

ASIC CLASS ORDER [CO 13/521]

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 13/521] under sections 655A and 673(1) of the *Corporations Act 2001* (the *Act*).

Paragraphs 655A(1)(b) and 673(1)(b) provide that ASIC may declare that Chapter 6 of the Act 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. Parts 6.3–6.9 of Chapter 6 set out the rules and procedures applying to a takeover bid. As well as providing a mechanical framework for the takeover process, these rules and procedures are designed to promote the principles underlying the takeover provisions in Chapter 6 which are set out in section 602 of the Act.

The takeover 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.

Three of these class orders are Class Order [CO 00/343] *Unmarketable parcels* and Class Order [CO 01/1543] *Takeover bids* and [CO 03/633] *Takeovers: notice of variation*

ASIC has recently reviewed the policy underlying Class Orders [CO 00/343], [CO 01/1543] and [CO 03/633] 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 the class orders is still both necessary and appropriate. ASIC has decided to reissue the relief underlying them in Class Order [CO 13/521].

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 Orders [CO 00/343], [CO 01/1543] and [CO 03/633] are

legislative instruments and were scheduled to eventually expire under the sunset provisions of the LIA. They have now been revoked under Class Order [CO 13/518]. ASIC's reissuing of the relief underlying them has provided an opportunity to deal with their eventual expiry. The modifications in Class Order [CO 13/521] are generally similar in nature to those in the relevant predecessor class orders.

Further, the class order incorporates several new modifications arising from a consultation process outlined 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 provisions in Chapter 6.

2. Purpose and operation of the class order

Paragraph 4(a) of the class order – Exercise or conversion before the offer period begins

Under section 617 of the Act, an off-market takeover bid must relate to securities in a class of securities that exist or will exist as at the date set by the bidder for determining the target holders to whom the bidder's statement will be sent under subsection 633(2). It must be between the date that the bidder gives the bidder's statement (or a separate written notice) to the target and the date of the first offer (inclusive) (*s633(2) date*). 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 the s633(2) date. The purpose of these provisions is to better facilitate the acquisition of securities under a takeover bid, including securities that come into existence on the conversion of convertible securities.

However section 617 does not permit the bid to extend to bid class securities issued on the conversion of other securities before the offer period begins. ASIC considers this to be an anomaly.

The class order modifies subsection 617(2) so that the bid extends to bid class securities issued on conversion or exercise from the s633(2) date until the end of the offer period. In effect, this extends the operation of subsection 617(2) to bid class securities that come into existence *before* the beginning of the offer period.

Consequential to this modification, the class order also makes a corresponding modification to the provision in the Act relating to the content of the bidder's statement if the bid is extended to bid class securities issued on the conversion of other securities (see paragraph 636(1)(j) and subparagraph 5(c) of the class order).

The modification continues, in substance, relief provided in Class Order [CO 01/1543].

Paragraph 4(b) of the class order – Share splitting in proportional bids and definition of small parcel

An off-market bid need not be for all the securities in the bid class. It may be an offer for a specified proportion of the securities in the bid class and in this case, the proportion must be the same for all holders of securities in the bid class (***proportional bid***). If accepting a proportional takeover bid would leave a shareholder with a ‘small parcel’ (see definition below), subsection 618(2) provides that the offer extends to the whole parcel (***Small Parcel Provision***).

There is potential for target security holders in a proportional bid to abuse the Small Parcel Provision e.g. by splitting large holdings into smaller parcels and then seeking to accept the bid for all of their securities or repeatedly purchasing and accepting into the bid holdings of a sufficiently small size that they attract the operation of the provision. These practices create uncertainty for the bidder and the market, undermine the proportional bid mechanism and are contrary to principles underlying the takeover provisions—in particular the principles that takeovers should occur in an efficient, competitive and informed market and the principle that as far as practicable, the holders of voting shares all have a reasonable and equal opportunity to participate in any benefits accruing to holders under a proposal under which a person would acquire a substantial interest in the company (see paragraphs 602(a) and (c)).

The class order modifies the Small Parcel Provision so that it does not apply to parcels of securities that have come into existence, or increased in size, because of a transaction entered into after the proportional bid was publicly proposed. The modification ensures that the Small Parcel Provision is available only to holders who will not benefit from any transaction or modification to their holding effected at a time when the potential advantage of reliance on the provision may be apparent. It thereby prevents target security holders from abusing the provision while preserving its operation in the case of holders who have not modified their holdings in response to the bid.

Acceptances by trustees and nominees

In an off-market bid, a person who holds parcels of 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 not only those parcels, but also any parcels that they hold in their own right (***Trustee Offer Provision***) (see paragraph 653B(1)(b)). In some cases, an acceptance for a parcel of target securities by a person as trustee, nominee or otherwise on account of another person may attract the operation of the Small Parcel Provision. An acceptance of this kind will relate to a parcel of securities forming part of a larger registered holding.

