



# Corporations Act 2001

## Act No. 50 of 2001 as amended

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taking into account amendments up to Act No. 118 of 2012

**Volume 3** includes: Table of Contents  
Chapters 5C–6D (ss. 601EA – 742)

The text of any of those amendments not in force  
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be  
affected by application provisions that are set out in the Notes section



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## **Chapter 5C—Managed investment schemes**

### **Part 5C.1—Registration of managed investment schemes**

#### **601EA Applying for registration**

- (1) To register a managed investment scheme, a person must lodge an application with ASIC.
- (2) The application must state:
  - (a) the name, and the address of the registered office, of the proposed responsible entity; and
  - (b) the name and address of a person who has consented to be the auditor of the compliance plan.
- (3) The applicant must have the consent referred to in paragraph (2)(b) when the application is lodged. After the scheme is registered, the applicant must give the consent to the responsible entity. The responsible entity must keep the consent.
- (4) The following must be lodged with the application:
  - (a) a copy of the scheme's constitution;
  - (b) a copy of the scheme's compliance plan;
  - (c) a statement signed by the directors of the proposed responsible entity that:
    - (i) the scheme's constitution complies with sections 601GA and 601GB; and
    - (ii) the scheme's compliance plan complies with section 601HA.

Note: Section 601HC requires that the copy of the compliance plan be signed by the directors of the responsible entity.

#### **601EB Registration of managed investment scheme**

- (1) ASIC must register the scheme within 14 days of lodgment of the application, unless it appears to ASIC that:
  - (c) the application does not comply with section 601EA; or

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- (d) the proposed responsible entity does not meet the requirements of section 601FA; or
  - (e) the scheme's constitution does not meet the requirements of sections 601GA and 601GB; or
  - (f) the scheme's compliance plan does not meet the requirements of section 601HA; or
  - (g) the copy of the compliance plan lodged with the application is not signed as required by section 601HC; or
  - (h) arrangements are not in place that will satisfy the requirements of section 601HG in relation to audit of compliance with the plan.
- (2) If ASIC registers the scheme, ASIC must give it an ARSN.
- (3) ASIC must keep a record of the registration of the scheme.
- (4) For the purpose of determining whether subsection (1) is satisfied in relation to the scheme:
- (a) references in Parts 5C.3, 5C.4 and 5C.5 to a registered scheme are taken to include a reference to the scheme; and
  - (b) references in those Parts to the responsible entity of a registered scheme are taken to include a reference to the proposed responsible entity of the scheme.

**601EC All documents etc. lodged with ASIC to bear ARSN or ABN**

After a managed investment scheme is registered, all documents relating to the scheme that are lodged with ASIC must set out:

- (a) the scheme's ARSN; or
- (b) if the last 9 digits of the scheme's ARSN are the same, and in the same order, as the last 9 digits of its ABN—the scheme's ABN.

Note: In any case where the scheme's ARSN would be used, the scheme's ABN may be used instead if section 1344 is satisfied.

**601ED When a managed investment scheme must be registered**

- (1) Subject to subsection (2), a managed investment scheme must be registered under section 601EB if:
- (a) it has more than 20 members; or

- (b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or
  - (c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.
- (2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.
- (3) ASIC may, in writing, determine that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20. ASIC must give written notice of the determination to the operator of each of the schemes.
- (4) For the purpose of this section, when working out how many members a scheme has:
- (a) joint holders of an interest in the scheme count as a single member; and
  - (b) an interest in the scheme held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if:
    - (i) the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate; or
    - (ii) the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.
- (5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.
- (6) For the purpose of subsection (5), a person is not operating a scheme merely because:
- (a) they are acting as an agent or employee of another person; or
  - (b) they are taking steps to wind up the scheme or remedy a defect that led to the scheme being deregistered.
- (7) A person who would otherwise contravene subsection (5) because an interest in a scheme is held in trust for 2 or more beneficiaries (see paragraph (4)(b)) does not contravene that subsection if they
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prove that they did not know, and had no reason to suspect, that the interest was held in that way.

**601EE Unregistered schemes may be wound up**

- (1) If a person operates a managed investment scheme in contravention of subsection 601ED(5), the following may apply to the Court to have the scheme wound up:
  - (a) ASIC;
  - (b) the person operating the scheme;
  - (c) a member of the scheme.
- (2) The Court may make any orders it considers appropriate for the winding up of the scheme.

## **Part 5C.2—The responsible entity**

### **Division 1—Responsibilities and powers**

#### **601FA Responsible entity to be public company and hold Australian financial services licence**

The responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme.

#### **601FB Responsible entity to operate scheme**

(1) The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and this Act.

(2) The responsible entity has power to appoint an agent, or otherwise engage a person, to do anything that it is authorised to do in connection with the scheme. For the purpose of determining whether:

(a) there is a liability to the members; or

(b) the responsible entity has properly performed its duties for the purposes of subsection 601GA(2);

the responsible entity is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if they were acting fraudulently or outside the scope of their authority or engagement.

Note: A scheme's constitution may provide for the responsible entity to be indemnified for liabilities—see subsection 601GA(2).

(3) An agent appointed, or a person otherwise engaged, by:

(a) the agent or person referred to in subsection (2); or

(b) a person who is taken under this subsection to be an agent of the responsible entity;

to do anything that the responsible entity is authorised to do in connection with the scheme is taken to be an agent appointed by the responsible entity to do that thing for the purposes of subsection (2).

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- (4) If:
- (a) an agent holds scheme property on behalf of the responsible entity; and
  - (b) the agent is liable to indemnify the responsible entity against any loss or damage that:
    - (i) the responsible entity suffers as a result of a wrongful or negligent act or omission of the agent; and
    - (ii) relates to a failure by the responsible entity to perform its duties in relation to the scheme;
- any amount recovered under the indemnity forms part of the scheme property.

**601FC Duties of responsible entity**

- (1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
- (a) act honestly; and
  - (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
  - (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
  - (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
  - (e) not make use of information acquired through being the responsible entity in order to:
    - (i) gain an improper advantage for itself or another person; or
    - (ii) cause detriment to the members of the scheme; and
  - (f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and
  - (g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and
  - (h) comply with the scheme's compliance plan; and
  - (i) ensure that scheme property is:
    - (i) clearly identified as scheme property; and

- (ii) held separately from property of the responsible entity and property of any other scheme; and
  - (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
  - (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and
  - (l) report to ASIC any breach of this Act that:
    - (i) relates to the scheme; and
    - (ii) has had, or is likely to have, a materially adverse effect on the interests of members;as soon as practicable after it becomes aware of the breach; and
  - (m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.
- (2) The responsible entity holds scheme property on trust for scheme members.
- Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.
- (3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.
- (5) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.
- Note 1: Section 79 defines *involved*.
- Note 2: Subsection (5) is a civil penalty provision (see section 1317E).
- (6) A person must not intentionally or recklessly be involved in a responsible entity's contravention of subsection (1).

### **601FD Duties of officers of responsible entity**

- (1) An officer of the responsible entity of a registered scheme must:
  - (a) act honestly; and

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- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
  - (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
  - (d) not make use of information acquired through being an officer of the responsible entity in order to:
    - (i) gain an improper advantage for the officer or another person; or
    - (ii) cause detriment to the members of the scheme; and
  - (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
  - (f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:
    - (i) this Act; and
    - (ii) any conditions imposed on the responsible entity's Australian financial services licence; and
    - (iii) the scheme's constitution; and
    - (iv) the scheme's compliance plan.
- (2) A duty of an officer of the responsible entity under subsection (1) overrides any conflicting duty the officer has under Part 2D.1.
- (3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.
- Note 1: Section 79 defines *involved*.
- Note 2: Subsection (3) is a civil penalty provision (see section 1317E).
- (4) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

**601FE Duties of employees of responsible entity**

- (1) An employee of the responsible entity of a registered scheme must not:
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- (a) make use of information acquired through being an employee of the responsible entity in order to:
    - (i) gain an improper advantage for the employee or another person; or
    - (ii) cause detriment to members of the scheme; or
  - (b) make improper use of their position as an employee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.
- (2) A duty of an employee of the responsible entity under subsection (1) overrides any conflicting duty the employee has under Part 2D.1.
- (3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.
- Note 1: Section 79 defines *involved*.
- Note 2: Subsection (3) is a civil penalty provision (see section 1317E).
- (4) A person must not intentionally contravene, or be involved in a contravention of, subsection (1).

#### **601FF Surveillance checks by ASIC**

- (1) ASIC may, from time to time, check whether the responsible entity of a registered scheme is complying with the scheme's constitution and compliance plan and with this Act.
- Note: For this purpose ASIC may exercise the powers set out in Division 3 of Part 3 of the ASIC Act.
- (2) The responsible entity and its officers must take all reasonable steps to assist ASIC in carrying out a check under subsection (1).
- (3) A person must not intentionally or recklessly fail to comply with subsection (2).

#### **601FG Acquisition of interest in scheme by responsible entity**

- (1) The responsible entity of a registered scheme may acquire and hold an interest in the scheme, but it must only do so:
- (a) for not less than the consideration that would be payable if the interest were acquired by another person; and

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- (b) subject to terms and conditions that would not disadvantage other members.

Note: If the responsible entity holds an interest in the scheme, it does so subject to section 253E (certain members cannot vote or be counted).

- (2) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: Subsection (2) is a civil penalty provision (see section 1317E).

- (3) A person must not intentionally be involved in a responsible entity's contravention of subsection (1).

**601FH Liquidator etc. of responsible entity entitled to exercise indemnity rights**

If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:

- (a) a provision of the scheme's constitution, or of another instrument, is void against the liquidator, or the administrator of the company or the deed, if it purports to deny the company a right to be indemnified out of the scheme property that the company would have had if it were not being wound up, were not under administration, or had not executed a deed of company arrangement; and
- (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.

## **Division 2—Changing the responsible entity**

### **601FJ Changes only take effect when ASIC alters record of registration**

- (1) Despite anything in this Division, the company named in ASIC's record of registration as the responsible entity or temporary responsible entity of a registered scheme remains the scheme's responsible entity until the record is altered to name another company as the scheme's responsible entity or temporary responsible entity.
- (2) A purported change of the scheme's responsible entity is ineffective unless it is in accordance with this Division.

### **601FK Requirements of section 601FA must be met**

A company cannot be chosen or appointed as the responsible entity or temporary responsible entity of a registered scheme unless it meets the requirements of section 601FA.

### **601FL Retirement of responsible entity**

- (1) If the responsible entity of a registered scheme wants to retire, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity. The resolution must be an extraordinary resolution if the scheme is not listed.
- (2) If the members choose a company to be the new responsible entity and that company has consented, in writing, to becoming the scheme's responsible entity:
  - (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
  - (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the members to be the new responsible entity may lodge that notice; and

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- (c) ASIC must comply with the notice when it is lodged.
- (3) If the members do not choose a company to be the new responsible entity, or the company they choose does not consent to becoming the scheme's responsible entity, the current responsible entity may apply to the Court for appointment of a temporary responsible entity under section 601FP.
- (4) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

**601FM Removal of responsible entity by members**

- (1) If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity. The resolutions must be extraordinary resolutions if the scheme is not listed.
- (2) If the members vote to remove the responsible entity and, at the same meeting, choose a company to be the new responsible entity that consents, in writing, to becoming the scheme's responsible entity:
  - (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
  - (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the members to be the new responsible entity may lodge that notice; and
  - (c) ASIC must comply with the notice when it is lodged.
- (3) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

Note: If the members vote to remove the responsible entity but do not, at the same meeting, choose a company to be the new responsible entity, or the company they choose does not consent to becoming

the scheme's responsible entity, the scheme must be wound up (see section 601NE).

**601FN ASIC or scheme member may apply to Court for appointment of temporary responsible entity**

ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA.

**601FP Appointment of temporary responsible entity by Court**

- (1) On application under section 601FL or 601FN, the Court may, by order, appoint a company as the temporary responsible entity of a registered scheme if the Court is satisfied that the appointment is in the interest of the members.
- (2) The Court may make any further orders that it considers necessary.
- (3) If the application was made by the current responsible entity, it must, as soon as practicable after the Court's order appointing the temporary responsible entity, lodge a notice with ASIC informing ASIC of the appointment made by the Court.
- (4) As soon as practicable after the appointment, ASIC must alter the record of the scheme's registration to name the appointed company as the scheme's temporary responsible entity.

**601FQ Temporary responsible entity to take steps for appointment of new responsible entity**

- (1) The temporary responsible entity of a registered scheme must call a members' meeting for the purpose of the members, by resolution, choosing a company to be the new responsible entity. The resolution must be an extraordinary resolution if the scheme is not listed. The temporary responsible entity must call the meeting as soon as practicable and, in any event, within 3 months of becoming the temporary responsible entity.
- (2) Within that 3 months, the temporary responsible entity may call further members' meetings for the purpose of choosing a company to be the new responsible entity. Before the end of the 3 months, it may apply to the Court for an extension of that period. If the Court

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grants the extension, the temporary responsible entity may, within the extended period, call further members' meetings for the purpose of choosing a company to be the new responsible entity.

- (3) Provided it still meets the requirements in section 601FA, nothing prevents the company that is the temporary responsible entity from being chosen as the new responsible entity.
- (4) If the members choose a company to be the new responsible entity and that company has consented, in writing, to becoming the scheme's responsible entity, the temporary responsible entity must, as soon as practicable, lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity. ASIC must comply with the notice when it is lodged.
- (5) The temporary responsible entity must apply to the Court for an order directing it to wind up the scheme, and the Court may make the order, if:
  - (a) no meeting is called within the 3 months or extended period for the purpose of choosing a new company to be the responsible entity; or
  - (b) the meeting or meetings called within that period for that purpose have not resulted in the members choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

ASIC or a member of the scheme may apply for the order if the temporary responsible entity does not do so.

- (6) The temporary responsible entity must not lodge a notice under subsection (4) unless the consent referred to in that subsection has been given before the notice is lodged.

## **Division 3—Consequences of change of responsible entity**

### **601FR Former responsible entity to hand over books and provide reasonable assistance**

If the responsible entity of a registered scheme changes, the former responsible entity must:

- (a) as soon as practicable give the new responsible entity any books in the former responsible entity's possession or control that this Act requires to be kept in relation to the scheme; and
- (b) give other reasonable assistance to the new responsible entity to facilitate the change of responsible entity.

### **601FS Rights, obligations and liabilities of former responsible entity**

- (1) If the responsible entity of a registered scheme changes, the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity.
- (2) Despite subsection (1), the following rights and liabilities remain rights and liabilities of the former responsible entity:
  - (a) any right of the former responsible entity to be paid fees for the performance of its functions before it ceased to be the responsible entity; and
  - (b) any right of the former responsible entity to be indemnified for expenses it incurred before it ceased to be the responsible entity; and
  - (c) any right, obligation or liability that the former responsible entity had as a member of the scheme; and
  - (d) any liability for which the former responsible entity could not have been indemnified out of the scheme property if it had remained the scheme's responsible entity.

**601FT Effect of change of responsible entity on documents etc. to which former responsible entity is party**

- (1) If the responsible entity of a registered scheme changes, a document:
  - (a) to which the former responsible entity is a party, in which a reference is made to the former responsible entity, or under which the former responsible entity has acquired or incurred a right, obligation or liability, or might have acquired or incurred a right, obligation or liability if it had remained the responsible entity; and
  - (b) that is capable of having effect after the change;  
has effect as if the new responsible entity (and not the former responsible entity) were a party to it, were referred to in it or had or might have acquired or incurred the right, obligation or liability under it.
- (2) Subsection (1) does not apply to a right, obligation or liability that remains a right, obligation or liability of the former responsible entity because of subsection 601FS(2).



## **Part 5C.3—The constitution**

### **601GA Contents of the constitution**

- (1) The constitution of a registered scheme must make adequate provision for:
  - (a) the consideration that is to be paid to acquire an interest in the scheme; and
  - (b) the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property; and
  - (c) the method by which complaints made by members in relation to the scheme are to be dealt with; and
  - (d) winding up the scheme.
- (2) If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:
  - (a) must be specified in the scheme's constitution; and
  - (b) must be available only in relation to the proper performance of those duties;and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.
- (3) If the responsible entity is to have any powers to borrow or raise money for the purposes of the scheme:
  - (a) those powers must be specified in the scheme's constitution; and
  - (b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power.
- (4) If members are to have a right to withdraw from the scheme, the scheme's constitution must:
  - (a) specify the right; and
  - (b) if the right may be exercised while the scheme is liquid (as defined in section 601KA)—set out adequate procedures for making and dealing with withdrawal requests; and

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- (c) if the right may be exercised while the scheme is not liquid (as defined in section 601KA)—provide for the right to be exercised in accordance with Part 5C.6 and set out any other adequate procedures (consistent with that Part) that are to apply to making and dealing with withdrawal requests.

The right to withdraw, and any provisions in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members.

**601GB Constitution must be legally enforceable**

The constitution of a registered scheme must be contained in a document that is legally enforceable as between the members and the responsible entity.

**601GC Changing the constitution**

- (1) The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:
  - (a) by special resolution of the members of the scheme; or
  - (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.
- (2) The responsible entity must lodge with ASIC a copy of the modification or the new constitution. The modification, or repeal and replacement, cannot take effect until the copy has been lodged.
- (3) The responsible entity must lodge with ASIC a consolidated copy of the scheme's constitution if ASIC directs it to do so.
- (4) The responsible entity must send a copy of the scheme's constitution to a member of the scheme within 7 days if the member:
  - (a) asks the responsible entity, in writing, for the copy; and
  - (b) pays any fee (up to the prescribed amount) required by the responsible entity.

## **Part 5C.4—The compliance plan**

### **601HA Contents of the compliance plan**

- (1) The compliance plan of a registered scheme must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with this Act and the scheme's constitution, including the arrangements for:
  - (a) ensuring that all scheme property is clearly identified as scheme property and held separately from property of the responsible entity and property of any other scheme (see paragraph 601FC(1)(i)); and
  - (b) if the scheme is required to have a compliance committee (see section 601JA)—ensuring that the compliance committee functions properly, including adequate arrangements relating to:
    - (i) the membership of the committee; and
    - (ii) how often committee meetings are to be held; and
    - (iii) the committee's reports and recommendations to the responsible entity; and
    - (iv) the committee's access to the scheme's accounting records and to the auditor of the scheme's financial statements; and
    - (v) the committee's access to information that is relevant to the responsible entity's compliance with this Act; and
  - (c) ensuring that the scheme property is valued at regular intervals appropriate to the nature of the property; and
  - (d) ensuring that compliance with the plan is audited as required by section 601HG; and
  - (e) ensuring adequate records of the scheme's operations are kept; and
  - (f) any other matter prescribed by the regulations.
- (2) If:
  - (a) a registration application is made as a result of a resolution passed under subparagraph 1457(1)(a)(i); and
  - (b) the resolution included a direction under subsection 1457(1A);

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the compliance plan lodged with the application must provide for scheme property to be held by a person other than the responsible entity, or a person that is not related to the responsible entity, as the responsible entity's agent.

**601HB Compliance plan may incorporate provisions from another scheme's plan**

- (1) The responsible entity of a registered scheme may lodge with ASIC a compliance plan for the scheme that is expressed to incorporate specified provisions, as in force at a specified time, of a compliance plan of another registered scheme of which it is also the responsible entity.
- (2) The specified provisions, as in force at the specified time, are taken to be included in the plan.

**601HC Directors must sign lodged copy of compliance plan**

The copy of a scheme's compliance plan that is lodged with ASIC must be signed by all the directors of the responsible entity.

**601HD ASIC may require further information about compliance plan**

- (1) ASIC may direct the responsible entity of a registered scheme to give it information about the arrangements contained in the compliance plan. The direction is to be given by notice in writing to the responsible entity.
- (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*.

**601HE Changing the compliance plan**

*Responsible entity's powers*

- (1) The responsible entity of a registered scheme may modify the scheme's compliance plan or repeal it and replace it with a new compliance plan.

*ASIC may require modifications*

- (2) ASIC may direct the responsible entity of a registered scheme to modify the scheme's compliance plan, as set out in the direction, to ensure that the plan is consistent with section 601HA. The direction is to be given by notice in writing to the responsible entity.

*Lodgment of modification or new plan*

- (3) The responsible entity must lodge with ASIC a copy of a modification of the scheme's compliance plan or of a new compliance plan within 14 days after the modification is made or the old plan is repealed. The copy must be signed by all the directors of the responsible entity.

**601HF ASIC may require consolidation of compliance plan to be lodged**

- (1) ASIC may direct the responsible entity of a registered scheme to lodge a consolidated copy of the scheme's compliance plan.
- (2) The consolidation must set out:
  - (a) the plan as modified to the time of lodgment; and
  - (b) if required by ASIC's direction—the full text of provisions taken to be included in the plan by subsection 601HB(2).

**601HG Audit of compliance plan**

- (1) The responsible entity of a registered scheme must ensure that at all times a registered company auditor, an audit firm or an authorised audit company is engaged to audit compliance with the scheme's compliance plan in accordance with this section. This auditor, firm or company is referred to as the ***auditor of the compliance plan***.
- (2) A person is not eligible to act as the individual auditor, lead auditor or review auditor of the compliance plan if the person is:
  - (a) an associate of the responsible entity; or
  - (b) an agent holding scheme property on behalf of the responsible entity or an associate of an agent of that kind; or
  - (c) the auditor of the responsible entity's financial statements.

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- (2A) However:
- (a) the auditor of the compliance plan and the auditor of the responsible entity's financial statements may work for the same firm of auditors or audit company; and
  - (b) the lead auditor or review auditor of the compliance plan (on the one hand) and the lead auditor or review auditor of the responsible entity's financial statements (on the other hand) may work for the same firm of auditors or audit company.
- (3) Within 3 months after the end of a financial year of the scheme, the auditor of the compliance plan must:
- (a) examine the scheme's compliance plan; and
  - (b) carry out:
    - (i) if the scheme has only had one responsible entity during the financial year—an audit of the responsible entity's compliance with the compliance plan during the financial year; or
    - (ii) if the scheme has had more than one responsible entity during the financial year—an audit of each responsible entity's compliance with the compliance plan during that part of the financial year when it was the scheme's responsible entity; and
  - (c) give to the scheme's current responsible entity a report that states whether, in the auditor's opinion:
    - (i) the responsible entity, or each responsible entity, complied with the scheme's compliance plan during the financial year or that part of the financial year when it was the scheme's responsible entity; and
    - (ii) the plan continues to meet the requirements of this Part.

*Contravention by individual auditor*

- (4) An individual auditor conducting an audit of a compliance plan contravenes this subsection if:
- (a) the auditor is aware of circumstances that:
    - (i) the auditor has reasonable grounds to suspect amount to a contravention of this Act; or
    - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (12)); or

- (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
- (b) if subparagraph (a)(i) applies:
  - (i) the contravention is a significant one; or
  - (ii) the contravention is not a significant one and the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
- (c) the auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the auditor becomes aware of those circumstances.

*Contravention by audit company*

- (4A) An audit company conducting an audit of a compliance plan contravenes this subsection if:
  - (a) the lead auditor for the audit is aware of circumstances that:
    - (i) the lead auditor has reasonable grounds to suspect amount to a contravention of this Act; or
    - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (12)); or
    - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
  - (b) if subparagraph (a)(i) applies:
    - (i) the contravention is a significant one; or
    - (ii) the contravention is not a significant one and the lead auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
  - (c) the lead auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the lead auditor becomes aware of those circumstances.

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*Contravention by lead auditor*

- (4B) A person contravenes this subsection if:
- (a) the person is the lead auditor for an audit of a compliance plan; and
  - (b) the person is aware of circumstances that:
    - (i) the person has reasonable grounds to suspect amount to a contravention of this Act; or
    - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (12)); or
    - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
  - (c) if subparagraph (b)(i) applies:
    - (i) the contravention is a significant one; or
    - (ii) the contravention is not a significant one and the person believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
  - (d) the person does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the person becomes aware of those circumstances.
- (5) The auditor of the compliance plan:
- (a) has a right of access at all reasonable times to the books of the scheme; and
  - (b) may require an officer of the responsible entity to give the auditor information and explanations for the purposes of the audit.
- (6) An officer of the responsible entity must:
- (a) allow the auditor of the compliance plan to have access to the books of the scheme; and
  - (b) give the auditor information or an explanation required under subsection (5); and
  - (c) otherwise assist the conduct of the audit.



- (7) The responsible entity must lodge the auditor's report under subsection (3) with ASIC at the same time as the financial statements and reports in respect of the scheme are to be lodged with ASIC (see sections 292 and 321).
- (7A) An offence based on subsection (1), (3), (6) or (7) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (8) The auditor of the compliance plan has qualified privilege in respect of:
- (a) a statement made in a report under subsection (3); or
  - (b) a notification to ASIC under subsection (4).
- (9) This section does not prevent the responsible entity from arranging for the auditor of the compliance plan to carry out audits in addition to those required by this section.

*Significant contraventions*

- (10) In determining for the purposes of this section whether a contravention of this Act is a significant one, have regard to:
- (a) the level of penalty provided for in relation to the contravention; and
  - (b) the effect that the contravention has, or may have, on:
    - (i) the overall financial position of the company, registered scheme or disclosing entity; or
    - (ii) the adequacy of the information available about the overall financial position of the company, registered scheme or disclosing entity; and
  - (c) any other relevant matter.
- (11) Without limiting paragraph (10)(a), a penalty provided for in relation to a contravention of a provision of Part 2M.2 or 2M.3, or section 324DAA, 324DAB or 324DAC, includes a penalty imposed on a director, because of the operation of section 344, for failing to take reasonable steps to comply with, or to secure compliance with, that provision.

