

# ASIC CLASS ORDER [CO 13/520]

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Class Order [CO 13/520] under sections 655A, 673 and 669 of the *Corporations Act 2001* (the *Act*).

Paragraphs 655A(1)(b), 669(1)(b) and 673(1)(b) provide that ASIC may declare that Chapters 6, 6A and 6C of the Act, respectively, apply as if specified provisions were omitted, modified or varied as specified in the declaration.

### 1. Background

Chapter 6 of the Act relates to takeovers. It regulates the acquisition of substantial interests in listed companies and bodies, listed registered managed investment schemes and unlisted companies with more than 50 members, by:

- (a) imposing a general prohibition relating to the acquisition of interests by, or on behalf of a person resulting in an increase of a persons' voting power in a regulated entity to, or from, a point above 20% (**General Prohibition**) (see section 606); and
- (b) providing for a number of exceptions to the general prohibition under which otherwise prohibited acquisitions may be made (including for example acquisitions under a takeover bid) (see section 611).

The interests with which the takeover provisions are concerned are 'relevant interests' as defined in sections 608 and 609 of the Act a person has in securities that are voting shares or voting interests in a managed investment scheme. Broadly, a person is taken to have a 'relevant interest' in securities that is regulated by the takeovers provisions if the person holds, or has the power to control voting or disposal of the security.

The concept of a relevant interest also underpins the operation of Part 6A.1 of the Act, which relates to compulsory acquisitions and buyouts following a takeover bid, and Part 6C.1 of the Act, which relates to the requirement for substantial holders of certain listed entities to give details in relation to their holding (including changes to their holding) to the entity and the operator of the market on which the securities are quoted. A person has a 'substantial holding' in a listed entity if, together with their associates, they have a relevant interest in voting shares or interests carrying 5% or more of the total votes attached to voting shares or interests in the relevant listed entity, or if they have made a takeover bid (see definition of a 'substantial holding' in section 9 of the Act).

The takeover, compulsory acquisition and substantial holding provisions were substantially rewritten by the *Corporate Law Economic Reform Program Act 1999* (the **CLERP Act**).

Since the implementation of the CLERP Act, ASIC has made a number of exemptions from, and modifications to, the takeover provisions by class order with a view to:

- (a) improving the operation of the provisions in light of developments and innovations observed in the market over time; and
- (b) addressing technical issues and anomalies identified in the course of ASIC's administration of the provisions.

These class orders include:

- (a) Class Order [CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition*;
- (b) Class Order [CO 01/1599] *Sydney Futures Exchange—participant's relevant interest and voting power*;
- (c) Class Order [CO 03/634] *Takeovers: listing rule escrow*; and
- (d) Class Order [CO 04/631] *Associates: right to dispose of securities*.

ASIC recently reviewed the policy underlying these class orders as part of a wider review of class orders relating to the takeover provisions in Chapters 6–6C and considers that the relief provided in these class orders is still both necessary and appropriate. ASIC has decided to reissue the relief underlying the class orders in Class Order [CO 13/520].

The *Legislative Instruments Act 2003* (the **LIA**) provides for the periodic expiry of legislative instruments ('sunsetting') to ensure that they are kept up to date and only remain in force for so long as they are needed. The four class orders are legislative instruments and were scheduled to eventually expire under the sunsetting provisions of the LIA. They have now been revoked under Class Order [CO 13/518]. ASIC's reissuing of the relief underlying them has given ASIC the opportunity to deal with their eventual expiry.

Class Order [CO 13/520] incorporates and consolidates the relief previously provided in the four class orders. The modifications included in Class Order [CO 13/520] are generally similar in nature to those in the relevant predecessor class orders.

Further, the class order incorporates some new modifications relating to acceptance facilities which was proposed and consulted on in ASIC Consultation Paper 193: *Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance (CP 193)*. These new modifications are similarly designed to address technical issues and improve the operation of the takeover, compulsory acquisition and substantial holding provisions in Chapters 6, 6A and 6C.

