



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## *ASIC Corporations (Replacement Bidder's and Target's Statements) Instrument 2023/688*

This is the Explanatory Statement for ASIC Corporations (Replacement Bidder's and Target's Statements) Instrument 2023/688 (**Instrument**).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

### Summary

1. Chapter 6 of the Act relates to takeovers. In a takeover, the bidder must lodge a bidder's statement and the target must lodge a target's statement with ASIC (each an **Original Statement**), and then send it to holders of bid class securities in the target within a prescribed time frame.
2. It may be necessary or desirable for the bidder or target to amend its Original Statement after it has been lodged but before it is dispatched. Generally, the Act provides for amendments to Original Statements to be made by way of a supplementary statement (**Supplementary Statement**). However, the operation of the Supplementary Statement provisions may be unclear or less suitable for updates made before dispatch of an Original Statement.
3. Where the bid class securities are quoted and one or more Supplementary Statements are lodged with ASIC before the relevant Original Statement is dispatched, the Act requires the bidder or target (as relevant) 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.
4. Where bid class securities are not quoted, and a Supplementary Statement is lodged with ASIC before the relevant 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.
5. 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

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of whether the Original Statement has already been sent to target holders. Sending a Supplementary Statement prior to the dispatch of the relevant Original Statement may confuse target holders and a bidder may be unclear as to what is required under the Act.

6. The Instrument provides relief so that a bidder or target may dispatch a single replacement bidder's or target's statement (each a **Replacement Statement**) that incorporates all of the changes that would otherwise be made and sent through a Supplementary Statement to security holders alongside an Original Statement.
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 Order \[CO 13/528\]](#) *Changes to a bidder's statement between lodgement and dispatch* ([CO 13/528]) is a legislative instrument and was scheduled to eventually expire under the sunsetting provisions of the LIA. ASIC's reissuing of the relief underlying [CO 13/528] has given ASIC the opportunity to deal with its eventual expiry. The modifications in the Instrument are generally similar in nature to those in [CO 13/528].
8. [CO 13/528] is repealed by *ASIC Corporations, Credit and Superannuation (Amendment and Repeal) Instrument 2023/699*.

### **Purpose of the instrument**

9. This Instrument allows a bidder or target 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.
10. The Instrument also provides relief for bidders 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

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reading item 6 in subsection 633(1), item 6 in subsection 635(1), section 646 and paragraph 647(3)(c) together.

### **Consultation**

11. On 30 November 2022, ASIC released Consultation Paper 365 (**CP 365**) seeking feedback on proposals to remake nine class orders relating to takeovers, compulsory acquisitions and relevant interests (including [CO 12/1209], [CO 13/519], [CO 13/520], [CO 13/521], [CO 13/522], [CO 13/524], [CO 13/525], [CO 13/526], and [CO 13/528]). The consultation period closed on 23 January 2023.
12. CP 365 invited feedback as to whether [CO 13/528] *Changes to a bidder's statement between lodgement and dispatch* was operating effectively and efficiently, or whether there were issues or improvements that should be considered to improve its operation.
13. ASIC received 4 submissions in response to CP 365, two of which addressed or made submissions relevant to [CO 13/528]. We took those submissions into account in making the Instrument. Details of the submissions received are contained in REP 773 Response to submissions on CP 365 which is available on ASIC's website at [www.asic.gov.au](http://www.asic.gov.au).

### **Operation of the instrument**

14. The Instrument relates to both off-market bids (see amendment to item 6 in subsection 633(1), notionally inserted section 633A) and market bids (see amendment to item 6 in subsection 635(1) and notionally inserted section 633B).
15. In both cases, where one or more Supplementary Statements are lodged with ASIC before dispatch of the Original Statement to holders, the Instrument allows a bidder and target to lodge and dispatch a Replacement Statement incorporating the substantive information in both the Original Statement and each subsequent Supplementary Statement. The Instrument sets out the time frames within which the Replacement Statement is to be dispatched.
16. Under the previous relief in [CO 13/528], a bidder was required to lodge a Supplementary Statement in order to lodge a Replacement Statement. The Instrument now permits the lodgement of a Replacement Statement without the requirement to lodge a Supplementary Statement first. This reflects the fact that, in practice, many bidders would lodge a first Supplementary Statement that included a copy of the marked-up Replacement Statement to meet the requirement. Bidders who wish to rely on the Replacement Statement relief in the Instrument are still required to lodge a Replacement Statement, and a marked-up copy of the Replacement Statement showing all changes from the original bidder's statement, no later than the time allowed for sending the original bidder's statement.
17. 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"> <li>• a Replacement Statement; and</li> <li>• a marked-up copy of the Replacement Statement showing the changes from the Original Statement (<b><i>Replacement Mark-up</i></b>).</li> </ul>
Dispatch of replacement to holders	<p>The bidder must dispatch the Replacement Statement to holders:</p> <ul style="list-style-type: none"> <li>• 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"> <li>- 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</li> <li>- ASIC agrees in writing to a shorter period of time; or</li> <li>- 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</li> </ul> </li> <li>• in a market bid—within 14 days after the Replacement Statement 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.</li> </ul>
Content of replacement	<p>The Replacement Statement must:</p> <ul style="list-style-type: none"> <li>• 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;</li> <li>• explain that it replaces the Original Statement and each Supplementary Statement;</li> </ul>

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- 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.

