



**ASIC**  
Australian Securities &  
Investments Commission

## REGULATORY GUIDE 5

# Relevant interests and substantial holding notices

August 2020

### About this guide

This guide is for investors who acquire an interest in the securities of a company or managed investment scheme, and their advisers. It:

- discusses the concept of a 'relevant interest' and various issues a person must consider in determining whether they have a relevant interest in securities under the *Corporations Act 2001* (Corporations Act);
- explains the requirement for a person to disclose the relevant interest in voting shares and voting interests that they and their associates have when they acquire or maintain a substantial holding in a listed company, body or managed investment scheme; and
- outlines ASIC's class order modifications to the relevant interest and substantial holding provisions.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This guide was issued in August 2020 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 5, issued June 2013, reissued November 2013

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

## Contents

<b>A</b>	<b>Overview</b> .....	<b>4</b>
	Purpose of this guide .....	4
	The relevant interest concept .....	5
	The use of the relevant interest concept in takeovers and substantial holding disclosure .....	7
	Summary of this guide .....	8
<b>B</b>	<b>Relevant interests in securities</b> .....	<b>9</b>
	Applying the relevant interest definition .....	9
	The basic rule for a relevant interest .....	11
	Extension to the basic rule: Interests in a body corporate or managed investment scheme .....	14
	Extension to the basic rule: Anticipation of performance of agreement or exercise of right or option .....	19
	Exceptions .....	20
<b>C</b>	<b>Takeovers and substantial holdings: Applying the relevant interest concept</b> .....	<b>28</b>
	The takeover and substantial holding thresholds .....	28
	Voting power .....	31
	Deemed increase in voting power: Acquisitions from an associate .....	32
	Associates .....	34
	Disposal rights giving rise to an association .....	39
<b>D</b>	<b>Options</b> .....	<b>42</b>
	Call options and put options .....	42
	Options for the issue of new securities .....	43
	Options over issued securities .....	44
	Substantial holding disclosure .....	47
<b>E</b>	<b>Warrants</b> .....	<b>48</b>
	What are warrants? .....	48
	Our approach to warrants and relief .....	50
	Call warrants .....	53
	Put warrants .....	54
	Trustees and associations .....	55
	Terms and scope of ASIC relief .....	57
	Substantial holding obligations .....	58
<b>F</b>	<b>Escrow arrangements</b> .....	<b>60</b>
	Relevant interests arising from escrow arrangements .....	60
	Escrow arrangements under the listing rules of a prescribed financial market .....	61
	Voluntary escrow arrangements .....	62
	Substantial holding disclosure .....	67
<b>G</b>	<b>Substantial holding notices</b> .....	<b>69</b>
	Principles underlying substantial holding disclosure .....	69
	When is substantial holding disclosure required? .....	70
	Timing for giving notice .....	73
	Documents to accompany notice .....	74
	The information to be provided in a substantial holding notice .....	75
	Joint notices .....	80
	Full disclosure .....	80
	<b>Appendix: Superseded guidance</b> .....	<b>82</b>
	<b>Key terms</b> .....	<b>83</b>
	<b>Related information</b> .....	<b>86</b>

## A Overview

### Key points

The 'relevant interest' concept defines the scope of a number of regulatory requirements under the *Corporations Act 2001* (Corporations Act) relating to corporate control and the disclosure of interests—in particular, the takeover and substantial holding provisions.

These provisions are concerned with a person's relevant interest in voting shares or voting interests. They require the disclosure of details about a person's substantial interests, and regulate the acquisition of interests above levels at which a person may acquire control over certain entities.

This guide discusses the relevant interest concept, including some of the circumstances in which a person may or may not have a relevant interest. It also discusses some of the modifications to the relevant provisions we have made by class order.

### Purpose of this guide

- RG 5.1 This guide aims to assist investors and their legal advisers to understand and apply the concept of a 'relevant interest' in securities, and its relevance to the takeover and substantial holding requirements of the Corporations Act.
- RG 5.2 These requirements apply when the votes attached to securities, in which a person and any of their associates have a relevant interest (as a proportion of all voting shares or interests), increase above one of the following two thresholds:
- (a) the 5% substantial holding threshold—after which a person must provide substantial holding notices relating to movements above or below the threshold, and any change of 1% or more (Pt 6C.1); and
  - (b) the 20% takeover threshold—after which acquisitions and offers to acquire relevant interests in voting shares or interests are only permitted through certain transactions or in certain circumstances (Ch 6).
- Note 1: See also Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (RG 6).
- Note 2: In this guide, references to chapters (Chs), parts (Pts) or sections (s) are to the Corporations Act (as notionally modified by ASIC class orders, where relevant), unless otherwise specified.
- RG 5.3 This guide also seeks to assist persons who have an obligation to provide a substantial holding notice under Pt 6C.1 to comply with their obligation to provide accurate and adequate disclosure.

- RG 5.4 In this guide, we primarily discuss the relevant interest concept as it is applied in the context of the takeover and substantial holding provisions. However, the relevant interest concept is used in other contexts and different exceptions may apply to exclude a person having a relevant interest for the purposes of some regulatory requirements but not others.
- RG 5.5 Accordingly, when considering the relevant interest concept for the purposes of provisions other than the takeover and substantial holding provisions, users of this guide should ensure that the relevant interest concept applies in a similar way in the relevant context.

## The relevant interest concept

- RG 5.6 The concept of a ‘relevant interest’ in securities defines the connections with securities falling within the scope of the takeover, post-bid compulsory acquisition and substantial holding provisions of the Corporations Act. The concept is therefore a fundamental part of the regulation of corporate control and market disclosure.
- RG 5.7 A relevant interest is concerned with a person’s capacity to exercise a degree of influence over securities. Accordingly, the concept encompasses connections wider than ownership, including connections giving rise to power or control over the voting or disposal of securities. As such, a number of people may have a relevant interest in the same securities in a variety of different capacities.
- RG 5.8 The nature of power or control over voting or disposal that may give rise to a relevant interest is intentionally expressed in wide terms to prevent avoidance of relevant requirements. A relevant interest can arise from power or control through agreements, arrangements, understandings and practices that are legally unenforceable, and whether or not the power or control is indirect, implied or informal.
- Note: See discussion of the Companies (Amendment) Bill 1971 (NSW), The Hon John Waddy MP, *Parliamentary debates*, New South Wales Legislative Assembly, 9 September 1971, pp. 912–913.
- RG 5.9 Table 1 summarises the principal provisions of the Corporations Act that use the relevant interest concept.

**Table 1: Rights and obligations under the Corporations Act depending on a person's relevant interests in securities**

Topic	Provisions	Explanation
Takeovers	Ch 6	<p>Acquisitions of a relevant interest in voting shares or interests that increase a person's voting power to more than 20%, or from a point above 20%, are prohibited under s606 unless they are made under a takeover bid, authorised under one of the other exceptions in s611, or the person's voting power is already above 90%. This prohibition also applies to:</p> <ul style="list-style-type: none"> <li>• acquiring legal or equitable interests that result in another person's voting power increasing in the same way; and</li> <li>• offers or invitations that would result in a breach of s606 if accepted.</li> </ul> <p>Note: See Regulatory Guide 9 <i>Takeover bids</i> (RG 9) and RG 6.</p>
Post-bid compulsory acquisition and buyouts	Pt 6A.1	<p>The right of a bidder to compulsorily acquire remaining securities following a takeover bid, and the obligation to make buyout offers to remaining holders and convertible security holders, depend on whether the bidder and its associates have relevant interests in at least 90% of the securities in the bid class: s661A(1), 662A(1) and 663A(1).</p> <p>Note: See Regulatory Guide 10 <i>Compulsory acquisitions and buyouts</i> (RG 10).</p>
Substantial holding disclosure	Pt 6C.1	<p>Persons who, together with their associates, have relevant interests in voting shares representing 5% or more of the votes in a listed company, body or listed registered managed investment scheme, must disclose details of their relevant interest. Disclosure must also be made when a person's substantial holding changes by 1%, they cease to have a substantial holding or they make a takeover bid.</p> <p>Note: See Section G of this guide. See also Regulatory Guide 222 <i>Substantial holding disclosure: Securities lending and prime broking</i> (RG 222).</p>
Tracing relevant interests	Pt 6C.2	<p>A listed company, listed managed investment scheme or ASIC may direct a person to disclose details of their relevant interests in voting shares or interests in the scheme: s672A and 672B. A register of information about relevant interests must be kept by the entity: s672DA.</p> <p>Note: See Regulatory Guide 86 <i>Tracing beneficial ownership</i> (RG 86).</p>
Director disclosure	s205F, 205G, 300(11) and (12)	<p>A director of a listed public company must provide the relevant market operator with details of their relevant interests in any securities of the company or a related body corporate within 14 days of their appointment (other than reappointment at the same meeting), the company's listing and any change in the director's interests.</p> <p>A listed entity must give the same information to ASX within five business days of these events, and when a director ceases to be a director: ASX Listing Rule 3.19A. If the company has given the information, the director may be eligible for an exemption: ASIC Corporations (Disclosure of Directors' Interests) Instrument 2016/881.</p> <p>The annual directors' report of a listed company or listed managed investment scheme must also include similar details: see s300(11) and (12). A director of a company must also give the company any information about the director that is necessary for the company to comply with Ch 6: s205F.</p> <p>Note: See Regulatory Guide 193 <i>Notification of directors' interests in securities—Listed companies</i> (RG 193).</p>

## The use of the relevant interest concept in takeovers and substantial holding disclosure

- RG 5.10 The takeover and substantial holding provisions are concerned with the relevant interests a person has in voting shares in a company, or voting interests in a managed investment scheme. A voting share or interest is an issued share or interest that carries a right to vote beyond limited matters such as a winding up, buyback or capital reduction, or the variation of rights: s9.
- RG 5.11 The focus of the provisions on voting rights reflects their underlying objective—to regulate the acquisition of corporate control and the disclosure of significant interests that may dictate or influence the entity’s future direction or affairs.
- RG 5.12 Consistent with these objectives, where there are groups of people who are either related or associated with respect to some aspect of the entity’s affairs, the takeover and substantial holding provisions apply by reference to the aggregated voting capacity of the group.
- RG 5.13 This is achieved through the use of the related definition of an ‘associate’. In considering their obligations under the takeover and substantial holding provisions, a person must, accordingly, take into account not only the relevant interest they may have in voting shares or interests, but also the relevant interests of any ‘associates’.
- RG 5.14 This aggregate of votes connected with a person and their associates through the relevant interest concept is the threshold trigger for both the general prohibition in relation to takeovers and the substantial holding disclosure requirements.
- RG 5.15 We discuss the related concepts of association and voting power in Section C of this guide.

### Unacceptable circumstances

- RG 5.16 Interests or arrangements relating to securities which do not give rise to a relevant interest may nonetheless occasion circumstances that are contrary to the principles and purposes underlying the takeover provisions set out in s602.
- RG 5.17 The Takeovers Panel may make a declaration of unacceptable circumstances under s657A involving interests or arrangements of this kind.

Note: See for example Takeovers Panel Guidance Note 20 *Equity derivatives*, which applies to interests arising through equity derivatives that may not give rise to a relevant interest.

## Summary of this guide

- RG 5.18 Table 2 summarises the issues we have addressed in this guide.
- RG 5.19 Unless otherwise indicated, our guidance applies with respect to listed registered managed investment schemes. Adjustments that take account of the different features of managed investment schemes are set out in s12(3), 604 and 610(5).

**Table 2: Summary of our guidance on relevant interests and substantial holdings**

Topic	What our guidance covers	Reference
Relevant interests in securities	We discuss three principal aspects of the relevant interest concept that should be considered when applying the definition in s608 and 609: the basic rule, extensions to the basic rule and the exceptions. We also discuss some class order modifications that we have made to the exceptions.	Section B
Takeovers and substantial holdings: Applying the relevant interest concept	We discuss how the relevant interest concept is applied in the context of the takeover and substantial holding requirements through the related concepts of 'associates', 'voting power' and the definition of a 'substantial holding'.	Section C
Options	We discuss the relevant interests that may arise from options and how a person having a relevant interest as a result of an option agreement should comply with their substantial holding obligations.	Section D
Warrants	We outline the relevant interests that may arise from warrants and the class order relief we have provided so that relevant interests and associations do not arise in some cases. We also discuss how a person having a relevant interest under the terms of a warrant should comply with their substantial holding obligations.	Section E
Escrow arrangements	We discuss the class order relief we have provided for escrow arrangements required under the listing rules of a prescribed financial market and the case-by-case relief we may provide for voluntary escrows.	Section F
Substantial holding notices	We discuss how a person should comply with the requirement to provide a substantial holding notice and the approach a person should take to various requirements. We also discuss the relief we have given to bidders who are required to provide regular notices as a result of acceptances during the takeover bid.	Section G



## B Relevant interests in securities

### Key points

There are three general tests to consider when determining whether a person has a relevant interest in securities: the basic rule, the extensions to the basic rule, and the exceptions.

The nature of power or control giving rise to a relevant interest is broadly cast to prevent avoidance of the requirements of the Corporations Act. It extends to understandings, arrangements and practices that may be informal or implied.

A person may be deemed to have a relevant interest in securities as a result of having interests in, or control over, a body corporate or managed investment scheme, or as a result of entering into a conditional agreement.

A number of exceptions apply so that, in certain circumstances, a person is taken not to have a relevant interest in securities. Some of these exceptions apply when determining relevant interests in a limited context—for example, under the takeover provisions but not the substantial holding provisions. We have modified or extended some of the exceptions by class order.

### Applying the relevant interest definition

- RG 5.20 Sections 608 and 609 define when a person has a relevant interest in securities: s9. Under these provisions, a person must consider and apply three general tests:
- (a) whether a person has a relevant interest under the *basic rule*;
  - (b) whether a person is deemed to have a relevant interest under the *extensions to the basic rule*; and
  - (c) whether the situation giving rise to the relevant interest falls within one of the *exceptions*.
- RG 5.21 Table 3 summarises these tests, as applied in s608 and 609, and includes a cross-reference to further discussion of each aspect in this guide.

**Table 3: Summary of the relevant interest concept**

Test	Description	Reference
<b>1. The basic rule</b>		
The basic rule: s608(1)–(2)	This is the general rule which determines whether a connection a person has with securities gives rise to a relevant interest. Under the rule, a relevant interest is derived from holding securities, or having some kind of power or control over voting or disposal.	RG 5.24– RG 5.36
<b>2. Extensions to the basic rule</b>		
Deemed interest through one or more bodies corporate or schemes: s608(3)–(7)	A person is deemed to have the same relevant interest in securities that a body corporate or managed investment scheme has if they have over 20% voting power or control of the body corporate or scheme. A person may have a deemed relevant interest through a chain of companies or schemes.	RG 5.37– RG 5.56
Deemed present interest in anticipation of performance of agreement or understanding, or exercise of right: s608(8)	A person acquires a relevant interest at the time of entering into an agreement or understanding, or being granted enforceable rights or options to acquire securities, regardless of the time for performance or exercise, or whether any conditions are attached.  Note: We have modified this concept for the purposes of the substantial holding requirements as they apply to securities lending arrangements: see RG 222.	RG 5.57– RG 5.64
<b>3. Exceptions</b>		
Exceptions: s609	In certain cases, despite the basic rule and the extended rules, a person is taken not to have a relevant interest because of a particular situation or connection with securities. These exceptions apply on their terms and do not prevent a person having a relevant interest on the basis of another connection falling outside the exception.	RG 5.65– RG 5.87

### Relevant interests of a body corporate in its own securities

RG 5.22 Under the relevant interest concept, a body corporate may have a relevant interest in its own securities: s608(9). This means that the takeover and substantial holding requirements apply to the body in the same way that they do to any other person who has a relevant interest in the body's securities.

RG 5.23 The body's relevant interest in its own securities may also be relevant to other persons—for example, if they may be deemed to have the same relevant interest in the body's holding in its own securities, or may be an associate of the body.

Note: An interest of this kind may arise, for example, under an escrow agreement with a security holder: see RG 5.246–RG 5.250.

## The basic rule for a relevant interest

- RG 5.24 The basic rule set out in s608(1) is that:
- A person has a relevant interest in securities if they:
- (a) are the holder of the securities;
  - (b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or
  - (c) have power to dispose of, or control the exercise of a power to dispose of, the securities.
- RG 5.25 It does not matter how remote the relevant interest is or how it arises under the basic rule. If two or more people can jointly exercise a power described, each are taken to have the power: s608(1).

### The broad nature of power or control

- RG 5.26 The nature of the power or control over voting or disposal that may give rise to a relevant interest under the basic rule is deliberately cast in wide terms. Under s608(2), it expressly extends to power or control that:
- (a) is indirect, implied or informal;
  - (b) may be exercised alone or jointly with someone else;
  - (c) does not relate to a particular security;
  - (d) may be made subject to restraint or restriction; and/or
  - (e) may be exercised through, or counter to, a trust, agreement or practice (in combination or otherwise and whether enforceable or not).
- RG 5.27 The wide scope of s608(2) derives from the legislature's concern that the objectives of the regulatory regime should not be circumvented:
- [W]hen dealing with a relevant interest in shares, it is important that the legislation clearly apply to the informal arrangements and gentlemen's agreements that can so often be arrived at in order to avoid any inconvenient obligations imposed by law.
- The Hon John Waddy MP, *Parliamentary debates*, New South Wales Legislative Assembly, 9 September 1971, p. 913.
- RG 5.28 The breadth of the extended definition of power or control has been acknowledged and applied in a number of cases: see, for example, *TVW Enterprises Ltd v Queensland Press Ltd* (1983) 7 ACLR 821 (*TVW Enterprises*) at 839 and *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 (*Yandal Gold*) at [90]–[92].
- RG 5.29 However, in applying the expanded notion of power or control in s608(2), it is still necessary to consider whether a power exists 'to exercise some true or actual measure of control' over voting or disposal: *Re Kornblums Furnishings Ltd* (1981) 6 ACLR 25 (*Kornblums Furnishings*) at 36;

*TVW Enterprises* at 838; *Yandal Gold* at [73]; and *Edensor Nominees Pty Ltd v ASIC* (2002) 41 ACSR 325 (*Edensor Nominees*) at [33].

Note: Control that is minor or peripheral, or merely hypothetical, theoretical or notional, may not be included: *North Sydney Brick & Tile Co Ltd v Darvall (No 2)* (1986) 10 ACLR 837 (*Darvall*) at 844; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 5 ACSR 720 at 747–748; and *Yandal Gold* at [73]. See also *Azumah Resources Ltd* [2006] ATP 34.

### Power or control through trusts, practices and relevant agreements

- RG 5.30 Under s608(2)(b), power or control may arise under a trust, agreement or practice (alone or in combination), whether enforceable or not. An agreement in this context means a relevant agreement: s9. A ‘relevant agreement’ is widely defined in s9 to mean:
- an agreement, arrangement or understanding:
- (a) whether formal or informal or partly formal and partly informal; and
  - (b) whether written or oral or partly written and partly oral; and
  - (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.
- RG 5.31 As defined, a relevant agreement embraces a broad range of relationships that need not necessarily be legal relationships—including understandings from which relevant parties may be free to withdraw.
- RG 5.32 A person may therefore have a relevant interest in securities on the basis of indirect power or control arising from an informal or implied practice, or an understanding with another person that is unenforceable: *Yandal Gold* at [73]. However, in determining whether some true measure of control exists as part of unenforceable arrangements or understandings of this kind, it must be assumed that the parties act in accordance with, rather than contrary to, their arrangement or understanding: *Edensor Nominees* at [33].
- RG 5.33 Section 608(8) may also be relevant in considering whether a relevant agreement gives rise to a relevant interest. Under this provision, if a person does not already have a relevant interest on the basis of a relevant agreement, the person would still be deemed to have a present relevant interest if one would arise, were the relevant agreement to be performed: see RG 5.57–RG 5.62.

#### Example 1: Voting agreements

Shareholder A enters into an agreement with Shareholder B under which Shareholder B agrees, in exchange for a cash sum, to vote in accordance with Shareholder A’s direction on a resolution at an upcoming general meeting of the company.

Shareholder A acquires a relevant interest in Shareholder B’s holding as a result of the voting agreement because Shareholder A will control the power, or the exercise of the power, to vote the securities: s608(1)(b). Shareholder B continues to have a relevant interest in the securities as holder under s608(1)(a)—but also as the person with the legal power to vote and dispose of the securities (even if doing so may result in a breach of the agreement): s608(1)(b) and (c) and 608(2)(b)(ii).

