



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 163

Takeovers: minimum bid price principle—s621

Related instruments [CO 00/2338]

Chapter 6 — Takeovers

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From 5 July 2007, this document may be referred to as Regulatory Guide 163 (RG 163) or Policy Statement 163 (PS 163). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 163.1) or their policy statement number (e.g. PS 163.1).

What this guide is about

RG 163.1 In this guide we discuss our relief from and views on the minimum bid price principle in s621(3)–(5) of the Corporations Law (Law).

RG 163.2 This guide aims to:

- (a) resolve practical issues for bidders in complying with the minimum bid price principle and takeover procedures; and
- (b) promote certainty in the operation of s621(3)–(5).

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A Minimum bid price principle

RG 163.3 The minimum bid price principle (s621(3)) says that under a takeover bid, the bidder must offer consideration at least equal to:

- (a) the maximum consideration that the bidder or an associate provided or agreed to provide for a bid class security (maximum consideration)
- (b) under any purchase or agreement during the four months before the date of the bid (pre-bid purchase).

A pre-bid purchase extends to an arrangement or understanding: see the definition of “agreement” in s9.

RG 163.4 For the purposes of the minimum bid price principle, the consideration offered or provided for a security is:

- (a) the amount of a cash sum;
- (b) the value of non-cash consideration; or
- (c) for mixed consideration, the cash sum and the value of the other consideration.

Underlying principles

RG 163.5 The minimum bid price principle is an application of the “equality principle” underpinning Chapter 6: s602(c). Section 602(c) says that as far as practicable, all holders must have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in a company, body or scheme to which Chapter 6 applies.

RG 163.6 Section 621(3) is one of a number of specific applications of the equality principle. The Corporations and Securities Panel (Panel) commented in one of its first decisions: “Subsection 621(3) is fundamental to the policy and operation of Chapter 6”.¹ The minimum bid price principle extends the equality principle to the period immediately before the offer period, ensuring equality of opportunity between:

- (a) holders who sell prior to the offer period; and
- (b) holders who receive an offer under the bid.

¹ *Re Email Limited* (2000) 18 ACLC 708, 715.

In the absence of s621(3), a bidder building a pre-bid stake could pay to a seller under a pre-bid purchase a premium over the consideration that it offers to holders under the bid. CASAC stated in 1998: “This might create a perception of inequitable treatment among shareholders”.²

Explanation

RG 163.7 Sections 621(3)–(5) were introduced by the CLERP Act. They replace the following old Law provisions:

- (a) the old minimum bid price principle: s641(1) and 676(1). This was limited to cash consideration.
- (b) the old collateral benefit prohibition, on a person proposing a takeover in the next four months offering any benefit that they were not proposing to provide under the takeover: s698(2) and (4).

RG 163.8 Sections 621(3)–(5) should be seen as a legislative scheme or package with:

- (a) the escalation agreement prohibition: s622; and
- (b) the collateral benefit prohibition: 623.

All are applications of the equality principle. Section 623 picks up where s621(3)–(5) leave off. Section 621(3) covers the four months before the date of the bid (the date of the first offer) while the prohibition in s623 covers the offer period.

RG 163.9 This view is underlined by CASAC’s complementary recommendations in 1998 that:

- (a) the minimum bid price principle should be extended to bids where the bidder offers non-cash bid consideration; and
- (b) the collateral benefit prohibition should not apply before the offer period. (Under the CLERP Bill at that time, the collateral benefit prohibition would apply to a person who proposed to make a takeover bid within the next four months.)³

The Government acted on both of these recommendations.

² CASAC *Recommendations for reform of ss 621(4) and 623(2) & (3) of the Corporate Law Economic Reform Program Bill* (1998) 4.

³ See also the Parliamentary Joint Committee on Corporations and Securities *Report on the Corporate Law Economic Reform Program Bill 1998* (May 1999) paras 3.20 - 2.27.

B Valuation time

Our policy

RG 163.10 A bidder may value quoted securities that it offers as bid consideration up to five business days before it sends the first offer: see [CO 00/2338]. Otherwise, the bidder would have to value as at the time it sends its first offer: s621(4).

RG 163.11 This relief gives the bidder time to:

- (a) value the quoted securities;
- (b) increase the bid consideration if necessary to comply with s621(3); and
- (c) update and print the bidder's statement and offer document.

RG 163.12 We may give similar relief on a case-by-case basis to bidders offering unquoted securities as consideration. Our relief will specify the additional time needed in each bidder's particular case.

Underlying principles

RG 163.13 A bidder must use an up-to-date value when determining that the bid consideration is at least equal to the value of the maximum consideration under s621(3). The bidder should value the bid consideration at a time as close as practical to when it makes its offer.

Explanations

Valuation time in s621(4)

RG 163.14 Without our relief, a bidder offering non-cash consideration under a bid must value the bid consideration as at the time of the offer: s621(4). This is the time of the first offer, ie the time that the bidder sends its first bidder's statement and offer document to a holder under item 6 of s633(1).

RG 163.15 The time for valuation in s621(4) coincides with the end of the four months before the date of the bid in s621(3). The "date" of an off-market bid is the date on which offers are first made under the bid: s9.

Procedural issues

RG 163.16 Because the bidder must value non-cash bid consideration as at the time of the offer, it may not have enough time to comply with s621(4) and the procedural step in item 6 of s633(1).

