

ASIC CLASS ORDER [CO 13/528]

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 13/528] under section 655A of the *Corporations Act 2001* (the *Act*).

Paragraph 655A(1)(b) provides that ASIC may declare that Chapter 6 of the Act applies as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Chapter 6 of the Act relates to takeovers. In a takeover, the bidder must lodge a bidder's statement (*Original Statement*) with ASIC and then send it (and its offer) to persons who hold bid class securities in the target within a prescribed time frame.

It may be necessary or desirable for the bidder to amend the Original Statement after it has been lodged but before it is dispatched. Generally, the Act provides for amendments to be made by way of a supplementary bidder's statement (*Supplementary Statement*). However, the operation of the Supplementary Statement provisions may be unclear or less suitable for updates made before dispatch of the Original Statement.

Where the bid class securities are quoted and one or more Supplementary Statements are lodged with ASIC before the Original Statement is dispatched, the Act requires the bidder to send a copy of each Supplementary Statement to the operator of each prescribed financial market (e.g. ASX) as soon as practicable and to dispatch the Original Statement together with the Supplementary Statements to holders (combined operation of item 6 in subsection 633(1) and item 6 in subsection 635(1), section 646, paragraph 647(3)(b) and the definition of 'bidder's statement' in section 9).

Where bid class securities are not quoted, and a Supplementary Statement is lodged with ASIC before the Original Statement is dispatched to holders, it may be that the combined operation of a number of provisions means that the Supplementary Statement must be:

- (a) sent to holders before dispatching the Original Statement; and
- (b) dispatched again with the Original Statement.

This is because a Supplementary Statement in relation to a bid for securities in the target that are not quoted must be sent 'as soon as practicable' irrespective of whether the Original Statement has already been sent to target holders. Sending a Supplementary Statement prior to the dispatch of the Original Statement may confuse target holders and a bidder may be unclear as to what is required under the Act.

ASIC Class Order [CO 00/344] relieved a bidder who lodged a Supplementary Statement before dispatching the Original Statement of any obligation to dispatch a copy of a Supplementary Statement, provided the bidder dispatched a replacement bidder's statement (***Replacement Statement***) that incorporated all of the changes in the Supplementary Statement to security holders—in other words, holders would receive a single document incorporating all the changes instead of the Original Statement together with a separate Supplementary Statement.

ASIC has recently reviewed the policy underlying Class Order [CO 00/344] as part of a wider review of class orders relating to the provisions of Chapters 6-6C of the Act. ASIC considers that the relief provided by this class order is still both necessary and appropriate. ASIC has decided to reissue the relief underlying Class Order [CO 00/344] in this class order. The nature of the relief is substantially the same.

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. Class Order [CO 00/344] is a legislative instrument and was scheduled to eventually expire under the sunsetting provisions of the LIA. It has now been revoked by Class Order [CO 13/518]. ASIC's reissuing of the substantive relief underlying the class order has provided an opportunity to deal with its eventual expiry.

2. Purpose of the class order

The class order allows a bidder to dispatch a Replacement Statement incorporating the substantive information in both the Original Statement and each subsequent Supplementary Statement. ASIC has granted this relief because, in many cases, it will be preferable for a holder to receive a single Replacement Statement when the Original Statement has been amended before dispatch, rather than:

- (a) where the bid class securities are not quoted—either:
 - (i) the Original Statement and a separate Supplementary Statement; or
 - (ii) a Supplementary Statement received before the Original Statement; and
- (b) where the bid class securities are quoted—an Original Statement and a separate Supplementary Statement that amends the Original Statement.

The class order also provides relief with respect to Supplementary Statements lodged prior to dispatch of an Original Statement in relation to bid class securities that are not quoted, which is designed to ensure that target holders are not confused by receiving a Supplementary Statement before the Original Statement and to remove any uncertainty about the procedure that the bidder must adopt when a Supplementary Statement is lodged before dispatch of the Original Statement. As noted above, this potential confusion arises when reading item 6 in subsection 633(1), item 6 in subsection 635(1), section 646 and paragraph 647(3)(c) together.

3. Operation of the class order

The class order relates to both off-market bids (see amendment to item 6 in subsection 633(1) and new notionally inserted section 633A) and market bids (see amendment to item 6 in subsection 635(1) and new notionally inserted section 633B).

In both cases, where one or more Supplementary Statements are lodged with ASIC before dispatch of the Original Statement to holders, the class order allows a bidder to lodge and dispatch a Replacement Statement incorporating the substantive information in both the Original Statement and each subsequent Supplementary Statement. The class order sets out the time frames within which the Replacement Statement is to be dispatched.