**Example 2: Agreements or understandings about acceptance of a takeover bid**

Bid Co Ltd has made a full conditional takeover bid for Target Ltd at \$1.00 a share. A representative of Bid Co Ltd and a major shareholder of Target Ltd agree during a telephone conversation that the major holder will accept the bid and that Bid Co Ltd will increase the offer to \$1.10 and declare it unconditional.

Bid Co Ltd will obtain a relevant interest in the shareholder's shares in Target Ltd as a result of the 'relevant agreement' to acquire the major holder's shares concluded during the telephone conversation—regardless of any practical difficulties there may be in achieving enforceability of this agreement through a court. Because the relevant interest is acquired as a result of the relevant agreement rather than acceptance of the bid (even though it is to be given effect through acceptance of the bid), Bid Co Ltd may breach s606: *Corebell Pty Ltd v New Zealand Insurance Co Ltd* (1988) 13 ACLR 349.

Bid Co Ltd would also have acquired a relevant interest in the major shareholder's shares if, prior to Bid Co Ltd making the bid, it had an understanding with the major shareholder that it would accept the bid, once made, even if the understanding was unenforceable. However, while an unenforceable understanding from which parties are free to withdraw may constitute a relevant agreement, a consensus of some sort between the parties may still be required: see also *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263 at [37].

**Negative power or control**

- RG 5.34 Under the basic rule, a relevant interest in securities may arise from a person's power to control 'the exercise' of voting rights or 'the exercise' of a power to dispose.
- RG 5.35 A person may have a power to control the exercise of a power to dispose of, or vote, securities even if they only have a power to prevent or restrain another person from disposing of, or voting, the securities. A relevant interest may therefore arise from a 'negative' power over disposal or voting, which may be exercised in limited circumstances. Examples include:
- (a) the power to restrict the ability of a counterparty to dispose of securities (together with any other assets) that it holds, pending implementation of a merger or other transaction (*Australian Pipeline Limited v Alinta Ltd* [2007] FCAFC 55 (*Alinta Ltd*));
  - (b) escrow arrangements with a security holder, restricting disposal of the securities for a fixed period (see RG 5.246–RG 5.250); and
  - (c) a pre-emptive right, or right of first refusal, over the sale and transfer of securities (*Kornblums Furnishings* at 36 and *TVW Enterprises* at 839).
- RG 5.36 Pre-emptive rights derived from a company, body or scheme's constitution, which are available on the same terms to all members, are taken not to give rise to a relevant interest under s609(8). However, pre-emptive rights that do not fall within the exception (e.g. because they differ between members or

arise under a private agreement) may give rise to a relevant interest in each of the securities that are the subject of pre-emption: *Darvall*.

## Extension to the basic rule: Interests in a body corporate or managed investment scheme

- RG 5.37 In addition to any relevant interests arising under the basic rule, a person may be deemed to have the same relevant interest in any securities that certain connected bodies corporate or managed investment schemes have. Under s608(3), a person is taken to have the same relevant interests as:
- (a) a body corporate, or managed investment scheme, in which the person's voting power is over 20% (s608(3)(a)); or
  - (b) a body corporate, or managed investment scheme, that the person controls (s608(3)(b)).

Note: The 'voting power' referred to in s608(3)(a) is based on the aggregate relevant interest of the person and each of their associates in relation to the entity (if any). We discuss the concepts of voting power and association further at RG 5.106–RG 5.154. See also RG 5.48–RG 5.56.

- RG 5.38 However, s608(3)(a) does not apply to relevant interests that the body corporate, or managed investment scheme, is itself deemed to have merely because of s608(3)(a) (i.e. merely on account of a voting power of more than 20% in another body corporate or scheme). In contrast, s608(3)(b) may be applied repeatedly: see RG 5.43–RG 5.47.

### Control under s608(3)

- RG 5.39 Section 608(4) provides that, for the purposes of s608(3)(b), a person controls a body corporate, or managed investment scheme, if they have the capacity to determine the outcome of decisions about the financial and operating policies of that body corporate or scheme.
- RG 5.40 Under this test, a person will generally control a body corporate or scheme if they are in a position to command more than 50% of the votes that may be cast at a general meeting because, for example, they would have the capacity to appoint or remove directors. However, the capacity to determine the outcome of decisions about the financial and operating policies of a body corporate may also arise when a person holds less than 50% of the votes that may be cast at a general meeting but otherwise has practical or effective control.
- RG 5.41 Section 608(5) provides that, in determining whether a person has control of a body corporate:
- (a) the practical influence a person can exert (rather than the rights they can enforce) is the issue to be addressed; and

- (b) any practice or pattern of behaviour affecting the body corporate's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

RG 5.42 However, a person is not taken to control a body corporate merely because:

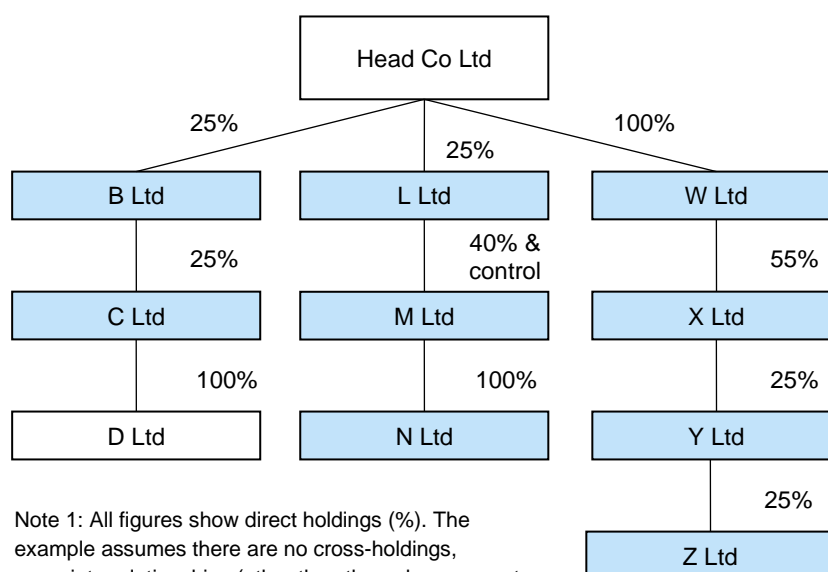
- (a) that person, together with an entity that is not an associate, jointly has the capacity to determine the outcome of decisions about the body corporate's financial and operating policies (s608(6)); or
- (b) the person has a capacity that they are under a legal obligation to exercise for the benefit of someone else (or, if the person is a body corporate, for the benefit of someone other than the body corporate's members) (s608(7)).

### The operation of the deeming provisions through a chain of bodies corporate or managed investment schemes

RG 5.43 Section 608(3) may operate in relation to a hierarchy of entities as the relevant interest of each entity is successively imported to the entity immediately above in the chain of interests: *NCSC v Brierley Investments Ltd* (1988) 14 ACLR 177 at 190. However, the 20% interest limb in s608(3)(a) can only be applied once in the chain, while the controlled entity limb in s608(3)(b) may have unlimited application.

RG 5.44 An example of the operation of s608(3) in relation to a chain of entities is discussed below, based on Figure 1.

**Figure 1: Relevant interests arising through interests in a body corporate or managed investment scheme**



Note 1: All figures show direct holdings (%). The example assumes there are no cross-holdings, associate relationships (other than through a corporate group), or practical control below 50%, unless indicated.

Note 2: Figure 1 is explained in RG 5.45–RG 5.47 (accessible version).

- RG 5.45 Figure 1 shows Head Co Ltd at the top of three chains of entities. In the left chain, Head Co Ltd has 25% direct ownership interest in B Ltd, and in turn B Ltd has a 25% direct ownership interest in C Ltd. At the end of the left chain, D Ltd is wholly owned by C Ltd. In the middle chain, Head Co Ltd has a 25% interest in L Ltd, and in turn L Ltd has a 40% direct interest and control of M Ltd. At the bottom of the middle chain, N Ltd is wholly owned by M Ltd. In the right chain, W Ltd is wholly owned by Head Co Ltd, and also has 55% direct interest in X Ltd, which in turn has 25% direct interest in Y Ltd. At the end of the right chain, Y Ltd has a 25% direct interest in Z Ltd.
- RG 5.46 In Figure 1, the companies in which Head Co Ltd has a relevant interest under s608(3) are shaded in blue. In the left chain, Head Co Ltd has a relevant interest in B Ltd and C Ltd, but not D Ltd. In the middle chain, Head Co Ltd has a relevant interest in L Ltd, M Ltd and N Ltd. In the right chain, Head Co Ltd has a relevant interest in W Ltd, X Ltd, Y Ltd and Z Ltd. The following explains why Head Co Ltd does, or does not, have a relevant interest in securities in each of the companies at the bottom of the three chains (i.e. D Ltd, N Ltd and Z Ltd):
- (a) C Ltd has a relevant interest in 100% of D Ltd securities through a direct holding. B Ltd also has a relevant interest in 100% of D Ltd by virtue of its 25% holding (and voting power) in C Ltd: s608(3)(a). However, because s608(3)(a) can only apply once, Head Co Ltd is not deemed to also have the relevant interest in 100% of D Ltd that B Ltd has, even though it has voting power of more than 20% in B Ltd. Head Co Ltd therefore has no relevant interest in D Ltd shares (but does have a relevant interest in B Ltd's holding of C Ltd securities: s608(3)(a)).
  - (b) M Ltd has a relevant interest in 100% of N Ltd securities through a direct holding. L Ltd has a voting power of 40% in M Ltd, but also has practical control of M Ltd, so it is deemed to have the same relevant interest in 100% of N Ltd under s608(3)(b). As Head Co Ltd has a voting power of over 20% in L Ltd, and s608(3)(a) has not yet been applied, Head Co Ltd is deemed to also have a relevant interest in the 100% stake in N Ltd.
  - (c) Y Ltd has a direct relevant interest in 25% of Z Ltd. X Ltd is deemed to have a relevant interest in the 25% stake in Z Ltd: s608(3)(a). W Ltd is also deemed to have a relevant interest in the 25% stake in Z Ltd on account of X Ltd's deemed relevant interest and its controlling holding in X Ltd: s608(3)(b). As Head Co Ltd controls W Ltd, it also has a relevant interest in the 25% stake in Z Ltd as s608(3)(b) has successive operation.
- RG 5.47 This example assumes there are no cross-holdings, associate relationships (other than through a corporate group), or practical control below 50% (other than where specified)—however, in applying s608(3), all relevant circumstances must be taken into account. For example, if Head Co Ltd had effective control of B Ltd, even though it holds only a direct 25% stake, it would have a relevant interest in D Ltd.



**Association by control and s608(3)(a)**

RG 5.48 The deeming provision in s608(3)(b) overlaps to some extent with the definition of ‘associate’. Two bodies corporate may be associates where one controls, or is controlled by, the other, or where both are controlled by the same entity (whether the entity is a natural person, body corporate, partnership or trust): s12(2)(a) and 64A. A similar test for control applies in this context: s50AA.

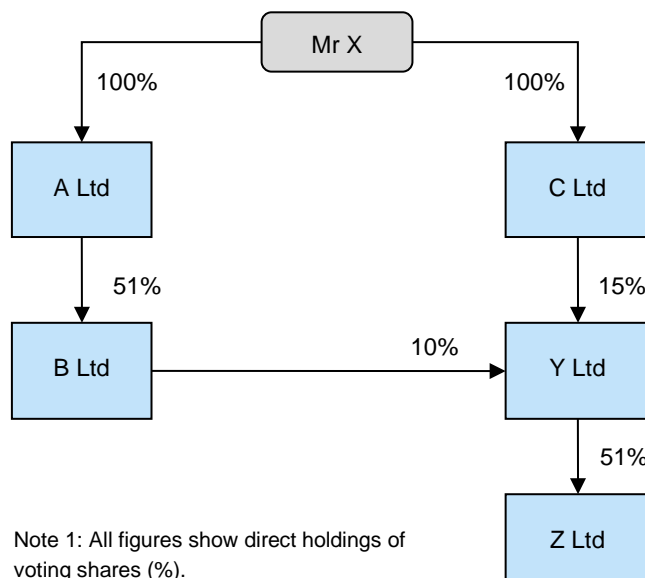
Note: Persons may also be associates for other reasons. We discuss the concept of association further at RG 5.124–RG 5.154.

RG 5.49 This overlap means that, where one body corporate controls another body corporate, the parent will both:

- (a) have a relevant interest in any securities the subsidiary has a relevant interest in under s608(3)(b); and
- (b) be associated with the subsidiary under s12(2)(a).

RG 5.50 Associations, such as those arising from control within a corporate group, are relevant in applying s608(3)(a). This is because a person’s voting power in a body or scheme depends on the relevant interests both the person and their associates have in voting shares or interests in the body. As a result, a person may be deemed to have the relevant interests in securities a body corporate has under s608(3)(a) entirely, or in part, on the basis of an associate’s holding (or other relevant interests) in that body corporate. The diagram in Figure 2 illustrates this concept.

**Figure 2: Deemed relevant interests through holdings of associates under s608(3)(a)**



Note 2: Figure 2 is explained in RG 5.50–RG 5.55 (accessible version).

- RG 5.51 In Figure 2, Mr X holds 100% of the shares in both A Ltd and C Ltd. On the left side of the chain, A Ltd holds 51% of shares in B Ltd, which in turn holds 10% of shares in Y Ltd. On the right side of the chain, C Ltd holds 15% of shares in Y Ltd, which in turn holds 51% of shares in Z Ltd.
- RG 5.52 Y Ltd holds (and therefore has a relevant interest in) 51% of the shares in Z Ltd. However, each of the other companies listed and Mr X also have the relevant interest in 51% of Z Ltd that Y Ltd has due to the operation of s608(3)(a). This is because their ‘voting power’ in Y Ltd is greater than 20%, even though some of them do not have relevant interests in more than 20% of Y Ltd shares.
- RG 5.53 The relevant interests of each person in Y Ltd are as follows:
- (a) A Ltd and B Ltd each have a relevant interest in 10% of Y Ltd (B Ltd as holder and A Ltd because it controls B Ltd (s608(3)(b)));
  - (b) C Ltd has a relevant interest in 15% of Y Ltd as holder; and
  - (c) Mr X has a relevant interest in 25% of Y Ltd as a result of his control over B Ltd and C Ltd, which collectively hold this number of shares (s608(3)(b)).
- RG 5.54 However, A Ltd, B Ltd and C Ltd are all associates of each other under s12(2)(a)(iii) because they are all controlled by the same entity—Mr X. The voting power they each have in Y Ltd is therefore the aggregate of the votes attached to both the shares they have a relevant interest in and the shares each of the others has a relevant interest in (as their associates). This means each of A Ltd, B Ltd and C Ltd have voting power of 25% in Y Ltd and are therefore deemed to have the same relevant interest that Y Ltd has in Z Ltd under s608(3)(a).
- Note: A Ltd and B Ltd are also associates of each other because they control, or are controlled by, each other: s12(2)(a)(i) and (ii).
- RG 5.55 The fact that A Ltd, B Ltd and C Ltd are associates of each other does not affect the *relevant interests* they each have in Y Ltd shares (as it does with respect to Z Ltd due to s608(3)(a)). While an associate’s relevant interests in securities are in effect aggregated with a person’s own to determine the person’s voting power in an entity, this does not mean the person themselves has a relevant interest in the securities in which the associate has a relevant interest merely because of the association. Whether a person has a relevant interest depends on the application of the tests in s608 and 609. As noted at RG 5.48–RG 5.50, the relevant interest tests may overlap with (or in the case of s608(3)(a)—require the application of) the test for association, but any relevant interest that arises still arises by virtue of the tests in s608 and 609.
- RG 5.56 We discuss the concepts of voting power and association further at RG 5.106–RG 5.143.

## Extension to the basic rule: Anticipation of performance of agreement or exercise of right or option

- RG 5.57 The relevant interest concept is further extended by s608(8). This provision applies to transactions and arrangements relating to securities to bring back to the earliest point in time the moment at which a person will be treated as having a relevant interest in the securities: *Re Adelaide Holdings Ltd* (1982) 6 ACLR 675 at 679. The provision is sometimes referred to as the ‘accelerator provision’ because it may cause a relevant interest to arise sooner than it otherwise would.
- RG 5.58 Section 608(8) operates when a person has a relevant interest in issued securities and (whether before or after acquiring the relevant interest) the person:
- (a) has entered or enters into a relevant agreement with another person with respect to the securities (s608(8)(b)(i));
  - (b) has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition) (s608(8)(b)(ii)); or
  - (c) has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities (s608(8)(b)(iii)).
- The effect of s608(8) is that the other person is taken to already have a relevant interest in the securities if they would have the relevant interest on performance of the agreement, enforcement of the right or exercise of the option.
- RG 5.59 The three subparagraphs in s608(8)(b) are not mutually exclusive: *Chew v Hamilton* (1985) 13 ACLR 440 at 446. The ambit of a relevant agreement referenced in s608(8)(b)(i) is particularly broad and, in many cases, will also encompass enforceable rights and options of the kind referred to in s608(8)(b)(ii) and (iii): see RG 5.30–RG 5.33.
- RG 5.60 One effect of the accelerator provision is to confirm that a person has a relevant interest even though their connection with a security holding is derived from a conditional transaction, arrangement or right.
- RG 5.61 Of course, in some cases, a conditional transaction or preliminary arrangement may, in any event, have resulted in a relevant interest under the basic rule, given the expansive nature of power or control referred to in s608(2): see for example *Alinta Ltd* at [243]–[246] and *Nicholas v Commissioner for Corporate Affairs (Vic)* (1982) 7 ACLR 45 at 54–55.
- RG 5.62 The accelerator provision only operates where the person who enters into the agreement, gives the enforceable right, or grants the option has a relevant interest in securities themselves. If the person acquires a relevant interest in the securities subsequently, the provision will operate in relation to those securities from that time: s608(8)(b).

## Specific applications

- RG 5.63 We discuss further the application of the relevant interest concept, including the accelerator provision, as it applies to options and warrants in Sections D and E.
- RG 5.64 For securities lending arrangements, we have modified the application of s608(8), in the context of the substantial holding provisions, so that a lender's relevant interest in loaned securities is not affected by the borrower ceasing to have a relevant interest: see Class Order [CO 11/272] *Substantial holding disclosure: securities lending and prime broking*. This modification is discussed further at RG 222.34–RG 222.37.

## Exceptions

- RG 5.65 Section 609 sets out a number of situations in which a person is taken not to have a relevant interest. These exceptions only apply to relevant interests arising merely because of the particular situation or circumstance. A person may still have a relevant interest because of other connections, or aspects of relevant arrangements or affairs falling outside the specified situation or circumstance. Not all the exceptions in s609 apply in the context of the substantial holding disclosure requirements: see s671B(7) and the definition of 'substantial holding' in s9.
- RG 5.66 We have modified some of the s609 exceptions by class order to clarify their operation. We have also introduced a number of new situations that are taken not to give rise to a relevant interest by way of class order modification. In some cases, the modified and extended exceptions under our class orders only apply when considering certain requirements under the Corporations Act (e.g. the takeover provisions but not the substantial holding provisions).
- RG 5.67 Where a person does not have a relevant interest in securities because of s609, no other person will be deemed to have a relevant interest in those securities through the application of s608(3).
- RG 5.68 Table 4 outlines the exceptions (including modifications and additions made by class order) that should be taken into account in determining whether a person has a relevant interest in securities for the purposes of the takeover and substantial holding requirements. The table also includes cross-references to further discussion and guidance, where applicable.

Note: Table 4 sets out the exceptions to the relevant interest concept for the purposes of the takeover and substantial holding provisions only. Some of ASIC's class order modifications included in the table apply only to Chs 6 and 6C. When considering relevant interests in other contexts, readers should carefully consider the applicability of the exceptions introduced or modified by class order.