RG 163.17 Without our relief:

- (a) The bidder must value the bid consideration on the day it sends its first bidder's statement and offer to a holder, within 14 to 28 days after it lodges the bidder's statement with us.
- (b) If the value of the consideration has decreased materially between the day that the bidder lodges the bidder's statement and the day of the first offer, it may have to increase the bid consideration and update the bidder's statement by replacement bidder's statement: see RG 163.62.

The bidder may have to increase the bid consideration because s621(3) and (4) require that the value rather than the number of securities that the bidder offers as bid consideration at least equals the value of maximum consideration. The bidder may increase the number of securities that it offers or top up with cash. This will involve meetings of the bidder's directors, executives and advisers to approve the changes to the documents.

- (c) The bidder must print copies of the bidder's statement and offer documents to send to holders. The bidder has a three-day period to print and send copies of its bidder's statement and offer documents to all holders, starting on the date that it sends its first.

RG 163.18 Class Order [CO 00/2338] gives the bidder up to five business days to value the bid consideration, update the bidder's statement and print the bidder's statement and offer documents. "Business day" means a day that is not a Saturday, Sunday, public holiday or bank holiday in the place concerned: s9.

Decreases in value after the valuation time

RG 163.19 If the bidder makes a pre-bid purchase after the valuation time and before the date of the first offer, the pre-bid purchase consideration must not exceed the value of bid consideration ascertained as at the valuation time. Section 621(3) applies to pre-bid purchases after the valuation time, because it covers the period until the date of the first offer.

RG 163.20 In addition, if the consideration for a pre-bid purchase after the valuation time did exceed the value of bid consideration, the

bid consideration may be automatically varied: s651A. Section 651A applies to cash purchases outside an off-market bid during the bid period.

Unquoted securities as bid consideration

RG 163.21 Class Order [CO 00/2338] covers bid consideration of quoted securities only. We will give similar relief on a case-by-case basis to a bidder offering unquoted securities as bid consideration. We will give this relief if the bidder requires additional time to value the securities and complete and print the bidder's statement.

RG 163.22 We differentiate between unquoted securities as bid consideration and quoted securities because the value of unquoted securities is less likely to change in the period between the lodgement of the bidder's statement and the time of the first offer than the market price of quoted securities. For quoted securities, the market price is the normal measure of value.

RG 163.23 We will give relief for bidders offering unquoted securities as bid consideration only if there has been or is likely to be a change in value. In deciding whether to give relief, and in determining the additional time that the bidder needs, we will consider the circumstances of the particular bid, eg the number of holders.

RG 163.24 If there is a material change in the value of the unquoted securities late in the 14 to 28 day period under item 6, we may give relief to extend the time for the bidder to send the bidder's statement: see Regulatory Guide 159 *Takeovers: Discretionary powers* at RG 159.42–RG 159.45. This relief would give the bidder time to value, update and print the bidder's statement.

C Valuation method

Our policy

RG 163.25 Non-cash bid consideration and pre-bid purchase consideration should be valued as follows:

- (a) for quoted securities:
 - (i) normally the bidder should adopt the volume weighted average market price of the securities in the ordinary course of trading during the two full trading days before each of:
 - (A) the time of the pre-bid purchase;
 - (B) the time as close as practical to when the bidder lodges its bidder's statement; and
 - (C) the valuation time (see [CO 00/2338]).An expert's report is not required for quoted securities as consideration;
 - (ii) we may give case-by-case relief allowing a bidder to adopt a valuation based on the market price over a period longer than two trading days, or based on another method of valuation; and
 - (iii) the period on which the value as at the valuation time is based must not start until at least five trading days have elapsed after the date the bidder sent a copy of the bidder's statement to the target and the securities exchange; and
- (b) for unquoted securities, the bidder should:
 - (i) value the consideration:
 - (A) for pre-bid purchase consideration, as at the time of the purchase or agreement; or
 - (B) for bid consideration, as at the time as close as practical to when the bidder lodges the bidder's statement and as at the valuation time; and
 - (ii) appoint an expert to report on whether in the expert's opinion the value of pre-bid purchase consideration and bid consideration is fair and reasonable and provide reasons for its opinion.

Underlying principles

RG 163.26 The equality principle demands that the bidder must offer to holders bid consideration at least equal to the maximum consideration. It is important that a valuation as close as practical to the true value of non-cash consideration forms the basis of this comparison between bid consideration and maximum consideration.

Explanations

RG 163.27 Section 621(3) does not require a bidder to offer bid consideration of the same kind as pre-bid purchase consideration, but the bid consideration must be of at least equal value. For example, the bidder may give cash as pre-bid purchase consideration and then offer securities as bid consideration.

RG 163.28 The minimum bid price principle requires the bidder to value consideration to compare the maximum consideration and the bid consideration. The bidder must also value consideration under different pre-bid purchases to identify the maximum consideration. The bidder must value the pre-bid purchase consideration as at the time the purchase or agreement is made: s621(4).

RG 163.29 If the bidder provides the same securities as pre-bid purchase and bid consideration, the bidder must value the consideration consistently, using the same method to ascertain the value as at the time of the offer, purchase or agreement.

Quoted securities

RG 163.30 Normally, when valuing quoted securities as consideration, the bidder should adopt the volume weighted average market price in the ordinary course of trading during the two full trading days before each of:

- (a) the pre-bid purchase;
- (b) the time as close as practical to when the bidder lodges its bidder's statement with us: see RG 163.62; and
- (c) the valuation time (see [CO 00/2338]).

