to object to the acquisition
- 664F** The Court's power to approve acquisition

conisante consulting

664G Signpost—completing the acquisition of the securities

Division 2—Compulsory buy-out of convertible securities by 100% holder

665A 100% holder must offer to buy out holders of convertible securities

665B 100% holder to tell holders of convertible securities of their right to be bought out

665C Right of holders of convertible securities to be bought out

Part 6A.3—Completion of compulsory acquisition of securities

666A Completing the acquisition of securities

666B Statutory procedure for completion

Part 6A.4—Experts' reports and valuations

667A Expert's report

667AA Expert to be nominated

667B Expert must not be an associate and must disclose prior dealings and relationships

667C Valuation of securities

Part 6A.5—Records of unclaimed consideration

668A Company's power to deal with unclaimed consideration for compulsory acquisition

668B Unclaimed consideration to be transferred to ASIC

Part 6A.6—ASIC powers

669 ASIC's power to exempt and modify

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

670A Misstatements in, or omissions from, takeover and compulsory acquisition and buy-out documents

670B Right to recover for loss or damage resulting from contravention

670C People liable on takeover or compulsory acquisition statement to inform maker about deficiencies in the statement

670D Defences against prosecutions under subsection 670A(3) and actions under section 670B

670E Liability for proposing a bid or not carrying through with bid

670F Defences

conisante consulting

Chapter 6C—Information about ownership of listed companies, listed registered schemes and listed notified foreign passport funds

671A Chapter extends to some listed bodies that are not companies

671AA ETFs

Part 6C.1—Substantial holding information

671B Information about substantial holdings must be given to company, responsible entity, fund operator and relevant market operator

671C Civil liability

Part 6C.2—Tracing beneficial ownership of shares

672A Disclosure notices

672B Disclosure by member of relevant interests and instructions

672C ASIC may pass information on to person who made request

672D Fee for complying with a direction given by a company, scheme or fund under this Part

672DA Register of information about relevant interests in listed company, listed registered scheme or listed notified foreign passport fund

672E No notice of rights

672F Civil liability

Part 6C.3—ASIC powers

673 ASIC's power to exempt and modify

Part 1.2—Interpretation

Division 1—General

...

9 Dictionary

Unless the contrary intention appears:

...

acceptance facility¹ means a facility established by a bidder under a takeover bid:

(a) through which specified holders (**facility participant**) of bid class securities or persons (**facility participant**) on whose behalf or account bid class securities are held, may provide to an acceptance facility operator:

- (i) completed acceptances (**facility acceptances**); or
- (ii) instructions to another person who holds bid class securities on behalf or account of the person to accept an offer under the bid (**facility acceptances**);

in relation to bid class securities; and

(b) under which the acceptance facility operator is authorised to maintain custody of the facility acceptances until such time as:

- (i) the facility participant withdraws the facility acceptance; or
- (ii) specified conditions (**triggering conditions**) for the delivery by the acceptance facility operator of the facility acceptances are met;

where under the terms of the facility:

(c) the facility:

- (i) in the case of a bid that is unconditional—must be made available to all holders of bid class securities or persons on whose behalf or account bid class securities are held;

¹ [CO 13/520](#) modifying Chapters 6, 6A and 6C

- (ii) otherwise—must be made available to all or specified holders of bid class securities or persons on whose behalf or account bid class securities are held; and
- (d) the triggering conditions for the facility depend solely on either or both of the following occurring (or being the subject of a written confirmation from the bidder):
 - (i) the bidder declaring the bid free of all conditions or stating that it will declare the bid free of all conditions no later than the time that all facility acceptances are processed;
 - (ii) the securities in which the bidder and its associates have a relevant interest together with the securities that are the subject of the facility exceeding a specified percentage of securities in the bid class; and
- (e) all facility participants participate in the facility on the same terms; and
- (f) if bid class securities are quoted on a prescribed financial market—the acceptance facility operator must provide information about facility acceptances to the bidder sufficiently regularly to enable the bidder to determine and disclose to the operator of the market every movement of at least 1% in the aggregate level of the bidder’s voting power and the votes attached to securities the subject of facility acceptances by 9.30am on the next trading day after the movement; and
- (g) if bid class securities are not quoted on a prescribed financial market—the facility operator must provide information about facility acceptances to the bidder sufficiently regularly to enable the bidder to determine and disclose to the target any movement in the aggregate level of the bidder’s voting power and the votes attached to securities the subject of facility acceptances above or below a percentage listed in subsection 654C(1) within 2 business days after the movement.

acceptance facility operator², in relation to an acceptance facility, means a person who:

- (a) holds an Australian financial services licence that covers the provision of financial services of the kind necessary to operate an acceptance facility; and

² [CO 13/520](#) modifying Chapters 6, 6A and 6C

(b) is not the bidder or an associate of the bidder for the bid to which the acceptance facility relates.

...

approved foreign market³ means any of the following:

- (a) Borsa Italiana;..
- (b) Bursa Malaysia (previously known as Bursa Malaysia Main Board and Bursa Malaysia Second Board);
- (c) Euronext Amsterdam;
- (d) Euronext Brussels;
- (e) Euronext Lisbon;
- (f) Euronext Paris;
- (g) Frankfurt Stock Exchange;
- (h) Hong Kong Stock Exchange;
- (i) JSE (also known as the Johannesburg Stock Exchange);
- (j) London Stock Exchange;
- (k) NASDAQ Global Market;
- (l) NASDAQ Global Select Market (together with NASDAQ Global Market, previously known as NASDAQ Stock Market);
- (m) New York Stock Exchange;
- (n) NSYE MKT (previously known as American Stock Exchange);
- (o) NZX (also known as New Zealand Stock Exchange);
- (p) Singapore Exchange;
- (q) SIX Swiss Exchange (previously known as SWX Swiss Exchange);
- (r) Tokyo Stock Exchange;
- (s) Toronto Stock Exchange.

...

³ [2017/669](#) modifying Chapter 6 (and also Chapters 2L, 5C and 6D, and Parts 7.6 (other than Division 4 and 8), 7.8 and 7.9) as they apply to any person who purports to rely on certain applicable ASIC legislative instruments. Under instrument [2015/1071](#) ASIC has approved “a foreign body conducting an approved foreign market” for the purposes of item 14(b) of the table in section 611 and ***approved foreign market*** has the same meaning as in section 5 of instrument 2017/669.

~~**convertible securities:** securities are convertible into another class of securities if the holder may have the other class of securities issued to them by the exercise of rights attached to those securities. An option may be a convertible security even if it is non-renounceable.~~⁴

convertible securities:⁵ securities are convertible into another class of securities if the holder may, by the exercise of rights attached to those securities:

- (a) have the other class of securities issued to them; or
- (b) have the securities transform into securities of that other class.

An option may be a convertible security even if it is non-renounceable.

...

substantial holding: a person has a **substantial holding** in a body corporate, listed registered scheme or listed notified foreign passport fund, if:

- (a) the total votes attached to voting shares in the body or voting interests in the scheme or fund, in which they or their associates:
 - (i) have relevant interests; and
 - ~~(ii) would have a relevant interest but for subsection 609(6) (market traded options) or 609(7) (conditional agreements);~~⁶
 - (ii) would have a relevant interest but for:
 - (A) subsection 609(6) (market traded options); or
 - (B) subsection 609(7) (conditional agreements); or
 - (C) subsection 609(11) (company that issues restricted securities);⁷

is 5% or more of the total number of votes attached to voting shares in the body or interests in the scheme or fund; or

⁴ [CO 13/520](#) modifying Chapters 6, 6A and 6C

⁵ [CO 13/520](#) modifying Chapters 6, 6A and 6C

⁶ [CO 13/520](#) modifying Chapters 6, 6A and 6C

⁷ [CO 13/520](#) modifying Chapters 6, 6A and 6C

conisante consulting

- (b) the person has made a takeover bid for voting shares in the body or voting interests in the scheme, and the bid period has started and not yet ended.

Note 1: For *relevant interest*, see section 608.

Note 2: Paragraph (b) does not apply in relation to a notified foreign passport fund.

...

Division 2—Associates

10 Effect of Division

- (1) This Division has effect for the purposes of interpreting a reference (in this Division called the *associate reference*), in relation to a person (in this Division called the *primary person*), to an associate.
- (2) A person is not an associate of the primary person except as provided in this Division.
- (3) Nothing in this Division limits the generality of anything else in it.

11 Associates of bodies corporate

If the primary person is a body corporate, the associate reference includes a reference to:

- (a) a director or secretary of the body; and
- (b) a related body corporate; and
- (c) a director or secretary of a related body corporate.

12 References in Chapters 6 to 6C, and other references relating to voting power and takeovers etc.

- (1) ~~Subject to subsection 16(1),~~ Subject to subsections 16(1) and (1A),⁸ but despite anything else in this Part, this section applies for the purposes of interpreting a reference to an associate (the *associate reference*), in relation to a designated body, if:
 - (a) the reference occurs in a provision of Chapter 6, 6A, 6B or 6C; or
 - (b) the reference occurs in a provision outside those Chapters that relates to any of the following matters:
 - (i) the extent, or restriction, of a power to exercise, or to control the exercise of, the votes attached to voting shares in the designated body;
 - (ii) the primary person's voting power in the designated body;
 - (iii) relevant interests in securities in the designated body;
 - (iv) a substantial holding in the designated body;
 - (v) a takeover bid for securities in the designated body;

⁸ [CO 13/526](#) modifying Chapters 6 and 6C

- (vi) the compulsory acquisition, or compulsory buy-out, of securities in the designated body.
- (2) For the purposes of the application of the associate reference in relation to the designated body, a person (the **second person**) is an associate of the primary person if, and only if, neither of the persons is ASIC and⁹ one or more of the following paragraphs applies:
 - (a) the primary person is a body corporate and the second person is:
 - (i) a body corporate the primary person controls; or
 - (ii) a body corporate that controls the primary person; or
 - (iii) a body corporate that is controlled by an entity that controls the primary person;
 - (b) subject to subsection (2A),¹⁰ the second person is a person with whom the primary person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs;¹¹
 - (c) subject to subsection (2A),¹² the second person is a person with whom the primary person is acting, or proposing to act, in concert in relation to the designated body's affairs¹³.

(2A) For the purposes of paragraphs (2)(b) and (c), the second person is not an associate of the primary person in relation to a designated body merely because:

- (a) they have entered or propose to enter into a relevant agreement; and
- (b) one of them has or will have a right under that relevant agreement (whether the right is enforceable presently or in

⁹ [CO 12/1209](#) modifying Chapters 6, 6A and 6C

¹⁰ [CO 13/520](#) modifying Chapters 6, 6A and 6C

¹¹ Regulation 1.0.18 of the *Corporations Regulations 2001* prescribes paragraphs 12(2)(b) and (c) for the purposes of s53 – hence “affairs” in this paragraph includes things listed in s53

¹² [CO 13/520](#) modifying Chapters 6, 6A and 6C

¹³ Regulation 1.0.18 of the *Corporations Regulations 2001* prescribes paragraphs 12(2)(b) and (c) for the purposes of s53 – hence “affairs” in this paragraph includes things listed in s53

the future and whether or not on the fulfilment of a condition) to dispose of securities in the designated body or control the exercise of a power to dispose of the securities.¹⁴

- (3) For the purposes of the application of this section in relation to a designated body that is a managed investment scheme:
 - (a) a reference to controlling or influencing the composition of the designated body's board is taken to be a reference to controlling or influencing:
 - (i) if the scheme is a registered scheme—whether a particular company becomes or remains the scheme's responsible entity; or
 - (ii) if the scheme is not a registered scheme—whether a particular person is appointed, or remains appointed, to the office (by whatever name it is known) in relation to the scheme that corresponds most closely to the office of responsible entity of a registered scheme; and
 - (b) a reference to voting shares in the designated body is taken to be a reference to voting interests in the managed investment scheme.
- (4) In relation to a matter relating to securities in a designated body, a person may be an associate of the body and the body may be an associate of the person.
- (5) In this section:
designated body means:
 - (a) a body; or
 - (b) a managed investment scheme.

13 References in Chapter 7

If the associate reference occurs in Chapter 7, it includes a reference to:

- (a) a person in partnership with whom the primary person carries on a financial services business; and
- (b) subject to subsection 16(2), a person who is a partner of the primary person otherwise than because of carrying on a financial services business in partnership with the primary person; and

¹⁴ [CO 13/520](#) modifying Chapters 6, 6A and 6C

conisante consulting

- (c) a trustee of a trust in relation to which the primary person benefits, or is capable of benefiting, otherwise than because of transactions entered into in the ordinary course of business in connection with the lending of money; and
- (d) a director of a body corporate of which the primary person is also a director and that carries on a financial services business; and
- (e) subject to subsection 16(2), a director of a body corporate of which the primary person is also a director and that does not carry on a financial services business.

15 General

- (1) The associate reference includes a reference to:
 - (a) a person in concert with whom the primary person is acting, or proposes to act; and
 - (b) a person who, under the regulations, is, for the purposes of the provision in which the associate reference occurs, an associate of the primary person; and
 - (c) a person with whom the primary person is, or proposes to become, associated, whether formally or informally, in any other way;in respect of the matter to which the associate reference relates.
- (2) If the primary person has entered, or proposes to enter, into a transaction, or has done, or proposes to do, any act or thing, in order to become associated with another person as mentioned in an applicable provision of this Division, the associate reference includes a reference to that other person.

16 Exclusions

- (1) A person is not an associate of another person by virtue of section 12 or subsection 15(1), or by virtue of subsection 15(2) as it applies in relation to section 12 or subsection 15(1), merely because of one or more of the following:
 - (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship;
 - (b) one, a client, gives specific instructions to the other, whose ordinary business includes dealing in financial products, to acquire financial products on the client's behalf in the ordinary course of that business;
 - (c) one had sent, or proposes to send, to the other an offer under a takeover bid for shares held by the other;
 - (d) one has appointed the other, otherwise than for valuable consideration given by the other or by an associate of the

conisante consulting

other, to vote as a proxy or representative at a meeting of members, or of a class of members, of a body corporate.

(1A) An issuer of a warrant and a holder of the warrant are not associates of each other merely because of the terms of the warrant. For the purposes of this subsection, **warrant** and **holder** have the respective meanings given by subsection 609(6F).¹⁵

- (2) For the purposes of proceedings under this Act in which it is alleged that a person was an associate of another person by virtue of paragraph 13(b) or (e), the first-mentioned person is not taken to have been an associate of the other person in relation to a matter by virtue of that paragraph unless it is proved that the first-mentioned person knew, or ought to have known, at that time, the material particulars of that matter.

17 Associates of composite person that carries on a financial services business

A reference to an associate, in relation to an entity (other than a body corporate) that carries on a financial services business, is, if 2 or more persons constitute the entity, a reference to an associate of any of those persons.

...

53 Affairs of a body corporate

For the purposes of the definition of *examinable affairs* in section 9, section 53AA, 232, 233 or 234, paragraph 461(1)(e), section 487, subsection 1307(1) or section 1309, or of a prescribed provision of this Act,¹⁶ the affairs of a body corporate include:

- (a) the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other person or persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body; and

¹⁵ [CO 13/526](#) modifying Chapters 6 and 6C

¹⁶ Regulation 1.0.18 of the *Corporations Regulations 2001* prescribes paragraphs 12(2)(b) and (c)

- (b) in the case of a body corporate (not being a licensed trustee company or the Public Trustee of a State or Territory) that is a trustee (but without limiting the generality of paragraph (a))—matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust and any payments that they have received, or are entitled to receive, under the terms of the trust; and
- (c) the internal management and proceedings of the body; and
- (d) any act or thing done (including any contract made and any transaction entered into) by or on behalf of the body, or to or in relation to the body or its business or property, at a time when:
 - (i) a receiver, or a receiver and manager, is in possession of, or has control over, property of the body; or
 - (ii) the body is under administration; or
 - (ia) a deed of company arrangement executed by the body has not yet terminated; or
 - (iii) a compromise or arrangement made between the body and any other person or persons is being administered; or
 - (iv) the body is being wound up;and, without limiting the generality of the foregoing, any conduct of such a receiver or such a receiver and manager, of an administrator of the body, of an administrator of such a deed of company arrangement, of a person administering such a compromise or arrangement or of a liquidator or provisional liquidator of the body; and
- (e) the ownership of shares in, debentures of, and interests in a managed investment scheme made available by, the body; and
- (f) the power of persons to exercise, or to control the exercise of, the rights to vote attached to shares in the body or to dispose of, or to exercise control over the disposal of, such shares; and
- (g) matters concerned with the ascertainment of the persons who are or have been financially interested in the success or failure, or apparent success or failure, of the body or are or have been able to control or materially to influence the policy of the body; and
- (h) the circumstances under which a person acquired or disposed of, or became entitled to acquire or dispose of, shares in, debentures of, or interests in a managed investment scheme made available by, the body; and
- (j) where the body has made available interests in a managed investment scheme—any matters concerning the financial or

conisante consulting

business undertaking, scheme, common enterprise or investment contract to which the interests relate; and

- (k) matters relating to or arising out of the audit of, or working papers or reports of an auditor concerning, any matters referred to in a preceding paragraph.

...

Chapter 6—Takeovers

602 Purposes of Chapter

The purposes of this Chapter are to ensure that:

- (a) the acquisition of control over:
 - (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
 - (ii) the voting shares in a listed body (other than a notified foreign passport fund); or
 - (iii) the voting interests in a listed registered scheme;takes place in an efficient, competitive and informed market; and
- (b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
 - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and
 - (ii) have a reasonable time to consider the proposal; and
 - (iii) are given enough information to enable them to assess the merits of the proposal; and
- (c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and
- (d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities under Part 6A.1.

Note 1: To achieve the objectives referred to in paragraphs (a), (b) and (c), the prohibition in section 606 and the exceptions to it refer to interests in “voting shares”. To achieve the objective in paragraph (d), the provisions that deal with the takeover procedure refer more broadly to interests in “securities”.

Note 2: Subsection 92(3) defines *securities* for the purposes of this Chapter.

602A Substantial interest concept

- (1) A reference in this Chapter to a ***substantial interest*** in a company, listed body (other than a notified foreign passport fund) or listed registered scheme is not to be read as being limited to an interest that is constituted by one or more of the following:

conisante consulting

- (a) a relevant interest in securities in the company, body or scheme;
 - (b) a legal or equitable interest in securities in the company, body or scheme;
 - (c) a power or right in relation to:
 - (i) the company, body or scheme; or
 - (ii) securities in the company, body or scheme.
- (2) A person does not have a **substantial interest** in the company, body or scheme for the purposes of this Chapter merely because the person has an interest in, or a relationship with, the company, body or scheme of a kind prescribed by the regulations for the purposes of this subsection.
- (3) The regulations may provide that an interest of a particular kind is an interest that may constitute a substantial interest in a company, listed body (other than a notified foreign passport fund) or listed registered scheme for the purposes of this Chapter.

603 Chapter extends to some listed bodies that are not companies

This Chapter applies to the acquisition of relevant interests in the securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of relevant interests in the securities of companies.

Note: Section 9 defines *company* and *listed*.

604 Chapter extends to listed registered schemes

- (1) This Chapter applies to the acquisition of relevant interests in the interests in a registered scheme that is also listed as if:
- (a) the scheme were a listed company; and
 - (b) interests in the scheme were shares in the company; and
 - (c) voting interests in the scheme were voting shares in the company; and
 - (d) a meeting of the members of the scheme were a general meeting of the company; and
 - (e) the obligations and powers that are imposed or conferred on the company were imposed or conferred on the responsible entity; and
 - (f) the directors of the responsible entity were the directors of the company; and
 - (g) the appointment of a responsible entity for the scheme were the election of a director of the company; and
 - (h) the scheme's constitution were the company's constitution.

Note 1: Paragraph (g): See subsection 610(2).

Note 2: Section 9 defines *voting interest* in a managed investment scheme.

- (2) The regulations may modify the operation of this Chapter as it applies in relation to the acquisition of interests in listed registered schemes.

605 Classes of securities

- (1) Takeover bids are made for securities within a particular class. Similarly, compulsory acquisition and buy-out rights operate on securities within a particular class.
- (2) For the purposes of this Chapter and Chapters 6A and 6C, securities are not 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.

605A Chapter does not apply to MCIs

This Chapter does not apply to MCIs.

Part 6.1—Prohibited acquisitions of relevant interests in voting shares

606 Prohibition on certain acquisitions of relevant interests in voting shares

Acquisition of relevant interests in voting shares through transaction entered into by or on behalf of person acquiring relevant interest

- (1) A person must not acquire a relevant interest in issued voting shares in a company if:
- (a) the company is:
 - (i) a listed company; or
 - (ii) an unlisted company with more than 50 members; and
 - (b) the person acquiring the interest does so through a transaction in relation to securities entered into by or on behalf of the person; and
 - (c) because of the transaction, that person's or someone else's voting power in the company increases:
 - (i) from 20% or below to more than 20%; or
 - (ii) from a starting point that is above 20% and below 90%.

Note 1: Section 9 defines **company** as meaning a company registered under this Act.

Note 2: Section 607 deals with the effect of a contravention of this section on transactions. Sections 608 and 609 deal with the meaning of **relevant interest**. Section 610 deals with the calculation of a person's voting power in a company.

Note 3: If the acquisition of relevant interests in an unlisted company with 50 or fewer members leads to the acquisition of a relevant interest in another company that is an unlisted company with more than 50 members, or a listed company, the acquisition is caught by this section because of its effect on that other company.

- (1A) However, the person may acquire the relevant interest under one of the exceptions set out in section 611 without contravening subsection (1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

conisante consulting

Acquisition of legal or equitable interest giving rise to relevant interest for someone else

- (2) A person must not acquire a legal or equitable interest in securities of a body corporate if, because of the acquisition:
- (a) another person acquires a relevant interest in issued voting shares in a company that is:
 - (i) a listed company; or
 - (ii) an unlisted company with more than 50 members; and
 - (b) someone's voting power in the company increases:
 - (i) from 20% or below to more than 20%; or
 - (ii) from a starting point that is above 20% and below 90%.

- (2A) However, if the acquisition of the relevant interest is covered by one of the exceptions set out in section 611, the person may acquire the legal or equitable interest without contravening subsection (2).

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A), see subsection 13.3(3) of the *Criminal Code*.

50 member threshold

- (3) In determining whether the company has more than 50 members for the purposes of subsection (1) or (2), count joint holders of a particular parcel of shares as 1 person.

Offers and invitations

- (4) A person must not:
- (a) make an offer, or cause an offer to be made on their behalf, if the person would contravene subsection (1) or (2) if the offer were accepted; or
 - (b) issue an invitation, or cause an invitation to be issued on their behalf, if the person would contravene subsection (1) or (2) if:
 - (i) an offer were made in response to the invitation; and
 - (ii) the offer were accepted.

Fault-based offence

- (4A) A person commits an offence if the person contravenes subsection (1), (2) or (4).

Absolute liability offence

- (4B) A person commits an offence of absolute liability if the person contravenes subsection (1), (2) or (4).

conisante consulting

Defences

- (5) It is a defence to the prosecution of a person for contravening subsection (1), (2) or (4) if the person proves that they contravened the subsection:
- (a) because of inadvertence or mistake; or
 - (b) because the person was not aware of a relevant fact or occurrence.

In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.

Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (5), see section 13.4 of the *Criminal Code*.

Extended meaning of acquiring relevant interests—conversions and increases in voting rights

- (6) A person is taken for the purposes of subsection (1) or (2) to acquire a relevant interest in voting shares in a company if:
- (a) securities in which the person already had a relevant interest become voting shares in the company; or
 - (b) there is an increase in the number of votes that may be cast on a poll attached to voting shares that the person already had a relevant interest in.

The acquisition occurs when the securities become voting shares or the number of votes increases.

Note: Some examples of cases to which this subsection applies are:

- * A person exercises a right to convert a non-voting preference share into an ordinary share that carries votes.
- * A person pays up partly-paid shares with limited votes and this leads to an increase in the number of votes attached to the shares.

607 Effect on transactions

A transaction is not invalid merely because it involves a contravention of section 606.

608 Relevant interests in securities

Basic rule—relevant interest is holding, or controlling voting or disposal of, securities

- (1) A person has a relevant interest in securities if they:
- (a) are the holder of the securities; or
 - (b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or

conisante consulting

- (c) have power to dispose of, or control the exercise of a power to dispose of, the securities.

It does not matter how remote the relevant interest is or how it arises. If 2 or more people can jointly exercise one of these powers, each of them is taken to have that power.

Extension to control exercisable through a trust, agreement or practice

- (2) In this section, power or control includes:
 - (a) power or control that is indirect; and
 - (b) power or control that is, or can be, exercised as a result of, by means of or by the revocation or breach of:
 - (i) a trust; or
 - (ii) an agreement; or
 - (iii) a practice; or
 - (iv) any combination of them;whether or not they are enforceable; and
 - (c) power or control that is, or can be made, subject to restraint or restriction.

It does not matter whether the power or control is express or implied, formal or informal, exercisable alone or jointly with someone else. It does not matter that the power or control cannot be related to a particular security.

Extension to relevant interests held through bodies corporate

- (3) A person has the relevant interests in any securities that any of the following has:
 - (a) a body corporate, or managed investment scheme, in which the person's voting power is above 20%;
 - (b) a body corporate, or managed investment scheme, that the person controls.

Paragraph (a) does not apply to a relevant interest that the body corporate or scheme itself has in the securities merely because of the operation of that paragraph in relation to another body corporate or managed investment scheme.

- (4) For the purposes of paragraph (3)(b), a person controls a body corporate if the person has the capacity to determine the outcome of decisions about the body corporate's financial and operating policies.
- (5) In determining whether a person has this capacity:
 - (a) the practical influence the person can exert (rather than the rights they can enforce) is the issue to be addressed; and

conisante consulting

- (b) any practice or pattern of behaviour affecting the body corporate's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (6) The person does not control the body corporate merely because the person and an entity that is not an associate jointly have the capacity to determine the outcome of decisions about the body corporate's financial and operating policies.
- (7) A person is not taken to control a body corporate merely because of a capacity they have if they are under a legal obligation to exercise that capacity for the benefit of:
 - (a) if the person is an individual—someone else; or
 - (b) if the person is a body corporate—someone other than its members.

Extension to control in anticipation of performance of agreements etc.

- (8) If at a particular time all the following conditions are satisfied:
 - (a) a person has a relevant interest in issued securities;
 - (b) the person (whether before or after acquiring the relevant interest):
 - (i) has entered or enters into an agreement with another person with respect to the securities; or
 - (ii) has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition); or
 - (iii) has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities;
 - (c) the other person would have a relevant interest in the securities if the agreement were performed, the right enforced or the option exercised;

the other person is taken to already have a relevant interest in the securities.

Note: Subsections 609(6) and (7) deal with specific situations in which the agreement will not give rise to a relevant interest.

conisante consulting

[Added Note: CO 11/272 inserts s8A in s608 for the purposes of Part 6C.1 only¹⁷]

Body corporate may have relevant interest in its own securities

- (9) This section may result in a body corporate having a relevant interest in its own securities.

Extension to interests in listed notified foreign passport funds

- (10) To avoid doubt, for the purposes of Chapter 6C, a person has a relevant interest in securities if the person would have a relevant interest in the securities if securities had the same meaning in this Chapter as it has in Chapter 6C.

[Added Note: Under [CO 13/521](#), Chapter 6C applies to all persons as if notional s608(10) were inserted providing: “A bidder has a relevant interest in securities if, under section 653AA, an offer is taken to have been accepted in relation to the securities.”¹⁸]

609 Situations not giving rise to relevant interests

Money lending and financial accommodation

- (1) ~~A person does not have a relevant interest in securities merely because of a security interest taken for the purpose of a transaction entered into by the person if:~~
- ~~(a) the security interest is taken or acquired in the ordinary course of the person’s business of the provision of financial accommodation by any means and on ordinary commercial terms; and~~
 - ~~(b) the person whose property is subject to the security interest is not an associate of the person.¹⁹~~

A person does not have a relevant interest in securities merely because of a security interest taken or acquired by the person if:

- (a) the security interest is taken or acquired:

¹⁷ [CO 11/272](#) modifying Part 6C.1. See at footnote 129. A note in the Instrument states: “For the avoidance of doubt, nothing in [the paragraphs inserting ss8A and 10A-10C] has effect for the purposes of Chapter 6 or Part 6C.2 of the Act”

¹⁸ [CO 13/521](#) modifying Chapter 6C. See at footnote 128

¹⁹ [CO 13/520](#) modifying Chapters 6, 6A and 6C

conisante consulting

- (i) in the ordinary course of the person's business of the provision of financial accommodation by any means; or
- (ii) for the benefit of one or more other persons in relation to financial accommodation provided by the other persons in the ordinary course of the other persons' business of the provision of financial accommodation by any means; and
on ordinary commercial terms; and
- (b) the person whose property is subject to the security interest is not an associate of any other person mentioned in this subsection.

For the purposes of this subsection a security interest includes a negative pledge.²⁰

Note: Sections 11 to 17 define *associate*.

Nominees and other trustees

- (2) A person who would otherwise have a relevant interest in securities as a bare trustee does not have a relevant interest in the securities if a beneficiary under the trust has a relevant interest in the securities because of a presently enforceable and unconditional right of the kind referred to in subsection 608(8).

Note: This subsection will often apply to a person who holds securities as a nominee.

Holding of securities by financial services licensee

- (3) ~~A financial services licensee does not have a relevant interest in securities merely because they hold securities on behalf of someone else in the ordinary course of their financial services business.²¹~~
A financial services licensee does not have a relevant interest in securities merely because they receive specific instructions from a person directing the financial services licensee to on behalf of the person:
 - (a) dispose of the securities; or
 - (b) enter into a sold position in relation to a security by dealing in:

²⁰ [CO 13/520](#) modifying Chapters 6, 6A and 6C

²¹ [CO 13/520](#) modifying Chapters 6, 6A and 6C

conisante consulting

- (i) a warrant; or
- (ii) a financial product that, but for the product not being transferable, would be a warrant;

in the ordinary course of the licensee's financial services business. For the purposes of paragraph (b), **sold position** means a position under which a person has an obligation to make delivery of the security.

Note: Subregulation 1.0.02(1) of the regulations defines **warrant**.²²

Shares covered by buy-backs

- (4) A person does not have a relevant interest in a company's shares if the relevant interest would arise merely because the company has entered into an agreement to buy back the shares.

Proxies

- (5) A person does not have a relevant interest in securities merely because the person has been appointed to vote as a proxy or representative at a meeting of members, or of a class of members, of the company, body or managed investment scheme if:
 - (a) the appointment is for one meeting only; and
 - (b) neither the person nor any associate gives valuable consideration for the appointment.

~~Market traded options and derivatives~~

- ~~(6) A person does not have a relevant interest in securities merely because of:~~
 - ~~(a) an market traded option over the securities; or~~
 - ~~(b) a right to acquire the securities given by a derivative.~~~~This subsection stops applying to the relevant interest when the obligation to make or take delivery of the securities arises.~~²³

Market traded options, derivatives and warrants

- (6) A person does not have a relevant interest in securities merely because of:
 - (a) a market traded option over the securities; or

²² [CO 13/520](#) modifying Chapters 6, 6A and 6C

²³ [CO 13/526](#) modifying Chapters 6 and 6C

- (b) a right to acquire the securities by a derivative; or
- (c) a right under a call warrant:
 - (i) to acquire the securities; or
 - (ii) to require the securities to be held in trust.

This subsection stops applying to the relevant interest when the obligation to make or take delivery of the securities arises.

Issuers of call warrants

- (6A) An issuer of a call warrant does not have a relevant interest in securities to which the warrant relates merely because the securities are held in trust under the terms of the warrant, provided the issuer has no power to control the voting or disposal of the securities (other than to enforce the terms of the trust or to retain ownership of the securities if the warrant expires unexercised or the holder of the warrant defaults) unless and until the warrant expires.
- (6B) If an issuer of a call warrant has a relevant interest in securities because subsection (6A) ceases to apply, the issuer is taken to acquire a relevant interest in the securities at that time, by a transaction in relation to the securities.

Issuers of put warrants

- (6C) An issuer of a put warrant does not have a relevant interest in securities to which the warrant relates merely because:
 - (a) the holder of the warrant has an option, under the terms of the warrant, to require the issuer to acquire the securities; or
 - (b) under the warrant or a trust securing the obligations of the issuer or the holder under the warrant, the issuer can exercise power to control the voting or disposal of the security, provided the power can only be exercised where:
 - (i) the option under the warrant is exercised; or
 - (ii) the option under the warrant expires unexercised; or
 - (iii) the issuer enforces the terms of the trust; or
 - (iv) the holder defaults under the warrant.
- (6D) If an issuer of a put warrant has a relevant interest in securities because subsection (6C) ceases to apply, the issuer is taken to acquire a relevant interest in the securities at that time, by a transaction in relation to the securities.