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*Person involved in audit*

(12) In this section:

***person involved in the conduct of an audit*** means:

- (a) the auditor; or
- (b) the lead auditor for the audit; or
- (c) the review auditor for the audit; or
- (d) a professional member of the audit team for the audit; or
- (e) any other person involved in the conduct of the audit.

**601HH Removal and resignation of auditors**

*Removal of auditor by responsible entity*

(1) The responsible entity:

- (a) must remove the auditor of the compliance plan if the auditor becomes ineligible under subsection 601HG(2) to act as auditor of the compliance plan; and
- (b) may, with ASIC's consent, remove the auditor of the compliance plan.

*Resignation of auditor*

(2) The auditor of the compliance plan may resign by written notice to the responsible entity if:

- (a) the auditor:
  - (i) applies to ASIC in writing for its consent to the resignation; and
  - (ii) gives the responsible entity written notice of the application at or about the same time as applying to ASIC; and
- (b) ASIC consents to the resignation.

(3) As soon as practicable after receiving the application, ASIC must notify the auditor and the responsible entity whether it consents to the resignation.

- (4) A statement by the auditor in the application or in answer to an inquiry by ASIC relating to the reasons for the application:
- (a) is not admissible in evidence in any civil or criminal proceedings against the auditor (other than proceedings for a contravention of section 1308); and
  - (b) may not be made the ground of a prosecution (other than a prosecution for a contravention of section 1308), action or suit against the auditor.

A certificate by ASIC that the statement was made in the application, or in answer to an inquiry by ASIC, is conclusive evidence that the statement was so made.

- (5) The auditor's resignation takes effect on the later of:
- (a) the day (if any) specified in the notice of resignation; or
  - (b) the day ASIC consents to the resignation; or
  - (c) the day (if any) fixed by ASIC for the purpose.

#### **601HI Action on change of auditor of compliance plan**

If the auditor of the compliance plan of a registered scheme changes, the responsible entity must, as soon as practicable after the change and in writing, ask ASIC to alter the record of the scheme's registration to show the name of the new auditor as the auditor of the scheme's compliance plan. ASIC must comply with the request if the change complies with this Act.

## Part 5C.5—The compliance committee

### 601JA When is a compliance committee required?

- (1) The responsible entity of a registered scheme must establish a compliance committee if less than half of the directors of the responsible entity are external directors.
- (2) A director of the responsible entity is an external director if they:
  - (a) are not, and have not been in the previous 2 years, an employee of the responsible entity or a related body corporate; and
  - (b) are not, and have not been in the previous 2 years, a senior manager of a related body corporate; and
  - (c) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
  - (d) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
  - (e) do not have a material interest in the responsible entity or a related body corporate; and
  - (f) are not a relative of a person who has a material interest in the responsible entity or a related body corporate.
- (3) The responsible entity must establish the compliance committee within 14 days after it is required to do so by subsection (1) or within any longer period that ASIC has agreed to in writing.
- (3A) A person must not intentionally or recklessly fail to comply with subsection (3).
- (4) In agreeing to a longer period under subsection (3), ASIC may impose conditions to be complied with and the responsible entity must comply with them.
- (4A) An offence based on subsection (4) is an offence of strict liability.

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

**601JB Membership of compliance committee**

- (1) A scheme's compliance committee must have at least 3 members, and a majority of them must be external members.
- (2) A member of the compliance committee is an external member if they:
  - (a) are not, and have not been in the previous 2 years, a non-external director, a senior manager or an employee of the responsible entity or a related body corporate; and
  - (b) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
  - (c) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
  - (d) do not have a material interest in the responsible entity or a related body corporate; and
  - (e) are not a relative of a person who has a material interest in the responsible entity or a related body corporate.
- (3) For the purposes of paragraph (2)(a), a person who is a director of a related body corporate, but not of the responsible entity itself, is an external director of the related body corporate if they would have been an external director of the responsible entity under subsection 601JA(2) had they been a director of the responsible entity.
- (4) A person who is, or has been, either:
  - (a) an external director of the responsible entity; or
  - (b) a member of a compliance committee for the scheme or another registered managed investment scheme operated by the responsible entity;is not, merely because of that directorship or membership, taken to be, or to have been, substantially involved in business dealings, or in a professional capacity, with the responsible entity.
- (5) If the membership of the scheme's compliance committee ceases to satisfy subsection (1), the responsible entity must make appointments to the committee to satisfy that subsection within 14

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days or within any longer period that ASIC has agreed to in writing.

- (6) In agreeing to a longer period under subsection (5), ASIC may impose conditions to be complied with and the responsible entity must comply with them.
- (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*.

**601JC Functions of compliance committee**

- (1) The functions of a scheme's compliance committee are:
  - (a) to monitor to what extent the responsible entity complies with the scheme's compliance plan and to report on its findings to the responsible entity; and
  - (b) to report to the responsible entity:
    - (i) any breach of this Act involving the scheme; or
    - (ii) any breach of the provisions included in the scheme's constitution in accordance with section 601GA; of which the committee becomes aware or that it suspects; and
  - (c) to report to ASIC if the committee is of the view that the responsible entity has not taken, or does not propose to take, appropriate action to deal with a matter reported under paragraph (b); and
  - (d) to assess at regular intervals whether the compliance plan is adequate, to report to the responsible entity on the assessment and to make recommendations to the responsible entity about any changes that it considers should be made to the plan.
- (2) In carrying out its functions, the compliance committee may commission independent legal, accounting or other professional advice or assistance, at the reasonable expense of the responsible entity.

**601JD Duties of members**

- (1) A member of a scheme's compliance committee must:
  - (a) act honestly; and

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the member's position; and
  - (c) not make use of information acquired through being a member of the committee in order to:
    - (i) gain an improper advantage for the member or another person; or
    - (ii) cause detriment to the members of the scheme; and
  - (d) not make improper use of their position as a member of the committee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.
- (2) A member of the compliance committee is to take all reasonable steps to assist ASIC in carrying out a check under subsection 601FF(1).
- (3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.
- Note 1: Section 79 defines *involved*.
- Note 2: Subsection (3) is a civil penalty provision (see section 1317E).
- (4) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

**601JE Compliance committee members have qualified privilege in certain cases**

A member of a scheme's compliance committee has qualified privilege in respect of a statement concerning the operation of the scheme made by or on behalf of the committee, or a member of the committee, to the responsible entity or to ASIC.

**601JF When can responsible entity indemnify compliance committee members?**

- (1) A scheme's responsible entity or a related body corporate must not:
- (a) indemnify a person who is or has been a member of the scheme's compliance committee against a liability incurred by the person as a member; or
  - (b) exempt the person from such a liability.

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- (2) A provision of the scheme's constitution or a body corporate's constitution is void in so far as it provides for the responsible entity or a related body corporate to do something that subsection (1) prohibits.
- (3) Subsection (1) does not prevent a person from being indemnified against a liability to another person (other than the responsible entity or a related body corporate) unless the liability arises out of conduct involving a lack of good faith.
- (4) Subsection (1) does not prevent a person from being indemnified against a liability for costs and expenses incurred by them:
  - (a) in defending proceedings, whether civil or criminal, in which judgment is given in favour of them or in which they are acquitted; or
  - (b) in connection with an application, in relation to such proceedings, in which the Court grants relief to them under this Act.
- (5) In this section:

*indemnify* includes indemnify indirectly through one or more interposed entities.

**601JG When can responsible entity pay insurance premiums for compliance committee members?**

- (1) A scheme's responsible entity or a related body corporate must not pay, or agree to pay, a premium in respect of a contract insuring a person who is or has been a member of the scheme's compliance committee against a liability:
  - (a) incurred by the person as a member; and
  - (b) arising out of conduct involving a wilful breach of a duty referred to in section 601JD.
- (2) If subsection (1) is contravened, the contract is void in so far as it insures the person against the liability.
- (3) Subsections (1) and (2) do not apply to a liability for costs and expenses incurred by a person in defending proceedings, whether civil or criminal and whatever their outcome.



- (4) In this section:

*pay* includes pay indirectly through one or more interposed entities.

#### **601JH Proceedings of compliance committee**

- (1) Subject to the requirements of the compliance plan, a scheme's compliance committee may regulate its proceedings as it thinks appropriate.
- (2) The committee must keep:
  - (a) minutes of its meetings; and
  - (b) records of its reports and recommendations.
- (3) A committee meeting may be held using any technology agreed to by all the members.

#### **601JJ Disclosure of interests**

- (1) A member of a scheme's compliance committee must disclose to the committee a direct or indirect pecuniary interest that they have in a matter being considered, or about to be considered, by the committee if their interest could conflict with the proper performance of their duties in relation to the consideration of the matter.
- (2) A disclosure under subsection (1) must occur at the first meeting of the committee after the relevant facts have come to the member's knowledge and must be recorded in the minutes of the meeting.

## Part 5C.6—Members' rights to withdraw from a scheme

### 601KA Members' rights to withdraw

#### *Withdrawal from schemes that are liquid*

- (1) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, at any time while the scheme is liquid (see subsection 601GA(4)).

#### *Withdrawal from schemes that are not liquid*

- (2) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, in accordance with this Part while the scheme is not liquid (see subsection 601GA(4)).

#### *Restrictions on withdrawal from schemes*

- (3) The responsible entity must not allow a member to withdraw from the scheme:
  - (a) if the scheme is liquid—otherwise than in accordance with the scheme's constitution; or
  - (b) if the scheme is not liquid—otherwise than in accordance with the scheme's constitution and sections 601KB to 601KE.

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

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

#### *Liquid schemes*

- (4) A registered scheme is liquid if liquid assets account for at least 80% of the value of scheme property.

#### *Liquid assets*

- (5) The following are liquid assets unless it is proved that the responsible entity cannot reasonably expect to realise them within

the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid:

- (a) money in an account or on deposit with a bank;
  - (b) bank accepted bills;
  - (c) marketable securities (as defined in section 9);
  - (d) property of a prescribed kind.
- (6) Any other property is a liquid asset if the responsible entity reasonably expects that the property can be realised for its market value within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid.

### **601KB Non-liquid schemes—offers**

- (1) The responsible entity of a registered scheme that is not liquid may offer members an opportunity to withdraw, wholly or partly, from the scheme to the extent that particular assets are available and able to be converted to money in time to satisfy withdrawal requests that members may make in response to the offer.
- (2) The withdrawal offer must be in writing and be made:
  - (a) if the constitution specifies procedures for making the offer—in accordance with those procedures; or
  - (b) otherwise—by giving a copy of the offer to all members of the scheme or to all members of a particular class.
- (3) The withdrawal offer must specify:
  - (a) the period during which the offer will remain open (this period must last for at least 21 days after the offer is made); and
  - (b) the assets that will be used to satisfy withdrawal requests; and
  - (c) the amount of money that is expected to be available when those assets are converted to money; and
  - (d) the method for dealing with withdrawal requests if the money available is insufficient to satisfy all requests.

The method specified under paragraph (d) must comply with section 601KD.
- (4) For joint members, a copy of the withdrawal offer need only be given to the joint member named first in the register of members.

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- (5) As soon as practicable after making the withdrawal offer, the responsible entity must lodge a copy of the offer with ASIC.

**601KC Non-liquid schemes—only one withdrawal offer to be open at any time**

Only one withdrawal offer may be open at any time in relation to a particular interest in a registered scheme that is not liquid.

**601KD Non-liquid schemes—how payments are to be made**

The responsible entity of a registered scheme that is not liquid must ensure that withdrawal requests made in response to a withdrawal offer are satisfied within 21 days after the offer closes. No request made under the withdrawal offer may be satisfied while the offer is still open. If an insufficient amount of money is available from the assets specified in the offer to satisfy all requests, the requests are to be satisfied proportionately in accordance with the formula:

$$\text{Amount of money available} \times \frac{\text{Amount member requested to withdraw}}{\text{Total of all amounts members request to withdraw}}$$

**601KE Non-liquid schemes—responsible entity may cancel withdrawal offer**

- (1) The responsible entity of a registered scheme that is not liquid:
- (a) may cancel a withdrawal offer before it closes if the offer contains a material error; or
  - (b) must cancel a withdrawal offer before it closes if it is in the best interests of members to do so.
- (2) The cancellation must be made:
- (a) if the constitution specifies procedures for cancelling the withdrawal offer—in accordance with those procedures; or
  - (b) otherwise—by notice in writing to the members to whom the withdrawal offer was made.
- (3) The responsible entity must lodge written notice of the cancellation with ASIC.

## **Part 5C.7—Related party transactions**

### **601LA Chapter 2E applies with modifications**

Chapter 2E applies to a registered scheme with the modifications set out in sections 601LB to 601LE and as if:

- (a) references to a public company were instead references to the responsible entity of the scheme; and
- (b) references to a benefit being given to or received by a related party of a public company were instead references to a benefit being given to or received by the responsible entity or a related party; and
- (c) references to a resolution of a public company were instead references to a resolution of the members of the scheme; and
- (d) references to a general meeting were instead references to a members' meeting of the scheme; and
- (e) references to members of a public company were instead references to members of the scheme; and
- (f) references to the company's best interests were instead references to the best interests of the scheme's members.

### **601LB Replacement section 207**

Chapter 2E applies as if section 207 were replaced by the following section:

#### **207 Purpose**

The rules in this Chapter, as they apply to a registered scheme, are designed to protect the interests of the scheme's members as a whole, by requiring member approval for giving financial benefits to the responsible entity or its related parties that come out of scheme property or that could endanger those interests.

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**601LC Replacement section 208**

Chapter 2E applies as if section 208 were replaced by the following section:

**208 Need for member approval for financial benefit**

- (1) If all the following conditions are satisfied in relation to a financial benefit:
- (a) the benefit is given by:
    - (i) the responsible entity of a registered scheme; or
    - (ii) an entity that the responsible entity controls; or
    - (iii) an agent of, or person engaged by, the responsible entity
  - (b) the benefit either:
    - (i) is given out of the scheme property; or
    - (ii) could endanger the scheme property
  - (c) the benefit is given to:
    - (i) the person or a related party; or
    - (ii) another person referred to in paragraph (a) or a related party of that person;
- then, for the person referred to in paragraph (a) to give the benefit, either:
- (d) the person referred to in paragraph (a) must:
    - (i) obtain the approval of the scheme's members in the way set out in sections 217 to 227; and
    - (ii) give the benefit within 15 months after the approval; or
  - (e) the giving of the benefit must fall within an exception set out in sections 210 to 216.

Note: Section 228 defines *related party*, section 191 defines *entity*, section 191 defines *control* and section 229 affects the meaning of *giving a financial benefit*.

- (2) If:
- (a) the giving of the benefit is required by a contract; and
  - (b) the making of the contract was approved in accordance with subparagraph (1)(d)(i) as a financial benefit given to the entity or related party; and
  - (c) the contract was made:
    - (i) within 15 months after that approval; or

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- (ii) before that approval, if the contract was conditional on the approval being obtained;  
member approval for the giving of the benefit is taken to have been given and the benefit need not be given within the 15 months.
- (3) Subsection (1) does not prevent the responsible entity from paying itself fees, and exercising rights to an indemnity, as provided for in the scheme's constitution under subsection 601GA(2).

**601LD Omission of sections 213, 214 and 224**

Chapter 2E applies as if sections 213, 214 and 224 were omitted.

Note: Instead of section 224, the rule in section 253E will apply.

**601LE Modification of section 225**

Chapter 2E applies as if subsection 225(1) were amended by omitting "subsection 224(1)" and substituting "section 253E".

## **Part 5C.8—Effect of contraventions (civil liability and voidable contracts)**

### **601MA Civil liability of responsible entity to members**

- (1) A member of a registered scheme who suffers loss or damage because of conduct of the scheme's responsible entity that contravenes a provision of this Chapter may recover the amount of the loss or damage by action against the responsible entity whether or not the responsible entity has been convicted of an offence, or has had a civil penalty order made against it, in respect of the contravention.
- (2) An action under subsection (1) must be begun within 6 years after the cause of action arises.
- (3) This section does not affect any liability that a person has under other provisions of this Act or under other laws.

### **601MB Voidable contracts where subscription offers and invitations contravene this Act**

- (1) If:
  - (a) a managed investment scheme is being operated in contravention of subsection 601ED(5) and a person (the *offeror*) offers an interest in the scheme for subscription, or issues an invitation to subscribe for an interest in the scheme; or
  - (b) a person (the *offeror*) fails to comply with Division 2 of Part 7.9 when offering an interest in a registered scheme for subscription or issuing an invitation to subscribe for an interest in a registered scheme;a contract entered into by a person (other than the offeror) to subscribe for the interest as a result of the person accepting the offer, or of the acceptance of an offer made by the person in response to the invitation, is voidable at the option of that person by notice in writing to the offeror.



- (2) If the person gives a notice under subsection (1), the obligations of the parties to the contract are suspended:
  - (a) during the period of 21 days after the notice is given; and
  - (b) during the period beginning when an application is made under subsection (4) in relation to the notice and ending when the application, and any appeals arising out of it, have been finally determined or otherwise disposed of.
- (3) Subject to subsection (6), the notice takes effect to void the contract:
  - (a) at the end of 21 days after the notice is given; or
  - (b) if, within that 21 days, the offeror applies under subsection (4)—at the end of the period when the obligations of the parties are suspended under paragraph (2)(b).
- (4) Within 21 days after the notice is given, the offeror may apply to the Court for an order declaring the notice to have had no effect.
- (5) The Court may extend the period within which the offeror may apply under subsection (4), even if the notice has taken effect.
- (6) On application under subsection (4), the Court may declare the notice to have had no effect if it is satisfied that, in all the circumstances, it is just and equitable to make the declaration.

## Part 5C.9—Winding up

### 601NA Winding up required by scheme's constitution

The constitution of a registered scheme may provide that the scheme is to be wound up:

- (a) at a specified time; or
- (b) in specified circumstances or on the happening of a specified event;

but a provision of the constitution that purports to provide that the scheme is to be wound up if a particular company ceases to be its responsible entity is of no effect (including for the purposes of paragraph 601NE(1)(a)).

### 601NB Winding up at direction of members

If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme.

### 601NC Winding up if scheme's purpose accomplished or cannot be accomplished

- (1) If the responsible entity of a registered scheme considers that the purpose of the scheme:
  - (a) has been accomplished; or
  - (b) cannot be accomplished;it may, in accordance with this section, take steps to wind up the scheme.
- (2) The responsible entity must give to the members of the scheme and to ASIC a notice in writing:
  - (a) explaining the proposal to wind up the scheme, including explaining how the scheme's purpose has been accomplished or why that purpose cannot be accomplished; and
  - (b) informing the members of their rights to take action under Division 1 of Part 2G.4 for the calling of a members' meeting

to consider the proposed winding up of the scheme and to vote on any extraordinary resolution members propose about the winding up of the scheme; and

- (c) informing the members that the responsible entity is permitted to wind up the scheme unless a meeting is called to consider the proposed winding up of the scheme within 28 days of the responsible entity giving the notice to the members.
- (3) If no meeting is called within that 28 days to consider the proposed winding up, the responsible entity may wind up the scheme.

### **601ND Winding up ordered by Court**

- (1) The Court may, by order, direct the responsible entity of a registered scheme to wind up the scheme if:
  - (a) the Court thinks it is just and equitable to make the order; or
  - (b) within 3 months before the application for the order was made, execution or other process was issued on a judgment, decree or order obtained in a court (whether an Australian court or not) in favour of a creditor of, and against, the responsible entity in its capacity as the scheme's responsible entity and the execution or process has been returned unsatisfied.
- (2) An order based on paragraph (1)(a) may be made on the application of:
  - (a) the responsible entity; or
  - (b) a director of the responsible entity; or
  - (c) a member of the scheme; or
  - (d) ASIC.
- (3) An order based on paragraph (1)(b) may be made on the application of a creditor.

### **601NE The winding up of the scheme**

- (1) The responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2) if:
    - (a) the scheme's constitution provides that the scheme is to be wound up at a specified time, in specified circumstances or
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- on the happening of a specified event and that time is reached, those circumstances occur or that event occurs; or
- (b) the members pass an extraordinary resolution directing the responsible entity to wind up the scheme; or
  - (c) the Court makes an order directing the responsible entity to wind up the scheme; or
  - (d) the members pass a resolution removing the responsible entity but do not, at the same meeting, pass a resolution choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

Note: For the Court's power to order winding up, see subsection 601FQ(5) and section 601ND.

- (2) The responsible entity of a registered scheme may wind up the scheme in accordance with its constitution and any orders under subsection 601NF(2) if the responsible entity is permitted by subsection 601NC(3) to wind up the scheme.
- (3) Interests must not be issued in a registered scheme at a time after the responsible entity has become obliged to ensure the scheme is wound up, or after the scheme has started to be wound up.

**601NF Other orders about winding up**

- (1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).
- (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).
- (3) An order under subsection (1) or (2) may be made on the application of:
  - (a) the responsible entity; or
  - (b) a director of the responsible entity; or
  - (c) a member of the scheme; or
  - (d) ASIC.

**601NG Unclaimed money to be paid to ASIC**

If, on completion of the winding up of a registered scheme, the person who has been winding up the scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the scheme property, the person must, as soon as practicable, pay the money or transfer the property to ASIC to be dealt with under Part 9.7.

## Part 5C.10—Deregistration

### 601PA Deregistration—voluntary

*Responsible entity may apply for deregistration*

- (1) The responsible entity of a registered scheme may lodge an application for deregistration of the scheme with ASIC.
- (2) The responsible entity may only apply if:
  - (a) the scheme:
    - (i) has 20 or less members (calculated in accordance with subsection 601ED(4)) and all the members agree that the scheme should be deregistered; and
    - (ii) is not required to be registered by paragraph 601ED(1)(b) or (c); or
  - (b) because of subsection 601ED(2) (exemption based on Division 2 of Part 7.9 not applying), the scheme is not required to be registered and all the members agree that the scheme should be deregistered; or
  - (c) the scheme is not a managed investment scheme.
- (3) If ASIC is satisfied that the application complies with subsections (1) and (2), it must give notice of the proposed deregistration:
  - (a) on the national database; and
  - (b) in the *Gazette*.When 2 months have passed since the *Gazette* notice, ASIC may deregister the scheme.
- (4) ASIC must give notice of the deregistration to the applicant.

### 601PB Deregistration by ASIC

- (1) ASIC may decide to deregister a registered scheme if:
  - (a) the scheme does not have a responsible entity that meets the requirements of section 601FA; or
  - (b) the scheme does not have a constitution that meets the requirements of sections 601GA and 601GB; or

- (c) the scheme does not have a compliance plan that meets the requirements of section 601HA; or
- (d) the scheme's property is not being:
  - (i) clearly identified as the scheme's property; and
  - (ii) held separately from property of the responsible entity and property of any other scheme;in accordance with the scheme's compliance plan; or
- (e) the following conditions are satisfied:
  - (i) the response to a return of particulars given to the responsible entity of the scheme is at least 6 months late; and
  - (ii) no other documents have been lodged by or on behalf of the scheme in the last 18 months; and
  - (iii) ASIC has no reason to believe that the scheme is being operated; or
- (ea) the scheme's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment; or
- (f) the scheme has been wound up.

*Deregistration procedure*

- (2) If ASIC decides to deregister a scheme under this section, it must give notice of the proposed deregistration:
  - (a) to the scheme's responsible entity; and
  - (b) to any other person who is winding up the scheme; and
  - (c) on the national database; and
  - (d) in the *Gazette*.

If the notice is given under paragraph (1)(a), (b), (c) or (d), the notice must specify the period at the end of which ASIC proposes to deregister the scheme.

- (3) ASIC may deregister the scheme:
  - (a) if paragraph (1)(a), (b), (c) or (d) applies—at the end of the period set out in the *Gazette* notice; or
  - (b) if paragraph (1)(e) or (f) applies—when 2 months have passed since the *Gazette* notice.

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- (4) ASIC does not have to give a person notice under subsection (2) if ASIC does not have the necessary information about the person's address.
- (5) ASIC must give notice of the deregistration to everyone who was notified of the proposed deregistration under paragraph (2)(a) or (b).

**601PC Reinstatement**

- (1) ASIC may reinstate the registration of a managed investment scheme if ASIC is satisfied that the scheme should not have been deregistered or if the defect that led to the scheme being deregistered has been remedied.
- (2) The Court may make an order that ASIC reinstate the registration of a managed investment scheme if:
  - (a) an application for reinstatement is made to the Court by:
    - (i) a person aggrieved by the deregistration; or
    - (ii) a person who was winding up the scheme; and
  - (b) the Court is satisfied that it is just that the scheme's registration be reinstated.
- (3) The Court may give any directions it thinks just for putting the scheme and other people in the same position, as far as possible, as if the scheme had not been deregistered.

*ASIC to give notice of reinstatement*

- (4) ASIC must give notice of a reinstatement in the *Gazette*. If ASIC exercises its power under subsection (1) in response to an application by a person, ASIC must also give notice of the reinstatement to the applicant.



## **Part 5C.11—Exemptions and modifications**

### **601QA ASIC's power to make exemption and modification orders**

- (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.

Without limiting this, ASIC may declare that this Chapter applies to a person as if section 601HA included a requirement for scheme property to be held by a person other than the responsible entity as the responsible entity's agent.

- (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 11 of Part 11.2 transitionals.

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**601QB Modification by regulations**

The regulations may modify the operation of this Chapter or any other provisions of this Act relating to securities in relation to:

- (a) a managed investment scheme; or
- (b) all managed investment schemes of a specified class.

## **Chapter 5D—Licensed trustee companies**

### **Part 5D.1—Preliminary**

#### **601RAA Definitions**

In this Chapter:

*client*, in relation to a trustee company, has the meaning given by subsection 601RAB(3).