RG 163.31 The bidder should use this method of valuation because the Corporations Law treats the market price as the normal measure of value. See the requirement that the bidder's statement includes the market price of quoted securities as pre-bid purchase consideration: s636(1)(h)(ii). Using the volume weighted average price across two

trading days reduces the risk of distortion because of short-term price volatility. An expert's report is not required if the bidder adopts the market price. We discuss the "ordinary course of trading" concept in Regulatory Guide 145 *Collateral benefits* (RG 145).

RG 163.32 To obtain the benefit of [CO 00/2338], as at the valuation time the bidder must value quoted securities in accordance with RG 163.30. We may give case-by-case relief allowing a bidder to adopt a value based on the market price over a period longer than two trading days, or based on another method of valuation. We will give this relief where it is likely that another period or method produces a value closer to the true value. We expect the relief will be exceptional. For example, this may be appropriate where the quoted securities are traded very thinly.

RG 163.33 A bidder must obtain the relief because:

- (a) if the bidder chooses a market price calculated across a period longer than two trading days, there is more uncertainty as the period of trading increases, whether the bidder has valued the securities as at the time of the offer. Section 621(4) requires the bidder to adopt the value ascertained as at this time; and
- (b) if the bidder chooses a method of valuation other than the market price, it needs relief because the market price is the normal measure of value.

RG 163.34 A market irregularity is a particular circumstance where we will give relief so that the bidder may adopt a valuation based on the market price over a longer period or a value other than the market price: see RG 163.78–RG 163.84.

RG 163.35 If the bidder adopts a valuation based on a method other than the market price, the bidder should appoint an expert to give an opinion on the value. It is particularly important that the bidder adequately explains in the bidder's statement the basis of the valuation and the reasons for adopting a value different to the market price.

RG 163.36 The period of trading on which the value as at the valuation time is based must not start until at least five trading days have elapsed after the bidder sends a copy of the bidder's statement to the target and the securities exchange under items 3 and 5 of s633(1). This is so there is time for the market price to reflect the impact of the takeover bid. We will not give relief to abridge the 14 day period between serving the bidder's statement on the target and sending the bidder's statement to holders if this would leave insufficient time for the five trading days: see Superseded Policy Statement 57 *Takeovers* at [SPS 57.36].

Unquoted securities

RG 163.37 Where the bidder gave unquoted securities as pre-bid purchase consideration, the bidder's statement must include or be accompanied by a report by an expert that states whether, in the expert's opinion, the value stated is fair and reasonable and gives the reasons for that opinion: s636(1)(h)(iii) and 636(2).

RG 163.38 Section 636(2) applies only where the bidder gave unquoted securities as pre-bid purchase consideration. But the subsection suggests that it is appropriate to appoint an expert when the bidder is required to value unquoted securities as bid consideration for the purposes of the minimum bid price principle.

RG 163.39 The expert appointed to value unquoted securities as pre-bid purchase or bid consideration must be independent. Section 648A(2) provides that the expert must be someone other than an associate of the bidder.

Range of values

RG 163.40 If the bidder provides a range of values of the unquoted securities, it is necessary to work out an appropriate point within the range for comparison between maximum consideration and bid consideration. The appropriate point to adopt in a range of values is the point that the bidder works out is the most likely value.

RG 163.41 Without exceptional circumstances, this will be the mid-point of the range (average or mean value). If there is a normal probability distribution of values, the mid-point is the most likely value. This is consistent with the Panel's decision in *Re Email Limited* (2000) 18 ACLC 708, 716:

If we adopted a valuation ... which could be represented by a simple, symmetrical bell curve, we would be entitled to take the mid-point of a valuation range based by the valuer on that curve... we would be adopting the valuer's conclusion that it was most probable that the value lay at the peak of the curve, and that it was no more likely to lie below that peak than above it.

RG 163.42 The result produced by this approach is not unlike that produced by the approach of Lockhart and Hill JJ in *BTR Plc v Westinghouse Brake and Signal Company (Australia) Ltd* (1992) 34 FCR 246, 259-60. Lockhart and Hill JJ characterised their approach as "commonsense":

If the expert, rather than arriving at a single price which he considers to be fair and reasonable, provides instead a range of

figures meeting that criterion (all derived from a single method of valuation), it must follow that the expert is of the opinion that each and every figure within the range is fair and reasonable... Commonsense, however, would suggest that the fairest result would be obtained by taking an average of values.

RG 163.43 Exceptionally, the bidder may consider that the mid-point of a range is not the most likely value. For example, the bidder may attach greater weight to one outcome than another, so that the probability distribution of values will be skewed. Note also it may be inappropriate to take the mid-point of values determined from different methods: *Hawker de Havilland Ltd v ASC* (1991) 6 ACSR 579, 591.

RG 163.44 It follows that the minimum bid price principle does not require the bidder to adopt:

- (a) the lowest point in the range for unquoted securities as bid consideration as the point of comparison with pre-bid purchase consideration; or
- (b) the highest point in the range for unquoted securities as pre-bid purchase consideration as the point of comparison with bid consideration.

RG 163.45 The bidder should explain in the bidder's statement the basis for fixing the point in a range for the purposes of the minimum bid price principle.

Reasonable grounds

RG 163.46 It is a separate issue whether the bidder and expert have reasonable grounds for their view on the value or a range of values: see Regulatory Guide 12 *Valuation reports and profit forecasts* at RG 12.69. If the bidder does not have reasonable grounds for the value, it risks breaching s621(3). The bidder may also risk a declaration of unacceptable circumstances by the Panel: see RG 163.124.