Warrant trustees

- (6E) Subsection (2) applies to a person (*the trustee*) who would otherwise have a relevant interest in securities as a trustee under a trust for the purpose of satisfying rights or obligations of the issuer

or holder of a warrant to which the securities relate because the trustee:

- (a) holds the securities; or
- (b) would so hold such securities on trust but for dealing in the securities under a securities lending arrangement in accordance with the terms of the trust deed on ordinary commercial terms:

despite:

- (c) the trustee having any of the following discretions which, under the terms of the trust deed relating to the warrant, may only be exercised on ordinary commercial terms or in an ordinary commercial manner as the case requires:
 - (i) discretions where the issuer or holder of the warrant becomes insolvent or breaches a term of the warrant;
 - (ii) discretions in relation to bonus issues, rights issues, returns of capital, security splits, security consolidations or other reconstructions of capital affecting the securities; or
 - (iii) discretions in relation to a takeover bid for or a compromise or arrangement under Part 5.1 affecting the issuer of the securities but not in relation to voting or disposal of the securities; or
 - (iv) discretions to deal in the securities under a securities lending arrangement; or
- (d) the holder of the warrant not having a presently enforceable or unconditional right of the kind referred to in subsection 608(8).

(6F) In this section:

call warrant means a security or derivative that:

- (a) confers on the holder a right, but not the obligation, to acquire securities by way of transfer; and
- (b) is issued under a Product Disclosure Statement; and
- (c) is admitted to quotation on the financial market operated by ASX Limited or Chi-X Australia Pty Ltd.

holder, in relation to a warrant, means a person who has a legal or equitable interest in the warrant.

put warrant means a security or derivative that:

- (a) confers on the holder a right, but not the obligation, to sell securities by way of transfer; and
- (b) is issued under a Product Disclosure Statement; and
- (c) is admitted to quotation on the financial market operated by ASX Limited or Chi-X Australia Pty Ltd.

securities lending arrangement means:

conisante consulting

- (a) an arrangement under which:
 - (i) one entity (*the lender*) agrees that it will:
 - (A) deliver the securities to another entity (*the borrower*) or to an entity nominated by the borrower; and
 - (B) vest title in those securities in the entity to which they are delivered; and
 - (ii) the borrower agrees that it will, after the lender does the things mentioned in subparagraph (i):
 - (A) deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender; and
 - (B) vest title in those securities (or those equivalent securities) in the entity to which they are delivered; or
- (b) an arrangement under which:
 - (i) the securities are held by one entity (*the borrower*) or an entity nominated by the borrower, on behalf of another entity (*the lender*); and
 - (ii) the lender agrees that the borrower may deal in the securities on its own behalf or on behalf of a person;
 - (iii) the borrower agrees that it will at some future time:
 - (A) deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender; and
 - (B) vest title in those securities (or those equivalent securities) in the entity to which they are delivered.

warrant means a call warrant or a put warrant.²⁴

Note: Without this subsection, subsection 608(8) would create a relevant interest from the option or contract.

Conditional agreements

- (7) A person does not have a relevant interest in securities merely because of an agreement if the agreement:
 - (a) is conditional on:
 - (i) a resolution under item 7 in the table in section 611 being passed; or

²⁴ [CO 13/526](#) modifying Chapters 6 and 6C

- (ii) ASIC exempting the acquisition under the agreement from the provisions of this Chapter under section 655A; and
- (b) does not confer any control over, or power to substantially influence, the exercise of a voting right attached to the securities; and
- (c) does not restrict disposal of the securities for more than 3 months from the date when the agreement is entered into.

The person acquires a relevant interest in the securities when the condition referred to in paragraph (a) is satisfied.

Pre-emptive rights

- (8) A member of a company, body or managed investment scheme does not have a relevant interest in securities of the company, body or scheme merely because the company's, body's or scheme's constitution gives members pre-emptive rights on the transfer of the securities if all members have pre-emptive rights on the same terms.

(8A) A bidder does not have a relevant interest in bid class securities merely because facility acceptances are given to an acceptance facility operator under an acceptance facility in relation to a takeover bid if:

- (a) the acceptance facility is the only acceptance facility established by the bidder in relation to bid class securities;
- (b) if the bid class securities are quoted on a prescribed financial market—for every movement of at least 1% in the aggregate level of the bidder's voting power and the votes attached to bid class securities the subject of facility acceptances, the bidder provides to the relevant market operator, by 9.30am on the next trading day after the movement, a notice (whether accompanying a notice required to be given under section 671B or otherwise), that:
 - (i) sets out the aggregate number and percentage of bid class securities:
 - (A) in which the bidder and its associates have a relevant interest; and
 - (B) which are subject of facility acceptances;
 - (ii) discloses the breakdown between the two categories in sub-subparagraphs (A) and (B); and
 - (iii) contains a statement setting out the preconditions to the facility operator releasing the facility acceptances and warning that the facility acceptances may be withdrawn by participants in the facility at any time until the preconditions are met; and

conisante consulting

- (c) if the bid class securities are not listed on a prescribed financial market—the bidder lodges with ASIC a notice of the kind referred to in paragraph (b) within 2 business days of the aggregate level of the bidder’s voting power and the votes attached to bid class securities the subject of acceptances under the acceptance facility rising or falling above or below a percentage listed in subsection 654C(1).

This subsection stops applying to the relevant interest when the offer under the bid is accepted in respect of the securities the subject of the facility acceptance.²⁵

Director of body corporate holding securities

- (9) A person does not have a relevant interest in securities merely because:
- (a) the person is a director of a body corporate; and
 - (b) the body corporate has a relevant interest in those securities.

Clearing and settlement facilities

- (9A) The operator of a clearing and settlement facility (within the meaning of Chapter 7) does not have a relevant interest in securities merely because of its provision of facilities for the settlement of transactions.

Prescribed exclusions

- (10) A person does not have a relevant interest in securities in the circumstances specified in the regulations. The regulations may provide that interests in securities are not relevant interests subject to specified conditions.

[Added Note: CO 11/272 inserts ss10A-10C in s609 for the purposes of Part 6C.1 only²⁶]

²⁵ [CO 13/520](#) modifying Chapters 6, 6A and 6C

²⁶ [CO 11/272](#) modifying Part 6C.1. See at footnote 129. A note in the Instrument states: “For the avoidance of doubt, nothing in [the paragraphs inserting ss8A and 10A-10C] has effect for the purposes of Chapter 6 or Part 6C.2 of the Act”

Securities escrowed under listing rules²⁷

- (11) A listed company does not have a relevant interest in restricted securities merely because under the listing rules of the prescribed financial market the company applies restrictions on the disposal of the securities by the holder.
- (12) The operator of a prescribed financial market does not have a relevant interest in restricted securities merely because under the listing rules of the market the operator has the power to control the exercise of a power to dispose of the securities.
- (13) For the purposes of subsections (11) and (12):

restricted securities has the same meaning as in the listing rules of the prescribed financial market.²⁸

ASIC²⁹

- (14) Subject to subsection (15), ASIC does not have a relevant interest in securities.
- (15) ASIC may have a relevant interest in securities if:
- (a) the securities are vested in, or held by, ASIC for and on behalf of the Commonwealth; or
 - (b) the securities are vested in, or held by, the Commonwealth on trust.
- (16) To avoid doubt, the Chairperson of ASIC does not have a relevant interest in securities merely because ASIC has a relevant interest in securities and the Chairperson holds that office.³⁰

IDPS operators³¹

- (17A) A person does not have a relevant interest in securities merely because the person:

²⁷ [CO 13/520](#) modifying Chapters 6, 6A and 6C

²⁸ [CO 13/520](#) modifying Chapters 6, 6A and 6C

²⁹ [CO 12/1209](#) modifying Chapters 6 and 6C

³⁰ [CO 12/1209](#) modifying Chapters 6 and 6C

³¹ [2015/1067](#) modifying Chapters 6 and 6C

conisante consulting

- (a) is the operator of an IDPS; or
- (b) is involved in the operation of an IDPS and is a financial services licensee or a representative (within the meaning of section 910A) of a financial services licensee;
- and under the terms of the IDPS:
- (c) holds the securities; or
- (d) has a discretion in relation to the disposal of the securities.

(17B) Subsection (17A) does not apply to a person if ASIC has given a notice in writing to the person stating that subsection (17A) does not apply to the person and has not withdrawn that notice.

(17C) In subsection (17A), **IDPS** and **operator** have the same meaning as in subsection 912AD(42).

Note: Notional subsection 912AD(42) of the Act is inserted by ASIC Class Order [CO 13/763].³²

[Added Note: There is no subsection (18)³³]

ETFs³⁴

(19A) A member of a registered scheme who is an authorised participant in relation to the scheme does not have a relevant interest in securities that form part of scheme property of the scheme merely because the scheme has an acquisition and withdrawal facility, provided that:

- (a) the scheme is an exchange traded fund; and
- (b) the current PDS contains a statement to the effect that the investment strategy for the scheme is to make investments that are expected to result in the value of an interest in the scheme changing in proportion to the value of a published index of securities, ignoring the effect of fees and other costs (including taxes) in relation to the scheme; and
- (c) the current PDS contains a statement to the effect that at the time the investment strategy for the scheme disclosed in the current PDS was first published in a Product Disclosure Statement for interests in the scheme, there were reasonable

³² [2015/1067](#) modifying Chapters 6 and 6C

³³ [CO 13/721](#) states that the subsections below are inserted "after subsection 609(16) (as notionally inserted by ASIC Class Order [CO 12/1209])"

³⁴ [CO 13/721](#) modifying Chapters 6 and 6C

grounds to believe that implementation of the investment strategy would not be likely to lead to scheme property including securities in a class of securities that:

- (i) would represent more than 10% by value of scheme property; and
- (ii) were, or would result in the responsible entity having a relevant interest in, securities in:
 - (A) a listed company; or
 - (B) an unlisted company with more than 50 members; or
 - (C) a listed body that is formed or incorporated in Australia; or
 - (D) a listed scheme.

Note: The responsible entity may have a relevant interest in securities that do not form part of scheme property because of paragraph 608(3)(b).

(19B) If subsection (19A) applies in relation to a member and the member makes a withdrawal request under the acquisition and withdrawal facility:

- (a) subsection (19A) stops applying in relation to any securities that the member would receive if the responsible entity transferred securities to the member in accordance with the withdrawal request; and
- (b) the member is taken to acquire a relevant interest in those securities at that time through a transaction in relation to the securities entered into by the member.

Note: If the member makes a withdrawal request only in relation to some of the member's interests in the scheme, subsection (19A) may still apply in relation to the member's remaining interests.

(19C) If:

- (a) other than because of subsection (19B), a member has a relevant interest in securities that form part of scheme property because subsection (19A) has stopped applying in relation to the scheme; and
- (b) the member makes a withdrawal request in relation to the interests in the registered scheme;

then for the purposes of section 606, at the time of the withdrawal request:

- (c) the member is taken to acquire a relevant interest in any securities that the member would receive if the responsible entity transferred securities to the member in accordance with the withdrawal request; and

- (d) the member is taken to have acquired the relevant interest through a transaction entered into by the member in relation to those securities; and
- (e) the member's voting power is taken to have increased from what it would have been before the withdrawal request if the votes attached to those securities were disregarded to what it was after the withdrawal request (taking the votes attached to those securities into account).

(19D) If, in the previous 6 months:

- (a) a member's voting power has increased because subsection (19A) stopped applying in relation to securities; and
- (b) the member has not been taken to acquire a relevant interest in the securities under subsection (19B) or (19C);

the increase in voting power is to be disregarded in determining the member's, or any other person's, voting power for the purposes of item 9 of the table in section 611.

(19E) In subsections (19A) to (19D) and in this subsection:

acquisition and withdrawal facility means, in relation to a registered scheme, a facility that the responsible entity has stated in the current PDS that it intends to offer on each trading day on which interests in the scheme are traded on the financial market operated by ASX which allows:

- (a) a person who is an authorised participant to acquire an interest in the scheme by contributing to the scheme; and
- (b) a member who is an authorised participant to request that the responsible entity satisfy a withdrawal request in relation to an interest in the scheme by transferring to the member;

consideration that predominantly comprises a parcel of securities, the composition of which in relation to an acquisition and a withdrawal is published by or on behalf of the responsible entity from time to time.

Note: The composition of the parcel of securities may be different for an acquisition and a withdrawal.

ASX means ASX Limited

Australian resident for tax purposes means, for a particular financial year, a person who is an Australian resident for the purposes of the Income Tax Assessment Act 1997 for the whole of that financial year.

authorised participant means, in relation to a registered scheme, a person who:

- (a) has an agreement with the responsible entity of the scheme in relation to making applications to acquire and withdraw interests in the scheme; and
- (b) has notified the responsible entity in writing that the person expects they will be an Australian resident for tax purposes for the financial year of the scheme in which the notification is made and for each subsequent financial year, and has not subsequently notified the responsible entity to the contrary; and
- (c) is, or who has engaged to act on its behalf, a participant (within the meaning of section 761A) in relation to a financial market, to acquire and dispose of interests in the scheme.

Chi-X means Chi-X Australia Pty Ltd.

current PDS, in relation to a registered scheme, means the most recently lodged Product Disclosure Statement relating to interests in the scheme.

exchange traded fund (or ETF) means a registered scheme in relation to which all of the following are satisfied:

- (a) interests in the scheme are in a class that are able to be traded on a financial market operated by ASX or Chi-X but the scheme is not listed on either of those markets;
- (b) the responsible entity has the power and approval to issue interests in that class on any day that those interests are able to be traded on the relevant financial market;
- (c) the responsible entity allows applications for and redemptions of interests in that class on any day that those interests are able to be traded on the relevant financial market;
- (d) the price or value of any financial product, index, currency, commodity or other thing that the scheme invests in or tracks is continuously disclosed or can be immediately ascertained;
- (e) the name of the scheme does not contain the expression “managed fund” or “hedge fund”.

trading day, in relation to a financial market, means any day that financial products are able to be traded on the market.³⁵

³⁵ [CO 13/721](#) modifying Chapters 6 and 6C

610 Voting power in a body or managed investment scheme

Person's voting power in a body or managed investment scheme

- (1) A person's **voting power** in a designated body is:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes in designated body}} \times 100$$

where:

person's and associates' votes is the total number of votes attached to all the voting shares in the designated body (if any) that the person or an associate has a relevant interest in.

total votes in designated body is the total number of votes attached to all voting shares in the designated body.

Note: Even if a person's relevant interest in voting shares is based on control over disposal of the shares (rather than control over voting rights attached to the shares), their voting power in the designated body is calculated on the basis of the number of votes attached to those shares.

Counting votes

- (2) For the purposes of this section, the number of votes attached to a voting share in a designated body is the maximum number of votes that can be cast in respect of the share on a poll:
- (a) if the election of directors is determined by the casting of votes attached to voting shares—on the election of a director of the designated body; or
 - (b) if the election of directors is not determined by the casting of votes attached to voting shares—on the adoption of a constitution for the designated body or the amendment of the body corporate's constitution.

Note: The Takeovers Panel may decide that the setting or varying of voting rights in a way that affects control of a designated body is unacceptable circumstances under section 657A.

- (3) If:
- (a) a transaction in relation to, or an acquisition of an interest in, securities occurs; and
 - (b) before the transaction or acquisition, a person did not have a relevant interest in particular voting shares but an associate of the person did have a relevant interest in those shares; and
 - (c) because of the transaction or acquisition, the person acquires a relevant interest in those shares;

then, for the purposes of applying section 606 to the transaction or acquisition, the person's voting power is taken to have increased because of the transaction or acquisition from what it would have been before the transaction or acquisition if the votes attached to

conisante consulting

those shares were disregarded to what it was after the transaction or acquisition (taking the votes attached to those shares into account).

(3A) Subsection (3) does not apply to an acquisition of an interest in securities by a subsidiary from its holding company, unless as a result of the acquisition the voting power of a person that is not a subsidiary of their ultimate holding company in the body corporate that issued the voting shares increases.³⁶

- (4) Disregard the operation of section 613 in working out a person's voting power in a designated body.

When a designated body is a managed investment scheme

- (5) For the purposes of the application of this section in relation to a designated body that is a managed investment scheme:
- (a) a reference to voting shares in the designated body is taken to be a reference to voting interests in the scheme; and
 - (b) a reference to the election of directors of the designated body is taken to be a reference to:
 - (i) if the scheme is a registered scheme—the appointment of a responsible entity for the scheme; or
 - (ii) if the scheme is not a registered scheme—the appointment of a person to the office (by whatever name it is known) in relation to the scheme that corresponds most closely to the office of responsible entity of a registered scheme; and
 - (c) a reference to the designated body's constitution is taken to be a reference to the scheme's constitution.

Meaning of designated body

- (6) In this section:

designated body means:

- (a) a body; or
- (b) a managed investment scheme.

³⁶ [CO 13/520](#) modifying Chapters 6, 6A and 6C

Part 6.2—Exceptions to the prohibition

611 Exceptions to the prohibition

The following table sets out:

- (a) acquisitions of relevant interests in a company's voting shares that are exempt from the prohibition in subsection 606(1); and
- (b) acquisitions of relevant interests in a company's voting shares resulting from acquisitions of legal or equitable interests in securities of a body corporate that are exempt from the prohibition in subsection 606(2).

Note: Some of the items in the table cover only activities in relation to the company itself (items 7, 8, 12 and 13) while the other items cover acquisitions in that company that may occur through activities in relation to other companies.

Acquisitions that are exempt	[operative]
Takeover bids	
<i>Acceptance of takeover offer</i>	
1	An acquisition that results from the acceptance of an offer under a takeover bid.
See also section 612.	
<i>On-market purchase during bid period</i>	
2	An acquisition in relation to bid class securities that results from an on-market transaction if:
	(a) the acquisition is by or on behalf of the bidder under a takeover bid; and
	(b) the acquisition occurs during the bid period; and
	(c) the bid is for all the voting shares in the bid class; and
	(d) the bid is:
	(i) unconditional; or
	(ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2).³⁷
	<u>(d) the bid is:</u>
	<u>(i) unconditional; or</u>
	<u>(ii) subject to conditions of either or both of the following kind:</u>
	<u>(A) conditions that relate only to the happening of an event or circumstance referred to in subsection 652C(1) or (2); or</u>
	<u>(B) the condition required by subsection 625(3), but not to any other conditions.³⁸</u>
See also sections 612 and 613.	
<i>On-market purchase of convertible securities during bid period</i>	
3	An acquisition of bid class securities that results directly from the exercise of rights attached to convertible securities if:
	(a) the acquisition is by or on behalf of the bidder under a takeover bid; and
	(b) the bidder acquired a relevant interest in the convertible securities through an on-market transaction during the bid period; and
	(c) the bid is for all the voting shares in the bid class; and
	(d) the bid is:
	(i) unconditional; or
	(ii) conditional only on the happening of an event referred to in

³⁷ [CO 13/520](#) modifying Chapters 6, 6A and 6C

³⁸ [CO 13/520](#) modifying Chapters 6, 6A and 6C

Acquisitions that are exempt	[operative]
<p>subsection 652C(1) or (2).³⁹</p> <p><u>(d) the bid is:</u></p> <p><u>(i) unconditional; or</u></p> <p><u>(ii) subject to conditions of either or both of the following kind:</u></p> <p><u>(A) conditions that relate only to the happening of an event or circumstance referred to in subsection 652C(1) or (2); or</u></p> <p><u>(B) the condition required by subsection 625(3),</u></p> <p><u>but not to any other conditions.</u>⁴⁰</p> <p>See sections 612 and 613.</p>	
<p><i>Acceptance of scrip offered as takeover consideration</i></p> <p>4 An acquisition that results from the acceptance of:</p> <p>(a) an offer under a takeover bid if the voting shares are included in the consideration for offers under the bid; or</p> <p>(b) an offer that results in an acquisition to which item 5 applies.</p> <p>See also section 612.</p>	
<p>Nature of acquirer</p> <p>6 An acquisition that results from the exercise by a person of a power, or appointment as a receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest if:</p> <p>(a) the person's ordinary business includes the provision of financial accommodation by any means; and</p> <p>(b) the person took or acquired the security interest in the ordinary course of their business of the provision of financial accommodation by any means and on ordinary commercial terms.⁴¹</p> <p><u>An acquisition that results from the exercise by a person of a power, or the appointment of a receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest if:</u></p> <p><u>(a) the ordinary business of:</u></p> <p><u>(i) the person; or</u></p> <p><u>(ii) a person or persons for the benefit of whom the person took or acquired the security interest;</u></p> <p><u>includes the provision of financial accommodation by any means;</u></p> <p><u>and</u></p>	

³⁹ [CO 13/520](#) modifying Chapters 6, 6A and 6C

⁴⁰ [CO 13/520](#) modifying Chapters 6, 6A and 6C

⁴¹ [CO 13/520](#) modifying Chapters 6, 6A and 6C

Acquisitions that are exempt

[operative]

(b) the person took or acquired the security interest:

(i) in the ordinary course of their business of the provision of financial accommodation by any means; or

(ii) for the benefit of one or more other persons in relation to financial accommodation provided by the other persons in the ordinary course of the other persons' business of the provision of financial accommodation by any means; and

on ordinary commercial terms.

For the purposes of this item a security interest includes a negative pledge.⁴²

Approval by resolution of target

- 7 An acquisition approved previously by a resolution passed at a general meeting of the company in which the acquisition is made, if:
- (a) no votes are cast in favour of the resolution by:
 - (i) the person proposing to make the acquisition and their associates; or
 - (ii) the persons (if any) from whom the acquisition is to be made and their associates; and
 - (b) the members of the company were given all information known to the person proposing to make the acquisition or their associates, or known to the company, that was material to the decision on how to vote on the resolution, including:
 - (i) the identity of the person proposing to make the acquisition and their associates; and
 - (ii) the maximum extent of the increase in that person's voting power in the company that would result from the acquisition; and
 - (iii) the voting power that person would have as a result of the acquisition; and
 - (iv) the maximum extent of the increase in the voting power of each of that person's associates that would result from the acquisition; and
 - (v) the voting power that each of that person's associates would have as a result of the acquisition.

Target newly formed

- 8 An acquisition that results from an issue of securities of the company in which the acquisition is made if the company has not started to carry on any business and has not borrowed any money.
-

Manner of acquisition

⁴² [CO 13/520](#) modifying Chapters 6, 6A and 6C

Acquisitions that are exempt	[operative]
	<i>3% creep in 6 months</i>
<p>9 An acquisition by a person if:</p> <p>(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</p> <p>(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.</p>	
	<i>Rights issues</i>
<p>10 An acquisition that results from an issue of securities that satisfies all of the following conditions:</p> <p>(a) a company offers to issue securities in a particular class;</p> <p>(b) offers are made to every person who holds securities in that class to issue them with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the issue;</p> <p>(c) all of those persons have a reasonable opportunity to accept the offers made to them;</p> <p>(d) agreements to issue are not entered into until a specified time for acceptances of offers has closed;</p> <p>(e) the terms of all the offers are the same.</p> <p>This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.</p> <p>See section 615.</p>	
<p>10A <u>An acquisition that results from an issue of securities that satisfies all of the conditions in item 10.</u></p> <p><u>For the purposes of determining whether the offers of a company's securities satisfy the conditions in paragraphs (d) and (e), disregard the following matters:</u></p> <p><u>(a) some or all persons who are offered securities as an exempt investor may:</u></p> <p><u>(i) receive the offers before other persons to whom offers are made; or</u></p> <p><u>(ii) be given a period of time to accept the offers which is less than the period of time given to other persons to whom offers are made;</u></p> <p><u>(b) the securities may be issued to a person as an exempt investor before securities are issued to other persons under the offers,</u></p>	<p><u>Accelerated rights issues</u>⁴³</p>

⁴³ [2015/1069](#) modifying Chapter 6

Acquisitions that are exempt	[operative]
<p><u>provided that under the terms of the offers any such issue to an exempt investor is to occur no earlier than 2 months before the issue of securities to other persons who are not exempt investors;</u></p> <p><u>(c) under the terms of the offers:</u></p> <p><u>(i) offerees who are not exempt investors are able to trade rights on a prescribed financial market until a specified time for acceptances of offers has closed; and</u></p> <p><u>(ii) offerees who are exempt investors are not able to trade rights.</u></p> <p><u>This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.</u></p> <p><u>See section 615.</u></p> <p><u>For the purposes of this item:</u></p> <p><u>exempt investor means a person:</u></p> <p><u>(a) offered securities in circumstances that do not need disclosure under Part 6D.2 because of subsections 708(8) to (12); or</u></p> <p><u>(b) offered securities as a wholesale client (as defined in section 761G).</u></p> <p><u>rights means rights to be issued securities under the offers.⁴⁴</u></p>	

Dividend reinvestment etc.

- 11 An acquisition that results from an issue of:
- (a) shares in a company to existing holders of shares in the company under a dividend reinvestment plan or bonus share plan; or
 - (b) interests in a managed investment scheme to existing holders of interests in the scheme under a distribution reinvestment plan or switching facility;
- if the plan or facility is available to all members.
- Disregard any unavailability to foreign holders in determining whether the plan or facility is available to all members.

Initial public offering (IPO) fundraising

- 12 An acquisition that results from an issue, under a disclosure document or a CSF offer document, of securities in the company in which the acquisition is made if:
- (a) the issue is to a promoter; and
 - (b) the document disclosed the effect that the acquisition would have on the promoter's voting power in the company; and
 - (c) no other disclosure document or CSF offer document has previously been issued or published by or on behalf of the company.

Underwriting of fundraising

⁴⁴ [2015/1069](#) modifying Chapter 6

Acquisitions that are exempt	[operative]
<p>13 An acquisition that results from an issue, under a disclosure document or a CSF offer document, of securities in the company in which the acquisition is made if:</p> <p>(a) the issue is to a person as underwriter to the issue or sub-underwriter; and</p> <p>(b) the document disclosed the effect that the acquisition would have on the person's voting power in the company.</p>	
<p><i>Acquisition through listed company</i></p> <p>14 An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of:</p> <p>(a) a prescribed financial market; or</p> <p>(b) a foreign body conducting a financial market that is a body approved in writing by ASIC for the purposes of this item.⁴⁵</p> <p><u>An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of:</u></p> <p><u>(a) a prescribed financial market; or</u></p> <p><u>(b) a foreign body conducting a financial market that is a body approved in writing by ASIC for the purposes of this item.⁴⁶</u></p> <p><u>where such inclusion is a primary listing.⁴⁷</u></p>	
<p><i>Wills etc.</i></p>	
<p>15 An acquisition through a will or through operation of law.</p>	
<p><i>Forfeiture of shares</i></p>	
<p>16 An acquisition that results from an auction of forfeited shares conducted on-market.</p>	
<p>Compromise, arrangement, liquidation or buy-back</p> <p><i>Part 5.1 compromise or arrangement</i></p>	

⁴⁵ [CO 13/520](#) modifying Chapters 6, 6A and 6C

⁴⁶ Under instrument [2015/1071](#) ASIC has approved "a foreign body conducting an approved foreign market" for the purposes of item 14(b) of the table in section 611 *Approved foreign market* has the same meaning as in section 5 of instrument [2017/669](#) which modifies section 9 as it applies in Chapter 6 (and also Chapters 2L, 5C and 6D, and Parts 7.6 (other than Division 4 and 8), 7.8 and 7.9) as they apply to any person who purports to rely on certain applicable ASIC legislative instruments. See at footnote 3.

⁴⁷ [CO 13/520](#) modifying Chapters 6, 6A and 6C

Acquisitions that are exempt [operative]	
17	An acquisition that results from a compromise or arrangement approved by the Court under Part 5.1. <i>Section 507 arrangement</i>
18	An acquisition that results from an arrangement entered into by a liquidator under section 507. <i>Buy-back</i>
19	An acquisition that results from a buy-back authorised by section 257A.
19A	<u>An acquisition that results from the responsible entity of a registered scheme buying interests in the scheme in accordance with Part 5C.6A.</u> ⁴⁸
Proprietary companies that have CSF shareholders	
19A	An acquisition of a relevant interest in issued voting shares in a proprietary company if: (a) the company has one or more CSF shareholders; and (b) all the other requirements (if any) prescribed by the regulations for the purposes of this paragraph are met. ⁴⁹
Regulations	
20	An acquisition made in a manner or in circumstances prescribed by the regulations. The circumstances may include acquisitions of relevant interests in voting shares in a specified body or class of bodies. ⁵⁰

612 Effect of non-compliance with takeover rules for exceptions 1 to 4

The exceptions in items 1 to 4 of the table in section 611 do not apply to a takeover bid if the bid is carried out in contravention of:

- (a) section 618 (full or proportionate bid); or
- (b) section 619 (offers to be the same); or
- (c) subsection 621(3) (minimum price); or
- (d) subsection 624(1) (minimum offer period); or

⁴⁸ [2016/1159](#) modifying Chapter 6 as it applies to a responsible entity

⁴⁹ *Corporations Regulations 2001* regulation [6.2.01A](#) prescribes for the purposes of paragraph (b) of item 19A: “the requirement that the company is an eligible CSF company at the time of the acquisition of the relevant interest”

⁵⁰ See *Corporations Regulations 2001* regulation [6.2.01](#) and regulation [6.2.02](#) (referring to [Schedule 3](#))

conisante consulting

- (e) sections 625 to 630 (conditional offers); or
- (f) items 2, 3 and 6 in the table in subsection 633(1) (procedural steps for off-market bid); or
- (g) items 3, 4 and 6 in the table in section 635 (procedural steps for market bid).

613 Bidder not to exercise voting rights if failure to send bids for off-market acquisition—exception 2 or 3

If the exception in item 2 or 3 of the table in section 611 applies to an acquisition on-market during a takeover bid, the bidder is not entitled to exercise the voting rights attached to the shares if:

- (a) the bid is an off-market bid; and
- (b) the bidder fails to send offers under the bid within 28 days after giving the bidder's statement to the target.

615 Treatment of foreign holders under equal access issue—exception 10

~~The exception in item 10 of the table in section 611 applies even though the conditions set out in the item are not satisfied in respect of foreign holders of the company's securities if, under the terms of the offers:~~

- ~~(a) the company must appoint a nominee for foreign holders of the company's securities who is approved by ASIC; and~~
- ~~(b) the company must transfer to the nominee:~~
 - ~~(i) the securities that would otherwise be issued to the foreign holders who accept the offer; or~~
 - ~~(ii) the right to acquire those securities; and~~
- ~~(c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.⁵¹~~

The exception in ~~item 10~~ item 10 or 10A⁵² of the table in section 611 applies even though the conditions set out in the item are not satisfied in respect of foreign holders of the company's securities, or such of those foreign holders as are specified in the offers, if, under the terms of the offers:

⁵¹ [CO 13/520](#) modifying Chapters 6, 6A and 6C

⁵² [2015/1069](#) modifying Chapter 6

conisante consulting

- (a) the company must appoint a nominee for those foreign holders of the company's securities who is approved by ASIC; and
- (b) the company must issue to the nominee:
 - (i) the securities that would otherwise be issued to the foreign holders who accept the offer; or
 - (ii) the right to acquire those securities; and
- (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.⁵³

⁵³ [CO 13/520](#) modifying Chapters 6, 6A and 6C

Part 6.3—The different types of takeover bid

616 Off-market bids and market bids

- (1) There are 2 kinds of takeover bid:
- (a) an off-market bid (for quoted or unquoted securities); or
 - (b) a market bid (only available for quoted securities).

Note: Although the prohibition in section 606 is against acquiring relevant interests in voting shares, a takeover bid may be made for any securities (for example, as a preliminary to compulsorily acquiring securities in that class under Part 6A.1).

- (2) The following table shows where to find the provisions dealing with the main features of the offers that may be made under off-market bids and market bids and the procedures to be followed:

Takeover bids		[signpost table]	
	Feature	Off-market bid	Market bid
1	people to whom offers made	617(1)-(2)	617(3)
2	securities covered	618(1)-(2)	618(3)
3	consideration offered for the securities	621(1), (3)-(5) and 651A	621(2), (3)-(5)
4	escalation agreements and collateral benefits not allowed	622 and 623	622 and 623
5	offer period	624(1)-(2) and 650C	624(1)-(2) and 649C
6	conditional offers	625(2)-(3) and 626-630	625(1)
7	procedure to be followed in making bid	632 and 633	634 and 635
8	acceptances	650E and 653A-653B	-

Part 6.4—Formulating the takeover offer

Division 1—General

617 Securities covered by the bid

Off-market bid

- (1) An off-market bid must relate to securities:
 - (a) in a class of securities (the **bid class**); and
 - (b) that exist or will exist as at the date set by the bidder under subsection 633(2).