The class order modification also applies to restrict reliance on the Small Parcel Provision when there is a change to a parcel for which an offer is deemed to have been made under the Trustee Offer Provision—for example, increases or transfers of a person’s beneficial interests in securities that form part of a larger registered holding (see new subsection 618(2B)). In this way, the class order also seeks to deter target holders from taking advantage of the Small Parcel Provision by splitting holdings through the creation of trusts or similar arrangements.

To provide bidders with sufficient information to determine whether the requirements of the class order have been met, a trustee or nominee who wishes to have the benefit of the Small

Parcel Provision in respect of a parcel accepted into the bid out of a larger holding under the Trustee Offer Provision must provide the bidder with a notice stating:

- (a) either that the parcel is held by the holder in their own right, or if the parcel is held by the holder as trustee or nominee for, or otherwise on account of one or more beneficiaries, the name and address of each beneficiary; and
- (b) the date the person who holds in their own right acquired a legal interest in the parcel or if the parcel is held non-beneficially, the date the person reasonably believes each beneficiary acquired a beneficial interest in the parcel (if the dates given are the same as the date the bid was publicly proposed, the time of day must also be stipulated).

The notice requirement will only apply in limited circumstances—that is, where:

- (a) the acceptance relies on the Trustee Offer Provision (i.e. the notification requirements do not apply to acceptances in respect of a person’s entire registered holding);
- (b) the acceptance relates to a parcel that is sufficiently small that if the holder accepts the proportional bid offer, the remainder of the parcel is a small parcel; and
- (c) the accepting holder seeks to rely on the Small Parcel Provision to have the bid extended to the entire parcel to which the acceptance relates.

A trustee or nominee who is content to accept only in respect of the bid proportion may accept in the usual way without giving the notice.

Meaning of minimum parcel and ‘small parcel’

The Small Parcel Provision is stated to apply where accepting a proportional takeover bid would leave a shareholder with a parcel of securities *‘that is less than a marketable parcel (within the meaning of the rules of the relevant financial market)’*. Not all prescribed financial markets define a ‘marketable parcel’ under their respective rules. Some may use the term ‘minimum parcel’ instead while others do not have a definition. ASIC is also aware that some people find the concept of ‘less than a marketable parcel’ confusing or objectionable as it may suggest that they have a parcel of securities that cannot be sold.

ASIC has modified the Small Parcel Provision to eliminate any ambiguity arising out of the reference to a marketable parcel and the potential for different definition to apply where securities are quoted on multiple markets. The class order inserts a definition of a ‘minimum parcel’ to mean either:

- (a) if a “marketable parcel” or “minimum parcel” is defined in the rules governing the operation of a prescribed financial market on which the securities are quoted—a marketable parcel or minimum parcel as defined in those rules; or
- (b) otherwise, a parcel of securities valued at not less than \$500 based on the closing price of the securities on the relevant prescribed financial market (see new subsection 618(2D)).

The class order also modifies the Small Parcel Provision so that it uses the term ‘small parcel’ and clarifies that small parcel is a parcel of quoted securities that is not a ‘minimum parcel’ as defined in subsection (2D) using the most recent closing price on whichever (or each—as the case may be) prescribed market on which the securities last traded (see new subsection 618(2A)).

Paragraph 4(c) of the class order – Specifying foreign holders to which subsection 619(3) applies and small parcels offered as consideration under a bid

Foreign holders

As far as practicable, all offers under a takeover bid must be the same because holders should have an equal opportunity to participate in the benefits of the bid (subsection 619(1) and paragraph 602(c)). However, where the bid consideration includes scrip (i.e. securities), the bidder may be constrained by foreign laws and regulations from making an offer of securities to a foreign holder. Alternatively, it may be highly impractical to comply with foreign regulations.

Subsection 619(3) allows the bidder to include terms in its bid that establish a ‘nominee procedure’ so that foreign holders can receive cash instead of the securities offered under the bid. A foreign holder for this purpose is a holder whose address on the register is a place outside Australia and the external territories (section 9). Under the nominee procedure, the bidder must appoint an ASIC approved nominee to sell the securities or rights that would otherwise be transferred to foreign holders who accept the offer and to distribute the proceeds to those holders net of expenses. The nominee procedure is an exception to the usual rule that all the offers under a takeover bid must be the same. Its premise is that the takeover bid should be considered compliant even if foreign holders do not receive an offer of securities, but cash realised from the sale of the securities.

Subsection 619(3) may be read to require that, if a bidder uses the nominee procedure, it must use it for *all* foreign holders. The class order modifies the provision to clarify that the bidder does not have to use the nominee procedure for all foreign holders of target securities but that the bidder may instead specify in the bidder’s statement the foreign holders to whom the nominee procedure applies. The modification continues, in substance, relief provided in Class Order [CO 01/1543].