D Bidder's statement

Our policy

RG 163.47 To take the benefit of [CO 00/2338] or case-by-case relief, the bidder must:

- (a) disclose the value of the non-cash bid consideration in the bidder's statement that it lodges with us; and
- (b) in the event of a material change in the value of the bid consideration, send a supplementary bidder's statement or replacement bidder's statement to all holders.

The prospectus disclosure requirement for bidder's statements may mean that, without a specific requirement in our relief, the bidder would have to disclose a valuation of securities as bid consideration: s636(1)(g). This is particularly so for unquoted securities.

RG 163.48 A bidder that provided securities as pre-bid purchase consideration must disclose in the bidder's statement the market price or value per security at the time of the pre-bid purchase: s636(1)(h)(ii) and (iii).

Underlying principles

RG 163.49 The specific requirement in our relief that the bidder discloses its valuation of the bid consideration is part of the package of relief available under this policy. This package resolves practical issues for bidders while promoting the purposes of the takeover provisions in Chapter 6. One purpose of the takeover provisions is that the holders of voting shares and the directors of the target are given enough information to enable them to assess the merits of the proposal: s602(b)(iii). The holders and directors of the target should have a reasonable time to consider the information: s602(b)(ii).

RG 163.50 The value of non-cash consideration offered is critical information for holders in assessing the merits of the bidder's proposal. It is particularly important that a bidder offering unquoted securities as bid consideration provides a valuation of this consideration. holders and the target cannot refer to a market price, and the bidder is in a better position to value the unquoted securities.

RG 163.51 holders and the target should have access to a valuation of the non-cash bid consideration as well as the pre-bid purchase

consideration so they can check that the bidder has complied with the minimum bid price principle.

RG 163.52 At the same time, the specific requirement in our relief removes uncertainty for the bidder about whether it must disclose the valuation of securities as bid consideration in its bidder’s statement.

Explanations

Valuation in the bidder’s statement

RG 163.53 The bidder must value securities that it gave as pre-bid purchase consideration and securities that it offers as bid consideration, to ensure that bid consideration is at least equal to the maximum consideration: s621(3). In view of this requirement, all bidders should disclose in the bidder’s statement the valuation of securities offered as bid consideration. We expect bidders would give a “headline valuation” anyway in promoting the offer to holders.

Content requirement: pre-bid purchase consideration

RG 163.54 If the bidder provided securities as pre-bid purchase consideration, the bidder must disclose in the bidder’s statement:

- (a) for quoted securities, the market price per security of those securities: s636(1)(h)(ii); and
- (b) for unquoted securities, the value per security of that consideration: s636(1)(h)(iii).

For the purposes of s636(1)(h), the bidder should value pre-bid purchase consideration in accordance with RG 163.25.

Content requirement: prospectus disclosure

RG 163.55 The bidder’s statement must include all material that would be required for a prospectus for an offer of those securities by the bidder under s710–713: s636(1)(g). This suggests that, although it is not certain in each case, the bidder would have to disclose a valuation of non-cash bid consideration.

RG 163.56 This is particularly so for unquoted securities because:

- (a) a value is more likely to be information that an investor would reasonably require in the absence of a market price; and
- (b) the more limited prospectus content requirement for quoted securities does not apply: s713.

RG 163.57 Authorities suggest s636(1)(g) may require the bidder to disclose a valuation. Bryson J commented he could not see clearly why disclosure of a valuation privately obtained is not required: *ICAL Ltd v County Natwest Securities Australia Ltd* (1988) 13 ACLR 129, 147. He used the language of the predecessor to s636(1)(g), as well as s636(1)(m). (Following the CLERP Act, the catch-all disclosure requirement in s636(1)(m) no longer requires disclosure of information that s636(1)(g) does not require: s636(1)(m)(iii).)

RG 163.58 Einfeld J suggested that if a target had reason to obtain a valuation from its advisers, the valuation and its basis should be disclosed: *Ridley MI Pty Ltd v Joe White Maltings Ltd* (1996) 22 ACSR 319, 328. Einfeld J relied on the information principle now in s602(b) and the content requirements in s750 of the old Law. Although it is not entirely clear from *Joe White Maltings* whether s636(1)(g) requires this disclosure.

RG 163.59 Dowsett J found that the bidder is not required to disclose “judgements” or “opinions based on information” about the valuation of securities offered as bid consideration: *Re Primac Holdings Ltd* (1996) 22 ACSR 213, 219. But he suggested that a professional opinion, as opposed to a business judgement of the bidder’s directors, should be disclosed. This is particularly relevant where the bidder must use an expert: see RG 163.25(a)(ii).

RG 163.60 Like a valuation, a forecast involves evaluation, opinion and estimate. A forecast may be part of a valuation. Tamberlin J found substantial support for the view that earnings forecasts provide material information which investors and their advisers would reasonably require: *Pancontinental Mining Ltd v Goldfields Ltd* (1995) 16 ACSR 463, 469–71, 475. But what is material is a matter for assessment in the particular circumstances.

Quoted securities

RG 163.61 Bidders who offer quoted securities as bid consideration:

- (a) to take the benefit of [CO 00/2338] must disclose the market price of the securities as at the valuation time, given by the method in RG 163.25(a). The bidder must also disclose the method for working out the market price, including the trading days used for the purposes of its calculations; and
- (b) as best practice, should disclose the highest and lowest closing prices of the securities in the four months before the valuation time.