Note: Subsection 92(3) defines **securities** for the purposes of this Chapter.

- ~~(2) If other securities exist or will exist at that date that:
 - ~~(a) will convert, or may be converted, to securities in the bid class; or~~
 - ~~(b) confer rights to be issued securities in the bid class;~~~~

~~the bid may extend to securities that come to be in the bid class during the offer period due to a conversion or exercise of the rights.~~

- (2) If other securities exist or will exist at that date that:
 - (a) will convert, or may be converted, to securities in the bid class; or
 - (b) confer rights to be issued securities in the bid class;the bid may extend to securities that come to be in the bid class during the period from the date set by the bidder under subsection 633(2) to the end of the offer period due to a conversion or exercise of the rights.⁵⁴

Note: The bidder's statement must say if the bid is extended in this way (see paragraph 636(1)(j)).

Market bid

- (3) A market bid must relate to securities:
 - (a) in a class of quoted securities (the **bid class**); and
 - (b) that exist or will exist at any time during the offer period.

⁵⁴ [CO 13/521](#) modifying Chapter 6

618 Offers must be for all or a proportion of securities in the bid class

Off-market bid

- (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 in the bid class.
- The proportion specified under paragraph (b) must be the same for all holders of securities in the bid class.

~~*Off market bid—non-marketable parcels*~~

~~*(2) If accepting an offer under an off market bid for quoted securities would leave a person with a parcel of the securities that is less than a marketable parcel (within the meaning of the rules of the relevant financial market), the offer extends to that parcel.*⁵⁵~~

Proportional takeover bids—small parcels

- (2) If accepting an offer under a proportional takeover bid for quoted securities would leave a person with a parcel of the securities that is a small parcel, the offer extends to that parcel.
- This subsection (including the application of this subsection to the circumstances specified in subsection (2B)) does not apply to a parcel of securities, whether held beneficially or otherwise, that has come into existence or increased in size because of a transaction entered into (including the creation of one or more trusts) after the bid was publicly proposed.
- (2A) For the purposes of subsection (2), a person accepting a proportional takeover bid for quoted securities would be left with a small parcel of securities if, and only if, the parcel of securities they would be left with is not:
- (a) if, on the most recent day before the date of acceptance that bid class securities were traded on a prescribed financial market, the securities were only traded on one prescribed financial market—a minimum parcel using the closing price of the securities on that prescribed financial market on that day; or

⁵⁵ [CO 13/521](#) modifying Chapter 6

- (b) if bid class securities traded on more than one prescribed financial market on that day—a minimum parcel using the closing price of the securities on any of the prescribed financial markets on which the securities traded on that day.
- (2B) If under paragraph 653B(1)(b) a person (*the holder*) may accept an off-market bid for securities as if a separate offer had been made in relation to:
 - (a) one or more parcels of bid class securities that they hold as trustee or nominee for, or otherwise on account of, another person (*a beneficiary*); or
 - (b) a parcel held in the holder's own right;
then subsection (2) applies to the holder in relation to each parcel rather than the aggregate of the parcels, provided the holder has, before or at the same time as an acceptance of the offer extended under subsection (2), given a notice complying with subsection (2C) to the bidder in relation to the parcel.
- (2C) A notice complies with this subsection in relation to a parcel of securities if the notice is signed by the holder of the securities and states:
 - (a) as applicable:
 - (i) that the holder holds the parcel in their own right; or
 - (ii) where the parcel is held by the holder as trustee or nominee for, or otherwise on account of, one or more beneficiaries—the name and address of each beneficiary; and
 - (b) if the holder holds the parcel as trustee or nominee for, or otherwise on account of, one or more beneficiaries—the date (and if that date is the same as the date the bid was publicly proposed—the time of day) the holder reasonably believes each beneficiary acquired a beneficial interest in the parcel; and
 - (c) if the holder holds the parcel in their own right—the date (and if that date is the same as the date the bid was publicly proposed—the time of day) the holder acquired a legal interest in the parcel.
- (2D) In subsection (2A):
minimum parcel, in relation to quoted securities, means:
 - (a) if a “marketable parcel” or “minimum parcel” is defined in the rules governing the operation of the relevant prescribed financial market on which the securities are quoted—a

marketable parcel or minimum parcel as defined in those rules;

- (b) otherwise—a parcel of the securities valued at not less than \$500 based on the closing price of the securities on the relevant prescribed financial market.⁵⁶

Market bid

- (3) An offer for securities under a market bid must be an offer to buy all the securities in the bid class.

619 General terms of the offer

Off-market bid

- (1) All the offers made under an off-market bid must be the same.

Note: The offers may include alternative forms of consideration (see section 621).

- (2) In applying subsection (1), disregard the following:

- (a) any differences in the offers attributable to the fact that the number of securities that may be acquired under each offer is limited by the number of securities held by the holder;
- (b) any differences in the offers attributable to the fact that the offers relate to securities having different accrued dividend or distribution entitlements;
- (c) any differences in the offers attributable to the fact that the offers relate to securities on which different amounts are paid up or remain unpaid;
- (d) any differences in the offers attributable to the fact that the bidder may issue or transfer only whole numbers of securities as consideration for the acquisition;
- (da) any differences in the offers attributable to the fact that the bidder may offer a lower amount or value of consideration to a person mentioned in any of the paragraphs in subsection 621(3B) than would otherwise be required to be offered.⁵⁷
- (e) any additional cash amount offered to holders instead of the fraction of a security that they would otherwise be offered.

⁵⁶ [CO 13/521](#) modifying Chapter 6

⁵⁷ [2015/1068](#) modifying Chapter 6

Foreign holders

- (3) ~~If the consideration for the bid includes an offer of securities, the securities do not need to be offered to foreign holders of the target's securities if under the terms of the bid:~~
- ~~(a) the bidder must appoint a nominee for foreign holders of the target's securities who is approved by ASIC; and~~
 - ~~(b) the bidder must transfer to the nominee:~~
 - ~~(i) the securities that would otherwise be transferred to the foreign holders who accept the bid for that consideration; or~~
 - ~~(ii) the right to acquire those securities; and~~
- ~~(c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.⁵⁸~~

Foreign holders

- (3) If the consideration for the bid includes an offer of securities, the securities do not need to be offered to foreign holders of the target's securities, or such of those foreign holders as are specified in the bidder's statement, if under the terms of the bid:
- (a) the bidder must appoint a nominee for those foreign holders who is approved by ASIC; and
 - (b) the bidder must transfer to the nominee:
 - (i) the securities that would otherwise be transferred to the foreign holders, or specified foreign holders, who accept the bid for that consideration; or
 - (ii) the right to acquire those securities; and
 - (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.

[Added Note: [CO 13/525](#) provides an exemption from s707(3) or s1012C(3) in relation to offers for sale of scrip consideration under s619(3) or a takeover-related small parcel sale facility under s619(4).]

Small parcels

- (4) If the consideration for the bid includes an offer of quoted securities, the securities do not need to be offered to holders of the

⁵⁸ [CO 13/521](#) modifying Chapter 6

target's securities who would otherwise be offered a small parcel of securities, if under the terms of the bid:

- (a) where a nominee is appointed under subsection (3)—the bidder and the nominee must follow the procedure in subsection (3) as if a reference to “foreign holders” were a reference to holders of the target's securities who would otherwise be offered a small parcel of securities; or
- (b) where a nominee is not appointed under subsection (3)—the bidder must pay to each holder of a small parcel of securities who accepts the bid an amount of cash which is equal to the market value of those securities.

(5) For the purposes of subsection (4):

market value of securities means the highest closing price for the securities published by any prescribed financial market on which the securities are quoted during the period beginning on the first day of the bid period, and ending on the earlier of:

- (a) 5 trading days before the first day on which the bidder must pay or provide the consideration to a holder of bid class securities under terms of the offers; and
- (b) the end of the bid period.

minimum parcel, in relation to quoted securities, means:

- (a) if a “marketable parcel” or “minimum parcel” is defined in the respective rules governing the operation of more than one prescribed financial market on which the securities are quoted—a marketable parcel or minimum parcel as defined in whichever of the rules the bidder specifies in the bidder's statement;
- (b) if a “marketable parcel” or “minimum parcel” is defined in the rules governing the operation of only one prescribed financial market on which the securities are quoted—a marketable parcel or minimum parcel as defined in those rules;
- (c) otherwise—a parcel of the securities valued at not less than \$500 based on the closing price of the securities on the relevant prescribed financial market.

small parcel, in relation to securities, means a parcel of securities which is not a minimum parcel calculated using the market value of those securities.⁵⁹

⁵⁹ [CO 13/521](#) modifying Chapter 6

[Added Note: [CO 13/525](#) provides an exemption from s707(3) or s1012C(3) in relation to offers for sale of scrip consideration under s619(3) or a takeover-related small parcel sale facility under s619(4).]

620 Off-market bid (offer formalities)

- (1) Each offer under an off-market bid must:
 - (a) be in writing; and
 - (b) have the same date; and
 - (c) provide that, unless withdrawn, it will remain open until the end of the offer period (see section 624); and
 - (d) state how, and when, the bidder is to satisfy their obligations.
- (2) Each offer must provide that the bidder is to pay or provide the consideration for the offer:
 - (a) if the bidder is given the necessary transfer documents with the acceptance—by the end of whichever of the following periods ends earlier:
 - (i) 1 month after the offer is accepted or, if the offer is subject to a defeating condition, within 1 month after the takeover contract becomes unconditional
 - (ii) 21 days after the end of the offer period; or
 - ~~(b) if the bidder is given the necessary transfer documents after the acceptance and before the end of the bid period—within 1 month after the bidder is given the necessary transfer documents; or~~
 - ~~(c) if the bidder is given the necessary transfer documents after the acceptance and after the end of the bid period—within 21 days after the bidder is given the necessary transfer documents.⁶⁰~~
 - (b) if the bidder is given the necessary transfer documents after the acceptance and before the end of the bid period and the offer is subject to a defeating condition at the time that the bidder is given the necessary transfer documents—by the end of whichever of the following periods ends earlier:
 - (i) 1 month after the takeover contract becomes unconditional; or
 - (ii) 21 days after the end of the offer period; or

⁶⁰ [CO 13/521](#) modifying Chapter 6

conisante consulting

- (ba) if the bidder is given the necessary transfer documents after the acceptance and before the end of the bid period and the offer is unconditional at the time that the bidder is given the necessary transfer documents—by the end of whichever of the following periods ends earlier:
 - (i) 1 month after the bidder is given the necessary transfer documents; or
 - (ii) 21 days after the end of the offer period; or
- (c) if the bidder is given the necessary transfer documents after the acceptance and after the end of the bid period:
 - (i) if at the time the bidder is given the necessary transfer documents the takeover contract is unconditional—within 21 days after the bidder is given the necessary transfer documents; or
 - (ii) if at the time the bidder is given the necessary transfer documents the takeover contract is subject to a defeating condition that relates only to the happening of an event or circumstance referred to in subsection 652C(1) or (2)—within 21 days after the takeover contract becomes unconditional.⁶¹

Note: Subsection 630(1) requires an offer that is subject to a defeating condition to specify a date for declaring whether the condition has been fulfilled or not.

- (3) The offer may provide that the bidder may avoid the takeover contract if the bidder is not given the necessary transfer documents within 1 month after the end of the offer period.

⁶¹ [CO 13/521](#) modifying Chapter 6

Division 2—Consideration for the offer

621 Consideration offered

Off-market bid—general

- (1) A bidder making an off-market bid for securities may offer any form of consideration for the securities, including:
- (a) a cash sum; or
 - (b) securities (including shares, debentures, interests in a managed investment scheme or options); or
 - (c) a combination of a cash sum and securities.

Note: Sections 650B and 651A deal with variations of the consideration offered under the bid.

Market bid—cash only

- (2) As the offers under a market bid for securities are made through a prescribed financial market, the bidder must offer to acquire the securities for a cash sum only for each security.

Note: Section 649B deals with variations of the consideration offered under the bid.

All bids—minimum consideration if bidder purchased securities in the 4 months before the bid

- (3) The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.

(3A) Despite subsection (3), if the securities in the bid class under a takeover bid are quoted securities, the consideration offered for securities in the bid class may be less than the minimum consideration required under subsection (3) to the extent of a decrease in the value of securities in the bid class provided both of the following are satisfied:

- (a) the decrease resulted from the target:
 - (i) declaring a cash dividend; or
 - (ii) converting its shares into a larger number under section 254H;
- (b) the date on which the operator of the market on which the bid class securities are quoted changes the basis of quotation of the securities to signify that trading in that class no longer carries the entitlement to the dividend or larger number of shares, is:

- (i) after the date the relevant purchase or agreement is made; and
- (ii) on or before the date of the bid.

Note: If bid class securities are quoted on more than one approved financial market, paragraph (b) applies in relation to whichever market operator first changes the basis of quotation.

(3B) Despite subsection (3) the bidder may offer consideration for securities in the bid class under a takeover bid that is less than the minimum consideration required under subsection (3) if the consideration is offered to any of:

- (a) a wholly-owned subsidiary of the bidder;
- (b) where the bidder is a wholly-owned subsidiary—its holding company or the holding company’s wholly-owned subsidiaries; or
- (c) a nominee or bare trustee of bid class securities for the bidder or bodies referred to in paragraphs (a) or (b),
provided that, if the offer is made to a body referred to in paragraphs (a) or (b) or to its nominee or bare trustee—the bidder has first obtained the written consent of the body for it or its nominee or bare trustee to receive the offer, and such consent acknowledges that the value of the consideration being offered is less than the value that would otherwise be required by subsection (3).⁶²

(4) For the purposes of subsection (3), the consideration offered or provided for a security is:

- (a) if the consideration offered or provided is a cash sum only—the amount of that cash sum; or
- (b) if the consideration offered or provided does not include a cash sum—the value of that consideration; or
- (c) if the consideration offered or provided is a cash sum and other consideration—the sum of the amount of the cash sum and the value of the other consideration.

The value of consideration that is not a cash sum is to be ascertained as at the time the relevant offer, purchase or agreement is made.

(4A) Despite subsection (4), if the consideration offered for securities in the bid class under a takeover bid includes quoted securities, the bidder may ascertain the value of the quoted securities as at any

⁶² [2015/1068](#) modifying Chapter 6

time of its choosing within the 5 business days before the date of the bid, provided all of the following are satisfied:

- (a) the quoted securities are valued by calculating the volume weighted average market price of those securities in the ordinary course of trading on the approved financial market during the 2 full trading days before the chosen time;
- (b) the period of trading on which the valuation is based does not start until at least 5 trading days have elapsed after the first day that the bidder has sent a copy of the bidder's statement and offer document:
 - (i) to the target under item 3 of subsection 633(1); and
 - (ii) to each approved financial market on which the target's securities are quoted;
- (c) the bidder's statement required to be sent by item 6 of subsection 633(1) includes the following information:
 - (i) the value of the quoted securities ascertained under paragraph (a);
 - (ii) details of the valuation method required to be applied by paragraph (a), including the trading days on which the valuation is based.

(4B) For the purposes of subsections (3) to (4A):

approved financial market means:

- (a) a prescribed financial market; and
- (b) an approved foreign market (see section 9).

Note: The definition of **approved foreign market** is notionally inserted by *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669*.

quoted security means a security in a class of securities that is quoted on an approved financial market.⁶³

(5) If:

- (a) a person agrees to buy a security in a company; and
- (b) the agreement provides that the price payable for the security is a price specified in the agreement but may be varied in accordance with the terms of the agreement;

any variation in price under the agreement is to be disregarded in working out, for the purposes of subsection (3), the price agreed to be paid for the security under the agreement.

⁶³ [2015/1068](#) modifying Chapter 6

622 Escalation agreements

Benefits linked to bids and proposed bids not allowed

- (1) A person who makes or proposes to make a takeover bid for securities, or their associate, contravenes this section if:
- (a) a person acquires a relevant interest in securities in the bid class within the 6 months before the bid is made or proposed; and
 - (b) at any time whatever, the bidder, proposed bidder or associate gives or agrees to give a benefit to, or receives or agrees to receive a benefit from:
 - (i) a person who had a relevant interest in any of the paragraph (a) securities immediately before the acquisition; or
 - (ii) an associate of a person who had a relevant interest in any of those securities at that time; and
 - (c) the benefit is attributable to the acquisition or matters that include the acquisition; and
 - (d) the amount or value of the benefit is, or is to be, determined by reference to or to matters that include either of the following:
 - (i) the amount or value of the consideration for the securities under the bid or proposed bid;
 - (ii) the amount or value of the consideration for which the bidder or proposed bidder acquires, offers or proposes to offer to acquire, securities in the bid class during the offer period (whether or not under the bid) or under Chapter 6A.

Strict liability offences

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Contravening agreements void

- (2) An agreement is void to the extent that it purports to provide for:
- (a) a person to give a benefit to a person; or
 - (b) a person to receive a benefit from a person;
- in contravention of subsection (1).

623 Collateral benefits not allowed

- ~~(1) A bidder, or an associate, must not, during the offer period for a takeover bid, give, offer to give or agree to give a benefit to a person if:~~

conisante consulting

- ~~(a) the benefit is likely to induce the person or an associate to:~~
 - ~~(i) accept an offer under the bid; or~~
 - ~~(ii) dispose of securities in the bid class; and~~
- ~~(b) the benefit is not offered to all holders of securities in the bid class under the bid.⁶⁴~~
- (1) A bidder, or an associate, must not, during:
 - (a) for an off-market bid—the offer period; or
 - (b) for a market bid—the bid period;
 - give, offer to give or agree to give a benefit to a person if:
 - (c) the benefit is likely to induce the person or an associate to:
 - (i) accept an offer under the bid; or
 - (ii) dispose of securities in the bid class; and
 - (d) the benefit is not offered to all holders of securities in the bid class under the bid.⁶⁵
- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) For the purpose of this section, a person does not receive a benefit that is not offered under a takeover bid merely because the person sells bid class securities on-market and the takeover bid is an off-market bid or a conditional bid.
- (3) This section does not prohibit:
 - (a) the variation of a takeover offer as provided by sections 649A to 650D; or
 - (b) an acquisition of securities through an on-market transaction; or
 - (c) simultaneous takeover bids for different classes of securities in the target.

⁶⁴ [CO 13/521](#) modifying Chapter 6

⁶⁵ [CO 13/521](#) modifying Chapter 6

Division 3—The offer period

624 Offer period

Offer period set in offer

- (1) The offers under a takeover bid must remain open for the period stated in the offer. The period must:
 - (a) start on the date the first offer under the bid is made; and
 - (b) last for at least 1 month, and not more than 12 months.However, the offer may be withdrawn during that period under section 652B.

Note: Sections 649C (market bids) and 650C (off-market bids) deal with variation of the offer period.

Automatic extension of offer period if bidder reaches 50% or consideration increased in last week

- ~~(2) If, within the last 7 days of the offer period:~~
 - ~~(a) for an off-market bid—the offers under the bid are varied to improve the consideration offered; or~~
 - ~~(b) in any case—the bidder's voting power in the target increases to more than 50%;~~~~the offer period is extended so that it ends 14 days after the event referred to in paragraph (a) or (b). The bidder must give the target and everyone who has not accepted an offer under the bid written notice that the extension has occurred within 3 days after that event.⁶⁶~~
- (2) If, within the last 7 days of the offer period:
 - (a) for an off-market bid—the offers under the bid are varied to improve the consideration offered; or
 - (b) in any case—the bidder's voting power in the target increases to more than 50%;the offer period is extended so that it ends 14 days after the event referred to in paragraph (a) or (b) at the following times:
 - (c) for a market bid—the close of ordinary trading; and
 - (d) for an off-market bid—the time of day the offer period would have ended if it had not been extended under this subsection.

⁶⁶ [CO 13/521](#) modifying Chapter 6

conisante consulting

The bidder must give each of the persons specified in paragraph 650D(1)(c) (other than those who have accepted an offer under the bid) written notice that the extension has occurred within 3 days after that event.⁶⁷

Note: The consideration for a market bid cannot be increased in the last 5 trading days of the offer period (see section 649B).

Strict liability offences

- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (4) For the purposes of this section, **close of ordinary trading**, in relation to a particular day, means the latest time specified in the rules governing the operation of each prescribed financial market on which bid class securities are quoted (or as otherwise determined by the relevant market operator) as the time after which no further on-market transactions may be effected on that day.

Treatment of acceptances in an acceptance facility

- (5) If

- (a) a bidder has established an acceptance facility;
 - (b) subsection 609(8A) applies with respect to securities the subject of facility acceptances provided to the acceptance facility operator under the terms of the acceptance facility; and
 - (c) the bidder has included in the notice given under subsection 630(3):
 - (i) a statement that the bid remains subject to one or more defeating conditions (other than defeating conditions of the kind referred to in paragraph 650F(1)(a));
 - (ii) a statement that the bidder has elected that this subsection is to apply; and
 - (iii) a description of the effect of this subsection;
- then, in determining the bidder's voting power for the purposes of paragraph (2)(b), the bidder is taken to acquire a relevant interest in facility acceptances in relation to the acceptance facility at the time the triggering conditions are satisfied.⁶⁸

⁶⁷ [CO 13/521](#) modifying Chapter 6

⁶⁸ [CO 13/521](#) modifying Chapter 6

[Note: ASIC Class Order [CO 13/520] notionally inserts subsection 609(8A) of the Act and definitions of *acceptance facility* and *acceptance facility operator* in section 9 of the Act.⁶⁹]

⁶⁹ This appears to be a note to paragraph 4(g) of [CO 13/521](#), rather than a note inserted into the section

Division 4—Conditional offers

625 Conditional offers—general

Market bids

- (1) Offers under a market bid must be unconditional.

Off-market bids may generally be conditional

- (2) Offers under an off-market bid may be subject to conditions that are not prohibited by sections 626 to 629.

- (3) If:

- (a) the consideration offered is or includes securities; and
- (b) the offer or the bidder's statement states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere);

the following rules apply:

- (c) the offer is subject to a condition that:
 - (i) an application for admission to quotation will be made within 7 days after the start of the bid period; and
 - (ii) permission for admission to quotation will be granted no later than 7 days after the end of the bid period;
- (d) the offer may not be freed from this condition.

The condition referred to in this subsection is not a defeating condition.⁷⁰

Note: Section 1325A provides that a Court may make a remedial order if the condition is not satisfied.

626 Maximum acceptance conditions in off-market bids

Maximum acceptance conditions not allowed

- (1) Offers under an off-market bid must not be subject to a maximum acceptance condition. A maximum acceptance condition is one that provides that the offers will terminate, or the maximum consideration offered under the bid will be reduced, if one or more of the following occur:

⁷⁰ [CO 13/521](#) modifying Chapter 6

conisante consulting

- (a) the number of securities for which the bidder receives acceptances reaches or exceeds a particular number; or
 - (b) the bidder's voting power in the company reaches or exceeds a particular percentage; or
 - (c) the percentage of securities the bidder has relevant interests in reaches or exceeds a particular percentage of securities in that class.
- (2) For the purposes of subsection (1), it does not matter:
 - (a) how the condition is expressed; or
 - (b) how a particular number or percentage was, or is to be, determined; or
 - (c) whether or not a particular number or percentage is specified in the condition and, if it is so specified, how it is expressed.
- (3) For the purposes of subsection (1), an offer under an off-market bid terminates if:
 - (a) the offer lapses, is withdrawn or otherwise ceases to have effect; or
 - (b) a binding takeover contract will not result from an acceptance of the offer; or
 - (c) an obligation of the bidder will not arise under the takeover contract; or
 - (d) the takeover contract is rescinded; or
 - (e) the bidder is entitled to rescind the takeover contract; or
 - (f) the bidder is relieved of an obligation arising under the takeover contract.

627 Discriminatory conditions not allowed for off-market bids

Offers under an off-market bid must not be subject to a condition that allows the bidder to acquire, or may result in the bidder acquiring, securities from some but not all of the people who accept the offers. It does not matter how the condition is expressed.

628 Conditions requiring payments to officers of target not allowed in off-market bids

An offer to a person under an off-market bid must not be made subject to a condition that requires the person to approve or consent to a payment or other benefit to an officer or employee of the target or a related body corporate:

- (a) as compensation for loss of; or
- (b) as consideration in connection with retirement from; any office or employment in connection with the management of the target or of a related body corporate. A purported requirement of this kind is void.

629 Conditions turning on bidder's or associate's opinion not allowed in off-market bids

- (1) Offers under an off-market bid must not be subject to a defeating condition if the fulfilment of the condition depends on:
 - (a) the bidder's, or an associate's, opinion, belief or other state of mind; or
 - (b) the happening of an event that is within the sole control of, or is a direct result of action by, any of the following:
 - (i) the bidder (acting alone or together with an associate or associates);
 - (ii) an associate (acting alone or together with the bidder or another associate or associates of the bidder).

A purported condition of this kind is void.

Note: Section 9 defines *defeating condition*. Sections 630, 650F and 650G deal with defeating conditions.

- (2) For the purposes of paragraph (1)(b):
 - (a) the target; and
 - (b) a subsidiary of the target;are taken not to be associates of the bidder if they would otherwise be an associate merely because of paragraph 12(2)(a).

630 Defeating conditions

Off-market bid may include defeating conditions

- (1) Offers under an off-market bid may be made subject to a defeating condition only if the offers specify a date (not more than 14 days and not less than 7 days before the end of the offer period) for giving a notice on the status of the condition.
- (2) If the offer period is extended by a period:
 - (a) the date for giving the notice is taken to be postponed for the same period; and
 - (b) as soon as practicable after the extension, the bidder must give a notice that states:
 - (i) the new date for giving the notice of the status of the condition; and
 - (ii) whether the offers have been freed from the condition and whether, so far as the bidder knows, the condition has been fulfilled on the date the notice under this subsection is given.

conisante consulting

Bidder to give notice of status of defeating condition near end of offer period

- (3) On the date determined under subsection (1) or (2), the bidder must give a notice that states:
- (a) whether the offers are free of the condition; and
 - (b) whether, so far as the bidder knows, the condition was fulfilled on the date the notice is given; and
 - (c) the bidder's voting power in the target.

The bidder must comply with this subsection whether or not the bidder has given a notice under subsection (4) or 650F(1).

Note: The offers may be freed of the condition by a declaration by the bidder under subsection 650F(1).

~~Bidder to give notice if defeating condition fulfilled~~

~~(4) If the condition is fulfilled (so that the offers become free of the condition) during the bid period but before the date for publishing the notice on the status of the condition, the bidder must publish as soon as practicable a notice that states that the condition has been fulfilled.⁷¹~~

Bidder to give notice if defeating condition fulfilled

- (4) If the condition is fulfilled (so that the offers become free of the condition) during the bid period but before the date for giving the notice on the status of the condition, the bidder must give as soon as practicable a notice that states that the condition has been fulfilled.⁷²
- (5) A notice under this section is given by:
- (a) giving the notice to the target; and
 - (b) for quoted bid class securities—giving the notice to the relevant market operator; and
 - (c) for unquoted bid class securities—lodging the notice with ASIC.

⁷¹ [CO 13/521](#) modifying Chapter 6

⁷² [CO 13/521](#) modifying Chapter 6

conisante consulting

Strict liability offences

- (6) An offence based on subsection (2), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6.5—The takeover procedure

Division 1—The overall procedure

631 Proposing or announcing a bid

- (1) A person contravenes this subsection if:
- (a) either alone or with other persons, the person publicly proposes to make a takeover bid for securities in a company; and
 - (b) the person does not make offers for the securities under a takeover bid within 2 months after the proposal.

The terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

Note: The Court has power under section 1325B to order a person to proceed with a bid.

- (1A) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (1)(b) and to the requirement that the terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

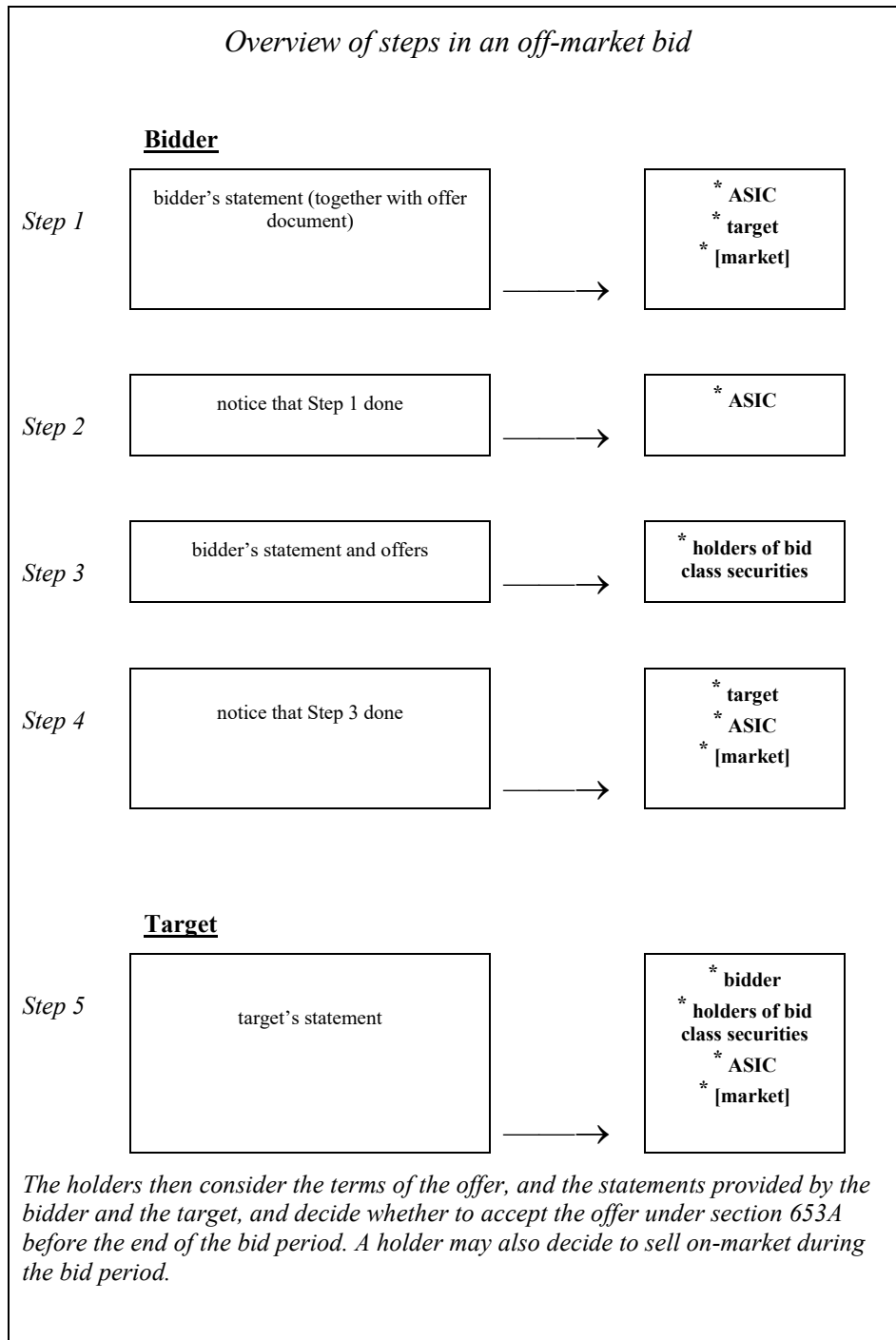
Proposals if takeover bid not intended

- (2) A person must not publicly propose, either alone or with other persons, to make a takeover bid if:
- (a) the person knows the proposed bid will not be made, or is reckless as to whether the proposed bid is made; or
 - (b) the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.
- (3) Section 1314 (continuing offences) and subsection 1324(2) (injunctions) do not apply in relation to a failure to make a takeover bid in accordance with a public proposal under subsection (1).

Note: For liability and defences for contraventions of this section, see sections 670E and 670F.

632 Overview of steps in an off-market bid

The following diagram gives an overview of the steps involved in an off-market bid.



633 Detailed steps in an off-market bid

- (1) The following table provides for the steps that a bidder must take to make an effective off-market bid and the steps that a target must take when an off-market bid is made.