## 2. Purpose and operation of the class order

### ***Paragraph 4(a) of the class order – Definition of acceptance facility and acceptance facility operator***

Subparagraph 4(a) of the class order inserts a definition of an acceptance facility (including definitions of various elements of an acceptance facility including a ‘facility participant’, ‘acceptance facility operator’, ‘facility acceptances’ and ‘triggering conditions’) for the purposes of new subsection 608(8A) (see paragraph 6(c) of the class order).

### ***Paragraph 4(b) of the class order – Modification to the definition of ‘convertible securities’***

An off-market takeover bid must relate to securities in a class of securities that exist or will exist as at a date set by the bidder (section 617). A bid may extend to securities that come to be in the bid class during the offer period due to a conversion of, or the exercise of rights to be issued bid class securities conferred by, other securities that exist at that date.

Paragraph 617(2)(a) refers to securities that ‘will convert, or may be converted, to securities in the bid class’. Without modification, the definition of ‘convertible securities’ (in section 9) may be limited to securities providing a right for the issue of securities in another class and may exclude the kind of securities that transform into securities in another class upon exercise.

The class order expands the definition of ‘convertible securities’ in section 9 to include a convertible security that may upon conversion (on the exercise of rights attached to those securities) transform into securities of another class. This modification recognises that the mechanism for conversion is not relevant to the policy on convertible securities in the context of takeovers.

This modification continues, in substance, a similar modification contained in Class Order [CO 01/1542].

### ***Paragraph 4(c) of the class order – Modification to definition of ‘substantial holding’***

A person with a substantial holding must make certain disclosures about that holding under Part 6C.1. In determining whether a person and their associates exceed the 5% threshold above which a person is defined to have a substantial holding, certain relevant interests which are exempt for the purposes of the takeover provisions are required to be counted—specifically:

- (a) relevant interests arising because of market-traded options or rights to acquire securities under a derivative; and
- (b) relevant interests arising because of agreements that are conditional on holder approval (under item 7 of section 611), or ASIC relief, which do not confer influence over voting rights and do not restrict disposal for more than three months (see subparagraphs (a)(i) and (ii) of the definition of ‘substantial holder’ in section 9).

The class order amends the definition of a substantial holding to further require that a listed entity's relevant interests in its own securities arising from restrictions on disposal of a holding of restricted securities applied under the listing rules of a prescribed financial market (e.g. ASX) (***Restricted Securities***) are counted in determining whether the 5% threshold is exceeded notwithstanding the modification in paragraph 6(d) of the class order—which modifies section 609 of the Act so that a listed entity does not acquire relevant interests in Restricted Securities (see new paragraph 609(11)).

The purpose of the modification in paragraph 4(c) is to ensure that share and interest holders, and potential investors, continue to have access to information relating to Restricted Securities—including the terms of restriction and details of the relevant agreements which apply to restrict disposal of the Restricted Securities.

***Paragraph 5 of the class order – Amendments to the association concept***

When calculating a person's voting power and when determining if a person has a substantial holding in a listed entity, it is necessary to consider the relevant interests that both a person and any associates have in securities of the body.

Under section 12(2) of the Act (***Associate Definition***), an associate in relation to an entity is (where a person is a body corporate) another body corporate that controls, is controlled by, or is under common control with the person or another persons with whom the person has, or proposes to enter into, an agreement, arrangement or understanding for the purpose of influencing or controlling the affairs of the relevant entity or the composition of its board, or with whom the person is acting in concert in relation to the relevant entity's affairs. The affairs of a body corporate are broadly defined to include matters such as the 'ownership of shares' or the 'power of persons to dispose of or exercise control over the disposal of shares': (see paragraphs 53(e) and (f) and regulation 1.0.18 of the *Corporations Regulations 2001* (***Corporations Regulations***)).

The class order modifies the Associate Definition in section 12 to make it clear that parties to a relevant agreement will not be associates merely because an agreement contains a provision giving a party the right to dispose of securities in the designated body or control the exercise of a power to dispose of the securities (see new subsection 12(2A)).

The modification is consistent with the underlying objective of the associate concept in section 12. The concept groups together persons with a common purpose in relation to a company. It aims to ensure that a person is not treated as acting independently from a person with whom they are in fact cooperating.