*estate management functions* has the meaning given by subsection 601RAC(2).

*estate that is administered or managed*, in relation to a trustee company, means all or any of the estate of a person (whether living or dead) that is administered or managed by the trustee company in the course of performing estate management functions.

*fees* means fees in the nature of remuneration (including commission).

*law* means a law of the Commonwealth or of a State or Territory, and includes a rule of common law or equity.

*licensed trustee company* means a trustee company that holds an Australian financial services licence covering the provision of one or more traditional trustee company services.

Note: Traditional trustee company services are financial services for the purpose of Chapter 7: see subsection 766A(1A).

*person with a proper interest*, in relation to an estate, has the meaning given by section 601RAD.

*publish*: if the regulations prescribe requirements to be complied with in relation to an obligation in a provision of this Part to publish something, *publish* (in that provision) means publish in accordance with those requirements.

*traditional trustee company services* has the meaning given by subsection 601RAC(1).

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*trustee company* has the meaning given by section 601RAB.

*will* includes a codicil and any other testamentary writing.

**601RAB Meaning of *trustee company* and *client* of trustee company**

- (1) A *trustee company* is a company:
  - (a) that is a corporation to which paragraph 51(xx) of the Constitution applies; and
  - (b) that is prescribed by the regulations as a trustee company for the purpose of this Act.
- (2) For the purpose of paragraph (1)(b), companies may (for example) be prescribed:
  - (a) by setting out a list of companies in the regulations; or
  - (b) by providing a mechanism in the regulations for the determination of a list of companies.
- (2A) Before the Governor-General makes a regulation that includes a company in a list set out for the purposes of paragraph (2)(a), the company must satisfy the Minister of the following:
  - (a) that it is a corporation to which paragraph 51(xx) of the Constitution applies;
  - (b) that its purposes include:
    - (i) providing services of the kind referred to in paragraph 601RAC(1)(c); and
    - (ii) performing functions of a kind referred to in paragraph 601RAC(2)(b) and at least one other estate management function;
  - (c) that it is, and will continue to be, capable of providing the services, and performing the functions, referred to in paragraph (b) of this subsection;
  - (d) that it is a fit and proper person;
  - (e) that an unacceptable control situation (as defined in section 601VAA) does not exist in relation to it in relation to any person;
  - (f) any other matter the Minister specifies by written notice to the company.

Note: Under Division 137 of the *Criminal Code* it may be an offence for a company to provide false or misleading information or documents to the Minister in purported compliance with this requirement.

- (3) A *client* of a trustee company is a person to whom, within the meaning of Chapter 7, a financial service (being a traditional trustee company service) is provided by the trustee company.

Note: Regulations made for the purpose of subsection 766A(1B) may prescribe the person or persons to whom a class of traditional trustee company services is taken to be provided.

**601RAC Meaning of *traditional trustee company services* and *estate management functions***

- (1) The following are *traditional trustee company services*:
- (a) performing estate management functions (see subsection (2));
  - (b) preparing a will, a trust instrument, a power of attorney or an agency arrangement;
  - (c) applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate;
  - (d) establishing and operating common funds;
  - (e) any other services prescribed by the regulations for the purpose of this paragraph.
- (2) The following are *estate management functions* (whether provided alone or jointly with another person or persons):
- (a) acting as a trustee of any kind, or otherwise administering or managing a trust;
  - (b) acting as executor or administrator of a deceased estate;
  - (c) acting as agent, attorney or nominee;
  - (d) acting as receiver, controller or custodian of property;
  - (e) otherwise acting as manager or administrator (including in the capacity as guardian) of the estate of an individual;
  - (f) acting in any other capacity prescribed by the regulations for the purpose of this paragraph.
- (3) Subsections (1) and (2) do not apply to:
- (a) operating a registered scheme; or
  - (b) providing a custodial or depository service (within the meaning of section 766E); or
  - (c) acting as trustee for debenture holders under Chapter 2L; or
  - (d) acting as a receiver or other controller of property of a corporation under Part 5.2; or

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- (e) acting as trustee of a superannuation fund, an approved deposit fund or a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); or
- (f) acting in any other capacity prescribed by the regulations for the purpose of this paragraph.

**601RAD Meaning of *person with a proper interest***

- (1) A ***person with a proper interest***, in relation to an estate, includes (but is not limited to) the following:
  - (a) ASIC;
  - (b) in relation to a charitable trust:
    - (i) the settlor, or one of the settlors, of the trust; or
    - (ii) a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust; or
    - (iii) a Minister of a State or Territory who has responsibilities relating to charitable trusts; or
    - (iv) a person who is named in the instrument establishing the trust as a person who may receive payments on behalf of the trust; or
    - (v) a person who is named in the instrument establishing the trust as a person who must, or may, be consulted by the trustee or trustees before distributing or applying money or other property for the purposes of the trust; or
    - (vi) a person of a class that the trust is intended to benefit;
  - (c) in the case of the estate of a deceased person:
    - (i) if the person died testate—a beneficiary under the person's will; or
    - (ii) if the person died intestate—a person who, under a law of a State or Territory, has, or is entitled to, an interest in the deceased's estate;
  - (d) in the case of any other trust:
    - (i) the settlor, or one of the settlors, of the trust; or
    - (ii) a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust; or
    - (iii) a beneficiary of the trust;

- (e) in relation to an application to a court relating to the estate—  
a person that the court considers, in the circumstances of the  
case, has a proper interest in the estate;
  - (f) a person prescribed by the regulations as having a proper  
interest in the estate;
  - (g) if a person covered by any of the above paragraphs is under a  
legal disability—an agent of the person.
- (2) None of the paragraphs or subparagraphs of subsection (1) limits,  
or is limited by, any of the other paragraphs or subparagraphs of  
that subsection.

### **601RAE Interaction between trustee company provisions and State and Territory laws**

- (1) The *trustee company provisions* are:
- (a) the provisions of this Chapter, and regulations or other  
instruments made for the purposes of this Chapter; and
  - (b) the provisions of Chapter 7, and regulations or other  
instruments made for the purposes of Chapter 7, as they  
apply in relation to financial services that are traditional  
trustee company services.
- (2) Subject to subsections (3) and (4), the trustee company provisions  
are intended to apply to the exclusion of laws of a State or  
Territory of the following kinds:
- (a) laws that authorise or license companies to provide  
traditional trustee company services generally (as opposed to  
laws that authorise or license companies to provide a  
particular traditional trustee company service);
  - (b) laws that regulate the fees that may be charged by companies  
for the provision of traditional trustee company services, and  
laws that require the disclosure of such fees;
  - (c) laws that deal with the provision of accounts by companies in  
relation to traditional trustee company services that they  
provide;
  - (d) laws that deal with the duties of officers or employees of  
companies that provide traditional trustee company services;
  - (e) laws that regulate the voting power that people may hold in  
companies that provide traditional trustee company services,  
or that otherwise impose restrictions on the ownership or

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control of companies that provide traditional trustee company services;

- (f) laws (other than laws referred to in section 601WBC) that deal with what happens to assets and liabilities held by a company, in connection with the provision by the company of traditional trustee company services, if the company ceases to be licensed or authorised to provide such services.
- (3) Subject to subsection (4), the trustee company provisions are not intended to apply to the exclusion of laws of a State or Territory that require a company to have (or to have staff who have) particular qualifications or experience if the company is to provide traditional trustee company services of a particular kind.
- (4) The regulations may provide:
- (a) that the trustee company provisions are intended to apply to the exclusion of prescribed State or Territory laws, or prescribed provisions of State or Territory laws; or
  - (b) that the trustee company provisions are intended not to apply to the exclusion of prescribed State or Territory laws, or prescribed provisions of State or Territory laws.
- (5) The provisions of this Chapter have effect subject to this section.
- Note: For example, section 601SAC (which provides that the powers etc. conferred by or under this Chapter are in addition to other powers etc.) is to be interpreted subject to this section.
- (6) Part 1.1A does not apply in relation to the trustee company provisions.



## **Part 5D.2—Powers etc. of licensed trustee companies**

### **Division 1—General provisions**

#### **601SAA Jurisdiction of courts not affected etc.**

- (1) Any inherent power or jurisdiction of courts in respect of the supervision of the performance of traditional trustee company services is not affected by anything in this Chapter.
- (2) A licensed trustee company that is performing traditional trustee company services of a particular kind is subject in all respects to the same control and to removal or restraint from acting, and generally to the jurisdiction of courts, in the same manner as any other person who performs traditional trustee company services of that kind.

#### **601SAB Regulations may prescribe other powers etc.**

A licensed trustee company also has, in relation to the provision of traditional trustee company services, such other powers, functions, liabilities and obligations, and such privileges and immunities, as are prescribed by the regulations.

#### **601SAC Powers etc. conferred by or under this Chapter are in addition to other powers etc.**

The powers, functions, liabilities and obligations, and the privileges and immunities, conferred or imposed on licensed trustee companies by or under this Chapter are in addition to, and not in derogation of, any powers, functions, liabilities and obligations, and any privileges and immunities, conferred or imposed by any other law:

- (a) on trustee companies; or
- (b) on persons who perform estate management functions or who provide other traditional trustee company services.

## **Division 2—Accounts**

### **601SBA Licensed trustee company not required to file accounts**

- (1) A licensed trustee company, when acting alone in relation to any estate of a deceased person, is not required to file, or file and pass, accounts relating to the estate unless the Court, of its own motion or on application by or on behalf of a person with a proper interest in the estate, so orders.
- (2) If a licensed trustee company is appointed and acts jointly with any other person in relation to any estate of a deceased person, the trustee company and that other person are not required to file, or file and pass, accounts relating to the estate unless:
  - (a) that other person intends to charge fees for acting in relation to the estate; or
  - (b) the Court, of its own motion or on application by or on behalf of a person with a proper interest in the estate, so orders.

### **601SBB Licensed trustee company may be required to provide account in relation to estate**

- (1) On application by a person with a proper interest in an estate that is administered or managed by a licensed trustee company, the trustee company must provide the person with an account of:
  - (a) the assets and liabilities of the estate; and
  - (b) the trustee company's administration or management of the estate; and
  - (c) any investment made from the estate; and
  - (d) any distribution made from the estate; and
  - (e) any other expenditure (including fees and commissions) from the estate.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Failure to comply with this subsection may also lead to the consequences set out in subsection (4) of this section.

- (2) If:
  - (a) a licensed trustee company has provided an account to a person under this section; and

- (b) the person applies for a further account within 3 months from the date on which the person was provided with the previous account;

the trustee company need not provide a further account in response to that application until the expiration of that period of 3 months.

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

- (3) A licensed trustee company may charge a reasonable fee for providing an account under this section.
- (4) If a licensed trustee company fails to provide a proper account under this section, the Court may, on application by the person who sought the account or any other person with a proper interest in the estate, make any order that the Court considers appropriate, including an order requiring the preparation and delivery of proper accounts.

#### **601SBC Court may order audit**

- (1) The Court may, on any application under section 601SBB, in addition to or in substitution for any account to be provided by the licensed trustee company under that section, order that a person named in the order must examine the accounts of the trustee company relating to the estate in respect of which the order is made.
- (2) On the making of any such order, the trustee company must:
- (a) give to the person named in the order a list of all the accounts kept by the company relating to the estate; and
  - (b) produce to the person, at an office of the trustee company at all reasonable times when required, all books in the company's possession relating to the estate; and
  - (c) provide the person with all necessary information and all other necessary facilities for enabling the person to make the examination.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

## **Division 3—Common funds**

### **601SCA Common funds of licensed trustee companies**

- (1) A licensed trustee company may, for the purposes of investment, pool together into a fund or funds money (*estate money*) from 2 or more estates that are administered or managed by the trustee company in the performance of estate management functions.
- (2) A fund into which money is pooled as mentioned in subsection (1) is a *common fund*.

Note: A common fund may also be regulated under Chapter 5C (if the fund constitutes a managed investment scheme) but see also section 601SCAA, which deals with any inconsistencies in regulation between the Chapters.

- (3) A common fund may also include other money.
- (4) This section has effect subject to regulations made for the purpose of section 601SCC.

Note: For example, the regulations may limit the circumstances in which other money may be pooled together with estate money.

### **601SCAA Common funds that are also registered schemes**

If, in relation to a common fund that is also a registered scheme, a provision of this Chapter or a regulation or other instrument made for the purposes of this Chapter is inconsistent with any of the following (a *registered scheme provision*):

- (a) a provision of Chapter 5C or a regulation or other instrument made for the purposes of that Chapter;
- (b) a provision of Part 7.9 of Chapter 7 or a regulation or other instrument made for the purposes of that Part;

the registered scheme provision prevails to the extent of the inconsistency.

### **601SCB Obligations relating to common funds**

- (1) If a licensed trustee company establishes more than one common fund, each must be allocated an appropriate distinguishing number.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) For each common fund, the licensed trustee company must keep accounts showing at all times the current amount for the time being at credit in the fund on account of each estate.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) A licensed trustee company must not put estate money into a common fund if doing so is contrary to an express provision of the conditions subject to which the estate money is held by the trustee company.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

### **601SCC Regulations relating to establishment or operation of common funds**

The regulations may include provisions relating to the establishment or operation of common funds.

### **601SCD Arm's length transactions**

- (1) A licensed trustee company that operates a common fund that is not a registered scheme must not give a financial benefit in relation to the common fund to a related party.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) Subsection (1) does not apply if the financial benefit is given on terms that:
- (a) would be reasonable in the circumstances if the trustee company and the related party were dealing at arm's length; or
  - (b) are less favourable to the related party than the terms referred to in paragraph (a).

- (3) In this section:

*financial benefit* has a meaning that is affected by section 229.

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*related party* has the meaning given by section 228, as if references in that section to a public company were references to a licensed trustee company.

## **Part 5D.3—Regulation of fees charged by licensed trustee companies**

### **Division 1—Disclosure of fees**

#### **601TAA Schedule of fees to be published and available**

A licensed trustee company must ensure that an up-to-date schedule of the fees that it generally charges for the provision of traditional trustee company services:

- (a) is published at all times on a website maintained by or on behalf of the trustee company; and
- (b) is available free of charge at offices of the trustee company during the usual opening hours of those offices.

Note 1: The schedule is of fees generally charged, and does not include fees that are agreed to etc. as mentioned in section 601TBB.

Note 2: Failure to comply with this section is an offence (see subsection 1311(1)).

#### **601TAB Disclosure to clients of changed fees**

- (1) If, while a licensed trustee company continues to provide a particular traditional trustee company service to a client or clients, the trustee company changes the fees that it will charge for the provision of the service, the trustee company must, within 21 days of the change of fees taking effect, comply with paragraph (a) or (b) in relation to the client or each client:
  - (a) if the client has requested to be sent copies of changed fees—send the client a copy of the changed fees in accordance with subsection (2); or
  - (b) in any other case—directly notify the client, in writing, that the changed fees are available on the internet on a specified website maintained by or on behalf of the trustee company.

Note 1: Initial disclosure to a client of the fees that a trustee company will charge for the provision of a trustee company service will generally occur through the provision to the client of a Financial Services Guide under Part 7.7. However, this section is not limited just to situations where there has been an initial disclosure through a Financial Services Guide.

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Note 1A: Other provisions in this Part and in the regulations limit the ability of licensed trustee companies to increase fees.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A copy of changed fees that is sent to a client under paragraph (1)(a) must be:
- (a) an electronic copy, if that is what the client has requested; or
  - (b) a hard copy, in any other case.
- (3) If a client to whom a traditional trustee company service is provided is under a legal disability, the following provisions have effect:
- (a) a copy of changed fees required by paragraph (1)(a), or a notice required by paragraph (1)(b), must instead be given to an agent of the client;
  - (b) a request referred to in paragraph (1)(a) or (2)(a) may instead be made by an agent of the client.



## **Division 2—General provisions about charging fees**

### **601TBA Charging of fees for the provision of traditional trustee company services**

- (1) Subject to this Part, a licensed trustee company may charge fees for the provision of traditional trustee company services.
- (2) If a provision of this Part limits the fees that a licensed trustee company may charge for the provision of a particular traditional trustee company service, the trustee company must not charge fees for that service in excess of that limit.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Excess fees may also be recovered under section 601XAA.

### **601TBB Part does not prevent charging of fees as agreed etc.**

- (1) Nothing in this Part prevents a licensed trustee company from charging:
  - (a) any fees that a testator, in his or her will, has directed to be paid; or
  - (b) any fees that have been agreed on in accordance with subsection (2).
- (2) An agreement referred to in paragraph (1)(b) that relates to the fees that may be charged by a licensed trustee company for the provision of a particular traditional trustee company service must be between the trustee company and:
  - (a) subject to paragraph (b) of this subsection—a person or persons who have authority to deal with the trustee company on matters relating to the provision of the service; or
  - (b) if the regulations prescribe the person or persons with whom the agreement must be made—that person or those persons.

### **601TBC Part does not prevent charging fee for provision of account**

Nothing in the Part prevents a licensed trustee company from charging a fee permitted by subsection 601SBB(3) for the provision of an account.

Section 601TBD

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**601TBD Part does not prevent reimbursement**

Nothing in this Part prevents the reimbursement to a licensed trustee company of all disbursements properly made by the trustee company in the provision of a traditional trustee company service.

**601TBE Estate management functions: payment of fees out of estate**

- (1) This section applies to the performance by a licensed trustee company of an estate management function relating to a particular estate.
- (2) Subject to subsection (3), fees charged by the trustee company, in accordance with this Part, for the performance of the function are payable to the trustee company out of the capital or income of the relevant estate.
- (3) Unless ASIC approves it under subsection (4):
  - (a) a management fee referred to in section 601TDD can only come out of the income of the relevant estate; and
  - (b) a common fund administration fee referred to in section 601TDE or 601TDI can only come out of the income received by the common fund on the assets of the charitable trust concerned that are included in the fund.
- (4) ASIC may, on application in writing by a licensed trustee company, approve payment of a proposed fee that, if paid without the approval, would contravene subsection (3), if ASIC is satisfied that:
  - (a) the payment of the fee will not significantly affect the capital of the relevant estate or charitable trust concerned; and
  - (b) the fee is a fair reflection of the work and expertise required to perform the estate management function.

### **Division 3—Fees otherwise than for being trustee or manager of a charitable trust**

#### **601TCA Fees otherwise than for being the trustee or manager of a charitable trust**

- (1) This section applies to a particular provision of a traditional trustee company service by a licensed trustee company, unless:
  - (a) the service consists of being the trustee or manager of a charitable trust (see Division 4); or
  - (b) the provision of the service started before the commencement of this section.
- (2) The trustee company must not charge fees that are in excess of its schedule of fees that was most recently published as required by section 601TAA before the trustee company started to provide the service.
- (3) This section does not limit anything in Division 2.

#### **601TCB Additional amount for preparation of returns etc.**

A licensed trustee company may charge a reasonable fee for work involved in the preparation and lodging of returns for the purpose of, or in connection with, assessments of any duties or taxes (other than probate, death, succession or estate duties) related to an estate that is administered or managed by the trustee company.

## **Division 4—Fees for being trustee or manager of a charitable trust**

### **Subdivision A—New client charitable trusts**

#### **601TDA Subdivision applies to new client charitable trusts**

This Subdivision applies to a particular provision of a traditional trustee company service by a licensed trustee company if:

- (a) the service consists of being the trustee or manager of a charitable trust; and
- (b) the provision of the service started on or after the commencement of this section.

#### **601TDB What the trustee company may charge**

- (1) For the provision of the service, the trustee company must only charge:
  - (a) either:
    - (i) a capital commission, and an income commission, as provided for in section 601TDC; or
    - (ii) a management fee as provided for in section 601TDD; and
  - (b) if applicable, common fund administration fees under section 601TDE; and
  - (c) if applicable, fees permitted by section 601TDF in respect of the preparation of returns etc.
- (2) This section does not limit anything in Division 2.

#### **601TDC Option 1: capital commission and income commission**

##### *One-off capital commission*

- (1) The trustee company may charge a capital commission (GST inclusive) at a rate not exceeding 5.5% of the gross value of the charitable trust's assets.

- (2) The capital commission must be charged only once during the period while the trustee company is trustee or manager of the charitable trust.
- (3) The regulations may make provision relating to the capital commission, including (but not limited to):
  - (a) the calculation of the commission or of the gross value of the charitable trust's assets; and
  - (b) when, during the period referred to in subsection (2), the commission may be charged.

*Annual income commission*

- (4) The trustee company may charge an annual income commission (GST inclusive) at a rate not exceeding 6.6% of the income received on account of the charitable trust's assets.
- (5) The regulations may make provision relating to the income commission, including (but not limited to):
  - (a) the calculation of the commission or of the income received on the charitable trust's assets; and
  - (b) when, during a year, the commission may be charged; and
  - (c) apportionment of the amount of the commission for part-years.

**601TDD Option 2: annual management fee**

- (1) Instead of a capital commission and income commission under section 601TDC, the trustee company may charge an annual management fee (GST inclusive) at a rate not exceeding 1.056% of the gross value of the charitable trust's assets.
- (2) The regulations may make provision relating to the management fee, including (but not limited to):
  - (a) the calculation of the management fee or of the gross value of the charitable trust's assets; and
  - (b) when, during a year, the management fee may be charged; and
  - (c) apportionment of the amount of the management fee for part-years.

Section 601TDE

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**601TDE Additional amount if trust money is in a common fund**

- (1) If any of the charitable trust's assets are included in a common fund operated by the trustee company, the trustee company may charge an annual common fund administration fee (GST inclusive) not exceeding 1.1% of the gross value of the charitable trust's assets in the fund.
- (2) The regulations may make provision relating to the common fund administration fee, including (but not limited to):
  - (a) the calculation of the common fund administration fee or of the gross value of the charitable trust's assets in the fund; and
  - (b) when, during a year, the common fund administration fee may be charged; and
  - (c) the apportionment of the common fund administration fee for part-years.

**601TDF Additional amount for preparation of returns etc.**

The trustee company may charge a reasonable fee for work involved in the preparation and lodging of returns for the purpose of, or in connection with, assessments of any duties or taxes (other than probate, death, succession or estate duties) related to the trust estate of the charitable trust.

**Subdivision B—Existing client charitable trusts**

**601TDG Subdivision applies to existing client charitable trusts**

This Subdivision applies to a particular provision of a traditional trustee company service by a licensed trustee company if:

- (a) the service consists of being the trustee or manager of a charitable trust; and
- (b) the provision of the service started before the commencement of this section.

**601TDH Trustee company not to charge more than was being charged before section commenced**

Subject to section 601TDI and 601TDJ, the trustee company must not charge fees in excess of the fees than it could have charged in

relation to the charitable trust immediately before the commencement of this section.

**601TDI Additional amount if trust money is in a common fund**

- (1) If any of the charitable trust's assets are included in a common fund operated by the trustee company, the trustee company may charge an annual common fund administration fee (GST inclusive) not exceeding 1.1% of the gross value of the charitable trust's assets in the fund.
- (2) The regulations may make provision relating to the common fund administration fee, including (but not limited to):
  - (a) the calculation of the common fund administration fee or of the gross value of the charitable trust's assets in the fund; and
  - (b) when, during a year, the common fund administration fee may be charged; and
  - (c) the apportionment of the common fund administration fee for part-years.

**601TDJ Additional amount for preparation of returns etc.**

The trustee company may charge a reasonable fee for work involved in the preparation and lodging of returns for the purpose of, or in connection with, assessments of any duties or taxes (other than probate, death, succession or estate duties) related to the trust estate of the charitable trust.

## **Division 5—Miscellaneous**

### **601TEA Power of the Court with respect to excessive fees**

- (1) If the Court is of the opinion that fees charged by a licensed trustee company in respect of any estate are excessive, the Court may review the fees and may, on the review, reduce the fees.
- (2) Subsection (1) does not apply to fees:
  - (a) that are charged as permitted by section 601TBB; or
  - (b) that relate to a charitable trust and that are charged as permitted by Subdivision A of Division 4.
- (3) In considering whether fees are excessive, the Court may consider any or all of the following matters:
  - (a) the extent to which the work performed by the trustee company was reasonably necessary;
  - (b) the extent to which the work likely to be performed by the trustee company is likely to be reasonably necessary;
  - (c) the period during which the work was, or is likely to be, performed by the trustee company;
  - (d) the quality of the work performed, or likely to be performed, by the trustee company;
  - (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the trustee company;
  - (f) the extent (if any) to which the trustee company was, or is likely to be, required to deal with extraordinary issues;
  - (g) the extent (if any) to which the trustee company was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
  - (h) the value and nature of any property dealt with, or likely to be dealt with, by the trustee company;
  - (i) if the fees are ascertained, in whole or in part, on a time basis—the time properly taken, or likely to be properly taken, by the trustee company in performing the work;
  - (j) any other relevant matters.



- (4) The Court may exercise its powers under subsection (1) either on its own motion or on the application by or on behalf of a person with a proper interest in the estate.
- (5) If the fees are reduced by more than 10%, the trustee company must, unless the Court in special circumstances otherwise orders, pay the costs of the review.
- (6) Subject to subsection (5), all questions of costs of the review are in the discretion of the Court.

#### **601TEB Directors' fees**

- (1) This section applies if:
  - (a) an estate that is administered or managed by a licensed trustee company has an interest in a corporation; and
  - (b) an officer of the trustee company, in his or her capacity as such an officer, acts as a director of the corporation for purposes connected with the administration or management of the estate.
- (2) The trustee company is entitled to receive from the corporation (and to retain) any director's fees that would be payable to the officer had he or she so acted otherwise than in his or her capacity as such an officer.
- (3) Neither the officer nor the estate is entitled to receive the fees that the trustee company is entitled to receive under subsection (2).