Small parcels offered as consideration under a bid

When a bidder offers quoted scrip as consideration in an off-market bid, the number of securities they are required to provide to some target holders may be less than a ‘marketable parcel’ or a ‘minimum parcel’ as defined in the rules of the market on which they are quoted or a related clearing and settlement facility. In some cases these rules restrict the creation of new parcels through securities that are not ‘marketable parcels’ or ‘minimum parcels’ with the aim of reducing the number of holdings of this kind (***Small Parcels***) on the listed entity’s register and associated administrative costs. As with securities trading, a scrip takeover may increase the number of Small Parcel holdings on the bidder’s register.

The insertion of new subsection 619(4) in class order allows a bidder to deal with offers of Small Parcels in the following two ways:

- (a) if a nominee is appointed under subsection 619(3) for foreign holders—the nominee may also be a nominee for other holders and sell the small parcel of securities offered as consideration and distribute the proceeds to the holders in accordance with that provision; or
- (b) in other circumstances—the bidder may offer cash (based on the highest closing price of the securities during a specified reference period) to the holders.

Given the costs associated with appointing a nominee, the class order does not require a bidder to appoint a nominee to sell the small parcel of securities and forward the cash proceeds to the holder. However, if a bidder intends to appoint a nominee and use the procedure in subsection 619(3), this procedure must also be used when dealing with small parcels.

Under the class order, the number of quoted securities that constitute a Small Parcel is determined by applying, where applicable, the definition in the rules of the relevant prescribed financial market (e.g. of the definition of a ‘marketable parcel’ in the ASX Operating Rules) but using the highest closing price published by the operator of any prescribed financial market on which the securities are quoted during the period beginning on the first day of the bid period, and ending on the earlier of:

- (a) five trading days before the first date on which the bidder must pay or provide bid consideration to a target holder under the terms of the offers; and
- (b) the end of the bid period (see new subsection 619(5)).

If the securities are quoted on more than one prescribed financial market containing a relevant definition of a ‘marketable’ or ‘minimum’ parcel then the bidder can elect which definition applies by specifying this in its bidder’s statement. If the securities are quoted on one or more prescribed financial markets, the rules of which do not contain a definition, then the relevant definition is a parcel of \$500 value.

The modification continues, in substance, similar relief contained in [CO 00/343].

Paragraph 4(d) of the class order— Timing of payment in conditional offers

Each offer that a bidder makes must set out when the bidder will make payment under the takeover contract. Under subsection 620(2), the period for a bidder to pay consideration runs from the time that the necessary transfer documents are given to the bidder. The ‘necessary transfer documents’ constitute the consideration provided by the holder under the takeover contract.

However, for an offer that is subject to a defeating condition (in broad terms, a condition which if not satisfied will enable the bidder to withdraw its offer), the period for a bidder to pay consideration should also be referable to the time that the takeover contract becomes

unconditional. At this time, the contract is binding and will not be rescinded. This is consistent with subparagraph 620(2)(a)(i) which takes account of when an offer becomes unconditional in its calculation of the timing for payment..

The class order modifies paragraph 620(2)(b) so that the bidder must provide in its offer that, if the bidder is given the necessary transfer documents after acceptance by the holder and before the end of the bid period, the bidder is to pay the consideration:

- (a) if the offer is subject to a defeating condition when the bidder is given the necessary transfer documents—by the earlier of one month after the takeover contract becomes unconditional or 21 days after the end of the offer period (new paragraph 620(2)(b); and
- (b) if the offer is unconditional—by the earlier of one month after the bidder is given the necessary transfer documents or 21 days after the end of the offer period (new paragraph 620(2)(ba)).

The class order also modifies paragraph 620(2)(c) so that, where necessary transfer documents are given after acceptance and after the end of the offer period the bidder is to pay the consideration:

- (a) within 21 days after the bidder is given the necessary transfer documents if at the time the bidder is given those documents the takeover contract is unconditional, the offer has been accepted and the offer period has ended; or
- (b) within 21 days after the takeover contract becomes unconditional if when the bidder is given the necessary transfer documents, the offer is subject to a defeating condition that relates to the occurrence of an event entitling the bidder to withdraw unaccepted offers under a market bid (under subsections 652C(1) or (2)) (see new subsection 620(2)(c)).

The modification of paragraph 620(2)(c) recognises that a bidder may free its offer from a condition relating to the events listed in subsection 652C(1) or (2) up to three business days after the end of the offer period (see paragraph 650F(1)(a)).

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraph 4(e) of the class order – Collateral benefits in market bids

Section 623(1) prohibits certain collateral benefits being offered or given to target holders outside the bid process. In particular, it prevents a bidder or an associate of the bidder giving, offering to give, or agreeing to give a benefit to a person during the offer period for the bid 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.