The modification recognises that the existence of a mere disposal right is not, in itself, an indication that the parties have a common purpose or objective in relation to the broader direction or destiny of the company. The parties to a relevant agreement involving a disposal right may not be seeking to achieve any more together than to simply the acquisition and disposal of securities.

Relevantly, the exclusion only relates to disposal rights and does not operate in relation to any other provision of an agreement, or any other relevant agreement between the parties that indicates the parties have a common purpose in relation to a company or otherwise creates an association. Examples of circumstances where the modification would not apply are when there is another term in the agreement or another agreement that:

- (a) the parties will seek to remove one or more of the directors;
- (b) one party will vote for the appointment of a director nominated by the other party;
- (c) the disposal right is conditional on such board changes;
- (d) is concerned with dividend policy;
- (e) is concerned with the future sale or acquisition of an asset by the company to or from a party;
- (f) a party will vote in favour of, or against, a corporate action (e.g. in favour of the issue of options or against liquidation);
- (g) the parties will consult on voting; or
- (h) the person who disposes of securities under the relevant agreement will continue to play a role in directing the company, whether through representation on the board or otherwise.

The modification continues, in substance, a similar modification contained in Class Order [CO 04/631].

***Paragraph 6(a) of the class order – The financial accommodation exception***

Section 609 sets out situations that do not give rise to a relevant interest. Subsection 609(1) relates to situations involving money lending and financial accommodation. Under the exception security interests taken or acquired in the ordinary course of a non-associated person's business of providing financial accommodation on ordinary commercial terms do not give rise to a relevant interest.

The class order modifies subsection 609(1) to effect three principal changes:

- (a) to extend the operation of the exception to persons holding a security interest (e.g. a mortgage) on trust for the benefit of a financier who would otherwise themselves have the benefit of the exception;
- (b) to ensure the exception covers purchasers of security interests; and
- (c) to ensure that a negative pledge that is not a security interest falls within the ambit of the exception.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1542].

### Security trustees

The class order extends the exception to relevant interests arising from a security interest acquired by a person (the security trustee) on ordinary commercial terms, for the benefit of one or more financiers in relation to financial accommodation provided by the financiers in the ordinary course of the financier's business of providing financial accommodation.

Lending transactions are often structured so that a security trustee takes and holds a mortgage for the benefit of the financier. The security trustee usually has a relevant interest in the securities covered by the mortgage because it has the power to dispose of these securities.

Subsection 609(1) as drafted may require the mortgage to be taken in the ordinary course of the security trustee's business of lending money or providing other financial accommodation. ASIC considers that it is unlikely that a security trustee is in this kind of business, as such without the relief, a security trustee may not be covered by the exception in the provision.

### Purchasers

The class order modifies the exception to make it clear that it is not limited to the initial financier (or its security trustee), but also applies to a purchaser of the security interest.

The exception in subsection 609(1) is limited to a 'security interest taken for the purpose of a transaction entered into by the person' and may not therefore extend to purchasers. It is uncertain whether the purchaser acquires a security interest such as a mortgage for the purposes of a loan 'entered into' by the purchaser.

The modification of subsection 609(1) recognises that the word 'acquired' in paragraph 609(1)(a) suggests that the provision was intended to cover the secondary mortgage market. The modification is designed to remove any doubt.

### Negative pledges

The class order modifies the exception to clarify that it extends to a relevant interest acquired by a financier because its lending is supported by a negative pledge covering the securities.

Negative pledges are used by financiers to protect themselves in corporate debt financing. However, there may be uncertainty about whether a negative pledge is covered by the reference to a 'security interest' in subsection 609(1). A negative pledge is a contractual promise by a borrower to the financier that the borrower will not create an encumbrance on its assets (the securities) in favour of another financier. A negative pledge may not constitute a security interest, as defined in section 51A, because it does not give the financier any proprietary interest in assets of the borrower.

### ***Paragraph 6(b) of the class order – Securities held by financial services licensee***

Subsection 609(3) provides that a financial services licensee does not have a relevant interest in securities merely because it holds securities on behalf of someone else in the ordinary course of their financial services business.