## **Part 5D.4—Duties of officers and employees of licensed trustee companies**

### **601UAA Duties of officers of licensed trustee company**

- (1) An officer of a licensed trustee company must:
  - (a) act honestly; and
  - (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
  - (c) not make use of information acquired through being an officer of the trustee company for the purpose (or for purposes including the purpose) of:
    - (i) gaining an improper advantage for the officer or another person; or
    - (ii) causing detriment to the clients of the trustee company; and
  - (d) not make improper use of their position as an officer for the purpose (or for purposes including the purpose) of:
    - (i) gaining, directly or indirectly, an advantage for the officer or for any other person; or
    - (ii) causing detriment to the clients of the trustee company; and
  - (e) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the trustee company complies, in relation to the provision of traditional trustee company services, with:
    - (i) this Act; and
    - (ii) any conditions imposed on the trustee company's Australian financial services licence.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

- (3) A duty of an officer of the trustee company under subsection (1) overrides any conflicting duty the officer has under Part 2D.1, but is subject to any conflicting duty the officer has under Part 5C.2.
- (4) A reference in this section to the clients of a licensed trustee company is a reference to the clients, when viewed as a group.

### **601UAB Duties of employees of licensed trustee company**

- (1) An employee of a licensed trustee company must not:
  - (a) make use of information acquired through being an employee of the trustee company for the purpose (or for purposes including the purpose) of:
    - (i) gaining an improper advantage for the employee or another person; or
    - (ii) causing detriment to the clients of the trustee company; or
  - (b) make improper use of their position as an employee for the purpose (or for purposes including the purpose) of:
    - (i) gaining, directly or indirectly, an advantage for the employee or for any other person; or
    - (ii) causing detriment to the clients of the trustee company.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

- (3) A duty of an employee of the trustee company under subsection (1) overrides any conflicting duty the employee has under Part 2D.1, but is subject to any conflicting duty the employee has under Part 5C.2.
- (4) A reference in this section to the clients of a licensed trustee company is a reference to the clients, when viewed as a group.

## **Part 5D.5—Limit on control of licensed trustee companies**

### **Division 1—15% voting power limit**

#### **601VAA Meaning of *unacceptable control situation***

For the purposes of this Part, an *unacceptable control situation* exists in relation to a licensed trustee company and in relation to a particular person if the person's voting power in the trustee company is more than:

- (a) 15%; or
- (b) if an approval of a higher percentage is in force under Division 2 in relation to the trustee company and in relation to the person—that higher percentage.

#### **601VAB Acquisitions of shares**

If:

- (a) a person, or 2 or more persons under an arrangement, acquire shares in a body corporate; and
- (b) the acquisition has the result, in relation to a licensed trustee company, that:
  - (i) an unacceptable control situation comes into existence in relation to the trustee company and in relation to a person; or
  - (ii) if an unacceptable control situation already exists in relation to the trustee company and in relation to a person—there is an increase in the voting power of the person in the trustee company;

the person or persons mentioned in paragraph (a) contravene this section.

Note: A contravention of this section is an offence (see subsection 1311(1)).

#### **601VAC Remedial orders**

- (1) If an unacceptable control situation exists in relation to a licensed trustee company, the Court may make such orders as the Court

considers appropriate for the purpose of ensuring that the unacceptable control situation ceases to exist.

- (2) However, the Court may only make orders under this section on application by:
  - (a) the Minister; or
  - (b) ASIC; or
  - (c) the trustee company; or
  - (d) a person who has any voting power in the trustee company; or
  - (e) a client of the trustee company.
- (3) The Court's orders may include:
  - (a) an order directing the disposal of shares; or
  - (b) an order restraining the exercise of any rights attached to shares; or
  - (c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person; or
  - (d) an order that any exercise of rights attached to shares be disregarded; or
  - (e) an order directing any person to do or refrain from doing a specified act, for the purpose of securing compliance with any other order made under this section; or
  - (f) an order containing such ancillary or consequential provisions as the Court thinks just.
- (4) Subsection (3) does not, by implication, limit subsection (1).
- (5) Before making an order under this section, the Court may direct that notice of the application be given to such persons as the Court thinks fit or be published in such manner as the Court thinks fit, or both.
- (6) The Court may, by order:
  - (a) rescind, vary or discharge an order made by the Court under this section; or
  - (b) suspend the operation of such an order.

Section 601VAD

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**601VAD Injunctions**

- (1) If any conduct (including a refusal or failure to act) amounts or would amount to a contravention of this Part in relation to a particular licensed trustee company, the trustee company is taken, for the purposes of section 1324, to be a person whose interests are affected by the conduct.
- (2) Subsection (1) does not, by implication, limit the class of persons whose interests are affected by the conduct.
- (3) The Minister has the same powers as ASIC to apply for an injunction under section 1324 in relation to a contravention of this Part.
- (4) The powers in sections 601VAC and 1324 do not, by implication, limit each other.

## **Division 2—Approval to exceed 15% voting power limit**

### **601VBA Application for approval to exceed 15% voting power limit**

- (1) A person may apply for approval to have voting power of more than 15% in a particular licensed trustee company by lodging with ASIC an application that:
  - (a) specifies the percentage of voting power (if any) the person currently has in the trustee company; and
  - (b) specifies the percentage of voting power the person is seeking approval to have in the trustee company; and
  - (c) sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (2) ASIC must give the application to the Minister as soon as possible.

### **601VBB Approval of application**

- (1) The Minister may grant the application if the Minister is satisfied that it would be in the interests of the licensed trustee company and its clients for the application to be granted.
- (2) If the Minister grants the application, the Minister must:
  - (a) give written notice of the approval to the applicant; and
  - (b) specify the percentage of the voting power the Minister approves the applicant having in the licensed trustee company (which may or may not be the percentage the applicant applied for); and
  - (c) either:
    - (i) specify the period during which the approval remains in force; or
    - (ii) specify that the approval remains in force indefinitely.
- (3) If the Minister refuses the application, the Minister must give written notice of the refusal to the applicant.
- (4) As soon as practicable, the Minister must arrange for a copy of a notice of approval under this section to be:
  - (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.

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**601VBC Duration of approval**

- (1) An approval under section 601VBB remains in force:
  - (a) if the notice of approval specifies a period during which the approval remains in force—until the end of that period, or if the Minister extends that period, until the end of that extended period; or
  - (b) otherwise—indefinitely.

*Extension of approval*

- (2) A person who holds an approval under section 601VBB that is in force for a specified period may apply to extend that period by lodging with ASIC an application that sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (3) ASIC must give the application to the Minister as soon as possible.
- (4) The Minister may grant the application if the Minister is satisfied that it would be in the interests of the licensed trustee company and its clients for the application to be granted.
- (5) If the Minister grants the application, the Minister must:
  - (a) give written notice of the extension to the applicant; and
  - (b) specify the extended period during which the approval remains in force (which may or may not be the period the applicant applied for).
- (6) If the Minister refuses the application, the Minister must give written notice of the refusal to the applicant.
- (7) As soon as practicable, the Minister must arrange for a copy of a notice of extension under this section to be:
  - (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.

**601VBD Conditions of approval**

- (1) An approval under section 601VBB is subject to such conditions (if any) as are specified in the notice of approval.



- (2) The Minister may, by written notice given to a person who holds an approval under section 601VBB:
  - (a) impose one or more conditions or further conditions to which the approval is subject; or
  - (b) revoke or vary any condition:
    - (i) imposed under paragraph (a); or
    - (ii) specified in the notice of approval.
- (3) The Minister's power under subsection (2) may be exercised:
  - (a) on the Minister's own initiative; or
  - (b) on application by the person who holds the approval.
- (4) An application made by a person under paragraph (3)(b) must be lodged with ASIC and must set out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (5) ASIC must give the application to the Minister as soon as possible.
- (6) If the Minister refuses an application under paragraph (3)(b), the Minister must give written notice of the refusal to the applicant.
- (7) As soon as practicable, the Minister must arrange for a copy of a notice under subsection (2) to be:
  - (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.
- (8) A person who holds an approval under section 601VBB must give written notice to ASIC as soon as practicable after they become aware that they have breached a condition to which the approval is subject.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

### **601VBE Varying percentage approved**

#### *Application by holder of approval*

- (1) A person who holds an approval under section 601VBB may apply to vary the percentage specified in the approval by lodging with ASIC an application that:

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- (a) specifies the percentage of the voting power the person currently has in the licensed trustee company concerned; and
- (b) specifies the percentage of the voting power the person is seeking approval to have in the trustee company; and
- (c) sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (2) ASIC must give the application to the Minister as soon as possible.
- (3) The Minister may grant the application if the Minister is satisfied that it would be in the interests of the licensed trustee company and its clients for the application to be granted.
- (4) If the Minister grants the application, the Minister must:
  - (a) give written notice of the variation to the applicant; and
  - (b) specify the variation granted (which may or may not be the variation the applicant applied for).
- (5) If the Minister refuses an application, the Minister must give written notice of the refusal to the applicant.

*Minister's own initiative*

- (6) The Minister may, by written notice given to a person who holds an approval under section 601VBB, vary the percentage specified in the approval if the Minister is satisfied that the variation would be in the interests of the licensed trustee company and its clients.

*Percentage varied upwards*

- (7) If the Minister varies a percentage upwards, the variation takes effect on the day the notice of variation is given.

*Percentage varied downwards*

- (8) If the Minister varies a percentage downwards, the variation takes effect on the day specified in the notice of variation. The specified day must be a day at least 90 days after the day on which the notice is given.

*Notification of variation*

- (9) As soon as practicable, the Minister must arrange for a copy of a notice of variation under this section to be:
- (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.

**601VBF Revoking an approval**

- (1) The Minister may, by written notice given to a person who holds an approval under section 601VBB in relation to a licensed trustee company, revoke the approval if:
- (a) the Minister is satisfied that it would be in the interests of the trustee company and its clients for the approval to be revoked; or
  - (b) the Minister is satisfied that an unacceptable control situation exists in relation to the trustee company and in relation to the person; or
  - (c) the Minister is satisfied that there has been a contravention of a condition to which the approval is subject.
- (2) The revocation takes effect on the day specified in the notice of revocation. The specified day must be a day at least 90 days after the day on which the notice is given.
- (3) If a person who holds an approval under section 601VBB applies to the Minister for revocation of the approval, the Minister must, by written notice given to the person, revoke the approval. The revocation takes effect on the day specified in the notice of revocation.
- (4) As soon as practicable, the Minister must arrange for a copy of a notice of revocation under this section to be:
- (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.

**601VBG Minister may require further information from applicants**

- (1) If a person has made an application under this Division, the Minister may, by written notice given to the person, require the person to give the Minister, within a specified period, further information about the application.

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- (2) The Minister may refuse to consider the application until the person gives the Minister the information.

**601VBH Minister may seek views of licensed trustee company and its clients**

For the purpose of making a decision under this Division (whether or not in response to an application) in relation to a licensed trustee company, the Minister may seek the views of the trustee company and its clients.

**601VBI Time limit for Minister's decision**

- (1) The Minister must make a decision on an application under this Division within 30 days after receiving the application.
- (2) However, before the end of the 30 days, the Minister may decide to extend the period for considering the application until the end of 60 days after the application was received.
- (3) If the Minister has not made a decision within the 30 days (or the 60 days, if subsection (2) applies), the Minister is taken to have granted whatever was applied for. As soon as practicable after that happens, the Minister must arrange for a notice to that effect to be:
  - (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.
- (4) The time for making the decision stops running if the Minister gives a notice under subsection 601VBG(1) in relation to the application, and does not start again until the notice is complied with.
- (5) The time limit in this section does not apply to an application under section 601VBB or 601VBE if an unacceptable control situation exists in relation to the applicant and in relation to the relevant licensed trustee company at any time before the Minister makes a decision.

## **Division 3—Other matters**

### **601VCA Acquisition of property**

- (1) The Court must not make an order under section 601VAC if:
  - (a) the order would result in the acquisition of property from a person otherwise than on just terms; and
  - (b) the order would be invalid because of paragraph 51(xxxi) of the Constitution.
- (2) Section 1350 does not apply in relation to the making of an order under section 601VAC.
- (3) In this section:

*acquisition of property* has the same meaning as in paragraph 51(xxxi) of the Constitution.

*just terms* has the same meaning as in paragraph 51(xxxi) of the Constitution.

### **601VCB Interests of clients to be viewed as a group**

A reference in this Part to the interests of the clients of a licensed trustee company is a reference to the interests of the clients, when viewed as a group.

### **601VCC Anti-avoidance**

- (1) If:
  - (a) one or more persons enter into, begin to carry out or carry out a scheme; and
  - (b) it would be concluded that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of Division 1 in relation to any person or persons (whether or not mentioned in paragraph (a)); and

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- (c) as a result of the scheme or a part of the scheme, a person (the ***controller***) increases the controller's voting power in a licensed trustee company;  
the Minister may give the controller a written direction to cease having that voting power within a specified time.
- (2) A person who is subject to a direction under subsection (1) must comply with the direction.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) A direction under subsection (1) is not a legislative instrument.
- (4) In this section:  
***increase*** voting power includes increasing it from a starting point of nil.

## **Part 5D.6—ASIC-approved transfers of estate assets and liabilities**

### **Division 1—Preliminary**

#### **601WAA Definitions**

(1) In this Part:

*asset* means property, or a right, of any kind, and includes:

- (a) any legal or equitable estate or interest (whether present or future, vested or contingent, tangible or intangible, in real or personal property) of any kind; and
- (b) any chose in action; and
- (c) any right, interest or claim of any kind including rights, interests or claims in or in relation to property (whether arising under an instrument or otherwise, and whether liquidated or unliquidated, certain or contingent, accrued or accruing); and
- (d) any CGT asset within the meaning of the *Income Tax Assessment Act 1997*.

*authorised ASIC officer*, when used in a particular provision of this Part, means a person authorised under subsection (2) to perform or exercise the functions or powers of an authorised ASIC officer under that provision.

*cancel*, in relation to a licence, means:

- (a) cancel the licence under Part 7.6; or
- (b) vary the conditions of the licence under Part 7.6 so that the licence ceases to cover traditional trustee company services.

*certificate of transfer* has the meaning given by subsection 601WBG(1).

*compulsory transfer determination* has the meaning given by subsection 601WBA(1).

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***estate assets and liabilities***, of a company, means assets (including assets in common funds) and liabilities of an estate, or incurred in relation to an estate, in relation to which the company was performing estate management functions, if the assets and liabilities were vested in or otherwise belonged to the company:

- (a) because of its performance of those functions; and
- (b) immediately before:
  - (i) if ASIC has cancelled the company's licence—the cancellation; or
  - (ii) otherwise—a relevant certificate of transfer comes into force.

Note: This Part does not apply to liabilities for breach of trust etc.: see section 601WBK.

***interest***, in relation to land, includes:

- (a) a legal or equitable estate or interest in the land; or
- (b) a right, power or privilege over, or in relation to, the land.

***liability*** includes a duty or obligation of any kind (whether arising under an instrument or otherwise, and whether actual, contingent or prospective).

***licence*** means an Australian financial services licence that is held by a trustee company and that covers the provision of one or more traditional trustee company services.

***receiving company*** has the meaning given by subsection 601WBA(1).

***transfer determination*** has the meaning given by subsection 601WBA(1).

***transferring company*** has the meaning given by subsection 601WBA(1).

***voluntary transfer determination*** has the meaning given by subsection 601WBA(1).

- (2) ASIC may, in writing, authorise a person who is a member of ASIC, or of its staff, to perform or exercise the functions or powers of an authorised ASIC officer under a particular provision of this Part.



## **Division 2—Transfer of estate assets and liabilities**

### **601WBA Transfer determinations**

- (1) ASIC may, in writing, make a determination (a *transfer determination*) that there is to be a transfer of estate assets and liabilities from a specified company (the *transferring company*) to another specified company (the *receiving company*) if:
  - (a) ASIC has cancelled the licence of the transferring company (the determination is a *compulsory transfer determination*);  
or
  - (b) the transferring company has applied in the prescribed form for a determination (the determination is a *voluntary transfer determination*).
- (2) ASIC may make a transfer determination only if:
  - (aa) for a compulsory transfer determination—the receiving company is a licensed trustee company or the Public Trustee of a State or Territory; and
  - (ab) for a voluntary transfer determination:
    - (i) the transferring company is a licensed trustee company or a company that was previously authorised as a trustee company under a law of a State or Territory; and
    - (ii) the receiving company is a licensed trustee company; and
  - (a) either:
    - (i) the Minister has consented to the transfer; or
    - (ii) the Minister’s consent to the transfer is not required (see section 601WBD); and
  - (b) ASIC is satisfied that:
    - (i) the transfer is in the interests of clients of the transferring company (when viewed as a group); and
    - (ii) unless the receiving company is a Public Trustee—the transfer is in the interests of clients of the receiving company (when viewed as a group); and
    - (iii) the board of the receiving company has consented to the transfer; and

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- (iv) legislation to facilitate the transfer that satisfies the requirements of section 601WBC has been enacted in the State or Territory in which the transferring company is registered and the State or Territory in which the receiving company is registered or of which it is the Public Trustee.
- (2A) Even if the Public Trustee of a State or Territory is not a company:
- (a) the Public Trustee may still be specified as a receiving company for the purposes of a compulsory transfer determination; and
  - (b) references in this Part (however expressed) to:
    - (i) a company; or
    - (ii) the board of a company;are taken to be references to that Public Trustee.
- (3) The determination must include particulars of the transfer, including:
- (a) the names of the transferring company and the receiving company; and
  - (b) for a compulsory transfer determination—whether it will be a total transfer or a partial transfer of the transferring company’s estate assets and liabilities; and
  - (c) if it will be a partial transfer—an indication of the part of the transferring company’s estate assets and liabilities that is to be transferred; and
  - (d) for a voluntary transfer determination—that it will be a total transfer of the transferring company’s estate assets and liabilities.
- (4) The determination must include a statement of the reasons why the determination has been made.
- (5) The determination is not a legislative instrument.

**601WBB When consent of receiving company is in force**

- (1) The consent referred to in subparagraph 601WBA(2)(b)(iii) remains in force until it is withdrawn by the receiving company’s board with the agreement of ASIC.

- (2) ASIC may agree to the consent being withdrawn if ASIC considers it appropriate to allow the consent to be withdrawn having regard to any of the following:
- (a) circumstances that have arisen since the consent was given;
  - (b) circumstances that were in existence at or before the time when the consent was given but that were not known to the receiving company's board when it gave its consent;
  - (c) any other relevant matter.

### **601WBC Complementary State or Territory legislation**

State or Territory legislation referred to in subparagraph 601WBA(2)(b)(iv) must include provision to ensure that, when a certificate of transfer comes into force under this Division, the receiving company is taken to be the successor in law in relation to estate assets and liabilities of the transferring company, to the extent of the transfer. In particular, the legislation must provide that:

- (a) assets of the transferring company become assets of the receiving company, to the extent of the transfer; and
- (b) liabilities of the transferring company become liabilities of the receiving company, to the extent of the transfer; and
- (c) the duties, obligations, immunities, rights and privileges applying to the transferring company apply to the receiving company, to the extent of the transfer; and
- (d) if the certificate of transfer includes provisions of a kind referred to in subsection 601WBG(3) specifying:
  - (i) that particular things are to happen or are taken to be the case—those things are taken to happen, or to be the case, in accordance with those provisions; or
  - (ii) a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with that mechanism are taken to happen, or to be the case, as determined in accordance with that mechanism.

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**601WBD Minister's power to decide that his or her consent is not required**

- (1) The Minister's consent to the transfer of estate assets and liabilities is not required if the Minister has, in writing, determined that his or her consent is not required in relation to:
  - (a) the transfer; or
  - (b) a class of transfers that includes the transfer.
- (2) The regulations may prescribe criteria to be taken into account by the Minister in deciding whether to make a determination.
- (3) A determination is a legislative instrument if it is expressed to apply in relation to a class of transfers (whether or not it is also expressed to apply in relation to one or more transfers identified otherwise than by reference to membership of a class).
- (4) If subsection (3) does not apply to a determination, the determination is not a legislative instrument.

**601WBE Determinations may impose conditions**

- (1) The transfer determination may impose conditions of either or both of the following kinds:
  - (a) conditions to be complied with by the transferring company or the receiving company before a certificate of transfer is issued in relation to the transfer of estate assets and liabilities;
  - (b) conditions to be complied with by the transferring company or the receiving company after a certificate of transfer has been issued or has come into force in relation to the transfer of estate assets and liabilities.
- (2) ASIC may, by notice in writing given to the transferring company or the receiving company, vary or revoke any condition of a determination if ASIC is satisfied that the variation or revocation is appropriate.
- (3) The transferring company or the receiving company may apply in writing to ASIC to have a condition of a kind referred in paragraph (1)(b) that applies to it varied or revoked.

- (4) ASIC may, by notice in writing given to the company that made the application, approve the variation or revocation if ASIC is satisfied that the variation or revocation is appropriate. A variation or revocation that is approved by ASIC has effect accordingly.
- (5) The transferring company or the receiving company must comply with any conditions that are imposed under subsection (1) as conditions to be complied with by that company.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) The transferring company or the receiving company does not commit an offence against this Act merely because the company is complying with a condition imposed under subsection (1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

### **601WBF Notice of determination**

ASIC must give a copy of the transfer determination to the transferring company and the receiving company.

### **601WBG Certificate of transfer**

- (1) If:
- (a) ASIC has made a transfer determination; and
  - (b) ASIC considers that the transfer should go ahead; and
  - (c) the consent referred to in subparagraph 601WBA(2)(b)(iii) has not been withdrawn under section 601WBB;
- ASIC must, in writing, issue a certificate (a *certificate of transfer*) stating that the transfer is to take effect.
- (2) The certificate of transfer must:
- (a) include the names of the transferring company and the receiving company; and
  - (b) for a compulsory transfer determination—state whether the transfer is a total transfer or a partial transfer; and
  - (c) if the transfer is a partial transfer—include, or have attached to it, a list of the estate assets and liabilities that are being transferred to the receiving company; and
  - (ca) for a voluntary transfer determination—state that the transfer is a total transfer; and

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- (d) state when the certificate is to come into force (either by specifying a date as the date it comes into force, or by specifying that the date it comes into force is a date worked out in accordance with provisions of the certificate).
- (3) The certificate may include provisions specifying, or specifying a mechanism for determining, other things that are to happen, or that are taken to be the case, in relation to assets and liabilities that are to be transferred, or in relation to the transfer of estate assets and liabilities that is to be effected, whether the transfer is total or partial.
- (4) The certificate comes into force in accordance with the statement included in the certificate as required by paragraph (2)(d).
- (5) The certificate is not a legislative instrument.

**601WBH Notice of certificate**

ASIC must:

- (a) give a copy of the certificate of transfer to the transferring company and the receiving company; and
- (b) publish notice of the issue of the certificate.

**601WBI Time and effect of transfer**

- (1) When a certificate of transfer comes into force, the receiving company becomes the successor in law of the transferring company in relation to estate assets and liabilities of the transferring company, to the extent of the transfer. In particular:
  - (a) if the transfer is a total transfer—all the estate assets and liabilities of the transferring company, wherever those assets and liabilities are located, become assets and liabilities of the receiving company (in the same capacity as they were assets and liabilities of the transferring company) without any transfer, conveyance or assignment; and
  - (b) if the transfer is a partial transfer—all the estate assets and liabilities included in the list referred to in paragraph 601WBG(2)(c), wherever those assets and liabilities are located, become assets and liabilities of the receiving company (in the same capacity as they were assets and

- liabilities of the transferring company) without any transfer, conveyance or assignment; and
- (c) to the extent of the transfer, the duties, obligations, immunities, rights and privileges applying to the transferring company apply to the receiving company.
- (2) If the certificate includes provisions of a kind referred to in subsection 601WBG(3):
- (a) if the provisions specify that particular things are to happen or are taken to be the case—those things are, by force of this section, taken to happen, or to be the case, in accordance with those provisions; and
- (b) if the provisions specify a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with the mechanism are, by force of this section, taken to happen, or to be the case, as determined in accordance with that mechanism.

#### **601WBJ Substitution of trustee company**

When a certificate of transfer comes into force, any appointment or nomination of the transferring company to a particular capacity (for example, as trustee, executor or administrator) in relation to the transferred estate assets and liabilities is taken to be an appointment or nomination of the receiving company to that capacity in relation to those assets and liabilities.

#### **601WBK Liabilities for breach of trust and other matters not affected by this Part**

- (1) Nothing in this Part applies to or affects liabilities of the transferring company, or of an officer or employee of the transferring company, for:
- (a) any breach of trust; or
- (b) any other misfeasance or nonfeasance; or
- (c) any exercise of, or failure to exercise, any discretion.
- (2) Nothing in this Part affects any rights of the transferring company, or of an officer or employee of the transferring company, to indemnity in respect of such liabilities.

### **Division 3—Other matters related to the transfer of estate assets and liabilities**

#### **601WCA Certificates evidencing operation of Act etc.**

- (1) An authorised ASIC officer, by signed writing, may certify that a specified asset or liability has become an asset or liability of the receiving company under this Part.
- (2) For all purposes and in all proceedings, a certificate under subsection (1) is prima facie evidence of the matters certified.

#### **601WCB Certificates in relation to land and interests in land**

If:

- (a) the receiving company becomes, under this Part, the owner of land, or of an interest in land, that is situated in a State or Territory; and
- (b) there is lodged with the Registrar of Titles or other appropriate officer of the State or Territory in which the land is situated a certificate that:
  - (i) is signed by an authorised ASIC officer; and
  - (ii) identifies the land or interest; and
  - (iii) states that the receiving company has, under this Part, become the owner of that land or interest;

the officer with whom the certificate is lodged may:

- (c) register the matter in the same manner as dealings in land or interests in land of that kind are registered; and
- (d) deal with, and give effect to, the certificate.