The relief is available if the following requirements are met:

Requirement Details

Lodgement with ASIC and sending of replacement and marked-up replacement to target and each market operator	<p>No later than the time for sending the Original Statement, the bidder must lodge with ASIC and send to the target (and, if the target is listed, the operator of each prescribed financial market):</p> <ul style="list-style-type: none"> ▪ a Replacement Statement; and ▪ a marked-up copy of the Replacement Statement showing the changes from the Original Statement (<i>Replacement Mark-up</i>).
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Dispatch of replacement to holders	<p>The bidder must dispatch the Replacement Statement to holders:</p> <ul style="list-style-type: none"> ▪ in an off-market bid—within 14 to 28 days after the Replacement Statement and Replacement Mark-up is lodged with ASIC and sent to the target (and, if applicable, the operator of each prescribed financial market on which the target’s securities are quoted), unless one of the following three scenarios applies (in which case it may be dispatched in less than 14 days): <ul style="list-style-type: none"> - the target provides written agreement to the shorter period, where that agreement has been approved in any of the specified ways a target’s statement must be approved (under subsection 639(1)) e.g. depending on the circumstances, by a resolution passed by the target’s directors; or - ASIC agrees in writing to a shorter period of time; or - the only change from the Original Statement is an update on the valuation of securities offered as bid consideration since the date of lodgement of the Original Statement; and ▪ in a market bid—within 14 days after the Replacement Statement
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and Replacement Mark-up is lodged with ASIC and sent to the target and the operator of each prescribed financial market on which the target's securities are quoted.

Content of replacement

The Replacement Statement must:

- incorporate all the substantive information in the Original Statement and in each Supplementary Statement that was lodged in relation to the Original Statement before, or at the same time as, the time when the Replacement Statement is lodged with ASIC;
- explain that it replaces the Original Statement and each Supplementary Statement;
- state the date or dates that the Original Statement and each Supplementary Statement was lodged with ASIC;
- be dated the day it is lodged with ASIC; and
- set out or reflect offers under the bid that are on the same terms as those set out in the Original Statement and offer document (if any) lodged with ASIC previously.

Off-market bids where securities are not quoted – procedure for providing updated information to holders where Supplementary Statement lodged before Original Statement is dispatched

The class order also incorporates a modification to paragraph 647(3)(c) relating to dispatch of a Supplementary Statement under a bid for securities in a target that are not quoted. Under the modification, a Supplementary Statement of this kind only needs to be dispatched if the bidder has already sent the Original Statement to all holders of bid class securities who have not accepted an offer under the bid. In effect the modification removes the requirement to dispatch a Supplementary Statement to target holders 'as soon as practicable' under paragraph 647(3)(c) where the Supplementary Statement is lodged before dispatch of offers.

As a result of the modification a bidder who lodges a supplementary bidder's statement in relation to an offer for unquoted securities before dispatch must either:

- (a) send the Supplementary Statement with the Original Statement at the time of dispatch (see the definition of 'bidder's statement' in section 9 and section 646); or
- (b) if the conditions for use of a Replacement Statement are satisfied—dispatch a Replacement Statement.

4. Consultation

On 14 November 2012, ASIC released Consultation Paper 193 *Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance (CP 193)* seeking feedback on proposals to update and consolidate a number of ASIC's regulatory guides relating to Chapters 6–6C of the Act which deal with takeovers, compulsory acquisitions and buy-outs

and information about substantial holdings in listed companies and managed investment schemes. CP 193 also sought feedback on proposals to reissue the class orders (including Class Order [CO 00/344]) associated with ASIC's updated guidance and to make new class orders addressing a number of discrete policy issues. The consultation period closed on 22 February 2013.

While CP 193 invited general feedback on the renewal of ASIC's class orders, the process did not include any specific consultation on the policy underlying Class Order [CO 00/344] because the relief raised no new policy considerations. ASIC received 7 submissions in response to CP 193. Details of the submissions received 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.

Notwithstanding ASIC's general consultation on the re-issue and update of its takeovers class orders, ASIC considers that Class Order [CO 13/528] 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 13/528]

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

The class order relates to Chapter 6 of the *Corporations Act 2001* (the *Act*) which deals with takeover bids. In a takeover, the bidder must lodge a bidder's statement (***Original Statement***) with ASIC and then send it (and its offer) to holders of bid class securities in the target. It may be necessary or desirable for the bidder to amend the Original Statement after it has been lodged but before it is dispatched to holders. Generally, the Act provides for amendments to be made by way of a separate supplementary bidder's statement (***Supplementary Statement***).

Where one or more Supplementary Statements are lodged with ASIC before the Original Statement is dispatched to holders, the class order allows the bidder to lodge and dispatch a single replacement statement incorporating the substantive information in both the Original Statement and each subsequent Supplementary Statement.

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.