Replacement bidder's statement

RG 163.62 In disclosing the valuation of non-cash bid consideration in the bidder's statement, the bidder should value the securities as at the time as close as practical to when the bidder lodges its bidder's statement with us, and again at valuation time. If the value of securities as bid consideration has fallen by the valuation time, the bidder may need to increase the bid consideration to comply with s621(3).

RG 163.63 If the value of the bid consideration at the valuation time has changed materially from the value stated in the bidder's statement lodged with us, the bidder should revise the valuation in a supplementary bidder's statement or replacement bidder's statement.

RG 163.64 To comply with the procedural steps under items 2 and 6 of s633(1), a bidder must:

- (a) lodge with us a bidder's statement disclosing a valuation of the non-cash bid consideration as at the time as close as practical to when the bidder lodges; and
- (b) send to all holders:
 - (i) the bidder's statement if the valuation is still current at the valuation time; or
 - (ii) if the value has materially changed at the valuation time, a replacement bidder's statement under [CO 00/344]. It is preferable that the bidder sends a single replacement bidder's statement. This is rather than eg for quoted securities, sending the original bidder's statement to holders and the supplementary bidder's statement to the relevant securities exchange under s647(3)(b): see RG 159.31.

RG 163.65 Item 6 of s633(1) requires that the offer must be made on the same terms as those set out in the bidder's statement and offer document lodged with us under item 2. A bidder updating the valuation using a replacement bidder's statement complies with item 6 because [CO 00/344 gives relief to the extent that item 6 would require a bidder to send the original bidder's statement.

RG 163.66 If the only changes to the original bidder's statement reflect changes in the valuation of securities as bid consideration since the day that the bidder lodged the original bidder's statement, the bidder may send the replacement bidder's statement without delay: [CO 00/2338]. Otherwise under [CO 00/344] the bidder would have to wait 14 days before sending the replacement bidder's statement to holders unless either target directors or ASIC agreed that the bidder may send it earlier.

RG 163.67 For other requirements of a bidder concerning supplementary or replacement bidder's statements see: s633(1) and 647, RG 159.31–RG 159.38 and [CO 00/344].

E Foreign securities

Our policy

RG 163.68 Class Order [CO 00/2338] extends to securities quoted on an ASIC-approved foreign exchange: see Regulatory Guide 72 *Foreign securities prospectus relief* at RG 72.61–RG 72.62. Our policy on valuing quoted securities applies to foreign securities quoted on an ASIC-approved foreign exchange: see RG 163.25(a).

RG 163.69 The bidder should convert the value of foreign securities as consideration to Australian dollars for the purposes of the comparison required by the minimum bid price principle as at the time of the pre-bid purchase and the valuation time.

Underlying principles

RG 163.70 As with Australian quoted securities as bid consideration, the value of securities quoted on a foreign exchange is more likely to change between lodgement and the valuation time than that of unquoted securities: see RG 163.22. Foreign securities should be valued using the method in RG 163.25(a) only if the market price is reliable.

Explanation

RG 163.71 In the absence of our relief, quoted securities are marketable securities in a class of marketable securities listed for quotation on a stock market of a securities exchange: s1097A(1). This does not include securities quoted on a foreign exchange only.

RG 163.72 ASIC-approved foreign exchanges meet ASIC’s criteria in RG 72.64. The market price of a security quoted on an exchange that meets these criteria is more likely to be reliable.

RG 163.73 We may give case-by-case relief for a bidder offering foreign securities quoted on a non-approved foreign exchange.

RG 163.74 In valuing foreign quoted securities, the bidder should adopt the volume weighted average market price of the securities in the ordinary course of trading during the two trading days before the pre-bid purchase or the valuation time: see RG 163.25(a). The “ordinary course of trading” concept can be applied in respect of most foreign exchanges: see in particular the statement of Gowans J in *AG (Vic) v Walsh’s Holdings Ltd* (1973) VR 137, 144 quoted at RG 145.41.

F Public proposals

Our policy

RG 163.75 Section 631 and s621(3)–(4) operate independently. If the bidder publicly proposes that it will offer a particular number of securities per bid class security as bid consideration, it cannot reduce this number: s631(1). This is although the minimum bid price principle would allow the bidder to decrease the number of securities offered under the bid as the value increases.

Underlying principles

RG 163.76 A bidder's public proposal to make a takeover bid must not be reckless or misleading: s631(2) and 999. The bidder must be held to the terms and conditions in its public proposal. This is so that the acquisition of control takes place in an efficient, competitive and informed market: s602(a), see Regulatory Guide 59 *Announcing and withdrawing takeover bids* at RG 59.3–RG 59.5. These principles differ from the equality principle underlying s621(3)–(5).

Explanations

RG 163.77 The terms and conditions of a takeover bid must be the same as or not substantially less favourable than those in the public proposal: s631(1). See RG 59, particularly RG 59.23–RG 59.27.

G Market irregularities

Our policy

RG 163.78 We may give case-by-case relief to allow a bidder to adopt a value of quoted securities as bid consideration different to the market price calculated under RG 163.25(a) (based on the two trading days before the valuation time), where the market price has materially decreased because of a market irregularity.

RG 163.79 To establish a market irregularity, the bidder must show it is likely that the purpose of traders was to temporarily decrease the price of the securities as bid consideration so that the bidder must increase the number of the securities to match the maximum consideration.