#### **601WCC Certificates in relation to other assets**

- (1) If:
  - (a) an asset (other than land or an interest in land) becomes, under this Part, an asset of the receiving company; and
  - (b) there is lodged with the person or authority who has, under a law of the Commonwealth, a State or a Territory, responsibility for keeping a register in respect of assets of that kind a certificate that:



- (i) is signed by an authorised ASIC officer; and
  - (ii) identifies the asset; and
  - (iii) states that the asset has, under this Part, become an asset of the receiving company;
- that person or authority may:
- (c) register the matter in the same manner as transactions in relation to assets of that kind are registered; and
  - (d) deal with, and give effect to, the certificate.
- (2) This section does not affect the operation of:
- (a) other provisions of this Act; or
  - (b) if the regulations prescribe provisions of one or more other Acts—those provisions of those Acts.

#### **601WCD Documents purporting to be certificates**

A document purporting to be a certificate given under this Division is, unless the contrary is established, taken to be such a certificate and to have been properly given.

#### **601WCE Construction of references to transferring company**

From when a certificate of transfer comes into force, in any instrument of any kind, a reference to the transferring company, in relation to assets or liabilities transferred under this Part, is taken to be a reference to the receiving company.

#### **601WCF Income or other distribution received by transferring company**

The transferring company must promptly account to the receiving company for any income or other distribution received by the transferring company after a certificate of transfer comes into force, if the income or distribution arises from assets transferred to the receiving company under this Part.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

**Chapter 5D** Licensed trustee companies

**Part 5D.6** ASIC-approved transfers of estate assets and liabilities

**Division 3** Other matters related to the transfer of estate assets and liabilities

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**601WCG Access to books**

The transferring company must, at the request of the receiving company, give the receiving company access to all books in its possession that relate to assets or liabilities transferred under this Part.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

**601WCH Minister or ASIC may seek views of trustee company and its clients**

For the purpose of deciding whether to exercise powers under this Part, the Minister or ASIC may seek the views of a trustee company or its clients in relation to the possible exercise of the powers.

## **Division 4—Miscellaneous**

### **601WDA Transferring company required to contact certain persons**

#### *Notice of cancellation of licence*

- (1) If the licence of a trustee company is cancelled, the trustee company must, as soon as practicable:
  - (a) take all reasonable steps to contact the following persons and advise them of the cancellation of the licence:
    - (i) all persons who the trustee company is aware have executed and lodged instruments, such as wills, that have not yet come into effect, but will potentially lead to estate assets and liabilities being held by the trustee company;
    - (ii) all persons who the trustee company is aware have appointed the trustee company as trustee or to some other capacity; and
  - (b) publish notice of the cancellation of the licence.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

#### *Notice of compulsory transfer determination*

- (2) If a certificate of transfer for a compulsory transfer determination comes into force, the transferring company must, as soon as practicable, take all reasonable steps to contact the persons referred to in subsection (1) and advise them of the transfer of estate assets and liabilities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

#### *Notice of voluntary transfer determination*

- (3) If a certificate of transfer for a voluntary transfer determination comes into force, the transferring company must, as soon as practicable, publish notice of the transfer of estate assets and liabilities.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

## **Part 5D.7—Contraventions and holding out**

### **601XAA Civil liability of licensed trustee companies**

- (1) A person who suffers loss or damage because of conduct of a licensed trustee company that contravenes a provision of this Chapter may recover the amount of the loss or damage by action against the trustee company, whether or not the trustee company has been convicted of an offence, or has had a civil penalty order made against it, in respect of the contravention.
- (2) Without limiting subsection (1), if:
  - (a) a licensed trustee company charges a person a fee in excess of fees permitted to be charged by this Chapter; and
  - (b) the person pays the fee;the amount of the excess is a loss that is recoverable by the person under subsection (1).
- (3) An action under subsection (1) must be begun within 6 years after the cause of action arises.
- (4) This section does not affect any liability that a person has under other provisions of this Act or under other laws.

### **601XAB Prohibition on holding out**

A person must not hold out that the person is a licensed trustee company if that is not the case.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

## **Part 5D.8—Exemptions and modifications**

### **601YAA Exemptions and modifications by ASIC**

- (1) ASIC may:
  - (a) exempt a person or class of persons, or an estate or class of estates, from all or specified provisions of this Chapter; or
  - (b) declare that this Chapter applies to a person or class of persons, or an estate or class of estates, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) 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.
- (3) An exemption or declaration is a legislative instrument if it is expressed to apply in relation to a class of persons or a class of estates (whether or not it is also expressed to apply in relation to one or more persons or estates identified otherwise than by reference to membership of a class).
- (4) If subsection (3) does not apply to an exemption or declaration, the exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*. The exemption or determination is not a legislative instrument.
- (5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(b) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the requirements of the *Legislative Instruments Act 2003* (if the declaration is of a kind referred to in subsection (3)), or with the gazettal requirement of subsection (4), as the case may be):
  - (a) the text of the declaration was made available by ASIC on the internet; or

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- (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

- (6) For the purpose of this section, the *provisions of this Chapter* include:
  - (a) regulations or other instruments 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 or other instruments made for the purposes of this Chapter; and
  - (c) any provisions of Division 2 of Part 10.12 that relate to this Chapter.

**601YAB Exemptions and modifications by regulations**

- (1) The regulations may:
  - (a) exempt a person or class of persons, or an estate or class of estates, from all or specified provisions of this Chapter; or
  - (b) provide that this Chapter applies to a person or class of persons, or an estate or class of estates, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) For the purpose of this section, the *provisions of this Chapter* include:
  - (a) regulations or other instruments 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 or other instruments made for the purposes of this Chapter; and
  - (c) any provisions of Division 2 of Part 10.12 that relate to this Chapter.

## 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; or
  - (iii) the voting interests in a listed managed investment 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 or listed managed investment scheme is not to be read as being limited to an interest that is constituted by one or more of the following:
  - (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 or listed managed investment 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 managed investment 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 managed investment 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.

## 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*.

*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.

*Absolute liability offences*

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

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Note: For *absolute liability*, see section 6.2 of the *Criminal Code*.

*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
  - (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%;

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(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
  - (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.

*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.

## **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.

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

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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.

*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.

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
  - (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.

*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

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provide that interests in securities are not relevant interests subject to specified conditions.

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

- (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.

## 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.

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<b>Acquisitions that are exempt</b>	[operative]
<b>Takeover bids</b>	
<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.
<hr/>	
<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: <ul style="list-style-type: none"><li>(a) the acquisition is by or on behalf of the bidder under a takeover bid; and</li><li>(b) the acquisition occurs during the bid period; and</li><li>(c) the bid is for all the voting shares in the bid class; and</li><li>(d) the bid is:<ul style="list-style-type: none"><li>(i) unconditional; or</li><li>(ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2).</li></ul></li></ul> See also sections 612 and 613.

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**Acquisitions that are exempt**

[operative]

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*On-market purchase of convertible securities during bid period*

- 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 subsection 652C(1) or (2).

See sections 612 and 613.

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*Acceptance of scrip offered as takeover consideration*

- 4 An acquisition that results from the acceptance of:
- (a) an offer under a takeover bid if the voting shares are included in the consideration for offers under the bid; or
  - (b) an offer that results in an acquisition to which item 5 applies.

See also section 612.

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**Nature of acquirer**

- 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:
- (a) the person's ordinary business includes the provision of financial accommodation by any means; and
  - (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.
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**Acquisitions that are exempt**

[operative]

**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.
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**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**

*3% creep in 6 months*

- 9 An acquisition by a person if:
- (a) throughout the 6 months before the acquisition that person, or any other person, has had voting power in the company of at least 19%; and
  - (b) as a result of the acquisition, none of the persons referred to in paragraph (a) would have voting power in the company more than 3 percentage points higher than they had 6 months before the acquisition.
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**Acquisitions that are exempt**

[operative]

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*Rights issues*

- 10 An acquisition that results from an issue of securities that satisfies all of the following conditions:
- (a) a company offers to issue securities in a particular class;
  - (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;
  - (c) all of those persons have a reasonable opportunity to accept the offers made to them;
  - (d) agreements to issue are not entered into until a specified time for acceptances of offers has closed;
  - (e) the terms of all the offers are the same.

This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.

See section 615.

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*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.

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*Initial public offering (IPO) fundraising*

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



**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
- (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

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- (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.

## 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.

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.

#### 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.

*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;
  - (e) any additional cash amount offered to holders instead of the fraction of a security that they would otherwise be offered.

*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.

**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.

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.

## **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.
- (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.

- (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.

## **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;

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- (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:
- (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.

- (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.

## **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.

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*.

## **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.

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:
  - (a) the number of securities for which the bidder receives acceptances reaches or exceeds a particular number; or

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- (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

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- (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.

*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.
- (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.



*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*.

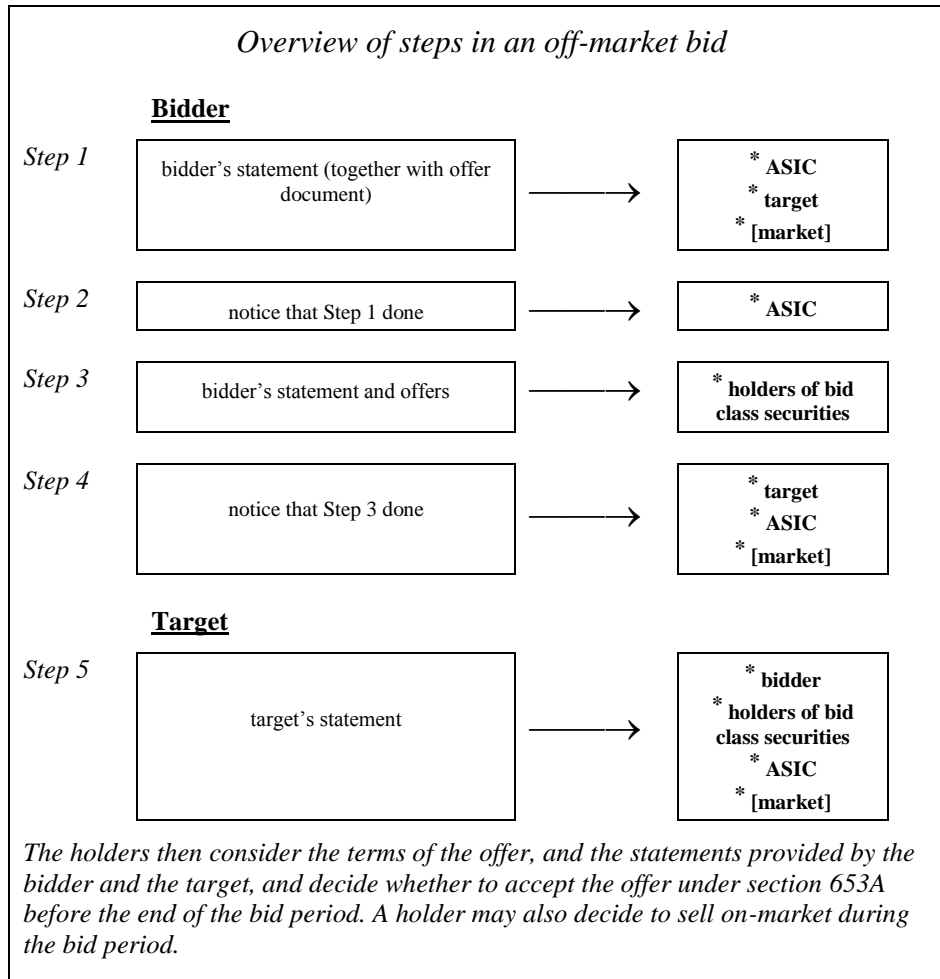
#### *Proposals if takeover bid not intended*

- (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.

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<b>Steps in off-market bid</b>		[operative table]
<b>Steps</b>		<b>Timing and relevant provisions</b>
1	The bidder must prepare: <ul style="list-style-type: none"><li>• a bidder's statement; and</li><li>• 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.</li></ul>	<i>See section 636 for content of statement.</i>
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 <i>See also subsection (5).</i>
6	The bidder must send the bidder's statement and offers to each person (other than the bidder) who holds: <ul style="list-style-type: none"><li>• securities in the bid class; or</li><li>• 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;</li></ul> as at the date set by the bidder under subsection (2).  The offers must be made on the terms set out in the bidder's statement and the offer document lodged with ASIC under item 2.	To be done: <ul style="list-style-type: none"><li>• within a 3 day period; and</li><li>• within 14-28 days after the bidder's statement is sent to the target</li></ul> The directors of the target may agree that the offers and accompanying documents be sent earlier. <i>See also subsections (5) and (6).</i> <i>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.</i> <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>

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<b>Steps in off-market bid</b>		[operative table]
<b>Steps</b>	<b>Timing and relevant provisions</b>	
7	<p>The bidder must send a notice to the target that the bidder's statement and offers have been sent as required by item 6.</p> <p>The notice must state the date of the offers.</p>	<p>To be done on the day all offers have been sent as required by item 6</p> <p><i>See subsection 620(1) on date of offer.</i></p>
8	<p>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.</p>	<p>To be done on the day all offers have been sent as required by item 6</p>
9	<p>The bidder must lodge with ASIC a notice that offers have been sent as required by item 6.</p>	<p>To be done on the day all offers have been sent as required by item 6</p>
10	<p>The target must prepare a target's statement.</p>	<p><i>See section 638 for content of statement.</i></p>
11	<p>The target must send the target's statement (and any accompanying report) to the bidder.</p>	<p>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</p>
12	<p>The target must send a copy of the target's statement (and any accompanying report) to each person who holds:</p> <ul style="list-style-type: none"> <li>• securities in the bid class; or</li> <li>• 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;</li> </ul> <p>as at the date set by the bidder under subsection (2).</p>	<p>To be done:</p> <ul style="list-style-type: none"> <li>• no earlier than the day on which the target sends the target's statement to the bidder; and</li> <li>• no later than 15 days after the target receives a notice that all offers have been sent as required by item 6</li> </ul> <p><i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i></p>
13	<p>The target must lodge a copy of the target's statement (and any accompanying report) with ASIC.</p>	<p>To be done on the day the target's statement is sent to the bidder</p> <p>See also subsection (7).</p>

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<b>Steps in off-market bid</b>		[operative table]
<b>Steps</b>	<b>Timing and relevant provisions</b>	
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 <i>See also subsection (7)</i>

*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.

*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*

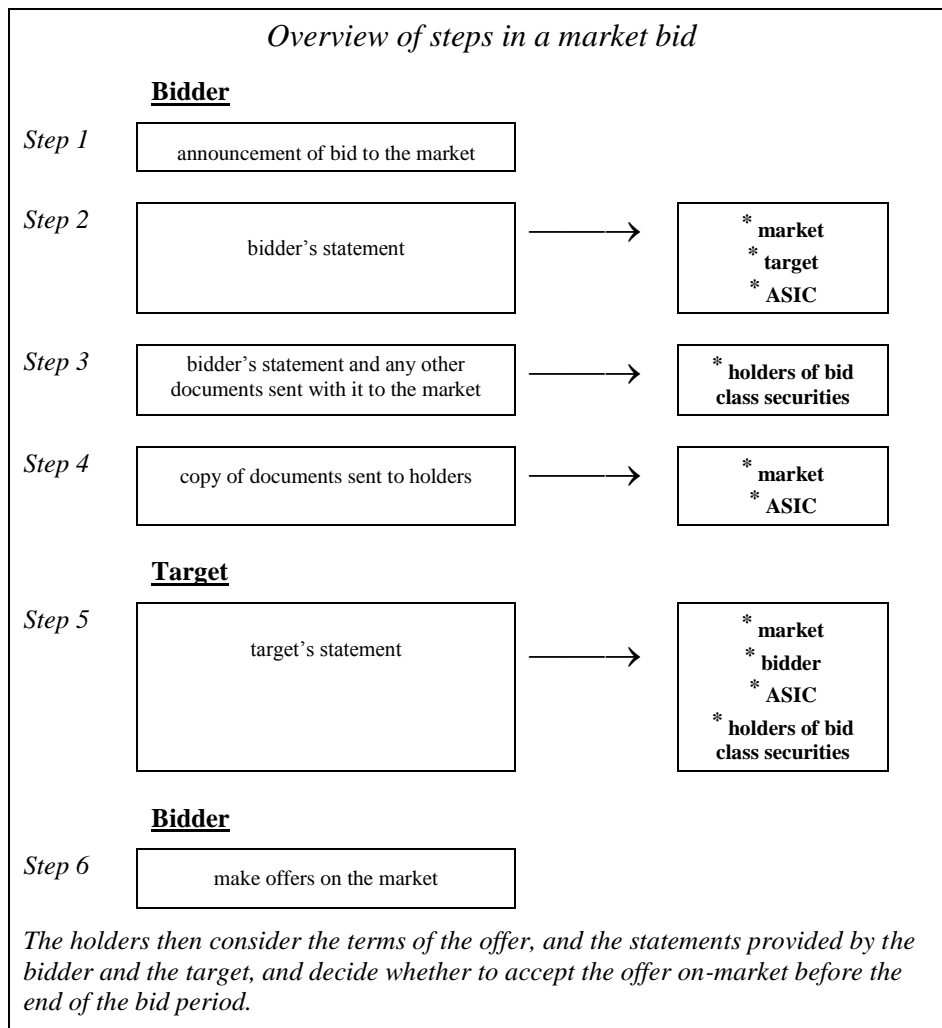
- (8) An offence based on this section is an offence of strict liability.

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

## **634 Overview of steps in a market bid**

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

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**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.



<b>Steps in market bid</b>		[operative]
<b>Steps</b>	<b>Timing and relevant provisions</b>	
1	The bidder must prepare a bidder's statement.	<i>See section 636 for content of statement</i>
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"> <li>• a copy of the bidder's statement; and</li> <li>• a copy of any other document that was sent with the bidder's statement to the relevant market operator.</li> </ul>	To be done on the day the announcement is made
5	The bidder must lodge with ASIC: <ul style="list-style-type: none"> <li>• a copy of the bidder's statement; and</li> <li>• a copy of any other document that was sent with the bidder's statement to the relevant market operator.</li> </ul>	To be done on the day the announcement is made
6	The bidder must send to each holder of bid class securities (other than the bidder): <ul style="list-style-type: none"> <li>• a copy of the bidder's statement; and</li> <li>• a copy of any other document that was sent with the bidder's statement to the relevant market operator.</li> </ul>	Within 14 days after the announcement is made. <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>
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

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<b>Steps in market bid</b>		[operative]
	<b>Steps</b>	<b>Timing and relevant provisions</b>
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.	<i>See section 638 for content of statement</i>
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	The target must send to the bidder: <ul style="list-style-type: none"><li>• a copy of the target's statement; and</li><li>• a copy of any other document that was sent with the target's statement to the relevant market operator.</li></ul>	To be done on the day the target sends a copy of the target's statement to the relevant market operator
12	The target must lodge with ASIC: <ul style="list-style-type: none"><li>• a copy of the target's statement; and</li><li>• a copy of any other document that was sent with the target's statement to the relevant market operator.</li></ul>	To be done on the day the target sends a copy of the target's statement to the relevant market operator
13	The target must send each holder of bid class securities: <ul style="list-style-type: none"><li>• a copy of the target's statement; and</li><li>• a copy of any other document that was sent with the target's statement to the relevant market operator.</li></ul>	Within 14 days after the announcement is made. <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>

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<b>Steps in market bid</b>		[operative]
<b>Steps</b>	<b>Timing and relevant provisions</b>	
14	The bidder must make offers for the securities under the bid through the relevant financial market.	To be done on the next day after the end of the 14 day period referred to in item 13.  If the bidder does not make the offers at that time, the bidder contravenes this section.  <i>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</i>

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(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*.

## **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 managed investment 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 section 710 to 713;
- (ga) if any managed investment products are offered as consideration under the bid and the bidder is:
  - (i) the responsible entity of the managed investment scheme; or
  - (ii) a person who controls the responsible entity of the managed investment 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;
- (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;
- (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;

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

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*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.

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- (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.

*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.
- (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*.

**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*.

### *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.

*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 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
  - (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.

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*.

## 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

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- (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 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*.
- (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:

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- (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
  - (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

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- (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
  - (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.

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.

<b>Effect of improving consideration</b>	[operative]
<b>Improvement</b>	<b>Effect on person who has already accepted bid offer</b>
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 bidder must send the person as soon as practicable after the variation a written notice informing them about their right to make the election.

**Chapter 6** Takeovers

**Part 6.6** Variation of offers

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

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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:
- (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
    - (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.

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
  - (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 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 that has only one director—that director.
- (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).

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- (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 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; or
  - (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); and
- (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.

### 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.

*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;

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- (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:
- (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.

### **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:

- (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).

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- (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.
- (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%;

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- (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:
  - (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.
- (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:

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- (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
  - (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
- (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.

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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
  - (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.

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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.

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:

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- (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.

**657H ASIC 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
  - (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

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- (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—the directors of the body corporate.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.

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*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.
- (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:
    - (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 managed investment 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 managed investment schemes.

## **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.

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).

*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.

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*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).
- (5) This section has effect despite anything in the constitution of the company whose securities are to be acquired.

## **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 the notice is given—a holder of the convertible securities referred to in that paragraph; and
  - (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.

**Chapter 6A** Compulsory acquisitions and buy-outs

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

**Division 1** Compulsory acquisition of bid class securities

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*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.

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:
  - (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 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.

**Chapter 6A** Compulsory acquisitions and buy-outs

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

**Division 1** Compulsory acquisition of bid class securities

Section 661E

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- (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.

## **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).

### **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
  - (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

**Chapter 6A** Compulsory acquisitions and buy-outs

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

**Division 2** Compulsory buy-out of bid class securities

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- (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 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:

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- (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.
- (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.

### **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

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- (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.

*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 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;

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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.
- (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.

#### **664G Signpost—completing the acquisition of the securities**

See section 666A for how to complete the acquisition.

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## 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

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- (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.
- (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

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- (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:
  - (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.
- (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*.

## **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

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- (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 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.
- (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.

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*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.

**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.

<b>People liable on the document</b>		[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>		
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

<b>People liable on the document</b>		[operative table]
<i>For these documents</i>		
	these people...	...are liable for loss or damages caused by
3	a director of a bidder that is a body 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

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<b>People liable on the document</b>		[operative table]
<i>For these documents</i>		
	these people...	...are liable for loss or damages caused by
9	a director of a body corporate 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.
10	<i>all documents</i> 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:
  - (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.

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*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 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
  - (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 and managed investment schemes**

### **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*.

## Part 6C.1—Substantial holding information

### 671B Information about substantial holdings must be given to company, responsible entity 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 managed investment scheme, if:
  - (a) the person begins to have, or ceases to have, a substantial holding in the company or scheme; or
  - (b) the person has a substantial holding in the company or scheme 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.

- (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 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 or scheme:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes in company or scheme}} \times 100$$

where:

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

*total votes in company or scheme* is the total number of votes attached to all voting shares in the company or interests in the scheme.

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; 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; and
  - (d) the name of each associate who has a relevant interest in voting shares in the company or interests in the scheme, 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 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.
- (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

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securities but for subsection 609(6) (market traded options) or 609(7) (conditional agreements).

**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.

## **Part 6C.2—Tracing beneficial ownership of shares**

### **672A Disclosure notices**

- (1) ASIC, a listed company or the responsible entity for a listed managed investment scheme, may direct:
  - (a) a member of the company or scheme; 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 or interests in the scheme;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 or scheme 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 or interests in the scheme 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).

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- (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 company or responsible entity—the company or responsible entity 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 or the responsible entity 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 or interests in a listed managed investment scheme, ASIC:

- (a) may pass the information on to the company or the responsible entity for the scheme; 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.

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

- (1) The regulations may prescribe fees that companies and responsible entities are to pay to persons for complying with directions given under this Part.



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- (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 or responsible entity that paid it to the person.

**672DA Register of information about relevant interests in listed company or listed managed investment scheme**

- (1) A listed company, or the responsible entity for a listed managed investment scheme, 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, or responsible entity, 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 or interests in the scheme;
  - (b) details of the circumstances that give rise to a person's relevant interest in shares in the company or interests in the scheme;
  - (c) the name and address of a person who has a relevant interest in shares in the company or interests in the scheme;
  - (d) details of instructions that a person has given about:
    - (i) the acquisition or disposal of shares in the company or interests in the scheme; or
    - (ii) the exercise of any voting or other rights attached to shares in the company or interests in the scheme; or
    - (iii) any other matter relating to shares in the company or interests in the scheme;
  - (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:
- (a) the company's registered office; or
  - (b) the company's principal place of business in this jurisdiction;
- or

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- (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 managed investment 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.
- (4) The company, or the responsible entity, 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 or responsible entity; and
    - (ii) is not at the principal place of business of the company or responsible entity 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 or responsible entity 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*).
- (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*.
- (6) The register must either contain:
- (a) the name of each holder of shares in the company, or interests in the scheme, to whom the information relates; and

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- (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, or the responsible entity, 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, or the responsible entity, 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 or scheme—without charge; and
  - (b) by any other person:
    - (i) if the company, or the responsible entity, requires the payment of a fee for the inspection—on payment of the fee; or
    - (ii) if the company, or the responsible entity, does not require the payment of a fee for the inspection—without charge.

