



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/684*

This is the Explanatory Statement for ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/684 (**Instrument**).

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

#### Summary

1. The Instrument modifies a bidder's right to compulsorily acquire securities following a takeover bid. The modification ensures that a bidder who has met the requirements for post-bid compulsory acquisition in relation to the bid class is not prevented from acquiring 100% ownership merely because employee securities, that would otherwise be in the bid class, are non-transferable. ASIC's modification also has the purpose of countering the possible defensive effect of non-transferable employee securities.
2. The *Legislative Instruments Act 2003* (the **LIA**) provides for the periodic expiry of legislative instruments ('sunsetting') to ensure that they are kept up to date and only remain in force for so long as they are needed. [Class Order \[CO 13/522\]](#) *Compulsory acquisitions and buyouts* (**[CO 13/522]**) is a legislative instrument and was scheduled to eventually expire under the sunsetting provisions of the LIA. ASIC's reissuing of the relief underlying **[CO 13/522]** has given ASIC the opportunity to deal with its eventual expiry. The modifications in the Instrument are generally similar in nature to those in **[CO 13/521]**.
3. **[CO 13/522]** is repealed by *ASIC Corporations, Credit and Superannuation (Amendment and Repeal) Instrument 2023/699*.

#### Purpose of the instrument

4. This Instrument relates to the provisions of Chapter 6A of the Act. In broad terms, Chapter 6A gives a person a right to compulsorily acquire securities under certain circumstances depending on the level of the person's interest in the relevant class of securities or the entity overall. The Chapter applies to interests held in companies, listed registered managed investment schemes and other listed bodies.

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5. There are two types of compulsory acquisition under Chapter 6A:
    - (a) post-bid compulsory acquisition—under which a bidder who has, during or at the end of the bid acquired relevant interests in 90% of securities in the bid class (**90% Relevant Interest Test**), and has acquired 75% of the securities that the bidder made offers for under the bid (**75% Acquisition Test**), may compulsorily acquire outstanding bid class securities; and
    - (b) general compulsory acquisition—under which any person can compulsorily acquire securities:
      - (i) in a class in respect of which the person holds full beneficial interest in 90% of the securities (by number); or
      - (ii) where the person has voting power in the entity of at least 90% and holds, either alone, or with a related body corporate, full beneficial interests in at least 90% (by value) of all the securities of the entity that are either shares or interests or convertible into shares or interests.
  6. Chapter 6A also provides a right to minority interest holders to have their interests bought out by the holder of an overwhelming majority of the securities in a class. Relevantly, where the overwhelming interest has been acquired by a bidder following a takeover bid, both the holders of remaining bid class securities and securities convertible into bid class securities must be offered an opportunity to be bought out by the bidder. This ensures that minority interest holders are not ‘locked-in’ as a minority in the event, for example, that the bidder decides not to proceed to compulsory acquisition.
  7. Chapter 6A was introduced by the Corporate Law Economic Reform Program Act 1999 (the **CLERP Act**). Since the implementation of the CLERP Act, ASIC has made a number of exemptions from, and modifications to, the provisions of Chapter 6A by way of legislative instrument with a view to:
    - (a) improving the operation of the provisions in light of developments and innovations observed in the market over time; and
    - (b) addressing technical issues and anomalies identified in the course of ASIC’s administration of the relevant provisions.

## Consultation

8. On 30 November 2022, ASIC released Consultation Paper 365 (**CP 365**) seeking feedback on proposals to remake nine class orders relating to takeovers, compulsory acquisitions and relevant interests (including [CO 12/1209], [CO 13/519], [CO 13/520], [CO 13/521], [CO 13/522], [CO 13/524], [CO 13/525], [CO 13/526], and [CO 13/528]). The consultation period closed on 23 January 2023.