Underlying principles

RG 163.80 During a market irregularity, the market price does not reflect the underlying value of the bid consideration, which is the basis for the comparison with maximum consideration. The market price does not reflect true supply and demand.

Explanation

RG 163.81 A decrease in the market price of securities offered by a bidder as bid consideration is to an extent a normal result of such an offer. The bidder bears the risk of such a decrease.

RG 163.82 In applying for our relief, the bidder must point to clear patterns of trading that make it likely traders had the purpose of decreasing the price of the securities as bid consideration. This relief will be exceptional.

RG 163.83 The bidder may give to us the opinion of a securities market professional to assist in showing a market irregularity. The market professional should not be an associate of the bidder.

RG 163.84 We will give relief allowing the bidder to adopt a value other than the market price calculated under RG 163.25(a)(i) (by reference to the two trading days before the valuation time) in other exceptional circumstances: see RG 163.25(ii) and RG 163.32–RG 163.33.

H Changes in value of bid class securities

Our policy

Decreases in value

RG 163.85 Under [CO 00/2338], bid consideration of cash or quoted securities may be below the maximum consideration to the extent of a decrease in the underlying value of bid class securities where:

- (a) the decrease resulted from:
 - (i) the target declaring a cash dividend; or
 - (ii) a share split under s254H; and
- (b) the ex date for the corporate action is:
 - (i) after the relevant pre-bid purchase; and
 - (ii) at or before the date of the bid.

We will give similar relief on a case-by-case basis for unquoted securities in respect of these corporate actions.

RG 163.86 We may give similar relief on a case-by-case basis for bid consideration of cash, quoted or unquoted securities for other decreases in the underlying value of bid class securities, such as other corporate actions, eg:

- (a) issue or allotment of securities;
- (b) a non-cash dividend; or
- (c) a return of capital.

An expert's opinion about the impact of the change on the value of the bid class securities may assist an application for relief. We will insist on such an opinion only where the impact of the corporate action is particularly complex.

RG 163.87 The "ex date" is the date on which the relevant securities exchange changes the basis of quotation for the securities to signify that trading in the securities no longer carries the entitlement to the corporate action.

Increases in value

RG 163.88 Where there is an increase in the underlying value of the bid class securities:

- (a) that resulted from a corporate action, eg a share consolidation under s254H;
- (b) the corporate action occurred after the relevant pre-bid purchase and at or before the valuation time; and
- (c) the bidder does not increase its consideration above the maximum consideration correspondingly,

the bidder may risk a declaration of unacceptable circumstances by the Panel: see [PS.163.124. This is despite the bidder offering consideration per security at least equal to the maximum consideration: in these circumstances, s621(3) on its strict terms may not operate.

Underlying principles

RG 163.89 If the underlying value of the bid class securities changes following the relevant pre-bid purchase because of a corporate action, under the equality principle there should be a corresponding adjustment of bid consideration away from the maximum consideration. If the value of bid class securities:

- (a) decreases, the bidder may offer bid consideration below the maximum consideration; and
- (b) increases, the bidder should offer bid consideration above the maximum consideration,

to the extent of the change.

Explanations

Decreases in value

RG 163.90 Section 641(1)(d) of the old Law gave ASIC the power to approve an amount of bid consideration below the maximum consideration. Section 641(1)(d) referred to cases where the target company:

- (a) made, agreed to make or announced an allotment of its shares;

- (b) granted, agreed to grant or announced options to subscribe for its shares;
- (c) issued, agreed to issue or announced an issue of convertible notes; and
- (d) declared, or announced, a dividend.

RG 163.91 In omitting s641(1)(d) of the old Law, there was no legislative intention that ASIC should no longer approve these adjustments. The amendment simplifies the Law by removing specific powers of approval. ASIC can achieve the same result under its general power to exempt and modify: s655A.

RG 163.92 A similar policy to that in s641(1)(d) of the old Law may be found in s619(2). Under s619(1), offers made under an off-market bid must be the same. However, in applying s619(1), the bidder may disregard some differences, eg where the offers involve securities which have different accrued dividend or distribution entitlements: s619(2)(b).

RG 163.93 We will give relief only for changes of value resulting from particularly clear changes in the underlying value of bid class securities, usually corporate actions. In making a pre-bid purchase, the bidder accepts the risk of market and business changes (and may protect itself by conditions). These changes are different to decisions by the target to change its share capital or distribute profits.

RG 163.94 For the purposes of our policy, the bidder should not take into account the taxation consequences for holders of a corporate action in working out what adjustment is appropriate.

RG 163.95 At the time of this guide, we have received few applications for relief concerning decreases in the value of bid class securities. In the light of our experience in the future we may review this policy. For example we may consider whether to expand the types of corporate actions decreasing the underlying value of bid class securities covered by [CO 00/2338].

I Alternative forms of consideration

Our policy

RG 163.96 If the bidder offers alternative forms of bid consideration, both forms of consideration must be at least equal to the maximum consideration.

Underlying principles

RG 163.97 If the bidder could offer alternative consideration that has a value below maximum consideration, it would effectively allow the bidder and a holder to contract out of the requirement in s621–3. Generally, the bidder and a holder cannot contract out of prohibitions and requirements in the takeover provisions.