The amount of the fee required by the company, or the responsible entity, 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, or the responsible entity, 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, or the responsible entity, must give the person the copy:
- (a) if the company, or the responsible entity, requires payment of a fee for the copy:
    - (i) before the end of 21 days after the day on which the payment of the fee is received by the company or the responsible entity; or

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(ii) within such longer period as ASIC approves in writing;  
or

(b) if the company, or the responsible entity, 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, or the responsible entity, 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 or responsible entity 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, or the responsible entity, before the end of 2 business days after the day on which the company, or the responsible entity, receives the information.

Note: The obligation to enter the details in the register under this subsection is a continuing obligation and the company or responsible entity 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 or responsible entity 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 or an interest in the listed managed investment scheme.

**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.

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- (2) It is a defence in proceedings brought under this section if the person who contravenes section 672B 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 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.

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## Chapter 6CA—Continuous disclosure

### 674 Continuous disclosure—listed disclosing entity bound by a disclosure requirement in market listing rules

#### *Obligation to disclose in accordance with listing rules*

- (1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.
- (2) If:
  - (a) this subsection applies to a listed disclosing entity; and
  - (b) the entity has information that those provisions require the entity to notify to the market operator; and
  - (c) that information:
    - (i) is not generally available; and
    - (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

- (2A) A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 2: Section 79 defines *involved*.

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- (2B) A person does not contravene subsection (2A) if the person proves that they:
- (a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and
  - (b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.
- (3) For the purposes of the application of subsection (2) to a listed disclosing entity that is an undertaking to which interests in a registered scheme relate, the obligation of the entity to notify the market operator of information is an obligation of the responsible entity.
- (4) Nothing in subsection (2) is intended to affect or limit the situations in which action can be taken (otherwise than by way of a prosecution for an offence based on subsection (2)) in respect of a failure to comply with provisions referred to in subsection (1).

*Obligation to make provisions of listing rules available*

- (5) If the listing rules of a listing market in relation to a listed disclosing entity contain provisions of a kind referred to in subsection (1), the market operator must ensure that those provisions are available, on reasonable terms, to:
- (a) the entity; or
  - (b) if the entity is an undertaking to which interests in a registered scheme relate—the undertaking's responsible entity.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

**675 Continuous disclosure—other disclosing entities**

- (1) This section applies to:
- (a) a listed disclosing entity if:
    - (i) there is only one listing market in relation to the entity and the listing rules of that market do not contain provisions of a kind referred to in subsection 674(1); or
    - (ii) there is more than one listing market in relation to the entity and none of those markets have listing rules that



contain provisions of a kind referred to in subsection 674(1); or

(b) an unlisted disclosing entity.

(2) If the disclosing entity becomes aware of information:

(a) that is not generally available; and

(b) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity; and

(c) either:

(i) if those securities are not managed investment products—the information is not required to be included in a supplementary disclosure document or a replacement disclosure document in relation to the entity; or

(ii) if those securities are managed investment products—the information has not been included in a Product Disclosure Statement, a Supplementary Product Disclosure Statement, or a Replacement Product Disclosure Statement, a copy of which has been lodged with ASIC; and

(d) regulations made for the purposes of this paragraph do not provide that disclosure under this section is not required in the circumstances;

the disclosing entity must, as soon as practicable, lodge a document with ASIC containing the information.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

Note 4: Subsection (2) has an extended operation in relation to disclosing entities that have made recognised offers of securities under Chapter 8 (see section 1200K).

(2A) A person who is involved in a disclosing entity's contravention of subsection (2) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

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Note 2: Section 79 defines *involved*.

- (2B) A person does not contravene subsection (2A) if the person proves that they:
- (a) took all steps (if any) that were reasonable in the circumstances to ensure that the disclosing entity complied with its obligations under subsection (2); and
  - (b) after doing so, believed on reasonable grounds that the disclosing entity was complying with its obligations under that subsection.
- (3) For the purposes of the application of this section to a disclosing entity that is an undertaking to which interests in a registered scheme relate:
- (a) the entity is aware of information if, and only if, the responsible entity is aware of the information; and
  - (b) the obligation of the entity to lodge a document under subsection (2) is an obligation of the responsible entity.

**676 Sections 674 and 675—when information is generally available**

- (1) This section has effect for the purposes of sections 674 and 675.
- (2) Information is generally available if:
  - (a) it consists of readily observable matter; or
  - (b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:
    - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and
    - (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.
- (3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
  - (a) information referred to in paragraph (2)(a);
  - (b) information made known as mentioned in subparagraph (2)(b)(i).

**677 Sections 674 and 675—material effect on price or value**

For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

**678 Application of *Criminal Code* to offences based on subsection 674(2), 674(5) or 675(2)**

The *Criminal Code* applies to an offence based on subsection 674(2), 674(5) or 675(2).

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: For the meaning of *offence based on* a provision, see the definition in section 9.

## Chapter 6D—Fundraising

### Part 6D.1—Application of the fundraising provisions

#### 700 Coverage of the fundraising rules

- (1) In this Chapter, *securities* has the same meaning as it has in Chapter 7, but does not include a security referred to in paragraph (e) of the definition of *security* in section 761A.

*Offers and invitations both covered*

- (2) For the purposes of this Chapter:
  - (a) offering securities for issue includes inviting applications for the issue of the securities; and
  - (b) offering securities for sale includes inviting offers to purchase the securities.

*Person offering securities*

- (3) For the purposes of this Chapter, the person who offers securities is the person who has the capacity, or who agrees, to issue or transfer the securities if the offer is accepted.

*Geographical coverage of Chapter*

- (4) This Chapter applies to offers of securities that are received in this jurisdiction, regardless of where any resulting issue, sale or transfer occurs.

#### 702 Treatment of offers of options over securities

For the purposes of this Chapter:

- (a) an offer of an option over securities is not taken to be an offer of the underlying securities; and
- (b) the grant of an option without an offer of the option is taken to be an offer of the option; and
- (c) an offer to grant an option is taken to be an offer to issue the security constituted by the option.

- Note 1: If a disclosure document is needed for the option and there is no further offer involved in exercising the option, the issue or sale of the underlying securities on the exercise of the option does not need a disclosure document.
- Note 2: Paragraph (b)—the grant of the option will not require a disclosure document if no consideration is payable on the grant or the exercise of the option (see subsections 708(15) and (16)).

### **703 Chapter may not be contracted out of**

A condition of a contract for the sale or issue of securities is void if it provides that a party to the contract is:

- (a) required or bound to waive compliance with any requirement of this Chapter; or
- (b) taken to have notice of any contract, document or matter not specifically referred to in the disclosure document for the offer.

### **703A Operating a clearing and settlement facility is not offering securities etc.**

Nothing that the operator of a clearing and settlement facility (within the meaning of Chapter 7) does in the course of, or in connection with, providing facilities for the settlement of transactions constitutes, for the purposes of this Chapter:

- (a) an offer of securities for subscription or purchase; or
- (b) an invitation to subscribe for or buy securities.

## Part 6D.2—Disclosure to investors about securities

### Division 1—Overview

#### 704 When disclosure to investors is needed

Sections 706, 707, 708, 708AA and 708A say when an offer of securities needs disclosure to investors under this Part.

Note 1: Section 727 prohibits offering securities without disclosure.

Note 2: If the offer needs disclosure, section 734 applies advertising restrictions. These continue throughout the whole offer process. Different restrictions apply before and after the disclosure document is lodged.

Note 3: The way the offers are made to people must not breach the securities hawking prohibition in section 736.

#### 705 Types of disclosure document

The following table shows what disclosure documents to use if an offer of securities needs disclosure to investors under this Part.

Disclosure document	
Type	Sections
1 <i>prospectus</i>	
The standard full-disclosure document.	content [710, 711, 713] procedure [717] liability [728 and 729] defences [731, 733]
2 <i>short form prospectus</i>	
May be used for any offer. Section 712 allows a prospectus to refer to material lodged with ASIC instead of setting it out. Investors are entitled to a copy of this material if they ask for it.	content [712]

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<b>Disclosure document</b>	
<b>Type</b>	<b>Sections</b>
3 <b><i>profile statement</i></b> Section 721 allows a brief profile statement (rather than the prospectus) to be sent out with offers with ASIC approval. The prospectus must still be prepared and lodged with ASIC. Investors are entitled to a copy of the prospectus if they ask for it.	content [714] procedure [717] liability [728 and 729] defences [732, 733]
4 <b><i>offer information statement</i></b> Section 709 allows an offer information statement to be used instead of a prospectus for an offer to issue securities if the amount raised from issues of securities is \$10 million or less.	content [715] procedure [717] liability [728 and 729] defences [732, 733]

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## Division 2—Offers that need disclosure to investors

### 706 Issue offers that need disclosure

An offer of securities for issue needs disclosure to investors under this Part unless section 708 or 708AA says otherwise.

### 707 Sale offers that need disclosure

*Only some sales need disclosure*

- (1) An offer of securities for sale needs disclosure to investors under this Part only if disclosure is required by subsection (2), (3) or (5).

*Off-market sale by controller*

- (2) An offer of a body's securities for sale needs disclosure to investors under this Part if:
  - (a) the person making the offer controls the body; and
  - (b) either:
    - (i) the securities are not quoted; or
    - (ii) although the securities are quoted, they are not offered for sale in the ordinary course of trading on a relevant financial market;

and section 708 does not say otherwise.

Note: See section 50AA for when a person controls a body.

*Sale amounting to indirect issue*

- (3) An offer of a body's securities for sale within 12 months after their issue needs disclosure to investors under this Part if:
  - (a) the body issued the securities without disclosure to investors under this Part; and
  - (b) either:
    - (i) the body issued the securities with the purpose of the person to whom they were issued selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; or
    - (ii) the person to whom the securities were issued acquired them with the purpose of selling or transferring the



securities, or granting, issuing or transferring interests in, or options over, them;

and section 708 or 708A does not say otherwise.

Note 1: Section 706 normally requires disclosure for the issue of securities. This subsection is intended to prevent avoidance of section 706. However, to establish a contravention of this subsection, the only purpose that needs to be shown is that referred to in paragraph (b).

Note 2: The issuer and the seller must both consent to the disclosure document (see section 720).

*The purpose test in subsection (3)*

(4) For the purposes of subsection (3):

(a) securities are taken to be:

(i) issued with the purpose referred to in subparagraph (3)(b)(i); or

(ii) acquired with the purpose referred to in subparagraph (3)(b)(ii);

if there are reasonable grounds for concluding that the securities were issued or acquired with that purpose (whether or not there may have been other purposes for the issue or acquisition); and

(b) without limiting paragraph (a), securities are taken to be:

(i) issued with the purpose referred to in subparagraph (3)(b)(i); or

(ii) acquired with the purpose referred to in subparagraph (3)(b)(ii);

if any of the securities are subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the issue and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the securities were issued or acquired with that purpose.

*Sale amounting to indirect off-market sale by controller*

(5) An offer of a body's securities for sale within 12 months after their sale by a person who controlled the body at the time of the sale needs disclosure to investors under this Part if:

(a) at the time of the sale by the controller either:

(i) the securities were not quoted; or

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- (ii) although the securities were quoted, they were not offered for sale in the ordinary course of trading on a relevant financial market on which they were quoted; and
- (b) the controller sold the securities without disclosure to investors under this Part; and
- (c) either:
  - (i) the controller sold the securities with the purpose of the person to whom they were sold selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; or
  - (ii) the person to whom the securities were sold acquired them with the purpose of selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them;

and section 708 does not say otherwise.

Note 1: Subsection (2) normally requires disclosure for a sale by a controller. This subsection is intended to prevent avoidance of subsection (2). However, to establish a contravention of this subsection, the only purpose that needs to be shown is that referred to in paragraph (c).

Note 2: See section 50AA for when a person controls a body.

Note 3: The controller and the seller must both consent to the disclosure document (see section 720).

*The purpose test in subsection (5)*

- (6) For the purposes of subsection (5):
  - (a) securities are taken to be:
    - (i) sold with the purpose referred to in subparagraph (5)(c)(i); or
    - (ii) acquired with the purpose referred to in subparagraph (5)(c)(ii);if there are reasonable grounds for concluding that the securities were sold or acquired with that purpose (whether or not there may have been other purposes for the sale or acquisition); and
  - (b) without limiting paragraph (a), securities are taken to be:
    - (i) sold with the purpose referred to in subparagraph (5)(c)(i); or

- (ii) acquired with the purpose referred to in subparagraph (5)(c)(ii);  
if any of the securities are subsequently sold, or offered for sale, within 12 months after their sale by the controller, unless it is proved that the circumstances of the initial sale and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the securities were sold or acquired (in the initial sale) with that purpose.

## **708 Offers that do not need disclosure**

### *Small scale offerings (20 issues or sales in 12 months)*

- (1) Personal offers of a body's securities by a person do not need disclosure to investors under this Part if:
  - (a) none of the offers results in a breach of the 20 investors ceiling (see subsections (3) and (4)); and
  - (b) none of the offers results in a breach of the \$2 million ceiling (see subsections (3) and (4)).

This subsection does not apply to an offer for sale to which subsection 707(3) (sale amounting to indirect issue) or (5) (sale amounting to indirect sale by controller) applies.

Note 1: Subsection 727(4) makes it an offence to issue or transfer securities without disclosure to investors once 20 issues or transfers have occurred or \$2 million has been raised.

Note 2: Under section 740 ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.

- (2) For the purposes of subsection (1), a personal offer is one that:
  - (a) may only be accepted by the person to whom it is made; and
  - (b) is made to a person who is likely to be interested in the offer, having regard to:
    - (i) previous contact between the person making the offer and that person; or
    - (ii) some professional or other connection between the person making the offer and that person; or
    - (iii) statements or actions by that person that indicate that they are interested in offers of that kind.

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- (3) An offer by a body to issue securities:
- (a) results in a breach of the 20 investors ceiling if it results in the number of people to whom securities of the body have been issued exceeding 20 in any 12 month period; and
  - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the body by issuing securities exceeding \$2 million in any 12 month period.
- (4) An offer by a person to transfer a body's securities:
- (a) results in a breach of the 20 investors ceiling if it results in the number of people to whom the person sells securities of the body exceeding 20 in any 12 month period; and
  - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the person from selling the body's securities exceeding \$2 million in any 12 month period.
- (5) In counting issues and sales of the body's securities, and the amount raised from issues and sales, for the purposes of subsection (1), disregard issues and sales that result from offers that:
- (a) do not need a disclosure document because of any other subsection of this section; or
  - (b) are not received in Australia; or
  - (c) are made under a disclosure document.
- Note: Also see provisions on restrictions on advertising (section 734) and securities hawking provisions (Part 6D.3).
- (7) In working out the amount of money raised by the body by issuing securities, include the following:
- (a) the amount payable for the securities at the time when they are issued;
  - (b) if the securities are shares issued partly-paid—any amount payable at a future time if a call is made;
  - (c) if the security is an option—any amount payable on the exercise of the option;
  - (d) if the securities carry a right to convert the securities into other securities—any amount payable on the exercise of that right.

*Sophisticated investors*

- (8) An offer of a body's securities does not need disclosure to investors under this Part if:
- (a) the minimum amount payable for the securities on acceptance of the offer by the person to whom the offer is made is at least \$500,000; or
  - (b) the amount payable for the securities on acceptance by the person to whom the offer is made and the amounts previously paid by the person for the body's securities of the same class that are held by the person add up to at least \$500,000; or
  - (c) it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made that the person to whom the offer is made:
    - (i) has net assets of at least the amount specified in regulations made for the purposes of this subparagraph; or
    - (ii) has a gross income for each of the last 2 financial years of at least the amount specified in regulations made for the purposes of this subparagraph a year; or
  - (d) the offer is made to a company or trust controlled by a person who meets the requirements of subparagraph (c)(i) or (ii).

Note 1: Section 9 defines *qualified accountant*.

Note 2: A financial services licensee has obligations under Division 3 of Part 7.7 when providing financial advice. ASIC has a power under section 915C to suspend or cancel a licensee's licence.

- (9) In calculating the amount payable, or paid, for securities for the purposes of paragraph (8)(a) or (b), disregard any amount payable, or paid, to the extent to which it is to be paid, or was paid, out of money lent by the person offering the securities or an associate.
- (9A) In addition to specifying amounts for the purposes of subparagraphs (8)(c)(i) and (ii), the regulations may do either or both of the following:
- (a) deal with how net assets referred to in subparagraph (8)(c)(i) are to be determined and valued, either generally or in specified circumstances;
  - (b) deal with how gross income referred to in subparagraph (8)(c)(ii) is to be calculated, either generally or in specified circumstances.

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- (9B) In determining the net assets of a person under subparagraph (8)(c)(i), the net assets of a company or trust controlled by the person may be included.

Note: **Control** is defined in section 50AA.

- (9C) In determining the gross income of a person under subparagraph (8)(c)(ii), the gross income of a company or trust controlled by the person may be included.

Note: **Control** is defined in section 50AA.

- (10) An offer of a body's securities does not need disclosure to investors under this Part if:
- (a) the offer is made through a financial services licensee; and
  - (b) the licensee is satisfied on reasonable grounds that the person to whom the offer is made has previous experience in investing in securities that allows them to assess:
    - (i) the merits of the offer; and
    - (ii) the value of the securities; and
    - (iii) the risks involved in accepting the offer; and
    - (iv) their own information needs; and
    - (v) the adequacy of the information given by the person making the offer; and
  - (c) the licensee gives the person before, or at the time when, the offer is made a written statement of the licensee's reasons for being satisfied as to those matters; and
  - (d) the person to whom the offer is made signs a written acknowledgment before, or at the time when, the offer is made that the licensee has not given the person a disclosure document under this Part in relation to the offer.

*Professional investors*

- (11) An offer of securities does not need disclosure to investors under this Part if it is made to:
- (a) a person covered by the definition of **professional investor** in section 9 (except a person mentioned in paragraph (e) of the definition); or
  - (b) a person who has or controls gross assets of at least \$10 million (including any assets held by an associate or under a trust that the person manages).

*Offers of securities to people associated with the body*

- (12) An offer of a body's securities does not need disclosure to investors under this Part if it is made to:
- (a) a senior manager of the body or a related body or their spouse, parent, child, brother or sister; or
  - (b) a body corporate controlled by a person referred to in paragraph (a).

*Certain offers to present holder of securities*

- (13) An offer of securities for issue does not need disclosure to investors under this Part if it is:
- (a) an offer of fully-paid shares in a body to 1 or more existing holders of shares in the body under a dividend reinvestment plan or bonus share plan; or
  - (b) an offer of interests in a managed investment scheme to 1 or more existing holders of interests in the scheme if:
    - (i) the offer is made under a distribution reinvestment plan or switching facility; or
    - (ii) the scheme is of a kind commonly known as a cash common fund or cash management trust.
- (14) An offer of a disclosing entity's debentures for issue does not need disclosure to investors under this Part if the offer is made to 1 or more existing debenture holders.

*Issues or sales for no consideration*

- (15) An offer of securities (other than options) does not need disclosure to investors under this Part if no consideration is to be provided for the issue or transfer of the securities.
- (16) An offer of options does not need disclosure to investors under this Part if:
- (a) no consideration is to be provided for the issue or transfer of the options; and
  - (b) no consideration is to be provided for the underlying securities on the exercise of the option.

*Compromise or arrangement under Part 5.1*

- (17) An offer of securities does not need disclosure to investors under this Part if it is made under a compromise or arrangement under Part 5.1 approved at a meeting held as a result of an order under subsection 411(1) or (1A).

*Deed of company arrangement*

- (17A) An offer of securities does not need disclosure to investors under this Part if:
- (a) it is made to any or all of the company's creditors under a deed of company arrangement; and
  - (b) it does not require the provision of consideration other than the release of the company from a debt or debts; and
  - (c) in a case where the offer is specified in the deed otherwise than as a result of a resolution passed at a meeting convened under section 445F—the subsection 439A(3) notice given in relation to the administration of the company was accompanied by a statement:
    - (i) that set out all relevant information about the offer that was within the knowledge of the administrator of the company; and
    - (ii) that stated that the statement is not a prospectus and may contain less information than a prospectus; and
  - (d) in a case where the offer is specified in the deed as a result of a resolution passed at a meeting convened under section 445F—the subsection 445F(2) notice given in relation to the resolution was accompanied by a statement:
    - (i) that set out all relevant information about the offer that was within the knowledge of the administrator of the deed; and
    - (ii) that stated that the statement is not a prospectus and may contain less information than a prospectus.

*Takeovers*

- (18) An offer of securities does not need disclosure to investors under this Part if it is:
- (a) made as consideration for an offer to acquire securities under a takeover bid under Chapter 6; and



(b) accompanied by a bidder's statement.

Note: Although this offer does not need a disclosure document, similar disclosures must be made about the securities in the bidder's statement under section 636.

*Debentures of certain bodies*

- (19) An offer of a body's debentures for issue or sale does not need disclosure to investors under this Part if the body is:
- (a) an Australian ADI; or
  - (b) registered under section 21 of the *Life Insurance Act 1995*.

*Offers by exempt bodies*

- (20) An offer of a body's securities in a State or Territory in this jurisdiction does not need disclosure to investors under this Part if the body is an exempt body of that State or Territory.

Note: Section 66A defines *exempt body*.

- (21) An offer of a body's securities for issue does not need disclosure to investors under this Part if the body is an exempt public authority of a State or Territory.

Note: Debentures, stock or bonds issued by a government are not securities for the purposes of this Chapter (see subsection 92(3)).

**708AA Rights issues that do not need disclosure**

- (1) This section applies to an offer of a body's securities (the *relevant securities*) for issue if:
- (a) but for subsection (2), disclosure to investors under this Part would be required by section 706; and
  - (b) a determination under subsection (3) is not in force in relation to the body at the time when the relevant securities are offered.

*Conditions required for rights issue*

- (2) The offer does not need disclosure to investors under this Part if:
- (a) the relevant securities are being offered under a rights issue; and
  - (b) the class of the relevant securities are quoted securities at the time at which the offer is made; and

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- (c) trading in that class of securities on a prescribed financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the following periods:
  - (i) the period during which the class of securities is quoted;
  - (ii) the period of 12 months before the day on which the offer is made; and
- (d) no exemption under section 111AS or 111AT covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (c); and
- (e) no order under section 340 or 341 covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (c); and
- (f) the body gives the relevant market operator for the body a notice that complies with subsection (7) within the 24 hour period before the offer is made.

*Determination by ASIC*

- (3) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the body contravened any of the following provisions:
  - (a) subsection 283AA(1), 283AB(1) or 283AC(1);
  - (b) the provisions of Chapter 2M as they apply to the body;
  - (c) section 674 or 675;
  - (d) section 724 or 728;
  - (e) subsection (10) of this section;
  - (f) section 1308 as that section applies to a notice under subsection (2) of this section.
- (4) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (5) The determination made under subsection (3) is not a legislative instrument.
- (6) A failure to publish a copy of the determination does not affect the validity of the determination.

*Requirements for notice*

- (7) A notice complies with this subsection if the notice:
- (a) states that the body will offer the relevant securities for issue without disclosure to investors under this Part; and
  - (b) states that the notice is being given under paragraph (2)(f); and
  - (c) states that, as at the date of the notice, the body has complied with:
    - (i) the provisions of Chapter 2M as they apply to the body; and
    - (ii) section 674; and
  - (d) sets out any information that is excluded information as at the date of the notice (see subsections (8) and (9)); and
  - (e) states:
    - (i) the potential effect the issue of the relevant securities will have on the control of the body; and
    - (ii) the consequences of that effect.

Note 1: A person is taken not to contravene section 727 if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 727(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The body has an obligation to correct a defective notice: see subsection (10) of this section.

- (8) For the purposes of subsection (7), excluded information is information:
- (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
  - (b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:
    - (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; or
    - (ii) the rights and liabilities attaching to the relevant securities.

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- (9) The notice given under subsection (2) must contain any excluded information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in a disclosure document.

*Obligation to correct defective notice*

- (10) The body contravenes this subsection if:
- (a) the notice given under subsection (2) is defective; and
  - (b) the body becomes aware of the defect in the notice within 12 months after the relevant securities are issued; and
  - (c) the body does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.
- (11) For the purposes of subsection (10), the notice under subsection (2) is **defective** if the notice:
- (a) does not comply with paragraph (2)(f); or
  - (b) is false or misleading in a material particular; or
  - (c) has omitted from it a matter or thing, the omission of which renders the notice misleading in a material respect.

**708A Sale offers that do not need disclosure**

*Sale offers to which this section applies*

- (1) This section applies to an offer (the **sale offer**) of a body's securities (the **relevant securities**) for sale by a person if:
- (a) but for subsection (5), (11) or (12), disclosure to investors under this Part would be required by subsection 707(3) for the sale offer; and
  - (b) the securities were not issued by the body with the purpose referred to in subparagraph 707(3)(b)(i); and
  - (c) a determination under subsection (2) was not in force in relation to the body at the time when the relevant securities were issued.
- (1A) This section also applies to an offer (the **sale offer**) of a body's securities (the **relevant securities**) for sale by a person if:

- (a) but for subsection (5), disclosure to investors under this Part would be required by subsection 707(5) for the sale offer; and
- (b) the securities were not sold by the controller with the purpose referred to in subparagraph 707(5)(c)(i); and
- (c) a determination under subsection (2) was not in force in relation to the body at the time when the relevant securities were issued.

*Determination by ASIC*

- (2) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the body contravened any of the following provisions:
  - (a) subsection 283AA(1), 283AB(1) or 283AC(1);
  - (b) the provisions of Chapter 2M as they apply to the body;
  - (c) section 674 or 675;
  - (d) section 724 or 728;
  - (e) subsection (9) of this section; or
  - (f) section 1308 as that section applies to a notice under subsection (5) of this section.
- (3) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (4) A failure to publish a copy of the determination does not affect the validity of the determination.