The class order modifies subsection 609(3) so that a financial services licensee does not have a relevant interest in the securities of its client merely because it receives specific instructions from the client directing the licensee (in the ordinary course of its financial services business) to dispose of the securities or to enter into a sold position in relation to the securities through a dealing in a warrant (or a financial product that would be a warrant but for it being transferable). A warrant is defined in regulation 1.0.02 of the Corporations Regulations to include derivatives and securities that would be derivatives but for their constituting a legal or equitable right or interest.

### Securities

The modification recognises that a securities dealer does not generally hold securities on behalf of its client. A securities dealer is normally an agent of its client rather than a trustee, and is authorised to exercise powers of the holder (specifically, the power to dispose) without actually holding the securities.

The principle underlying the modification is that a securities dealer should not have a relevant interest in securities when it is merely acting under specific instructions from its client to dispose of the client's securities. In such cases a securities dealer would have limited discretion to dispose of the securities and the power to dispose would be for a limited time.

### Derivatives

The modified exception in subsection 609(3) also extends the operation of the provision to recognise derivatives trading. Subsection 609(3), as enacted, refers only to a licensee holding 'securities'. The definition of securities under section 9 does not include market-traded options or derivatives therefore, the exception does not extend to analogous circumstances involving derivatives. Without relief, a broker whose ordinary business includes dealing in derivatives, and who enters into a sold position on instruction from a client, may have a relevant interest in the underlying securities.

The class order replicates the exception for securities dealers so that a derivatives broker does not have a relevant interest in relation to a security merely because the broker has received specific instructions from the client directing it to enter into a sold position in relation to that security in the ordinary course of the broker's business (which includes derivatives trading). A sold position for this purpose is defined as a position under which a person has an obligation to make delivery of a security.

### Managed discretionary arrangements

The exclusion in subsection 609(3) as modified does not cover managed discretionary accounts, where the dealer has a broader discretion to control the disposal of the client's securities.

The modification continues, in substance, similar modifications contained in Class Order [CO 01/1542] and [CO 01/1599].

***Paragraph 6(c) of the class order – Relevant interests arising from acceptances facilities***

Paragraph 6(c) of the class order introduces new relief for bidders who establish an acceptance facility in relation to a takeover bid. Under an acceptance facility a holder of securities or a person otherwise entitled to accept an offer under of a bid is able to provide to a facility operator a completed acceptance form or instructions to another person who holds the securities on their behalf to accept the bid. The facility operator holds the acceptances or instructions until certain conditions relating to the conditionality or level of acceptances the bidder receives are met, at which point the acceptances and instructions are forwarded to their final recipients. The facility operator reports regularly to the bidder about the number of securities in respect of which acceptances and instructions are being held.

An acceptance facility allows participants in the facility to indicate their willingness to accept the bid without accepting. The advantage from a participant's point of view is that the acceptances or instructions they provide can be withdrawn at any time until the conditions for release of the acceptances or instructions. More broadly an acceptance facility can assist in overcoming difficulties a bidder may have in achieving a requisite level of acceptances due to the conditionality of a bid. This difficulty results from the circular problem that:

- (a) it will often not be possible to satisfy a minimum acceptance condition, or achieve the necessary level of acceptances, without certain holders (e.g. institutional holders) accepting; and
- (b) in some cases, these holders will not accept unless the condition is met or the necessary level of acceptances achieved.

It is possible a bidder will acquire a relevant interest in target securities as a result of target holders providing acceptances or custodial instructions to a facility operator. This is because the bidder and facility participants may be parties to an overall arrangement or understanding in relation to the securities, irrespective of whether they deal with each other directly (see also section 52). An arrangement or understanding of this kind may be sufficient to constitute a 'relevant agreement' under the broad definition in section 9. The bidder may therefore acquire a relevant interest in facility participants' securities outside the takeover bid and in contravention of the General Prohibition by virtue of the accelerator provision in subsection 608(8).

The class order inserts new subsection 609(8A) which confirms that a bidder does not acquire a relevant interest in securities tendered into an acceptance facility provided that the facility complies with certain terms and the bidder makes regular disclosures about the level of facility acceptances.

