



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 27

Takeovers: minimum acceptance conditions

Chapter 6 — Acquisition of shares (Part 6.3)

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From 5 July 2007, this document may be referred to as Regulatory Guide 27 (RG 27) or Practice Note 27 (PN 27). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 27.1) or their practice note number (e.g. PN 27.1).

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Introduction

RG 27.1 In this guide the ASC sets out its views on the effect of s642 of the Corporations Law (Law) on minimum acceptance conditions and caps on the consideration offered under offers. The ASC may take these matters into account in deciding whether to refuse to register takeover documents under s644(3)(a) of the Law, or may rely on them

in action taken after registration. This guide replaces NCSC Releases 309 and 347.

Condition not allowed in takeover offer

RG 27.2 A copy offer and Part A statement are eligible to be registered under s644 and acquisitions by acceptance of the offers are within the exception in s616 only if the offers comply with Div 1 of Pt 6.3 of the Law. Subsection 642(1) is one of the provisions of that Division. It is in the following terms:

“None of the offers may be subject to a condition (however expressed, and whatever the purported effect of fulfilment or failure of the condition) the fulfilment or failure of which depends on, or depends on matters including, one or both of the following matters:

- (a) whether the number of shares in respect of which the offeror receives an acceptance or acceptances of one or more of the offers exceeds a particular number of shares;
- (b) whether the percentage of shares in the relevant class to which the offeror becomes entitled exceeds a particular percentage; and
- (c) whether the number of offers accepted exceeds a particular number,

however, the particular number or percentage was, or is to be, determined, whether or not the particular number or percentage is specified in the condition and, if it is so specified, however it is expressed.”

RG 27.3 Subsection 642(1) replaces s16(2)(h) of the *Companies (Acquisition of Shares) Act 1980* and Codes (CASA), which was inserted by the *Companies and Securities Legislation Amendment Act 1986*. It corresponds closely with that provision, except that paragraph (b) and the other references to a percentage are new.

RG 27.4 The Explanatory Memorandum to the amending Bill states that the conditions being prohibited were objectionable, because “the use of such conditions may introduce uncertainty for offerees and may enable offerors to avoid honouring over generous bids”. It gave as the policy of the amendment “to ensure that an offeror cannot achieve what is in effect a pro rata bid by the use of these conditions” and to prevent conditions being structured to achieve a “first come first served” bid.

Maximum acceptance conditions banned

RG 27.5 Offers under a takeover scheme may not be made subject to a maximum acceptance condition, ie a defeating condition that the number of shares in respect of which acceptances are received be no greater than a particular number of shares or percentage of the shares to which the offers relate.

RG 27.6 A maximum acceptance condition does not comply with s642(1) because it is:

“a condition ... the ... failure of which depends on ... whether the number of shares in respect of which the offeror receives ... acceptances ... of the offers exceeds a particular number of shares ... specified in the condition”.

It is clear that this result was the intended effect of the subsection.

Minimum acceptance conditions permitted

RG 27.7 Offers under a takeover scheme may, however, be made subject to a minimum acceptance condition, ie a defeating condition that the number of shares in respect of which acceptances are received equal or exceed a particular number or percentage.

RG 27.8 The *Companies and Securities Legislation Amendment Act 1986* provides that the 1985 report to Ministerial Council of the Companies and Securities Advisory Committee on Partial Takeover Bids is a relevant extrinsic document for the purposes of the interpretation provisions (s16(2AE) of CASA, now s642(6) of the Law). Concern was nonetheless felt that paragraph 16(2)(h) of CASA might prohibit a minimum acceptance condition, which might be described as:

“a condition ... the fulfilment of which depends on ... whether the number of shares in respect of which the offeror receives ... acceptances ... of the offers exceeds a particular number of shares ... specified in the condition”.

RG 27.9 The concern was addressed by including in the Law s642(4) and 642(5), which do not correspond with any of the provisions of CASA. Briefly stated, those subsections provide that s642(1) does not apply in relation to a condition which:

- (a) prevents a contract arising;
- (b) limits the offeror's obligations under a contract;
- (c) discharges a contract; or
- (d) entitles the offeror to rescind a contract,

only because the offeror receives less than a particular number of acceptances or acceptances for less than a particular number or percentage of shares.