**Table 4: Exceptions to the relevant interest concept—Takeovers and disclosure of substantial holdings**

Exception	Situation not giving rise to a relevant interest	Reference
<b>Exceptions applying for the purposes of both the takeover provisions and the substantial holding requirements</b>		
Moneylenders' security interests	Security interests taken or acquired in the ordinary course of a non-associated person's business of providing financial accommodation on ordinary commercial terms  Note: A 'security interest' is defined in s51A.	s609(1) and Class Order [CO 13/520] <i>Relevant interests, voting power and exceptions to the general prohibition</i> ; see also RG 5.69–RG 5.78
Bare trustees	Bare trustees (including nominees) where a beneficiary under the trust has a relevant interest because of a presently enforceable and unconditional right	s609(2)
AFS licensees acting on client instructions	A relevant interest an Australian financial services (AFS) licensee has merely because, in the ordinary course of its financial services business, it receives specific instructions from its client to dispose of the securities or enter into a sold position through a dealing in derivatives	s609(3) and [CO 13/520]; see also RG 5.79–RG 5.87
Buybacks	Relevant interests arising merely because a company has entered into a buyback agreement	s609(4)
Single meeting proxies	Proxy holders or corporate representatives appointed for a single meeting for no consideration	s609(5)
Pre-emptive rights in constitution	Pre-emptive rights in a company, body or managed investment scheme's constitution which are on the same terms for all members	s609(8)
Directorship	Directorship of a body corporate, which, in itself, does not give rise to a relevant interest in securities in which the body corporate has a relevant interest	s609(9)
Market and facility operators	Operation of a clearing and settlement facility  Note: We have provided a further exception for the operators of prescribed financial markets in relation to restricted securities: s609(12)–(13) inserted by [CO 13/520].	s609(9A) and [CO 13/520]
Acceptance facilities	Establishment by a bidder of an acceptance facility complying with [CO 13/520]	s609(8A) (inserted by [CO 13/520]); see also RG 9.497–RG 9.526
Investor directed portfolio services (IDPSs)	Operating, or being involved as an AFS licensee or representative in the operation of, an IDPS  Note: The IDPSs and operators to which the exception applies are defined in s912AD(42) inserted by Class Order [CO 13/763] <i>Investor directed portfolio services</i> .	s609(17A)–(17D) (inserted by ASIC Corporations (IDPS – Relevant Interests) Instrument 2015/1067); see also Regulatory Guide 148 <i>Platforms that are managed investment schemes and nominee and custody services</i> (RG 148)

Exception	Situation not giving rise to a relevant interest	Reference
Warrant issuers and trustees	<ul style="list-style-type: none"> <li>Put warrant issuers (including where securities are held in trust on certain terms to secure the holder's obligations);</li> <li>Call warrant issuers where securities are held in trust; and</li> <li>Warrant trustees retaining certain limited discretions for the purpose of satisfying rights or obligations of the issuer or holder</li> </ul>	s609(6A)–(6F) (inserted by [CO 13/526] <i>Warrants: Relevant interests and associations</i> ); see also Section E
ASIC	<p>Any relevant interest ASIC may have in securities, except where securities are vested in, or held by:</p> <ul style="list-style-type: none"> <li>ASIC for and on behalf of the Commonwealth; or</li> <li>the Commonwealth on trust.</li> </ul> <p>Any interest the chairperson of ASIC has by virtue of that office merely because ASIC has a relevant interest</p>	s609(14)–(16) (inserted by Class Order [CO 12/1209] <i>Relevant interests, ASIC and ASIC Chairperson</i> )
<b>Exceptions applying for the purposes of the takeover provisions but not the substantial holding requirements</b>		
Exchange-traded options, call warrants and derivatives	<p>Relevant interests arising because of market-traded options or rights to acquire securities under a derivative. The exception applies until the time to make or take delivery</p> <p>Note: We have extended this exception to include relevant interests arising from a right to acquire securities, or require securities are held in trust, under a call warrant quoted on ASX: see Section E.</p>	s609(6) and [CO 13/526]; see also RG 5.177–RG 5.182 and RG 5.189–RG 5.245
Agreements subject to holder approval or ASIC relief	Relevant interests arising because of agreements that are conditional on holder approval under item 7 of s611, or ASIC relief, which do not confer influence over voting rights and do not restrict disposal for more than three months. The exception applies until approval or relief is given	s609(7); see also Regulatory Guide 74 <i>Acquisitions approved by members</i> (RG 74) at RG 74.94–RG 74.96
Listing rule escrow agreements	A listed company's relevant interest in its own securities arising from restrictions on disposal of a holding of restricted securities applied under the listing rules of a prescribed financial market	s609(11) and (13) (inserted by [CO 13/520]); see RG 5.251–RG 5.257
Voluntary escrow agreements	The relevant interest arising because of a company, underwriter or lead manager applies restrictions on disposal of the company's securities under an escrow agreement in connection with an initial public offer of securities	s609(13A)–(13C) (inserted by [CO 13/520]); see RG 5.256–RG 5.276

Exception	Situation not giving rise to a relevant interest	Reference
Exchange traded funds (ETFs)—acquisition and withdrawal facilities	<p>Relevant interests certain authorised participants of an ETF have in securities forming part of the ETF as a result of an acquisition and withdrawal facility where:</p> <ul style="list-style-type: none"> <li>the investment strategy of the ETF is to track a published index of securities that will not lead to any security to which Ch 6 applies representing more than 10% (by value) of the ETF's assets; and</li> <li>the authorised participant has not made a withdrawal request under the facility</li> </ul>	s609(19A)–(19E) (inserted by Class Order [CO 13/721] <i>Relief to facilitate quotation of exchange traded funds on the AQUA Market</i> )
<b>Exceptions applying for the purposes of the substantial holding requirements only</b>		
Prime broking and custodial service providers	A relevant interest arising from a right to borrow securities at some future time under certain prime broking or custodial arrangements complying with [CO 11/272]. The exception ceases when the prime broker or custodian exercises the borrowing right (i.e. the acquisition of the relevant interest is deferred)	s609(10A)–(10C) (inserted by [CO 11/272]); see also RG 222

### ASIC modification: The financial accommodation exception

- RG 5.69 Section 609(1) provides an exception from the definition of ‘relevant interest’ for a person who takes a security interest in the ordinary course of their business of providing financial accommodation and on ordinary commercial terms. The exception does not apply if the security interest relates to the property of an associate.
- RG 5.70 [CO 13/520] modifies the exception in s609(1) to extend it to:
- persons holding a security interest (such as a mortgage) on trust for a financier in the ordinary course of the financier’s business of providing financial accommodation;
  - purchasers of a security interest of this kind; and
  - financiers, where their lending is supported by a negative pledge.
- RG 5.71 We have made these modifications to ensure that a person does not have a relevant interest in securities merely because they participate in common commercial ‘arm’s length’ mortgage structures and transactions.
- RG 5.72 Table 5 sets out the modifications to s609(1) we have made under [CO 13/520], together with an explanation of the rationale underlying the change.

**Table 5: Modifications to s609(1) under [CO 13/520]**

Modification	Details	Explanation
Security trustees	We have extended the exception to relevant interests arising from a security interest acquired by a person (the security trustee) on ordinary commercial terms, for the benefit of one or more financiers in relation to financial accommodation provided by the financiers in the ordinary course of the financier's business of providing financial accommodation.	Lending transactions are often structured so that a security trustee takes and holds a mortgage for the benefit of the financier. The security trustee usually has a relevant interest in the securities covered by the mortgage because it has the power to dispose of these securities. Without our relief, the security trustee may not be covered by the exception in s609(1). Section 609(1) may require the mortgage to be taken in the ordinary course of the security trustee's business of lending money or providing other financial accommodation. It is unlikely that the security trustee is in this business.
Purchasers	We have modified the exception to make it clear that it is not limited to the initial financier (or its security trustee), but also applies to a purchaser of the security interest.	The exception in s609(1) is limited to a 'security interest taken for the purposes of a transaction entered into by the person'. This may not extend to purchasers of mortgages. It is uncertain whether the purchaser acquires the mortgage for the purposes of a loan 'entered into' by the purchaser. While the use of the word 'acquired' in s609(1)(a) suggests that the provision was intended to cover the secondary mortgage market, our modification is designed to remove any doubt.
Negative pledges	We have modified the exception to clarify that it extends to a relevant interest acquired by a financier because its lending is supported by a negative pledge covering the securities.	Negative pledges are used by financiers to protect themselves in corporate debt financing. But there may be uncertainty about whether a negative pledge is covered by the reference to a 'security interest' in s609(1). A negative pledge is a contractual promise by a borrower to the financier that the borrower will not create an encumbrance on its assets (the securities) in favour of another financier. A negative pledge may not constitute a security interest, as defined in s51A, because it does not give the financier any proprietary interest in assets of the borrower.

### Corresponding modifications to item 6

- RG 5.73 Item 6 of s611 contains an exception from the general prohibition in s606 which corresponds with the exception from the relevant interest concept in s609(1). The exception in item 6 is for an acquisition that results from an exercise of power, or appointment as receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest.
- RG 5.74 [CO 13/520] contains corresponding modifications to item 6 of s611 so that:
- (a) the exception applies to security trustees (without our relief, the security trustee's business would have to be lending or providing other financial accommodation); and
  - (b) for the exception, a security interest includes a negative pledge.



RG 5.75 Our class order also includes a technical modification of item 6 of s611 to clarify its operation in relation to receivers when a security interest is exercised. The item is expressed to apply to a person appointed ‘as a receiver’ but only if the person’s ordinary business includes providing financial accommodation: item 6(a) of s611. A receiver is unlikely to be in this business. We have modified item 6 so that it applies to acquisitions resulting from the appointment of a receiver. It is likely that the equivalent provision under the old Corporations Law covered an acquisition by a receiver appointed by the financier: *Haughton Properties Pty Ltd v Sandridge City Development Co Pty Ltd* (1994) 13 ACLC 1. Without our relief, the drafting of item 6 of s611 may disturb this result.

Note: See also *BioProspect Limited 01* [2008] ATP 8.

### **Security interests taken or acquired with a purpose inconsistent with the policy underlying the exceptions**

RG 5.76 The exception in s609(1) recognises that persons in the business of providing financial accommodation will, in the ordinary course of their business, commonly take security interests over shares and other securities in connection with financing transactions for the particular purpose of securing the funds they have lent against default, and not with a view to obtaining dominion or influence over the securities in a way that is designed to affect control of the issuer of the securities. The corresponding exception in item 6 of s611 seeks to ensure that the takeover provisions do not unduly restrict the exercise of the financier’s security interest.

RG 5.77 ASIC may take regulatory action, including applying to the Takeovers Panel for a declaration of unacceptable circumstances, if a person seeks to rely on the exceptions in s609(1) or item 6 of s611 where it appears that:

- (a) the security interest does not fall within the exceptions (e.g. because a relevant person does not in fact provide financial accommodation in the ordinary course of their business); or
- (b) the person has taken or acquired the security interest for purposes that are otherwise inconsistent with the policy underlying the exceptions.

RG 5.78 Situations where reliance on the exceptions may be excluded or inconsistent with their underlying policy include where:

- (a) the financier has taken or acquired the security interest, entirely or in part, for the purpose of influencing whether, to whom or how the securities are to be disposed of following an event of default; or
- (b) the financier has taken or acquired the security interest in anticipation of, or in connection with, a proposal by the financier or its associates to acquire control, or a substantial interest in, the issuer of the securities.

## ASIC modification: The exception for AFS licensees

- RG 5.79 [CO 13/520] modifies s609 so that an AFS licensee does not have a relevant interest in the securities of its client merely because it receives specific instructions from the client directing the licensee (in the ordinary course of its financial services business):
- (a) to dispose of the securities; or
  - (b) to enter into a sold position in relation to the securities.
- RG 5.80 Our modification replaces s609(3), which otherwise provided an exclusion from the relevant interest concept for an AFS licensee who *holds* securities on behalf of its client in the ordinary course of its financial services business.

### Securities dealers

- RG 5.81 [CO 13/520] modifies the application of the exception in s609(3) in relation to securities dealers because a dealer does not generally hold securities on behalf of its client. A securities dealer is normally an agent of its client rather than a trustee, and is authorised to exercise powers of the holder (specifically, the power to dispose) without actually holding the securities. Section 40 of the old Corporations Law—the predecessor to s609(3)—merely referred to:
- authority to exercise powers as the holder of the relevant interest only because of instructions given to the person ... to dispose of the share on [another] person's behalf ...
- RG 5.82 The principle underlying our modification is that a securities dealer should not have a relevant interest in securities when it is merely acting under specific instructions from its client to dispose of the client's securities. This is because:
- (a) the dealer has limited discretion in disposing of the securities; and
  - (b) the dealer's power to dispose is for a limited period.

### Derivatives dealers

- RG 5.83 The exception in s609(3) operates in relation to dealings in securities by an AFS licensee. It does not apply to derivatives trading. The definition of securities under s9 does not include market-traded options or derivatives—therefore, s609(3) does not extend to analogous circumstances involving derivatives.
- RG 5.84 Without relief, a broker whose ordinary business includes dealing in derivatives, and who enters into a sold position on instruction from a client, may have a relevant interest in the underlying securities.
- RG 5.85 [CO 13/520] replicates the exception for securities dealers so that a derivatives broker does not have a relevant interest in relation to a security merely because the broker has received specific instructions from the client directing it to enter into a sold position in relation to that security in the

ordinary course of the broker's business (which includes derivatives trading). A derivative for this purpose is a financial product that:

- (a) falls within the definition of 'warrant' in reg 1.0.02(1) of the *Corporations Regulations 2001* (Corporations Regulations); or
- (b) would fall within the definition of 'warrant' but for the financial product not being transferable.

#### **Managed discretionary accounts**

RG 5.86 The exclusion for dealers was intended to cover only relevant interests of a dealer that arise as a result of specific instructions from a client directing the dealer to dispose of the securities. The exclusion does not cover managed discretionary accounts, where the dealer has a broader discretion to control the disposal of the client's securities.

RG 5.87 Accordingly, our modifications in [CO 13/520] do not cover dealer-managed discretionary accounts.

## C Takeovers and substantial holdings: Applying the relevant interest concept

### Key points

The takeover and substantial holding provisions operate by reference to thresholds depending on a person's relevant interest in voting shares or voting interests combined with that of any associates.

Acquisitions from an associate may be deemed to involve an increase in voting power under s610(3). We have modified Ch 6 so that, in certain cases, an acquisition by a subsidiary from its ultimate holding company does not involve a deemed increase in voting power, consistent with the treatment of other intra-group transfers.

A person may be an associate on the basis that they have, or propose to enter into, a relevant agreement, or propose to act in concert in relation to a body. Bodies corporate may also be associates on the basis of a relationship of control or common control. We have provided class order relief so that parties to an agreement to acquire and dispose of securities are not associates merely because of the disposal right.

### The takeover and substantial holding thresholds

- RG 5.88 The relevant interest concept is central to the framework of the takeover and substantial holding provisions because it defines the connections that are taken into account in applying the principal thresholds triggering the requirements of Ch 6 and Pt 6C.1:
- (a) the general prohibition in s606 in relation to takeovers; and
  - (b) the definition of a 'substantial holding' in s9 and the 'movement of at least 1%' in s671B(2).
- RG 5.89 The thresholds for both the takeover provisions and substantial holding provisions involve similar calculations incorporating two essential elements:
- (a) accounting for the votes attached to voting shares or interests, in which a person has a relevant interest; and
  - (b) the aggregation of the relevant interests in voting shares or interests of a person and their associates.
- RG 5.90 These elements reflect the underlying concern of the respective regimes with the acquisition of corporate control and the disclosure of interests that may have a capacity to dictate or influence the entity's future direction or affairs.
- RG 5.91 For the purposes of the takeover provisions, both elements are incorporated through the definition of a person's 'voting power' in s610. In the substantial holding context, the elements are found in the definitions in s9 and 671B(2),

which are similar to the ‘voting power’ definition. Both definitions incorporate the concept of an ‘associate’ set out in s12.

### **Application of the provisions**

- RG 5.92 The entities with respect to which the takeover and substantial holding provisions apply are similar but not identical. Both regimes apply to a person’s interests in:
- (a) listed companies;
  - (b) listed registered managed investment schemes; and
  - (c) listed bodies that are not companies but are incorporated or formed in Australia.

However, the takeover provisions also apply to a person’s interests in unlisted companies with more than 50 members.

### **The substantial holding disclosure threshold**

- RG 5.93 Under s671B, a person must give certain information about their relevant interests, and the interests of any associates, in voting shares in a listed company or body, or voting interests in a listed registered managed investment scheme, to the entity and to each relevant market operator.
- RG 5.94 A person must provide a substantial holding notice if they:
- (a) begin to have, or cease to have, a substantial holding in the listed entity;
  - (b) have a substantial holding in the listed entity and there is a movement of at least 1% in their holding; or
  - (c) make a takeover bid for securities of the listed entity: s671B(1).
- RG 5.95 A person has a substantial holding if they and their associates have (or would have but for certain exceptions in s609) relevant interests in voting shares or interests carrying 5% or more of the total votes attached to all voting shares or interests: s9. There is movement of more than 1% if, using the same formula, the percentage of votes has increased or decreased by this amount from the percentage previously disclosed: s671B(2).

Note: For further discussion about when a person is an associate, see RG 5.124–RG 5.154.

- RG 5.96 A person also has a substantial holding throughout the period between making a takeover bid and the end of the bid period: s9. A bidder must therefore provide substantial holding disclosure about movements of at least 1% even if it holds less than 5% before or after the movement: see RG 5.297–RG 5.300.

## The general takeover threshold

- RG 5.97 Under Ch 6, the acquisition of corporate control is regulated by way of a general prohibition on offers, invitations, acquisitions and transactions that result in a breach of the takeover threshold (s606), subject to a number of permitted exceptions (s611).
- RG 5.98 Section 606(1) prohibits a person from acquiring a relevant interest in issued voting shares (or interests) through a transaction relating to those shares if the transaction results in that person's, or someone else's, voting power in the relevant entity increasing:
- (a) from 20%, or below, to more than 20%; or
  - (b) from a starting point above 20% and below 90%.
- RG 5.99 A person is also prohibited from acquiring a legal or equitable interest in securities if another person acquires a relevant interest and this results in a breach of the same threshold: s606(2). A person must not make an offer or invitation that would result in the person breaching the prohibitions in s606(1) or (2), upon acceptance of the offer or a resulting offer.
- RG 5.100 Two principal aspects of the prohibition under s606(1) are the requirements that:
- (a) the person must acquire a relevant interest through a *transaction*; and
  - (b) the person's, or someone else's, *voting power* must increase.
- Note: The prohibition in s606(2) also requires the acquisition of a relevant interest in voting shares (or interests) but not necessarily through a transaction.
- RG 5.101 We discuss voting power further at RG 5.106–RG 5.123.

## Acquiring a relevant interest through a transaction

- RG 5.102 A person acquires a relevant interest if they *obtain* a relevant interest, even if the relevant interest they obtain arises as a result of the deeming provisions in s608(3) and (8): *Yandal Gold* at [82]–[100] and *Edensor Nominees* at [34]–[39]. A person is also taken to acquire a relevant interest when:
- (a) securities in which the person already had a relevant interest become voting shares in the company (e.g. the conversion of non-voting securities); or
  - (b) there is an increase in the number of votes that may be cast on a poll attached to voting shares, in which the person already had a relevant interest (e.g. when partly paid securities with proportional voting rights are paid up in full): s606(6).
- RG 5.103 Under s606(1), a transaction giving rise to the acquisition of the relevant interest must have been entered into by, or on behalf of, the person and must be in relation to securities: s606(1). Under s64, and the definition of 'enter into' in s9, entry into a transaction in relation to shares and other securities includes:
- (a) entering into, or becoming a party to, a relevant agreement in relation to the shares or securities (see RG 5.30–RG 5.33); and

- (b) exercising an option to have the shares or securities allotted, issued or granted.

RG 5.104 The general prohibition in s606 may therefore apply to prevent a person from entering into, or becoming a party to, a relevant agreement (including an unenforceable arrangement or understanding, or an agreement that does not necessarily involve the sale or purchase of any securities) if the person would obtain a relevant interest in breach of the takeover threshold: see for example *Flinders Diamonds Ltd v Tiger International Resources Inc* (2004) 49 ACSR 199 at [40].

RG 5.105 A person may also be prevented by s606 from exercising options to be issued voting shares or interests unless the resulting acquisition falls within an exception to the prohibition in s611.

## Voting power

RG 5.106 The general prohibition in s606 operates when a person's 'voting power' increases above the takeover threshold.

RG 5.107 Under s610(1), a person's voting power in a body is the total number of votes attached to all the voting shares in the body that the person or an associate has a relevant interest in as a percentage of the total votes attached to all voting shares:

$$\text{Voting power} = \frac{\text{Person's and associates' votes}}{\text{Total votes in designated body}} \times 100$$

RG 5.108 The same calculation applies to determine a person's voting power in a managed investment scheme by reference to voting interests in the scheme.

RG 5.109 Votes attached to voting shares, in which a person and their associates have a relevant interest, are counted in calculating a person's voting power even if the person's relevant interest arises from the person's power or control over disposal rather than voting.