ASIC has provided this relief because acceptance facilities established on appropriate terms and operated in an appropriate manner may improve the efficiency and competitiveness of the bid process by removing structural impediments to the success of bids. The relief removes uncertainty that a bidder who has established such a facility may be liable for a contravention of section 606 of the Act (which prohibits certain acquisitions of relevant interests in voting shares) as a result.



The relief only applies if:

- (a) the acceptance facility is the only acceptance facility established by the bidder in relation to the bid class;
- (b) in the case of an unconditional bid—participation in the facility is open to all holders entitled to accept the bid (in a conditional bid the facility must be open to either all holders or only those specified by the bidder);
- (c) the terms on which all facility users participate are the same;
- (d) the facility is operated by a facility agent who:
  - (i) is a person other than the bidder or an associate of the bidder; and
  - (ii) holds an Australian financial services license that covers the provision of financial services of the kind necessary to operate the facility;
- (e) under the terms of the facility, whether or not acceptances and instructions tendered into the facility are released by the facility agent depends solely on either or both of the following occurring and/or either or both of the following being the subject of a written confirmation from the bidder:
  - (i) the bidder declaring the bid free of all conditions or stating that it will declare the bid free of all conditions no later than the time that all facility acceptances are processed; and
  - (ii) the securities in which the bidder and its associates have a relevant interest combined with the securities that are the subject of the facility exceeding a specified percentage of securities in the bid class;
- (f) facility participants are free to withdraw from the facility at any time until the preconditions to the facility agent releasing the acceptances or instructions are met; and
- (g) the facility is disclosed and operated in accordance with certain requirements to report to the market regularly regarding the number of securities the subject of facility acceptances or instructions.

***Paragraph 6(d) of the class order— Securities escrowed under listing rules***

The class order modifies section 609 so that a listed company does not have a relevant interest in securities merely because it must apply restrictions on the disposal of Restricted Securities (see new subsection 609(11)). Notwithstanding the relevant interest exemption applies in respect of the takeover provisions in Chapter 6, the exception does not apply in the context of the substantial holding requirements (see the reference to subparagraph 4(c) of the class order above).

Further, for certainty, the class order also modifies section 609 so that the operator of a prescribed financial market does not have a relevant interest in relation to Restricted

Securities. Relief for the operator is available in respect of both the takeover and the substantial holding provisions (see new subsection 609(12)).

ASIC's modification is designed to ensure the entry into escrow arrangements of the kind required under the listing rules of various prescribed financial markets are not unreasonably hindered by the takeover provisions.

The modification continues, in substance, a similar modification contained in [CO 03/634].

***Paragraph 6(e) of the class order – Acquisitions within a group and voting power***

Under subsection 610(3) a person's voting power may be taken to have increased when acquiring securities in which they did not already have a relevant interest, from an associate. This provision seeks to address the potential that a person who makes an acquisition from an associate is not caught by the General Prohibition because their voting power already incorporates their associates' relevant interests and therefore does not otherwise increase as a result of the acquisition. Subsection 610(3) recognises that commercially there may be a significant difference between a person having a relevant interest and their associate having the relevant interest in terms of the control of an entity.

One effect of the subsection 610(3) however is that an acquisition by a subsidiary from its ultimate holding company will generally result in the subsidiary's voting power increasing for the purposes of the prohibition on acquisitions of relevant interests in voting shares (under section 606).

The class order modifies the voting power provision under subsection 610(3) so that a subsidiary that acquires securities from its holding company is not taken to have increased its voting power as a result of the acquisition. For simplicity, the relief effected by the class order applies to any transfer from a holding company (not just an ultimate holding company).

The modification recognises that an acquisition of securities by one group company from another should not necessarily give rise to takeover concerns. Unless the transfer increases the voting power of a person outside the group, it cannot change ultimate control over the issuer of the securities.