Steps in off-market bid		[operative table]
	Steps	Timing and relevant provisions
1	<p>The bidder must prepare:</p> <ul style="list-style-type: none"> • a bidder's statement; and • if the bidder's statement does not set out all the terms of the offer—an offer document that sets out the other terms of the offer. 	See section 636 for content of statement.
2	The bidder must lodge a copy of the bidder's statement and offer document with ASIC.	
3	The bidder must send a copy of the bidder's statement and offer document to the target.	To be done on the day the bidder's statement is lodged or within 21 days afterwards
4	The bidder must lodge with ASIC a notice stating that the bidder's statement and offer document have been sent to the target.	To be done on the day the bidder's statement is sent to the target
5	The bidder must send a copy of the bidder's statement and offer document to the operator of each prescribed financial market on which the target's securities are quoted.	To be done on the day the bidder's statement is sent to the target See also subsection (5).
6	<p>The bidder must send the bidder's statement and offers to each person (other than the bidder) who holds:</p> <ul style="list-style-type: none"> • securities in the bid class; or • if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities; <p>as at the date set by the bidder under subsection (2).</p> <p>The offers must be made on the terms set out in the bidder's statement and</p>	<p>To be done:</p> <ul style="list-style-type: none"> • within a 3 day period; and • within 14–28 days after the bidder's statement is sent to the target <p>The directors of the target may agree that the offers and accompanying documents be sent earlier.</p> <p>See also subsections (5) and (6).</p> <p>Item 2 of the table in section 611 covers offers made by the bidder on market during the period between the lodgment of the bidder's statement and the making of the offers under the bid.</p>

Steps in off-market bid	[operative table]
Steps	Timing and relevant provisions
the offer document lodged with ASIC under item 2. ⁷³	Sections 648B and 648C provide for the manner in which documents may be sent to holders. ⁷⁵
6 The bidder must:	
(a) if the bidder is not eligible to rely on section 633A—send the bidder's statement and offers to each person (other than the bidder) who, as at the date set by the bidder under subsection (2), holds:	For subitem (a), to be done:
· securities in the bid class; or	· within a 3 day period; and
· if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities;	· within 14—28 days after the bidder's statement is sent to the target.
or:	The directors of the target may agree that the offers and accompanying documents be sent earlier.
(b) if the bidder is eligible to rely on section 633A—send the replacement bidder's statement and offers to each person (other than the bidder) who, as at the date set by the bidder under subsection (2), holds:	See also subsections (5) and (6). Item 2 of the table in section 611 covers offers made by the bidder on-market during the period between the lodgment of the bidder's statement and the making of offers under the bid.
· securities in the bid class; or	Sections 648B and 648C provide for the manner in which documents may be sent to holders.
· if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities.	For subitem (b), to be done:
In either case, the offers must be made on the terms set out in the	(a) within a 3 day period; and (b) within 14—28 days after the bidder becomes eligible to rely on section 633A unless one of the following subparagraphs apply in which case it may be done less than 14 days after the bidder becomes eligible to rely on that section:
	(i) the target agrees in writing, following approval of this agreement in any of the ways a target's statement must be approved under subsection 639(1);

⁷³ [CO 13/528](#) modifying Chapter 6

Steps in off-market bid		[operative table]
Steps	Timing and relevant provisions	
<u>original bidder's statement and the offer document lodged with ASIC under item 2.</u> ⁷⁴		(ii) ASIC agrees in writing; or (iii) <u>all changes to the bidder's statement reflect a change in the valuation of securities offered as bid consideration since the day that the bidder lodged the original bidder's statement.</u> ⁷⁶
7	The bidder must send a notice to the target that the bidder's statement and offers have been sent as required by item 6. The notice must state the date of the offers.	To be done on the day all offers have been sent as required by item 6 See subsection 620(1) on date of offer.
8	The bidder must send a notice that offers have been sent as required by item 6 to the operator of each prescribed financial market on which the target's securities are quoted.	To be done on the day all offers have been sent as required by item 6
9	The bidder must lodge with ASIC a notice that offers have been sent as required by item 6.	To be done on the day all offers have been sent as required by item 6
10	The target must prepare a target's statement.	See section 638 for content of statement.
11	The target must send the target's statement (and any accompanying report) to the bidder.	To be done no later than 15 days after the target receives a notice that all offers have been sent as required by item 6
12	The target must send a copy of the target's statement (and any accompanying report) to each person who holds: • securities in the bid class; or	To be done: • no earlier than the day on which the target sends the target's statement to the bidder; and

⁷⁵ [CO 13/528](#) modifying Chapter 6

⁷⁴ [CO 13/528](#) modifying Chapter 6

⁷⁶ [CO 13/528](#) modifying Chapter 6

Steps in off-market bid		[operative table]
Steps		Timing and relevant provisions
	<ul style="list-style-type: none"> if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities; <p>as at the date set by the bidder under subsection (2).</p>	<ul style="list-style-type: none"> no later than 15 days after the target receives a notice that all offers have been sent as required by item 6 <p>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</p>
13	The target must lodge a copy of the target's statement (and any accompanying report) with ASIC.	To be done on the day the target's statement is sent to the bidder See also subsection (7).
14	The target must send a copy of the target's statement (and any accompanying report) to the operator of each prescribed financial market on which the target's securities are quoted.	To be done on the day the target's statement is sent to the bidder See also subsection (7)

(1A) Despite any other provision of this Chapter, the copy of the bidder's statement and offer document that the bidder lodges with ASIC under item 2 of the table in subsection (1), sends to the target under item 3 of the table and sends to the operator of each relevant prescribed financial market under item 5 of the table may omit the following information:

- (a) the date of the proposed offer or any other date that is related to or dependent on that date; and
- (b) the name and address of the holders of securities referred to in item 6 of the table.

The bidder must include the information in the bidder's statement and offer document sent to the holders of securities under item 6 of the table in subsection (1).

(1B) Despite subsection 636(1), the copy of the bidder's statement and offer document that the bidder lodges with ASIC under item 2 of the table in subsection (1), sends to the target under item 3 of the table and sends to the operator of each relevant prescribed financial market under item 5 of the table may include the following information:

- (a) details of the bidder's relevant interest and voting power referred to in paragraphs 636(1)(k) and (l) as at the date of lodgment; or
- (b) details of the consideration and benefits referred to in paragraphs 636(1)(h) and (i) for the period of 4 months before the date of lodgment.

The bidder's statement and offer document sent to holders of securities under item 6 of the table in subsection (1) must be updated to include the information in paragraph (a) as at the date of the bid and the information in paragraph (b) for the period of 4 months before the date of the bid.

(1C) If the bidder's statement and offer document:

(a) omits information under subsection (1A); or

(b) includes information under subsection (1B),
the bidder must:

(c) send to the target and the operator of each relevant prescribed financial market at the time that the bidder sends its first bidder's statement and offer document to holders;
and

(d) attach to the notice lodged with ASIC under item 9 of the table in subsection (1);

a copy of the bidder's statement and offer document as sent to holders.⁷⁷

Date for determining holders of securities

(2) The people to whom information is to be sent under items 6 and 12 of the table in subsection (1) are the holders of the securities referred to in those items as at the date set by the bidder in:

(a) the bidder's statement; or

(b) a separate written notice given to the target on or before the date set by the bidder.

Note: The bidder may set the date when the bidder asks the target for a list of members under section 641.

(3) The date set by the bidder must be:

(a) on or after the date on which the bidder gives the bidder's statement, or the separate written notice, to the target; and

(b) on or before the date on which the first offers under the bid are made to holders of the securities.

(4) As soon as practicable after setting the day, the bidder must give notice of it by:

(a) if the securities in the bid class are quoted—giving the notice to the relevant market operator; or

(b) otherwise—lodging the notice with ASIC.

⁷⁷ [CO 13/521](#) modifying Chapter 6

conisante consulting

Information to be sent with bidder's statement

- (5) A bidder's statement required to be sent under item 5 or 6 in the table in subsection (1) must be sent together with any other information sent by the bidder to the target with the statement.

Information to be sent with notices that offers have been sent

- (6) If the bidder sends the people to whom the bidder's statement is sent under item 6 of the table in subsection (1) additional information together with the bidder's statement and the offer, the bidder must also include that information in any notice under item 7, 8 or 9 of the table.

Information to be sent with target's statement

- (7) If the target sends the people to whom the target's statement is sent under item 12 of the table in subsection (1) additional information together with the target's statement, the target must also include that information in any notice under item 13 or 14 of the table.

Strict liability offences

- (8) An offence based on this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

633A Off-market bid – Replacement bidder's statement: lodging supplementary statement before sending original statement

- (1) This section applies to an off-market bid in relation to which a bidder has lodged with ASIC a supplementary bidder's statement, and the lodgment of the supplementary statement occurs before the bidder's statement that it supplements has been sent to any holder of bid class securities.
- (2) For the purposes of subitem 6(b) of the table subsection 633(1), a bidder is eligible to rely on this section if the bidder, no later than the time allowed for sending the original bidder's statement to persons holding bid class securities under subitem 6(a) of the table in subsection 633(1):
- (a) lodges with ASIC; and
 - (b) sends to the target; and
 - (c) if the bid class securities are quoted and the target is listed—sends to the operator of each prescribed financial market on which the target's securities are quoted;
- a replacement bidder's statement and a copy of that replacement bidder's statement marked to show all changes from the original bidder's statement.

(3) In this section and subsection 633(1):

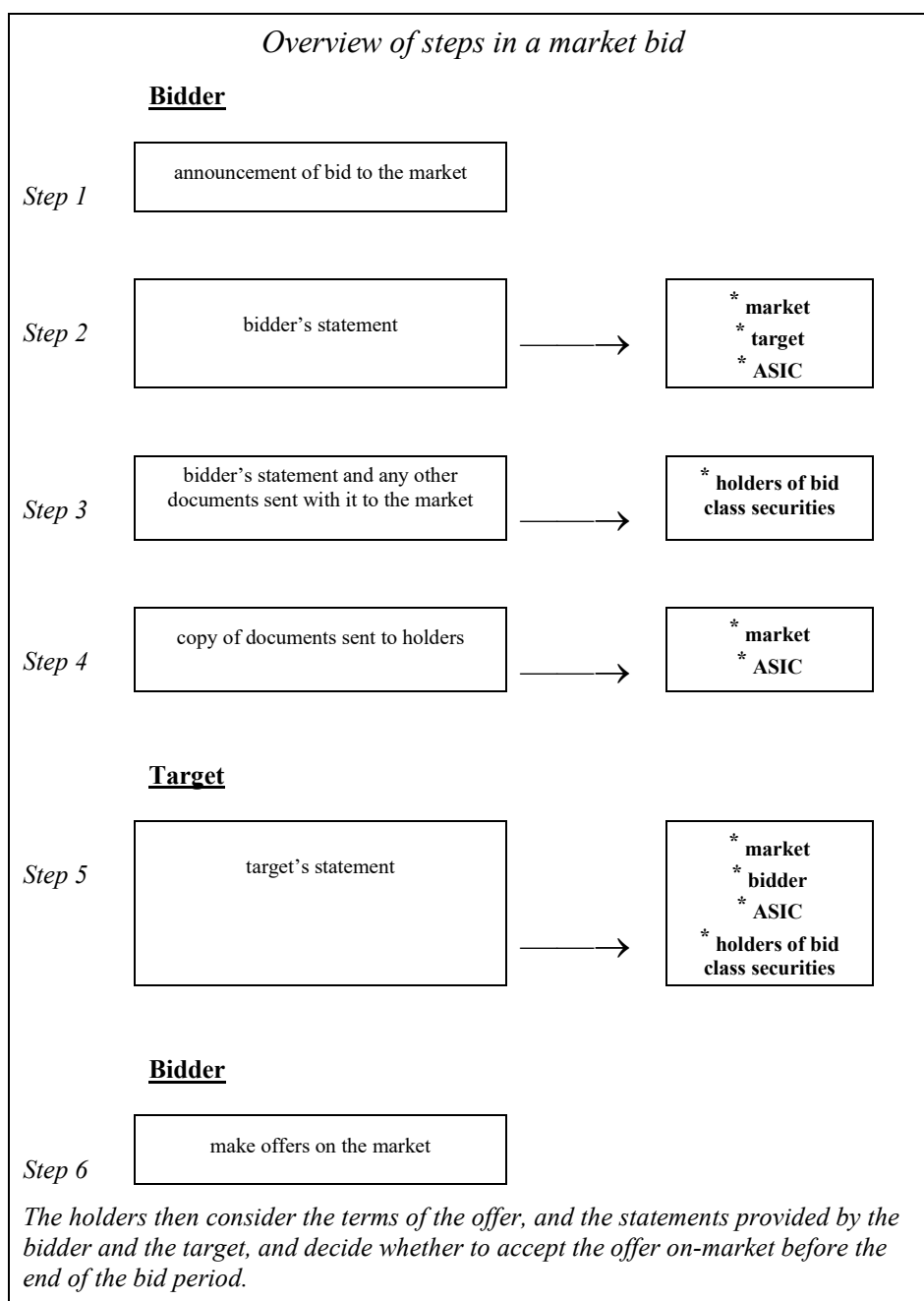
replacement bidder's statement means a bidder's statement that:

- (a) incorporates all the substantive information in an original bidder's statement and in each supplementary bidder's statement that was lodged in relation to the original bidder's statement before, or at the same time as, the time when the replacement bidder's statement is lodged with ASIC; and
- (b) explains that it replaces the original bidder's statement and each supplementary statement and states the date or dates that the original bidder's statement and each supplementary statement were lodged with ASIC; and
- (c) bears a date that is the same as the date that it is lodged with ASIC; and
- (d) sets out or reflects offers under the bid that are on the same terms as those set out in the original bidder's statement and offer document (if any) lodged with ASIC under item 2 of the table in subsection 633(1).⁷⁸

634 Overview of steps in a market bid

The following diagram gives an overview of the steps involved in a market bid.

⁷⁸ [CO 13/528](#) modifying Chapter 6



635 Detailed steps in a market bid

- (1) The following table provides for the steps that a bidder must take to make an effective market bid and the steps that a target must take when a market bid is made.

Steps in market bid	[operative]
Steps	Timing and relevant provisions

conisante consulting

Steps in market bid		[operative]
Steps		Timing and relevant provisions
1	The bidder must prepare a bidder's statement.	See section 636 for content of statement
2	The bidder must have the bid announced to the relevant financial market.	
3	The bidder must send a copy of the bidder's statement to the relevant market operator	To be done on the day the announcement is made
4	The bidder must send to the target: <ul style="list-style-type: none">• a copy of the bidder's statement; and• a copy of any other document that was sent with the bidder's statement to the relevant market operator.	To be done on the day the announcement is made
5	The bidder must lodge with ASIC: <ul style="list-style-type: none">• a copy of the bidder's statement; and• a copy of any other document that was sent with the bidder's statement to the relevant market operator.	To be done on the day the announcement is made

Steps in market bid	[operative]
Steps	Timing and relevant provisions
<p>6 The bidder must send to each holder of bid class securities (other than the bidder):</p> <ul style="list-style-type: none"> • a copy of the bidder's statement; and • a copy of any other document that was sent with the bidder's statement to the relevant market operator.⁷⁹ <p>6 The bidder must:</p> <p>(a) if the bidder is not eligible to rely on subsection 635A—send to each holder of bid class securities (other than the bidder):</p> <ul style="list-style-type: none"> · a copy of the bidder's statement; and · a copy of any other document that was sent with the bidder's statement to the relevant market operator; <p>or:</p> <p>(b) if the bidder is eligible to rely on section 635A—send to each holder of bid class securities (other than the bidder):</p> <ul style="list-style-type: none"> · a copy of the replacement bidder's statement; and · a copy of any other document that was sent with the replacement bidder's statement to the relevant market operator.⁸⁰ 	<p>Within 14 days after the announcement is made.</p> <p>Sections 648B and 648C provide for the manner in which documents may be sent to holders.⁸¹</p> <p><u>For subitem (a), within 14 days after the announcement is made.</u></p> <p><u>For subitem (b), within 14 days after the bidder is eligible to rely on section 635A.</u></p> <p><u>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</u>⁸²</p>

⁷⁹ [CO 13/528](#) modifying Chapter 6

⁸⁰ [CO 13/528](#) modifying Chapter 6

conisante consulting

Steps in market bid		[operative]
	Steps	Timing and relevant provisions
7	The bidder must lodge with ASIC a copy of every other document sent to holders of bid class securities with the bidder's statement.	To be done no later than the day copies of the bidder's statement have been sent to all holders of bid class securities
8	The bidder must give the relevant market operator a copy of every other document sent to holders of bid class securities with the bidder's statement.	To be done no later than the day copies of the bidder's statement have been sent to all holders of bid class securities
9	The target must prepare a target's statement.	See section 638 for content of statement
10	The target must send a copy of the target's statement to the relevant market operator.	Within 14 days after the announcement is made
11	<p>The target must send to the bidder:</p> <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant market operator. 	To be done on the day the target sends a copy of the target's statement to the relevant market operator
12	<p>The target must lodge with ASIC:</p> <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant market operator. 	To be done on the day the target sends a copy of the target's statement to the relevant market operator

⁸¹ [CO 13/528](#) modifying Chapter 6

⁸² [CO 13/528](#) modifying Chapter 6

Steps in market bid		[operative]
Steps		Timing and relevant provisions
13	<p>The target must send each holder of bid class securities:</p> <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant market operator. 	<p>Within 14 days after the announcement is made.</p> <p>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</p>
14	The bidder must make offers for the securities under the bid through the relevant financial market.	<p>To be done on the next day after the end of the 14 day period referred to in item 13.</p> <p>If the bidder does not make the offers at that time, the bidder contravenes this section.</p> <p>Item 2 of the table in section 611 covers offers made by the bidder on market during the 14 day period between the announcement and the making of the offers under the bid</p>

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

635A Market bid – Replacement bidder's statement: lodging supplementary statement before sending original statement

- (1) This section applies to a market bid in relation to which a bidder has lodged with ASIC a supplementary bidder's statement, and the lodgment of the supplementary statement occurs before the bidder's statement that it supplements has been sent to any holder of bid class securities.
- (2) For the purposes of subitem 6(b) of the table subsection 635(1), a bidder is eligible to rely on this section if the bidder, no later than the time allowed for sending the original bidder's statement to persons holding bid class securities under subitem 6(a) of the table in subsection 635(1):
- (a) lodges with ASIC; and
 - (b) sends to the target; and
 - (c) sends to the operator of each prescribed financial market on which the target's securities are quoted;
- a replacement bidder's statement and a copy of that replacement bidder's statement marked to show all changes from the original bidder's statement.

(3) In this section and in subsection 635(1):

replacement bidder's statement means a bidder's statement that:

- (a) incorporates all the substantive information in an original bidder's statement and in each supplementary bidder's statement that was lodged in relation to the original bidder's statement before, or at the same time as, the time when the replacement bidder's statement is lodged with ASIC; and
- (b) explains that it replaces the original bidder's statement and each supplementary statement and states the date or dates that the original bidder's statement and each supplementary statement were lodged with ASIC; and
- (c) bears a date that is the same as the date that it is lodged with ASIC; and
- (d) sets out or reflects offers under the bid that are on the same terms as those set out in the original bidder's statement and offer document (if any) lodged with ASIC under item 5 of the table in subsection 635(1).⁸³

⁸³ [CO 13/528](#) modifying Chapter 6

Division 2—The bidder's statement

636 Bidder's statement content

- (1) A bidder's statement must include the following:
 - (a) the identity of the bidder;
 - (b) the date of the statement;
 - (c) if the target is a company or body—details of the bidder's intentions regarding:
 - (i) the continuation of the business of the target; and
 - (ii) any major changes to be made to the business of the target, including any redeployment of the fixed assets of the target; and
 - (iii) the future employment of the present employees of the target;
 - (d) if the target is a registered scheme—details of the bidder's intentions regarding:
 - (i) the continued operation of the scheme; and
 - (ii) any major changes to be made to the operation of the scheme, including any redeployment of scheme property; and
 - (iii) any plans to remove the current responsible entity and appoint a new responsible entity;
 - (e) for an off-market bid—a statement that the bidder's statement has been lodged with ASIC but that ASIC takes no responsibility for the content of the statement;
 - (f) in relation to the cash consideration (if any) offered under the bid—details of:
 - (i) the cash amounts (if any) held by the bidder for payment of the consideration; and
 - (ii) the identity of any other person who is to provide, directly or indirectly, cash consideration from that person's own funds; and
 - (iii) any arrangements under which cash will be provided by a person referred to in subparagraph (ii);
 - ~~(g) if any securities (other than managed investment products) are offered as consideration under the bid and the bidder is:~~
 - ~~(i) the body that has issued or will issue the securities; or~~
 - ~~(ii) a person who controls that body;~~

all material that would be required for a prospectus for an offer of those securities by the bidder under whichever of the following is applicable:

 - ~~(iii) sections 710 to 713;~~
 - ~~(iv) sections 713C to 713E;~~

conisante consulting

- ~~(ga) if any managed investment products are offered as consideration under the bid and the bidder is:~~
- ~~(i) the responsible entity of the registered scheme; or~~
 - ~~(ii) a person who controls the responsible entity of the registered scheme;~~
- ~~all material that would be required by section 1013C to be included in a Product Disclosure Statement given to a person in an issue situation (within the meaning of section 1012B) in relation to those managed investment products;⁸⁴~~
- (g) if any securities (other than managed investment products) are offered as consideration under the bid and:
- (i) the bidder is the body that has issued or will issue the securities; or
 - (ii) the bidder is a person that controls that body; or
 - (iii) that body agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the securities;
- all material that would be required for a prospectus⁸⁵ for an offer of those securities by the bidder, or, if subparagraph (iii) applies, the body, under sections 710 to 713;
- (ga) if any managed investment products are offered as consideration under the bid and:
- (i) the bidder is the responsible entity of the managed investment scheme to which those managed investment products relate; or
 - (ii) the bidder is a person that controls the responsible entity of the managed investment scheme to which those managed investment products relate; or
 - (iii) the responsible entity agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the managed investment products;
- all material that would be required by section 1013C to be included in a Product Disclosure Statement⁸⁶ given to a

⁸⁴ [CO 13/521](#) modifying Chapter 6

⁸⁵ Note that [2016/72](#) modifying Chapter 6D inserts exceptions to the requirement for consent in s716 (similar to those in notional sections 636(3A)-(3D) and 638(3A)-(3D)) relating to: Statements by official persons, or in books, journals etc; Historical geological data; and Trading data

- person in an issue situation (within the meaning of section 1012B) in relation to those managed investment products;
- (gb) if any foreign passport fund products are offered as consideration under the bid and:
- (i) the bidder is the operator of the notified foreign passport fund to which those foreign passport fund products relate; or
 - (ii) the bidder is a person that controls the operator of the notified foreign passport fund to which those foreign passport fund products relate; or
 - (iii) the operator agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the foreign passport fund products;
- all material that would be required by sections 1013C and 1013GA to be included in a Product Disclosure Statement⁸⁷ given to a person in an issue situation (within the meaning of section 1012B) in relation to those foreign passport fund products.⁸⁸
- (h) if the bidder or an associate provided, or agreed to provide, consideration for a security in the bid class under a purchase or agreement during the 4 months before the date of the bid—the following information about the consideration:
- (i) to the extent to which the consideration is a cash sum—the amount per security of the cash sum;
 - (ii) to the extent to which the consideration is quoted securities—the market price per security of those securities;
 - (iii) to the extent to which the consideration is neither a cash sum nor a quoted security—the value per security of that consideration;

⁸⁶ Note that [2016/72](#) modifying Part 7.9 inserts exceptions to the requirement for consent in s1013K (similar to those in notional sections 636(3A)-(3D) and 638(3A)-(3D)) relating to: Statements by official persons, or in books, journals etc; Historical geological data; and Trading data

⁸⁷ Note that [2016/72](#) modifying Part 7.9 inserts exceptions to the requirement for consent in s1013K (similar to those in notional sections 636(3A)-(3D) and 638(3A)-(3D)) relating to: Statements by official persons, or in books, journals etc; Historical geological data; and Trading data

⁸⁸ [CO 13/521](#) modifying Chapter 6

- (i) if, during the period of 4 months before the date of the bid, the bidder or an associate gave, or offered to give or agreed to give a benefit to another person and the benefit was likely to induce the other person, or an associate, to:
 - (i) accept an offer under the bid; or
 - (ii) dispose of securities in the bid class;and the benefit is not offered to all holders of securities in the bid class under the bid—details of the benefit;
- ~~(j) if the bid is to extend to securities that come to be in the bid class during the offer period due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—a statement to that effect;⁸⁹~~
- (j) if the bid is to extend to securities that come to be in the bid class during the period from the date set by the bidder under subsection 633(2) to the end of the offer period due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—a statement to that effect;⁹⁰
- (k) for an off-market bid—the following details in relation to each class of securities in the target:
 - (i) the total number of securities in the class;
 - (ii) the number of securities in the class that the bidder had a relevant interest in immediately before the first offer is sent (expressed as a number of securities or as a percentage of the total number of securities in the class);
- (l) for an off-market bid—the bidder's voting power in the company;
- (m) any other information that:
 - (i) is material to the making of the decision by a holder of bid class securities whether to accept an offer under the bid; and
 - (ii) is known to the bidder; and
 - (iii) does not relate to the value of securities offered as consideration under the bid.

The information that the bidder must disclose under subparagraph (k)(i) and paragraph (l) must be only as up-to-date as it is reasonable to expect in the circumstances. The bidder does not

⁸⁹ [CO 13/521](#) modifying Chapter 6

⁹⁰ [CO 13/521](#) modifying Chapter 6

have to disclose information under paragraph (m) if it would be unreasonable to require the bidder to do so because the information had previously been disclosed to the holders of bid class securities.

Note: Paragraph (b)—See subsection 637(2) for the date of the statement.

Expert's report on non-cash consideration provided for bid class securities in last 4 months

- (2) If the bidder's statement includes details of the value per share of consideration under subparagraph (1)(h)(iii), the statement must include, or be accompanied by, a report by an expert that states whether, in the expert's opinion, the value stated is fair and reasonable and gives the reasons for forming that opinion.

Note: Subsections 648A(2) and (3) provide for the independence of the expert and disclosure of any association between the bidder and the expert or the target and the expert. A contravention of one of those subsections results in the bidder's statement not complying with this subsection.

Consent of person to whom statement attributed

- (3) The bidder's statement may only include, or be accompanied by, a statement by a person, or a statement said in the bidder's statement to be based on a statement by a person, if:
- (a) the person has consented to the statement being included in the bidder's statement, or accompanying it, in the form and context in which it is included; and
 - (b) the bidder's statement states that the person has given this consent; and
 - (c) the person has not withdrawn this consent before the bidder's statement is lodged with ASIC.

But the bidder's statement may include or be accompanied by a statement without the requirements in paragraphs (a) to (c) being met where:

- (d) the statement was made in a document lodged with:
 - (i) ASIC; or
 - (ii) the operator of a prescribed financial market by a listed company, managed investment scheme, notified foreign passport fund or other body in compliance with the listing rules of the prescribed financial market;
- (e) the bidder's statement:
 - (i) fairly represents the statement; or
 - (ii) includes, or is accompanied by, a correct and fair copy of the document or the part of the document that contains the statement; and

conisante consulting

- (f) if the bidder's statement is not accompanied by a copy of the document or part of the document that contains the statement—the bidder's statement:
 - (i) identifies the document or the part of the document that contains the statement; and
 - (ii) states that the bidder, on request during the bid period, will provide within 2 business days of the request, a copy of the document (or part) free of charge to any holder of bid class securities.⁹¹

*Statements by official persons, or in books, journals etc*⁹²

- (3A) Subsection (3) does not apply to a statement that:
 - (a) fairly represents what purports to be a statement made by an official person; or
 - (b) is a correct and fair copy of, or extract from, what purports to be a public official document; or
 - (c) is a correct and fair copy of, or extract from, a statement which has already been published in a book, journal or comparable publication;provided the statement was not made, or published, 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.

*Historical geological data*⁹³

- (3B) Subsection (3) does not apply to a historical geological report reference that is included in a bidder's statement or an accompanying document provided all of the following are satisfied:
 - (a) the historical geological report reference is included in a geological report (*the current report*) set out in the statement or document;
 - (b) the report (*the previous report*) to which the historical geological report reference relates is available for inspection or acquisition by any person, with or without payment of a fee, at or from:

⁹¹ [CO 13/521](#) modifying Chapter 6

⁹² [2016/72](#) modifying Chapter 6

⁹³ [2016/72](#) modifying Chapter 6

conisante consulting

- (i) a governmental department, authority or agency of an Australian State or Territory or of the Commonwealth; or
 - (ii) an operator of a prescribed financial market;.
- (c) the previous report was not prepared in connection with the takeover bid;
- (d) the previous report was not prepared or commissioned by a person:
 - (i) who is the bidder or an associate; or
 - (ii) with whom the bidder, or an associate, has shared an interest in a tenement the subject of the current report;
or
 - (iii) from whom the bidder, or an associate, has purchased the tenement; or
 - (iv) where securities are offered as consideration under the bid and the bidder, or an associate, is not the body that has issued or will issue the securities:
 - (A) with whom the issuer, or an associate, has shared an interest in a tenement that is covered by the current report; or
 - (B) from whom the issuer, or an associate, has purchased the tenement;
- (e) the current report states, close to the historical geological report reference:
 - (i) the name of the person who prepared the previous report; and
 - (ii) that the person who prepared the previous report has not consented to the use of the historical geological report reference in the bidder's statement or in the accompanying document (as applicable).

If the current report includes more than one historical geological report reference which relates to the previous report, paragraph (e) only has to be complied with in relation to the first occurring reference provided it is apparent that the subsequent references are from the same source.

Trading data⁹⁴

- (3C) Subsection (3) does not apply to a trading data reference that is included in a bidder's statement or an accompanying document provided both of the following are satisfied:
- (a) the trading data to which the trading data reference relates reflects trading on an approved financial market;
 - (b) the bidder's statement or the accompanying document states, close to the trading data reference:
 - (i) the name of the person who prepared the trading data; and
 - (ii) that the person who prepared the trading data has not consented to the use of the reference in the bidder's statement or the accompanying document (as applicable).

If the statement or document includes more than one trading data reference relating to trading data prepared by the same person, paragraph (b) only has to be complied with in relation to the first occurring reference provided it is apparent that the subsequent references are from the same source.

- (3D) In this section:

approved financial market means:

- (a) a prescribed financial market;
- (b) an approved foreign market (see section 9);
- (c) Chicago Board of Trade (also known as CBOT);
- (d) Commodities Exchange (also known as COMEX);
- (e) Euronext.liffe;
- (f) ICE Futures Canada;
- (g) ICE ENDEX;
- (h) ICE Futures Europe;
- (i) ICE Futures Singapore;
- (j) ICE Futures U.S.;
- (k) London Metal Exchange;
- (l) NASDAQ PHLX (also known as PHLX);
- (m) NASDAQ Futures (also known as NFX); and
- (n) New York Mercantile Exchange (also known as NYMEX).

⁹⁴ [2016/72](#) modifying Chapter 6

conisante consulting

Note: The definition of ***approved foreign market*** is notionally inserted by ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669.

geological report means a report dealing with the estimation, assessment or evaluation of minerals that has been prepared by a person who:

- (a) is a Member or Fellow of:
 - (i) the Australian Institute of Mining and Metallurgy; or
 - (ii) the Australian Institute of Geoscientists; and
- (b) has not less than five years' experience relevant to the estimation, assessment and evaluation of minerals of the kind that are the subject of the report.

historical geological report reference means a copy of, or extract from, or accurate representation of, a geological report.

trading data means quantitative data on the prices at which financial products are traded and the volume of that trading.

trading data reference means a copy of, or extract from, accurate representation or analysis of, trading data.⁹⁵

- (4) The bidder must keep the consent.

Strict liability offences

- (5) An offence based on subsection (3) or (4) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

637 Bidder's statement formalities

Approval

- (1) The copy of the bidder's statement that is lodged with ASIC must be approved by:
 - (a) for a bidder that is a body corporate (other than a notified foreign passport fund):
 - (i) if the consideration offered under the bid is a cash sum only—a resolution passed by the directors of the bidder; or

⁹⁵ [2016/72](#) modifying Chapter 6

conisante consulting

- (ii) otherwise—a unanimous resolution passed by all the directors of the bidder; or
 - (b) for a bidder who is an individual—the bidder.
- (2) The bidder's statement must be dated. The date is the date on which it is lodged with ASIC.

Strict liability offences

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 3—The target's response

638 Target's statement content

General requirement

- (1) A target's statement must include all the information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid.
- (1A) However, the statement must contain this information:
 - (a) only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the statement; and
 - (b) only if the information is known to any of the directors of the target.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

- (2) In deciding what information should be included under subsection (1), have regard to:
 - (a) the nature of the bid class securities; and
 - (b) if the bid class securities are interests in a managed investment scheme—the nature of the scheme; and
 - (c) the matters that the holders of bid class securities may reasonably be expected to know; and
 - (d) the fact that certain matters may reasonably be expected to be known to their professional advisers; and
 - (e) the time available to the target to prepare the statement.