### Votes attached to voting shares or interests

RG 5.110 Voting power can only be derived from relevant interests in voting shares or interests and the general prohibition only applies where a person acquires a relevant interest in voting shares (or voting interests in a managed investment scheme). The substantial holding requirements are similarly concerned only with voting shares and interests: s671B(3).

RG 5.111 A voting share is defined in s9 as an issued share in a body that carries any voting rights beyond the right to vote on the following:

- (a) a proposal to reduce the body's share capital;

- (b) a resolution to approve the terms of a buyback agreement;
- (c) a proposal that affects the rights attached to the share;
- (d) a proposal to wind up the body;
- (e) a proposal to dispose of the whole of the body's property, business and undertaking; and
- (f) a resolution put during a winding up or while a dividend (or part of a dividend) for the share is unpaid.

RG 5.112 Under the formula in s610, a person's voting power depends on the number of votes attached to the relevant voting shares. The focus on votes rather than absolute holdings provides the most accurate reflection of a person's power to influence decision making at a general meeting. Given the possibility that the number of votes attached to a share may vary, s610(2) further refines the approach by providing that (in determining voting power) the number of votes attached to a voting share is the number of votes that can be cast in respect of the share on a poll on the election of a director (or, if director election is not determined through voting, on the adoption or amendment of the constitution).

Note: See the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998, paragraph 7.62.

## Deemed increase in voting power: Acquisitions from an associate

- RG 5.113 A person's voting power includes the votes attached to voting shares in which both the person and their associates have a relevant interest. Because an associate's votes are already counted, a person's voting power would not increase under the definition in s610(1) when the person acquires voting shares from their associate. This is the case even if the person did not have a relevant interest in the associate's voting shares before the acquisition. Because there is no increase in voting power, a transaction of this kind would not be caught by the general prohibition in s606: s606(1)(c) and 606(2)(b).
- RG 5.114 In general, a person should not be free to acquire a relevant interest in voting shares from their associate without triggering s606. Commercially, there may be a significant difference between a person having a relevant interest in shares in a company and the person's associate having a relevant interest. An acquisition from an associate may effect a change of control of a company—a matter with which s606 is concerned.
- RG 5.115 Section 610(3) addresses this situation by deeming that, for the purposes of s606, a person's voting power increases when they acquire a relevant interest in voting shares if, before the acquisition, an associate had a relevant interest in the shares but the person did not. This brings the acquisition within the scope of s606.



## Corporate groups

- RG 5.116 Members of a corporate group are generally associates of each other: see s12(2)(a). As such, under s610(3), the voting power of a group company may be deemed to have increased because it acquires securities from another group company.
- RG 5.117 However, s610(3) only operates when the person acquiring the relevant interest does not have a relevant interest before the transaction. Because of the overlap between the definition of ‘associate’ in s12(2)(a) and the deeming provision in s608(3), in many cases, the group company acquiring the voting shares will already have a relevant interest in the voting shares: see RG 5.48–RG 5.56. Section 610(3) will not be triggered if s608(3) applies, such that the acquiring group company already has a relevant interest.
- RG 5.118 Table 6 demonstrates how s608(3) and 610(3) apply to acquisitions within a corporate group.

**Table 6: Acquisitions within a corporate group: s608(3) and 610(3)**

Acquisition	Application of s608(3) and 610(3)
Acquisition from a sibling company	<p>Section 610(3) is not triggered by an acquisition of securities from a sibling company because, under s608(3), the acquirer will be deemed to have a relevant interest in the securities of its sibling.</p> <p>Under s608(3)(a), a person is deemed to have the relevant interest of a body corporate in which the person’s voting power is over 20%. The acquirer has voting power of over 20% in its sibling because its holding company’s votes in the sibling are counted in the acquirer’s voting power: s610(1). The holding company is the acquirer’s associate.</p>
Acquisition by a subsidiary from an intermediate company	<p>Section 610(3) is not triggered by an acquisition of securities by a subsidiary from its holding company, if the holding company is an intermediate company in the group.</p> <p>The subsidiary already has the relevant interest in the securities that the intermediate company has because of s608(3). The subsidiary has voting power of over 20% in the intermediate company. The subsidiary has the voting power of the ultimate holding company in the intermediate company. The ultimate holding company is the subsidiary’s associate.</p>
Acquisition by a subsidiary from its ultimate holding company	<p>Section 610(3) is triggered when a subsidiary acquires securities from the ultimate holding company.</p> <p>Section 608(3) does not apply. A subsidiary does not have voting power of over 20% in its ultimate holding company: s608(3)(a). Nor does the subsidiary control its ultimate holding company: s608(3)(b).</p>

## ASIC modification: Acquisitions within a group

- RG 5.119 As set out in Table 6, an acquisition by a subsidiary from its ultimate holding company will generally result in the subsidiary's voting power increasing for the purposes of s606 because of the operation of s610(3).
- RG 5.120 However, an acquisition of securities by one group company from another should not trigger s606. Unless the transfer increases the voting power of a person outside the group, it cannot change ultimate control over the issuer of the securities.
- RG 5.121 [CO 13/520] modifies s610 so that a subsidiary that acquires securities from its holding company is not taken to have increased its voting power as a result of the acquisition. For simplicity, the relief effected by [CO 13/520] applies to any transfer from a holding company (not just an ultimate holding company).
- RG 5.122 Our relief does not apply where, as a result of the acquisition, the voting power of a person outside the group increases. A person is outside the group if they are not a subsidiary of the ultimate holding company.
- RG 5.123 This underlines the existing position under the Corporations Act that an acquisition by a subsidiary from its holding company can result in a breach of s606 if the subsidiary, or a group company in another part of the group:
- (a) has a holder outside the group with voting power of over 20%, or with control (s608(3)); or
  - (b) has an agreement with a person outside the group for the purpose of controlling the issuer of the securities.

## Associates

- RG 5.124 A number of people may be taken to be associates for the purposes of the takeover, substantial holding and compulsory acquisition provisions.
- RG 5.125 The associate concept is applied in a variety of contexts in Chs 6–6C where the objective of a relevant provision necessitates that persons are treated as a group on the basis of their relationship, common interests or concerted objectives.
- RG 5.126 The relevant interests of associates must be considered when calculating a person's voting power and when considering whether a person has a substantial holding: s9 and 610. The nature of an association and an associate's relevant interests must also be disclosed in a substantial holding notice: s671B(3). Persons who collectively acquire securities cannot avoid the general prohibition in s606, or the requirement to disclose details of substantial holdings, because all voting shares are treated as a single bloc.

RG 5.127 Further, associates of a person are excluded from taking certain actions that the person themselves cannot take—including giving an escalating or collateral benefit (s622 and 623) or voting on a resolution to approve an acquisition under item 7 of s611. The actions of a person’s associate are also equated to those of the person in some cases—for example, the minimum bid price rule in s621(3) and the prohibition on certain defeating conditions in s629. The associate is grouped with the person, in these circumstances, because they may not be acting independently.

### Relationships giving rise to an association

RG 5.128 Section 12 defines the relationships and circumstances giving rise to an association for the purposes of Chs 6–6C and related references. Table 7 sets out the bases on which a person may be an associate under s12.

**Table 7: Relationships giving rise to an association under s12**

Relationship	Details
Bodies corporate—control or common control: s12(2)(a)	A body corporate is an associate of another body corporate if it controls, or is controlled by, the other body corporate, or both bodies corporate are controlled by the same entity (including a natural person).
Relevant agreement: s12(2)(b)	A second person is associated with the first person if the second person is a person with whom the first person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body’s board or the conduct of the designated body’s affairs.
Acting in concert: s12(2)(c)	A second person is associated with the first person if the second person is a person with whom the first person is acting, or proposing to act, in concert in relation to the designated body’s affairs.

Note: The defined relationships apply to managed investment schemes with the necessary modifications to references to voting shares and to controlling or influencing the composition of the board: see s12(3).

### Bodies corporate—Control or common control

RG 5.129 Under s12(2)(a), a body corporate is an associate of another body corporate if:

- (a) it controls, or is controlled by, the other body corporate (s12(2)(a)(i) and (ii)); or
- (b) both bodies corporate are controlled by the same entity (s12(2)(a)(iii)).

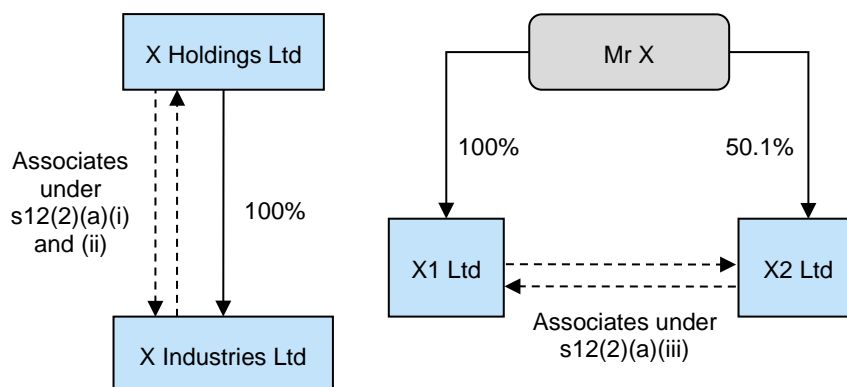
Note: Section 50AA defines when an entity controls another.

RG 5.130 The ‘entity’ in common control of the two bodies corporate for the purposes of s12(2)(a)(iii) may be either a natural person, another body corporate

(other than an exempt public authority), a partnership or a trust (and in the case of a trust, may include the trustee of the trust): s64A.

RG 5.131 Figure 3 illustrates how some associate relationships may arise between bodies corporate under s12(2)(a).

**Figure 3: Associations arising from control and common control of bodies corporate**



Note 2: Figure 3 is explained in RG 5.132–RG 5.133 (accessible version).

RG 5.132 Figure 3 shows X Holdings Ltd has 100% direct shareholdings in X Industries Ltd. X Holdings Ltd and X Industries Ltd are associates under s12(2)(a)(i) and (ii) because X Holdings Ltd controls X Industries Ltd. Figure 3 also shows Mr X has 100% direct shareholdings in X1 Ltd and 50.1% direct share holdings in X2 Ltd. X1 Ltd and X2 Ltd are associates under s12(2)(a)(iii) because they are both controlled by Mr X.

RG 5.133 Although Mr X controls X1 Ltd and X2 Ltd, he is not an associate of these entities on the basis of s12(2)(a) as this provision only operates to define bodies corporate as associates. However, Mr X would be deemed to have the relevant interests that X1 Ltd and X2 Ltd have due to the operation of s608(3): see RG 5.37–RG 5.56.

Note: Despite the fact that Mr X is not an associate on the basis of s12(2)(a), he may still be associated with X1 Ltd and X2 Ltd under s12(2)(b) or (c) (i.e. if he has entered into a relevant agreement or is acting in concert with those entities): see RG 5.134–RG 5.141.

### Relevant agreements and acting in concert

RG 5.134 Under s12(2), a person may be an associate of another person with respect to a body if:

- they propose to enter into, or have, a relevant agreement for the purpose of controlling or influencing the composition of the body's board or the conduct of the body's affairs (s12(2)(b)); or

- (b) they propose to act, or are acting, in concert in relation to the body's affairs (s12(2)(c)).

Note: In relation to a matter relating to securities in a body or managed investment scheme, the person may be an associate of the issuer of the securities and vice versa: s12(4).

RG 5.135 The circumstances in which an association may arise on the basis of a 'relevant agreement' under s12(2)(b) and 'acting in concert' under s12(2)(c) will often involve a significant overlap. This is because a 'relevant agreement' is defined broadly to include any agreement, arrangement or understanding, whether formal or informal, written or oral, and regardless of whether it is enforceable at law or in equity: s9. An understanding of this kind will often form a necessary part of concerted action: see *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No 4)* (1984) 2 ACLC 829 at 832.

RG 5.136 'Acting in concert' connotes knowing conduct the result of communication between the parties—not simultaneous actions which occur spontaneously (or coincidentally).

Note: *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 373; *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501 (*Bank of Western Australia*) at 524; *Bateman v Newhaven Park Stud Ltd* (2004) 49 ACSR 597 at [33]; and *Perpetual Custodians Ltd v IOOF Investment Management Ltd* (2012) 91 ACSR 530 at 542–543.

RG 5.137 It contemplates a consensus between parties as to a common purpose or objective. As with a 'relevant agreement', the understanding need not be formal or enforceable, and it is not essential that parties are committed to it or bound to support it—but there must be some adoption of it: *Bank of Western Australia* at 542. See also RG 5.30–RG 5.33.

RG 5.138 It is also unnecessary for a person to be doing or performing any physical or overt act to be 'acting in concert'. A person need only be 'engaged in a concert': *Industrial Equity Ltd v Commissioner for Corporate Affairs (Vic)* (1989) 1 ACSR 153 at 159.

### **Affairs of a body corporate**

RG 5.139 Both of the bases for an association under s12(2)(b) and (c) are concerned with the affairs of a body (or managed investment scheme). The affairs of a body corporate extend (but are not limited) to the wide variety of affairs referred to in s53: reg 1.0.18 of the Corporations Regulations. These include:

- (a) the promotion, formation, membership, control, business, trading, transactions and dealings, property, liabilities, profits and other income, receipts, losses, outgoings and expenditure of the body;
- (b) the internal management and proceedings of the body;

- (c) the ownership of shares, debentures and interests in a managed investment scheme made available by the body; and
- (d) the power of persons to exercise, or control the exercise of, voting or disposal of shares.

Note: In this guide, references to regulations (regs) are to the Corporations Regulations, unless otherwise specified.

### Drawing inferences from indicia of an association

RG 5.140 The nature and basis of many associate relationships mean that, in considering whether a relevant agreement exists, or whether parties are acting in concert, it will often be necessary to draw inferences from matters such as partial evidence, patterns of behaviour and a lack of a commercially viable explanation for the impugned circumstances: *Winepros Ltd* [2002] ATP 18 at [27] and *Dromana Estate Ltd OIR* [2006] ATP 8 at [25].

RG 5.141 Circumstances that may be relevant in determining whether an association is likely to exist include:

- (a) a shared goal or purpose of the parties involved;
- (b) prior collaborative conduct;
- (c) structural links (including trust arrangements, common directorships, family ties and business relationships);
- (d) common investments and dealings;
- (e) common knowledge of relevant facts; and
- (f) actions or dealings that are uncommercial.

Note: See *Viento Group Ltd* [2011] ATP 1 at [120], considering factors in *Mount Gibson Iron Limited* [2008] ATP 4. See also *CMI Limited* [2011] ATP 4.

### Exclusions from the definition of 'associate'

RG 5.142 Section 16(1) excludes from the definition of 'associate' in s12, associate relationships arising merely because:

- (a) one person gives advice to the other or acts on the other's behalf in the proper performance of the functions attaching to a professional capacity or a business relationship;
- (b) one person (a client) gives to another person, whose ordinary business includes dealing in financial products on the client's behalf (broker), specific instructions to acquire financial products on the client's behalf in the ordinary course of that business;
- (c) one person has sent, or proposes to send, to the other an offer under a takeover bid for shares held by the other; or
- (d) one person has appointed the other (other than for valuable consideration given by the other person or by an associate of the other

person) to vote as a proxy or representative at a meeting of members, or a class of members, of a body corporate.

Note: See also [CO 12/1209], which modifies s12(2) so that the ‘associate’ concept does not apply where one of the persons in an associate relationship or arrangement is ASIC (e.g. where ASIC and another person enter into a relevant agreement that would otherwise give rise to an association).

- RG 5.143 The exclusions only apply to associate relationships that would arise ‘merely because’ of the particular circumstances described. A person may still be an associate on account of understandings, arrangements or other connections falling outside those specified in s16(1).

## Disposal rights giving rise to an association

- RG 5.144 It is possible that a person who enters into an agreement that includes a disposal right may become associated with the counterparty under s12(2)(b) or (c), taking into account the definition of ‘affairs of a body corporate’ in s53. Examples of agreements that contain disposal rights are:
- (a) an on-market or off-market share acquisition agreement;
  - (b) an agreement for the acquisition of an equity derivative, whether entered into or acquired on-market or off-market;
  - (c) a pre-bid acceptance agreement (under which the bidder agrees with a holder that the holder will accept the bidder’s offer);
  - (d) a listing rule or voluntary escrow; and
  - (e) a pre-emptive right or right of first refusal.
- RG 5.145 Section 53 was originally intended to apply in the insolvency context and some of the paragraphs are more difficult to apply in the associate context. Other paragraphs are easier to read with s12. A disposal right may create an association because of references in s53 to the ‘ownership of shares’ or the ‘power of persons to dispose of or exercise control over the disposal of shares’: s53(e) and (f). See also RG 5.139.
- RG 5.146 If the definition of ‘associate’ applies to a disposal right, a party would be taken to have voting power not only in the securities that are the subject of the disposal right, but all securities held by the other party.
- RG 5.147 The legislative history of the ‘associate’ definition suggests that this result is wider than Parliament intended. This was a problem under the *Companies (Acquisition of Shares) Act 1980* and corresponding codes which was rectified under the old Corporations Law. Paragraph 1908 of the Explanatory Memorandum to the Corporations Bill 1988 stated that:
- any shares held by an associate of a person (the association arising by virtue of an agreement by the person to acquire particular shares from the other person) which are not subject to the agreement will not be included in the person’s entitlement.

RG 5.148 The Takeovers Panel has also recognised the legislative intention to exclude associations arising merely from agreements that involve nothing more than the sale and purchase of securities: see *Crescent Gold Limited 02* [2011] ATP 14 at [36].

Note: See also *Perpetual Custodians Ltd v IOOF Investment Management Ltd* (2012) 91 ACSR 530.

### **ASIC modification: Relevant agreements for disposal**

RG 5.149 [CO 13/520] modifies the definition of ‘associate’ in s12(2)(b) and (c) to make it clear that parties to a relevant agreement are not associates merely because the agreement contains a provision giving a party the right to dispose of securities in the designated body or to control the exercise of a power to dispose of the securities.

RG 5.150 Our modification is consistent with the underlying objective of the associate concept in s12. The concept groups together persons with a common purpose in relation to a company. It aims to ensure that a person is not treated as acting independently from a person with whom they are in fact cooperating.

RG 5.151 A disposal right is not, in itself, an indication that the parties have a common purpose or objective in relation to the broader direction or destiny of the company. The parties may not be seeking to achieve any more together than to simply acquire and dispose of securities.

### **Relevant interests**

RG 5.152 A disposal right gives rise to a relevant interest for the person who has the ability to dispose, or control the disposal of, the securities that are the subject of the right: s608. [CO 13/520] affects only the potential association between the parties, and not the relevant interest arising from the disposal right. As a result, a party’s voting power may still increase—but only on the basis of the acquisition of a relevant interest in the securities that are the subject of the agreement.

### **Circumstances where our modification does not apply**

RG 5.153 [CO 13/520] only relates to a disposal right. It does not operate in relation to any other provision of an agreement or any other relevant agreement between the parties that indicates the parties have a common purpose in relation to a company, or otherwise gives rise to an association.

Note: See also *Touch Holdings Limited* [2013] ATP 3.

RG 5.154 Examples of circumstances where our modification would not apply are when there is another term in the agreement or another agreement that:

- (a) the parties will seek to remove one or more of the directors;



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

## D Options

### Key points

An option is a security for the purposes of Chs 6–6C and can be the subject of a takeover bid and compulsory acquisition.

Because options are generally not voting shares, the requirements of Chs 6–6C will not apply directly to a person's relevant interests in options. However, options may give rise to a relevant interest in the securities underlying the option, which may be voting shares.

### Call options and put options

RG 5.155 An option is a contract under which one party (the option taker) has the right, but not the obligation, to buy or sell an asset from another (the option writer) at a set price on or before a specified future time.

RG 5.156 There are two basic types of options over securities: call options and put options. Table 8 summarises the position of the respective parties to a call option and a put option—in this guide, we refer to these parties as being either in the bought position or the sold position. These positions reflect the outcome of the exercise of the option.

**Table 8: Call and put options**

Option type	Party	Right/obligation	Position
Call option	Taker	Exercisable right to buy underlying securities	Bought
	Writer	Agrees to sell underlying securities if the taker exercises the option	Sold
Put option	Taker	Exercisable right to sell underlying securities	Sold
	Writer	Agrees to buy underlying securities if the taker exercises the option	Bought

RG 5.157 Options may be granted over existing shares or other securities. In addition, a company may grant call options that give the taker the right to be issued new shares in the company. Options of this kind are sometimes referred to as 'company options' or 'options over unissued shares'.