The relief does not apply where, as a result of the acquisition, the voting power of a person outside the group increases. A person is outside the group if they are not a subsidiary of the ultimate holding company. This underlines the existing position under the Act that an acquisition by a subsidiary from its holding company can result in a breach of section 606 if the subsidiary or a group company in another part of the group:

- (a) has a holder outside the group with voting power of over 20%, or with control (subsection 608(3)); or
- (b) has an agreement with a person outside the group for the purpose of controlling the issuer of the securities.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1542].

***Paragraph 6(f) of the class order – On market purchases during a bid***

Section 611 sets out a number of exceptions to the General Prohibition. Two exceptions relate to on-market purchases during the currency of a bid:

- (a) item 2 of section 611 permits on-market acquisitions of bid class securities by a bidder during the bid period; and
- (b) item 3 of section 611 permits a bidder to acquire bid class securities as a result of the exercise of convertible securities purchased on-market during the bid period.

The class order modifies items 2 and 3 of section 611 to correct a drafting error which requires the relevant bid to be either unconditional or conditional only on the happening of an event referred to in subsection 652C(1) or (2) (events which, if they occur, permit a bidder under a market bid to withdraw their offers). A bid will generally be conditional on events of this kind *not* happening. The modification also clarifies that items 2 and 3 of section 611 may be relied upon even when the bid is subject to the statutory condition in subsection 625(3).

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1542].

***Paragraph 6(g) of the class order – Exercise of a security interest***

Item 6 of section 611 contains an exception from the General Prohibition which corresponds with the exception from the relevant interest concept in subsection 609(1). The exception permits an acquisition that results from an exercise of power, or appointment as receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest.

Consequential on the modifications to the exception in subsection 609(1) (see paragraph 6(a) of the class order), the class order makes corresponding modifications to item 6 of section 611 so that:

- the exception applies to security trustees (without the relief, the security trustee's business would have to be lending or providing other financial accommodation); and
- for the exception, a security interest includes a negative pledge.

The class order also includes a technical modification of item 6 of section 611 to clarify its operation in relation to receivers when a security interest is exercised. The item is expressed to apply to a person appointed 'as a receiver' but only if the person's ordinary business includes providing financial accommodation: item 6(a) of section 611. A receiver is unlikely to be in this business. ASIC has modified item 6 so that it applies to acquisitions resulting from the appointment of a receiver.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1542].

***Paragraph 6(h) of the class order – Downstream acquisitions: Secondary listings***

Item 14 of section 611 permits the acquisition of a relevant interest that results from a person acquiring another relevant interest in voting shares or interests in a body listed on a prescribed financial market (e.g.) ASX, or a foreign market approved in writing by ASIC. (***Downstream Acquisition***) ASIC has approved a list of foreign exchanges for the purposes of item 14 (see Class Order [CO 02/259]). A Downstream Acquisition occurs because of the operation of subsection 608(3) which deems a person to have the same relevant interests in securities that another body corporate has where the person has voting power of over 20% in, or controls, that body corporate.

The class order modifies item 14 of section 611 so that it only applies to primary listings—thereby excluding secondary listings from the scope of the exemption. This modification reflects that the place of incorporation and the listing rules of the exchange on which the upstream entity has its primary listing may not satisfy the policy behind the exemption in item 14. As a result of the modification the item 14 exemption will not apply if the upstream entity only has a secondary listing on a prescribed financial market or on an approved foreign exchange.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1542].

***Paragraph 6(i) of the class order – Specifying foreign holders to which the nominee procedure applies***

Two exceptions to the General Prohibition are:

- (a) the exception for acquisitions as part of a rights issue (and associated underwriting arrangements) under item 10 of section 611; and
- (b) the exception for acquisitions as part of an accelerate rights issue (and associated underwriting arrangements) under item 10A of section 611, notionally inserted by Class Order [CO 09/459].

One of the limitations on the rights issue and accelerated rights issue exceptions is that offers to issue securities must be made to every person who holds securities in the relevant class. This limitation is imposed so that:

- (a) each holder has an equal opportunity to participate in the offer; and
- (b) it is less likely that any one holder's proportionate holding will increase substantially.