The class order modifies subsection 623(1) so that, for a market bid, the prohibition applies during the ‘bid period’ rather than the ‘offer period’. ASIC has made this modification because, without it, there would be a gap between the time at which the minimum bid price principle (in subsections 621(3)–(5)) stops applying and the time that the prohibition on collateral benefits starts applying. The minimum bid price principle requires that the consideration offered for bid class securities under a takeover bid must equal or exceed the maximum consideration that the bidder or their associate provided or agreed to provide for a bid class security under a purchase or agreement during the four months before the date of the bid.

ASIC considers that this extension is appropriate because the collateral benefits prohibition in section 623 is intended to pick up where the minimum bid price principle leaves off. Both extend the equality principle in s602(c) (described above in relation to subparagraph 5(b) of the class order) beyond the consideration that the bidder offers under the takeover bid.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraphs 4(f) and (g) of the class order – Automatic extensions of the offer period

Under subsection 624(2), an offer period is automatically extended if, during the final seven days of the offer period, the bidder’s voting power in the target increases to more than 50%, or in an off-market bid, the offers under the bid are varied to improve the consideration offered. If either of these events occurs, the offer period is extended so that it ends 14 days after the triggering event.

While the term ‘day’ is not defined in the Act, the legal position is generally that a day comprises a full 24 hours, ending at midnight: (see e.g. *Prowse v McIntyre* (1961) 111 CLR 264).

In contrast, the offer period for a takeover bid, as originally determined or subsequently extended by the bidder, may end at any time of day specified by the bidder, as long as it lasts for at least one month and not more than 12 months (paragraph 624(1)(b)).

If an off-market bid is automatically extended, it is likely that subsection 624(2) requires the extended offer period to stay open until midnight on the 14th day after the triggering event. This may create confusion because a bidder will often have previously specified a closing time that is earlier than midnight.

The class order provides relief from the requirement for an automatically extended offer period for an off-market bid to remain open until midnight on the closing day. The relief provides that an automatically extended offer period for an off-market bid remains open on the 14th day of the extension period until the time of day that the offer period would have ended if it had not been extended.

The class order modifies subsection 624(2) in this way to reduce the potential that confusion may arise as a result of the operation of this provision, and to ensure that the bid will still close at a time of day that is commercially suitable for the bidder.

The class order also provides relief so that an automatically extended market bid is no longer required to remain open until midnight on the 14th day of the extended offer period – it remains open until the ‘close of ordinary trading’. A definition of this term has been included in a new subsection 624(4).

The modification of subsection 624(2) also incorporates an amendment to the subsection which is related to the amendment made to subsection 650D(1) in paragraph 6(c) of the class order. This amendment is discussed further below.

Acceptance facilities triggered in the final 7 days of the offer period

Paragraph 4(g) of the class order also inserts a new subsection 624(5) which relates to acceptance facilities. Under an acceptance facility a holder of securities or a person otherwise entitled to accept an offer under 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 acceptance or instruction they provide can be withdrawn at any time until the conditions for release of the acceptances or instructions.

Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition* provides relief to bidders to ensure that they do not acquire a relevant interest in securities tendered into a facility. The acquisition of a relevant interest of this kind would not be covered by the exception to the general takeover prohibition in section 606 that a formal acceptance of the bid would (see item 1 of section 611). Under Class Order [CO 13/520] a bidder does not have a relevant interest in securities in respect of which acceptance facility acceptances or instructions are held by the facility operator.

New subsection 624(5) provides mechanical relief that offers a bidder who has established an acceptance facility certainty that the bid will be extended under subsection 624(2) before it closes where the acceptances in the facility, once received, would increase the bidder’s voting power to more than 50% during the last 7 days. The bidder may require this certainty because:

- (a) bidders are unable to drop defeating conditions (other than conditions relating to events listed in subsections 652C(1) and (2)) and extend the bid in the final 7 days: see subsections 650C(2) and 650F(1); and

- (b) particularly where the conditions of release from the acceptance facility are only satisfied very close to the end of the offer period, acceptances and instructions may not be received by the bidder from the facility operator, and may not be actioned by the persons who hold securities on behalf or account of others, before the bid closes.

New subsection 624(5) addresses this potential uncertainty by deeming that, for the purposes of calculating the 50% voting power in subsection 624(2) only, a bidder is taken to acquire securities the subject of facility acceptances and instructions as soon as the conditions for release of the acceptances and instructions from the facility are satisfied. However, the provision only applies if:

- (a) the acceptance facility is one that complies with and is operated in accordance with the relevant conditions in Class Order [CO 13/520]; and
- (b) the bidder elects that the provision should apply by including in the notice given under subsection 630(3) a statement that the bidder has made this election and a description of the election.

