

# ASIC CLASS ORDER [CO 13/522]

## 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 13/522] under section 669 of the *Corporations Act 2001* (the *Act*).

Paragraph 669(1)(b) provides that ASIC may declare that Chapter 6A of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

### 1. Background

- 1.1 This class order relates to the provisions of Chapter 6A of the Act. In broad terms, Chapter 6A gives a person a right to compulsorily acquire securities under certain circumstances depending on the level of the person's interest in the relevant class of securities or the entity overall. The Chapter applies to interests held in companies, listed registered managed investment schemes and other listed bodies.
- 1.2 There are two types of compulsory acquisition under Chapter 6A:
  - (a) post-bid compulsory acquisition—under which a bidder who has, during or at the end of the bid acquired relevant interests in 90% of securities in the bid class (**90% Relevant Interest Test**), and has acquired 75% of the securities that the bidder made offers for under the bid (**75% Acquisition Test**), may compulsorily acquire outstanding bid class securities; and
  - (b) general compulsory acquisition—under which any person can compulsorily acquire securities:
    - (i) in a class in respect of which the person holds full beneficial interest in 90% of the securities (by number); or
    - (ii) where the person has voting power in the entity of at least 90% and holds, either alone, or with a related body corporate, full beneficial interests in at least 90% (by value) of all the securities of the entity that are either shares or interests or convertible into shares or interests.
- 1.3 Chapter 6A also provides a right to minority interest holders to have their interests bought out by the holder of an overwhelming majority of the securities in a class. Relevantly, where the overwhelming interest has been acquired by a bidder following a takeover bid, both the holders of remaining bid class securities and securities convertible into bid class securities must be offered an opportunity to be bought out by the bidder. This ensures that minority interest holders are not 'locked-in' as a minority

in the event, for example, that the bidder decides not to proceed to compulsory acquisition.

1.4 Chapter 6A was introduced 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 provisions of Chapter 6A by way of 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 relevant provisions.

1.5 Two relevant class orders are:

- (a) Class Order [CO 01/1544] *Compulsory acquisition following a takeover bid* (which modifies the 75% Acquisition Test); and
- (b) Class Order [CO 03/636] *Takeovers: non-transferable employee securities* (which facilitates the bidder's compulsory acquisition of securities held by employees of the target company where there are restrictions on the transfer of the securities).

1.6 ASIC has recently reviewed the policy underlying [CO 01/1544] and [CO 03/636] as part of a wider review of class orders relating to the provisions of Chapters 6–6C and considers that the relief provided by the class orders is still both necessary and appropriate. ASIC has decided to reissue the relief underlying both of those class orders in Class Order [CO 13/522].

1.7 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 01/1544] and [CO 03/636] are legislative instruments and were scheduled to eventually expire under the sunsetting provisions of the LIA. They have now been revoked by Class Order [CO 13/518]. ASIC's reissuing of the substantive relief underlying them has provided an opportunity to deal with their eventual expiry.

1.8 Further, in November 2012, ASIC released ASIC Consultation Paper 193: *Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance (CP 193)* (which is available from ASIC's website at [www.asic.gov.au](http://www.asic.gov.au)). In CP 193 ASIC sought feedback on proposals to further modify Chapter 6A to improve its operation and address additional technical issues and anomalies ASIC has become aware of through its experience administering the legislation over time. These proposals related to:

- (a) apparent anomalies in the operation of subsection 661A(2) which excludes certain relevant interests the bidder has from being counted for the purposes of the 90% Relevant Interest Test; and

- (b) the potential overlap between the compulsory acquisition and buyout rights provisions whereby a bidder might be entitled to compulsorily acquire bid class securities concurrently with minority holders being entitled to be bought out.

The class order also incorporates new modifications addressing these issues.