Director's recommendations

- (3) A target's statement must contain a statement by each director of the target:
 - (a) recommending that offers under the bid be accepted or not accepted, and giving reasons for the recommendation; or
 - (b) giving reasons why a recommendation is not made.
- (4) The statement under subsection (3) must be made by:
 - (a) if the target is under administration—the liquidator or administrator; or
 - (b) if the target has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

conisante consulting

Consent of person to whom statement attributed

- (5) The target's statement may only include, or be accompanied by, a statement by a person, or a statement said in the target's statement to be based on a statement by a person, if:
- (a) the person has consented to the statement being included in the target's statement, or accompanying it, in the form and context in which it is included; and
 - (b) the target's statement states that the person has given this consent; and
 - (c) the person has not withdrawn this consent before the target's statement is lodged with ASIC.

But the target's statement may include or be accompanied by a statement without the requirements in paragraphs (a) to (c) being met where:

- (d) the statement was made in a document lodged with:
 - (i) ASIC; or
 - (ii) the operator of a prescribed financial market by a listed company, managed investment scheme or other body in compliance with the listing rules of the prescribed financial market;
- (e) the target's statement:
 - (i) fairly represents the statement; or
 - (ii) includes, or is accompanied by, a correct and fair copy of the document or the part of the document that contains the statement;
- (f) if the target's statement is not accompanied by a copy of the document or part of the document that contains the statement—the target's statement:
 - (i) identifies the document or the part of the document that contains the statement; and
 - (ii) states that the target, on request during the bid period, will provide within 2 business days of the request, a copy of the document (or part) free of charge to any holder of bid class securities.⁹⁶

Statements by official persons, or in books, journals etc⁹⁷

- (5A) Subsection (5) does not apply to a statement that:

⁹⁶ [CO 13/521](#) modifying Chapter 6

⁹⁷ [2016/72](#) modifying Chapter 6

conisante consulting

- (a) fairly represents what purports to be a statement made by an official person; or
 - (b) is a correct and fair copy of, or extract from, what purports to be a public official document; or
 - (c) is a correct and fair copy of, or extract from, a statement which has already been published in a book, journal or comparable publication;
- provided the statement was not made, or published, 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.

Historical geological data⁹⁸

- (5B) Subsection (5) does not apply to a historical geological report reference that is included in a target's statement or an accompanying document provided all of the following are satisfied:
- (a) the historical geological report reference is included in a geological report (***the current report***) set out in the statement or document;
 - (b) the report (***the previous report***) to which the historical geological report reference relates is available for inspection or acquisition by any person, with or without payment of a fee, at or from:
 - (i) a governmental department, authority or agency of an Australian State or Territory or of the Commonwealth; or
 - (ii) an operator of a prescribed financial market;
 - (c) the previous report was not prepared in connection with the preparation of the target's statement;
 - (d) the previous report was not prepared or commissioned by a person:
 - (i) who is the target or an associate; or
 - (ii) with whom the target, or an associate, has shared an interest in a tenement the subject of the current report;
 - or
 - (iii) from whom the target, or an associate, has purchased the tenement; or

⁹⁸ [2016/72](#) modifying Chapter 6

- (iv) where securities are offered as consideration under the bid and the bidder, or an associate, is not the body that has issued or will issue the securities:
 - (A) with whom the issuer, or an associate, has shared an interest in a tenement that is covered by the current report; or
 - (B) from whom the issuer, or an associate, has purchased the tenement;
- (e) the current report states, close to the historical geological report reference:
 - (i) the name of the person who prepared the previous report; and
 - (ii) that the person who prepared the previous report has not consented to the use of the historical geological report reference in the target's statement or in the accompanying document (as applicable).

If the current report includes more than one historical geological report reference which relates to the previous report, paragraph (e) only has to be complied with in relation to the first occurring reference provided it is apparent that the subsequent references are from the same source.

Trading data⁹⁹

- (5C) Subsection (5) does not apply to a trading data reference that is included in a target's statement or an accompanying document provided both of the following are satisfied:
 - (a) the trading data to which the trading data reference relates reflects trading on an approved financial market;
 - (b) the target's statement or the accompanying document states, close to the trading data reference:
 - (i) the name of the person who prepared the trading data; and
 - (ii) that the person who prepared the trading data has not consented to the use of the reference in the target's statement or the accompanying document (as applicable).

If the statement or document includes more than one trading data reference relating to trading data prepared by the same person, paragraph (b) only has to be complied with in relation to the first

⁹⁹ [2016/72](#) modifying Chapter 6

conisante consulting

occurring reference provided it is apparent that the subsequent references are from the same source.

(5D) In this section:

approved financial market, geological report, historical geological report reference, trading data and trading data reference have the same respective meanings as in subsection 636(3D).¹⁰⁰

(6) The target must keep the consent.

Strict liability offences

(7) An offence based on subsection (1), (3), (5) or (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

639 Target's statement formalities

Approval

- (1) The copy of the target's statement that is lodged with ASIC must be approved by:
- (a) if paragraphs (b) and (c) do not apply—a resolution passed by the directors of the target; or
 - (b) for a target that is under administration—the liquidator or administrator; or
 - (c) for a target that has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

Date

- (2) The target's statement must be dated. The date is the date on which it is lodged with ASIC.

Strict liability offences

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

¹⁰⁰ [2016/72](#) modifying Chapter 6

640 Expert's report to accompany target's statement if bidder connected with target

- (1) If:
- (a) the bidder's voting power in the target is 30% or more; or
 - (b) for a bidder who is, or includes, an individual—the bidder is a director of the target; or
 - (c) for a bidder who is, or includes, a body corporate—a director of the bidder is a director of the target;

a target's statement given in accordance with section 638 must include, or be accompanied by, a report by an expert that states whether, in the expert's opinion, the takeover offers are fair and reasonable and gives the reasons for forming that opinion.

Note: Subsections 648A(2) and (3) provide for the independence of the expert and disclosure of any association between the target and the expert or the bidder and the expert. A contravention of one of those subsections results in the target's statement not complying with this subsection.

- (2) In determining whether the bidder's voting power in the target is 30% or more, calculate the bidder's voting power at the time the bidder's statement is sent to the target.
- (3) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

641 Target must inform bidder about securities holdings

Requirement to inform bidder and information that must be given

- (1) If the bidder has given a bidder's statement to the target and requested the target to give the bidder information in accordance with this section, the target must inform the bidder of:
- (a) the name and address of each person who, at a time specified by the bidder under subsection (2), held securities:
 - (i) in the bid class; or
 - (ii) convertible into securities in the bid class; and
 - (b) the type, and number of each type, of those securities held by the person at the specified time.

- (1A) However, the target does not need to give information to the bidder about a person or their holding of securities unless the target knows the person's name.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

- (1B) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

conisante consulting

Time at which target's information must be correct

- (2) The bidder's request must specify a day as at which the information must be correct. The day must be one that occurs after the day on which the bidder makes the request unless the target agrees to it being the day on which the bidder makes the request.

Form in which target must provide information

- (3) The target must give the information to the bidder:
 - (a) in the form that the bidder requests; or
 - (b) if the target is unable to comply with the request—in writing.
- (4) If the target must give the information to the bidder in electronic form, the information must be readable but the information need not be formatted for the bidder's preferred operating system.

Fee for provision of information

- (5) The target may require the bidder to pay an amount, not exceeding the prescribed amount, for the provision of the information to the bidder.

Time by which target must provide information

- (6) The target must give the information to the bidder no later than the latest of the following times:
 - (a) the end of the second day after the day on which the bidder requested the information; or
 - (b) the end of the next day after the day as at which the information must be correct; or
 - (c) the time when the target receives the amount mentioned in subsection (5).

642 Expenses of directors of target companies

- (1) If the target is a company or body, the directors of the target have a right to recover from the target any expenses they reasonably incur in the interest of members of the target and in relation to the takeover bid. The directors have this right regardless of anything contained in the target's constitution (if any).
- (2) If the target is a managed investment scheme, the responsible entity for the scheme has a right to recover from scheme property any expenses it reasonably incurs in the interest of members of the scheme and in relation to the takeover bid. The responsible entity has this right regardless of anything contained in the scheme's constitution.

Division 4—Updating and correcting the bidder's statement and target's statement

643 Supplementary bidder's statement

- (1) If a bidder becomes aware of:
 - (a) a misleading or deceptive statement in the bidder's statement; or
 - (b) an omission from the bidder's statement of information required by section 636; or
 - (c) a new circumstance that:
 - (i) has arisen since the bidder's statement was lodged; and
 - (ii) would have been required by section 636 to be included in the bidder's statement if it had arisen before the bidder's statement was lodged;

that is material from the point of view of a holder of bid class securities, the bidder must prepare a supplementary bidder's statement that remedies this defect.

Note 1: The bidder must then send and lodge the supplementary bidder's statement in accordance with section 647.

Note 2: Section 670A makes it an offence to give a bidder's statement after the bidder has become aware of a misleading or deceptive statement, omission or new circumstance that is material from the point of view of a holder of securities to whom the statement is given (unless the deficiency is corrected).

Note 3: The power to issue a supplementary bidder's statement is not limited to the situations dealt with in this section.

Note 4: This section applies to a bidder's statement that has already been previously supplemented.

- (2) For an offence based on subsection (1), strict liability applies to the conduct, that the bidder must prepare a supplementary bidder's statement that remedies the defect.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

644 Supplementary target's statement

- (1) If a target becomes aware of:
 - (a) a misleading or deceptive statement in the target's statement; or
 - (b) an omission from the target's statement of information required by section 638; or
 - (c) a new circumstance that:
 - (i) has arisen since the target's statement was lodged; and

- (ii) would have been required by section 638 to be included in the target's statement if it had arisen before the target's statement was lodged;

that is material from the point of view of a holder of bid class securities, the target must prepare a supplementary target's statement that remedies this defect.

Note 1: The target must then send and lodge the supplementary target's statement in accordance with section 647.

Note 2: Section 670A makes it an offence to give a target's statement after the target has become aware of a misleading or deceptive statement, omission or new circumstance that is material from the point of view of a holder of securities to whom the statement is given (unless the deficiency is corrected).

Note 3: The power to issue a supplementary target's statement is not limited to the situations dealt with in this section.

Note 4: This section applies to a target's statement that has already been previously supplemented.

- (2) For an offence based on subsection (1), strict liability applies to the conduct, that the target must prepare a supplementary target's statement that remedies the defect.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

645 Form of supplementary statement

Identity as a supplementary statement

- (1) At the beginning of a supplementary bidder's or target's statement there must be:
 - (a) a statement that it is a supplementary statement; and
 - (b) an identification of the statement it supplements; and
 - (c) an identification of any previous supplementary statements lodged with ASIC in relation to the bid; and
 - (d) a statement that it is to be read together with the statement it supplements and any previous supplementary statements.

Approval of supplementary bidder's statement

- (2) The copy of the supplementary bidder's statement that is lodged with ASIC must be approved by:
 - (a) for a bidder that is a body corporate:
 - (i) if the consideration offered under the bid is a cash sum only—a resolution passed by the directors of the bidder; or
 - (ii) otherwise—a unanimous resolution passed by all the directors of the bidder; or
 - (b) for a bidder who is an individual—the bidder.

conisante consulting

Approval of supplementary target's statement

- (3) The copy of a supplementary target's statement that is lodged with ASIC must be approved by:
- (a) if paragraphs (b) and (c) do not apply—a resolution passed by the directors of the target; or
 - (b) for a target that is under administration—the liquidator or administrator; or
 - (c) for a target that has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

Date

- (4) A supplementary statement must be dated. The date is the date on which it is lodged with ASIC.

646 Consequences of lodging a supplementary statement

If a supplementary statement is lodged with ASIC, for the purposes of the application of ~~this Chapter and Chapter 6B~~ this Chapter, Chapter 6B and instruments made for the purposes of this Chapter¹⁰¹ to events that occur after the lodgment, the bidder's or target's statement is taken to be the original statement together with the supplementary statement.

647 To whom supplementary statement must be sent

- (1) A supplementary bidder's statement must be sent to the target as soon as practicable.
- (2) A supplementary target's statement must be sent to the bidder as soon as practicable.
- ~~(3) Either kind of supplementary statement must as soon as practicable be:~~
- ~~(a) lodged with ASIC; and~~
 - ~~(b) if the bid class securities are quoted and the target is listed—sent to the operator of each prescribed financial market on which the target's securities are quoted; and~~

¹⁰¹ [2015/1115](#) modifying Chapter 6

- (c) ~~if the bid is an off-market bid and the bid class securities are not quoted—sent to all holders of bid class securities who have not accepted an offer under the bid.~~¹⁰²
- (3) A bidder or target must do the following in relation to a supplementary statement:
- (a) for a supplementary bidder's statement—the bidder must as soon as practicable:
- (i) lodge the supplementary statement with ASIC; and
 - (ii) if the bid class securities are quoted and the target is listed—send the supplementary statement to the operator of each prescribed financial market on which the target's securities are quoted; and
 - (iii) if the bid is an off-market bid, the bid class securities are not quoted and the bidder has sent a bidder's statement under item 6 of the table in subsection 633(1) or item 6 of the table in subsection 635(1)—send the supplementary statement to all holders of bid class securities who have not accepted an offer under the bid.
- (b) for a supplementary target's statement—the target must as soon as practicable:
- (i) lodge the supplementary statement with ASIC; and
 - (ii) if the bid class securities are quoted and the target is listed—send the supplementary statement to the operator of each prescribed financial market on which the target's securities are quoted; and
 - (iii) if the bid is an off-market bid and the bid class securities are not quoted—send the supplementary statement to all holders of bid class securities who have not accepted an offer under the bid.¹⁰³

Note: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

- (4) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

¹⁰² [CO 13/528](#) modifying Chapter 6

¹⁰³ [CO 13/528](#) modifying Chapter 6

Division 5—General rules on takeover procedure

Subdivision A—Experts' reports

648A Experts' reports

- (1) If the bidder or target obtains 2 or more reports each of which could be used for the purposes of subparagraph 636(1)(h)(iii) or subsection 640(1), the bidder's or target's statement must be accompanied by a copy of each report.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) The expert must be someone other than an associate of the bidder or target.
- (3) The report must set out details of:
 - (a) any relationship between the expert and:
 - (i) the bidder or an associate of the bidder; or
 - (ii) the target or an associate of the target;including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
 - (b) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on; and
 - (c) any fee, payment or other benefit (whether direct or indirect) that the expert has received or will or may receive in connection with making the report.

Note: If the statement includes, or is accompanied by, the report, it must state that the expert has consented to this being done (see subsections 636(3) and 638(5)).

Subdivision B—Sending documents to holders of securities

648B Address at which bidder may send documents to holders of securities

The bidder may send a document to a holder of securities for the purposes of this Chapter at the address shown for the holder in the information given to the bidder by the target under section 641. This section does not limit the address to which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

648C Manner of sending documents to holders of securities

If a document must be sent to the holder of securities under this Chapter, the document must be sent:

- (a) if the document is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
- (b) if the document is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

Subdivision C—Effect of proportional takeover approval provisions

648D Constitution may contain proportional takeover approval provisions

- (1) Subject to this Subdivision, the constitution of a company may contain provisions to the effect that, if offers are made under a proportional takeover bid for securities of the company:
 - (a) the registration of a transfer giving effect to a takeover contract for the bid is prohibited unless and until a resolution (an **approving resolution**) to approve the bid is passed in accordance with the provisions; and
 - (b) a person (other than the bidder or an associate of the bidder) who, as at the end of the day on which the first offer under the bid was made, held bid class securities is entitled to vote on an approving resolution; and
 - (c) an approving resolution is to be voted on in whichever of the following ways is specified in the provisions:
 - (i) at a meeting, convened and conducted by the company, of the persons entitled to vote on the resolution;
 - (ii) by means of a postal ballot conducted by the company in accordance with a procedure set out in the provisions;or, if the provisions so provide, in whichever of those ways is determined by the directors of the company; and
 - (d) an approving resolution that has been voted on is taken to have been passed if the proportion that the number of votes in favour of the resolution bears to the total number of votes on the resolution is greater than the proportion specified in the provisions, and otherwise is taken to have been rejected.

The proportion specified under paragraph (d) must not exceed 50%.

Note: Section 9 defines **proportional takeover bid**. See paragraph 618(1)(b).

- (2) To be effective, an approving resolution in relation to a proportional takeover bid must be passed before the **approving**

conisante consulting

resolution deadline. The deadline is the 14th day before the last day of the bid period.

Note: In certain circumstances, an approving resolution will be taken to have been passed (see subsection 648E(3)).

- (3) Except to the extent to which a company's constitution provides otherwise:
- (a) the provisions that apply to a general meeting of the company apply, with such modifications as the circumstances require, to a meeting convened under the company's proportional takeover approval provisions; and
 - (b) those provisions apply as if the meeting convened under the proportional takeover provisions were a general meeting of the company.

The provisions referred to in paragraph (a) may be the provisions of a law, provisions of the company's constitution or any other provisions.

648E Resolution to be put if proportional bid made

- (1) If:
- (a) a company's constitution contains proportional takeover approval provisions; and
 - (b) offers are made under a proportional bid for a class of the company's securities;
- then:
- (c) the company's directors must ensure that a resolution to approve the bid is voted on in accordance with those provisions before the approving resolution deadline; and
 - (d) if the directors fail to ensure that a resolution of that kind is voted on before the deadline, each of the directors contravenes this subsection.

Note: Subsection 648D(2) sets the approving resolution deadline.

- (2) If a resolution to approve the bid is voted on in accordance with the proportional takeover approval provisions before the approving resolution deadline, the company must, on or before the deadline, give:
- (a) the bidder; and
 - (b) if the company is listed—each relevant financial market; a written notice stating that a resolution to approve the bid has been voted on and whether the resolution was passed or rejected.

- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

conisante consulting

- (3) If no resolution to approve the bid has been voted on in accordance with the proportional takeover approval provisions as at the end of the day before the approving resolution deadline, a resolution to approve the bid is taken, for the purposes of those provisions, to have been passed in accordance with those provisions.

648F Effect of rejection of approval resolution

If a resolution to approve the bid is voted on, in accordance with the proportional takeover approval provisions, before the approving resolution deadline and is rejected:

- (a) despite section 652A:
 - (i) all offers under the bid that have not been accepted as at the end of deadline; and
 - (ii) all offers under the bid that have been accepted, and from whose acceptance binding contracts have not resulted, as at the end of the deadline;are taken to be withdrawn at the end of the deadline; and
- (b) as soon as practicable after the deadline, the bidder must return to each person who has accepted an offer referred to in subparagraph (a)(ii) any documents that the person sent the bidder with the acceptance of the offer; and
- (c) the bidder:
 - (i) is entitled to rescind; and
 - (ii) must rescind as soon as practicable after the deadline;each binding takeover contract for the bid; and
- (d) a person who has accepted an offer made under the bid is entitled to rescind their takeover contract.

648G Including proportional takeover provisions in constitution

- (1) A company's proportional takeover approval provisions, unless sooner omitted from the constitution of the company, cease to apply at the end of:
 - (a) unless paragraph (b) or (c) applies—3 years;
 - (b) if the constitution provides that the provisions apply for a specified period of less than 3 years and the provisions have not been renewed—the specified period; or
 - (c) if the provisions have been renewed on at least one occasion and the resolution, or the most recent resolution, renewing the provisions states that the provisions are renewed for a specified period of less than 3 years—the specified period.
- (2) The period referred to in subsection (1) starts:
 - (a) if the provisions were contained in the company's constitution when it was incorporated or formed and have not been renewed—at that time; or

conisante consulting

- (b) if the provisions were inserted in the company's constitution and have not been renewed—when the provisions were inserted; or
 - (c) if the provisions have been renewed on at least one occasion—when the provisions were renewed, or last renewed.
 - (3) When the provisions cease to apply, the company's constitution is, by force of this subsection, altered by omitting the provisions.
 - (4) A company may renew its proportional takeover approval provisions. The provisions are to be renewed in the same manner as that in which the company could alter its constitution to insert proportional takeover approval provisions.
 - (5) With every notice that:
 - (a) specifies the intention to propose:
 - (i) a resolution to alter a company's constitution by inserting proportional takeover approval provisions; or
 - (ii) a resolution to renew a company's proportional takeover approval provisions; and
 - (b) is sent to a person who is entitled to vote on the proposed resolution;the company must send a statement that:
 - (c) explains the effect of the proposed provisions, or of the provisions proposed to be renewed; and
 - (d) explains the reasons for proposing the resolution and sets out the factual matters and principles underlying those reasons; and
 - (e) states whether, as at the day on which the statement is prepared, any of the directors of the company is aware of a proposal by a person to acquire, or to increase the extent of, a substantial interest in the company and, if so, explains the extent (if any) to which the proposal has influenced the decision to propose the resolution; and
 - (f) for a proposed resolution to renew proportional takeover approval provisions—reviews both the advantages, and disadvantages, of the provisions proposed to be renewed for:
 - (i) the directors; and
 - (ii) the company's members;during the period during which the provisions have been in effect; and
 - (g) discusses both the potential advantages, and the potential disadvantages, of the proposed provisions, or of the provisions proposed to be renewed, for:
 - (i) the directors; and
-

conisante consulting

- (ii) the company's members.
- (6) If, on a particular day, a company purports to:
 - (a) alter its constitution by inserting proportional takeover approval provisions; or
 - (b) renew its proportional takeover approval provisions;then:
 - (c) holders who together hold not less than 10% (by number) of the issued securities in a class of securities in the company to which the provisions apply may, within 21 days after that day, apply to the Court to have the purported alteration or renewal set aside to the extent to which it relates to that class; and
 - (d) unless and until an application made under paragraph (c) is finally determined by the making of an order setting aside the purported alteration or renewal to that extent, the company is taken for all purposes (other than the purposes of an application of that kind):
 - (i) to have validly altered its constitution by inserting the provisions referred to in paragraph (a) applying to that class; or
 - (ii) to have validly renewed the provisions referred to in paragraph (b) applying to that class.
- (7) An application under paragraph (6)(c) may be made, on behalf of the holders entitled to make the application, by a holder or holders appointed by them in writing.
- (8) On an application under paragraph (6)(c), the Court may make an order setting aside the purported alteration or renewal to the extent to which it applies to that class if it is satisfied that it is appropriate in all the circumstances to do so. Otherwise the Court must dismiss the application.
- (9) Within 14 days after the day on which the Court makes an order of the kind referred to in subsection (8) in relation to a company, the company must lodge a copy of the order with ASIC.
- (10) An offence based on subsection (5) or (9) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

648H Effect of Subdivision

This Subdivision applies notwithstanding anything contained in:

- (a) the operating rules of a financial market; or
- (b) the constitution of a company; or
- (c) any agreement.

Part 6.6—Variation of offers

Division 1—Market bids

649A General

A bidder may only vary the offers under a market bid in accordance with section 649B or 649C.

Note: ASIC may allow other variations under section 655A.

649B Market bids—raising bid price

The bidder may increase the current market bid price. They may not do so, however, during the last 5 trading days of the relevant financial market in the offer period.

649C Market bids—extending the offer period

- (1) The bidder may extend the offer period. The extension must be announced to the relevant financial market at least 5 trading days of the market before the end of the offer period. However, the announcement may be made up to the end of the offer period if during those 5 trading days:
 - (a) another person lodges with ASIC a bidder's statement for a takeover bid for securities in the bid class; or
 - (b) another person announces a takeover bid for securities in the bid class; or
 - (c) another person makes offers under a takeover bid for securities in the bid class; or
 - (d) the consideration for offers under another takeover bid for securities in the bid class is improved.

The offer period is extended by having the extension announced to the relevant financial market.

Note: Section 624 provides for an automatic extension of the bid period in certain circumstances.

- (2) On the day on which the announcement is made, the bidder must:
 - (a) give the target and the relevant market operator a notice setting out the terms of the announcement; and
 - (b) lodge a notice setting out the terms of the announcement with ASIC.

- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Division 2—Off-market bids (express variation by bidder)

650A General

- (1) A bidder may only vary the offers under an off-market bid in accordance with section 650B, 650C or 650D.
Note: ASIC may allow other variations under section 655A.
- (2) If the bidder varies the offer under an off-market bid in accordance with section 650B, 650C or 650D, the bidder must vary all unaccepted offers under the bid in the same way.

Note: Subsections 650B(2) and (3) deal with the effect of a variation on takeover contracts that have already resulted from acceptances of offers under the bid when the variation is made.

650B Off-market bids—consideration offered

Improving the consideration offered

- (1) The bidder may vary the offers made under the bid to improve the consideration offered:
 - (a) by increasing a cash sum offered; or
 - (b) by increasing the number of securities offered; or
 - (c) by increasing the rate of interest payable under debentures offered; or
 - (d) by increasing the amount or value of debentures offered; or
 - (e) by increasing the number of unissued securities that may be acquired under options offered; or
 - (f) by offering a cash sum in addition to securities; or
 - (g) if the securities being acquired include shares to which rights to accrued dividends are attached—by giving the holders the right to:
 - (i) retain the whole or a part of the dividend; or
 - (ii) be paid an amount equal to the amount of the dividend;

in addition to the consideration already offered; or

~~(h) offering an additional alternative form of consideration.~~¹⁰⁴

(h) offering an additional or alternative form of consideration.¹⁰⁵

¹⁰⁴ [CO 13/521](#) modifying Chapter 6

Note: If the bidder increases the consideration during the last 7 days of the offer period, subsection 624(2) extends the offer period by a further 14 days.

Effect of increase in consideration on offers already accepted

- (2) Improving the consideration has the effects set out in the following table on the rights of a person who has already accepted an offer when the variation is made.

Effect of improving consideration		[operative]
Improvement		Effect on person who has already accepted bid offer
1	improvement of the only form of consideration being offered	entitled to the improved consideration
2	2 or more forms of consideration offered and all forms improved by the same factor or percentage	entitled to the improvement in the form of consideration accepted
3	2 or more forms of consideration offered and improvement in the consideration is identical for all forms	entitled to the improvement in the form of consideration accepted
4	addition of a new form of consideration	entitled to make a fresh election as to the form of consideration to be taken
5	any other improvement	entitled to make a fresh election as to the form of consideration to be taken

(2A) The person is entitled to receive the improved consideration immediately, subject to the following paragraphs:

- (a) if the time for payment of the consideration in accordance with subsection 620(2) has not yet occurred, the person is not entitled to receive the improved consideration until that time;
- (b) if the person has to make an election before being entitled to the improved consideration, the person is not entitled to receive the improved consideration until the later of:
 - (i) the time when the election is made; and
 - (ii) the time applicable under paragraph (a).

Fresh election as to the form of consideration

- (3) If a person who has already accepted an offer has the right to make a fresh election as to the form of consideration to be taken, the

¹⁰⁵ [CO 13/521](#) modifying Chapter 6

conisante consulting

bidder must send the person as soon as practicable after the variation a written notice informing them about their right to make the election.

Note 1: Section 651B says how the election is to be exercised.

Note 2: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

Strict liability offences

- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

650C Off-market bids—extension of offer period

- (1) A bidder making an off-market bid may extend the offer period at any time before the end of the offer period.
- (2) If the bid is subject to a defeating condition, ~~the bidder may extend the offer period after the publication of the notice under subsection 630(3) only if one of the following happens after the publication:~~ the bidder may extend the offer period after the bidder has given the notice under subsection 630(3) only if one of the following happens after the bidder has given the notice:¹⁰⁶
- (a) another person lodges with ASIC a bidder's statement for a takeover bid for securities in the bid class;
 - (b) another person announces a takeover bid for securities in the bid class;
 - (c) another person makes offers under a takeover bid for securities in the bid class;
 - (d) the consideration for offers under another takeover bid for securities in the bid class is improved.

Note: Section 624 says how long the total offer period can be.

650D Off-market bids—method of making variation

Variation to be made by notice to the target and holders

- (1) To vary offers under an off-market bid, the bidder must:
- (a) prepare a notice that:
 - (i) sets out the terms of the proposed variation; and

¹⁰⁶ [CO 13/521](#) modifying Chapter 6

- (ii) if the bid is subject to a defeating condition and the proposed variation postpones for more than 1 month the time by which the bidder must satisfy their obligations under the bid—informs people about the right to withdraw acceptances under section 650E; and
- (b) lodge the notice with ASIC; and
- (c) after the notice is lodged, give the notice to:
 - (i) the target; and
 - ~~(ii) everyone to whom offers were made under the bid.~~¹⁰⁷
 - (ii) in respect of each class of securities the holders of which the bidder sent offers under item 6 of subsection 633(1) and for which the bidder has obtained a copy of a register including the name and address of each person who, at a time subsequent to the time specified by the bidder under subsection 633(2), held securities in the class—the following persons:
 - (A) each person (other than the bidder) on the most recent register obtained by the bidder to whom the bidder would have had to send the bidder's statement and offers under item 6 of subsection 633(1) if the date set by the bidder under subsection 633(2) had been the date at which holdings are recorded on that register; and
 - (B) any other person who has accepted the offer in respect of securities in the class; and
 - (iii) in respect of any other class of securities the holders of which the bidder sent offers under item 6 of subsection 633(1)—each person to whom offers were made under the bid because they held securities in that class.¹⁰⁸

Note: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

- (2) A person must be sent a copy of the notice under subparagraph (1)(c)(ii) even if they have already accepted the offer. However, they need not be sent a copy if:
 - (a) the variation merely extends the offer period; and

¹⁰⁷ [CO 13/521](#) modifying Chapter 6

¹⁰⁸ [CO 13/521](#) modifying Chapter 6

conisante consulting

- (b) the bid is not subject to a defeating condition at the time the notice is given to the target.
- (3) A notice under subsection (1) must be signed by:
 - (a) if the bidder is, or includes, an individual—the individual; and
 - (b) if the bidder is, or includes, a body corporate (other than a notified foreign passport fund) with 2 or more directors—not fewer than 2 of the directors who are authorised to sign the notice by a resolution passed at a directors' meeting; and
 - (c) if the bidder is, or includes, a body corporate (other than a notified foreign passport fund) that has only one director—that director.
- (3A) Notwithstanding subsection (3), a notice under subsection (1) need not be signed if the notice is approved by:
 - (a) for a bidder that is a body corporate:
 - (i) if the consideration offered under the bid is a cash sum only—a resolution passed by the directors of the bidder; or
 - (ii) otherwise—a unanimous resolution passed by all the directors of the bidder; or
 - (b) for a bidder who is an individual—the bidder.¹⁰⁹
- (4) A copy of a notice given to a person under subparagraph (1)(c)(ii) must include a statement that:
 - (a) a copy of the notice was lodged with ASIC on a specified date; and
 - (b) ASIC takes no responsibility for the contents of the notice.

650E Right to withdraw acceptance

- (1) A person who accepts an offer made under an off-market bid may withdraw their acceptance of the offer if:
 - (a) the bid is subject to a defeating condition; and
 - (b) the bidder varies the offers under the bid in a way that postpones for more than 1 month the time when the bidder has to meet their obligations under the bid; and
 - (c) the person is entitled to be given a notice of the variation under subsection 650D(1).