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9. CP 365 invited feedback as to whether [CO 13/522] *Compulsory Acquisitions and Buyouts* was operating effectively and efficiently, or whether there were issues or improvements that should be considered to improve its operation.
  10. ASIC received 4 submissions in response to CP 365, one of which addressed [CO 13/522]. We took that submission into account in making the Instrument. Details of the submissions received are contained in REP 773 Response to submissions on CP 365 which is available on ASIC's website at [www.asic.gov.au](http://www.asic.gov.au).

## Operation of the instrument

### Compulsory acquisition of non-transferable employee securities

11. Companies, and other entities the securities of which are subject to Chapter 6A, may issue securities to their employees or non-executive directors under an employee incentive plan or a similar kind of scheme (*employee securities*). In order to achieve the objectives of the incentive plan the securities that are issued may be non-transferable. If the company's constitution or the terms on which the employee securities are issued restrict their transfer the restrictions might prevent the bidder from acquiring the securities under a takeover bid. The restrictions on transfer may also mean the employee securities are in a different class from the class to which the bid related (the *bid class*) meaning the bidder is unable to acquire them under the post-bid compulsory acquisition provisions.
12. The Instrument modifies subsection 661A(1) which establishes a bidder's right to compulsorily acquire securities following a takeover bid. The purpose of the modification is to ensure that a bidder who has met the requirements for post-bid compulsory acquisition in relation to the bid class is not prevented from acquiring 100% ownership merely because employee securities, that would otherwise be in the bid class, are non-transferable. ASIC's modification also has the purpose of countering the possible defensive effect of non-transferable employee securities. Many bidders seek 100% ownership of the target. Uncertainty about whether a bidder can compulsorily acquire non-transferable employee securities may be a factor in discouraging takeover bids.
13. Sub-subparagraph 5(a)(i) of the Instrument extends subsection 661A(1) so that if a bidder compulsorily acquires bid class securities it may also compulsorily acquire non-transferable employee securities where:
  - (a) the employee securities are in a different class to the bid class merely because they are non-transferable due to restrictions in the company's constitution; and
  - (b) the employee securities, if included in the bid class, would not exceed 10% of all bid class securities (by number worked out at the end of the period for which offers under the takeover bid remain open (offer period)).
14. In a general sense, the modification treats non-transferable employee securities similarly to bid class securities issued during or after the offer period. The

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bidder may elect to compulsorily acquire later issued securities if it acquires bid class securities: see subsection 661A(4). Under subsection (4A), where a bidder elects to compulsorily acquire non-transferable employee securities the bidder must acquire all employee securities which were issued or granted before the end of the offer period and may elect to acquire any others in which the bidder has a relevant interest (no matter when they were issued or granted): see sub-subparagraph 5(a)(iii) of the Instrument.

15. For the purposes of the modified subsection 661A(1), securities are ‘non-transferable’ when the constitution of the company or the terms of issue of the securities restricts their transfer (see paragraph (a) of subsection 661A(1)). Further, the security must be issued under a scheme to or for the benefit of employees or non-executive directors of the company (or a related body corporate) in relation to their employment or services (see notionally inserted subsection 661A(6) inserted at sub-subparagraph 5(a)(v) of the Instrument). These terms limit the scope of the modification to employee securities that fall outside the bid class for a takeover bid.
16. The Instrument also makes a number of consequential amendments which apply in the context of the compulsory acquisition of non-transferable employee securities:
  - (a) section 661A sets out the circumstances in which a bidder may compulsorily acquire securities in the bid class following a takeover bid. It has effect notwithstanding anything to the contrary in the constitution of the target company: subsection 661A(5). The Instrument further modifies subsection 661A(5) for the avoidance of doubt, to ensure that it has effect despite anything in the terms of issue of the securities to be acquired which would include any restrictions on their transfer. A similar modification has been made to subsection 664A(4) which relates to general compulsory acquisitions which occur otherwise than in a takeovers context. The Instrument also modifies subsection 666B(2), which relates to the statutory procedure for completing the compulsory acquisition process, to further clarify that the process is effective notwithstanding any restrictions on transfer of the securities contained in the company’s constitution or the terms of issue of the securities;
  - (b) paragraph 661B(1)(c) sets out persons to whom the bidder must give a compulsory acquisition notice. The Instrument modifies this provision to include holders of non-transferable securities where the bidder has elected to compulsorily acquire non-transferable securities.
  - (c) subsection 661D(1) allows holders of securities who have received a compulsory acquisition notice to obtain from the bidder the names and addresses of everyone else to whom the bidder has given the notice. ASIC has made a consequential modification to this provision in recognition that, where the compulsory acquisition