However, foreign laws and regulations may constrain the issuer from making an offer of securities to a foreign holder. Alternatively, it may be highly impractical to comply with foreign regulations. Section 615 (and [CO 09/459] which incorporates section 615 in the case of accelerated rights issues) recognise that the relevant rights issue exception should be available even if foreign holders do not receive an offer of securities or rights, but cash realised from the sale of the securities or rights. Section 615 sets out a procedure that allows

foreign holders to participate in the benefits flowing from a rights issue that has control implications and seeks to minimise those control effects, while permitting non-foreign holders to rely on the relevant exceptions to the General Prohibition notwithstanding foreign holders do not receive offers.

Under the procedure in section 615:

- (a) the company must appoint a nominee for foreign holders who is approved by ASIC;
- (b) the company must issue to the nominee the securities that would otherwise be issued to the foreign holders who accept the offer or 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 net proceeds of the sale (after expenses).

The class order modifies section 615 to clarify that an issuer does not need to use the nominee procedure for all foreign holders of the issuer for the rights issue exception or the accelerated rights issue exception to apply. The modification allows the issuer instead to specify in its offers the foreign holders to whom the nominee procedure applies and extend offers to foreign holders in those foreign jurisdictions it is able to. For example, an issuer could do so by specifying the place of the foreign holder's registered address.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1542].

***Paragraph 6(j) of the class order – Relevant interests counted for the purposes of the substantial holding provisions***

Paragraph 6(j) of the class order makes modifications to section 671(7) which correspond with modifications made in paragraph 4(c) of the class order to the definition of 'substantial holding' in section 9 of the Act.

### **3. Consultation**

On 14 November 2012 ASIC released CP 193 seeking feedback on proposals to update and consolidate a number of regulatory guides relating to Chapters 6–6C of the Act. CP 193 also sought feedback on proposals to reissue the class orders associated with ASIC's updated guidance (including Class Orders [CO 01/1542], [CO 01/1599], [CO 03/634] and [CO 04/631] ) and to make new class orders addressing some discrete policy issues. The consultation period closed on 22 February 2013.

CP193 invited feedback on the following specific modifications contained in Class Order [CO 13/520]:

- (a) the update of ASIC's modification of subsection 609(1);
- (b) the update and consolidation of relief for financial services licensees in subsection 609(3); and
- (c) new relevant interest relief for acceptance facilities.

ASIC received 7 submissions in response to CP193. Details of the submissions are contained in REP 350 *Response to submissions on CP 193 Takeovers, compulsory acquisitions and substantial holdings* which is available on ASIC's website at [www.asic.gov.au](http://www.asic.gov.au).

Notwithstanding ASIC's consultation, ASIC considers that Class Order [CO 13/520] is of a minor or machinery nature and does not substantially alter existing arrangements.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ASIC Class Order [CO 13/520]

This class order is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the class order

Class Order [CO 13/520] relates to takeovers and notionally modifies the rules and mechanisms associated with voting power, prohibited acquisitions of relevant interests in voting shares and exceptions to that prohibition.

The class order makes modifications to Chapters 6, 6A and 6C of the *Corporations Act 2001* in the following areas:

- (a) the respective definitions of ‘convertible securities’, ‘substantial holding’ and ‘associate’, as they apply to references in those Chapters;
- (b) situations that do not give rise to a person having a relevant interest in securities relating to:
  - (i) money lending and financial accommodation;
  - (ii) securities in relation to which a financial services licensee has received specific instructions to dispose of from its client;
  - (iii) acceptance facilities that are commonly established by bidders in connection with a takeover bid; and
  - (iv) securities that are subject to ‘escrow’ (i.e. restrictions on disposals) under the listing rules of a financial market;
- (c) acquisitions within a group of companies and voting power;
- (d) on-market acquisitions of securities during a bid;
- (e) an exception to the general prohibition on acquiring relevant interests related to security interests;
- (f) the exclusion of secondary listings from the scope of an exception to the general prohibition on acquiring relevant interests; and
- (g) a nominee procedure that applies in a rights issue context relating to foreign holders.

#### Human rights implications

This class order does not engage any of the applicable rights or freedoms.

**Conclusion**

This class order is compatible with human rights as it does not raise any human rights issues.