¹⁰⁹ [CO 13/521](#) modifying Chapter 6

conisante consulting

- (2) To withdraw their acceptance, the person must:
 - (a) give the bidder notice within 1 month beginning on the day after the day on which the copy of the notice of the variation was received; and
 - (b) return any consideration received by the person for accepting the offer.
- (3) A notice under paragraph (2)(a) must:
 - (a) comply with the conditions specified in regulations made for the purposes of this paragraph; or
 - (b) if no such regulations are made—be in writing.
- (4) To return consideration that includes securities, the person must:
 - (a) take any actions that are specified in regulations made for the purposes of this paragraph in relation to the return of those securities; or
 - (b) if no such regulations are made—give the bidder any transfer documents needed to effect the return of the securities.
- (5) If the person withdraws their acceptance, the bidder must:
 - (a) take any actions that are specified in regulations made for the purposes of this paragraph in relation to the withdrawal of acceptance; and
 - (b) return any documents that the person sent the bidder with the acceptance of the offer;
within 14 days after:
 - (c) if the person does the things referred to in subsection (2) on the same day—that day; or
 - (d) if the person does those things on different days—the last of those days.
- (6) If under this section a person returns to a company any certificates (together with any necessary transfer documents) in respect of the securities issued by the company, the company must cancel those securities as soon as possible. Any reduction in share capital is authorised by this subsection.
- (7) An offence based on subsection (5) or (6) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

650F Freeing off-market bids from defeating conditions

- (1) If the offers under an off-market bid are subject to a defeating condition, the bidder may free the offers, and the takeover contracts, from the condition only by giving the target a notice

conisante consulting

declaring the offers to be free from the condition in accordance with this section:

- ~~(a) if the condition is that the bidder may withdraw unaccepted offers if an event or circumstance referred to in subsection 652C(1) or (2) occurs in relation to the target not later than 3 business days after the end of the offer period; or¹¹⁰~~
 - (a) if the condition relates only to the happening of an event or circumstance referred to in subsection 652C(1) or (2)—not later than 3 business days after the end of the offer period; or¹¹¹
 - (b) in any other case—not less than 7 days before the end of the offer period.
- (2) The notice must:
 - (a) state that the offers are free from the condition; and
 - (b) specify the bidder's voting power in the company.
 - (3) The notice must be:
 - (a) if the securities in the bid class are quoted—given to the relevant market operator; and
 - (b) if those securities are not quoted—lodged with ASIC.
 - (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

650G Contracts and acceptances void if defeating condition not fulfilled

All takeover contracts, and all acceptances that have not resulted in binding takeover contracts, for an off-market bid are void if:

- (a) offers made under the bid have at any time been subject to a defeating condition; and
- ~~(b) the bidder has not declared the offers to be free from the condition within the period before the date applicable under subsection 630(1) or (2); and¹¹²~~

¹¹⁰ [CO 13/521](#) modifying Chapter 6

¹¹¹ [CO 13/521](#) modifying Chapter 6

¹¹² [CO 13/521](#) modifying Chapter 6

conisante consulting

- (b) the bidder has not declared the offers to be free from the condition within the period before the date applicable under subsection 650F(1); and¹¹³
- (c) the condition has not been fulfilled at the end of the offer period.

A transfer of securities based on an acceptance or contract that is void under this section must not be registered.

¹¹³ [CO 13/521](#) modifying Chapter 6

Division 3—Off-market bids (automatic variations)

651A Off-market bid—effect on bid consideration of purchases made outside bid

Effect of purchases outside bid on offers made under the bid

- (1) The offers made under an off-market bid, and the takeover contracts, are varied under this section if:
 - (a) the bidder purchases securities in the bid class outside the bid during the bid period; and
 - (b) the consideration for that purchase consists solely of a cash sum; and
 - (c) either:
 - (i) the consideration, or 1 of the forms of consideration, payable under the bid consists of a cash sum only and the consideration referred to in paragraph (b) is higher than the cash sum payable for the securities under the bid; or
 - (ii) a cash sum only is not the consideration, or 1 of the forms of consideration, payable under the bid.

Note 1: Section 9 defines *takeover contract*.

Note 2: The effect of section 623 is that the purchase outside the bid has to be made through an on-market transaction (see subsection 623(1) and paragraph 623(3)(b)).

Effect on unaccepted cash offers

- (2) If:
 - (a) one of the forms of consideration offered to a person under an off-market bid is a cash sum only; and
 - (b) the person has not accepted the offer before the purchase outside the bid occurs;the cash sum is taken to be increased to the highest outside purchase price before the offer is accepted.

Effect on cash offers already accepted

- (3) The consideration payable for each security covered by a takeover contract arising from the acceptance of an offer for a cash sum only is increased to the highest outside purchase price. If the person who accepted the offer has already received the whole or any part of the consideration under the contract, they are entitled to receive the increase in consideration immediately.

conisante consulting

Effect on non-cash offers accepted at any time during bid period

- (4) If:
- (a) a person accepts an offer under a bid at any time during the bid period; and
 - (b) the consideration paid or provided, or to be paid or provided, under the takeover contract arising from the acceptance of the offer does not consist of a cash sum only;
- then:
- (c) the person may elect to take as consideration for each security covered by the takeover contract a cash sum equal to the highest outside purchase price instead of the consideration they originally accepted; and
 - (d) the bidder must give the person a written notice of their right to make the election within 14 days after the end of the offer period.

Note: Section 651B says how the election is to be exercised.

- (5) An offence based on subsection (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

651B How to make an election for new forms of consideration

- (1) An election under section 650B or 651A to take a new form of consideration must be made:
- (a) by written notice to the bidder; and
 - (b) within 1 month after the person receives the notice from the bidder of their right to make the election.
- (2) The person becomes entitled to the new form of consideration if they:
- (a) make the election; and
 - (b) return to the bidder:
 - (i) any consideration they have already received; and
 - (ii) any necessary transfer documents.

651C Returning securities as part of election

- (1) If under section 651B a person returns to a company any certificates (together with any necessary transfer documents) in respect of the securities issued by a company, the company must cancel those securities as soon as possible.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6.7—Withdrawal and suspension of offers

652A Withdrawal of unaccepted offers under takeover bid

Unaccepted offers under a takeover bid may only be withdrawn under section 652B or 652C.

652B Withdrawal of takeover offers with ASIC consent

Unaccepted offers under a takeover bid may be withdrawn with the written consent of ASIC. ASIC may consent subject to conditions.

652C Withdrawal of market bids

Bidder entitled to withdraw if certain events happen during the offer period

- (1) The bidder may withdraw unaccepted offers made under a market bid if 1 of the following happens during the bid period, but only if the bidder's voting power in the target is at or below 50% when the event happens:
 - (a) the target converts all or any of its shares into a larger or smaller number of shares (see section 254H);
 - (b) the target or a subsidiary resolves to reduce its share capital in any way;
 - (c) the target or a subsidiary:
 - (i) enters into a buy-back agreement; or
 - (ii) resolves to approve the terms of a buy-back agreement under subsection 257C(1) or 257D(1);
 - (d) the target or a subsidiary issues shares, or grants an option over its shares, or agrees to make such an issue or grant such an option;
 - (e) the target or a subsidiary issues, or agrees to issue, convertible notes;
 - (f) the target or a subsidiary disposes, or agrees to dispose, of the whole, or a substantial part, of its business or property;
 - (g) the target or a subsidiary grants, or agrees to grant, a security interest in the whole, or a substantial part, of its business or property;
 - (h) the target or a subsidiary resolves to be wound up.
- (2) The bidder may also withdraw unaccepted offers made under a market bid if 1 of the following happens during the bid period:

conisante consulting

- (a) a liquidator or provisional liquidator of the target or of a subsidiary is appointed;
- (b) a court makes an order for the winding up of the target or of a subsidiary;
- (c) an administrator of the target, or of a subsidiary, is appointed under section 436A, 436B or 436C;
- (d) the target or a subsidiary executes a deed of company arrangement;
- (e) a receiver, or a receiver and manager, is appointed in relation to the whole, or a substantial part, of the property of the target or of a subsidiary.

This is so regardless of the bidder's voting power at the time.

- (3) Notice of the withdrawal must be given to each relevant market operator.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6.8—Acceptances

653A Acceptance of offers made under off-market bid

If:

- (a) an offer is made under an off-market bid for quoted securities; and
- (b) regulations made for the purposes of this paragraph set out any requirements for the manner in which the acceptance of the offer, so far as it relates to those securities, must be complied with;

an acceptance of the offer for those securities is effective only if it is made in that way.

653AA Acceptances received by the bidder for securities registered in a clearing and settlement facility¹¹⁴

If, under an off-market bid for quoted securities, a bidder receives a written instruction or authority, or both, that:

- (a) is from a holder of securities registered in a clearing and settlement facility or a person with a right to be registered as a holder of such securities; and
- (b) is provided for the purpose, and has the effect, of enabling the bidder to effect acceptance of the offer by instructing another person, in accordance with the operating rules of a clearing and settlement facility, to accept, in accordance with section 653A, an offer made under the bid on behalf of the holder or person mentioned in paragraph (a);

the offer is taken, for the purposes of this Chapter apart from section 653A, to have been accepted in relation to the securities covered by the instruction or authority when it is received by the bidder.

653B Acceptances by transferees and nominees of offers made under off-market bid

- (1) If an off-market bid is made for securities:
 - (a) a person who:

¹¹⁴ [CO 13/521](#) modifying Chapter 6

conisante consulting

- (i) is able during the offer period to give good title to a parcel of those securities; and
 - (ii) has not already accepted an offer under the bid for those securities;
- may accept as if an offer on terms identical with the other offers made under the bid had been made to that person in relation to those securities; and
- (b) a person who holds 1 or more parcels of those securities as trustee or nominee for, or otherwise on account of, another person may accept as if a separate offer had been made in relation to:
 - (i) each of those parcels; and
 - (ii) any parcel they hold in their own right.

If a person accepts an offer under a proportional takeover bid for securities, no-one else may accept an offer under the bid in respect of those securities.

Note: Section 9 defines *proportional takeover bid*. See paragraph 618(1)(b).

- (2) For the purposes of this section:
 - (a) a person is taken to hold securities if the person is, or is entitled to be registered as, the holder of the securities; and
 - (b) a person is taken to hold the securities on trust for, as nominee for or on account of another person if they:
 - (i) are entitled to be registered as the holder of particular securities; and
 - (ii) hold their interest in the securities on trust for, as nominee for or on account of that other person; and
 - (c) in determining under subsection (1) whether a person has accepted an offer for particular securities under a takeover bid, a person who accepts an offer under a proportional takeover bid is taken to have accepted the offer for all the securities in the bid class that they hold at the time they accept the offer.
 - (3) If under paragraph (1)(b) a person may accept as if a separate offer is taken to be made to a person for a parcel of securities within a holding, an acceptance of that offer is ineffective unless:
 - (a) the person gives the bidder a notice stating that the securities consist of a separate parcel; and
 - (b) the acceptance specifies the number of securities in the parcel.
 - (4) A notice under subsection (3) must:
 - (a) comply with the conditions specified in regulations made for the purposes of this paragraph that provide for the manner of giving the notice; or
 - (b) if no such regulations are made—be in writing.
-

conisante consulting

- (5) A person contravenes this subsection if:
 - (a) they purport to accept an offer under this section; and
 - (b) the acceptance is not made in accordance with this section.The acceptance is, however, as valid as it would have been if it had been made in accordance with this section.
- (6) A person may, at the one time, accept for 2 or more parcels under this section as if there had been a single offer for a separate parcel consisting of those parcels.

Part 6.9—Other activities during the bid period

654A Bidder not to dispose of securities during the bid period

- (1) The bidder must not dispose of any securities in the bid class during the bid period.
- (1A) An offence based on subsection (1) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2) Subsection (1) does not apply to a disposal of securities by the bidder if:
 - (a) someone else who is not an associate of the bidder makes an offer, or improves the consideration offered, under a takeover bid for securities in the bid class after the bidder's statement is given to the target; and
 - (b) the bidder disposes of the securities after the offer is made or the consideration is improved.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2), see subsection 13.3(3) of the *Criminal Code*.

654B Disclosures about substantial shareholdings in listed companies

During the bid period, substantial shareholding notices that need to be lodged under section 671B must be lodged by 9.30 am the next business day (rather than the usual 2 business days).

654C Disclosures about substantial shareholdings in unlisted companies

- (1) A bidder making a bid for securities of an unlisted company must give the target a notice stating the bidder's voting power in the target if, at a particular time during the bid period, the bidder's voting power in the target rises from below a percentage in the following list to that percentage or higher:
 - (a) 25%;
 - (b) 50%;
 - (c) 75%;
 - (d) 90%.
- (2) The notice must be given as soon as practicable, and in any event within 2 business days, after the rise in voting power occurred.
- (3) The target must:

conisante consulting

- (a) make the notice available at its registered office for inspection without charge by any holder of bid class securities during the bid period; and
 - (b) lodge the notice with ASIC.
- (4) An offence based on subsection (1) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Part 6.10—Review and intervention

Division 1—ASIC's power to exempt and modify

655A ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Note: Under section 656A, the Panel has power to review the exercise by ASIC of its powers under this section.
- (2) In deciding whether to give the exemption or declaration, ASIC must consider the purposes of this Chapter set out in section 602.
- (3) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

655B Notice of decision and review rights

- (1) Subject to subsection (2), ASIC must take such steps as are reasonable in the circumstances to give to each person whose interests are affected by a decision under section 655A a notice, in writing or otherwise:
 - (a) of the making of the decision; and
 - (b) of the person's right to have the decision reviewed by the Panel under section 656A.
- (2) Subsection (1) does not require ASIC to give notice to a person affected by the decision or to the persons in a class of persons affected by the decision, if ASIC determines that giving notice to the person or persons is not warranted, having regard to:
 - (a) the cost of giving notice to the person or persons; and
 - (b) the way in which the interests of the person or persons are affected by the decision.
- (3) A failure to comply with this section does not affect the validity of the decision.

Division 2—The Takeovers Panel

Subdivision A—Review of ASIC’s exercise of its exemption or modification powers

656A Review of exercise of exemption or modification powers

- (1) The Panel may review:
 - (a) a decision of ASIC under section 655A; or
 - (b) a decision of ASIC under section 673 in relation to securities of the target of a takeover bid during the bid period.

For these purposes, *decision* has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.
- (2) An application to the Panel for review of the decision may be made by any person whose interests are affected by the decision.
- (3) For the purpose of reviewing the decision, the Panel may exercise all the powers and discretions conferred on ASIC by this Chapter or Chapter 6C. The Panel must make a decision:
 - (a) affirming the decision; or
 - (b) varying the decision; or
 - (c) setting aside the decision and:
 - (i) making a decision in substitution for the decision under review; or
 - (ii) remitting the matter for reconsideration by ASIC in accordance with any directions or recommendations of the Panel.
- (4) The decision must be in writing and published in the *Gazette*.
- (5) If the Panel varies an ASIC decision, or makes a decision in substitution for an ASIC decision:
 - (a) the ASIC decision as varied, or the substituted decision, is taken for all purposes (other than the purposes of applications to the Panel for review in accordance with this section) to be a decision of ASIC under section 655A; and
 - (b) when the Panel’s determination on the review comes into operation, the ASIC decision as varied, or the substituted decision, has effect, or is taken to have had effect, on and from the day on which the ASIC decision has or had effect.

Paragraph (b) applies unless the Panel otherwise orders.

656B Operation and implementation of a decision that is subject to review

- (1) Subject to this section, applying to the Panel under section 656A for review of an ASIC decision does not:
 - (a) affect the operation of the decision; or
 - (b) prevent the taking of action to implement the decision.
- (2) On application by a party to the proceedings before the Panel, the Panel may:
 - (a) make an order staying, or otherwise affecting the operation or implementation of, the whole or a part of the decision if the Panel considers that:
 - (i) it is desirable to make the order after taking into account the interests of any person who may be affected by the review; and
 - (ii) the order is appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review; or
 - (b) make an order varying or revoking an order made under paragraph (a) (including an order that has previously been varied on one or more occasions under this paragraph).
- (3) Subject to subsection (4), the Panel must not:
 - (a) make an order under paragraph (2)(a) unless ASIC has been given a reasonable opportunity to make a submission to the Panel in relation to the matter; or
 - (b) make an order under paragraph (2)(b) unless:
 - (i) ASIC; and
 - (ii) the person who requested the making of the order under paragraph (2)(a); and
 - (iii) if the order under paragraph (2)(a) has previously been varied by an order or orders under paragraph (2)(b)—the person or persons who applied for the last-mentioned order or orders;have been given a reasonable opportunity to make submissions to the Panel in relation to the matter.
- (4) Subsection (3) does not prohibit the Panel from making an order without giving to a person referred to in that subsection a reasonable opportunity to make a submission to the Panel in relation to a matter if the Panel is satisfied that, by reason of the urgency of the case or otherwise, it is not practicable to give that person such an opportunity. If an order is so made without giving such an opportunity to ASIC, the order does not come into operation until a notice setting out the terms of the order is served on ASIC.

conisante consulting

- (5) An order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)):
 - (a) is subject to the conditions that are specified in the order; and
 - (b) has effect until:
 - (i) if a period for the operation of the order is specified in the order—the end of that period or, if the application for review is decided by the Panel before the end of that period, the decision of the Panel on the application for review comes into operation; or
 - (ii) if a period for the operation of the order is not specified in the order—the decision of the Panel on the application for review comes into operation.

Subdivision B—Unacceptable circumstances

657A Declaration of unacceptable circumstances

- (1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.

Note: Sections 659B and 659C deal with court proceedings during and after a takeover bid.

- (2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:
 - (a) are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of the company or another company; or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or
 - (b) are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602; or
 - (c) are unacceptable because they:
 - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or

conisante consulting

- (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

- (3) In exercising its powers under this section, the Panel:
 - (a) must have regard to:
 - (i) the purposes of this Chapter set out in section 602; and
 - (ii) the other provisions of this Chapter; and
 - (iii) the rules made under section 658C; and
 - (iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the ASIC Act; and
 - (b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).
- (4) The Panel must give an opportunity to make submissions in relation to the matter to:
 - (a) each person to whom a proposed declaration relates; and
 - (b) each party to the proceedings; and
 - (c) ASIC.
- (5) The declaration must be in writing and published in the *Gazette*.
- (6) As soon as practicable, the Panel must give each person to whom the declaration relates:
 - (a) a copy of the declaration; and
 - (b) a written statement of the Panel's reasons for making the declaration.
- (7) This section does not require the Panel to perform a function, or exercise a power, in a particular way in a particular case.

657B When Panel may make declaration

The Panel can only make a declaration under section 657A within:

- (a) 3 months after the circumstances occur; or

conisante consulting

- (b) 1 month after the application under section 657C for the declaration was made;
- whichever ends last. The Court may extend the period on application by the Panel.

657C Applying for declarations and orders

- (1) The Panel may make a declaration under section 657A, or an order under section 657D or 657E, only on an application made under this section.
- (2) An application for a declaration under section 657A or an order under section 657D or 657E may be made by:
 - (a) the bidder; or
 - (b) the target; or
 - (c) ASIC; or
 - (d) any other person whose interests are affected by the relevant circumstances.

Note: The Administrative Appeals Tribunal cannot review ASIC's decision whether to apply to the Panel (see paragraph 1317C(gc)).

- (3) An application for a declaration under section 657A can be made only within:
 - (a) 2 months after the circumstances have occurred; or
 - (b) a longer period determined by the Panel.

657D Orders that Panel may make following declaration

- (1) The Panel may make an order under subsection (2) if it has declared circumstances to be unacceptable under section 657A. It must not make an order if it is satisfied that the order would unfairly prejudice any person. Before making the order, the Panel must give:
 - (a) each person to whom the proposed order would be directed; and
 - (b) each party to the proceedings; and
 - (c) ASIC;an opportunity to make submissions to the Panel about the matter
- (2) The Panel may make any order (including a remedial order but not including an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) that it thinks appropriate to:
 - (a) if the Panel is satisfied that the rights or interests of any person, or group of persons, have been or are being affected, or will be or are likely to be affected, by the circumstances—protect those rights or interests, or any other rights or interests, of that person or group of persons; or

conisante consulting

- (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred; or
 - (c) specify in greater detail the requirements of an order made under this subsection; or
 - (d) determine who is to bear the costs of the parties to the proceedings before the Panel;
- regardless of whether it has previously made an order under this subsection or section 657E in relation to the declaration. The Panel may also make any ancillary or consequential orders that it thinks appropriate.

Note: Section 9 defines *remedial order*.

- (3) The Panel may vary, revoke or suspend an order made under this section. Before doing so, it must give an opportunity to make submissions in relation to the matter to:
 - (a) each person to whom the order is directed; and
 - (b) each party to the proceedings in which the order was made; and
 - (c) ASIC.
- (4) If the Panel makes an order under this section, the Panel must give a copy of the order, and a written statement of its reasons for making the order, to:
 - (a) each party to the proceedings before the Panel; and
 - (b) each person to whom the order is directed if they are not a party to the proceedings; and
 - (c) for an order relating to specified securities of a company—the company; and
 - (d) ASIC.

The Panel must also publish the order in the *Gazette*. The order takes effect as soon as it is made and not when all the requirements of this subsection are met.
- (5) If the Panel makes an order of the kind referred to in paragraph (j) of the definition of *remedial order*, the exercise of rights attached to shares is to be disregarded as provided in the order.
- (6) If the Panel makes an order of the kind referred to in paragraph (k) of the definition of *remedial order*, then, by force of this subsection, the agreement or offer specified in the order is cancelled, or becomes voidable, as from the making of the order or any later time that is specified in the order.

657E Interim orders

- (1) The Panel, or the President of the Panel, may make an interim order of a kind referred to in subsection 657D(2) in relation to circumstances even if:
 - (a) there is no declaration under section 657A that the circumstances are unacceptable; or
 - (b) no application to the Panel for a declaration of that kind has been made.The order must specify the period (not exceeding 2 months) for which it is to have effect.
- (2) The order ceases to have effect:
 - (a) at the end of the period specified in the order; or
 - (b) if, before the end of that period, proceedings for a declaration under section 657A in relation to the circumstances (and all related proceedings for an order under section 657D) are determined—when those proceedings are determined.

657EA Internal Panel reviews

- (1) The following may apply under this section for review by the Panel of a decision of the Panel made on an application under section 657C:
 - (a) a party to the proceedings in which the decision was made; or
 - (b) ASIC.For these purposes, **decision** has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.
 - (2) If the decision is not:
 - (a) a decision to make a declaration under section 657A; or
 - (b) a decision to make an order under section 657D or 657E;the person may apply for review only with the consent of the President of the Panel.
 - (3) The regulations may provide for the time limits within which an application may be made for review of a decision.

Note: Regulations made under the ASIC Act deal with the constitution of the Panel for the purposes of conducting a review under this section and the procedures to be followed in conducting the review.
 - (4) After conducting a review under this section, the Panel may:
 - (a) vary the decision reviewed; or
 - (b) set aside the decision reviewed; or
 - (c) set aside the decision reviewed and substitute a new decision.
-

conisante consulting

In conducting the review, the Panel has the same power to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C.

- (5) Despite section 657B, the Panel can only make a declaration under section 657A after conducting a review under this section if the declaration is made within:
 - (a) 3 months after the circumstances in relation to which the declaration is made occur; or
 - (b) 1 month after the application for review was made; whichever ends last. The Court may extend the period on application by the Panel.

657EB References by Courts

- (1) A Court hearing proceedings in relation to a decision of the Panel made on an application under section 657C may refer the decision to the Panel for review.

Note: Regulations made under the ASIC Act deal with the constitution of the Panel for the purposes of conducting a review under this section and the procedures to be followed in conducting the review.

- (2) After conducting a review under this section, the Panel may:
 - (a) vary the decision reviewed; or
 - (b) set aside the decision reviewed; or
 - (c) set aside the decision reviewed and substitute a new decision.

In conducting the review, the Panel has the same powers to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C.

657F Offence to contravene Panel order

- (1) A person who contravenes an order made under section 657D or 657E commits an offence.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

657G Orders by the Court where contravention or proposed contravention of Panel order

- (1) If a person contravenes, or proposes to engage in conduct that would contravene, an order made by the Panel under section 657D or 657E, the Court may make any orders it considers appropriate to secure compliance with the Panel's order, including:

conisante consulting

- (a) 1 or more remedial orders; and
- (b) an order directing a person to do, or to refrain from doing, a specified act.

Note: Section 9 defines *remedial order*.

- (2) An application for an order under this section may only be made by:
 - (a) ASIC; or
 - (b) the President of the Panel; or
 - (c) a person to whom the Panel's order relates; or
 - (d) a person who was a party to the proceedings in which the Panel's order was made.

657ASIC may publish report about application to Panel or Court

- (1) ASIC may publish a report, statement or notice in relation to an application it has made for:
 - (a) a declaration of unacceptable circumstances under section 657A; or
 - (b) an order under subsection 657D(2); or
 - (c) an order under section 657E; or
 - (d) review under section 657EA of a decision of the Panel; or
 - (e) an order under section 657G to secure compliance with an order made under subsection 657D(2) or section 657E.
- (2) The report, statement or notice must:
 - (a) state that the application has been made; and
 - (b) name the company; and
 - (c) if ASIC considers that the report, statement or notice should name any other person to whom the declaration would relate or the order would be directed—name that other person.
- (3) The report, statement or notice may be published in any way that ASIC thinks appropriate. It need not be in writing.
- (4) This section does not limit a function or power of ASIC, the Panel or any other person or body.

Subdivision C—General provisions

658A Power of Panel where a proceeding is frivolous or vexatious

- (1) If an application is made to the Panel under this Division, the Panel may, at any stage of the proceeding, if it is satisfied that the application is frivolous or vexatious:
 - (a) dismiss the application; or

conisante consulting

- (b) if the Panel considers it appropriate, on the application of a party to the proceedings, direct that the person who made the application must not, without leave of the Panel, make a subsequent application to the Panel of a kind or kinds specified in the direction.
- (2) A direction given by the Panel under paragraph (1)(b) has effect despite any other provision of this Act or a provision of any other Act.
- (3) The Panel may revoke or vary the direction.

658B Evidentiary value of findings of fact by Panel

- (1) A finding of fact recorded in an order by the Panel, or a written statement of the reasons for an order of the Panel, is proof of the fact in the absence of evidence to the contrary.
- (2) A certificate signed by the President of the Panel that states a finding of fact made in proceedings before the Panel is proof of the fact in the absence of evidence to the contrary.

658C Panel's power to make rules

- (1) The President of the Panel may, after consultation with members of the Panel, make rules, not inconsistent with this Act or the Regulations, to clarify or supplement the operation of the provisions of this Chapter.
- (2) In making rules under this section, the President of the Panel must consider the purposes of this Chapter set out in section 602.
- (3) A rule under this section must be in writing and the President of the Panel must:
 - (a) publish notice of it in the *Gazette*; and
 - (b) give the Minister, and ASIC, a copy of the rule as soon as practicable after it is published in the *Gazette*.
- (4) Within 28 days after receiving the copy, the Minister may disallow the whole or a specified part of the rule.
- (5) If a person contravenes a rule made under this section, the Court may give directions for compliance with the rule to:
 - (a) that person; or
 - (b) if that person is a body corporate (other than a notified foreign passport fund)—the directors of the body corporate; or
 - (c) if that person is a notified foreign passport fund—the directors of the operator of the fund.

conisante consulting

The Court must give the person against whom the order is sought, and any person aggrieved by the contravention, an opportunity to be heard before giving directions under this subsection.

- (6) The Court may give a direction under subsection (5) only on application by:
- (a) ASIC; or
 - (b) the President of the Panel; or
 - (c) a person aggrieved by the contravention.

658D Inconsistency between Panel rules and ASIC exemption or declaration

If there is an inconsistency between a rule made under section 658C and an exemption given, or declaration made, by ASIC under section 655A, the rule made under section 658C prevails to the extent of the inconsistency.

Division 3—Court powers

659A Panel may refer questions of law to the Court

The Panel may, of its own motion, refer a question of law arising in a proceeding before the Panel to the Court for decision.

659AA Object of sections 659B and 659C

The object of sections 659B and 659C is to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended.

659B Court proceedings before end of bid period

Delay in commencing court proceedings until after end of bid period

- (1) Only the following may commence court proceedings in relation to a takeover bid, or proposed takeover bid, before the end of the bid period:
- (a) ASIC;
 - (b) a Minister of the Commonwealth;
 - (c) a Minister of a State or Territory in this jurisdiction;
 - (d) the holder of an office established by a law of:
 - (i) the Commonwealth; or
 - (ii) a State or Territory in this jurisdiction;
 - (e) a body corporate incorporated for a public purpose by a law of:
 - (i) the Commonwealth; or
 - (ii) a State or Territory in this jurisdiction;to the extent to which it is exercising a power conferred by a law of the Commonwealth or a State or Territory in this jurisdiction.

Note: This restriction starts to apply as soon as there is a takeover bid, or a proposed takeover bid; it does not start to apply only when the bid period commences.

Court power to stay proceedings that have already commenced

- (2) A court may stay:
- (a) court proceedings in relation to a takeover bid or proposed takeover bid; or
 - (b) court proceedings that would have a significant effect on the progress of a takeover bid;
- until the end of the bid period.

conisante consulting

- (3) In deciding whether to exercise its powers under subsection (2), the court is to have regard to:
 - (a) the purposes of this Chapter; and
 - (b) the availability of review by the Panel under Division 2.
- (4) For the purposes of this section:

court proceedings in relation to a takeover bid or proposed takeover bid:

- (a) means any proceedings before a court in relation to:
 - (i) an action taken or to be taken as part of, or for the purposes of, the bid or the target's response to the bid; or
 - (ii) a document prepared or to be prepared, or a notice given or to be given, under this Chapter; and
- (b) includes:
 - (i) proceedings to enforce an obligation imposed by this Chapter; or
 - (ii) proceedings for the review of a decision, or the exercise of a power or discretion, under this Chapter; or
 - (iii) proceedings for the review of a decision, or the exercise of a power or discretion, under Chapter 6C in relation to securities of the target of a takeover bid during the bid period; and
 - (iv) proceedings under Part 2F.1A for leave to bring, or to intervene in, proceedings referred to in paragraph (a) or subparagraph (b)(i), (ii) or (iii).

This is not limited to proceedings brought under this Chapter or this Act but includes proceedings under other Commonwealth and State or Territory laws (including the general law).

- (5) Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

659C Court proceedings after end of bid period

- (1) If:
 - (a) an application is made to the Panel for a declaration under section 657A that particular conduct amounts to, or leads to, circumstances that are unacceptable; and
 - (b) the Panel refuses to make the declaration; and
 - (c) a Court finds after the end of the bid period that the conduct contravenes this Act;the Court's powers under this Act in relation to the conduct are limited to the following:
 - (d) the Court may:

conisante consulting

- (i) determine whether a person is guilty of an offence against this Act because they engaged in or were involved in the conduct; and
 - (ii) impose a penalty if the person is found guilty;
- (e) the Court may:
 - (i) determine whether a person who engaged in, or was involved in, the conduct contravened a provision of this Act; and
 - (ii) order the person to pay an amount of money to another person (whether by way of damages, account of profits, pecuniary penalty or otherwise);
- (f) the Court may make an order under section 1318 or 1322 in relation to the conduct.

This subsection does not confer power or jurisdiction on a court that it does not have apart from this subsection.

- (2) Without limiting subsection (1), the only kind of remedial order that the Court may make is one that requires the person to pay money to another person.

Chapter 6A—Compulsory acquisitions and buy-outs

660A Chapter extends to some listed bodies that are not companies

This Chapter extends to the acquisition of securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of securities of companies.

Note: Section 9 defines *company* and *listed*.

660B Chapter extends to listed registered schemes

- (1) This Chapter extends to the acquisition of interests in a registered scheme that is also listed as if:
 - (a) the scheme were a company; and
 - (b) interests in the scheme were shares in the company; and
 - (c) voting interests in the scheme were voting shares in the company.
- (2) If Part 6A.1 applies to a scheme at the end of the bid period for a takeover, that Part continues to apply to the scheme in relation to the takeover bid even if the scheme ceases to be listed.
- (3) If Part 6A.2 applies to a scheme when a compulsory acquisition notice under section 664C is lodged, that Part (including Division 2 of that Part) continues to apply to the scheme in relation to the notice even if the scheme ceases to be listed.
- (4) The regulations may modify the operation of this Chapter as it applies in relation to the acquisition of interests in listed registered schemes.

660C Chapter does not apply to MCIs

This Chapter does not apply to MCIs.

Part 6A.1—Compulsory acquisitions and buy-outs following takeover bid

Division 1—Compulsory acquisition of bid class securities

661A Compulsory acquisition power following takeover bid

Threshold for compulsory acquisition power

- (1) Under this subsection, the bidder under a takeover bid may compulsorily acquire any securities in the bid class if:
- (a) the bid is:
 - (i) an off-market bid to acquire all the securities in the bid class; or
 - (ii) a market bid; and
 - (b) during, or at the end of, the offer period:
 - (i) the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class; and
 - (ii) the bidder and their associates have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid (whether the acquisitions happened under the bid or otherwise).

This is so even if the bidder subsequently ceases to satisfy subparagraph (b)(i) because of the issue of further securities in the bid class.

If the bidder compulsorily acquires securities in the bid class under this subsection, the bidder may also compulsorily acquire non-transferable securities in a different class where:

- (a) the constitution of the company that issued the non-transferable securities or the terms of issue of the non-transferable securities restrict their transfer; and
- (b) the non-transferable securities would be in the bid class but for the restriction referred to in paragraph (a); and
- (c) if all the non-transferable securities were securities in the bid class, they would not exceed 10% of the securities in the bid class (by number, worked out at the end of the offer period).¹¹⁵

¹¹⁵ [CO 13/522](#) modifying Chapter 6A

conisante consulting

Note: Subsection 92(3) defines *securities* for the purposes of this Chapter.