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extends to non-transferable employee securities in accordance with ASIC's amendment, the securities to which the compulsory acquisition notice relates will no longer be limited to 'bid class' securities.

#### Amendments to the 75% Acquisition Test

17. Before a bidder may compulsorily acquire securities under subsection 661A(1) following or during a takeover bid, they must meet two principal thresholds. The bidder and their associates must, during, or at the end of, the offer period under the bid:
  - (a) have relevant interests in at least 90% (by number) of the securities in the bid class; and
  - (b) have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid.
18. Under section 12(2) of the Act, the bidder's associates for the purposes of this test are (where the bidder is itself a body corporate) other bodies corporate that control, are controlled by, or are under common control with the bidder and other persons with whom the bidder has, or proposes to enter into, an agreement, arrangement or understanding for the purpose of influencing or controlling the affairs of the target company or the composition of its board, or with whom the person is acting in concert in relation to the target's affairs.
19. The purpose of the 75% Acquisition Test is to ensure that the terms of the bid that precedes the compulsory acquisition have been accepted by a sufficient majority of target holders independent of the bidder. This requirement underpins the statutory right of the bidder to compulsorily acquire the remaining securities on the same terms as those offered under the bid. The Instrument amends Chapter 6A to address a number of issues and anomalies in relation to the calculation of the 75% Acquisition Test. These amendments are designed to promote the underlying purpose of the test.

#### *Exclusion of target securities controlled by the bidder or their associates from the 75% Acquisition Test*

20. The Instrument modifies section 661A to ensure that, when determining whether the 75% Acquisition Test has been met, the following are excluded from the calculation:
  - (a) securities in which the bidder or their associates had a relevant interest as at the date of the first offer under the bid; and
  - (b) securities issued to an associate of the bidder during the offer period (see notionally inserted paragraph 661A(2A)(a)).
21. The 75% Acquisition Test applies to acquisitions during the offer period by 'the bidder and their associates', regardless of how the acquisition takes place. As a

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result there is uncertainty whether a bidder is able to satisfy the 75% Acquisition Test by:

- (a) acquiring securities in which the bidder themselves, or one of their associates, already have relevant interests (including for example where the bidder acquires securities held by the associate); or
  - (b) counting as an ‘acquisition’ securities issued directly to an associate of the bidder during the offer period (including for example securities the associate subscribed for under a fundraising) and which the bidder offered to acquire under the bid.
22. In each case counting acquisitions of this kind towards the 75% Acquisition Test is likely to be inconsistent with the underlying policy of the test of seeking to ensure that sufficient acceptance of the bid terms by independent holders has been demonstrated before a bidder is entitled to proceed to compulsory acquisition on those terms.
23. Paragraph 661A(2A)(a) clarifies the operation of the provision and addresses the potential that the underlying policy of the 75% Acquisition Test is not met by expressly excluding any securities in which the bidder or their associates have a relevant interest from the 75% Acquisition Test. However, the Instrument provides a new exception in paragraph 661A(2A)(a)(i), with the effect that the 75% Acquisition Test includes any securities acquired on-market by the bidder during the bid period but prior to commencement of the offer period in reliance on the exception in item 2 of section 611. The inclusion of these particular securities upholds the underlying policy described above.
24. The securities excluded under paragraph 661A(2A)(a) are excluded from being counted both as part of the number of securities ‘acquired’ by the bidder and their associates and as part of the number of securities ‘the bidder offered to acquire under the bid’. Having excluded securities from the number ‘acquired’, it may otherwise be impossible for the bidder to meet the 75% Acquisition Test if the provision did not also exclude them from the number the bidder ‘offered to acquire’.
25. Consequential on the introduction of paragraph 661A(2A)(a), the Instrument amends subsection 661A(2) to ensure that the narrower ‘relevant interest’ concept in the provision does not apply with respect to the 75% Acquisition Test. The purpose of this amendment is to ensure that the usual test for determining a relevant interest in section 608 (including the deeming provision in paragraph 608(3)(a)) applies for the purposes of determining whether securities are excluded from the 75% Acquisition Test in accordance with paragraph 661A(2A)(a).