*Clarification on the time for dispatch of the target's statement*

18. Section 635A provides a mechanism for a bidder in a market bid to provide a replacement bidder's statement in specific circumstances. Where this occurs, the timetable for dispatch of the replacement bidder's statement in section 635 is amended to take into account the new disclosure in the replacement bidder's statement.
19. The Instrument provides clarity regarding the impact of a replacement bidder's statement on the timeframes for a target's statement under a market bid, including item 13 of subsection 635(1). In particular, the Instrument amends item 13 of subsection 635(1) to clarify that, in a market bid where a bidder has lodged with ASIC and given to the relevant market operator and the target, a replacement bidder's statement in reliance on section 635A, the target must send its target's statement no later than the time for sending the replacement bidder's statement, rather than 14 days after the original announcement of the bid.

*Replacement target's statements*

20. Without relief, a target cannot lodge a replacement target's statement to amend its target's statement in the period after giving the target's statement to the bidder and lodging the target's statement with ASIC (see items 11–13 of subsection 633(1) and items 10–12 of subsection 635(1)), but before dispatch to holders. A target may wish to amend its target's statement in this period as a result of issues raised by ASIC or the bidder.
21. The Instrument provides new relief so that a target, if the bid class securities are quoted, may lodge with ASIC and send to the prescribed market operator and the bidder a replacement target's statement. Under the Instrument, the target must also lodge a marked-up copy of the replacement target's statement showing all changes from the original target's statement. Lodgement of the replacement target's statement and marked-up replacement target's statement is also required to occur no later than the time for dispatch of the original target's statement. The Instrument does not provide an extension or recommence the time periods contained in sections 633 and 635. Targets may continue to seek extensions from ASIC by way of individual relief.

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

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22. The Instrument 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.
23. 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.

*Consequential amendments in respect of subsection 617(2)*

24. *ASIC Corporations (Takeover bids) Instrument 2023/683* expressly extends the scope of subsection 617(2) to derivatives, and includes a number of consequential amendments to facilitate that relief. As noted in the explanatory statement of *ASIC Corporations Instrument 2023/683*, it has also been necessary to make consequential amendments to subsection 633(1) items 6 and 12, so that those items also include the derivatives which fall under subsection 617(2). Since the Instrument makes other modifications to subsection 633(1) items 6 and 12, ASIC has made these consequential amendments in respect of subsection 617(2) in the Instrument.

**Legislative instrument and primary legislation**

25. The subject matter and policy implemented by the Instrument is more appropriate for a legislative instrument rather than primary legislation because it provides administrative relief in circumstances where strict compliance with the primary legislation produces an unintended or unforeseen result.
26. It will be a matter for the Government and for Parliament as to whether the Act or Regulations may be amended in future to include the relief in the Instrument.

**Duration of the Instrument**

27. The Instrument expires after 5 years. This allows sufficient time for the Government and for Parliament to determine whether to amend the primary legislation or regulations to include the relief.

**Legislative authority**

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28. This Instrument is made under section 655A of the Corporations Act 2001. Paragraph 655A(1)(b) provides 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.
  29. The Instrument commences on the day after it is registered on the Federal Register of Legislation and continues in force for 5 years until 1 October 2028.
  30. Under subsection 33(3) of the Acts Interpretation Act 1901 (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make any instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend any such instrument.
  31. As a legislative instrument, the Instrument is disallowable under section 42 of the Legislation Act 2003.

### **Statement of Compatibility with Human Rights**

32. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the [Attachment](#).

## **Statement of Compatibility with Human Rights**

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### ***ASIC Corporations (Replacement Bidder's and Target's Statements) Instrument 2023/688***

#### Overview

1. The Instrument 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 and the target must lodge a target's statement (each an 'Original Statement') with ASIC and then send it to holders of bid class securities in the target. It may be necessary or desirable for the bidder or target 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 or target's statement (Supplementary Statement).
2. The Instrument provides relief so that a bidder or target may dispatch a single replacement bidder's or target's statement that incorporates all of the changes that would otherwise be made and sent through a Supplementary Statement to security holders alongside an Original Statement.

#### Assessment of human rights implications

3. This Instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

4. This Instrument 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*.