- ~~(2) For the purposes of subsection (1), disregard any relevant interests that the bidder has merely because of the operation of subsection 608(3) (relevant interest by 20% interest in body corporate).~~¹¹⁶
- (2) For the purposes of the 90% calculation in subparagraph (1)(b)(i), disregard any relevant interests that the bidder or their associates have merely because of the operation of paragraph 608(3)(a) (relevant interest by 20% interest in body corporate).
- (2A) For the purposes of the 75% calculation in subparagraph (1)(b)(ii):
- (a) exclude from the number of securities acquired and from the number of securities that the bidder offered to acquire under the bid, securities:
- (i) in which the bidder or their associate has a relevant interest at the date of the first offer under the bid; or
- (ii) issued to an associate of the bidder during the offer period; and
- (b) if the securities are convertible securities, exclude from the number of securities that the bidder offered to acquire under the bid convertible securities (other than any securities excluded because of paragraph (a)) where the holder by exercising the rights attached to those securities has:
- (i) another class of securities issued to them; or
- (ii) has the securities transformed into securities in another class,
- in the period from the date set by the bidder under subsection 633(2) to the end of the offer period.¹¹⁷

Court may allow compulsory acquisition even if threshold not reached

- (3) Under this subsection, the bidder under a takeover bid may compulsorily acquire securities in the bid class with the approval of the Court.

¹¹⁶ [CO 13/522](#) modifying Chapter 6A

¹¹⁷ [CO 13/522](#) modifying Chapter 6A

Securities to be acquired

- (4) If the bidder compulsorily acquires securities in the bid class under subsection (1) or (3), the bidder:
- (a) must acquire all the securities in the bid class:
 - (i) which were issued or granted before the end of the offer period; and
 - (ii) in which the bidder does not have a relevant interest; and
 - (b) may elect to acquire all securities in the bid class:
 - (i) that were issued or granted after the end of the offer period and before the notice under section 661B is issued; and
 - (ii) in which the bidder does not have a relevant interest; but only if the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class when the bidder gives notice under section 661B; and
 - (c) if securities exist when the bidder gives the notice under section 661B that:
 - (i) will convert, or may be converted, to securities in the bid class; or
 - (ii) confer rights to be issued securities in the bid class that may be exercised; within the period of 6 weeks after the notice is given—may elect to acquire securities that come to be in the bid class during that period due to a conversion or exercise of the rights but only if the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class when the bidder gives notice under section 661B; and
 - (d) may elect to acquire any securities in the bid class in which the bidder has a relevant interest (no matter when they were issued or granted).

(4A) If the bidder compulsorily acquires non-transferable securities under subsection (1), the bidder:

- (a) must acquire all the non-transferable securities which were issued or granted before the end of the offer period and in which the bidder does not have a relevant interest; and

conisante consulting

- (b) may elect to acquire any non-transferable securities in which the bidder has a relevant interest (no matter when they were issued or granted).¹¹⁸
- (5) This section has effect despite anything in the constitution of the company whose securities are to be acquired.
For the avoidance of doubt, this section also has effect despite anything in the terms of issue of the securities to be acquired.¹¹⁹
- (6) In this section, **non-transferable securities** means securities issued under a scheme to or for the benefit of employees or non-executive directors of the company that issued the securities or of a related body corporate in relation to their employment or services.¹²⁰

661B Compulsory acquisition notice

Compulsory acquisition notice

- (1) To compulsorily acquire securities under subsection 661A(1) or (3), the bidder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) informs the holders of the securities that the bidder is entitled to acquire their securities under that subsection; and
 - (ii) informs the holders about the compulsory acquisition procedure under this Part, including:
 - (A) their right under section 661D to obtain the names and addresses of everyone else the bidder has given the notice to; and
 - (B) their right under section 661E to apply to the Court for an order that the securities not be compulsorily acquired; and
 - (b) lodge the notice with ASIC; and
 - ~~(c) give the notice to each other person who is:~~
 - ~~(i) a holder of securities in the bid class; or~~
 - ~~(ii) if the bidder elects under paragraph 661A(4)(c) to acquire securities that come to be in the bid class after~~

¹¹⁸ [CO 13/522](#) modifying Chapter 6A

¹¹⁹ [CO 13/522](#) modifying Chapter 6A

¹²⁰ [CO 13/522](#) modifying Chapter 6A

~~the notice is given—a holder of the convertible securities referred to in that paragraph; and~~¹²¹

- (c) give the notice to each other person who is:
- (i) a holder of securities in the bid class; or
 - (ii) if the bidder elects under paragraph 661A(4)(c) to acquire securities that come to be in the bid class after the notice is given—a holder of the convertible securities referred to in that paragraph; or
 - (iii) if the bidder elects to acquire non-transferable securities under subsection 661A(1)—a holder of the non-transferable securities; and¹²²
- (d) give a copy to each relevant market operator on the same day as it is lodged with ASIC if the target is listed.

If alternative forms of consideration were offered under the takeover bid, the notice must specify which of those forms of consideration will apply to the acquisition of the holder's securities if the holder does not elect one of the forms under paragraph 661C(2)(a).

Note: Everyone who holds bid class securities on the day on which the notice is lodged with ASIC is entitled notice. Under section 661E, anyone who holds the securities after that day may apply to the Court to stop the acquisition.

Time for dispatching notices to holders

- (2) The bidder must dispatch the notices under paragraph (1)(c):
- (a) during the offer period, or within 1 month after:
 - (i) the end of offer period if the acquisition is under subsection 661A(1); or
 - (ii) the court approval if the acquisition is under subsection 661A(3); and
 - (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Strict liability offences

- (2A) An offence based on subsection (1) or (2) is an offence of strict liability.

¹²¹ [CO 13/522](#) modifying Chapter 6A

¹²² [CO 13/522](#) modifying Chapter 6A

conisante consulting

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Manner of giving notice to holders

- (3) The bidder may give the notice to a holder:
- (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.
- A notice sent by post is taken to be given 3 days after it is posted.
- (4) The notice may be sent:
- (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.
- This section does not limit the manner in which the notice may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

661C Terms on which securities to be acquired

Same terms as takeover bid

- (1) The bidder may acquire the securities only on the terms that applied to the acquisition of securities under the takeover bid immediately before:
- (a) the notice under section 661B is given if it is given before the end of the offer period; or
 - (b) the end of the offer period if it is not.

Alternative forms of consideration under takeover bid

- (2) If alternative forms of consideration were offered under the takeover bid, the form of consideration that applies to the acquisition of the holder's securities is:
- (a) the form that the holder elects; or
 - (b) the form set out in the compulsory acquisition notice under subsection 661B(1).
- (3) The holder makes an election under subsection (2) by giving the bidder a notice of the election by the later of:
- (a) 1 month after the compulsory acquisition notice is given under section 661B; or
 - (b) 14 days after the holder is given a statement under section 661D if the holder asks for it.
- (4) The election must:

conisante consulting

- (a) comply with the conditions specified in regulations made for the purposes of this paragraph that provide for the manner of making the election; or
- (b) if no such regulations are made—be in writing.

661D Holder may obtain names and addresses of other holders

- (1) Within 1 month after a compulsory acquisition notice in relation to securities ~~in the bid class~~¹²³ is lodged with ASIC under section 661B, the holder of the securities may ask the bidder in writing for a written statement of the names and addresses of everyone else the bidder has given the notice to. The bidder must give the holder the statement within 7 days after the request.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

661E Holder may apply to Court to stop acquisition

- (1) The holder of securities covered by a compulsory acquisition notice under section 661B may apply to the Court for an order that the securities not be compulsorily acquired under subsection 661A(1). The application must be made before the later of:
 - (a) the end of 1 month after the holder is given notice under section 661B; or
 - (b) the end of 14 days after the holder is given a statement under section 661D if the holder asks for it.
- (2) The Court may order that the securities not be compulsorily acquired under subsection 661A(1) only if the Court is satisfied that the consideration is not fair value for the securities.

Note: See section 667C on valuation.

- (3) If the Court makes an order under this section in relation to an acquisition of securities, the order applies to all holders who have applications to the Court pending for an order under this section in relation to the acquisition.

661F Signpost—completing the acquisition of the securities

See section 666A to find out how to complete the acquisition.

¹²³ [CO 13/522](#) modifying Chapter 6A

Division 2—Compulsory buy-out of bid class securities

662A Bidder must offer to buy out remaining holders of bid class securities

- (1) If the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class at the end of the offer period, the bidder must offer to buy out the remaining holders of bid class securities in accordance with sections 662B and 662C.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) This section does not apply to securities that are issued:
- (a) if the takeover bid was not subject to a defeating condition—after the end of the offer period; or
 - (b) if the takeover bid was subject to a defeating condition—after the notice whether the bid is free from a defeating condition or not is given under subsection 630(3).

- (2A) This section also does not apply to securities if the bidder has given the holder of the securities a compulsory acquisition notice under section 661B and the terms on which the bidder may acquire the securities are the same as the terms of the bid immediately before the end of the offer period.¹²⁴

662B Bidder to tell remaining holders of their right to be bought out

Notice to remaining holders of bid class securities

- (1) The bidder must:
- (a) prepare a notice in the prescribed form that:
 - (i) states that the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class; and
 - (ii) informs the holder of bid class securities about their right to be bought out under this Part; and
 - (iii) sets out the terms on which the holder may be bought out; and
 - (b) lodge the notice with ASIC; and

¹²⁴ [CO 13/522](#) modifying Chapter 6A

- (c) give the notice to each other person who:
 - (i) is a holder of securities in the bid class on the day on which the notice is lodged with ASIC; and
 - (ii) has not been given a compulsory acquisition notice under section 661B when the notice under subsection (2) is given; and
- (d) give the notice to each relevant market operator on the same day as it is lodged with ASIC if the target is listed.

If alternative forms of consideration were offered under the takeover bid, the notice must specify which of those forms will apply to the acquisition of the holder's securities if the holder does not give the bidder an election notice under subsection 662C(1).

Note: The notice is to be given to everyone who holds bid class securities on the day on which the notice is lodged with ASIC. Under section 662C, anyone who acquires the securities after that day may require the bidder to acquire the securities.

Time for dispatching notice to holders

- (2) The bidder must dispatch the notices under paragraph (1)(c):
 - (a) during, or within 1 month after the end of, the offer period; and
 - (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The bidder may give the notice to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.

A notice sent by post is taken to be given 3 days after it is posted.
- (4) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

662C Right of remaining holder of securities in the bid class to be bought out

- (1) Within 1 month after notice is given in relation to securities under section 662B, the holder of the securities may give the bidder written notice requiring the bidder to acquire the securities. If alternative forms of consideration were offered under the takeover bid, the holder may elect in the notice which of those forms will apply to the acquisition of the holder's securities.
- (2) The notice by the holder gives rise to a contract between the holder and the bidder for the sale of the securities on:
 - (a) the terms that applied to the acquisition of securities under the bid immediately before the end of the offer period; or
 - (b) if alternative forms of consideration applied at that time—on the terms that the bidder will provide:
 - (i) the alternative specified by the holder in the notice under subsection (1); or
 - (ii) if the holder has not made an election under that subsection—the alternative set out in the bidder's notice under section 662B; or
 - (c) if the holder and the bidder agree on other terms—those terms.

Division 3—Compulsory buy-out of convertible securities

663A Bidder must offer to buy out holders of convertible securities

- (1) If the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class at the end of the offer period, the bidder must offer to buy out the holders of securities that are convertible into bid class securities in accordance with sections 663B and 663C. This section does not apply to securities if a takeover bid has been made for the convertible securities and a notice has been given under section 661B or 662B in relation to the convertible securities.

Note: For when securities are convertible into bid class securities, see the definition of *convertible securities* in section 9.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

663B Bidder to tell holders of convertible securities of their right to be bought out

Notice to holders of convertible securities

- (1) The bidder must:
- (a) prepare a notice in the prescribed form that:
 - (i) states that the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class; and
 - (ii) informs the holder of convertible securities about their right to be bought out under this Part; and
 - (iii) sets out the terms on which the holder may be bought out; and
 - (b) lodge the notice with ASIC; and
 - (c) give each other person who is a holder of convertible securities:
 - (i) the notice; and
 - (ii) a copy of the expert's report, or of all the experts' reports, under section 667A; and
 - (d) give a copy of those documents to each relevant market operator on the same day as it is lodged with ASIC if the target is listed.

Note 1: Subparagraph (a)(iii)—Section 667A deals with the contents of an expert's report.

Note 2: The notice is to be given to everyone who holds convertible securities on the day on which the notice is lodged with ASIC. Under section 663C,

anyone who acquires the securities after that day may require the bidder to acquire the securities.

Time for dispatching notice to holders

- (2) The bidder must dispatch the notices and reports under paragraph (1)(c):
- (a) during, or within 1 month after the end of, the offer period; and
 - (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The bidder may give the notice or report to a holder:
- (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.

A notice or report sent by post is taken to be given 3 days after it is posted.

- (4) The notice may be sent:
- (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

663C Right of holders of convertible securities to be bought out

- (1) Within 1 month after notice under section 663B is given in relation to convertible securities, the holder of the convertible securities may give the bidder a notice requiring the bidder to acquire the securities.
- (2) The holder's notice gives rise to a contract between the holder and the bidder for the sale of the securities on:
- (a) the terms agreed to by the bidder and the holder; or
 - (b) the terms determined by the Court on application by the holder.
- (3) If the Court makes a determination under paragraph (2)(b) in relation to the terms of sale for a holder's securities of a particular class, the determination applies to all holders of securities in that class who have applications to the Court pending for a

conisante consulting

determination under that paragraph in relation to the terms of sale of their securities.

Part 6A.2—General compulsory acquisitions and buy-outs

Division 1—Compulsory acquisition of securities by 90% holder

664A Threshold for general compulsory acquisition power

90% holder—holder of 90% of securities in particular class

- (1) A person is a 90% holder in relation to a class of securities of a company if the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% of the securities (by number) in that class.

90% holder—holder with 90% voting power and 90% of whole company or scheme

- (2) A person is also a 90% holder in relation to a class of securities of a company if:
- (a) the securities in the class are shares or convertible into shares; and
 - (b) the person's voting power in the company is at least 90%; and
 - (c) the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% by value of all the securities of the company that are either shares or convertible into shares.

Note: Subsection 667A(2) provides that the expert's report that accompanies the compulsory acquisition notice must support the paragraph (c) condition.

90% holder may acquire remainder of securities in class

- (3) Under this section, a 90% holder in relation to a class of securities of a company may compulsorily acquire all the securities in that class in which neither the person nor any related bodies corporate has full beneficial interests if either:
- (a) the holders of securities in that class (if any) who have objected to the acquisition between them hold less than 10% by value of those remaining securities at the end of the objection period set out in the notice under paragraph 664C(1)(b); or
 - (b) the Court approves the acquisition under section 664F.

If subsection (2) applies to the 90% holder, the holder may compulsorily acquire securities in a class only if the holder gives compulsory acquisition notices in relation to all classes of shares

and securities convertible into shares of which they do not already have full beneficial ownership.

Note: Subsection 92(3) defines *securities* for the purposes of this Chapter.

- (4) This section has effect despite anything in the constitution of the company whose securities are to be acquired. For the avoidance of doubt, this section also has effect despite anything in the terms of issue of the securities to be acquired.¹²⁵
- (5) This Part does not apply to shares that give the shareholder, as a shareholder, a right to occupy or use real property that the company owns or holds under lease, whether the right is a lease or licence or a contractual right.
- (6) The 90% holder's power to compulsorily acquire securities under a notice given under section 664C ends if the 90% holder contravenes section 664D by offering benefits outside the terms proposed in the compulsory acquisition notice under section 664C.

664AA Time limit on exercising compulsory acquisition power

The 90% holder in relation to a class of securities of a company may compulsorily acquire securities in that class under section 664A only if the holder lodges the compulsory acquisition notice for the acquisition with ASIC under paragraph 664C(2)(a) within whichever of the following periods ends last:

- (a) the period of 12 months that started on 13 March 2000; or
- (b) the period of 6 months after the 90% holder becomes the 90% holder in relation to that class.

664B The terms for compulsory acquisition

- (1) The 90% holder may acquire the securities in the class for a cash sum only and, subject to subsection (2), must pay the same amount for each security in the class acquired.
- (2) The 90% holder may pay different amounts for the securities in the class acquired if the differences are attributable to either or both of the following:
 - (a) the fact that there are differences in the accrued dividend or distribution entitlements of the securities;
 - (b) the fact that there are differences in the amounts paid up, or that remain unpaid, on the securities.

¹²⁵ [CO 13/522](#) modifying Chapter 6A

664C Compulsory acquisition notice

Compulsory acquisition notice

- (1) To compulsorily acquire securities under section 664A, the 90% holder must prepare a notice in the prescribed form that:
 - (a) sets out the cash sum for which the 90% holder proposes to acquire the securities; and
 - (b) specifies a period of at least 1 month during which the holders may return the objection forms; and
 - (c) informs the holders about the compulsory acquisition procedure under this Part, including:
 - (i) their right to obtain the names and addresses of the other holders of securities in that class from the company register; and
 - (ii) their right to object to the acquisition by returning the objection form that accompanies the notice within the period specified in the notice; and
 - (d) gives details of the consideration given for any securities in that class that the 90% holder or an associate has purchased within the last 12 months; and
 - (e) discloses any other information that is:
 - (i) known to the 90% holder or any related bodies corporate; and
 - (ii) material to deciding whether to object to the acquisition; and
 - (iii) not disclosed in an expert's report under section 667A.
- (2) The 90% holder must then:
 - (a) lodge the notice with ASIC; and
 - (b) give each other person (other than a related body corporate) who is a holder of securities in the class on the day on which the notice is lodged with ASIC:
 - (i) the notice; and
 - (ii) a copy of the expert's report, or of all experts' reports, under section 667A; and
 - (iii) an objection form; and
 - (c) give the company copies of those documents; and
 - (d) give copies of those documents to the relevant market operator if the company is listed.

Note: Everyone who holds the securities on the day on which the notice is lodged with ASIC is entitled to notice. Under subsection 664E(1), anyone who acquires the securities during the objection period may object to the acquisition.

conisante consulting

Time for dispatching notice to holders

- (3) The 90% holder must dispatch the notices under paragraph (2)(b) on the day the 90% holder lodges the notice with ASIC or on the next business day.

Manner of giving notice to holders

- (4) The 90% holder may give the notice to a holder:
- (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.
- A notice sent by post is taken to be given 3 days after it is posted.
- (5) The notice may be sent:
- (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

Notice not to be withdrawn

- (6) The 90% holder may not:
- (a) withdraw a notice under this section; or
 - (b) if the 90% holder has given a notice under this section in relation to those securities and the objection period for that notice has not ended—give another notice under this section in relation to securities.

664D Benefits outside compulsory acquisition procedure

- (1) If the 90% holder gives a notice under section 664C to compulsorily acquire securities, the 90% holder or an associate must not offer, give or agree to give a benefit to a person during the objection period if:
- (a) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) dispose of securities in that class; or
 - (ii) not object to the acquisition of those securities under the notice; and
 - (b) the benefit is not provided for in the notice.
- (2) If the 90% holder proposes to give a notice under section 664C to acquire securities within the next 4 months, the 90% holder or an

conisante consulting

associate must not offer, give or agree to give a benefit to a person if:

- (a) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) dispose of securities in that class; or
 - (ii) not object to the acquisition of those securities under the notice; and
 - (b) the benefit is not proposed to be provided for in the notice.
- (3) If the 90% holder gives a notice under section 664C to compulsorily acquire securities, the 90% holder or an associate must not give a benefit to a person:
- (a) within 1 month after the end of the objection period (see subsection 664F(2)); or
 - (b) during any proceedings by the Court to determine an application under subsection 664F(1) by the 90% holder;
- if:
- (c) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) not object, or pursue an objection, to the acquisition of those securities under the notice; or
 - (ii) dispose of securities in that class; and
 - (d) the benefit is not offered to all holders of securities in that class under the notice.
- (3A) An offence based on subsection (1), (2) or (3) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (4) This section does not prohibit simultaneous notices under section 664C to compulsorily acquire different classes of securities in the company.

664E Holder's right to object to the acquisition

- (1) A person who holds securities covered by the compulsory acquisition notice may object to the acquisition of the securities by signing an objection form and returning it to the 90% holder. The objection:
 - (a) relates to all securities that are covered by the notice and are held by the person at the end of the objection period; and
 - (b) cannot be withdrawn.
- (2) The 90% holder must lodge with ASIC a copy of any objection form returned under subsection (1) as soon as practicable after it is returned.

conisante consulting

- (3) As soon as practicable after the end of the objection period, the 90% holder must:
 - (a) prepare a list that sets out:
 - (i) the names of people who hold securities covered by the compulsory acquisition notice and have objected to the acquisition; and
 - (ii) details of the securities they hold; and
 - (b) lodge the list with ASIC; and
 - (c) give a copy of the list to the company; and
 - (d) if the company is listed—give a copy to the relevant market operator.
- (4) If people who hold at least 10% of the securities covered by the compulsory acquisition notice object to the acquisition before the end of the objection period, the 90% holder must give everyone to whom the compulsory acquisition notice was sent under section 664C:
 - (a) a notice that the proposed acquisition will not occur; or
 - (b) a notice that the 90% holder has applied to the Court for approval of the acquisition under section 664F;within 1 month after the end of the objection period.
- (5) An offence based on subsection (2), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

664F The Court's power to approve acquisition

- (1) If people who hold at least 10% of the securities covered by the compulsory acquisition notice object to the acquisition before the end of the objection period, the 90% holder may apply to the Court for approval of the acquisition of the securities covered by the notice.
- (2) The 90% holder must apply within 1 month after the end of the objection period.
- (3) If the 90% holder establishes that the terms set out in the compulsory acquisition notice give a fair value for the securities, the Court must approve the acquisition of the securities on those terms. Otherwise it must confirm that the acquisition will not take place.

Note: See section 667C on valuation.
- (4) The 90% holder must bear the costs that a person incurs on legal proceedings in relation to the application unless the Court is satisfied that the person acted improperly, vexatiously or otherwise unreasonably. The 90% holder must bear their own costs.

conisante consulting

664G Signpost—completing the acquisition of the securities

See section 666A for how to complete the acquisition.

Division 2—Compulsory buy-out of convertible securities by 100% holder

665A 100% holder must offer to buy out holders of convertible securities

- (1) A person is a 100% holder of securities in a class if the person, either alone or with a related body corporate, holds full beneficial interests in all the securities in the class.
- (2) A 100% holder in relation to a class of securities (the *main class*) who becomes a 100% holder through compulsory acquisitions under this Part must offer to buy out the holders of securities in another class that are convertible into main class securities in accordance with sections 665B and 665C. This subsection does not apply to securities if a notice is given in relation to the securities under section 661B, 662B or 664C.

Note: For when securities are convertible into main class securities, see the definition of *convertible securities* in section 9.

- (3) An offence based on subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

665B 100% holder to tell holders of convertible securities of their right to be bought out

Notice to holders of convertible securities

- (1) The 100% holder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) states that the person giving the notice has acquired all the securities in the main class; and
 - (ii) sets out the information that was included in the compulsory acquisition notice given in relation to securities in the main class under paragraphs 664C(1)(d) and (e); and
 - (iii) sets out the cash sum for which they are willing to acquire the convertible securities; and
 - (iv) informs the holder of convertible securities about their right to be bought out under this Part; and
 - (b) lodge the notice with ASIC; and
 - (c) give each other person who is a holder of convertible securities on the day on which the notice is lodged with ASIC:
 - (i) the notice; and

- (ii) a copy of the expert's report, or all experts' reports, under section 667A; and
- (d) give a copy of the documents to the company that issued the securities; and
- (e) give a copy of the documents to each relevant market operator on the same day as it is lodged with ASIC if the company is listed.

Note 1: Subparagraph (a)(iv)—Section 667A deals with the contents of an expert's report.

Note 2: The notice is to be given to everyone who holds convertible securities on the day on which the notice is lodged with ASIC. Under section 665C, anyone who holds the securities after that day may require the 100% holder to acquire the securities.

Time for dispatching notice to holders

- (2) The 100% holder must dispatch the notices and reports under paragraph (1)(c):
 - (a) within 1 month after they become the 100% holder; and
 - (b) on the day the 100% holder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The 100% holder may give the notice or report to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.

A notice or report sent by post is taken to be given 3 days after it is posted.

- (4) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

665C Right of holders of convertible securities to be bought out

- (1) Within 1 month after notice under section 665B is given in relation to convertible securities, the holder of the convertible securities may give the 100% holder a notice requiring the 100% holder to acquire the securities.

conisante consulting

- (2) The notice by the holder of convertible securities gives rise to a contract between the holder and the 100% holder for the sale of the securities on:
 - (a) terms agreed to by the 100% holder and the holder of the convertible securities; or
 - (b) the terms determined by the Court on application by the holder of the convertible securities.
- (3) If the Court makes a determination under paragraph (2)(b) in relation to the terms of sale for a holder's convertible securities of a particular class, the determination applies to all holders of convertible securities in that class who have applications to the Court pending for a determination under that paragraph in relation to the terms of sale of their convertible securities.

Part 6A.3—Completion of compulsory acquisition of securities

666A Completing the acquisition of securities

Completion to be by private treaty or statutory procedure

- (1) A person entitled to acquire securities under section 661A or 664A must either:
 - (a) pay, issue or transfer the consideration to the holder, take a transfer of the securities from the holder and have the company that issued the securities register the transfer; or
 - (b) complete the procedure laid down in section 666B; by the end of the period referred to in subsection (2) or (3).

Strict liability offences

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Time for completing compulsory acquisition following takeover

- (2) For an acquisition under section 661A, the period ends 14 days after the later of:
 - (a) the end of 1 month after the compulsory acquisition notice was lodged with ASIC under section 661B; or
 - (b) the end of 14 days after the last statement under section 661D was given if a request is made under that section; or
 - (c) if an application to stop the acquisition is made to the Court under section 661E—the application is finally determined.

Time for completing compulsory acquisition under Part 6A.2

- (3) For an acquisition under section 664A or 664F, the period ends 14 days after the later of:
 - (a) the end of the objection period; or
 - (b) if an application for approval of the acquisition is made to the Court under section 664F in relation to the securities—the application is finally determined.

666B Statutory procedure for completion

- (1) Under this section, the person acquiring the securities must:
-

conisante consulting

- (a) give the company that issued the securities a copy of the compulsory acquisition notice under section 661B or 664C together with a transfer of the securities:
 - (i) signed as transferor by someone appointed by the person acquiring the securities; and
 - (ii) signed as transferee by the person acquiring the securities; and
- (b) pay, issue or transfer the consideration for the transfer to the company that issued the securities.

The person appointed under subparagraph (a)(i) has authority to sign the transfer on behalf of the holder of the securities.

- (2) If the person acquiring the securities complies with subsection (1), the company that issued the securities must:
 - (a) register the person as the holder of the securities; and
 - (b) hold the consideration received under subsection (1) in trust for the person who held the securities immediately before registration; and
 - (c) give written notice to the person referred to in paragraph (b) as soon as practicable that the consideration has been received and is being held by the company pending their instructions as to how it is to be dealt with.

For the avoidance of doubt, if the person acquiring the securities complies with subsection (1), the transfer of the securities to the person is effective notwithstanding any restrictions on transfer of the securities contained in the constitution of the company that issued the securities or the terms of issue of the securities.¹²⁶

- (3) If the consideration held under subsection (2) consists of, or includes, money, that money must be paid into a bank account opened and maintained for that purpose only.
- (4) An offence based on subsection (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

¹²⁶ [CO 13/522](#) modifying Chapter 6A

Part 6A.4—Experts’ reports and valuations

667A Expert’s report

- (1) An expert’s report under section 663B, 664C or 665B must:
 - (a) be prepared by a person nominated by ASIC under section 667AA; and
 - (b) state whether, in the expert’s opinion, the terms proposed in the notice give a fair value for the securities concerned; and
 - (c) set out the reasons for forming that opinion.

Note: See section 667C on valuation.

- (2) If the person giving the compulsory acquisition notice is relying on paragraph 664A(2)(c) to give the notice, the expert’s report under section 664C must also:
 - (a) state whether, in the expert’s opinion, the person (either alone or together with a related body corporate) has full beneficial ownership in at least 90% by value of all the securities of the company that are shares or convertible into shares; and
 - (b) set out the reasons for forming that opinion.
- (3) If the person giving the compulsory acquisition notice obtains 2 or more reports, each of which were obtained for the purposes of that notice, a copy of each report must be given to the holder of the securities.
- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

667AA Expert to be nominated

- (1) A person who proposes to obtain an expert’s report for the purposes of section 663B, 664C or 665B must request ASIC in writing to nominate a person to prepare the expert’s report.
- (2) Within 14 days after receiving a request under subsection (1), ASIC must nominate:
 - (a) an appropriate person to prepare the report; or
 - (b) up to 5 appropriate persons, one of whom the person making the request may choose to prepare the report.
- (3) In determining whether a person is an appropriate person to prepare an expert’s report, and without limiting the matters that

conisante consulting

ASIC may consider, ASIC must consider the nature of the company to be valued.

667B Expert must not be an associate and must disclose prior dealings and relationships

- (1) The expert who provides the report must not be an associate of:
 - (a) the person giving the notice; or
 - (b) the company that issued the securities.
- (2) The report must set out details of:
 - (a) any relationship between the expert and:
 - (i) the person giving the notice or an associate of the person giving the notice; or
 - (ii) the company that issued the securities or an associate of the company;
including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
 - (b) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on; and
 - (c) any fee, payment or other benefit (whether direct or indirect) that the expert has received or will or may receive in connection with the report.

667C Valuation of securities

- (1) To determine what is fair value for securities for the purposes of this Chapter:
 - (a) first, assess the value of the company as a whole; and
 - (b) then allocate that value among the classes of issued securities in the company (taking into account the relative financial risk, and voting and distribution rights, of the classes); and
 - (c) then allocate the value of each class pro rata among the securities in that class (without allowing a premium or applying a discount for particular securities in that class).
- (2) Without limiting subsection (1), in determining what is fair value for securities for the purposes of this Chapter, the consideration (if any) paid for securities in that class within the previous 6 months must be taken into account.

Part 6A.5—Records of unclaimed consideration

668A Company's power to deal with unclaimed consideration for compulsory acquisition

Records of unclaimed compulsory acquisition consideration

- (1) If a company is paid consideration in respect of securities that are compulsorily acquired under Part 6A.1 or 6A.3, the company must maintain records of:
 - (a) the consideration paid (including any benefit accruing from the consideration and any property substituted for the whole or any part of that consideration); and
 - (b) the people who are entitled to that consideration; and
 - (c) any transfers of the consideration to the people entitled to it.
- (2) The company must keep the records at:
 - (a) its registered office; or
 - (b) its principal place of business in this jurisdiction; or
 - (c) another place in this jurisdiction approved by ASIC.
- (3) A person may ask the company to let the person inspect all or any of the records kept by the company under this section. The company must let the person inspect the records:
 - (a) if the company requires payment of an amount not exceeding the prescribed amount—within 7 days after the day on which the company receives that amount; or
 - (b) in any other case—within 7 days after the day on which the request is made.
- (4) By the end of February each year, the company must publish in the *Gazette* a copy of the records kept under subsection (1) as at the end of the previous December.
- (5) An offence based on subsection (1), (2), (3) or (4) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

668B Unclaimed consideration to be transferred to ASIC

- (1) If the company has not transferred the unclaimed consideration to the person entitled to it within 12 months after the publication of a copy of the records in the *Gazette*, the company must transfer the consideration to ASIC within 1 month after the end of that 12 month period.

conisante consulting

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The company is then discharged from liability to any person in respect of the consideration.
- (3) ASIC must deal with the consideration under Part 9.7.
- (4) Except as provided by subsection (2), this Part does not deprive a person of any right or remedy to which the person is entitled against a liquidator or company.

Part 6A.6—ASIC powers

669 ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

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

670A Misstatements in, or omissions from, takeover and compulsory acquisition and buy-out documents

- (1) A person must not give:
- (a) a bidder's statement;
 - (b) a takeover offer document;
 - (c) a notice of variation of a takeover offer;
 - (d) a target's statement;
 - (e) a compulsory acquisition notice under section 661B or 664C;
 - (f) a compulsory buy-out notice under section 662B, 663B or 665B;
 - (g) a report that is included in, or accompanies, a statement or notice referred to in paragraphs (a) to (f);
- if there is:
- (h) for all documents—a misleading or deceptive statement in the document; or
 - (i) for a bidder's statement or target's statement—an omission from the document of material required by section 636 or 638; or
 - (j) for a bidder's statement or a target's statement—a new circumstance that:
 - (i) has arisen since the document was lodged; and
 - (ii) would have been required by section 636 or 638 to be included in the document if it had arisen before the document was lodged; or
 - (k) for an expert's report under subsection 636(2) or section 640, 663B, 664C or 665B—an omission from the report of material required by subsection 648A(3) or 667B(2).