Explanations

RG 163.98 Under s621(3), the bid consideration must at least equal the maximum consideration. There is no suggestion that if the bidder offers alternative bid consideration, this requirement only applies to one or some of these alternatives. We do not anticipate giving relief from s621(3) to allow the bidder to offer alternative bid consideration (whether cash or non-cash) below maximum consideration. We may review this policy in light of our experience.

J Previous takeover bid

Our policy

RG 163.99 We will give case-by-case relief so that in identifying maximum consideration the bidder may exclude pre-bid purchases made by it under a previous takeover bid. We will not give this relief where the bidder withdrew unaccepted offers under:

- (a) a market bid, relying on s652C; or
- (b) an off-market takeover bid that was unconditional.

Underlying principles

RG 163.100 If the pre-bid purchase was under a takeover bid, all holders had a reasonable and equal opportunity to participate in any benefits accruing to the holders through the proposal: s602(c). Each holder had the opportunity to accept the previous offer.

RG 163.101 We will not give relief where the previous takeover bid was unconditional and the bidder withdrew unaccepted offers: s652A–C. This is because holders who had already accepted the bidder’s offer before the withdrawal may be better off than those who had not.

Explanations

RG 163.102 Without our relief, a takeover contract under a previous takeover bid by the bidder will be a pre-bid purchase if a holder accepted within four months before the second takeover bid. The previous bid consideration was consideration that the bidder agreed to provide: s621(3). This includes a takeover contract rescinded under a defeating condition: “defeating condition” paragraph (a) in s9. We may review this policy in light of our experience.

RG 163.103 See RG 59, in particular RG 59.81 on ASIC consent to withdraw unaccepted offers under s652B.

K Purchases by bidder's associates

Our policy

RG 163.104 We will give case-by-case relief to exclude pre-bid purchase consideration provided by a person who became an associate of the bidder after the pre-bid purchase.

Underlying principles

RG 163.105 The equality principle demands that if an associate of a bidder makes a pre-bid purchase, the bidder should account for the pre-bid purchase consideration provided by the associate in identifying the maximum consideration. This is because the associate and the bidder were or were likely to be acting together in purchasing bid class securities for the purposes of the takeover bid. It ensures that the bidder does not indirectly build a pre-bid stake by paying a premium over the amount offered to holders under the takeover bid.

RG 163.106 This concern does not apply where a purchaser and the bidder were not associates at the time of the pre-bid purchase, but later became associates. The purchaser was acting independently of the bidder in paying the pre-bid purchase consideration.

Explanations

RG 163.107 Section 621(3) covers maximum consideration that the bidder *or an associate* provided or agreed to provide under a pre-bid purchase.

RG 163.108 A bidder applying for our relief must clearly establish that the purchaser and the bidder were independent at the time of the pre-bid purchase, although they became associated later. We will look closely at the particular circumstances before deciding to give our relief.

L Offers to group companies and nominees

Our policy

RG 163.109 A bidder may offer bid consideration that is below the maximum consideration to:

- (a) a body corporate that is in the same wholly-owned group as the bidder; and
- (b) nominees and bare trustees of bid class securities for the bidder or a body mentioned in paragraph (a).

See [CO 00/2338].

RG 163.110 For [CO 00/2338] to cover an offer to such a body corporate (or its nominee), the body must give to the bidder its written consent for it or its nominee to receive an offer that is below the maximum consideration.

Underlying principles

RG 163.111 The interests in the takeover bid of the bidder and a body corporate in the same wholly-owned group are likely to be aligned. The equality principle does not protect the interests of the bidder.

RG 163.112 Where the bidder or such a body corporate holds the bid class securities through a bare trustee or nominee, it retains a beneficial interest in the securities. A holding by a nominee should be treated like a direct holding by the bidder or the body.

Explanations

RG 163.113 Without our relief, the bidder must offer to all holders consideration at least equal to the maximum consideration: s621(3). All the offers made under an off-market bid must be the same: s619(1).

RG 163.114 The bidder may for example wish to concentrate group holdings of bid class securities in order to obtain 80 per cent of the voting shares in the target company, so that capital gains rollover relief is available to accepting holders.

RG 163.115 For the purposes of our relief, a wholly-owned group comprises a parent company and its wholly-owned companies, including any intermediate wholly-owned companies in a corporate chain.⁴

RG 163.116 Class Order [CO 00/2338] requires the consent of the offeree body corporate because its directors owe fiduciary duties of loyalty to it. Although the interests of the group may be relevant in determining its interests: *Walker v Wimborne* (1976) 137 CLR 1. The consent requirement provides:

- (a) a trigger for the directors to consider the interests of the body corporate in contracting out of the protection afforded by the minimum bid price principle; and
- (b) evidence that the body decided to contract out.

⁴ CASAC *Corporate Groups Final Report* (May 2000) n.107.

M Price variation agreements

Our policy

RG 163.117 A bidder relying on s621(5) must take into account the total consideration actually paid or determined under a price variation agreement when identifying the maximum consideration.

RG 163.118 If the consideration paid or determined under a price variation agreement exceeds that specified in the agreement, the bidder may risk a declaration of unacceptable circumstances by the Panel: see RG 163.124.

Underlying principles

RG 163.119 The equality principle demands that if the bidder actually provides consideration above that specified in a price variation agreement, the bidder must offer bid consideration at least equal to that consideration.

Explanations

RG 163.120 A price variation agreement is a pre-bid purchase agreement that specifies a price for the bid class securities, but allows the price to be varied. For the purposes of s621(3), the bidder may disregard any variation in price under the agreement when working out the price agreed to be paid for the security under the agreement: s621(5).