Provisions bearing on minimum acceptance conditions

RG 27.10 Subsections 662(3) and 662(4) require the offeror to specify in the offer the number or percentage of the shares or the number of acceptances necessary to satisfy the condition. The number may be specified as a percentage of the shares in the relevant class or the shares in the relevant class to which the offeror is not already entitled. It may not, however, be varied, and any provision which purports to reserve the right to vary it is void.

RG 27.11 For the purpose of determining whether a minimum acceptance condition is satisfied, s664(3) deems all shares to which the offeror becomes entitled outside the takeover scheme (such as those acquired on market in reliance on s620) to have been acquired by acceptances of offers under the scheme.

RG 27.12 If the offeror becomes entitled outside the scheme to more than 20% of the voting shares in the company to which it was not previously entitled, the offers are deemed by virtue of s664(2) to be free from the minimum acceptance condition.

Expression of the condition

RG 27.13 Subsections 642(4) and 642(5) are premised on one of three events taking place, whichever is specified in the condition. The ASC does not understand this to mean that a condition cannot be included in reliance on one or other of those subsections, which depends on the occurrence of any two or all three of the events mentioned in the relevant provision, so long as it does not depend on any occurrence other than those mentioned in that subsection. For instance, an offeror could include one condition based on paragraphs 642(4)(a) and 642(4)(c), another based on paragraphs 642(4)(a) and 642(4)(d) and a third based on paragraphs 642(4)(a) and 642(4)(e). In

the ASC's view it would be purely a question of drafting taste whether those three conditions were combined into one having the same overall effect.

Capped offers banned

RG 27.14 Offers under a takeover scheme may not provide for a consideration to be available for some shares to which they relate and not others, ie that:

- (a) a specified amount of consideration of a particular kind is available for accepting offerees; and
- (b) in the event that consideration is exhausted, a different consideration will be given to some accepting offerees or for some shares for which acceptances are received.

RG 27.15 For instance, Offeror offers to acquire all 100 million shares in Target. It offers to give one share in itself for each share in Target, up to a maximum of 50 million shares, and will give cash for the balance. Acceptances in excess of 50 million will be pro rated.

RG 27.16 This term falls within the letter of the prohibition in s642(1), because it is a condition, the fulfilment or failure of which depends on the number of shares for which the offeror receives acceptances. It is contrary to the policy of the legislation, because it operates as a pro-rating or first come first served limitation on the availability of the consideration.

RG 27.17 The condition is outside the exception for minimum acceptance conditions, which, so far as relevant, allows "a condition ... the sole effect of which is to prevent ... an obligation of the offeror from arising under a contract arising from an acceptance of the offer" unless sufficient acceptances are received. This is because the offeror's obligation to provide the capped consideration arises from the early acceptances. The possibility of discriminatory pricing is apparent if the shares are worth much more than the cash substitute.

Even if expressed as minimum acceptance conditions

RG 27.18 For similar reasons, where alternative considerations are offered under a takeover scheme, the offers may not include a defeating condition to the effect that the offers will fail unless at least a certain amount or proportion of one of the alternative considerations

is the subject of acceptances. This is so, even if the condition is expressed as a minimum acceptance condition relating to one of alternative considerations.

RG 27.19 For instance, Offeror offers scrip or cash for all of the issued shares in Target, but the offers are subject to a defeating condition that offerees who accept for not less than 50% of the shares stipulate for the cash consideration.

RG 27.20 Like a maximum acceptance condition, this condition is:

“a condition ... the ... failure of which depends on ... whether the number of shares in respect of which the offeror receives ... acceptances ... exceeds a particular number”,

the number depending on the number of shares for which acceptances are eventually received.

RG 27.21 Although cast in terms of a minimum level of acceptances of a particular kind, it is not a minimum acceptance condition such as is permitted by s642(4) and 642(5). The offeror's obligation does not depend on the total acceptances, but on the number of accepting offerees who elect to take one of the alternative considerations.

RG 27.22 In substance, the condition sets an upper limit on the amount which the offeror may be required to provide of the consideration (in the example, the scrip) to which the purported minimum acceptance condition does not refer. It would expose offerees to uncertainty for no other reason than to enable an offeror to resile from an over-generous bid.