## Options as a security

- RG 5.158 Options may give rise to a relevant interest in the securities underlying the option, which may be voting shares.
- RG 5.159 However, an option may also be a security itself (distinct from its underlying security), for the purposes of Chs 6–6C, and may therefore be made the subject of a takeover bid and compulsory acquisition: s92(3)(e). However, because options are not voting shares, the general prohibition in s606 and the substantial holding requirements will generally not apply directly to a person’s relevant interests in options.

Note: A market-traded option is not a security for the purposes of Chs 6–6C: s92(3)(g).

## Options for the issue of new securities

- RG 5.160 Options to acquire new shares or other securities may be granted by the company that issues the underlying class of securities. Options for the issue of new shares may be listed on a financial market alongside the underlying shares.
- RG 5.161 Options for the issue of new shares do not give rise to a relevant interest in shares before shares are issued following exercise of the option. Although options for the issue of new shares may be said to relate to ‘unissued shares’, this reference should not be understood to imply that unissued shares exist. Shares are created at the time they are issued: *Re VGM Holdings Ltd* [1942] 1 All ER 224. See also *Exicom Pty Ltd v Futuris Corporation Ltd* (1995) 18 ACSR 404.
- RG 5.162 Additionally, the takeover and substantial holdings provisions do not account for unissued shares. Even if an option to have a share issued could be described as a power to control the future disposal of that share, the definition of ‘voting share’ in s9 only includes issued shares. Further, the accelerator provision (which brings forward the time for recognising a relevant interest under options and other agreements) only applies when the counterparty has a relevant interest in issued shares: s608(8)(a).

## Acquiring a relevant interest on exercise

- RG 5.163 The earliest time that the holder of an option for the issue of shares can acquire a relevant interest in the shares is when they are issued. On issue, the person to whom they are allotted will acquire a relevant interest in those shares for the purposes of the takeover and substantial holding provisions.
- RG 5.164 The acquisition of shares resulting from the exercise of an option to be issued shares is a transaction to which the general prohibition in s606 applies: see RG 5.103(b). The holder of an option over unissued shares may

therefore be prevented from exercising the option if doing so would result in a breach of the takeover threshold, unless an exception to the general prohibition applies to the resulting acquisition.

## Options over issued securities

- RG 5.165 Under the basic rule, a person has a relevant interest in securities, for the general prohibition in s606 and the substantial holding requirements, if they:
- (a) are the holder of the securities;
  - (b) have a power to exercise, or control the exercise of, a right to vote attached to the securities; or
  - (c) have a power to dispose of, or control the exercise of a power to dispose of, the securities: s608(1).
- RG 5.166 For most options over issued shares, the person in the bought position may not have a direct relevant interest in the underlying shares that derives from control over the voting or disposal of the shares underlying the option: s608(1)(b) and (c).
- RG 5.167 However, if the person in the sold position has an existing relevant interest in the underlying securities to which the options relate, the person in the bought position is deemed to acquire a relevant interest in the underlying securities before the options are exercised under s608(8)(b)(i)–(iii).
- RG 5.168 This is because a call taker has the right to purchase the number of underlying securities covered by the option agreement from the call writer. On performance of the agreement, enforcement of the right or exercise of the option, the call taker would have a relevant interest in the underlying shares. The accelerator provision in s608(8) brings back to the earliest possible point in time (i.e. when the option itself is granted) the moment at which a person is treated as having a relevant interest in the underlying shares: see RG 5.57–RG 5.64.
- RG 5.169 Similarly, a put taker has the right or option to require the put writer to purchase the number of securities covered by the option agreement. The put writer acquires a relevant interest in the underlying shares if the put taker has an existing relevant interest in those shares: s608(8)(b)(i)–(iii).
- RG 5.170 As a result the person in the bought position acquires a relevant interest in the securities underlying call and put options if the person in the sold position has a relevant interest in underlying securities (whether acquired before or after the option is issued).

Note: For exchange-traded options, see also RG 5.177–RG 5.179.

## Identification of the underlying shares

- RG 5.171 When determining whether a person in the bought position acquires a relevant interest in the underlying shares, the question of how identifiable the underlying shares must be with the options held needs to be considered.
- RG 5.172 In *Yaramin Pty Ltd v Augold NL* (1997) 11 ACLR 439 (*Yaramin*), at 442, de Jersey J rejected the argument that s9(6) of the *Companies (Acquisition of Shares) Act 1980* should be confined in its operation to agreements relating to designated shares or parcels of shares.
- RG 5.173 Taking into account the statements made by the court in the *Yaramin* case, and the policy underlying s608(2) (which states that it does not matter whether power or control cannot be related to a particular security), our view is that shares will be sufficiently identifiable with options, for the purpose of s608(8), if the person in the sold position has a relevant interest in shares that are equivalent in number and class to the shares to which the options relate.
- RG 5.174 If, while the options are current, the person in the sold position has a relevant interest in fewer shares than are required to satisfy the exercise of all the options, the person in the bought position only has a relevant interest in the lesser number of shares. Every time the number of shares in which the person in the sold position has a relevant interest changes, the number of shares in which the person in the bought position has a relevant interest changes accordingly.

## Position on exercise of options

- RG 5.175 A person in the bought position may have already acquired a relevant interest in the underlying shares as a result of entering into an option agreement. In this situation, the existence of their relevant interest in the underlying shares, and any voting power based on that interest, for the purposes of s606 and Pt 6C.1, will not change when the person purchases the underlying shares on exercising the call or put option. However, this is subject to a possible change in the level of relevant interest or voting power during the life of the option: see RG 5.174.

## Person in the sold position

- RG 5.176 The person in the bought position acquires a relevant interest in the underlying securities when the option is written (if the person in the sold position has a relevant interest in the underlying securities at the time). However, the person in the sold position does not cease to have a relevant interest merely as a result of entering into the option agreement. The person in the sold position will often retain their relevant interest until the option is exercised and the underlying securities transferred.

## Exchange-traded options

- RG 5.177 Exchange-traded options are standardised series of options that ASX has determined may be traded through its financial market. Exchange-traded options are options over issued shares.
- RG 5.178 Through a process of novation under the ASX Clear Operating Rules, exchange-tradeable option contracts are split in two on registration—with the effect that the operator of the clearing and settlement facility becomes a central counterparty standing between the taker and writer of the option. Each party’s obligation is then owed directly to the operator of the clearing and settlement facility. Delivery obligations on exercise of the option are also randomly assigned by the clearing and settlement operator within an option series.
- RG 5.179 While the application of s608(8) is complicated by the novation of option contracts on registering with the operator of the clearing and settlement facility, we consider that the provision operates so that a person in the bought position under an exchange-traded option is deemed to have a relevant interest in the underlying shares. This view is supported by the existence of the exemption in s609(6) and the policy underlying s671B(7) and paragraph (a)(ii) of the definition of ‘substantial holding’ in s9.

Note: See Information Release IR 98/14 *Exchange-traded options—Relief from s615 of the Corporations Law*, 14 August 1998.

## The partial exception

- RG 5.180 Section 609(6) operates as an exception to s608(8), so that a person does not have a relevant interest in securities merely because of:
- (a) a market-traded option over the securities (i.e. exchange-traded options); or
  - (b) a right to acquire the securities given by a derivative.
- RG 5.181 The exception does not apply, however, when considering a person’s relevant interest for the purposes of the substantial holding provisions: s671B(7) and the definition of ‘substantial holding’ in s9. As such, a person must take into account any relevant interests they or their associates may have in considering their disclosure obligations under the substantial holding provisions.
- RG 5.182 Where the exception in s609(6) applies, for the purposes of the takeover provisions, it ceases to apply when the obligation to make or take delivery of the securities arises.

## Association

- RG 5.183 It is possible that an option agreement may result in an association between the parties under s12(2). If parties to an option are associates, they need to account for the relevant interests held by the counterparty in considering their

obligations under the takeover and substantial holding provisions—including any relevant interests that are not the subject of the option agreement.

Note: For example, the option may be a relevant agreement entered into for the purpose of controlling or influencing the conduct of share ownership or the power of persons to dispose of, or exercise control over the disposal of, shares: s12(2)(b) read with reg 1.0.18 and s53(e) and (f). See also RG 5.124–RG 5.154.

- RG 5.184 However, under the relief provided by [CO 13/520], no association arises between the parties merely because an option agreement contains a right to dispose of underlying securities, or to control the exercise of a power to dispose: see RG 5.149–RG 5.152.
- RG 5.185 As such, most option agreements will not give rise to an association between the parties to the option. However, if the option agreement contains other terms (e.g. an agreement to consult on voting), the parties may be associated: see RG 5.153–RG 5.154.

## Substantial holding disclosure

- RG 5.186 In some cases, particularly when a call or put option is traded on an exchange, the person in the bought position may have difficulty in complying with the obligation under s671B(1) to notify details of the relevant interests that they themselves and the person in the sold position have in the underlying shares. This would be the case if the person in the bought position does not know the identity of, or details of the relevant interests of, the person in the sold position.
- RG 5.187 In this case, we accept that the person in the bought position discharges their obligation if they assess their entitlements and, where appropriate, lodge notices under s671B on the basis that the person in the sold position has relevant interests in enough shares to satisfy their obligations under the options, without specifying the nature of the relevant interests of the person in the sold position.
- RG 5.188 If a person were to contravene s671B(1) in such circumstances, they would not be liable to pay damages to a person who suffers loss or damage as a result of the contravention: s671C(2).

## E Warrants

### Key points

We have given class order relief so that parties to call and put warrants that are quoted on ASX do not have a relevant interest in securities underlying the warrant in certain circumstances.

Under our relief, the holders of quoted call warrants do not have a relevant interest before exercise of the warrant—however, this does not apply for the purposes of the substantial holding requirements. Our relief extends to issuers of covered call warrants who have lodged the underlying securities with a trustee and have limited control over the securities.

Issuers of quoted put warrants are also able to disregard their relevant interests under our relief, provided that they do not exercise control over voting or disposal of the underlying securities.

Our relief extends to warrant trustees with certain discretions under a warrant trust deed. We have also given relief so that parties to a quoted warrant are not associates under s12.

### What are warrants?

- RG 5.189 Warrants are financial products, primarily issued by financial institutions, which provide a level of exposure to an underlying asset, instrument or index. The terms of warrants vary as they are agreed between the issuer and holder. However, a warrant series that meets the requisite criteria may be admitted to trading on ASX.
- RG 5.190 Many deliverable warrants are similar to options over issued shares—providing a right to the holder to buy or sell a share at a set price (the strike price) until a date in the future (the expiry date). Table 9 summarises some of these types of warrants.
- RG 5.191 As with options, warrants can give rise to a relevant interest in underlying securities, which may need to be taken into account when determining a person’s obligations under the takeover and substantial holding provisions.

**Table 9: Characteristics of some deliverable warrants commonly relating to shares**

Type of warrant	Key characteristic
Regular call warrant	Entitles the holder to buy a fixed quantity of the underlying shares from the issuer.
Regular put warrant	Entitles the holder to sell a fixed quantity of the underlying shares to the issuer.



Type of warrant	Key characteristic
Instalment warrant	Following payment of an initial instalment, the holder is entitled to specified rights, such as dividends, distributions and franking credits, paid by an underlying share. The holder may make an optional final payment later to purchase the share in full. The 'unpaid amount' for the share is often treated as a loan from the warrant issuer.
Endowment warrant	Typically, a long-term warrant carrying the right to purchase a share by payment of an outstanding amount which fluctuates over time. The outstanding amount will generally increase with the application of regular interest payments and decrease when dividends and other distributions from the share are applied.

Note: This table includes a general description of the common features of each type of warrant. Individual warrant terms may vary significantly from those described.

## General characteristics and similarities with options

RG 5.192 Warrants have the following characteristics that are similar to options and that distinguish them from shares:

- (a) they are frequently designed to give an investor financial exposure to the performance of the underlying entity or commodity—rather than, necessarily, control over the company;
- (b) they do not give direct control over the underlying securities until they are exercised; and
- (c) they generally have relatively short, fixed lives, compared with equities.

RG 5.193 The rights and obligations of warrant issuers are often very similar to those of option writers. Likewise, the rights and obligations of warrant holders are very similar to those of option takers.

### Quoted warrants

RG 5.194 Warrants that are quoted on ASX generally have these additional characteristics:

- (a) ASX applies an overall limit to the proportion of the underlying securities over which exercisable quoted warrants may be issued (except for fully covered warrants);
- (b) there are specific disclosure regimes for warrant issuers in the ASX Operating Rules;
- (c) within a series, their terms are standardised, fully disclosed and are not variable by the issuer or holder;
- (d) they are primarily marketed to, and acquired and traded by, retail investors; and
- (e) in general, they have relatively longer lives than exchange-traded options (except for long-life flex options).

- RG 5.195 Unlike exchange-traded option writers, who are anonymous except to the operator of the relevant clearing and settlement facility, the issuer of a quoted warrant is a single entity that is always readily identifiable, so the application of s606 and the substantial holding provisions to warrants is more focused.

## Our approach to warrants and relief

- RG 5.196 The terms of warrant agreements set out the rights and obligations of the holders and writers of warrants in relation to the underlying securities. Given the variety of terms on which warrants may be issued, the appropriate consequence of issuing or acquiring a warrant under the takeover or substantial holding provisions will necessarily differ between warrant series.
- RG 5.197 Accordingly, as a general principle, we base our regulatory treatment of warrants on the rights and obligations that different persons have in relation to particular warrants, regardless of the type of warrant. The criteria we use for determining relief for warrants are the specific mechanisms by which particular warrants deal with the issues of ownership, disposal power and voting rights of the underlying shares, and the timing and nature of exercising rights, rather than the structure or form of the warrants.

### **ASIC relief: Relevant interests arising from quoted warrants**

- RG 5.198 We recognise that, for many warrants, the rights and obligations in relation to underlying securities are sufficiently remote or tenuous that they are unlikely to be used as a means of gaining control of a company. For this reason, we have provided class order relief allowing warrant issuers and holders (and, where applicable, trustees) to disregard, in some cases, a relevant interest in underlying securities arising from warrants quoted on ASX. Table 10 contains a summary of the relief that is contained in [CO 13/526].

Note: Given the variety of terms on which warrants are issued, a particular warrant series may give rise to a relevant interest in underlying securities on a basis other than those listed in Table 10.

**Table 10: Summary of ASIC’s relevant interest relief for quoted warrants under [CO 13/526]**

Party	Relevant interest	Treatment of relevant interest	Reference
<b>Call warrants</b>			
Holder	Accelerated relevant interest arising from the right to acquire securities underlying the warrant from the issuer: s608(8)  Relevant interest arising from a right to require the securities are held in trust under the warrant	Substantial holding disclosure—no relief provided. The relevant interest must be counted.  Takeovers—relief provided to disregard the relevant interest if no power exists under the warrant to control voting or disposal.	RG 5.206– RG 5.211
Issuer	Relevant interest arising from holding underlying securities	No relief provided. The relevant interest must be counted.	RG 5.212– RG 5.216
	Relevant interest in underlying securities held in trust by a trustee under the terms of the warrant	Relief provided to disregard the relevant interest until expiry, provided that the issuer has no power to control voting or disposal other than to enforce certain terms of the trust.	RG 5.212– RG 5.216
Trustee	Relevant interest arising from holding the securities on trust (or having lent securities held in trust) where, under the trust, the trustee has certain discretions that may be exercised for the purposes of satisfying the rights or obligations of the issuer or holder	Relief provided to disregard the relevant interest in the trust securities, provided that: <ul style="list-style-type: none"> <li>• discretions under the terms of the trust deed are limited to specified matters and exercised on ordinary commercial terms or like manner; or</li> <li>• the trustee is a bare trustee that cannot rely on s609(2).</li> </ul>	RG 5.224– RG 5.229
<b>Put warrants</b>			
Holder	Relevant interest arising from holding underlying securities	No relief provided. The relevant interest must be counted.	RG 5.217– RG 5.218
Issuer	Accelerated relevant interest arising from the acquisition of securities from the holder on exercise of the holder’s right to put	Relief provided to disregard the relevant interest if no power exists under the warrant to control voting or disposal.	RG 5.219– RG 5.223
	Relevant interest in underlying securities arising from the rights given to the issuer under the terms of the warrant, or a trust securing the obligations of the warrant holder (and/or issuer)	Relief provided to disregard the relevant interest until expiry, provided that the issuer has no power to control voting or disposal other than to enforce certain terms of the trust on exercise, expiry or default by the warrant holder.	RG 5.219– RG 5.223

Party	Relevant interest	Treatment of relevant interest	Reference
Trustee	Relevant interest arising from holding the securities on trust (or having lent securities held on trust) where, under the trust, the trustee has certain discretions that may be exercised for the purposes of satisfying the rights or obligations of the issuer or holder	Relief provided to disregard the relevant interest in the trust securities, provided that: <ul style="list-style-type: none"> <li>discretions under the terms of the trust deed are limited to specified matters and exercised on ordinary commercial terms or like manner; or</li> <li>the trustee is a bare trustee that cannot rely on s609(2).</li> </ul>	RG 5.224–RG 5.229

### Association relief

- RG 5.199 As with options, in addition to giving rise to a relevant interest in underlying securities, a warrant may also result in the issuer and holder becoming associates: see also RG 5.183–RG 5.185.
- RG 5.200 The nature of the relationship between most issuers and holders of quoted warrants means that the mere fact of entering into a warrant agreement should not constitute an association that the law recognises for tracing entitlements or relevant interests—provided that the association does not give a call warrant holder either a direct or indirect power over the voting shares.
- RG 5.201 For certainty, we have provided class order relief to disregard any association between warrant issuers and holders arising merely because of the warrant: see RG 5.230–RG 5.234.

### Reliance on ASIC relief

- RG 5.202 We are concerned that warrant issues should not be used to abuse the policy underlying our relief for warrants through sham transactions.
- RG 5.203 If a person does anything that is not within the spirit of our class order relief, or uses the class order relief in a way that is contrary to the principles and purposes set out in s602, we may apply to the Takeovers Panel for declarations and orders. Any party seeking to use warrants in a control transaction is advised to seek our advice before embarking on any such course of conduct.
- RG 5.204 We may also consider taking injunctive, or other action, against parties that act outside the class order relief and contravene Chs 6 and/or 6C. We may also review the suitability for licensing of any AFS licensee who breaches, or facilitates the breach of, any of the takeover or substantial holding provisions (including by failing to comply with the requirements of the class order relief).

## Call warrants

RG 5.205 Call warrants over underlying shares can give rise to a relevant interest in some cases. We have provided relevant interest relief in certain circumstances.

### Holder's relevant interests

RG 5.206 Call warrants give the holder of a warrant the right, but not the obligation, to acquire the underlying securities under the terms of the warrant agreement. Therefore, a call warrant holder has a relevant interest in the securities that are the subject of the warrant agreement and in which the warrant issuer has a relevant interest.

RG 5.207 Section 608(8) will accelerate that relevant interest to the point of entry into the warrant agreement, even if the warrant or the right is only exercisable in the future. The call warrant holder has a relevant interest in the underlying securities even if the exercise of the warrant is subject to strict conditions: s608(2).

RG 5.208 Under s609(6)(b), a person does not have a relevant interest merely because they have a right to acquire the securities given by a derivative. Some warrants are derivatives—however, others may not be because they are securities: see s761D(3)(c), 764A(1)(a), reg 7.1.04(7) and the definition of 'security' in s761A. See also the definition of 'warrant' in reg 1.0.02.

RG 5.209 Additionally, s609(6)(b) only applies to a relevant interest that the holder has because of their right to acquire the securities. Without relief, the holder may, additionally or alternatively, have a relevant interest because of a right under the warrant to require the securities to be held in trust.

RG 5.210 [CO 13/526] provides relief to the holders of call warrants that may be securities, or otherwise fall outside s609(6) on their terms, so that the holders are able to disregard a relevant interest arising from a warrant in a similar way that relevant interests are disregarded when s609(6)(b) applies.

RG 5.211 Although the result of the relief is that no relevant interest arises for the purposes of the takeover provisions, as a consequence of holding a call warrant, any relevant interest that would arise, but for the relief, must still be taken into account for the purposes of the substantial holding provisions. This is consistent with the treatment of derivatives under the definition of 'substantial holding' in s9 and 671B(7).

