



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 31

Acquisitions by a broker acting as principal for client facilitation purposes

October 2009

About this guide

This guide is for brokers and their advisers.

It explains when ASIC will give relief from s606 of the *Corporations Act 2001* (Corporations Act) to allow a broker to acquire securities as principal for prompt disposal in the course of providing client facilitation services.

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 version was issued on 27 October 2009 and is based on legislation and regulations as at 27 October 2009.

Previous versions:

- Superseded Regulatory Guide 31, issued 11 August 1992, updated 17 May 1993, 6 February 1995, 9 May 1997, rebadged as a regulatory guide 5 July 2007.

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.

Relief from s606 for acquisitions by brokers acting as principal

Key points

We will consider granting case-by-case relief from s606 of the Corporations Act to allow a broker or syndicate of brokers to acquire a large parcel of securities from a single client (or associated clients) as principal for prompt disposal in the course of providing client facilitation services. We will only grant relief if it does not appear to us that the broker has a control purpose.

Any relief we give will be subject to conditions designed to restrict the broker's ability to exert control over the relevant entity and to prevent warehousing. Under our conditions, the broker:

- must reduce its voting power in the relevant entity to 20% or less within 14 days after acquiring the securities;
- must not exercise any voting rights attached to those securities in excess of 20% without our consent; and
- in selling any securities acquired under the relief, must use its best endeavours to obtain as wide a placement as practicable, for the highest practicable price.

Where we grant relief from s606, the broker will still be required to comply with the obligation to give substantial holding notices in s671B.

Client facilitation and the prohibition in s606

RG 31.1 Often a broker will buy and sell securities on behalf of a client as agent. Sometimes, instead of acting as agent, a broker will acquire securities directly from its clients and hold the securities briefly as principal for prompt resale. This may occur where the client decides to sell their parcel of securities at a firm price to a broker for on-sale. By selling the whole parcel directly to a broker rather than trying to dispose of it in smaller parcels on-market, the holder achieves a firm price. Brokers, as professional share traders, may be better placed to handle the sale of a large parcel of securities without causing the share price to fall. The broker assumes the risk the share price will fall in the period between acquisition from their client and on-sale—but also secures business and has the opportunity to profit. This is known as 'client facilitation'.

RG 31.2 Chapter 6 of the Corporations Act regulates the acquisition of control over listed entities and unlisted companies with more than 50 members (Chapter 6 entities). Section 606 is one of the key provisions in Chapter 6. It prohibits a person from acquiring a relevant interest in securities if as a result the person will increase their voting power in a Chapter 6 entity from 20% or below to more than 20% or from a starting point that is above 20%, unless they do so pursuant to one of the exceptions in s611.

- RG 31.3 A broker can buy and sell securities as an agent and not acquire a relevant interest in the securities or have voting power in the relevant entity: see s609(3) as amended by Class Order [CO 01/1542] *Relevant interests, voting power and exceptions to the main takeover prohibition* and Regulatory Guide 171 *Anomalies and issues in the takeover provisions* (RG 171) at RG 171.23–RG 171.27.
- RG 31.4 In contrast, a broker is prohibited by s606 from acquiring securities as principal if as a result it will increase its voting power in a Chapter 6 entity from 20% or below to more than 20% or from a starting point that is above 20%. This will occur where the parcel of securities acquired by the broker from its client is large (over 20% of the entity’s issued share capital). An example of where a client may wish to dispose of a large parcel of securities within a short period of time is where the client has made an unsuccessful bid for the entity—that is, the client has acquired over 20% of the entity’s securities on issue but not a large enough stake to give them control.

Large parcel relief

- RG 31.5 We will consider granting case-by-case relief from s606 to allow a broker or syndicate of brokers to acquire a large parcel of securities from a single client (or associated clients) as principal for prompt disposal in the course of providing client facilitation services. A large parcel is generally a parcel of more than 20%, but may be less depending on the initial voting power of the broker. This relief is known as ‘large parcel relief’.

Relief for client facilitation where there is no control purpose

- RG 31.6 We will only grant large parcel relief where we are satisfied that the broker is genuinely providing client facilitation services and it does not appear to us that the broker has a control purpose.
- RG 31.7 The rationale for granting relief to permit a broker to provide client facilitation services is that its role in providing these services is similar to a broker’s role in buying and selling securities as an agent. In these circumstances, the broker will generally be seeking to profit from ordinary broking activities, rather than attempting to obtain or increase control over a Chapter 6 entity. Accordingly, where a broker does not have a control purpose, we consider that the commercial benefits to the broker and the broker’s clients are likely to outweigh any risk that the purposes of Chapter 6 will be undermined.
- RG 31.8 In exercising our discretion to grant large parcel relief and in considering whether the broker is acting for genuine client facilitation purposes and does not have a control purpose, we will consider the following factors:

- (a) whether the broker is acquiring the securities with the purpose of on-selling them, rather than the purpose of holding or voting any of the securities;
- (b) the broker's voting power in the entity—for example, we consider that there is a greater risk of our relief being used for control purposes where the broker has a significant voting power in the entity. This is because the broker is less likely to be neutral in their disposal of the securities and it may be tempted to use the relief for warehousing. For example they may do this by helping a potential friendly bidder to build a pre-bid stake in the hope of an attractive offer for their holding; and
- (c) how long the broker has had that voting power—we will apply more scrutiny if the broker or its associates have recently been acquiring securities in the entity.