Note 1: See section 670D for defences.

Note 2: Section 1041H imposes liabilities in respect of other conduct related to the dealings in securities.

conisante consulting

Forecasts and other forward-looking statement

- (2) A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular.

Offence if statement, omission or new matter materially adverse

- (3) A person commits an offence if they contravene subsection (1) and:
- (a) the misleading or deceptive statement; or
 - (b) the omission or new circumstance;
- is materially adverse from the point of view of the holder of securities to whom the document is given.

Civil liability

- (4) A person contravenes this subsection if:
- (a) the person contravenes subsection (1); and
 - (b) either:
 - (i) the misleading or deceptive statement; or
 - (ii) the omission or new circumstance;is materially adverse from the point of view of the holder of securities to whom the document is given.

Note: This subsection is a civil penalty provision (see section 1317E).

670B Right to recover for loss or damage resulting from contravention

- (1) A person who suffers loss or damage that results from a contravention of subsection 670A(1) may recover the amount of the loss or damage from a person referred to in the following table if the loss or damage is one that the table makes the person liable for. This is so even if the person did not commit, and was not involved in, the contravention.

People liable on the document	[operative table]
<i>For these documents</i>	
these people...	...are liable for loss or damages caused by
<i>bidder's statement or takeover offer document</i>	

People liable on the document		[operative table]
<i>For these documents</i>		
	these people...	...are liable for loss or damages caused by
1	the bidder	any contravention of subsection 670A(1) in relation to the document
2	each director of a bidder that is a body if the consideration offered under the bid is not a cash sum only	any contravention of subsection 670A(1) in relation to the document
3	a director of a bidder that is a body (other than a notified foreign passport fund) unless the director proves that they: (a) were not present when the directors resolved to adopt the statement or offer document; or (b) voted against the resolution; if the consideration offered under the bid is a cash sum only	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
<i>notice of variation of a takeover offer</i>		
4	the bidder	any contravention of subsection 670A(1) in relation to the document
5	a director of a bidder that is a body	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
<i>a target's statement</i>		
6	the target	any contravention of subsection 670A(1) in relation to the document
7	a director of the target unless the director proves that they: (a) were not present when the directors resolved to adopt the statement; or (b) voted against the resolution	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
<i>a compulsory acquisition or compulsory buy-out notice</i>		
8	the person giving the notice	any contravention of subsection 670A(1) in relation to the document

People liable on the document		[operative table]
<i>For these documents</i>		
	these people...	...are liable for loss or damages caused by
9	a director of a body corporate (other than a notified foreign passport fund) giving the notice unless the director proves that they: (a) were not present when the directors resolved to give the notice; or (b) voted against the resolution	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
9A	if a notified foreign passport fund is giving the notice, a director of the operator of the fund unless the director proves that they: (a) were not present when the directors resolved to give the notice; or (b) voted against the resolution	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
10	all documents a person named in the document, with their consent, as having made a statement: (a) that is included in the document; or (b) on which a statement made in the document is based	the inclusion of the statement in the document
11	a person who contravenes, or is involved in a contravention of, subsection 670A(1)	that contravention

(2) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.

(3) This Chapter does not affect any liability that a person has under any other law.

Note: Conduct that contravenes subsection 670A(1) is expressly excluded from the operation of section 1041H.

670C People liable on takeover or compulsory acquisition statement to inform maker about deficiencies in the statement

(1) A person referred to in the table in subsection 670B(1) in relation to a document must notify the issuer of the document in writing as soon as practicable if they become aware during the bid period or objection period that:

conisante consulting

- (a) a material statement in the document is misleading or deceptive; or
 - (b) there is a material omission from the document of information required by section 636, 638 or 640; or
 - (c) a material new circumstance that:
 - (i) has arisen since the document was lodged; and
 - (ii) would have been required by section 636, 638 or 640 to be included in the document if it had arisen before the document was lodged.
- (2) An expert whose report accompanies, or is included in, a target's statement under section 640 must notify the target in writing as soon as practicable if they become aware during the bid period or objection period that:
- (a) a material statement in the report is misleading or deceptive; or
 - (b) there has been a significant change affecting information included in the report.
- (3) An expert whose report accompanies, or is included in, a bidder's statement under subsection 636(2) must notify the bidder in writing as soon as practicable if they become aware during the bid period or objection period that:
- (a) a material statement in the report is misleading or deceptive; or
 - (b) there has been a significant change affecting information included in the report.
- (4) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

670D Defences against prosecutions under subsection 670A(3) and actions under section 670B

Not knowing statement misleading or deceptive

- (1) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of a misleading or deceptive statement in a document if the person proves that they did not know that the statement was misleading or deceptive.

Not knowing there was an omission

- (2) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of an omission from a document in

conisante consulting

relation to a particular matter if the person proves that they did not know that there was an omission from the document in relation to that matter.

Reasonable reliance on information given by someone else—statements and omissions

- (3) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention against subsection 670A(1), because of a misleading or deceptive statement in, or an omission from, a document if the person proves that they placed reasonable reliance on information given to them by:
- (a) if the person is a body—someone other than a director, employee or agent of the body; or
 - (b) if the person is an individual—someone other than an employee or agent of the individual.
- (4) For the purposes of subsection (3), a person is not the agent of a body or individual merely because they perform a particular professional or advisory function for the body or individual.

Withdrawal of consent—statements and omissions

- (5) A person who is named in a document as:
- (a) making a statement included in the document; or
 - (b) making a statement on the basis of which a statement is included in the document;
- does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention against subsection 670A(1), because of a misleading or deceptive statement in, or an omission from, a document if the person proves that they publicly withdrew their consent to being named in the document in that way.

Unawareness of new matter

- (6) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of a new circumstance that has arisen since the document was lodged if the person proves that they were not aware of the matter.

670E Liability for proposing a bid or not carrying through with bid

- (1) A person who:
- (a) enters into a transaction relating to securities in reliance on:
 - (i) a public proposal for a takeover bid; or
 - (ii) an announcement of a market bid; and

conisante consulting

- (b) suffers loss or damage that results from a contravention of section 631:
may recover the amount of the loss or damage from:
 - (c) the person who contravened the section; or
 - (d) any person involved in the contravention.
- (2) To determine the amount of compensation payable under subsection (1), deduct the price of the securities at which the transaction was entered into from the price of the securities at which the transaction would have been likely to be entered into if the proposal or announcement had not been made.

670F Defences

A person does not commit an offence under subsection 631(1) or (2), and is not liable under section 670E for a contravention of those subsections if the person proves that they could not reasonably have been expected to comply with those subsections because:

- (a) at the time of the proposal or announcement, circumstances existed that the person did not know of and could not reasonably have been expected to know of; or
- (b) after the proposal or announcement, a change in circumstances occurred that was not caused, directly or indirectly, by the person.

Chapter 6C—Information about ownership of listed companies, listed registered schemes and listed notified foreign passport funds

671A Chapter extends to some listed bodies that are not companies

This Chapter applies to the acquisition of relevant interests in the securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of relevant interests in the securities of companies.

Note: Section 9 defines *company* and *listed*.

671AA ETFs¹²⁷

For the purposes of this Chapter and the definition of *substantial holding* in section 9, subsection 609(19A) applies as if paragraph 609(19A)(c) were omitted.

¹²⁷ [CO 13/721](#) modifying Chapter 6C

Part 6C.1—Substantial holding information

[Added Note: Under [CO 13/521](#), Chapter 6C applies as if ss608 were modified by inserting:

608 (Relevant interests in securities)

...

(10) A bidder has a relevant interest in securities if, under section 653AA, an offer is taken to have been accepted in relation to the securities.¹²⁸]

*[Added Note: Under CO 11/272 Part 6C.1 applies as if ss608 and 609 were modified by inserting the following:*¹²⁹

608 (Relevant interests in securities)

...

(8A) If securities are subject to:

(a) an arrangement (the *securities lending arrangement*) under which:

(i) one entity (the *lender*) agrees that it will:

(A) deliver the securities to another entity (the *borrower*) or to an entity nominated by the borrower; and

(B) vest title in those securities in the entity to which they are delivered; and

(ii) the borrower agrees that it will, after the lender does the things mentioned in subparagraph (i):

(A) deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender; and

(B) vest title in those securities (or those equivalent securities) in the entity to which they are delivered; or

¹²⁸ [CO 13/521](#) modifying Chapter 6C

¹²⁹ [CO 11/272](#) modifying Part 6C.1. A note in the Instrument states: “For the avoidance of doubt, nothing in [the paragraphs inserting ss8A and 10A-10C] has effect for the purposes of Chapter 6 or Part 6C.2 of the Act”

- (b) an arrangement (the *securities lending arrangement*) under which:
- (i) the securities are held by one entity (the *borrower*) or an entity nominated by the borrower, on behalf of another entity (the *lender*); and
 - (ii) the lender agrees that the borrower may deal in the securities on its own behalf or on behalf of a person;
 - (iii) the borrower agrees that it will at some future time:
 - (A) deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender; and
 - (B) vest title in those securities (or those equivalent securities) in the entity to which they are delivered;

and the securities are subsequently disposed of by the borrower or an entity nominated by the borrower resulting in that entity ceasing to have a relevant interest in the securities, the lender of the securities under the securities lending arrangement is taken to have a relevant interest in the securities (or equivalent securities) that the borrower has agreed to deliver to, and vest title in, the lender or an entity nominated by the lender.

...

609 (Situations not giving rise to relevant interests)]

...

(10A) A service provider does not have a relevant interest in securities under subsection 608(8) merely because, in the course of providing services to a person as part of carrying on a prime broking business or custodial business, the person has, under a securities lending arrangement, given to the provider:

- (a) where the provider or an entity nominated by the provider holds the securities on behalf of the person or an entity nominated by the person—a present right (*borrowing right*) to, at some future time, deal in the securities on its own behalf or on behalf of a person;
- (b) otherwise—a present right (*borrowing right*) to, at some future time, have the securities held by or on behalf of the person delivered to the provider or an entity nominated by the provider and to have the title in those securities vested in the entity to which they are delivered;

provided both of the following are satisfied:

- (c) the person is not subject to any restriction (other than a permissible restriction) by or under any relevant agreement between the person and the provider or an associate of the

provider in how it can deal with the securities in respect of which the borrowing right is given;

- (d) the borrowing right is acquired by the provider as part of a bona fide arrangement entered into in the ordinary course of carrying on that business.

(10B) For the avoidance of doubt, subsection (10A) stops applying in respect of particular securities when the service provider exercises the borrowing right in respect of those securities.

(10C) In subsections (10A), (10B) and this subsection:

custodial business means a business of providing to wholesale clients a package of at least the following financial services and other services:

- (a) custodial or depository services;
(b) services in relation to a securities lending arrangement.

custodial or depository service has the meaning given by subsection 766E(1).

permissible restriction means:

- (a) a mortgage, charge or security taken or acquired in relation to the securities in the ordinary course of carrying on a prime broking business or custodial business and on ordinary commercial terms; or
(b) any restrictions of a procedural or administrative nature in relation to giving instructions to the service provider for dealing in the securities.

prime broking business means a business of providing to wholesale clients a package of at least the following services in accordance with a written agreement commonly known as a prime broking agreement or prime brokerage agreement:

- (a) dealing in a financial product to the extent the dealing is acquiring or disposing of the financial product, or arranging for another person to acquire or dispose of the financial product;
(b) services that enable or facilitate clients to meet their obligations to other persons that arise from entering into transactions with those other persons in connection with the acquisitions and disposals mentioned in paragraph (a);
(c) custodial or depository services;
(d) services in relation to a securities lending arrangement;
(e) consolidated reporting and other operational support services.

securities lending arrangement has the same meaning as in paragraphs 608(8A)(a) and (b).

service provider means a person:

- (a) that holds an Australian financial services licence that covers the provision of a custodial or depositary service; or
 - (b) that is exempt under:
 - (i) paragraph 911A(2)(i); or
 - (ii) Schedule 2 to the ASIC Corporations (Repeal and Transitional) Instrument 2016/396; or
 - (iii) an instrument, not being a legislative instrument, made by ASIC and which applies to the person on terms similar to Schedule 2 of the legislative instrument referred to in subparagraph (iia) or any of the ASIC Class Orders repealed by that legislative instrument;
- from the requirement to hold an Australian financial services licence for the provision of a custodial or depositary service.

wholesale client has the meaning given by section 761G. /

671B Information about substantial holdings must be given to company, responsible entity, fund operator and relevant market operator

Requirement to give information

- (1) A person must give the information referred to in subsection (3) to a listed company, or the responsible entity for a listed registered scheme, or the operator of a listed notified foreign passport fund in accordance with this section, if:
 - (a) the person begins to have, or ceases to have, a substantial holding in the company, scheme or fund; or
 - (b) the person has a substantial holding in the company, scheme or fund and there is a movement of at least 1% in their holding; or
 - (c) the person makes a takeover bid for securities of the company or scheme.

The person must also give the information to each relevant market operator.

Note 1: Section 9 defines *substantial holding* and *associate*.

Note 2: The information must be given even if the situation changes by the time the information is to be given.

Note 3: Paragraph (c) does not apply in relation to a notified foreign passport fund.

conisante consulting

[Added Note: Under [CO 13/524](#) a bidder and its associates are, subject to conditions, exempted from s671B(1) to the extent that it would otherwise require certain information relating to acceptances and persons accepting.¹³⁰]

- (2) For the purposes of this section, there is a **movement of at least 1%** in a person's holding if the percentage worked out using the following formula increases or decreases by 1 or more percentage points from the percentage they last disclosed under this Part in relation to the company, scheme or fund:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes in company, scheme or fund}} \times 100$$

where:

person's and associates' votes is the total number of votes attached to all the voting shares in the company, interests in the scheme or interests in the fund (if any) that the person or an associate has a relevant interest in.

¹³⁰ The conditional exemption provided by [CO 13/524](#) is:

A bidder under a takeover bid and each of its associates is exempt from subsection 671B(1) of the Act to the extent that that subsection would otherwise require:

- (a) the bidder to give the name and address of a person who has accepted an offer made under the bid and who, as at the time the information referred to in subsection 671B(3) is given, remains a registered holder of the securities to which the offer relates; or
- (b) the information referred to in subsection 671B(3) of the Act relating to acceptances of offers under the takeover bid to be accompanied by copies of the bidder's statement, the takeover offer document or any acceptance forms.

The exemption in paragraph (a) does not apply to the extent the bidder is required to name the person other than merely because the person has accepted the offer under the bid.

Condition

The bidder must give the following information to the target by no later than the next business day after receiving a request in writing from the target:

- (a) the name and address of each person who has accepted the offer under the bid and who, as at the time the information is given, remains a registered holder of the securities to which the offer relates; and
- (b) for each such person, the number of securities held by the person in respect of which the bidder has a relevant interest because of the person's acceptance of the offer under the bid.

total votes in company, scheme or fund is the total number of votes attached to all voting shares in the company, interests in the scheme or interests in the fund.

Note: Subsection (7) expands the normal concept of relevant interest to take account of market traded options and conditional agreements.

Information that must be given

- (3) The information to be given is:
- (a) the person's name and address; and
 - (b) details of their relevant interest in:
 - (i) voting shares in the company; or
 - (ii) interests in the scheme; or
 - (iii) interests in the fund; and
 - (c) details of any relevant agreement through which they would have a relevant interest in:
 - (i) voting shares in the company; or
 - (ii) interests in the scheme; or
 - (iii) interests in the fund; and
 - (d) the name of each associate who has a relevant interest in voting shares in the company, interests in the scheme or interests in the fund, together with details of:
 - (i) the nature of their association with the associate; and
 - (ii) the relevant interest of the associate; and
 - (iii) any relevant agreement through which the associate has the relevant interest; and
 - (e) if the information is being given because of a movement in their holding—the size and date of that movement; and
 - (f) if the information is being given because a person has ceased to be an associate—the name of the person; and
 - (g) any other particulars that are prescribed.

Note: Subsection (7) expands the normal concept of relevant interest to take account of market traded options and conditional agreements.

*Information that need not be given*¹³¹

- (3A) Where a relevant interest in voting shares in the company or interests in the scheme arises, changes or ceases because of a securities lending arrangement, the consideration paid in relation to the relevant interest does not need to be given.

¹³¹ [CO 11/272](#) modifying Chapter 6C

Information to be in prescribed form and accompanied by certain documents

- (4) The information must be given in the prescribed form and must be accompanied by:
- (a) a copy of any document setting out the terms of any relevant agreement that:
 - (i) contributed to the situation giving rise to the person needing to provide the information; and
 - (ii) is in writing and readily available to the person; and
 - (b) a statement by the person giving full and accurate details of any contract, scheme or arrangement that:
 - (i) contributed to the situation giving rise to the person needing to provide the information; and
 - (ii) is not both in writing and readily available to the person.

If the person is required to give a copy of a contract, scheme or arrangement, the copy must be endorsed with a statement that the copy is a true copy.

*Information that need not be accompanied by certain securities lending agreements*¹³²

- (4A) Where a securities lending arrangement contributed to the situation giving rise to the person needing to provide the information, the information need not be accompanied by a copy of any master securities lending agreement, provided the information is accompanied by:
- (a) a statement by the person giving full and accurate details of the following matters in relation to the securities lending arrangement:
 - (i) the type of agreement;
 - (ii) the parties to the agreement;
 - (iii) the circumstances in which the parties can exercise the voting rights attached to the securities;
 - (iv) the date the securities were or are expected to be delivered by the lender to the borrower or the entity nominated by the borrower;
 - (v) the scheduled date (if any) the securities (or equivalent securities) are expected to be delivered by

¹³² [CO 11/272](#) modifying Chapter 6C

the borrower to the lender or to an entity nominated by the lender;

(vi) whether the borrower has a right to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender earlier than the scheduled date (if any) and, if so, the circumstances in which this right can be exercised;

(vii) whether the lender has a right to require the borrower to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender earlier than the scheduled date (if any) and, if so, the circumstances in which this right can be exercised;

(viii) the circumstances (if any) under which the borrower is not required to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender on settlement; and

(b) a statement that the person will, if requested by the company or responsible entity to whom the prescribed form must be given or ASIC, give a copy of the agreement to the company, responsible entity or ASIC.

If the person is requested to give a copy of the agreement, the copy must be given within 2 business days after receiving the request and the copy must be endorsed with a statement that the copy is a true copy.

(4B) In subsections (3A), (4A) and this subsection:

custodial or depository service has the meaning given by subsection 766E(1).

master securities lending agreement means:

(a) an Australian Master Securities Lending Agreement as published by the Australian Securities Lending Association; or

(b) a Global Master Securities Lending Agreement as published by the International Securities Lending Association; or

(c) a written agreement that is on substantially the same terms as an agreement mentioned in paragraph (a) or (b); or

(d) a written agreement commonly known as a prime broking agreement or prime brokerage agreement between a service provider and a wholesale client under which the provider agrees to provide a package of at least the following services to the client:

(i) dealing in a financial product to the extent the dealing is acquiring or disposing of the financial product, or arranging for another person to acquire or dispose of the financial product;

conisante consulting

- (ii) services that enable or facilitate clients to meet their obligations to other persons that arise from entering into transactions with those other persons in connection with the acquisitions and disposals mentioned in subparagraph (i);
- (iii) custodial or depository services;
- (iv) services in relation to a securities lending arrangement;
- (v) consolidated reporting and other operational support services.

securities lending arrangement has the same meaning as in paragraphs 608(8A)(a) and (b).

service provider has the same meaning as in subsection 609(10C).

wholesale client has the meaning given by section 761G.¹³³

- (5) The information does not need to be accompanied by the documents referred to in subsection (4) if the transaction that gives rise to the person needing to provide the information takes place on a prescribed financial market.

Deadline for giving information

- (6) The person must give the information:
 - (a) within 2 business days after they become aware of the information; or
 - (b) by 9.30 am on the next trading day of the relevant financial market after they become aware of the information if:
 - (i) a takeover bid is made for voting shares in the company or voting interests in the scheme; and
 - (ii) the person becomes aware of the information during the bid period.

~~*Relevant interests—exchange traded options and conditional agreements*~~

- ~~(7) For the purposes of this section, a person has a relevant interest in securities if the person would have a relevant interest in the~~

¹³³ [CO 11/272](#) modifying Chapter 6C

~~securities but for subsection 609(6) (market traded options) or 609(7) (conditional agreements).~~¹³⁴

Relevant interests not excluded¹³⁵

- (7) For the purposes of this section a person has a relevant interest in securities if the person would have a relevant interest in the securities but for:
- (a) subsection 609(6) (market traded options);
 - (b) subsection 609(7) (conditional agreements); or
 - (c) subsection 609(11) (company that issues restricted securities).

ETFs¹³⁶

- (7A) If a member of a registered scheme that has an acquisition and withdrawal facility does not have a relevant interest in securities that form part of scheme property because of subsection 609(19A) (as affected by section 671AA), then for the purposes of this section and the definition of **substantial holding** in section 9, the member is taken to have a relevant interest in the securities that would be transferred to the member if:
- (a) the member made a withdrawal request under the acquisition and withdrawal facility for all their interests in the scheme, other than any interests in relation to which the member has a relevant interest in securities that form part of scheme property because of subsection 609(19B); and
Note: Subsection 609(19B) may give a member a relevant interest in securities that form part of scheme property if the member has made a withdrawal request in relation to some or all of their interests in the scheme.
 - (b) the numbers and classes of securities transferred to the member under the facility for each interest in the scheme were the same as the numbers and classes of securities most recently disclosed to the member by the responsible entity in relation to a withdrawal request for an interest under the facility.

¹³⁴ [CO 13/520](#) modifying Chapters 6, 6A and 6C

¹³⁵ [CO 13/520](#) modifying Chapters 6, 6A and 6C

¹³⁶ [CO 13/721](#) modifying Chapter 6C

conisante consulting

(7B) In subsection (7A), *acquisition and withdrawal facility* has the same meaning as in subsection 609(19E).¹³⁷

Fault-based offence

- (8) A person commits an offence if the person contravenes subsection (1).

Strict liability offence

- (9) A person commits an offence of strict liability if the person contravenes subsection (1).

671C Civil liability

- (1) A person who contravenes section 671B is liable to compensate a person for any loss or damage the person suffers because of the contravention.
- (2) It is a defence in proceedings brought under this section if the person who contravenes section 671B proves that they contravened that section:
- (a) because of inadvertence or mistake; or
 - (b) because they were not aware of a relevant fact or occurrence.
- In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.
- (3) If 2 or more persons each contravene section 671B because of the same act or omission, their liability under this section for the contravention is joint and individual.

¹³⁷ [CO 13/721](#) modifying Chapter 6C

Part 6C.2—Tracing beneficial ownership of shares

672A Disclosure notices

- (1) ASIC, a listed company, the responsible entity for a listed registered scheme or the operator of a listed notified foreign passport fund may direct:
 - (a) a member of the company, scheme or fund; or
 - (b) a person named in a previous disclosure under section 672B as having a relevant interest in, or having given instructions about, voting shares in the company, interests in the scheme or interests in the fund;to make the disclosure required by section 672B.
- (2) ASIC must exercise its powers under this section if requested to do so by a member of the company, scheme or fund unless it considers that it would be unreasonable to do so in all the circumstances.

672B Disclosure by member of relevant interests and instructions

- (1) A person given a direction under section 672A must disclose to the person giving the direction:
 - (a) full details of their own relevant interest in the shares, interests in the scheme or interests in the fund and of the circumstances that give rise to that interest; and
 - (b) the name and address of each other person who has a relevant interest in any of the shares or interests together with full details of:
 - (i) the nature and extent of the interest; and
 - (ii) the circumstances that give rise to the other person's interest; and
 - (c) the name and address of each person who has given the person instructions about:
 - (i) the acquisition or disposal of the shares or interests; or
 - (ii) the exercise of any voting or other rights attached to the shares or interests; or
 - (iii) any other matter relating to the shares or interests; together with full details of those instructions (including the date or dates on which they were given).

(1AA) If a member of a registered scheme does not have a relevant interest in securities that form part of scheme property because of subsection 609(19A) (as affected by section 671AA), then for the

purposes of this section and section 672DA, the member is taken to have a relevant interest in securities that the member has a relevant interest in for the purposes of section 671B because of subsection 671B(7A).¹³⁸

- (1A) However, a matter referred to in paragraph (1)(b) or (c) need only be disclosed to the extent to which it is known to the person required to make the disclosure.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

- (1B) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (2) The disclosure must be made within 2 business days after:
- (a) the person is given the direction; or
 - (b) if the person applies for an exemption under section 673 from the obligation to make the disclosure and ASIC refuses to grant the exemption—ASIC notifies the person of its decision on the application; or
 - (c) if the direction is given by a listed company, the responsible entity of a listed registered scheme or the operator of a listed notified foreign passport fund—the company, responsible entity or operator pays any fee payable under the regulations made for the purposes of section 672D.
- (3) The person does not have to comply with a direction given by the company, responsible entity or operator if the person proves that the giving of the direction is vexatious.

672C ASIC may pass information on to person who made request

If ASIC receives information in response to a direction under section 672A about shares in a company, interests in a listed registered scheme or interests in a listed notified foreign passport fund, ASIC:

- (a) may pass the information on to the company, the responsible entity for the scheme or the operator of the fund; and
- (b) if ASIC gave the direction in response to a request under subsection 672A(2)—must pass the information on to the person who made the request unless ASIC considers it would be unreasonable in all the circumstances to do so.

¹³⁸ [CO 13/721](#) modifying Chapter 6C

672D Fee for complying with a direction given by a company, scheme or fund under this Part

- (1) The regulations may prescribe fees that listed companies, responsible entities of listed registered schemes and operators of listed notified foreign passport funds are to pay to persons for complying with directions given under this Part.
- (2) A person is liable to repay a fee paid to the person for complying with a direction under section 672A if the person does not comply with the direction on time even if the person does so later. The fee may be recovered as a debt due to the company, responsible entity or operator that paid it to the person.

672DA Register of information about relevant interests in listed company, listed registered scheme or listed notified foreign passport fund

- (1) A listed company, the responsible entity for a listed registered scheme or the operator of a listed notified foreign passport fund, must keep a register of the following information that it receives under this Part on or after 1 January 2005 (whether the information is received pursuant to a direction the company, the responsible entity or the operator itself gives under section 672A or is received from ASIC under section 672C):
 - (a) details of the nature and extent of a person's relevant interest in shares in the company, interests in the scheme or interests in the fund;
 - (b) details of the circumstances that give rise to a person's relevant interest in shares in the company, interests in the scheme or interests in the fund;
 - (c) the name and address of a person who has a relevant interest in shares in the company, interests in the scheme or interests in the fund;
 - (d) details of instructions that a person has given about:
 - (i) the acquisition or disposal of shares in the company, interests in the scheme or interests in the fund; or
 - (ii) the exercise of any voting or other rights attached to shares in the company, interests in the scheme or interests in the fund; or
 - (iii) any other matter relating to shares in the company, interests in the scheme or interests in the fund;
 - (e) the name and address of a person who has given instructions of the kind referred to in paragraph (d).

The register must be kept in accordance with this section.

- (2) A register kept under this section by a listed company must be kept at:

conisante consulting

- (a) the company's registered office; or
 - (b) the company's principal place of business in this jurisdiction; or
 - (c) a place in this jurisdiction (whether or not an office of the company) where the work involved in maintaining the register is done; or
 - (d) another place in this jurisdiction approved by ASIC.
- (3) A register kept under this section by the responsible entity of a listed registered scheme must be kept at:
- (a) the responsible entity's registered office; or
 - (b) the responsible entity's principal place of business in this jurisdiction; or
 - (c) a place in this jurisdiction (whether or not an office of the responsible entity) where the work involved in maintaining the register is done; or
 - (d) another place in this jurisdiction approved by ASIC.
- (3A) A register kept under this section by the operator of a listed notified foreign passport fund must be kept at:
- (a) the operator's registered office; or
 - (b) the operator's principal place of business in this jurisdiction; or
 - (c) a place in this jurisdiction (whether or not an office of the operator) where the work involved in maintaining the register is done; or
 - (d) another place in this jurisdiction approved by ASIC.
- (4) The company, responsible entity or operator must lodge with ASIC a notice of the address at which the register is kept within 7 days after the register is:
- (a) established at a place that:
 - (i) is not the registered office of the company, responsible entity or operator; and
 - (ii) is not at the principal place of business of the company, responsible entity or operator in this jurisdiction; or
 - (b) moved from one place to another.

Notice is not required for moving the register between the registered office and the principal place of business in this jurisdiction.

Note: The obligation to notify ASIC under this subsection is a continuing obligation and the company, responsible entity or operator is guilty of an offence for each day, after the 7 day period, until ASIC is notified (see section 4K of the *Crimes Act 1914*).

conisante consulting

- (5) An offence based on subsection (2), (3), (3A) or (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (6) The register must either contain:
- (a) the name of each holder of shares in the company, interests in the scheme or interests in the fund to whom the information relates; and
 - (b) against the name of each such holder:
 - (i) the name and address of each other person (if any) who, according to information the company, responsible entity or operator has received under this Part on or after 1 January 2005, has a relevant interest in any of the shares or interests (together with details of the relevant interest and of the circumstances because of which the other person has the relevant interest); and
 - (ii) the name and address of each person who, according to information received by the company, responsible entity or operator under this Part on or after 1 January 2005, has given relevant instructions in relation to any of the shares or interests (together with details of those relevant instructions); and
 - (c) in relation to each item of information entered in the register, the date on which the item was entered in the register; or be in such other form as ASIC approves in writing.
- (7) The register must be open for inspection:
- (a) by any member of the company, scheme or fund—without charge; and
 - (b) by any other person:
 - (i) if the company, responsible entity or operator requires the payment of a fee for the inspection—on payment of the fee; or
 - (ii) if the company, responsible entity or operator does not require the payment of a fee for the inspection—without charge.

The amount of the fee required by the company, responsible entity or operator under subparagraph (b)(i) must not exceed the amount prescribed by the regulations for the purposes of this subsection.

- (8) A person may request the company, responsible entity or operator to give to the person a copy of the register (or any part of the register) and, if such a request is made, the company, responsible entity or operator must give the person the copy:
- (a) if the company, responsible entity or operator requires payment of a fee for the copy:

conisante consulting

- (i) before the end of 21 days after the day on which the payment of the fee is received by the company, responsible entity or operator; or
 - (ii) within such longer period as ASIC approves in writing; or
- (b) if the company, responsible entity or operator does not require payment of a fee for the copy:
 - (i) before the end of 21 days after the day on which the request is made; or
 - (ii) within such longer period as ASIC approves in writing.

The amount of the fee required by the company, responsible entity or operator under paragraph (a) must not exceed the amount prescribed by the regulations for the purposes of this subsection.

Note: The obligation to give the copy under this subsection is a continuing obligation and the company, responsible entity or operator is guilty of an offence for each day, after the period referred to in paragraph (a) or (b), until the copy is given (see section 4K of the *Crimes Act 1914*).

- (9) The information that subsection (6) requires to be entered in the register must be entered in the register by the company, responsible entity or operator before the end of 2 business days after the day on which the company, responsible entity or operator receives the information.

Note: The obligation to enter the details in the register under this subsection is a continuing obligation and the company, responsible entity or operator is guilty of an offence for each day, after the 2 business day period, until the details are entered in the register (see section 4K of the *Crimes Act 1914*).

672E No notice of rights

A company, responsible entity or operator is not, because of anything done under this Part:

- (a) taken for any purpose to have notice of; or
- (b) put on inquiry as to;

a person's right in relation to a share in the company, an interest in the listed registered scheme or an interest in the listed notified foreign passport fund.

672F Civil liability

- (1) A person who contravenes section 672B is liable to compensate a person for any loss or damage the person suffers because of the contravention.
- (2) It is a defence in proceedings brought under this section if the person who contravenes section 672B proves that they contravened that section:

conisante consulting

- (a) because of inadvertence or mistake; or
- (b) because they were not aware of a relevant fact or occurrence.

In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.

- (3) If 2 or more persons each contravene section 672B because of the same act or omission, their liability under this section for the contravention is joint and individual.

Part 6C.3—ASIC powers

673 ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) In deciding whether to give the exemption or declaration, ASIC must consider the purposes of Chapter 6 set out in section 602.
- (3) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) For the purposes of this section, the ***provisions of this Chapter*** include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.