Paragraph 4(h) of the class order – Admission to quotation condition

Subsection 625(3) imposes a statutory condition on off-market bids. If the consideration offered under such a bid is, or includes, securities, and the offer or the bidder's statement states or implies that the securities are to be quoted on a financial market (in Australia or elsewhere), the offer is subject to a condition that:

- (a) an application for admission to quotation will be made within seven days after the start of the bid period; and
- (b) permission for admission to quotation will be granted no later than seven days after the end of the bid period.

The class order modifies subsection 625(3) to clarify that the condition it imposes is a statutory condition and not a 'defeating condition' within the meaning of that term in section 9. This technical modification recognises that the mandatory condition differs from other conditions the bidder may choose to apply to its bid and overcomes potential anomalies that may otherwise result.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraph 4(i) of the class order – Giving a notice on the status of conditions

Where a takeover bid is subject to a defeating condition, the bidder is required to give a notice about the status of the condition near the end of the offer period. Subsection 630(4), as enacted, requires a bidder, in circumstances where a condition of the offer is fulfilled during the bid period but before the date for publishing the notice on status of the condition, to publish as soon as practicable a notice that states that the condition has been fulfilled.

The class order modifies subsection 630(4) to remove the references to ‘publishing’ and ‘publish’ and replace them with references to ‘giving’ and ‘give’. The modification serves to clarify the operation the provision and ensure consistency with the language adopted in other parts of section 630 (see subsections 630(1) and (2)).

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraph 5(a) of the class order – Information required in the bidder’s statement lodged with ASIC

However, in many cases a bidder will need to lodge the bidder’s statement with ASIC some time before dispatch: see items 2 and 6 of subsection 633(1).

The class order modifies section 633 so that in the copies of the bidder’s statement that the bidder lodges with ASIC, sends to the target and sends to any relevant financial market operator, the bidder may omit or provide modified disclosure in relation to the following:

- (a) the holders’ name and address;
- (b) bid timing including the offer period and the date for giving notice on the status of conditions;
- (c) details of the purchases made and benefits given by the bidder and its associates in relation to bid class securities in the four months before the date of the bid; and
- (d) the bidder’s relevant interest in bid class securities and voting power in the target (see new subsections 633(1A) and (1B)).

The modification is necessary because a bidder should not be required to disclose information at the time of lodgement if:

- (a) the information is not available, or to disclose it would unreasonably fetter the bidder’s discretions; and
- (b) the information is not critical until the start of the offer period.

The class order requires the updated disclosure in the bidder’s statement dispatched to holders to be current as at the date that offers are first made, consistent with the requirements in subsection 636(1). It also requires that the updated bidder’s statement is:

- (a) sent to the target and the operator of each relevant prescribed financial market at the time that the bidder sends its first bidder’s statement and offer document to holders; and
- (b) is attached to the notice the bidder lodges with ASIC notifying it that offers have been dispatched under item 9 of subsection 633(1) (see new subsection 633(1C)).

This modification continues, with minor adjustments, a modification of similar nature contained in Class Order [CO 01/1543].

Paragraph 5(b) of the class order – Bidder must disclose prospectus or PDS information about non-controlled issuer

Paragraph 636(1)(g) requires a bidder to include in the bidder's statement prospectus information about the securities offered under a takeover bid if the bidder is the issuer or the bidder controls the issuer of the scrip consideration. Paragraph 636(1)(ga) similarly requires Product Disclosure Statement (**PDS**) information to be included in the bidder's statement about managed investment products offered as consideration.

The purpose of the prospectus and PDS information requirement is to provide a holder who accepts the offer with appropriate information about the consideration and allow them to assess the merits of the bid. However, if an issuer or responsible entity that the bidder does not control authorises the bidder to offer the securities or managed investment products, these provisions, as enacted, would not require the bidder to include prospectus or PDS information about the securities in the bidder's statement.

The class order modifies paragraphs 636(1)(g) and (ga) so that a bidder that offers securities or managed investment products as consideration under a bid must also disclose prospectus or PDS information in the bidder's statement if the issuer of the securities or the responsible entity agrees to the bidder offering, or authorises, arranges for or permits the bidder to offer the securities or managed investment products. Under ASIC's modification, the bidder must disclose prospectus or PDS information even if the bidder does not control the issuer or responsible entity.

ASIC has extended the operation of paragraphs 636(1)(g) and (ga) because, when a bidder offers securities or managed investment products, target holders and directors should be given prospectus or PDS information to enable them to assess the merits of the bid.

Under the class order, a bidder must disclose all material that would be required for a prospectus for an offer of the securities (under sections 710-713) by the issuer, rather than by the bidder. This means that the bidder must obtain information from the issuer if:

- (a) the bidder does not have knowledge of the prospectus information; and
- (b) the issuer authorised the bidder to offer the securities.