*Sale offer of quoted securities—case 1*

- (5) The sale offer does not need disclosure to investors under this Part if:
  - (a) the relevant securities are in a class of securities that were quoted securities at all times in the 3 months before the day on which the relevant securities were issued; and
  - (b) trading in that class of securities on a prescribed financial market on which they were quoted was not suspended for more than a total of 5 days during the shorter of the period during which the class of securities were quoted, and the period of 12 months before the day on which the relevant securities were issued; and

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- (c) no exemption under section 111AS or 111AT covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (b); and
  - (d) no order under section 340 or 341 covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (b); and
  - (e) either:
    - (i) if this section applies because of subsection (1)—the body gives the relevant market operator for the body a notice that complies with subsection (6) before the sale offer is made; or
    - (ii) if this section applies because of subsection (1A)—both the body, and the controller, give the relevant market operator for the body a notice that complies with subsection (6) before the sale offer is made.
- (6) A notice complies with this subsection if the notice:
- (a) is given within 5 business days after the day on which the relevant securities were issued by the body; and
  - (b) states that the body issued the relevant securities without disclosure to investors under this Part; and
  - (c) states that the notice is being given under paragraph (5)(e); and
  - (d) states that, as at the date of the notice, the body has complied with:
    - (i) the provisions of Chapter 2M as they apply to the body; and
    - (ii) section 674; and
  - (e) sets out any information that is excluded information as at the date of the notice (see subsections (7) and (8)).
- Note 1: A person is taken not to contravene section 727 if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 727(5).
- Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The body has an obligation to correct a defective notice: see subsection (9) of this section.
- (7) For the purposes of subsection (6), excluded information is information:
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- (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
  - (b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:
    - (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; or
    - (ii) the rights and liabilities attaching to the relevant securities.
- (8) The notice given under subsection (5) must contain any excluded information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in a disclosure document.

*Obligation to correct defective notice*

- (9) The body contravenes this subsection if:
- (a) the notice given under subsection (5) is defective; and
  - (b) the body becomes aware of the defect in the notice within 12 months after the relevant securities are issued; and
  - (c) the body does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.
- (10) For the purposes of subsection (9), the notice under subsection (5) is **defective** if the notice:
- (a) does not comply with paragraph (6)(e); or
  - (b) is false or misleading in a material particular; or
  - (c) has omitted from it a matter or thing the omission of which renders the notice misleading in a material respect.

*Sale offer of quoted securities—case 2*

- (11) The sale offer does not need disclosure to investors under this Part if:
- (a) the relevant securities are in a class of securities that are quoted securities of the body; and

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- (b) either:
  - (i) a prospectus is lodged with ASIC on or after the day on which the relevant securities were issued but before the day on which the sale offer is made; or
  - (ii) a prospectus is lodged with ASIC before the day on which the relevant securities are issued and offers of securities that have been made under the prospectus are still open for acceptance on the day on which the relevant securities were issued; and
- (c) the prospectus is for an offer of securities issued by the body that are in the same class of securities as the relevant securities.

*Sale offer of quoted securities—case 3*

- (12) This subsection is satisfied if:
  - (a) the body offered to issue securities under a prospectus; and
  - (b) the body issued the relevant securities to:
    - (i) a person (the ***underwriter***) named in that prospectus as an underwriter of the issue; or
    - (ii) a person nominated by the underwriter; and
  - (c) the relevant securities were issued to the underwriter, or the person nominated by the underwriter, at or about the time that persons who applied for securities under the prospectus were issued with those securities; and
  - (d) the relevant securities are in a class of securities that were quoted securities of the body.



## **Division 3—Types of disclosure documents**

### **709 Prospectuses, short-form prospectuses, profile statements and offer information statements**

#### *Prospectus or short-form prospectus*

- (1) If an offer of securities needs disclosure to investors under this Part, a prospectus must be prepared for the offer unless subsection (4) allows an offer information statement to be used instead. Under section 712, the prospectus may simply refer to material already lodged with ASIC instead of including it.

Note: See sections 710 to 713 for the contents of a prospectus.

#### *Profile statement*

- (2) A profile statement for an offer may be prepared in addition to the prospectus if ASIC has approved the making of offers of that kind with a profile statement instead of a disclosure document.

Note 1: See section 714 for the contents of a profile statement.

Note 2: Subsection 729(2) provides that there is still liability to investors on the prospectus when a profile statement is used.

- (3) ASIC may approve the use of profile statements for offers of securities of a particular kind. The approval may specify information to be included in the profile statement (including information about a matter referred to in paragraphs 714(1)(a) to (d)).

#### *Offer information statement*

- (4) A body offering to issue securities may use an offer information statement for the offer instead of a prospectus if the amount of money to be raised by the body by issuing the securities, when added to all amounts previously raised by:
  - (a) the body; or
  - (b) a related body corporate; or
  - (c) an entity controlled by:
    - (i) a person who controls the body; or
    - (ii) an associate of that person;

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by issuing securities under an offer information statement is \$10 million or less.

Note 1: See section 715 for the contents of an offer information statement. The statement must include financial statements that are less than 6 months old.

Note 2: Under section 740, ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.

- (5) In working out the amount of money to be raised by a body or entity by issuing securities, include the following:
- (a) the amount payable for the securities at the time when they are issued;
  - (b) if the securities are issued partly-paid—any amount payable at a future time if a call is made;
  - (c) if the securities are options—any amount payable on the exercise of the options;
  - (d) if the securities carry a right to convert the securities into other securities—any amount payable on the exercise of that right.

However, do not include an amount payable for securities, or payable on the exercise of options, if the securities or options are issued under an eligible employee share scheme.

## Division 4—Disclosure requirements

### 710 Prospectus content—general disclosure test

- (1) A prospectus for a body’s securities must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters set out in the table below. The prospectus 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 prospectus; and
  - (b) only if a person whose knowledge is relevant (see subsection (3)):
    - (i) actually knows the information; or
    - (ii) in the circumstances ought reasonably to have obtained the information by making enquiries.

<b>Disclosures</b>		[operative]
<b>Offer</b>	<b>Matters</b>	
1	offer to issue (or transfer) shares, debentures or interests in a managed investment scheme	<ul style="list-style-type: none"> <li>• the rights and liabilities attaching to the securities offered</li> <li>• the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue (or issued) the shares, debentures or interests</li> </ul>

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<b>Disclosures</b>		[operative]
<b>Offer</b>	<b>Matters</b>	
2	offer to grant (or transfer) a legal or equitable interest in securities or grant (or transfer) an option over securities	<ul style="list-style-type: none"> <li>• the rights and liabilities attaching to:                             <ul style="list-style-type: none"> <li>- the interest or option</li> <li>- the underlying securities</li> </ul> </li> <li>• for an option—the capacity of the person making the offer to issue or deliver the underlying securities</li> <li>• if the person making the offer is:                             <ul style="list-style-type: none"> <li>- the body that issued or is to issue the underlying securities; or</li> <li>- a person who controls that body;</li> </ul>                             the assets and liabilities, financial position and performance, profits and losses and prospects of that body                             <ul style="list-style-type: none"> <li>- a person who controls that body;</li> </ul> </li> <li>• if subsection 707(3) or (5) applies to the offer—the assets and liabilities, financial position and performance, profits and losses and prospects of the body whose securities are offered</li> </ul>

Note: Section 713 makes special provision for prospectuses for continuously quoted securities.

- (2) In deciding what information should be included under subsection (1), have regard to:
- (a) the nature of the securities and of the body; and
  - (b) if the securities are investments in a managed investment scheme—the nature of the scheme; and
  - (c) the matters that likely investors may reasonably be expected to know; and
  - (d) the fact that certain matters may reasonably be expected to be known to their professional advisers.
- (3) For the purposes of this section, a person’s knowledge is relevant only if they are one of the following:
- (a) the person offering the securities;
  - (b) if the person offering the securities is a body—a director of the body;
  - (c) a proposed director of the body whose securities will be issued under the offer;

- (d) a person named in the prospectus as an underwriter of the issue or sale;
- (e) a person named in the prospectus as a person named in the prospectus as a financial services licensee involved in the issue or sale;
- (f) a person named in the prospectus with their consent as having made a statement:
  - (i) that is included in the prospectus; or
  - (ii) on which a statement made in the prospectus is based;
- (g) a person named in the prospectus with their consent as having performed a particular professional or advisory function.

Note: Section 729 says who is liable for misstatements in, and omissions from, a disclosure document.

## **711 Prospectus content—specific disclosures**

### *Terms and conditions of offer*

- (1) The prospectus must set out the terms and conditions of the offer.

### *Disclosure of interests and fees of certain people involved in the offer*

- (2) The prospectus must set out the nature and extent of the interests (if any) that each person referred to in subsection (4) holds, or held at any time during the last 2 years, in:
  - (a) the formation or promotion of the body; or
  - (b) property acquired or proposed to be acquired by the body in connection with:
    - (i) its formation or promotion; or
    - (ii) the offer of the securities; or
  - (c) the offer of the securities.
- (3) The prospectus must set out the amount that anyone has paid or agreed to pay, or the nature and value of any benefit anyone has given or agreed to give:
  - (a) to a director, or proposed director, to induce them to become, or to qualify as, a director of the body; and

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- (b) for services provided by a person referred to in subsection (4) in connection with:
  - (i) the formation or promotion of the body; or
  - (ii) the offer of the securities; and
- (c) if the prospectus is for interests in a managed investment scheme—to the responsible entity:
  - (i) to procure acquisitions of interests in the scheme; or
  - (ii) for services provided under the constitution of the scheme.

To comply with this subsection it is not sufficient merely to state in the prospectus that a person has been paid or will be paid normal, usual or standard fees.

- (4) Disclosures need to be made under subsections (2) and (3) in relation to:
  - (a) any directors and proposed directors of the body;
  - (b) a person named in the prospectus as performing a function in a professional, advisory or other capacity in connection with the preparation or distribution of the prospectus;
  - (d) a promoter of the body;
  - (e) an underwriter (but not a sub-underwriter) to the issue or sale or a financial services licensee named in the prospectus as a financial services licensee involved in the issue or sale.

*Quotation of securities*

- (5) If the prospectus for an offer of securities states or implies that the securities will be able to be traded on a financial market (whether in Australia or elsewhere), the prospectus must state that:
  - (a) the securities have been admitted to quotation on that financial market; or
  - (b) an application for admission of the securities to quotation on that financial market has been made to the operator of that market; or
  - (c) an application for admission of the securities to quotation on that financial market will be made to the operator of that market within 7 days after the date of the prospectus.

Note 1: Paragraph 724(1)(b) gives times within which the person should seek and obtain admission to quotation.

Note 2: Subsection 716(1) requires the prospectus to be dated.

*Expiry date*

- (6) The prospectus must state that no securities will be issued on the basis of the prospectus after the expiry date specified in the prospectus. The expiry date must not be later than 13 months after the date of the prospectus. The expiry date of a replacement prospectus must be the same as that of the original prospectus it replaces.

Note 1: Subsection 716(1) requires the prospectus to be dated.

Note 2: Section 719 deals with replacement prospectuses.

*Lodgment with ASIC*

- (7) The prospectus must state that:
- (a) a copy of the prospectus has been lodged with ASIC; and
  - (b) ASIC takes no responsibility for the content of the prospectus.

*Prescribed information*

- (8) The prospectus must set out the information required by the regulations.

## **712 Prospectus content—short form prospectuses**

*Prospectus may simply refer to material lodged with ASIC*

- (1) Instead of setting out information that is contained in a document that has been lodged with ASIC, a prospectus may simply refer to the document. The reference must:
- (a) identify the document or the part of the document that contains the information; and
  - (b) inform people of their right to obtain a copy of the document (or part) under subsection (5).
- (2) The reference must also include:
- (a) if the information is primarily of interest to professional analysts or advisers or investors with similar specialist information needs:
    - (i) a description of the contents of the document (or part);
    - and

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- (ii) a statement to the effect that the information in the document (or part) is primarily of interest to those people; or
  - (b) in any other case—sufficient information about the contents of the document to allow a person to whom the offer is made to decide whether to obtain a copy of the document (or part).
- (3) The document (or part) referred to under subsection (1) is taken to be included in the prospectus.
- (4) A person who wishes to take advantage of subsection (1) may lodge a document with ASIC even if this Act does not require the document to be lodged.
- (5) If the prospectus is taken to include a document, or part of a document, under subsection (1), the person making the offer must give a copy of the document (or part) free of charge to anyone who asks for it during the application period of the prospectus.

**713 Special prospectus content rules for continuously quoted securities**

*Alternative general disclosure test*

- (1) A prospectus for an offer of:
  - (a) continuously quoted securities of a body; or
  - (b) options to acquire continuously quoted securities of a body;satisfies section 710 if it complies with subsections (2), (3) and (4) of this section.
- (2) The prospectus must contain all the information investors and their professional advisers would reasonably require to make an informed assessment of:
  - (a) the effect of the offer on the body; and
  - (c) the rights and liabilities attaching to the securities offered; and
  - (d) if the securities are options—the rights and liabilities attaching to:
    - (i) the options themselves; and
    - (ii) the underlying securities.



The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.

- (3) The prospectus must state that:
  - (a) as a disclosing entity, the body is subject to regular reporting and disclosure obligations; and
  - (b) copies of documents lodged with ASIC in relation to the body may be obtained from, or inspected at, an ASIC office.
  
- (4) The prospectus must either:
  - (a) inform people of their right to obtain a copy of any of the following documents:
    - (i) the annual financial report most recently lodged with ASIC by the body;
    - (ii) any half-year financial report lodged with ASIC by the body after the lodgment of that annual financial report and before the lodgment of the copy of the prospectus with ASIC;
    - (iii) any continuous disclosure notices given by the body after the lodgment of that annual financial report and before the lodgment of the copy of the prospectus with ASIC; or
  - (b) include, or be accompanied by, a copy of the document.

If the prospectus informs people of their right to obtain a copy of the document, the person making the offer must give a copy of the document free of charge to anyone who asks for it during the application period for the prospectus.

*Information excluded from continuous disclosure notice*

- (5) Information about the offer must also be set out in the prospectus if the information:
  - (a) has been excluded from a continuous disclosure notice in accordance with the listing rules of the prescribed financial market whose operator was given the notice; and
  - (b) is information that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:

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- (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; and
- (ii) the rights and liabilities attaching to the securities being offered.

The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.

*ASIC power to exclude entity from this section*

- (6) ASIC may determine in writing that a body may not rely on this section if it is satisfied that, in the previous 12 months, any of the following provisions were contravened in relation to the body:
  - (a) the provisions of Chapter 2M;
  - (aa) subsection 674(2) or 675(2);
  - (ab) subsection 708AA(10) or 708A(9);
  - (b) section 724;
  - (c) section 728;
  - (d) section 1308 as it applies to a notice under subsection 708AA(2) or 708A(5);

ASIC must publish a copy of the determination in the *Gazette*. While the determination is in force, section 710 and not this section applies to securities of the body.

**714 Contents of profile statement**

- (1) A profile statement must:
  - (a) identify the body and the nature of the securities; and
  - (b) state the nature of the risks involved in investing in the securities; and
  - (c) give details of all amounts payable in respect of the securities (including any amounts by way of fee, commission or charge); and
  - (d) state that the person given the profile statement is entitled to a copy of the prospectus free of charge; and
  - (e) state that:
    - (i) a copy of the statement has been lodged with ASIC; and
    - (ii) ASIC takes no responsibility for the content of the statement; and

- (f) give any other information required by the regulations or by ASIC approval under subsection 709(3).
- (2) The profile statement must state that no securities will be issued on the basis of the statement after the expiry date specified in the statement. The expiry date must not be later than 13 months after the date of the prospectus. The expiry date of a replacement statement must be the same as that of the original statement it replaces.

Note 1: Subsection 716(1) requires the profile statement to be dated.

Note 2: Section 719 deals with supplementary and replacement profile statements.

### **715 Contents of offer information statement**

- (1) An offer information statement for the issue of a body's securities must:
  - (a) identify the body and the nature of the securities; and
  - (b) describe the body's business; and
  - (c) describe what the funds raised by the offers are to be used for; and
  - (d) state the nature of the risks involved in investing in the securities; and
  - (e) give details of all amounts payable in respect of the securities (including any amounts by way of fee, commission or charge); and
  - (f) state that:
    - (i) a copy of the statement has been lodged with ASIC; and
    - (ii) ASIC takes no responsibility for the content of the statement; and
  - (g) state that the statement is not a prospectus and that it has a lower level of disclosure requirements than a prospectus; and
  - (h) state that investors should obtain professional investment advice before accepting the offer; and
  - (i) include a copy of a financial report for the body; and
  - (j) include any other information that the regulations require to be included in the statement.

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- (2) The financial report included under paragraph (1)(i) must:
- (a) be a report for a 12 month period and have a balance date that occurs within the last 6 months before the securities are first offered under the statement; and
  - (b) be prepared in accordance with the accounting standards; and
  - (c) be audited.
- (3) The statement must state that no securities will be issued on the basis of the statement after the expiry date specified in the statement. The expiry date must not be later than 13 months after the date of the statement. The expiry date of a replacement statement must be the same as that of the original statement it replaces.

Note 1: Subsection 716(1) requires the statement to be dated.

Note 2: Section 719 deals with replacement statements.

**715A Presentation etc. of disclosure documents**

- (1) The information in a disclosure document must be worded and presented in a clear, concise and effective manner.

Note: If this subsection is contravened, ASIC may make a stop order under section 739.

- (2) A contravention of subsection (1) is not an offence.

**716 Disclosure document date and consents**

*Date of disclosure document*

- (1) A disclosure document must be dated. The date is the date on which it is lodged with ASIC.

*Consent of person to whom statement attributed*

- (2) A disclosure document may only include a statement by a person, or a statement said in the document to be based on a statement by a person, if:
- (a) the person has consented to the statement being included in the document in the form and context in which it is included; and
  - (b) the document states that the person has given this consent; and

- (c) the person has not withdrawn this consent before the document is lodged with ASIC.

## Division 5—Procedure for offering securities

### 717 Overview of procedure for offering securities

The following table summarises what a person who wants to offer securities must do to make an offer of securities that needs disclosure to investors under this Part and gives signposts to relevant sections:

<b>Offering securities (disclosure documents and procedure)</b>			
	<b>Action required</b>	<b>Sections</b>	<b>Comments and related sections</b>
1	Prepare disclosure document, making sure that it: <ul style="list-style-type: none"><li>• sets out all the information required</li><li>• does not contain any misleading or deceptive statements</li><li>• is dated</li></ul> and that the directors consent to the disclosure document.	710 711 712 713 714 715 716	Section 728 prohibits offering securities under a disclosure document that is materially deficient.  Section 729 deals with the liability for breaches of this prohibition.  Sections 731, 732 and 733 set out defences.
2	Lodge the disclosure document with ASIC	718	Subsection 727(3) prohibits processing applications for non-quoted securities for 7 days after the disclosure document is lodged.

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**Offering securities (disclosure documents and procedure)**

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Action required	Sections	Comments and related sections
3 Offer the securities, making sure that the offer and any application form is either included in or accompanies: <ul style="list-style-type: none"> <li>• the disclosure document; or</li> <li>• a profile statement if ASIC has approved the use of a profile statement for offers of that kind.</li> </ul>	721	Sections 727 and 728 make it an offence to: <ul style="list-style-type: none"> <li>• offer securities without a disclosure document</li> <li>• offer securities if the disclosure document is materially deficient.</li> </ul> Subsection 729(3) deals with liability on the prospectus if a profile statement is used. The securities hawking provisions (section 736) restrict the way in which the securities can be offered.
4 If it is found that the disclosure document lodged was deficient or a significant new matter arises, either: <ul style="list-style-type: none"> <li>• lodge a supplementary or replacement document under section 719; or</li> <li>• return money to applicants under section 724.</li> </ul>	719 724	Section 728 prohibits making offers after becoming aware of a material deficiency in the disclosure document or a significant new matter. Section 730 requires people liable on the disclosure document to inform the person making the offer about material deficiencies and new matters.
5 Hold application money received on trust until the securities are issued or transferred or the money returned.	722	Investors may have a right to have their money returned if certain events occur (see sections 724, 737 and 738).

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**Offering securities (disclosure documents and procedure)**

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	<b>Action required</b>	<b>Sections</b>	<b>Comments and related sections</b>
6	Issue or transfer the securities, making sure that: <ul style="list-style-type: none"><li>• the investor used an application form distributed with the disclosure document; and</li><li>• the disclosure document is current and not materially deficient; and</li><li>• any minimum subscription condition has been satisfied.</li></ul>	723	Section 721 says which disclosure document must be distributed with the application form. Section 729 identifies the people who may be liable if: <ul style="list-style-type: none"><li>• securities are issued in response to an improper application form; or</li><li>• the disclosure document is not current or is materially deficient.</li></ul> Sections 731, 732 and 733 provide defences for the contraventions. Section 737 provides remedies for an investor.

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**718 Lodging of disclosure document**

A disclosure document to be used for an offer of securities must be lodged with ASIC.

Note 1: Subsection 727(3) makes it an offence to process applications for non-quoted securities under an offer that needs a disclosure document until 7 days after the disclosure document is lodged.

Note 2: See section 720 for the consents that need to be obtained before lodgment.

Note 3: Section 351 says what signatures are necessary for documents that are to be lodged with ASIC.

**719 Lodging supplementary or replacement document**

*Need for a supplementary or replacement document*

- (1) If the person making the offer becomes aware of:
- (a) a misleading or deceptive statement in the disclosure document; or
  - (b) an omission from the disclosure document of information required by section 710, 711, 712, 713, 714 or 715; or



- (c) a new circumstance that:
- (i) has arisen since the disclosure document was lodged;  
and
  - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged;

that is materially adverse from the point of view of an investor, the person may lodge a supplementary or replacement document with ASIC.

- Note 1: Section 728 makes it an offence to continue making offers after the person has become aware of a misleading or deceptive statement, omission or new circumstance that is materially adverse from the point of view of an investor unless the deficiency is corrected.
- Note 2: Because of section 712, a prospectus may be taken to include information in another document. This should be taken into account when considering whether the prospectus is deficient.
- Note 3: The power to issue a supplementary or replacement document is not limited to the situations dealt with in this section.
- Note 4: This section applies to a document that has already been previously supplemented or replaced.
- Note 5: See section 720 for the consents that need to be obtained before lodgment.

- (1A) If the person making the offer becomes aware that information in the disclosure document is not worded and presented in a clear, concise and effective manner, the person may lodge a supplementary or replacement document with ASIC.

*Form of supplementary document*

- (2) At the beginning of a supplementary document, there must be:
- (a) a statement that it is a supplementary document; and
  - (b) an identification of the disclosure document it supplements;  
and
  - (c) an identification of any previous supplementary documents lodged with ASIC in relation to the offer; and
  - (d) a statement that it is to be read together with the disclosure document it supplements and any previous supplementary documents.

The supplementary document must be dated. The date is the date on which it is lodged with ASIC.

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*Form of replacement document*

- (3) At the beginning of a replacement document, there must be:

- (a) a statement that it is a replacement document; and
- (b) an identification of the disclosure document it replaces.

The replacement document must be dated. The date is the date on which it is lodged with ASIC.

*Consequences of lodging a supplementary document*

- (4) If a supplementary document is lodged with ASIC, the disclosure document is taken to be the disclosure document together with the supplementary document for the purposes of the application of this Chapter to events that occur after the lodgment.

Note: This subsection means, for example, that offers made after lodgment of the supplementary document must be accompanied by copies of both the original disclosure document and the supplementary document.

*Consequences of lodging a replacement document*

- (5) If a replacement document is lodged with ASIC, the disclosure document is taken to be the replacement document for the purposes of the application of this Chapter to events that occur after the lodgment.

Note: This subsection means, for example, that offers made after lodgment of the replacement document must be accompanied by copies of the replacement document and not the original disclosure document.

**720 Consents needed for lodgment**

The lodgment of a disclosure document, or a supplementary or replacement document, for the offer of a body's securities requires the consent of:

<b>Consents required for lodgment</b>		[operative]
<b>Type of offer</b>	<b>People whose consent is required</b>	
<i>Issue offers</i>		
1	offer of securities for issue	every director of the body every person named in the document as a proposed director of the body if securities interests in a managed investment scheme made available by a body—every director of that body if securities interests in a managed investment scheme made available by an individual—that individual
<i>sale offers (sale by controller)</i>		
2	offer of securities for sale that needs a disclosure document because of subsection 707(2)	if seller an individual—that individual if seller a body—every director of the body
<i>sale offers (sale amounting to indirect issue)</i>		
3	offer of securities for sale that needs a disclosure document because of subsection 707(3)	every director of the body whose securities are offered for sale if seller an individual—that individual if seller a body—every director of the body

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<b>Consents required for lodgment</b>		[operative]
<b>Type of offer</b>	<b>People whose consent is required</b>	
<i>sale offers (sale amounting to indirect sale by controller)</i>		
4	offer of securities for sale that needs a disclosure document because of subsection 707(5)	if seller an individual—that individual if seller a body—every director of the body if individual controls the body whose securities are offered for sale—that individual if body controls the body whose securities are offered for sale—every director of the controlling body

**721 Offer must be made in, or accompanied by, the disclosure document**

*Offers using prospectus alone*

- (1) Offers of securities for which a prospectus is being used must be made in, or accompanied by, the prospectus.

Note 1: Subsection 727(1) makes it an offence to make an offer of securities unless the offer is made in or accompanied by the disclosure document and subsection 723(1) makes it an offence to issue securities unless they are applied for on a form that was issued in or together with the disclosure document.