RG 163.121 It is arguable that if the bidder actually pays a price in excess of that specified, s621(5) does not apply. Section 621(5) is limited to identifying the price *agreed* to be paid, not the price actually paid. Otherwise, the bidder could use a price variation agreement as a device to minimise bid consideration required by s621(3). Also, some price variation agreements are prohibited under s622, escalation agreements.

N Unacceptable circumstances

Our policy

RG 163.122 The following table lists other examples of situations where the bidder may risk a declaration of unacceptable circumstances by the Panel.

<i>Situation A</i>	<p>The bidder:</p> <ul style="list-style-type: none"> (a) temporarily inflates the value of securities offered as bid consideration at the valuation time by a corporate action or announcing a corporate action, eg a buyback; and (b) fails to adjust its bid consideration to account for the imminent decrease in the value of the securities once the effect on price of the corporate action has passed.
<i>Situation B</i>	<p>The bidder:</p> <ul style="list-style-type: none"> (a) acquires bid class securities by acquiring a body which holds them or acquiring a "mixed lot" which includes the securities during the four months before the date of the bid; and (b) fails to take this into account as a pre-bid purchase.
<i>Situation C</i>	<p>The bidder fails to take into account a pre-bid purchase by an associate of the bidder.</p>

Explanations

RG 163.123 The Panel may declare circumstances in the affairs of a company to be unacceptable circumstances. The Panel may declare circumstances to be unacceptable whether or not the circumstances constitute a contravention of the Law: s657A.

RG 163.124 The Panel may make a declaration on application of:

- (a) the bidder;
- (b) the target;
- (c) ASIC; or
- (d) any other person whose interests are affected: s657C.

Key terms

RG 163.125 In this guide, a reference to:

“CASAC” means Companies and Securities Advisory Committee

“CLERP Act” means the Corporate Law Economic Reform Program Act 1999

“holders” means holders of bid class securities and other securities that may be acquired under s617

“Law” means the Corporations Law

“maximum consideration” means the maximum consideration that the bidder or its associates provided or agreed to provide for a bid class security under a pre-bid purchase

“minimum bid price principle” is the principle contained in s621(3)–(4)

“old Law” means the Corporations Law before it was amended by the CLERP Act

“Panel” means the Corporations and Securities Panel

“pre-bid purchase” means a purchase or agreement under which the bidder or an associate provided or agreed to provide consideration for bid class securities during the four months before the date of the bid

“valuation time” for bid consideration, means:

- (a) the time when the bidder sends its first bidder’s statement and offer document under item 6 of s633(1); or
- (b) the time when the bidder values the bid consideration for the purposes of the minimum bid price principle under our relief.

Related information

RG 163.126

Headnotes

s621(3)–(5); minimum bid price principle; time and method of valuing consideration; disclosure of valuation.

Class orders

[CO 00/2338], [CO 00/344]

Policy statements and practice notes

Superseded Policy Statement 57 *Takeovers* [SPS 57]

Superseded Practice Note 67 *Financial forecasts in prospectuses* [SPN 67]

Regulatory guides

RG 7 *Calculating time periods*

RG 12 *Valuation reports and profit forecasts*

RG 35 *Collateral benefits in takeovers*

RG 59 *Announcing and withdrawing takeover bids (s653 and s746)*

RG 72 *Foreign securities prospectus relief*

RG 145 *Collateral benefits—Takeovers funding and pre-bid purchases*

RG 159 *Takeovers: Discretionary powers*

Legislation

s9, 254H, 602(a), (b)(ii) and (c), 617, 619(1) and (2)(b), 621(3)–(5), 622, 623, 623(3)(c), 631, 631(1) and (2), 633(1), 636(1)(g),(h)(ii) and (iii), (m)(ii), 636(2), 646, 647(3)(b), 648A(2), 650B(1)(h), 651A, s652A–C, 655A, 657A, 657C, 710–713, 999, 1097A(1)

Old Law provisions

s641(1)(d), 676(1), 698(2) and (4)

Cases

AG (Vic) v Walsh's Holdings Ltd (1973) VR 137

BTR Plc v Westinghouse Brake and Signal Company (Australia) Ltd (1992) 34 FCR 246

Re Email Limited (2000) 18 ACLC 708, 715–6

Hawker de Havilland Ltd v ASC (1991) 6 ACSR 579, 591

ICAL Ltd v County Natwest Securities Australia Ltd (1988) 13 ACLR 129, 147

Pancontinental Mining Ltd v Goldfields Ltd (1995) 16 ACSR 463, 469–71, 475

Re Primac Holdings Ltd (1996) 22 ACSR 213, 219

Ridley MI Pty Ltd v Joe White Maltings Ltd (1996) 22 ACSR 319, 328

Walker v Wimborne (1976) 137 CLR 1

Consultation papers and reports

Minimum bid price principle: s621(3)–(5) (May 2000)

CASAC Corporate Groups Final Report (May 2000)

CASAC Recommendations for reform of ss 621(4) and 623(2) & (3) of the Corporate Law Economic Reform Program Bill (1998)

Corporations and Securities Panel Policy on the Minimum Price Requirement - s621(3) & (4) (March 2000)

Information releases

[IR 00/16] ASIC calls for comment on minimum bid price principle

[IR 00/37] ASIC releases policy for bidders that build a pre-bid stake