### Issuer's relevant interests

RG 5.212 The issuer of a covered call warrant normally retains a relevant interest in securities that it holds as cover for its obligations under the warrant. It retains the relevant interest, even when it places underlying securities in trust for

holders. This is because the warrant is only a conditional agreement. If the holder does not exercise the warrant, or defaults in some way, the effect of the basic warrant agreement is that the securities remain the property of the issuer, or return to the issuer out of the trust arrangements. Therefore, it will actually be very difficult for the issuer to dispose of these securities while the warrant exists, in a way that results in the issuer ceasing to have a relevant interest.

- RG 5.213 For an issuer to dispose of the underlying securities, it must first transfer its rights and obligations in relation to the securities to another person. The onus will lie squarely on any issuer of covered call warrants, who asserts that it no longer has a relevant interest in the cover securities, to convince ASIC that its arrangements relating to the cover securities mean that it has disposed of those securities.
- RG 5.214 We have issued [CO 13/526] for issuers of covered call warrants to disregard any relevant interest that may arise from holding the underlying securities as cover against the rights of the holders and the obligations of the issuer.
- RG 5.215 The class order only applies if:
- (a) the underlying securities are held in trust under the terms of the call warrant; and
  - (b) the call warrant issuer does not have the power to control voting—other than to enforce the terms of the trust, or to retain ownership if the call warrant expires unexercised or the call warrant holder defaults.
- RG 5.216 If a call warrant issuer has ensured that the underlying securities are lodged with a nominee company or trustee, and it has no power to control voting or disposal of the underlying securities (other than requiring the trustee or nominee to comply with the provisions of the trust or warrant agreement), the relevant interest that a call warrant issuer may have in the underlying securities is sufficiently remote for it to be disregarded.

## Put warrants

### Holder's relevant interests

- RG 5.217 We will not grant relief to put warrant holders from the takeover or substantial holding provisions—except to disregard an association formed solely by entry into a quoted put warrant agreement.
- RG 5.218 There is no reason for granting relief to put warrant holders, because holding the warrant does not affect their control over any underlying securities.

## Issuer's relevant interests

- RG 5.219 Put warrants give the holder the right, but not the obligation, to sell the underlying securities to the issuer. Therefore, a put warrant issuer has a relevant interest in the securities that are the subject of the warrant agreement, and in which the put warrant holder has a relevant interest. Section 608(8) will accelerate that relevant interest to the point of entry into the warrant agreement, even if the warrant or the right is only exercisable by the warrant holder, and only at some time in the future.
- RG 5.220 A warrant issuer may also have a relevant interest in the underlying security because the holder, under the terms of the warrant (or the trust securing the obligations under the warrant), has given the issuer a right in relation to the securities.
- RG 5.221 In particular, this may arise in relation to instalment or endowment warrants with a loan component. Under such warrants, the holder may be required to place the underlying security in trust to secure their obligations. Without relief, the issuer may have a relevant interest under s608(8)(b)(ii), because the issuer has a right to dispose of the securities held in trust if the holder does not exercise the put option.
- RG 5.222 We have granted relief under [CO 13/526] so that the relevant interests of put warrant issuers are disregarded in these situations.
- RG 5.223 We have granted this relief because:
- (a) as a result of the secondary trading of quoted warrants, issuers of quoted put warrants will not be able to trace the relevant interests or intentions of the warrant holders; and
  - (b) issuers have no present control over the underlying securities.

## Trustees and associations

### Warrant trustee relief

- RG 5.224 We have granted relief in [CO 13/526] in relation to the general prohibition in s606 and the substantial holding provisions for a trustee who holds securities on trust to satisfy the obligations of an issuer or holder of warrants.
- RG 5.225 The relief allows the trustee to disregard any relevant interest in the securities it holds as cover that may arise merely because the trustee has certain discretions under the trust deed (including trust securities that have been lent by the trustee under securities lending arrangements). The relief applies when the trustee has certain discretions that might prevent it from being covered by the exception for bare trustees in s609(2).

- RG 5.226 Allowable discretions include:
- (a) discretions available on the default or insolvency of the issuer or holder;
  - (b) discretions in relation to certain transactions affecting share capital, such as rights issues or capital reconstructions;
  - (c) discretions in relation to takeover bids or schemes of arrangement (the relief allows for a discretion to bring forward the time for exercise but not a discretion to decide whether to accept or reject a bid); and
  - (d) discretions to lend the securities.
- RG 5.227 The discretions must be exercised on ordinary commercial terms or in an ordinary commercial manner.
- RG 5.228 We have provided the relief for trustees because, in the circumstances in which the relief applies, the trustee's power is tenuous and information about any substantial holding resulting from the trustee's role would likely be immaterial to the market.
- RG 5.229 [CO 13/526] recognises that the purpose of the trust may be to secure the obligations of the warrant holder under the warrant as well as the warrant issuer. It recognises that, under the terms of the warrant, a trustee may exercise a range of discretionary powers over the securities in trust. It is unlikely that these powers would be used as a means of gaining control of a company.

## Associations

- RG 5.230 Entering into a call warrant agreement or put warrant agreement may make the issuer and holder associates under s12(2). This may also have implications in terms of s608(3)(a), under which a person is deemed to have the same relevant interest as another body corporate in which it has voting power of over 20%. An associate's relevant interests in the body corporate are included in calculating a person's voting power.
- RG 5.231 For quoted warrants, the aggregation of voting power of issuers and holders by s608(3)(a) is inappropriate because:
- (a) most warrant issuers are financial institutions with widespread and diverse shareholdings, and have funds management arms that trade actively in securities. This would make monitoring the issuer's holdings very difficult for warrant holders; and
  - (b) most warrant issuers have a wide spread of holders, who are likely to have portfolios of their own, and these would need to be aggregated with the issuer's holdings. This would make monitoring the holders' entitlements very difficult for warrant issuers.



- RG 5.232 Because the issuer is so easily identifiable in the case of a warrant, aggregations can readily focus on one person.
- RG 5.233 [CO 13/526] gives relief to disregard any association between warrant holders and warrant issuers merely because of the warrant.
- RG 5.234 The remoteness of an association between warrant issuers and holders that arises solely because of a warrant agreement means that the association should not be recognised for the purposes of aggregation under s608(8)(a). Our class order relief operates so that the association between the issuers and holders will clearly not operate in relation to s608(8)(a).

## Terms and scope of ASIC relief

- RG 5.235 Our class order relief only applies on the strict terms of the relief. There are a number of key limitations on our relief that need to be considered.
- RG 5.236 The relief also operates, in some cases, only to defer recognition of a relevant interest to a later event. As a result, a person may be taken to acquire underlying securities at that later time when the relief is no longer applicable.

## Control over voting or disposal

- RG 5.237 Our class order relief does not apply if the call warrant holder or put warrant issuer, at any time until the exercise of the warrant, has the power to control voting or disposal of any of the securities underlying the warrant (other than as provided for in the class order).

## Quoted warrants

- RG 5.238 Our class order relief only applies to quoted warrants over listed securities. Many of the preconditions for relief—such as standardised contracts, disclosure by issuers, and anonymous markets—apply only to quoted warrants. The continuous disclosure requirements for listed securities also add a desirable level of transparency to trading in warrants.

## When class order relief ceases to apply

- RG 5.239 Our class order relief for call and put warrants ceases to apply:
- (a) on the exercise, maturing or lapsing of warrants. If a warrant is exercised or allowed to mature, either the call warrant holder or the call warrant issuer obtains control over the underlying securities. Therefore,

it is logical to recognise the relevant interests that had previously been deemed to be too remote or tenuous; or

- (b) if the terms of a warrant change, so that either the issuer or the holder acquires the power to control voting or disposal of the underlying securities.

### Passive acquisition

- RG 5.240 If, under the terms of a warrant, the holder or issuer automatically gains a relevant interest in voting shares or interests on the expiry of a warrant, the person will still legally acquire the shares or interests when it acquires the relevant interest under the terms of the warrant agreement. There will still be an acquisition, even though the person takes no positive action at the time.
- RG 5.241 On issuing or acquiring the warrant, the person will enter into a transaction in relation to the underlying securities and will acquire the relevant interest in the securities as a result of entering into the warrant agreement. We reject any suggestion that it would be possible to construct a warrant agreement that would give a person a relevant interest in the underlying securities without entering into a transaction at the time of gaining the relevant interest.
- RG 5.242 Similarly, if a person avails themselves of our class order relief, on the exercise or lapse of the warrant, any relevant interest or voting power that has been disregarded under the relief will commence being counted for the purposes of the Corporations Act, and the person will acquire the relevant interest, and therefore the shares, at the time the relief ceases to have effect. Even though the agreement had been entered into previously, and the relevant interest was only acquired on the lapse of the effect of the relief, the person would acquire the underlying securities at the time of gaining the relevant interest.

## Substantial holding obligations

- RG 5.243 We will not give relief to disregard any relevant interest or entitlement that may arise from holding a call warrant for the purposes of the substantial holding provisions.
- RG 5.244 We recognise that call warrant holders may have difficulty in determining their voting power for the purposes of the substantial holding provisions. However, we consider that, because the markets for the underlying securities and derivatives are closely related, it is reasonable to require call warrant holders to disclose their holdings of warrants to the market by aggregating them with any other relevant interests in, or entitlements to, the underlying securities.

RG 5.245 In accordance with this approach, there are two ways that call warrant holders can comply with the substantial holding notification requirements:

- (a) by closely monitoring the warrant issuer's holdings of the underlying securities and:
  - (i) aggregating the relevant interest that the holder gains through its holding of call warrants with any other entitlements to underlying securities it has apart from its call warrants; and
  - (ii) reporting any changes in its entitlements arising from changes in the warrant issuer's holdings; or

Note: It would not be acceptable for a warrant holder who takes this approach to seek to avoid its obligations under the substantial holding provisions by deliberately avoiding inquiring about any changes in the warrant issuer's holdings in the underlying securities.

- (b) (the preferred way) by assuming that the warrant issuer currently has sufficient securities to meet any obligations under the warrants it has issued—that is, assume that each warrant held gives voting power in relation to the relevant number of underlying securities, as recommended for options: see RG 5.186–RG 5.188.

## F Escrow arrangements

### Key points

A person may acquire a relevant interest in securities as a result of an agreement placing the securities into escrow. In some cases, this may mean an entity has a relevant interest in its own securities.

We have provided legislative relief to modify s609 so that a relevant interest is not acquired for the purpose of Ch 6 by:

- the market operator and the company that must apply restrictions on the disposal of the securities under the listing rules of a prescribed financial market; or
- a company, lead manager or professional underwriter that enters into a voluntary escrow arrangement with a holder of securities in connection with an initial public offer (IPO).

Our relief does not apply to the requirement to disclose substantial holdings in Pt 6C.1.

Where the requirements of the legislative relief are not met in relation to a voluntary escrow arrangement, where appropriate we may give individual relief to modify s609, so that a company, underwriter or lead manager does not have a relevant interest in the escrowed securities. These applications will be assessed on a case-by-case basis.

### Relevant interests arising from escrow arrangements

RG 5.246 A holder of securities may enter into arrangements to have those securities held in escrow for a period of time. Under an escrow arrangement, the holder generally agrees not to dispose of the securities, or rights or interests connected with the securities, for the duration of the escrow. An escrow arrangement may contain exceptions which allow the holder to dispose of the securities, or rights or interests connected with the securities, in limited circumstances. For example, holders may be allowed to dispose of their escrow securities under an equal access share buy-back.

RG 5.247 An entity will commonly enter into escrow arrangements with certain existing security holders in support of a public offering of securities. This may promote investor confidence and an orderly market: see RG 5.254–RG 5.257.

### Relevant interests of parties to escrow arrangements

RG 5.248 A person who enters into an escrow arrangement with a holder has a relevant interest in the securities that are subject to the escrow because the person

controls the exercise of a power to dispose of the securities: s608(1)(c). The power to control disposal includes the ‘negative power’ of restriction: RG 5.35.

Note: See also s609(7), which provides that a relevant interest does not arise from certain agreements which ‘restrict’ the disposal of securities for no more than three months.

- RG 5.249 Section 608(9) states that s608 may result in a body corporate having a relevant interest in its own securities. This confirms that a company may have a relevant interest in its own securities if it has entered into an escrow arrangement with a security holder.
- RG 5.250 In the absence of relief, companies and other counterparties to an escrow arrangement will generally have to account for their relevant interests in the securities held in escrow in considering their obligations under both the takeover and substantial holding provisions.

## Escrow arrangements under the listing rules of a prescribed financial market

- RG 5.251 Under the listing rules of various prescribed financial markets, listed companies and companies seeking listing may be required to apply restrictions on the disposal by holders of certain ‘restricted securities’, and enter into a restriction agreement placing the securities in escrow, so that the holder may not deal with the securities for a specified time: see for example ASX Listing Rules 9.1 and 9.3 and Appendix 9B.

Note: In this guide, we refer to such arrangements as ‘listing rule escrow’.

### ASIC modification: Escrow arrangements under listing rules

- RG 5.252 [CO 13/520] modifies s609 so that a listed company does not have a relevant interest in securities merely because the company must apply restrictions on the disposal of the securities as part of a listing rule escrow under the listing rules of a prescribed financial market. Our modification applies for the purposes of the takeover provisions in Ch 6, but not the substantial holding requirements in Pt 6C.1.
- RG 5.253 Our class order also modifies s609 so that the market operator does not have a relevant interest merely because it has the power to control the disposal of securities that are the subject of a listing rule escrow. This includes, where relevant, the market operator’s power to consent to the release of securities from the escrow in the event of a takeover bid or scheme of arrangement. The relief for the market operator applies for the purposes of both the takeover provisions in Ch 6 and the substantial holding requirements in Pt 6C.1.

## Why we consider relief for listing rule escrows is appropriate

- RG 5.254 We have given the relief in [CO 13/520] to facilitate the benefit of a ‘fair, orderly and transparent market’, which the listing rule escrow requirements seek to achieve: s792A.
- RG 5.255 Listing rule escrow is designed to:
- (a) reduce the opportunity and incentive for:
    - (i) related parties of the company and promoters to sell assets of dubious value to the company; or
    - (ii) seed capitalists who are likely to have paid a substantially lower price for their securities than incoming investors;
      - making a windfall profit at the expense of incoming investors; and
  - (b) align the economic interests of a vendor of an asset to the company, a seed capitalist, a promoter or a provider of professional services rewarded with securities for the duration of the escrow with those of the incoming investors.
- RG 5.256 Escrow delays the time in which a vendor can realise the value of the securities. The delay allows the value of assets or services sold to an entity to become more apparent, and for the market price of the entity’s securities to adjust before the vendor receives full consideration. In that way, the business risk is shared between the vendor and other investors.
- RG 5.257 The escrow arrangements may promote an orderly market in the securities by preventing a sell-down of a substantial number of securities immediately after the securities are issued.

## Voluntary escrow arrangements

- RG 5.258 In some cases, a holder may be requested to enter into an escrow arrangement, in circumstances where a listing rule escrow is not required (a ‘voluntary escrow’) by:
- (a) a company; or
  - (b) an underwriter or lead manager.
- RG 5.259 The company, underwriter or lead manager may require the voluntary escrow to promote investor confidence in an offer of securities.

## ASIC modification: Voluntary escrow arrangements

- RG 5.260 The relief in [CO 13/520] also modifies s609 in relation to voluntary escrow arrangements in connection with an IPO. As with the relief for companies for

listing rule escrow under [CO 13/520], our relief applies for the purposes of the takeover provisions in Ch 6, but not the substantial holding requirements in s671B: see RG 5.285–RG 5.286.

RG 5.261 Our relief is available to a company, underwriter or lead manager who requires a holder to enter into a voluntary escrow arrangement in connection with an IPO. These are the entities that generally acquire a relevant interest under voluntary escrow arrangements.

#### **Rationale for relief**

RG 5.262 Voluntary escrows may provide similar benefits to listing rule escrows:

- (a) aligning the interests of the holders that are subject to escrow with those incoming investors under an IPO;
- (b) promoting an orderly market for securities following an IPO; and
- (c) increasing investor confidence when participating in an IPO: see RG 5.254–RG 5.257.

RG 5.263 Our relief only applies to escrow arrangements entered into in connection with an IPO because this is the most common scenario in which the benefits of a voluntary escrow are evident. It also ensures that our relief is not available to extend a prior escrow arrangement, such as a listing rule escrow.

RG 5.264 Our relief is available to companies, underwriters and lead managers because we consider that:

- (a) relief for companies is consistent with the rationale of allowing the time value of securities in the company to be sufficiently established following listing; and
- (b) relief for underwriters and lead managers promotes capital raisings and reorganisation by allowing the underwriters and lead managers to protect themselves from an early sell-down which may depress the price of securities.

RG 5.265 Relief for professional underwriters and lead managers that underwrite or manage offers of securities in the ordinary course of their business are less likely to have a defensive purpose in requiring an escrow arrangement.

RG 5.266 However, our relief for voluntary escrows is only available for escrow arrangements that meet certain requirements and in certain circumstances. This is because the benefits of an escrow must be balanced against the possible defensive effect of an escrow against any potential takeover. The requirements for our relief are discussed further below: see RG 5.267–RG 5.277.

## Circumstances and conditions of our relief

RG 5.267 Our class order relief can only be relied on where the relevant escrow agreements meet the requirements set out in Table 11.

**Table 11: Voluntary escrow agreements: Permitted terms**

Requirement	Details
Restriction	The escrow agreement must restrict disposal and not voting.
Terms relating to takeover bids	<p>The escrow agreement must allow the holder to accept into a successful takeover bid and allow the securities to be transferred or cancelled as part of a merger by scheme of arrangement.</p> <p>A 'successful bid' for this purpose is one where the holders of at least 50% of the bid class securities that are not subject to escrow, and to which the offers under the bid relate, have accepted.</p> <p>The escrow agreement must require the securities to be returned to escrow if the bid does not become unconditional. The wording of the proposed agreement must reflect this requirement as it applies to both a full and a proportional bid.</p>
Duration	<p>The escrow must terminate no later than:</p> <ul style="list-style-type: none"> <li>• for an escrow arrangement with an underwriter or lead manager—one year after the date that the parties enter into the voluntary escrow; or</li> <li>• for an escrow arrangement with the company—two years after the date that the parties enter into the voluntary escrow</li> </ul>
Permitted transfers	<p><b>Transfers where there is no change in beneficial ownership</b></p> <p>Where the escrowed securities are beneficially held, the holder may only transfer the escrowed securities to another holder when:</p> <ul style="list-style-type: none"> <li>• the transfer does not result in a change in the beneficial ownership of the escrowed securities;</li> <li>• the transfer does not extend the duration of the escrow under the escrow agreement; and</li> <li>• the transferee agrees to inherit the same restrictions on voting and disposal as under the escrow agreement.</li> </ul> <p><b>Transfers where there is an exercise of security interests over the escrowed securities</b></p> <p>Where the escrow allows the holder to create a security interest in favour of a financial institution for a loan or other financial accommodation, the holder must not create the security interest unless the financial institution agrees in writing to take or acquire the security interest subject to the terms of the escrow agreement.</p>



**No restriction on voting**

RG 5.268 An escrow agreement should not restrict a holder's ability to exercise the voting rights attached to securities placed in escrow. A voting restriction is not necessary to achieve the underlying objectives of escrow: see RG 5.254–RG 5.257. An escrow agreement that confers the power to control the exercise of votes attached to securities in escrow may indicate a purpose other than escrow, for which relevant interest relief may not be appropriate.

**Carve-out for a successful bid**

RG 5.269 Our requirement that an escrow agreement must allow the holder to accept into a successful takeover bid is similar to the requirement in ASX Listing Rule 9.5. It is designed to reduce the defensive effect of the escrow.

RG 5.270 However, even if holders are free to accept a successful takeover bid, an escrow arrangement may still have a defensive effect. A potential bidder may be discouraged because it is more difficult to build a pre-bid stake. There may also be an increased difficulty for a bidder in having to first acquire more than 50% of the available securities (those that are not subject to escrow).

**Duration of voluntary escrow**

RG 5.271 Given the potential defensive effect of escrow arrangements, under our relief the maximum duration permitted for the voluntary escrow is one year for underwriter escrow or 'lead manager escrow' and two years for company escrow.

RG 5.272 These periods are consistent with the periods applicable to listing rule escrows, and are designed to provide a balance between the following considerations:

- (a) allowing sufficient delay for the market to value goods and services provided by the holder and to prevent a sell-down immediately after the securities are quoted; and
- (b) minimising the period during which the holder is restrained from further selling. A prolonged escrow may affect the market for control over the company.

**Permitted transfers of escrowed securities**

RG 5.273 Voluntary escrow agreements may contain exceptions which allow the holder to transfer their rights or interests in the securities in limited prescribed circumstances.