The rationale for this requirement is that, if an issuer authorises the bidder to offer its securities as consideration, the bidder should be in a position to obtain from the issuer the information needed for prospectus disclosure. This modification is required because, while paragraph 636(1)(g) imports the prospectus disclosure requirements (in sections 710–713), the information that must be disclosed in a prospectus is limited by reference to a person whose knowledge is relevant (under paragraph 710(1)(b)). A person's knowledge is relevant if they are 'the person offering the securities' (under paragraph 710(3)(a)).

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraph 5(c) of the class order – Exercise or conversion before the offer period begins

This is a modification consequential on the amendment referred to above in relation to paragraph 4(a) of the class order.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraphs 5(d) and (e) of the class order – Consent to use a lodged statement

If a bidder or target wishes to include a statement by another person in the bidder's statement or the target's statement, they must obtain the person's consent (subsections 636(3) and 638(5)). It may be difficult to obtain a person's consent to include in a bidder's or target's statement a public statement they have made in a lodged document—particularly in the context of a hostile takeover bid. For example, it may be difficult for a bidder to obtain the consent of the target's chairman to include their statement in a bidder's statement.

The class order modifies subsections 636(3) and 638(5) so that the bidder's or target's statement may include a statement by a person without the person's consent, if the statement was made in a document that has been lodged with:

- (a) ASIC; or
- (b) the operator of a prescribed financial market (by a listed company, managed investment scheme or other listed body in compliance with the listing rules).

For the relief to apply:

- (a) the bidder's or target's statement must:
 - (i) fairly represent the statement; or
 - (ii) include, or be accompanied by, a correct and fair copy of the document, or part of the document, that contains the statement; and
- (b) if the bidder's or target's statement is not accompanied by a copy of the document, or part of the document, that contains the statement, the bidder's or target's statement must:
 - (i) identify the document or part of the document; and
 - (ii) state that the target will, on request, provide the document to a target holder within 2 business days free of charge.

This modification has been made because, if a person makes a statement in a document lodged with a securities exchange under the listing rules or with ASIC, they do so in a regulated context for the purpose of informing holders and the market. The person who makes the statement should be mindful of potential liability. It is readily foreseeable that the statement may be quoted in the context of a takeover bid.

The modification continues, in substance, similar relief contained in Class Order [CO 01/1543].

Paragraph 6(a) of the class order – Clarification of paragraph 650B(1)(h)

Section 650B of the Act sets a number of ways that the bidder may vary offers to improve the consideration offered—including by offering an ‘additional alternative form of consideration’ (see paragraph 650B(1)(h)). ASIC’s modification clarifies that this provision is not intended to operate only when there is already more than one form of consideration on offer under the bid—by omitting ‘or’ between ‘additional’ and ‘alternative’.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraph 6(b) of the class order – Clarification of operation of subsection 650C(2)

Subsection 650C(2) relates to extensions of the offer period where a bid is subject to a defeating condition. It enables the bidder to extend the offer period after ‘publication’ of a notice about the status of the defeating condition. Similar to the modification contained in paragraph 4(i) of the class order, a modification is also made to subsection 650C(2) to omit the references to ‘publication’ of the notice and replace them with references to ‘giving’ the notice.

The modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraph 6(c) of the class order – notices of variation of offers under subparagraph 650D(1)(c)(ii)

If the bidder varies offers under an off-market bid, they must send a notice of the variation to everyone to whom offers were made under the bid (subparagraph 650D(1)(c)(ii)). However at the time of the variation, some persons to whom offers were made may no longer hold bid class securities because they have disposed of their holding to another person (e.g. by selling the securities on market). Holders who have disposed of their holdings in this way are unlikely to want to continue to receive notices relating to the bid.

The class order modifies subparagraph 650D(1)(c)(ii) so that where the bidder has obtained a copy of a register that relates to a class of target securities the holders of which the bidder sent offers under the bid, and that records the name and address of holders as at a time subsequent to the subsection 633(2) record date, the bidder must send the notices of variation to:

- (a) those persons shown on the most recent copy of the register obtained by the bidder to whom the bidder would have had to send the bidder’s statement and offers under item 6 of the table in subsection 633(1) if the date set by the bidder under subsection 633(2) had been the date at which the holdings are recorded on that copy of the register; and
- (b) any other person who has accepted the offer under the bid.

The modification in paragraph 650D(1)(c) operates separately in relation to each class of target securities the holders of which the bidder sent offers under the bid and if the bidder does not have access to an updated register in relation to a particular class then the existing requirement to send to everyone to whom offers were made applies with respect to holders in that class. For example, if the bidder has an updated register for one class (e.g. ordinary shares in the bid class) but not another (e.g. convertible securities—the holders of which the bidder sent the bidder’s statement and offers because the bid extended under subsection 617(2) to ordinary shares issued on exercise of the convertible securities) the bidder must:

- (a) in respect of the class for which the more recent register is available to the bidder—send notices of variation to the persons in the class recorded on the register; and
- (b) in respect of the other class—send notices of variation to the persons in the class to whom offers were made under the bid.