## **2 Purpose and operation of the class order**

### ***Compulsory acquisition of non-transferable employee securities***

- 2.1 Companies, and other entities the securities of which are subject to Chapter 6A, may issue securities to their employees or non-executive directors under an employee incentive plan or a similar kind of scheme (***employee securities***). In order to achieve the objectives of the incentive plan the securities that are issued may be non-transferable. If the company's constitution or the terms on which the employee securities are issued restrict their transfer the restrictions might prevent the bidder from acquiring the securities under a takeover bid. The restrictions on transfer may also mean the employee securities are in a different class from the class to which the bid related (the ***bid class***) meaning the bidder is unable to acquire them under the post-bid compulsory acquisition provisions.
- 2.2 The class order modifies subsection 661A(1) which establishes a bidder's right to compulsorily acquire securities following a takeover bid. The purpose of the modification is to ensure that a bidder who has met the requirements for post-bid compulsory acquisition in relation to the bid class is not prevented from acquiring 100% ownership merely because employee securities, that would otherwise be in the bid class, are non-transferable. ASIC's modification also has the purpose of countering the possible defensive effect of non-transferable employee securities. Many bidders seek 100% ownership of the target. Uncertainty about whether a bidder can compulsorily acquire non-transferable employee securities may be a factor in discouraging takeover bids.
- 2.3 The modifications in the class order in relation to the compulsory acquisition of non-transferable employee securities continue in substance the relief provided in Class Order [CO 03/636].
- 2.4 Paragraph 4(a) of the class order extends subsection 661A(1) so that if a bidder compulsorily acquires bid class securities it may also compulsorily acquire non-transferable employee securities where:
  - (a) the employee securities are in a different class to the bid class merely because they are non-transferable due to restrictions in the company's constitution; and

- (b) the employee securities, if included in the bid class, would not exceed 10% of all bid class securities (by number worked out at the end of the period for which offers under the takeover bid remain open (*offer period*)).
- 2.5 In a general sense, the modification treats non-transferable employee securities similarly to bid class securities issued during or after the offer period. The bidder may elect to compulsorily acquire later issued securities if it acquires bid class securities: see subsection 661A(4). Under new subsection (4A), where a bidder elects to compulsorily acquire non-transferable employee securities the bidder must acquire all employee securities which were issued or granted before the end of the offer period and may elect to acquire any others in which the bidder has a relevant interest (no matter when they were issued or granted): see sub-subparagraph 4(a)(iii) of the class order.
- 2.6 For the purposes of the modified subsection 661A(1), securities are ‘non-transferable’ when the constitution of the company or the terms of issue of the securities restricts their transfer (see paragraph (a) of subsection 661A(1)). Further, the security must be issued under a scheme to or for the benefit of employees or non-executive directors of the company (or a related body corporate) in relation to their employment or services (see new subsection 661A(6) inserted at sub-subparagraph 4(a)(v) of the class order). These terms limit the scope of the modification to employee securities that fall outside the bid class for a takeover bid.
- 2.7 The class order also makes a number of consequential amendments which apply in the context of the compulsory acquisition of non-transferable employee securities:
- (a) section 661A sets out the circumstances in which a bidder may compulsorily acquire securities in the bid class following a takeover bid. It has effect notwithstanding anything to the contrary in the constitution of the target company: subsection 661A(5). The class order further modifies subsection 661A(5) for the avoidance of doubt, to ensure that it has effect despite anything in the terms of issue of the securities to be acquired which would include any restrictions on their transfer. A similar modification has been made to subsection 664A(4) which relates to general compulsory acquisitions which occur otherwise than in a takeovers context. The class order also modifies subsection 666B(2), which relates to the statutory procedure for completing the compulsory acquisition process, to further clarify that the process is effective notwithstanding any restrictions on transfer of the securities contained in the company’s constitution or the terms of issue of the securities;
- (b) paragraph 661B(1)(c) sets out persons to whom the bidder must give a compulsory acquisition notice. The class order modifies this provision to include holders of non-transferable securities where the bidder has elected to compulsorily acquire non-transferable securities.

- (c) subsection 661D(1) allows holders of securities who have received a compulsory acquisition notice to obtain from the bidder the names and addresses of everyone else to whom the bidder has given the notice. ASIC has made a consequential modification to this provision in recognition that, where the compulsory acquisition extends to non-transferable employee securities in accordance with ASIC's amendment, the securities to which the compulsory acquisition notice relates will no longer be limited to 'bid class' securities.