RG 31.9 Even where we do give relief, we will continue to monitor the situation to make sure we have no ongoing control concerns. If we do have concerns that the relief is being used for control purposes, we may apply to the Takeovers Panel for a declaration of unacceptable circumstances. We will look for any indications that contrary to their initial intention, the broker appears to be holding the securities for control purposes rather than trying to dispose of the securities, for example, where the broker or an associate subsequently makes a bid.

RG 31.10 We suggest that brokers retain records of all disposals made, as we may ask to see this information if we have any control concerns. This information will also assist brokers to demonstrate compliance with their substantial holding obligations: see RG 31.19–RG 31.20.

RG 31.11 Brokers should also be mindful of the prohibition against insider trading in s1043A of the Corporations Act and should put appropriate information barriers in place.

RG 31.12 Syndicates of brokers cooperating to acquire and dispose of a large parcel of securities may also need relief from s606 if they are acting as associates and as a result of the acquisition their voting power exceeds 20% (even if individual relevant interests are 20% or less).

Conditions for our large parcel relief

RG 31.13 Large parcel relief will generally be granted subject to conditions that the broker:

- (a) must reduce its voting power in the relevant entity to 20% or less, within 14 days after acquiring the relevant securities;
- (b) must not exercise any voting rights attached to those securities in excess of 20% without our consent; and

- (c) in selling any securities acquired under the relief, must use its best endeavours to obtain as wide a placement as practicable, for the highest practicable price.

- RG 31.14 These conditions are designed to restrict the broker's ability to exert control over the relevant entity and to prevent warehousing.
- RG 31.15 We are imposing voting restrictions and a requirement to sell down within 14 days, only over the securities above 20%. This is because the broker could acquire up to 20% without relief. It is also because it may be difficult to dispose of the entire parcel in such a short time frame. However, in the ordinary course, in keeping with the purpose of our relief, we would expect a broker to sell down all of the securities acquired within a reasonable period of time after the acquisition.
- RG 31.16 In considering whether to give our consent to permit a broker to exercise votes attaches to the securities acquired, we will take into account all the relevant circumstances. However, given the policy underlying our relief (i.e. that the broker does not have a control purpose), we are likely to give our consent only in very rare circumstances.
- RG 31.17 In selling down any securities obtained in reliance on our relief (not just the securities above 20%), the broker must attempt to find a balance between obtaining as wide a placement and as high a price as practicable. We will ordinarily interpret 'as wide a placement as practicable' to have been met if, in ordinary market conditions, no person acquires more of the relevant securities from the broker than would constitute 5% of the securities of the relevant entity. Selling securities into a takeover offer would not breach the condition.
- RG 31.18 We will not give large parcel relief between the announcement and the holding of any general meeting of the relevant entity's securityholders. This will assist in preventing the vote being distorted as a result of a large portion of securities being restricted from voting.

Substantial holding provisions

- RG 31.19 Where we grant relief from s606, the broker will still be required to comply with the obligation to give substantial holding notices in s671B. We will not give relief from this requirement.
- RG 31.20 Compliance with the substantial holding provisions will promote the principle that the acquisition of control takes place in an efficient, competitive and informed market: s602(a). It will also provide information to us and the market about the process by which the relevant parcel has been sold down, including whether there have been any off-market transfers. This

will assist us if we are concerned that the relief is being used for control purposes.

How to apply for large parcel relief

RG 31.21 Applications for large parcel relief should:

- (a) confirm that the broker will be acquiring the relevant securities in the course of providing genuine client facilitation services and that the broker does not have any control purpose;
- (b) confirm that the broker can meet the conditions for relief in RG 31.13;
- (c) comply with Regulatory Guide 51 *Applications for relief* (RG 51);
- (d) be accompanied by the prescribed fee; and
- (e) be addressed to the Manager of Corporations or Emerging, Mining and Resources (as appropriate), c/o Australian Securities and Investments Commission, GPO Box 9827 in your capital city and emailed to applications@asic.gov.au

Key terms

Term	Meaning in this document
Chapter 6 entity	Listed entities and unlisted companies with more than 50 members
client facilitation	Where a broker acquires securities directly from its client and holds the securities briefly as principal for prompt resale
Corporations Act	The <i>Corporations Act 2001</i> including regulations made for the purposes of the Act
large parcel relief	Case-by-case relief from s606 to allow a broker to acquire a large parcel of securities from a single holder (or associated holders) as principal for prompt disposal in the course of providing client facilitation services
RG 171 (for example)	An ASIC regulatory guide (in this example, numbered 171)
s606 (for example)	A section of the Corporations Act (in this example, numbered 606)