The class order also modifies subsection 624(2) to align the persons to whom the bidder must dispatch a written notice that an automatic extension has occurred with the modified requirements in s650D(1)(c)—except to the extent that the bidder may be required to give the subsection 624(2) notice to persons who have accepted the offer.

The modifications of paragraph 650D(1)(c) and subsection 624(2) recognises that bidders will commonly obtain copies of the target register throughout the bid period for the purposes of communications and/or ongoing monitoring of the bid’s progress. It seeks to ensure that the bidder’s notices regarding variation of its offers are, as far as practicable, sent to persons for whom the variation is likely to be relevant, based on the most-up-to date information available to the bidder.

The modification of subparagraph 650D(1)(c)(ii) expressly includes each person who has accepted the offer under the bid in order to ensure that persons who may not be on the more recent version of the register, because their securities have been acquired by the bidder under the bid, still receive notices relating to improvements in consideration which may affect them: see subsection 650B(2).

Paragraph 6(d) of the class order – signing a notice of variation under subsection 650D

A notice of variation of an offer under an off-market bid must be signed:

- (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 (subsection 650D(3)).

The class order includes a new subsection 650D(3A) which removes the signing requirement as long as the notice has been 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.

ASIC has provided the relief underlying the modification because it considers that it is appropriate for a bidder to have the option of approving a notice of variation in the same way as a bidder's statement rather than signing the notice.

The modification continues, in substance, similar relief contained in Class Order [CO 03/633].

Paragraph 6(e) of the class order – Clarification of paragraph 650F(1)(a)

The class order corrects a drafting error in paragraph 650F(1)(a) which relates to the timing of when a bidder is permitted to free its offers from defeating conditions. The modification is required because paragraph 650F(1)(a), as enacted, refers to conditions that a bidder may 'withdraw' unaccepted offers if an event or circumstances referred to in subsection 652C(1) or (2) occurs. This may cause confusion because a defeating condition does not allow a bidder to withdraw unaccepted offers. Offers may only be withdrawn with ASIC's written consent (see section 652B).

The class order modifies paragraph 650F(1)(a) to refer instead to the happening of an event or circumstance referred to in subsection 652C(1) or (2).

This modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraph 6(f) – Clarification of subsection 650G(b)

Subsection 650G(b) provides that all takeover contracts, and all acceptances that have not resulted in binding takeover contracts, for an off-market bid that is subject to a defeating condition are void if 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). The reference to subsections 630(1) and (2) is incorrect because offers are permitted to be freed of certain conditions under subsection 650F(1) later than the date applicable under subsection 630(1) or (2) (see paragraph 650F(1)(a)).

The class order modifies paragraph 650G(b) to correct this error and insert a reference to the date applicable under subsection 650F(1).

This modification continues, in substance, a similar modification contained in Class Order [CO 01/1543].

Paragraphs 7 and 8 of the class order – Acceptances received by the bidder for securities registered in a clearing and settlement facility

Under sections 653A and regulation 6.8.01 of the *Corporations Regulations 2001* (***Corporations Regulations***) an acceptance of a takeover offer for quoted securities to which the operating rules of a clearing and settlement facility apply is only effective if made in the way specified in those rules. For securities registered on the ASX's Clearing House Electronic Subregister System (***CHESS***), the relevant rules are the ASX Settlement Operating Rules (***Settlement Rules***).

A target holder whose securities are CHESS registered can instruct their broker directly to accept the bid through CHESS. As an alternative, the offer terms will generally provide that the target holder can return an acceptance form to the bidder instructing the bidder (or its representative) that they accept the bid—which the bidder may then seek to effect by engaging the holder's broker through CHESS: Settlement Rule 14.14.7. For some target holders returning a completed acceptance form may be a more familiar method of acceptance.

In *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55 the court held that where a target holder whose securities are CHESS registered returns an acceptance form, there is no acceptance of the bid until the acceptance is 'processed' by effecting it through the CHESS system. This is because of the combined effect of section 653A, regulations 6.8.01 and 7.11.24 of the Corporations Regulations, and Settlement Rule 14.14.

The class order modifies the Act so that, for the purposes of Chapter 6 and 6C an offer is taken to have been accepted in respect of securities registered in a clearing and settlement facility when:

- (a) the bidder has received a written instruction or authority (or both) from a holder entitled to accept the offer (or a person with a right to be registered as holder); and
- (b) the instruction or authority is given for the purpose, and has the effect, of enabling the bidder to instruct another person through the relevant clearing and settlement facility to effect acceptance of the offer (see new section 653AA—inserted for the purposes of Chapter 6 and new subsection 609(10) inserted for the purposes of Chapter 6C).