***Amendments to the 75% Acquisition Test***

- 2.8 Before a bidder may compulsorily acquire securities under subsection 661A(1) following or during a takeover bid, they must meet two principal thresholds. The bidder and their associates must, during, or at the end of, the offer period under the bid:
- (i) have relevant interests in at least 90% (by number) of the securities in the bid class; and
  - (ii) have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid.
- 2.9 Under section 12(2) of the Act, the bidder's associates for the purposes of this test are (where the bidder is itself a body corporate) other bodies corporate that control, are controlled by, or are under common control with the bidder and other persons with whom the bidder has, or proposes to enter into, an agreement, arrangement or understanding for the purpose of influencing or controlling the affairs of the target company or the composition of its board, or with whom the person is acting in concert in relation to the target's affairs.
- 2.10 The purpose of the 75% Acquisition Test is to ensure that the terms of the bid that precedes the compulsory acquisition have been accepted by a sufficient majority of target holders independent of the bidder. This requirement underpins the statutory right of the bidder to compulsorily acquire the remaining securities on the same terms as those offered under the bid. The class order amends Chapter 6A to address a number of issues and anomalies in relation to the calculation of the 75% Acquisition Test. These amendments are designed to promote the underlying purpose of the test.

***Exclusion of target securities controlled by the bidder or their associates from the 75% Acquisition Test***

- 2.11 The class order modifies section 661A to ensure that, when determining whether the 75% Acquisition Test has been met, the following are excluded from the calculation:
- (a) securities in which the bidder or their associates had a relevant interest as at the date of the first offer under the bid; and
  - (b) securities issued to an associate of the bidder during the offer period (see new paragraph 661A(2A)(a)).

- 2.12 The 75% Acquisition Test applies to acquisitions during the offer period by ‘the bidder and their associates’, regardless of how the acquisition takes place. As a result there is uncertainty whether a bidder is able to satisfy the 75% Acquisition Test by:
- (a) acquiring securities in which the bidder themselves, or one of their associates, already have relevant interests (including for example where the bidder acquires securities held by the associate); or
  - (b) counting as an ‘acquisition’ securities issued directly to an associate of the bidder during the offer period (including for example securities the associate subscribed for under a fundraising) and which the bidder offered to acquire under the bid.
- 2.13 In each case counting acquisitions of this kind towards the 75% Acquisition Test is likely to be inconsistent with the underlying policy of the test of seeking to ensure that sufficient acceptance of the bid terms by independent holders has been demonstrated before a bidder is entitled to proceed to compulsory acquisition on those terms.
- 2.14 New paragraph 661A(2A)(a) clarifies the operation of the provision and addresses the potential that the underlying policy of the 75% Acquisition Test is not met by expressly excluding any securities in which the bidder or their associates have a relevant interest from the 75% Acquisition Test.
- 2.15 The securities excluded under the new paragraph 661A(2A)(a) are excluded from being counted both as part of the number of securities ‘acquired’ by the bidder and their associates and as part of the number of securities ‘the bidder offered to acquire under the bid’. Having excluded securities from the number ‘acquired’, it may otherwise be impossible for the bidder to meet the 75% Acquisition Test if the provision did not also exclude them from the number the bidder ‘offered to acquire’.
- 2.16 Consequential on the introduction of paragraph 661A(2A)(a), the class order amends subsection 661A(2) to ensure that the narrower ‘relevant interest’ concept in the provision does not apply with respect to the 75% Acquisition Test. The purpose of this amendment is to ensure that the usual test for determining a relevant interest in section 608 (including the deeming provision in paragraph 608(3)(a)) applies for the purposes of determining whether securities are excluded from the 75% Acquisition Test in accordance with paragraph 661A(2A)(a).
- 2.17 The inclusion of new paragraph 661A(2A)(a) and the consequential amendment to subsection 661A(2) continues in substance similar relief previously provided in Class Order [CO 01/1544].

*Convertible securities and the 75% Acquisition Test*

- 2.18 The class order also notionally inserts a new provision, paragraph 661A(2A)(b) to provide relief from the 75% Acquisition Test when the bid class for a takeover offer is convertible securities. Convertible securities are securities which can be converted into,

or exchanged for, another class of security (for example ordinary shares in a company) by the holder exercising a right attached to the security.

- 2.19 The application of the 75% Acquisition Test is complicated in the case of bids for convertible securities as holders may exercise their convertible securities during the offer period. If a substantial proportion of holders to whom offers are made under the bid exercise their convertible securities it may be impossible for the bidder to meet the 75% Acquisition Test. This is because the bidder cannot count convertible securities that are exercised as securities acquired by it (the numerator in the percentage calculation) but these convertible securities would still be counted as securities that the bidder offered to acquire (the denominator) under the 75% Acquisition Test.
- 2.20 New paragraph 661A(2A)(b) excludes from the number of convertible securities that the bidder offered to acquire under the bid convertible securities that are exercised or converted between a certain date set by the bidder and the end of the offer period. The inclusion of this new provision reflects that if a holder exercises their convertible securities rather than accepting the offer for the convertible securities under the bid, the holder will neither have accepted nor directly rejected the terms of the bidder's offer. The holder may have exercised the convertible securities for other reasons.
- 2.21 The inclusion of new paragraph 661A(2A)(b) continues in substance the similar relief previously provided in Class Order [CO 01/1544].