*Convertible securities and the 75% Acquisition Test*

26. The Instrument also notionally inserts paragraph 661A(2A)(b) to provide relief from the 75% Acquisition Test when the bid class for a takeover offer is convertible securities. Convertible securities are securities which can be

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converted into, or exchanged for, another class of security (for example ordinary shares in a company) by the holder exercising a right attached to the security.

27. The application of the 75% Acquisition Test is complicated in the case of bids for convertible securities as holders may exercise their convertible securities during the offer period. If a substantial proportion of holders to whom offers are made under the bid exercise their convertible securities it may be impossible for the bidder to meet the 75% Acquisition Test. This is because the bidder cannot count convertible securities that are exercised as securities acquired by it (the numerator in the percentage calculation) but these convertible securities would still be counted as securities that the bidder offered to acquire (the denominator) under the 75% Acquisition Test.
28. Paragraph 661A(2A)(b) excludes from the number of convertible securities that the bidder offered to acquire under the bid convertible securities that are exercised or converted between a certain date set by the bidder and the end of the offer period. The inclusion of this provision reflects that if a holder exercises their convertible securities rather than accepting the offer for the convertible securities under the bid, the holder will neither have accepted nor directly rejected the terms of the bidder's offer. The holder may have exercised the convertible securities for other reasons.

#### Amendments to the 90% Relevant Interest Test

29. Under the 90% Relevant Interest Test for post-bid compulsory acquisition a bidder and their associates must have, during, or at the end of, the offer period, relevant interests in at least 90% (by number) of the bid class securities. Subsection 661A(2) states that in calculating the bidder's relevant interest the bidder must disregard relevant interests that the bidder has merely because of the operation of subsection 608(3) of the Act.
30. Under subsection 608(3) a person is deemed to have the same relevant interests a body corporate or managed investment scheme has based on the person's interests in the body corporate or managed investment scheme. It applies where a person has more than 20% voting power in a body corporate or managed investment scheme (paragraph 608(3)(a)) and where the person controls a body corporate or managed investment scheme (paragraph 608(3)(b)).
31. The 90% Relevant Interest Test is a test of overwhelming ownership of the relevant class of securities. The exclusion in subsection 661A(2) recognises that it may be artificial, and inconsistent with the underlying purpose of the 90% Relevant Interest Test, to count securities in which the bidder has a relevant interest merely because it has voting power of more than 20% in another entity.
32. The Instrument modifies subsection 661A(2) to address two apparent anomalies in the application of the provision having regard to the overall purpose of the 90% Relevant Interest Test. It:
  - (a) clarifies that only deemed relevant interests arising on the basis of a person having voting power of greater than 20% are excluded under the provision for the purposes of calculating whether the bidder has

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satisfied the 90% Relevant Interest Test. This amendment has been made because subsection 661A(2) refers to subsection 608(3) which may be taken to include not only paragraph 608(3)(a) (which operates on the basis of a person's voting power being over 20%) but also paragraph 608(3)(b) (which operates on the basis that a person has control of the body corporate). The inclusion of relevant interests arising under paragraph 608(3)(b) were not intended to be excluded from the 90% Relevant Interest Test; and