However, the modification does not affect the requirements of section 653A—including that the acceptances must be processed in accordance with the rules of the relevant clearing and settlement facility. This is because it is not designed to affect the settlement process or the common law position in relation to offer and acceptance—only the application of Chapters 6 and 6C.

The purpose of the modification is to improve certainty for bidders and holders by clarifying the application of Chapter 6 and 6C where a holder seeks to accept a takeover offer for securities registered in a clearing and settlement facility such as CHESS by returning a completed acceptance form to the bidder or its representative. The modification seeks to align the operation of Chapter 6 with the expectations of target holders that once they have delivered the bidder a completed acceptance form they have accepted the offer.

The modification addresses a number of consequences arising from an interpretation that an acceptance form received by the bidder for relevant securities does not constitute an acceptance for the purposes of Chapters 6 and 6C by deeming that it does for the purposes of

applying various requirements of Chapters 6 and 6C. In particular it means that, in relation to acceptance forms received by the bidder, or its representative, in respect of securities registered in a clearing and settlement facility:

- (a) the bidder must take the acceptance into account when determining whether there has been a change in its voting power that may need to be disclosed in a substantial holding notice, even if the acceptance has yet to be processed;
- (b) the relevant interest acquired by the bidder upon receiving the acceptance form will fall within the exception in item 1 of section 611;
- (c) even if the acceptance is not yet processed, it will be taken into account in determining whether the bidder has received acceptances that increase its voting power to over 50% in the final seven days of a bid (paragraph 624(2)(b)); and
- (d) if the bidder varies the bid in a way that postpones the bidder's obligations under the bid for more than one month, the target holder may still be entitled to withdrawal rights under section 650E even if the variation is effected before the acceptance is processed.

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 00/343], [CO 01/1543] and [CO 03/633]) and to make new class orders addressing a number of discrete policy issues. The consultation period closed on 22 February 2013.

CP 193 invited feedback on the following specific modifications contained in Class Order [CO 13/521]:

- (a) share splitting in proportional bids (see paragraph 4(b) of the class order);
- (b) the closing time for an automatically extended offer period (see paragraph 4(f) of the class order); and
- (c) the timing of acceptances in a clearing and settlement facility (see paragraphs 7 and 8 of the class order).

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

Notwithstanding ASIC's consultation, ASIC considers that Class Order [CO 13/521] 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 13/521]

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 13/521] relates to takeover bids. The class order makes modifications to Chapter 6 and 6C of the *Corporations Act 2001* (the *Act*) in the following areas:

- (a) Extension of a bid to bid class securities that come into existence on the conversion of convertible securities in certain circumstances;
- (b) Preventing artificial share splitting in proportional bids including in the situation where trustees or nominees are involved;
- (c) Removing uncertainty related to the meaning of a ‘marketable parcel’;
- (d) Where bid consideration includes scrip (e.g. securities), clarification of how:
 - (i) a nominee procedure applies to foreign holders that enables them to receive cash instead; and
 - (ii) the bidder can deal with ‘small parcels’ of securities;
- (e) The timing of payment of consideration by the bidder where conditional offers are involved;
- (f) The prohibition on a bidder giving collateral benefits to target holders;
- (g) Clarifying timing issues related to the closing time for offer periods that are automatically extended under the Act;
- (h) Relevant interests acquired by a bidder in respect of acceptances received in an acceptance facility established by the bidder in connection with the takeover bid;
- (i) Clarification that a certain condition imposed on off-market bids under the Act relating to admission to quotation is not a defeating condition;
- (j) The requirement that the bidder give a notice about the status of a defeating condition near the end of the offer period;
- (k) Information that need not be included in the bidder’s statement lodged with ASIC;

- (l) Extension of a requirement relating to the bidder disclosing prospectus or Product Disclosure Statement information about an issuer of securities or the responsible entity of a scheme even where the bidder does not control the issuer or the responsible entity;
- (m) A statement that must be included in the bidder's statement if the bid is extended to bid class securities issued on the conversion of other securities;
- (n) Consent not required to be obtained by a bidder or target where they wish to include a statement made by another person in a document lodged with ASIC or the operator of a prescribed financial market by a listed body in the bidder's statement or the target's statement;
- (o) Clarification of notice requirements relating to the extension of the offer period where a bid is subject to a defeating condition;
- (p) Persons to whom a bidder must send notices of variation when it varies offers under an off-market bid;
- (q) Requirement relating to a bidder signing of notices of variation;
- (r) Clarifying the operation of a provision relating to a bidder seeking to free an off-market bid from defeating conditions; and
- (s) Clarification of the treatment, for the purpose of considering the application of Chapter 6 and 6C of the Act in relation to paper acceptances received by the holders of securities registered in a clearing and settlement facility before the acceptances are processed.

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.