***Amendments to the 90% Relevant Interest Test***

- 2.22 Under the 90% Relevant Interest Test for post-bid compulsory acquisition a bidder and their associates must have, during, or at the end of, the offer period, relevant interests in at least 90% (by number) of the bid class securities. Subsection 661A(2) states that in calculating the bidder's relevant interest the bidder must disregard relevant interests that the bidder has merely because of the operation of subsection 608(3) of the Act.
- 2.23 Under subsection 608(3) a person is deemed to have the same relevant interests a body corporate or managed investment scheme has based on the person's interests in the body corporate or managed investment scheme. It applies where a person has more than 20% voting power in a body corporate or managed investment scheme (paragraph 608(3)(a)) and where the person controls a body corporate or managed investment scheme (paragraph 608(3)(b)).
- 2.24 The 90% Relevant Interest Test is a test of overwhelming ownership of the relevant class of securities. The exclusion in subsection 661A(2) recognises that it may be artificial, and inconsistent with the underlying purpose of the 90% Relevant Interest Test, to count securities in which the bidder has a relevant interest merely because it has voting power of more than 20% in another entity.

- 2.25 The class order modifies subsection 661A(2) to address two apparent anomalies in the application of the provision having regard to the overall purpose of the 90% Relevant Interest Test. It:
- (a) clarifies that only deemed relevant interests arising on the basis of a person having voting power of greater than 20% are excluded under the provision for the purposes of calculating whether the bidder has satisfied the 90% Relevant Interest Test. This amendment has been made because subsection 661A(2) refers to subsection 608(3) which may be taken to include not only paragraph 608(3)(a) (which operates on the basis of a person's voting power being over 20%) but also paragraph 608(3)(b) (which operates on the basis that a person has control of the body corporate). The inclusion of relevant interests arising under paragraph 608(3)(b) were not intended to be excluded from the 90% Relevant Interest Test; and
  - (b) extends the exclusion in subsection 661A(2) to relevant interests not only of the bidder but also the bidder's associates that may contribute to the bidder satisfying the 90% Relevant Interest Test. The amendment ensures that it is not possible for a bidder to avoid the exclusion by seeking to rely on deemed relevant interests held by associates to satisfy the 90% Relevant Interest Test. The policy underlying the exclusion of deemed relevant interests under paragraph 608(3)(a) applies equally to the interests of the bidder's associates.
- 2.26 These amendments are consistent with the underlying purpose of the provision and the legislative intention evidenced by:
- (a) the description in subsection 661A(2) of the types of relevant interest to be disregarded (i.e. 'relevant interest by 20% interest in body corporate'); and
  - (b) the recommendation in the Compulsory Acquisitions Report of the Legal Committee of the Companies and Securities Advisory Committee (January 1996) on which the amendments introducing subsection 661A(2) were largely based.

***Concurrent buyout and compulsory acquisition rights in relation to bid class securities***

- 2.27 The post-bid compulsory acquisition provisions and the post-bid buyout provisions apply to bid class securities in similar, but not identical, circumstances. The right of remaining holders of bid class securities to be bought out following a bid arises when the bidder acquires a relevant interest in at least 90% of the bid class securities. The right to compulsorily acquire arises when the bidder additionally satisfies the similar (but not identical) 90% Relevant Interest Test and additionally the 75% Acquisition Test.
- 2.28 The result of a takeover bid may therefore mean that both:
- (a) the bidder is entitled to compulsorily acquire certain bid class securities under subsection 661A(1); and