RG 5.274 Where the escrowed securities are held by a trust or a nominee, our relief continues to apply even where there is a change of trustee or nominee.

Similar to the requirement in ASX Listing Rule 9.6, the escrow securities may only be transferred when:

- (a) the transfer does not involve a change in the beneficial ownership of the escrowed securities;
- (b) the transfer does not extend the period of the escrow agreement; and
- (c) the transferee agrees to inherit the same restrictions on disposal of escrowed securities under the escrow agreement.

RG 5.275 Unlike listing rule escrow, voluntary escrow arrangements may allow the holder to create a security interest in the escrow securities in favour of a financial institution as security for a loan or other financial accommodation. Where this occurs, the financial institution must agree in writing that no escrowed securities may be transferred to the financial institution in connection with the security interests until the expiry of the escrow period.

Note: Under ASX Listing Rule 9.1, the holder of the restricted securities and each 'controller' are required to enter into a restriction deed in the form set out in Appendix 9A: see ASX Listing Rule 19.12 for the definition of 'controller' under the ASX Listing Rules. Under clause 1 of Appendix 9A, the holder of the restricted securities is prohibited from creating, or agreeing or offering to create, any security interests in the restricted securities. A similar restriction applies to the controller in relation to their controller interests in the holder of restricted securities under clause 2 of Appendix 9A.

RG 5.276 Where the voluntary escrow arrangement permits the holder to create a security interest over the escrowed securities, our relief also continues to apply where the bona fide third-party financial institution exercises its security interest over the escrowed securities, resulting in a change in the beneficial ownership in the securities. Our relief applies where:

- (a) the financial institution is a person that does not acquire a relevant interest in the escrowed securities because of the exception in s609(1): see: RG 5.67–RG 5.76; and
- (b) the securities remain in escrow with the holder under the escrow agreement for the outstanding period of the escrow.

RG 5.277 Our relief applies in these circumstances because we consider that these types of transfers do not undermine the purpose of escrow and are unlikely to be used to construct a possible takeover defence. We consider the rationale for voluntary escrow relief is less clear in relation to transfers of escrowed securities outside those circumstances prescribed by our relief—for example, in the event of death of the holder or other party who obtains the escrowed securities under a court order. In these cases, the fact that the transfer of the securities has occurred usually indicates that there is no additional need for, or benefit in, permitting the voluntary escrow arrangement to continue.

## Disclosure of escrow arrangements

- RG 5.278 If the securities that are subject to escrow are issued under a prospectus, we require details of the voluntary escrow to be disclosed in the prospectus: see also RG 228.159–RG 228.160.
- RG 5.279 If the issue of the securities is approved at a meeting of holders, the details must be disclosed in the notice of meeting or explanatory statement accompanying the notice.

## Applying for individual relief

- RG 5.280 Our relief does not cover all types of voluntary escrow arrangements—for example, voluntary escrow arrangements entered into in connection with an acquisition of a new business. Where the requirements in [CO 13/520] are not met in relation to a voluntary escrow arrangement, where appropriate we may give relief to modify s609 on a case-by-case basis.
- RG 5.281 Voluntary escrow relief will generally only be provided where the relevant escrow agreements meet the restriction, terms and duration requirements set out in Table 11.
- RG 5.282 Voluntary escrow relief is made under two heads of power, being s655A and s673. This is because, consistent with our legislative relief, individual relief for voluntary escrow requires:
- (a) a modification of s609 to enable a person to disregard a relevant interest resulting from an escrow arrangement for the purposes of the takeover provisions; and
  - (b) a corresponding modification to s671B to ensure that the parties' obligations under the substantial holding provisions are not affected by the modification to s609.

## Escrow arrangements with a defensive purpose

- RG 5.283 In deciding whether to grant relief, we will take into account the purpose of the escrow and the potential defensive effect of the escrow arrangement.
- RG 5.284 We will not grant relief if we consider that the purpose or effect of the escrow may be to construct a defence against a takeover.

## Substantial holding disclosure

- RG 5.285 Our relief for companies and underwriters or lead managers that enter into listing rule escrows, or voluntary escrows, does not extend to the substantial holding provisions. A party will still acquire a relevant interest as a result of entering into an escrow arrangement, for the purposes of s671B, and will be

required to notify the relevant company and the market of details of their relevant interests in accordance with the requirements of that provision.

RG 5.286 In particular, substantial holding information given to the relevant market operator must be accompanied by the escrow agreement and any other documents setting out the terms of a relevant agreement contributing to the creation of the escrow: s671B(4).

## G Substantial holding notices

### Key points

The requirement to disclose details of substantial holdings in listed entities is designed to ensure that investors have access to information about the identity, interests and dealings of persons who may be in a position to influence or control the destiny of an entity.

A person who gives a substantial holding notice must give full rather than minimal or technical disclosure. This includes details of net movements and a full explanation of the basis and nature of any relevant interests or associations comprising the person's voting power.

A substantial holding notice must be accompanied by documents, in writing and readily available, setting out the terms of any relevant agreement contributing to the situation giving rise to the need for substantial holding disclosure. A statement giving details of any contract, scheme or arrangement, which is not in writing and readily available, must also be provided. A substantial holder cannot avoid giving relevant details of an overall arrangement by separating them out into a later agreement subject to finalisation.

### Principles underlying substantial holding disclosure

- RG 5.287 The purpose of the substantial holding provisions is to ensure that holders, directors and the market have timely access to sufficient information about:
- (a) who the controllers of substantial blocs of voting shares are;
  - (b) who the associates of substantial holders are;
  - (c) details of any consideration or special benefits that a person received for disposing of their relevant interest; and
  - (d) details of any agreements, special conditions or restrictions that may affect the disposal of shares or the way in which they are voted.

- RG 5.288 The substantial holding disclosure requirements can be traced back to the consideration by the UK Board of Trade's Committee on Company Law Amendment (Cohen Committee) of the longstanding requirement to maintain and provide public access to the company's register of members and the impact of the use of nominee shareholdings on its underlying objective. The committee noted, in relation to the register access requirements that:

... the intention thereof is to enable a shareholder to know who his co-adventurers are and the public to find out who control[s] the business in which they are contemplating investment or to which they are considering granting credit.

Note: See Board of Trade (UK), *Report of the Committee on Company Law Amendment* (Cohen Committee), Cmd 6659, 1945, paragraph 77.

- RG 5.289 The report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General (Eggleston Committee), which foreshadowed the introduction of the substantial holding disclosure regime in Australia, identified a similar underlying objective for the regime:
- ... shareholders are entitled to know whether there are in existence, substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend.
- Commonwealth, Second interim report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General (Eggleston Committee), Parliamentary Paper No. 43, 1969, paragraph 4.*
- RG 5.290 The substantial holding disclosure requirements promote the principle underlying the takeover provisions in Ch 6 that the acquisition of control should take place in an efficient, competitive and informed market: s602(a). The requirements allow investors to know when a person is accumulating significant interests ahead of, or as part of, a transaction that may affect control of an entity. Heightened and accelerated requirements to disclose substantial holdings when a takeover bid has been made reflect the particular importance of the market being kept fully and promptly informed about the progress of a bid, and the actions of other substantial holders, throughout the bid period: see RG 5.297–RG 5.300 and RG 5.308.
- RG 5.291 However, the purpose of the substantial holding disclosure requirements is not limited to identifying bidders or potential bidders, or informing the market about the success or otherwise of a bid. The purpose of the requirements is, more broadly, to underpin the integrity of the markets for quoted securities by ensuring that investors are generally informed about the existence and dealings of persons who may have substantial influence over the entities in which they are investing, and arrangements that may be relevant to their investment decision. This includes, for example, substantial holdings acquired through securities lending and prime broking arrangements: see RG 222.9.

## When is substantial holding disclosure required?

- RG 5.292 A person must provide a substantial holding notice if, in relation to an entity that is a listed company, listed registered managed investment scheme or a listed body incorporated or formed in Australia, the person:
- (a) begins to have, or ceases to have, a substantial holding;
  - (b) has a substantial holding and there is a movement of at least 1% in their holding; or
  - (c) makes a takeover bid for securities of the listed entity: s671B(1).

RG 5.293 A person has a substantial holding if, together with their associates, they have relevant interests in voting shares or interests carrying 5% or more of total votes: s9. Certain relevant interests that are exempt for the purposes of the takeover provisions are counted for the substantial holding disclosure requirements—for example, relevant interests arising under market-traded options and conditional agreements: see s609(6), 609(7) and 671B(7), and paragraph (a)(ii) of the definition of ‘substantial holding’ in s9.

Note: Table 4 at RG 5.68 sets out the exceptions that apply only for the purposes of the takeover provisions, those that apply only for the purposes of the substantial holding provisions and those that apply for the purposes of both.

RG 5.294 Under s9, a person also has a substantial holding if they have made a takeover bid for voting shares or interests and the bid period has started and not ended: see RG 5.297–RG 5.300.

### Net movements in substantial holdings

RG 5.295 When the substantial holding requirement is triggered by the movement of a holding in one direction, followed by a movement in the opposite direction, the substantial holder must disclose the movement in each direction: s671B(1)(b). The holder must not merely disclose the net movement between one notice and the next. The holder must give the information required by s671B(3) in each notice, even if the situation changes by the time that the information is required to be given: Note 2 to s671B(1). Form 604 and Form 605 (see RG 5.316) require the holder to disclose particulars of each change in a relevant interest since they were last required to give a notice.

RG 5.296 For example, where offers under a bid close subject to defeating conditions (except for a prescribed circumstances condition: s650F(1)(a)), the bidder must disclose both its increased substantial holding as a result of acceptances, and its reduced holding immediately on close.

Note: Under s671B(6)(b)(ii), the bidder must disclose this information by 9.30 am on the next business day because it will be aware of the level of acceptances during the bid period. The bidder should carefully monitor acceptances at the close.

### Substantial holding disclosure by a bidder

RG 5.297 Under the definition in s9, a person has a ‘substantial holding’ if they have made a takeover bid for voting shares or interests and the bid period has started and not ended. This means that, even if the bidder and its associates have relevant interests in voting shares or interests of less than 5% in total, a bidder must provide substantial holding notices disclosing, for example, when there is change in its holding of 1% or more throughout the bid period.

Note: The bid period for an off-market bid starts when the bidder’s statement is given to the target, and ends at the end of the offer period (or one month later if no offers are made). In a market bid, the bid period starts when the bid is announced: s9.

RG 5.298 In addition, regardless of the level of the bidder and its associates' relevant interests, or whether there is a change in relevant interests, a bidder must provide a substantial holding notice in relation to voting shares or interests in the target at the time it 'makes' the takeover bid for the target's securities: s671B(1)(c).

RG 5.299 Under the structure of Ch 6 generally, the making of a takeover bid is distinct from the making of offers under the takeover bid. A bid consists of a number of steps, including the making of offers: see s632–635. The existence of a bid is also contemplated prior to the making of offers: see for example items 2 and 3 of s611, s613 and the definition of 'bid period' in s9. Accordingly, having regard to the procedural nature of a takeover bid, ASIC considers that a bidder makes a bid for the purposes of s671B(1)(c) and paragraph (b) of the definition of 'substantial holding' in s9:

- (a) in the case of an off-market bid—when the bidder's statement is sent to the target (this is the day on which the first step of the bid procedure referred to in s632 is to be completed and the 'bid period' commences: see s9 and items 3–5 of the table in s633(1)); and
- (b) in the case of a market bid—when the bidder has the bid announced to the relevant financial market (see item 2 of s635).

Note: See also s687 of the old Corporations Law and s39(1) of the *Companies (Acquisition of Shares) Act 1980*.

RG 5.300 Where a bidder is required to provide a substantial holding notice due to s671B(1)(c) or paragraph (b) of the definition of 'substantial holding' in s9, the notice must be provided even if the reportable relevant interest of the bidder and its associates in the target's voting shares or interests is nil.

Note: See also the Explanatory Memorandum to the Companies (Acquisition of Shares) Bill 1980, paragraph 125.

### Other disclosures

RG 5.301 Information about substantial holdings may need to be included in the annual report: see for example ASX Listing Rule 4.10.4.

RG 5.302 A person may also need to disclose information about a 'substantial interest' that they have in an entity to avoid unacceptable circumstances in the context of a possible control transaction: see Takeovers Panel Guidance Note 20 *Equity derivatives*. The interests that must be disclosed need not necessarily give rise to a relevant interest or an obligation to disclose under the substantial holding provisions.



## Timing for giving notice

- RG 5.303 The timing for giving a substantial holding notice varies depending on whether the listed entity in respect of which the substantial holder is giving the notice is the subject of a takeover bid.
- RG 5.304 Where the listed entity is not the subject of a takeover bid, the substantial holding notice must be given within two business days of:
- (a) the person becoming, or ceasing to be, a substantial holder in the listed entity; or
  - (b) a movement of at least 1% in the person's substantial holding in the listed entity.
- RG 5.305 This timing is accelerated during a takeover bid, when the substantial holding notice must be given by 9.30 am on the next business day: see RG 5.308.
- RG 5.306 In either case, a person must give a substantial holding notice whether or not they have completed a larger investment move or unwound their investment position within that time: s671B(6)(a).
- RG 5.307 The short deadlines for giving notices are designed 'to compel, in fast-moving markets, the immediate disclosure of the identity of the persons who become substantial security holders': *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 511.

### Disclosures during a takeover bid

- RG 5.308 When there is a takeover bid for a listed entity, if the substantial holding requirement is triggered during the bid period, notices must be given by 9.30 am on the next business day: s654B and 671B(6)(b). This applies to all substantial holders, not just bidders.

Note: For discussion on when ASIC considers a person has made a takeover bid for the purposes of s671B(6)(b)(i), see RG 5.299. This view is consistent with s654B, which applies, in any event, during the 'bid period'.

### Takeover bid for an unlisted company

- RG 5.309 When there is a takeover bid for an unlisted company, the bidder must give the target a notice if its voting power rises to 25%, 50%, 75% and/or 90%. The bidder must give the notice as soon as practicable and, in any event, within two business days after the increase occurs: s654C.

### Securities lending and prime broking

- RG 5.310 Under [CO 11/272], a prime broker or custodian may defer taking into account a relevant interest arising from a borrowing right for compliance

with the substantial holding requirement when a control transaction is underway for the relevant listed securities. Despite this, voluntary disclosure to the market and the listed entity is appropriate in such circumstances to avoid the non-disclosure giving rise to unacceptable circumstances. For further discussion, see RG 222.59–RG 222.67.

## Documents to accompany notice

- RG 5.311 The substantial holder must give to the listed entity and the relevant market operator copies of all agreements, arrangements or understandings that contribute in some way to the situation giving rise to the need to provide the notice: s671B(4). The quality or degree of contribution to the situation is irrelevant.
- RG 5.312 In *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263 at 271–272, Wicks J recognised that:
- All there has to be is a reasonable nexus between the agreement on the one hand and the relevant interest on the other ... the expression ‘contribution’ is used because the draftsman recognised that there might well be more than one relevant agreement in the situation concerned and that any contribution, even if it duplicates what has been said elsewhere, would be regarded as relevant for the purposes of s671B(4). Once a relevant agreement is found to have made a contribution, the quality or degree of that contribution is beside the point.
- RG 5.313 Where multiple agreements contribute to the situation, a copy of all documents setting out the terms of each agreement must accompany the notice. Substantial holders cannot avoid their obligation to disclose full or substantive details of all contributing agreements and arrangements by, for example:
- (a) entering into a preliminary agreement or understanding incorporating limited terms (which triggers the substantial holding requirement); and then
  - (b) omitting substantive details of the overall transaction that have been negotiated on the basis that a formal or collateral written agreement or arrangement containing these details was (or will be) finalised at a later time after the immediate substantial holding disclosure requirement arising in relation to the transaction has been discharged.
- RG 5.314 When a preliminary step or agreement gives rise to a change in voting power before other agreements contributing to the overall situation have been finalised, the substantial holding notice must still be accompanied by a statement setting out full and accurate details of other contracts, schemes or arrangements that have been negotiated: s671B(4)(b). As noted in *Austar United Communications Limited* [2003] ATP 16 at [43], a failure to provide details of surrounding agreements or arrangements may also give rise to unacceptable circumstances, having regard to the efficient, competitive and informed market principle set out in s602(a).

## The information to be provided in a substantial holding notice

- RG 5.315 Under s671B(3), a substantial holder must give the following information in a substantial holding notice:
- (a) the person's name and address;
  - (b) details of their relevant interest in voting shares or interests in the relevant company or scheme;
  - (c) details of any relevant agreement through which they would have a relevant interest in voting shares or interests in the relevant company or scheme;
  - (d) the name of each associate who has a relevant interest in voting shares in the company or interests in the scheme, together with details of:
    - (i) the nature of their association with the associate;
    - (ii) the relevant interests of the associate; and
    - (iii) any relevant agreement through which the associate has the relevant interest;
  - (e) if the information is being given because of a movement in their holding—the size and date of that movement;
  - (f) if the information is being given because a person has ceased to be an associate—the name of that person; and
  - (g) any other particulars that are prescribed.
- RG 5.316 This information must be given in the prescribed form: s671(4). The prescribed forms for substantial holding notices are:
- (a) Form 603 *Notice of initial substantial holder*;
  - (b) Form 604 *Notice of change of interest of substantial holder*; and
  - (c) Form 605 *Notice of ceasing to be a substantial holder*: reg 1.0.03 and Sch 1 of the Corporations Regulations.
- RG 5.317 These forms must be completed in accordance with the directions and instructions specified in the form: reg 1.0.04. Where there is insufficient space to complete a particular section, details can be provided in an annexure to the form with a cross-reference to the annexure included in the relevant section.
- RG 5.318 Table 12 provides some guidance on completing the various sections of Form 603. This guidance is also generally relevant when completing the corresponding sections in Form 604 and Form 605, with necessary adjustments.

**Table 12: Guidance on completing ASIC Form 603**

Item	Directions
<b>1. Details of substantial holder</b>	
Name  ACN/ARSN (if applicable)	<p>A single joint notice can be given for two or more persons who have similar or related relevant interests or who are associates and therefore have the same voting power: RG 5.323–RG 5.326. Each joint notice giver should be listed here. Alternatively, the joint notice givers can be given a collective title for ease of reference elsewhere in the form, where possible. Where a large group is to be defined, use an annexure.</p> <p style="padding-left: 40px;">Note: For example, 'A Ltd, and the persons listed in Annexure 1 (together "The A Ltd Group")'.</p> <p>The names and addresses of each person for whom the notice is given must still be listed in paragraph 7.</p>
Date of becoming a substantial holder	<p>Remember that a person may acquire a relevant interest in securities (and therefore become a substantial holder) before an agreement is performed.</p> <p>For example, a person who makes an ordinary purchase of securities on-market will acquire a relevant interest in those securities when the trade takes place, not when settlement occurs (usually three days later).</p>
<b>2. Details of voting power</b>	
<p>This paragraph sets out the relevant securities from which the substantial holder's voting power (on the date that they became a substantial holder) is derived: s671B(3)(b). For more information on voting power, see RG 5.106–RG 5.112.</p>	
Class of securities	<p>Shares in a company and interests in a managed investment scheme, if not divided into two or more classes, constitute a single class: s57. If a person's voting power is derived from more than one class of voting shares or interests, the details of the securities in which the substantial holder and their associates have a relevant interest should be set out in separate rows.</p> <p>Use a descriptor for each class of securities that is likely to be easily understood and fully distinguishable from any other securities on issue (e.g. 'fully paid ordinary shares').</p> <p>This paragraph is only concerned with relevant interests in voting shares or interests that contribute to voting power—so do not include securities in which the holder has a relevant interest that do not themselves carry voting rights (e.g. options or warrants), but do include any underlying voting shares or interests that the holder has a relevant interest in by virtue of the options or warrants. Details of any options or warrants giving a relevant interest in underlying voting shares or interests should be disclosed in paragraph 3.</p> <p style="padding-left: 40px;">Note: Further information on relevant interests arising from options and warrants is set out in Sections D and E of this guide.</p>
Number of securities  Person's votes	<p>Set out the number of securities in each class that the substantial holder and their associates have a relevant interest in, and the number of votes that may be cast for these holdings.</p> <p>Where each share or interest carries one vote, these numbers will be the same. Partly paid shares may have voting rights that are proportional to the amount paid up.</p> <p style="padding-left: 40px;">Note: See for example ASX Listing Rule 6.9.</p>
Voting power	<p>Express the substantial holder's voting power as a percentage.</p>

Item	Directions
<b>3. Details of relevant interests</b>	
This paragraph sets out details of the relevant interests in voting shares or interests from which the substantial holder's voting power (on the date that they became a substantial holder) is derived. It provides further information about the relevant interests disclosed in paragraph 2: s671B(3)(b), (c) and (d).	
Holder of relevant interest Nature of relevant interest	<p>The relevant interests each person contributing to the substantial holder's voting power (including any associates) has in voting shares or interests should be disclosed separately by reference to the nature of the relevant interest. For example, where a substantial holder has relevant interests in some voting shares as the holder of the shares, and relevant interests in other voting shares as a result of an option over the shares, the holder should set these out as separate items.</p> <p>In describing the nature of each relevant interest, give full rather than minimal or technical disclosure. It is not sufficient to merely describe the legal provision giving rise to the relevant interest. Include details of:</p> <ul style="list-style-type: none"> <li>• any relevant agreement or circumstances by which the relevant interest was acquired; and</li> <li>• any qualification or limitation on any power to control or influence the voting or disposal of the relevant securities.</li> </ul> <p>See RG 5.327–RG 5.330. Use an annexure if more room is required.</p> <p>Under s671B(4), a copy of relevant agreements, or a statement giving full details of contracts, schemes or arrangements contributing to the situation giving rise to the need to provide a substantial holding notice may have to accompany the substantial holding notice: RG 5.311–RG 5.314.</p>
Class and number of securities	Set out the class (identified in paragraph 2) and number of securities in which the previously described relevant interests arise.
<b>4. Details of present registered holders</b>	
This paragraph requires details of who holds the securities in which the relevant interests disclosed in paragraph 3 arise.	
Holder of relevant interest	Each holder of a relevant interest disclosed at paragraph 3 should be named here.
Registered holder of securities	<p>The person currently registered as the holder of the securities in which the person in the first column has a relevant interest (e.g. if the voting shares or interests are directly held, the same person will occupy the first and second columns).</p> <p>If the identity of the present registered holder cannot be determined (e.g. an on-market purchase that has not yet settled or a relevant interest arising from an exchange-traded option), write 'unknown'.</p>
Person entitled to be registered as holder	<p>List the person(s) who are entitled to be registered as holder of the securities that are the subject of the relevant interest.</p> <p>In many cases, the circumstances giving rise to the relevant interest will involve the holder of that relevant interest having a right to become (if they are not already) registered as the holder of the securities—for example, if the relevant interest arises because shares or interests are:</p> <ul style="list-style-type: none"> <li>• held by a custodian on trust; or</li> <li>• acquired under an agreement that has not yet settled (including an on-market purchase).</li> </ul>
Class and number of securities	Set out the class (identified in paragraph 2) and the number of securities in which the previously described relevant interests arise.