Note 2: Section 736 makes it an offence to make unsolicited offers in a way that amounts to securities hawking.

Note 3: Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

- (1A) Subsection (1) does not apply to the extent that subsection (2) allows a profile statement to be used instead of a prospectus.

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

*Offers using prospectus and profile statement*

- (2) An offer of securities may be made in, or accompanied by, a profile statement if:
  - (a) under subsection 709(3), ASIC has approved the making of offers of that kind with a profile statement instead of a prospectus; and
  - (b) the profile statement complies with the requirements specified in ASIC approval.
- (3) If the offer that is made to a person is made in or accompanied by a profile statement, the person making the offer must give the person a copy of the prospectus free of charge if the person asks for it.

*Offers using offer information statement*

- (4) Offers for which an offer information statement is being used must be made in, or accompanied by, the offer information statement.

Note 1: Subsection 727(1) makes it an offence to make an offer of securities unless the offer is made in or accompanied by the disclosure document and subsection 723(1) makes it an offence to issue securities unless they are applied for on a form that was issued in or together with the disclosure document.

Note 2: Section 736 makes it an offence to make unsolicited offers in a way that amounts to securities hawking.

Note 3: Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

*Offence*

- (5) A person commits an offence if the person intentionally or recklessly contravenes subsection (1) or (4).

## **722 Application money to be held on trust**

- (1) If a person offers securities for issue or sale under a disclosure document, the person must hold:
  - (a) all application money received from people applying for securities under the disclosure document; and
  - (b) all other money paid by them on account of the securities before they are issued or transferred;in trust under this section for the applicants until:

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- (c) the securities are issued or transferred; or
  - (d) the money is returned to the applicants.
- (2) If the application money needs to be returned to an applicant, the person must return the money as soon as practicable.
- (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*.

**723 Issuing or transferring the securities under a disclosure document**

*Applications must be made on form included in, or accompanied by, disclosure document*

- (1) If an offer of securities needs a disclosure document, the securities may only be issued or transferred in response to an application form. The securities may only be issued or transferred if the person issuing or transferring them has reasonable grounds to believe that:
- (a) the form was included in, or accompanied by:
    - (i) the disclosure document; or
    - (ii) if subsection 721(2) allows a profile statement to be used—the prospectus or the profile statement;when the form was distributed by the person issuing or transferring the securities; or
  - (b) the form was copied, or directly derived, by the person making the application from a form referred to in paragraph (a).

*Minimum subscription condition must be fulfilled before issue or transfer*

- (2) If a disclosure document for an offer of securities states that the securities will not be issued or transferred unless:
- (a) applications for a minimum number of the securities are received; or
  - (b) a minimum amount is raised;
- the person making the offer must not issue or transfer any of the securities until that condition is satisfied. For the purpose of working out whether the condition has been satisfied, a person who

has agreed to take securities as underwriter is taken to have applied for those securities.

Note 1: Under section 722, the application money must be held in trust until the issue or transfer of the securities.

Note 2: This subsection prevents the issue or transfer of the securities not only to those who apply for them in response to the disclosure document but also to those who do not need to apply for them (for example, because they are to take the securities under an underwriting agreement).

*Issue or transfer void if quotation condition not fulfilled*

- (3) If a disclosure document for an offer of securities states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere) and:
- (a) an application for the admission of the securities to quotation is not made within 7 days after the date of the disclosure document; or
  - (b) the securities are not admitted to quotation within 3 months after the date of the disclosure document;
- then:
- (c) an issue or transfer of securities in response to an application made under the disclosure document is void; and
  - (d) the person offering the securities must return the money received by the person from the applicants as soon as practicable.

*Strict liability offences*

- (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*.

**724 Choices open to person making the offer if disclosure document condition not met or disclosure document defective**

- (1) If a person offers securities under a disclosure document and:
- (a) the disclosure document states that the securities will not be issued or transferred unless:
    - (i) applications for a minimum number of the securities are received; or
    - (ii) a minimum amount raised;

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and that condition is not satisfied within 4 months after the date of the disclosure document; or

- (b) the disclosure document states or implies that the securities are to be quoted on a financial market (whether in Australia or elsewhere) and:
  - (i) an application for the admission to quotation is not made within 7 days after the date of the disclosure document; or
  - (ii) the securities are not admitted to quotation within 3 months after the date of the disclosure document; or
- (c) the person becomes aware that:
  - (i) the disclosure document contains a misleading or deceptive statement; or
  - (ii) there is an omission from the disclosure document of information required by section 710, 711, 712, 713, 714 or 715;  
that is materially adverse from the point of view of an investor; or
- (d) the person becomes aware of a new circumstance that:
  - (i) has arisen since the disclosure document was lodged; and
  - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged; and
  - (iii) is materially adverse from the point of view of an investor;

the person must deal under subsection (2) with any applications for the securities made under the disclosure document that have not resulted in an issue or transfer of the securities. For the purpose of working out whether a condition referred to in paragraph (a) has been satisfied, a person who has agreed to take securities as underwriter is taken to have applied for those securities.

- (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 person must either:
- (a) repay the money received by the person from the applicants; or



- (b) give the applicants:
  - (i) the documents required by subsection (3); and
  - (ii) 1 month to withdraw their application and be repaid; or
- (c) issue or transfer the securities to the applicants and give them:
  - (i) the documents required by subsection (3); and
  - (ii) 1 month to withdraw their application and be repaid.

Note: Section 719 deals with lodging supplementary and replacement documents. Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

(3) The documents to be given are set out in the following table:

<b>Documents to be given</b>		[operative]
<b>Circumstances</b>	<b>Documents</b>	
1	the sole disclosure document is a prospectus	a supplementary or replacement prospectus that corrects the deficiency or changes the terms of the offer
2	the disclosure documents are a prospectus and a profile statement and subsection (1) applies to the prospectus	a statement that sets out the changes needed to the prospectus to correct the deficiency or change the terms of offer; and  a statement that the person is entitled to a copy of the prospectus free of charge
3	the disclosure documents are a prospectus and a profile statement and subsection (1) applies to the profile statement  <i>Note that item 2 and this item may both apply to the offer.</i>	a supplementary or replacement profile statement that corrects the deficiency or changes the terms of the offer

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<b>Documents to be given</b>		[operative]
	<b>Circumstances</b>	<b>Documents</b>
4	the disclosure document is an offer information statement	a supplementary or replacement offer information statement that corrects the deficiency or changes the terms of the offer

**725 Expiration of disclosure document**

- (1) If a person offers securities under a disclosure document and the disclosure document passes its expiry date, the person must deal with applications for the securities under the document in accordance with subsections (2) and (3).

- (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) If an application is received on or before the expiry date, the person may issue or transfer securities to the applicant.

Note: Subsection 723(1) (when read with subsections 719(4) and (5)) requires the person issuing or transferring the securities to have reasonable grounds to believe that the application form was included in, or accompanied by, a disclosure document that was current at the time.

- (3) If an application is received after the expiry date, the person must either:

- (a) return any money received by the person from the applicant; or
- (b) give the applicant:
  - (i) a new disclosure document; and
  - (ii) 1 month to withdraw their application and be repaid; or
- (c) issue or transfer the securities to the applicant and give them:
  - (i) a new disclosure document; and
  - (ii) 1 month to withdraw their application and be repaid.

## **Part 6D.3—Prohibitions, liabilities and remedies**

### **Division 1—Prohibitions and liabilities**

#### **726 Offering securities in a body that does not exist**

A person must not offer securities of a body that has not been formed or does not exist if the offer would need disclosure to investors under Part 6D.2 if the body did exist. This is so even if it is proposed to form or incorporate the body.

#### **727 Offering securities without a current disclosure document**

##### *Offer of securities needs lodged disclosure document*

- (1) A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless a disclosure document for the offer has been lodged with ASIC.

##### *Offer form to be included in or accompanied by disclosure document*

- (2) A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless:
  - (a) if a prospectus is used for the offer—the offer or form is:
    - (i) included in the prospectus; or
    - (ii) accompanied by a copy of the prospectus; or
  - (b) if both a prospectus and a profile statement are used for the offer—the offer or form is:
    - (i) included in the prospectus or profile statement; or
    - (ii) accompanied by a copy of the prospectus or profile statement; or
  - (c) if an offer information statement is used for the offer—the offer or form is:
    - (i) included in the statement; or
    - (ii) accompanied by a copy of the statement.

**Chapter 6D** Fundraising

**Part 6D.3** Prohibitions, liabilities and remedies

**Division 1** Prohibitions and liabilities

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Note: Sections 706, 707, 708, 708AA and 708A say when the offer needs disclosure to investors under Part 6D.2.

*Non-quoted securities—waiting period after lodgment before processing applications for securities*

- (3) A person must not accept an application for, or issue or transfer, non-quoted securities offered under a disclosure document until the period of 7 days after lodgment of the disclosure document has ended. ASIC may extend the period by notice in writing to the person offering the securities. The period as extended must end no more than 14 days after lodgment.

*Issue or transfer not to breach section 708 ceiling*

- (4) If a person relies on subsection 708(1) to make offers of securities without disclosure to investors under Part 6D.2, the person must not issue or transfer securities without disclosure to investors under that Part if the issue or transfer would result in a breach of the 20 investors ceiling or the \$2 million ceiling (see subsections 708(3), (4), (5), (6) and (7)).

*Circumstances in which a person is taken not to contravene this section*

- (5) If:
- (a) a person relies on subsection 708AA(2) or 708A(5) to make offers of securities for issue or sale without disclosure to investors under Part 6D.2; and
  - (b) the notice given under that subsection purported to comply with subsection 708AA(7) or 708A(6) but did not actually comply with subsection 708AA(7) or 708A(6);
- the person is taken not to contravene this section.

**728 Misstatement in, or omission from, disclosure document**

*Misleading or deceptive statements, omissions and new matters*

- (1) A person must not offer securities under a disclosure document if there is:
- (a) a misleading or deceptive statement in:
    - (i) the disclosure document; or

- (ii) any application form that accompanies the disclosure document; or
- (iii) any document that contains the offer if the offer is not in the disclosure document or the application form; or
- (b) an omission from the disclosure document of material required by section 710, 711, 712, 713, 714 or 715; or
- (c) a new circumstance that:
  - (i) has arisen since the disclosure document was lodged; and
  - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged.

Note 1: The person may make further offers after making up the deficiency in the current disclosure document by lodging a supplementary or replacement document.

Note 2: See sections 731, 732 and 733 for defences.

Note 3: Section 1041H imposes liabilities in respect of other conduct related to the offering of the securities.

*Forecasts and other forward-looking statements*

- (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 an investor.

## 729 Right to recover for loss or damage resulting from contravention

### *Right to compensation*

- (1) A person who suffers loss or damage because an offer of securities under a disclosure document contravenes subsection 728(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.

<b>People liable on disclosure document</b> [operative]		
	<b>These people...</b>	<b>are liable for loss or damage caused by...</b>
1	the person making the offer	any contravention of subsection 728(1) in relation to the disclosure document
2	each director of the body making the offer if the offer is made by a body	any contravention of subsection 728(1) in relation to the disclosure document
3	a person named in the disclosure document with their consent as a proposed director of the body whose securities are being offered	any contravention of subsection 728(1) in relation to the disclosure document
4	an underwriter (but not a sub-underwriter) to the issue or sale named in the disclosure document with their consent	any contravention of subsection 728(1) in relation to the disclosure document
5	a person named in the disclosure document with their consent as having made a statement: (a) that is included in the disclosure document; or (b) on which a statement made in the disclosure document is based	the inclusion of the statement in the disclosure document
6	a person who contravenes, or is involved in the contravention of, subsection 728(1)	that contravention

Note: Item 2—*director* includes a shadow director (see section 9).

- (2) A person who acquires securities as a result of an offer that was accompanied by a profile statement is taken to have acquired the securities in reliance on both the profile statement and the prospectus for the offer.
- (3) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.
- (4) This Part does not affect any liability that a person has under any other law.

Note: Conduct that contravenes subsection 728(1) is expressly excluded from the operation of section 1041H.

### **730 People liable on disclosure document to inform person making the offer about deficiencies in the disclosure document**

- (1) A person referred to in the table in section 729 must notify the person making the offer in writing as soon as practicable if they become aware during the application period that:
  - (a) a material statement in the disclosure document is misleading or deceptive; or
  - (b) there is a material omission from the disclosure document of material required by section 710, 711, 712, 713, 714 or 715; or
  - (c) a material new circumstance that:
    - (i) has arisen since the disclosure document was lodged; and
    - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged.
- (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*.

### **731 Due diligence defence for prospectuses**

#### *Reasonable inquiries and reasonable belief—statements*

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of

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subsection 728(1), because of a misleading or deceptive statement in a prospectus if the person proves that they:

- (a) made all inquiries (if any) that were reasonable in the circumstances; and
- (b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive.

*Reasonable inquiries and reasonable belief—omissions*

- (2) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of an omission from a prospectus in relation to a particular matter if the person proves that they:
  - (a) made all inquiries (if any) that were reasonable in the circumstances; and
  - (b) after doing so, believed on reasonable grounds that there was no omission from the prospectus in relation to that matter.

**732 Lack of knowledge defence for offer information statements and profile statements**

*Not knowing statement misleading or deceptive*

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of a misleading or deceptive statement in an offer information statement or profile statement 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 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of an omission from an offer information statement or profile statement in relation to a particular matter if the person proves that they did not know that there was an omission from the statement in relation to that matter.



### 733 General defences for all disclosure documents

*Reasonable reliance on information given by someone else—  
statements and omissions*

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention against subsection 728(1), because of a misleading or deceptive statement in, or an omission from, a disclosure 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.
- (2) For the purposes of subsection (1), 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*

- (3) A person who is named in a disclosure document as:
  - (a) being a proposed director or underwriter; or
  - (b) making a statement included in the document; or
  - (c) making a statement on the basis of which a statement is included in the document;does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention against subsection 728(1), because of a misleading or deceptive statement in, or an omission from, a disclosure document if the person proves that they publicly withdrew their consent to being named in the document in that way.

*Unawareness of new matter*

- (4) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of a new circumstance that has arisen since the disclosure document was lodged if the person proves that they were not aware of the matter.

### 734 Restrictions on advertising and publicity

*No advertising or publicity for offers covered by the exception for 20 issues in 12 months*

- (1) A person must not:
- (a) advertise; or
  - (b) publish a statement that directly or indirectly refers to; an offer, or intended offer, of securities that would need a disclosure document but for subsection 708(1) (exception for 20 issues in 12 months).

*Advertising or publicity for offers that need a disclosure document*

- (2) If an offer, or intended offer, of securities needs a disclosure document, a person must not:
- (a) advertise the offer or intended offer; or
  - (b) publish a statement that:
    - (i) directly or indirectly refers to the offer or intended offer; or
    - (ii) is reasonably likely to induce people to apply for the securities.
- (2A) Subsection (2) does not apply if the advertisement or publication is authorised by subsection (4), (5), (6) or (7).

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

*Strict liability offences*

- (2B) 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*.

*Image advertising*

- (3) In deciding whether a statement:
- (a) indirectly refers to an offer, or intended offer, of securities; or
  - (b) is reasonably likely to induce people to apply for securities;
- have regard to whether the statement:

- (c) forms part of the normal advertising of a body's products or services and is genuinely directed at maintaining its existing customers, or attracting new customers, for those products or services; and
- (d) communicates information that materially deals with the affairs of the body; and
- (e) is likely to encourage investment decisions being made on the basis of the statement rather than on the basis of information contained in a disclosure document.

*Dissemination of disclosure document*

- (4) A person may disseminate a disclosure document that has been lodged with ASIC without contravening subsection (2). This does not apply if an order under section 739 is in force in relation to the offer.

Note: Subsection (4) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(1)).

*Advertising and publicity before the disclosure document is lodged*

- (5) Before the disclosure document is lodged, an advertisement or publication does not contravene subsection (2) if it:
  - (a) if the offer is of securities in a class already quoted—includes a statement that:
    - (i) if the securities are likely to be offered by way of issue—identifies the issuer of the securities; and
    - (ii) if the securities are likely to be offered pursuant to sale offers to which section 707 will apply—identifies the issuer of the securities and the seller of the securities; and
  - (iii) in any case—a disclosure document for the offer will be made available when the securities are offered; and
  - (iv) indicates when and where the disclosure document is expected to be made available; and
  - (v) a person should consider the disclosure document in deciding whether to acquire the securities; and
  - (vi) anyone who wants to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document; and

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- (b) in any other case—contains the following but nothing more:
  - (i) a statement that identifies the offeror and the securities;
  - (ii) a statement that a disclosure document for the offer will be made available when the securities are offered;
  - (iii) a statement that anyone who wants to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document;
  - (iv) a statement of how to arrange to receive a copy of the disclosure document.

To satisfy paragraph (b), the advertisement or publication must include all of the statements referred to in subparagraphs (i), (ii) and (iii). It may include the statement referred to in subparagraph (iv).

Note: Subsection (5) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(2)).

*Advertising and publicity after the disclosure document is lodged*

- (6) After the disclosure document is lodged, an advertisement or publication does not contravene subsection (2) if it includes a statement that:
  - (a) identifies:
    - (i) if the securities are offered by way of issue—the issuer of the securities; or
    - (ii) if the securities are offered pursuant to sale offers to which section 707 applies or will apply—the issuer of the securities and the seller of the securities; and
  - (b) indicates that the disclosure document for the offer is available and where it can be obtained; and
  - (c) the offers of the securities will be made in, or accompanied by, a copy of the disclosure document; and
  - (d) a person should consider the disclosure document in deciding whether to acquire the securities; and
  - (e) anyone who wants to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document.

Note: Subsection (6) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(3)).

*General exceptions*

- (7) An advertisement or publication does not contravene subsection (2) if it:
- (a) relates to an offer of securities of a listed body and consists of a notice or report by the body, or one of its officers, about its affairs to the relevant market operator; or
  - (b) consists solely of a notice or report of a general meeting of the body; or
  - (c) consists solely of a report about the body that is published by the body and:
    - (i) does not contain information that materially affects affairs of the body other than information previously made available in a disclosure document that has been lodged, an annual report or a report referred to in paragraph (a) or (b); and
    - (ii) does not refer (whether directly or indirectly) to the offer; or
  - (d) is a news report or is genuine comment, in a newspaper or periodical or on radio or television relating to:
    - (i) a disclosure document that has been lodged or information contained in such a disclosure document; or
    - (ii) a notice or report covered by paragraph (a), (b) or (c); or
  - (e) is a report about the securities of a body or proposed body published by someone who is not:
    - (i) the body; or
    - (ii) acting at the instigation of, or by arrangement with, the body; or
    - (iii) a director of the body; or
    - (iv) a person who has an interest in the success of the issue or sale of the securities.

Paragraphs (d) and (e) do not apply if anyone gives consideration or another benefit for publishing the report.

*Liability of publishers*

- (8) A person does not contravene subsection (1) or (2) by publishing an advertisement or statement if they publish it in the ordinary course of a business of:
- (a) publishing a newspaper or magazine; or

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(b) broadcasting by radio or television;  
and the person did not know and had no reason to suspect that its publication would amount to a contravention of a provision of this Chapter.

Note: Depending on the circumstances of the publication, the person may, however, commit an offence by being involved in someone else's contravention of subsection (1) or (2).

*Pathfinder documents*

- (9) A person does not contravene subsection (1) or (2) by sending a draft disclosure document for securities to a person if an offer of the securities to the person would not require a disclosure document because of subsection 708(8) or (10) (sophisticated investors) or 708(11) (professional investors).

**735 Obligation to keep consents and other documents**

- (1) A person who offers securities under a disclosure document must keep a consent required in respect of the document by subsection 716(2) or section 720.
- (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*.

**736 Securities hawking prohibited**

- (1) A person must not offer securities for issue or sale in the course of, or because of, an unsolicited:
- (a) meeting with another person; or
  - (b) telephone call to another person.
- (1A) Subsection (1) does not apply if the offer is exempted under subsection (2).
- (1B) An offence based on subsection (1) is an offence of strict liability.

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

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

- (2) Subsection (1) does not prohibit an offer of securities if:
- (a) the offer does not need a disclosure document because of subsection 708(8) or (10) (sophisticated investors); or
  - (b) the offer does not need a disclosure document because of subsection 708(11) (professional investors); or
  - (c) the offer is an offer of listed securities made by telephone by a licensed securities dealer; or
  - (d) the offer is made to a client by a licensed securities dealer through whom the client has bought or sold securities in the last 12 months; or
  - (e) the offer is made under an eligible employee share scheme.

## **Division 2—Remedies**

### **737 Remedies for investors**

*Right to withdraw and have money returned*

- (1) If securities are issued to a person in contravention of section 724 (situation calling for a supplementary or replacement document), the person has the right to return the securities and to have their application money repaid. This is so even if the company that issued the securities is being wound up.
- (2) A right referred to in subsection (1) is exercisable by written notice given to the company within 1 month after the date of the issue.
- (3) If the body or the seller does not repay the money as required by subsection (1), the directors of the body or seller are personally liable to repay the money.

### **738 Securities may be returned and refund obtained**

If securities are issued or transferred to a person as a result of an offer that contravenes section 736, the person may return the securities within 1 month after the issue or transfer. If they do so, they are entitled to be repaid the amount they paid for the securities.



## **Part 6D.4—ASIC's powers**

### **739 ASIC stop orders**

#### *Power to make orders*

- (1) This section applies if ASIC is satisfied that:
  - (a) information in a disclosure document lodged with ASIC is not worded and presented in a clear, concise and effective manner (see section 715A); or
  - (b) an offer of securities under a disclosure document lodged with ASIC would contravene section 728; or
  - (c) an advertisement or publication of a kind referred to in subsection 734(5) or (6) that relates to securities is defective (see subsection (6) of this section).
- (1A) ASIC may order that:
  - (a) if paragraph (1)(a) or (b) applies—no offers, issues, sales or transfers of the securities be made while the order is in force; or
  - (b) if paragraph (1)(c) applies—specified conduct in respect of the securities to which the advertisement or publication relates must not be engaged in.
- (1B) An order under paragraph (1A)(b) may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with the requirements of a specified provision of this Chapter.
- (2) Before making an order under subsection (1A), ASIC must:
  - (a) hold a hearing; and
  - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (3) If ASIC considers that any delay in making an order under subsection (1A) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order may be made

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without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.

- (4) At any time during the hearing, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order lasts until:
  - (a) ASIC makes an order under subsection (1A) after the conclusion of the hearing; or
  - (b) the interim order is revoked;whichever happens first.
- (5) An order under subsection (1A), (3) or (4) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities under the disclosure document.

*Defective advertisements or statements*

- (6) For the purposes of this section, an advertisement or publication of a kind referred to in subsection 734(5) or (6) is *defective* if:
  - (a) there is a misleading or deceptive statement in the advertisement or publication; or
  - (b) there is an omission from the advertisement or publication of material required by the relevant subsection to be included in the advertisement or publication; or
  - (c) if the advertisement or publication relates to an offer of securities in a class that is not already quoted, and is published before a disclosure document in relation to the offer is lodged—the advertisement or publication includes material that is not referred to in paragraph 734(5)(b).

*Forecasts and other forward-looking statements*

- (7) For the purposes of the definition of *defective* in subsection (6), 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.
- (8) Subsection (7) does not limit the circumstances in which a statement may be misleading.

#### **740 Anti-avoidance determinations**

(1) ASIC may determine in writing that a number of different bodies are closely related and that their transactions should be aggregated for the purposes of this Chapter. If ASIC does so:

- (a) an issue, sale or transfer of securities in any other bodies is taken to also be an issue, sale or transfer of the securities of each of the other bodies by those bodies; and
- (b) any money received from an issue, sale or transfer of securities in any of the bodies is taken to also be received by each of the other bodies from an issue, sale or transfer of its own securities.

ASIC must give written notice of the determination to each of the bodies.

(2) ASIC may determine in writing that the transactions of a body and of a person who controls the body should be aggregated for the purposes of this Chapter. If ASIC does so:

- (a) an issue of securities in the body is taken to also be the transfer of the securities by the controller; and
- (b) any money received from an issue of securities in the body is taken to also be received by the controller from a transfer of the securities; and
- (c) a sale or transfer of securities in the body by the controller is taken to also be the issue of the securities by the body; and
- (d) any money received from a sale or transfer of securities in the body by the controller is taken to also be received by the body from an issue of the securities.

ASIC must give written notice of the determination to the body and the controller.

#### **741 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.

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- (2) The exemption or declaration may do all or any of the following:
  - (a) apply to all or specified provisions of this Chapter;
  - (b) apply to all persons, specified persons, or a specified class of persons;
  - (c) relate to all securities, specified securities or a specified class of securities;
  - (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.

## **Part 6D.5—Miscellaneous**

### **742 Exemptions and modifications by regulations**

- (1) The regulations may:
  - (a) exempt a person or class of persons from all or specified provisions of this Chapter; or
  - (b) exempt a security or class of securities from all or specified provisions of this Chapter; or
  - (c) provide that this Chapter applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (2) Without limiting subsection (1), regulations made for the purposes of this section may:
  - (a) declare that provisions of this Chapter are modified so that they apply (with or without further modifications) in relation to persons, securities, financial products or situations to which they would not otherwise apply; or
  - (b) declare that provisions of this Chapter are modified so that they apply (whether with or without further modifications) in a way that changes the person by whom or to whom a document or information is required to be given by a provision of this Chapter.
- (3) For the purpose of this section, the *provisions of this Chapter* include:
  - (a) definitions in this Act, or in the regulations, as they apply to references in this Chapter; and
  - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Chapter.