- (b) minority holders are entitled to require the bidder to acquire the securities under subsection 662A(1).
- 2.29 The potential overlap is recognised in a provision which states that a bidder undertaking post-bid compulsory acquisition does not need to give buyout notices to those holders to whom it has already sent compulsory acquisition notices (subparagraph 662B(1)(c)(ii)). If all holders of remaining securities at the end of the offer period are given a compulsory acquisition notice prior to the time for giving a buyout notice (no later than one month after the end of the offer period), no buyout notices will need to be dispatched.
- 2.30 However, even when no remaining holder is to be given a buyout notice because of subparagraph 662B(1)(c)(ii), there is still a requirement that buyout offers are made in accordance with sections 662B and 662C by lodging a notice with ASIC and giving the notice to each relevant market operator (e.g. the ASX).
- 2.31 The class order modifies section 662A to confirm that a person does not need to make buyout offers if they have given a post-bid compulsory acquisition notice to every remaining holder, and the terms applying to the compulsory acquisition notice are the same as the terms of the bid immediately before the end of the offer period (see new subsection 662A(2A)). This modification addresses a technical anomaly in the provision which means that the bidder may need to give a person a buy-out right notwithstanding that the provision does not require notification of the buyout right to be given. The modification does not remove any advantage the minority holders may otherwise have as there should be no difference between the terms on offer under the buy-out right and the compulsory acquisition.

### **3 Consultation**

- 3.1 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 regulatory guides relating to Chapters 6–6C of the Act. CP 193 also sought feedback on proposals to reissue the class orders (including Class Orders [CO 01/1544] and [CO 03/636]) 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.
- 3.2 In addition to inviting general feedback, CP 193 expressly consulted on the following specific modifications contained in the class order as discussed above:
- (a) modifications to the scope of relevant interests excluded under the 90% Relevant Interest Test; and
  - (b) amendments to address issues arising when simultaneous compulsory acquisition and buyout rights arise.

- 3.3 ASIC received 7 submissions in response to CP 193. Details of the submissions received are contained in REP 350 *Responses 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).
- 3.4 Notwithstanding the consultation, ASIC considers that Class Order [CO 13/522] 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 13/522]

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 13/522] relates to the provisions of Chapter 6A of the *Corporations Act 2001* (the *Act*). Generally, Chapter 6A of the Act gives a person a right to compulsorily acquire securities under certain circumstances depending on the level of the person's interest in the relevant class of securities or the entity overall. Chapter 6A also provides a right to minority interest holders to have their interests bought out by the holder of an overwhelming majority of the securities in a class.

The class order makes notional modifications to Chapter 6A in the following areas:

#### *Compulsory acquisition of non-transferable employee securities*

Companies may issue securities to their employees or non-executive directors under an employee incentive plan or a similar kind of scheme (*employee securities*). To achieve the objectives of the incentive plan the securities that are issued may be non-transferable. If the company's constitution or the terms on which the employee securities are issued restrict their transfer, the restrictions might prevent the bidder from acquiring the securities under a takeover bid.

The class order notionally modifies Chapter 6A to ensure that a bidder who has met the requirements for post-bid compulsory acquisition in relation to the bid class is not prevented from acquiring 100% ownership merely because employee securities, that would otherwise be in the bid class, are non-transferable.

#### *Threshold control tests*

Before a bidder may compulsorily acquire securities under the Act following or during a takeover bid, they must meet two principal thresholds relating to their level of control of the target company. One of these thresholds is that the bidder and their associates must have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid (*75% Acquisition Test*).

The purpose of the 75% Acquisition Test is to ensure that the terms of the bid that precedes the compulsory acquisition have been accepted by a sufficient majority of target holders independent of the bidder. This requirement underpins the statutory right of the bidder to compulsorily acquire the remaining securities on the same terms as those offered under the bid. The class order notionally modifies Chapter 6A to address a number of issues and

anomalies regarding the calculation of the 75% Acquisition Test. The notional modifications relate to:

- (a) excluding target securities controlled by the bidder or their associates; and
- (b) convertible securities.

The other principal control threshold that a bidder must satisfy is that they and their associates have a relevant interest in at least 90% (by number) of the bid class securities (**90% Relevant Interest Test**). For the purposes of determining whether the 90% Relevant Interest Test has been met, the Act provides that certain relevant interests that the bidder has are to be disregarded. The class order addresses two apparent anomalies in the application of this provision.

*Potential overlap between the compulsory acquisition and buyout rights provisions*

The class order clarifies the interaction of these provisions by confirming that a bidder does not need to make buyout offers if they have given a post-bid compulsory acquisition notice to every remaining holder, and the terms applying to the compulsory acquisition notice are the same as the terms of the bid immediately before the end of the offer period.

**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.