Item	Directions
<p><b>5. Consideration</b></p> <p>This paragraph is concerned with the consideration given for the relevant interests discussed in paragraph 3 in the four months before the day on which the holder became a substantial holder.</p>	
<p>Holder of relevant interest</p>	<p>Each holder of a relevant interest disclosed at paragraphs 3 and 4, who has acquired that relevant interest in the four-month period before the date given in paragraph 1, should be named here.</p> <p>Consider, for example, the following scenario:</p> <ul style="list-style-type: none"> <li>• Hold Co controls two subsidiaries, each of which directly holds 3% of the voting shares in a company;</li> <li>• Early Subsidiary purchased its shares on 1 January;</li> <li>• Late Subsidiary purchased its shares on 1 July; and</li> <li>• Hold Co, Early Subsidiary and Late Subsidiary give a joint notice on 2 July.</li> </ul> <p>For the purposes of this paragraph, only details of the voting shares purchased by Late Subsidiary need to be given. However, all three companies giving the notice will be a 'holder of relevant interest' in relation to that parcel.</p>
<p>Date of acquisition</p>	<p>The date in the four-month period before the date given in paragraph 1 that the securities giving rise to the relevant interest were acquired—see discussion in relation to paragraph 1 above.</p>
<p>Consideration (cash or non-cash)</p>	<p>The consideration given for acquiring the relevant interest must be clearly set out.</p> <p>Details of the consideration must include any and all benefits (monetary or otherwise) that any person from whom a relevant interest was acquired has, or may become entitled to receive, in relation to that acquisition. Details must be included even if the benefit is conditional on the happening of a contingency. Details must be included of any benefit paid on behalf of the substantial holder or their associate in relation to the acquisitions, even if they are not paid directly to the person from whom the relevant interest was acquired: Note 9 on Form 603.</p> <p style="padding-left: 40px;">Note: Brokerage and other transaction costs of the substantial holder that do not represent a benefit to a person from whom the relevant interest was acquired should not be included when setting out the consideration provided for the relevant interest.</p> <p>Details of the consideration provided must be disclosed with respect to each acquisition of a relevant interest separately. Where the substantial holder's relevant interests arise from a number of intraday transactions (e.g. multiple on-market purchases), details of the consideration given under each transaction should be provided (not aggregate figures for each day or other specified time period).</p> <p style="padding-left: 40px;">Note: This level of information is required so that the market can ascertain the minimum price at which the substantial holder could make a takeover bid for the entity: s621(3).</p> <p>The description of cash consideration paid must also be expressed precisely, or must be able to be readily calculated with precision—that is, on the basis of an amount per share for each acquisition. For example, it is not sufficient to state that the shares were acquired at a price between \$X or \$Y, or at a price per share that has been rounded to the nearest whole cent per share.</p> <p>Where a large number of transactions are to be reported, an annexure should be used.</p>
<p>Class and number of securities</p>	<p>Set out the class (identified in paragraph 2) and the number of securities in which the relevant interest was acquired.</p>

Item	Directions
<b>6. Associates</b>	
This paragraph requires disclosure of the basis of any associate relationship that has contributed to the substantial holder's voting power: s671B(3)(d). The nature of the associate's relevant interests is set out in paragraph 3.	
Name and ACN/ARSN (if applicable)	As with the description of the relevant interests in paragraph 3, full and detailed disclosure of the nature of the association should be set out—not simply a generic, technical or legal description referencing the provisions of the Corporations Act.
Nature of association	For example, it is not sufficient to merely state that a person is an associate because they are acting in concert with the substantial holder. The notice must describe the relevant transaction in clear commercial and legal terms: see RG 5.327–RG 5.330.
<b>7. Addresses</b>	
Name	This includes not only the substantial holder(s), but any other persons named as holders of relevant interests, registered holders of securities, persons entitled to be registered as holders of securities, and associates.
Address	

### ASIC exemption: Takeover bid acceptances

- RG 5.319 Class Order [CO 13/524] *Bidder giving substantial holding notice* provides an exemption from the substantial holding requirements so that a bidder:
- does not need to include in a substantial holding notice the name and address of each accepting target holder who is the registered holder of the securities to which the notice relates at the time the notice is given; and
  - does not need to attach copies of the bidder's statement, offer document or acceptance forms to a substantial holding notice relating to acquisitions under the bid.
- RG 5.320 The relief in [CO 13/524] is subject to a condition that the bidder provides, by no later than the next business day after receiving a written request from the target:
- the name and address of each target holder who has accepted the offer under the bid and remains registered as holder of the securities; and
  - for each of those target holders—the number of securities held by the target holder in respect of which the bidder has a relevant interest due to the target holder's acceptance of the bid.
- RG 5.321 We have granted this relief because it will often be unduly onerous for a bidder to include the relevant documents and details in each substantial holding notice that it lodges during a bid.
- RG 5.322 Our relief does not affect the requirement for the bidder to lodge the bidder's statement and offer document with ASIC and send these documents to the relevant market operator under s633(1).

## Joint notices

- RG 5.323 A single transaction or event may result in the voting power of a number of different persons changing and, as a result, a number of persons each having an individual obligation to give a substantial holding notice in respect of their changed voting power.
- RG 5.324 When two or more persons have similar or related relevant interests, or are associates, so that they acquire or change their substantial holding because of the same transaction, they may give a single joint notice (rather than lodging separate notices). A joint notice will satisfy s671B for each person, provided that it clearly identifies each person and the details of their relevant interest or the nature of their association: s671B(3). No relief from us is necessary in these circumstances.
- RG 5.325 The person giving the notice must have the authority to bind other persons on whose behalf the notice is given.
- Note: For parties to a securities lending transaction and the use of joint notices, see our guidance at RG 222.93–RG 222.94.
- RG 5.326 A substantial holder should take care in presenting complex information in a joint notice—for example, about associations—so that it does not contravene s671B(3) or 1041H (misleading or deceptive conduct).

## Full disclosure

- RG 5.327 A person who gives a substantial holding notice must give full rather than minimal or technical disclosure. A notice lacking sufficient information for an investor to understand the nature of the substantial holding, or the change in holding, does not promote the principles underlying the substantial holding disclosure requirement. A notice should fully, specifically and accurately disclose the identity of the substantial holder, the details of the substantial holding or the change in holding, and any relevant agreement and the nature of any relevant association in accordance with the requirements of s671B(3).
- RG 5.328 It is not sufficient for a notice to describe the nature of the substantial holding or association generically, or describe its bare legal nature by reference to the provisions of the Corporations Act. For example, the holder must not merely say: ‘X and Y are associated because X is acting in concert with Y in relation to the affairs of Company Z’. The notice must describe the relevant transaction in clear commercial and legal terms.
- RG 5.329 The substantial holder must disclose any qualifications to their power to vote or dispose of the securities. They must disclose all benefits given for the acquisition or change in substantial holding. If the transaction took place on



a prescribed financial market, the notice should say so. The holder should use attachments to the form if there is insufficient room to explain the transaction or association in full. The substantial holder should define or explain any acronyms, shorthand or codes (e.g. generated by the holder's compliance system) used in the notice.

RG 5.330 Without full disclosure of substantial holdings, there is a risk that the market will be misled about the ownership and control of listed entities. It is also important that the disclosure allows the market to understand the nature of the substantial holding being disclosed.

## Appendix: Superseded guidance

- RG 5.331 This guide provides updated guidance on relevant interests. Additional updated guidance on other aspects of Chs 6–6C is provided in:
- (a) RG 6 *Takeovers: Exceptions to the general prohibition*;
  - (b) RG 9 *Takeover bids*; and
  - (c) RG 10 *Compulsory acquisitions and buyouts*.
- RG 5.332 Together, these four guides consolidate and replace a number of pre-existing regulatory guides, taking into account changes in the law since the guides were first published. The regulatory guides replaced by this guide on relevant interests and substantial holding notices are listed in Table 13.

**Table 13: Superseded regulatory guides**

Number	Name of guide
SRG 5	<i>Relevant interests in unissued share capital</i>
SRG 9	<i>Relevant interests in shares</i>
SRG 48	<i>Takeovers aspects of options over shares</i>
SRG 143	<i>Takeovers provisions: Warrants</i>
SRG 159	<i>Takeovers, compulsory acquisitions and substantial holding notices</i> Note: Parts of SRG 159 have been replaced by other guides.
SRG 171	<i>Anomalies and issues in the takeover provisions</i> Note: Parts of SRG 171 have been replaced by other guides.

## Key terms

Term	Meaning in this document
20% interest limb	Section 608(3)(a) of the Corporations Act, under which a person is deemed to have a relevant interest on the basis of having voting power of greater than 20% in a body corporate or managed investment scheme
accelerator provision	Section 608(8) of the Corporations Act
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act  Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s12 of the Corporations Act
ASX	The exchange market operated by ASX Limited
bid class	Has the meaning given in s9 of the Corporations Act
bidder	A bidder under a takeover bid, as defined in s9 of the Corporations Act
bid period	Has the meaning given in s9 of the Corporations Act
bought position	The party to a call or put option that on exercise will acquire the underlying security
call	A call option
Ch 6 (for example)	A chapter of the Corporations Act (in this example numbered 6)
class	A class of securities
[CO 13/520] (for example)	An ASIC class order (in this example numbered 13/520)  Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
controlled entity limb	Section 608(3)(b) of the Corporations Act, under which a person is deemed to have a relevant interest on the basis of control of a body corporate or managed investment scheme
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act

Term	Meaning in this document
Corporations Regulations	Corporations Regulations 2001
financial market	As defined in s767A of the Corporations Act, a facility through which offers to acquire or dispose of financial products are regularly made or accepted
general prohibition	The prohibitions on offers, invitations, acquisitions and transactions in s606 of the Corporations Act
holder	A holder of securities
listing rule escrow	An escrow arrangement entered into in accordance with the requirements of the listing rules of a prescribed financial market
old Corporations Law	The law, set out in s82 of the <i>Corporations Act 1989</i> , which preceded the Corporations Act. Unless otherwise indicated, a reference to the old Corporations Law is a reference to the law as it stood before implementation of the <i>Corporate Law Economic Reform Program Act 1999</i>
option	A contractual arrangement under which one party has the right, but not the obligation, to buy or sell an underlying asset from the other at a set price and before a specified future time
prescribed financial market	A financial market prescribed in reg 1.0.02A of the Corporations Regulations
Pt 6C.1 (for example)	A part of the Corporations Act (in this example numbered 6C.1)
put	A put option
reg 1.0.18 (for example)	A regulation of the Corporations Regulations (in this example numbered 1.0.18)
relevant interest	Has the meaning given in s608 and 609 of the Corporations Act
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
s602 (for example)	A section of the Corporations Act (in this example numbered 602), unless otherwise specified
securities	Has the meaning given to that term for the purposes of Chs 6–6C in s92(3) of the Corporations Act
sold position	The party to a call or put option that on exercise will dispose of the underlying security
substantial holding	Has the meaning given in s9 of the Corporations Act
takeover threshold	The level of voting power specified in s606(1)(c) and 606(2)(b), above which the general prohibition operates

<b>Term</b>	<b>Meaning in this document</b>
target	Has the meaning given in s9 of the Corporations Act
underlying security	The security that is acquired or disposed of when an option is exercised
voluntary escrow	An escrow arrangement that is not required to be entered into under the listing rules of a prescribed financial market
voting power	Has the meaning given in s610 of the Corporations Act
warrant	A financial product, primarily issued by financial institutions, which provide a level of exposure to an underlying asset, instrument or index

## Related information

### Headnotes

acting in concert, associates, corporate groups, disclosure, escrow arrangements, exchange traded options, financial accommodation, options, relevant agreements, relevant interests, security interest, substantial holdings, takeover threshold, unacceptable circumstances, voluntary escrow, voting interests, voting power, voting shares, warrants

### Legislative instruments

ASIC Corporations (Disclosure of Directors' Interests) Instrument 2016/881

ASIC Corporations (IDPS – Relevant Interests) Instrument 2015/1067

[CO 11/272] *Substantial holding disclosure: securities lending and prime broking*

[CO 12/1209] *Relevant interests, ASIC and ASIC Chairperson*

[CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition*

[CO 13/524] *Bidder giving substantial holding notice*

[CO 13/526] *Warrants: Relevant interests and associations*

[CO 13/721] *Relief to facilitate quotation of exchange traded funds on the AQUA Market*

[CO 13/763] *Investor directed portfolio services*

### Regulatory guides

RG 6 *Takeovers: Exceptions to the general prohibition*

RG 9 *Takeover bids*

RG 10 *Compulsory acquisitions and buyouts*

RG 74 *Acquisitions approved by members*

RG 86 *Tracing beneficial ownership*

RG 128 *Collective action by investors*

RG 148 *Platforms that are managed investments schemes and nominee and custody services*

RG 193 *Notification of directors' interests in securities—Listed companies*

RG 222 *Substantial holding disclosure: Securities lending and prime broking*

## Information sheets

INFO 50 *Notifying the ASX about directors' interests in company securities*

## Legislation

Corporations Act, s9, 12, 12(2)(a), 12(2)(b), 12(2)(c), 12(3), 12(a), 50AA, 53, 53(e), 53(f), 64, 64, 64A, 92(3), 205F, 205G, 300(11), 300(12), 602(a), 604, 606, 606(1), 606(1)(c), 606(2), 606(2)(b), 606(3), 606(6), 606(8), 608, 608(1), 608(1)(a), 608(1)(b), 608(1)(c), 608(2), 608(2)(b), 608(3), 608(3)(a), 608(3)(b), 608(4)–(7), 608(8), 608(8)(b)(i), 608(8)(b)(ii), 608(8)(b)(iii), 608(9), 609(1)–(5), 609(6), 608(6)(b), 608(7)–(9), 608(9A), 610, 610(1)–(3), 611, 633(1), 650F(1)(a), 654B, 654C, 657A, 661A(1), 662A(1), 663A(1), 671B, 671B(1), 671B(1)(b), 671B(2), 671B(3), 671B(4), 671B(6)(a), 671B(6)(b), 671B(6)(b)(ii), 672A, 672B, 672DA

Corporations Regulations, Sch 1, regs 1.0.02, 1.0.03, 1.0.04, 1.0.18, 7.1.04(7)

*Companies (Acquisition of Shares) Act 1980* and corresponding state codes

## Cases

*Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No 4)* (1984) 2 ACLC 829

*ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 (*Yandal Gold*)

*Austar United Communications Limited* [2003] ATP 16

*Australian Pipeline Limited v Alinta Ltd* [2007] FCAFC 55 (*Alinta Ltd*)

*Azumah Resources Ltd* [2006] ATP 34

*Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501 (*Bank of Western Australia*)

*Bateman v Newhaven Park Stud Ltd* (2004) 49 ACSR 597

*BioProspect Limited 01* [2008] ATP 8

*Chew v Hamilton* (1985) 13 ACLR 440

*CMI Limited* [2011] ATP 4

*Corebell Pty Ltd v New Zealand Insurance Co Ltd* (1988) 13 ACLR 349

*Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 5 ACSR 720

*Dromana Estate Ltd* 01R [2006] ATP 8

*Edensor Nominees Pty Ltd v ASIC* (2002) 41 ACSR 325 (*Edensor Nominees*)

*Exicom Pty Ltd v Futuris Corporation Ltd* (1995) 18 ACSR 404

*Flinders Diamonds Ltd v Tiger International Resources Inc* (2004) 49 ACSR 199

*Haughton Properties Pty Ltd v Sandridge City Development Co Pty Ltd* (1994) 13 ACLC 1

*Industrial Equity Ltd v Commissioner for Corporate Affairs (Vic)* (1989) 1 ACSR 153

*Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500

*Mount Gibson Iron Limited* [2008] ATP 4

*NCSC v Brierley Investments Ltd* (1988) 14 ACLR 177

*New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263

*Nicholas v Commissioner for Corporate Affairs (Vic)* (1982) 7 ACLR 45

*North Sydney Brick & Tile Co Ltd v Darvall (No 2)* (1986) 10 ACLR 837 (*Darvall*)

*Perpetual Custodians Ltd v IOOF Investment Management Ltd* (2012) 91 ACSR 530

*Re Adelaide Holdings Ltd* (1982) 6 ACLR 675

*Re Kornblums Furnishings Ltd* (1981) 6 ACLR 25 (*Kornblums Furnishings*)

*Re VGM Holdings Ltd* [1942] 1 All ER 224

*Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367

*Touch Holdings Limited* [2013] ATP 3

*TVW Enterprises Ltd v Queensland Press Ltd* (1983) 7 ACLR 821 (*TVW Enterprises*)

*Viento Group Ltd* [2011] ATP 1



*Winepros Ltd* [2002] ATP 18

*Yaramin Pty Ltd v Augold NL* (1997) 11 ACLR 439 (*Yaramin*)

## **Media and information releases**

IR 98/14 *Exchange-traded options—Relief from s615 of the Corporations Law*, 14 August 1998

IR 02/16 *ASIC issues new class orders about warrants*, 18 September 2002

IR 04/22 *ASIC gives ‘associate’ and IDPS takeover relief*, 16 June 2004

IR 04/59 *ASIC releases policy on substantial holdings*, 18 November 2004

MR 13/148 *ASIC releases consolidated guidance on takeovers*, 21 June 2013

MR 13/281 *ASIC grants relief for periodic statements for quoted and listed managed funds and to facilitate quotation of ETFs on the AQUA market*, 17 October 2013

## **ASIC forms**

Form 603 *Notice of initial substantial holder*

Form 604 *Notice of change of interests of substantial holder*

Form 605 *Notice of ceasing to be a substantial holder*

## **Other documents**

ASX Guidance Note 11 *Restricted securities and voluntary escrow*

Board of Trade (UK) (Cohen Committee), *Report of the Committee on Company Law Amendment*, Cmd 6659, 1945

Commonwealth, *Second interim report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General* (Eggleston Committee), Parliamentary Paper No. 43 (1969)

Takeovers Panel Guidance Note 20 *Equity derivatives*