- (b) extends the exclusion in subsection 661A(2) to relevant interests not only of the bidder but also the bidder's associates that may contribute to the bidder satisfying the 90% Relevant Interest Test. The amendment ensures that it is not possible for a bidder to avoid the exclusion by seeking to rely on deemed relevant interests held by associates to satisfy the 90% Relevant Interest Test. The policy underlying the exclusion of deemed relevant interests under paragraph 608(3)(a) applies equally to the interests of the bidder's associates.
33. These amendments are consistent with the underlying purpose of the provision and the legislative intention evidenced by:
- (a) the description in subsection 661A(2) of the types of relevant interest to be disregarded (i.e. 'relevant interest by 20% interest in body corporate'); and
  - (b) the recommendation in the Compulsory Acquisitions Report of the Legal Committee of the Companies and Securities Advisory Committee (January 1996) on which the amendments introducing subsection 661A(2) were largely based.

#### Concurrent buyout and compulsory acquisition rights in relation to bid class securities

34. The post-bid compulsory acquisition provisions and the post-bid buyout provisions apply to bid class securities in similar, but not identical, circumstances. The right of remaining holders of bid class securities to be bought out following a bid arises when the bidder acquires a relevant interest in at least 90% of the bid class securities. The right to compulsorily acquire arises when the bidder additionally satisfies the similar (but not identical) 90% Relevant Interest Test and additionally the 75% Acquisition Test.
35. The result of a takeover bid may therefore mean that both:
- (a) the bidder is entitled to compulsorily acquire certain bid class securities under subsection 661A(1); and
  - (b) minority holders are entitled to require the bidder to acquire the securities under subsection 662A(1).
36. The potential overlap is recognised in a provision which states that a bidder undertaking post-bid compulsory acquisition does not need to give buyout



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notices to those holders to whom it has already sent compulsory acquisition notices (subparagraph 662B(1)(c)(ii)). If all holders of remaining securities at the end of the offer period are given a compulsory acquisition notice prior to the time for giving a buyout notice (no later than one month after the end of the offer period), no buyout notices will need to be dispatched.

37. However, even when no remaining holder is to be given a buyout notice because of subparagraph 662B(1)(c)(ii), there is still a requirement that buyout offers are made in accordance with sections 662B and 662C by lodging a notice with ASIC and giving the notice to each relevant market operator (e.g. the ASX).
38. The Instrument modifies section 662A to confirm that a person does not need to make buyout offers if they have given a post-bid compulsory acquisition notice to every remaining holder, and the terms applying to the compulsory acquisition notice are the same as the terms of the bid immediately before the end of the offer period (see notionally inserted subsection 662A(2A)). This modification addresses a technical anomaly in the provision which means that the bidder may need to give a person a buy-out right notwithstanding that the provision does not require notification of the buyout right to be given. The modification does not remove any advantage the minority holders may otherwise have as there should be no difference between the terms on offer under the buy-out right and the compulsory acquisition.

#### **Legislative instrument and primary legislation**

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

#### **Duration of the Instrument**

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

#### **Legislative authority**

42. This Instrument is made under section 669 of the Corporations Act 2001. Paragraph 669(1)(b) provides that ASIC may declare that Chapter 6A of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
43. The Instrument commences on the day after it is registered on the Federal Register of Legislation and continues in force for 5 years until 1 October 2028.
44. Under subsection 33(3) of the Acts Interpretation Act 1901 (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of

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the Act), where an Act confers a power to make any instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend any such instrument.

45. As a legislative instrument, the Instrument is disallowable under section 42 of the Legislation Act 2003.

**Statement of Compatibility with Human Rights**

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

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

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

### ***ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/684***

#### Overview

1. This Instrument relates to the provisions of Chapter 6A of the Act. In broad terms, Chapter 6A gives a person a right to compulsorily acquire securities under certain circumstances depending on the level of the person's interest in the relevant class of securities or the entity overall. The Chapter applies to interests held in companies, listed registered managed investment schemes and other listed bodies.

#### Assessment of human rights implications

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

#### Conclusion

3. This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.