CORPORATIONS LAW SIMPLIFICATION PROGRAM

TAKEOVERS
PROPOSAL FOR SIMPLIFICATION

TASK FORCE
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Simplification Task Force
Attorney-General's Department
Barton ACT 2600

TAKEOVERS

PROPOSAL FOR SIMPLIFICATION

Scope and effect of proposal

This proposal covers Chapter 6 of the Corporations Law and the interpretation provisions in Part 1.2, including sections 11, 12, 15,16, 30-45, 51 and 64, so far as they are relevant to Chapter 6. it is proposed to introduce policy changes to these provisions to simplify their operation and to redraft them in plain English. The main changes to be made will:

- recast the central prohibition in section 615 and associated provisions so that they are easier to follow
- replace the checklist of content rules for disclosure documents provided by bidders and targets (A, B, C and D statements) with a general disclosure test
- improve the protection for target shareholders by requiring a bidder to extend the offer by 14 days if during the last week of the bid:
  - an off market bidder increases the consideration
  - an on market or off market bidder's interest rises above 50%
- improve the liability and defence provisions for takeover documents and bring them into line wit those proposed for prospectuses
- apply section 615 only to companies with more than 50 members
- extend the scope of part 6.8 (tracing of interests in shares) to all companies which are covered by Chapter 6
- remove review by the Administrative Appeals Tribunal (AAT) of ASC decisions whether to:
  - grant exemptions or modifications in relation to takeovers
  - register a takeover document by a person making an off market bid (part a statement)
  - refer a matter to the corporations and securities panel
- widen the circumstances in which the panel can make declarations of unacceptable conduct or unacceptable acquisition.

The proposal deals with the replacement of the responsible entity for collective investment schemes. It does not recommend the application of the Chapter 6 takeover rules to schemes. Rather, it proposes that changes in the responsible entity for schemes be approved by disinterested members only.

The proposal also addresses the recommendations made in the report of the Legal Committee of the Companies and Securities Advisory Committee (CASAC) entitled *Anomalies in the Takeovers Provisions of the Corporations Law* (March 1994). These are dealt with in proposals 5, 7, 9, 11 and 28 and in the table on pages 23 to 25.

In addition, the Task Force invites comments on the recommendations made by the CASAC Legal Committee in its report entitled *Compulsory Acquisitions* (January 1996). The Task Force agrees with the thrust of the recommendations made in relation to the compulsory acquisition mechanism in Chapter 6, the most important of which is to introduce a new

general power to compulsorily acquire securities once certain conditions have been met. The key recommendations are set out on page 11.

Benefits

The proposed changes will result in:

- takeover provisions that are easier to understand and apply
- reduced compliance costs
- improved information about takeovers
- easier compulsory acquisitions.

THE PROPOSAL

Proposal	Issues for consideration
Prohibited acquisitions	
1. The central takeover prohibition (section 615) will be improved by:	
a. eliminating the separate concept of entitlement and relying instead on a revised concept of relevant interest, and	
b. measuring relevant interests, acquisitions and the 20%-90% range by the number of votes attached to shares a person controls, rather than the number of voting shares.	
2. As a result, a person will be prohibited from acquiring a relevant interest in voting shares through a transaction entered into by or on behalf of the person if the acquisition would increase their or another person's relevant interest in the 20%-90% range.	
Relevant interests	
3. Relevant interest will be defined in terms of having:	
a. power to control the exercise of voting rights attached to shares, or	
b. power through an agreement to substantially influence the exercise of voting rights attached to shares, or	A. Should a person who is able to substantially influence the exercise of voting rights attached to a share otherwise than under an agreement have a relevant interest in the share? If so, in what circumstances?
c. power of the disposal of shares.	B. Is it necessary for the definition of relevant interest to extend to the power over disposal of shares?
4. As at present under sections 30-35, a relevant interest may be held either directly or indirectly through agreements or corporate structures.	
5. The concept of relevant interest will be further refined as follows:	
a. a member of a company will no longer have a relevant interest in the shares held by other members merely because of pre-emptive rights under the company's constitution	
b. a person will not acquire a relevant interest in a share under an exchange traded securities derivative until they are obliged to	

Proposal	Issues for consideration
take delivery of the underlying share, whether or not the writer of the derivative has any interest in the share	
c. a body corporate will have a relevant interest in the shares in which related bodies corporate have a relevant interest	
d. the recommendations dealing with relevant interest in the CASAC Legal Committee Anomalies Report will be implemented (recommendations 1 to 8).	
Associates	
6. The concept of associate will no longer be used to measure relevant interest for the purposes of section 615. elsewhere in Chapter 6, only the following will be regarded as associates of a person:	
a. related bodies corporate (paragraph 11(b))	
b. parties to an agreement which confers corporate control (paragraphs 12(1)(d) and (e))	
c. parties to an agreement to act in concert with the person (paragraph 15(1)(a).	
<u>Exceptions to the prohibition</u>	
7. The present exceptions to the takeover prohibition in section 615 will be retained, except that:	A. Should a bidder be allowed to enter into pre-bid agreements or understanding with shareholders without acquiring a relevant interest in their shares? If so, what conditions should be imposed (eg that the exception is condition on the bidder making a bid within 1 month)? B. Should the prohibition apply only in relation to listed companies?
a. the prohibition will not apply to companies with 50 or fewer members	
b. the exception for acquisitions under a prospectus by underwriters and promoters will be narrowed, so that it only applies where the effect of the acquisition on the company is disclosed in the prospectus, and	
c. the exceptions for acquisitions by other persons under either a prospectus (subsection 622(1)) or a secondary trading notice (section 622A) will be removed.	C. Should subsection 622(1) be retained an applied only to a company's first prospectus?
<u>Takeover bids</u>	

Proposal	Issues for consideration
8. A bidder offering shares as consideration under a takeover scheme will be permitted to arrange for the shares, which would otherwise be offered to foreign shareholders, to be sold and the proceeds of sale paid to them.	
9. During the offer period and for 3 days after its close, a bidder will be able to declare offers and contracts resulting from acceptances free of prescribed occurrence (as defined in section 603) conditions.	
10. A bidder will be required to extend the closing date of a bid by 14 days if, during the last week for the bid;	
1. under an on market or off market bid the relevant interest of the bidder in the target shares rises above 50%, or	
b. the consideration under an off market bid is increased.	
<u>Benefits given outside a takeover bid</u>	
11. A bidder will be prohibited (whether before or during the bid) from offering benefits to target shareholders if they are likely to induce acceptances. The existing prohibitions on giving benefits in section 698 will be removed.	Should section 641 provide that where a bidder has paid cash for shares in the 4 months before a bid offering a scrip as consideration, the bid must include an equivalent cash alternative?
12. The operation of section 697 will be altered to allow bidders to agree to adjust the price paid for target shares up to the amount offered for the shares under a subsequent full bid.	
<u>Contents of takeover documents</u>	
13. The rules for the contents of takeover statements in section 750 will be amended to require that:	A. Should it be possible to issue securities under what is now a Part A statement if that statement foreshadowed the quotation of those securities within a specified time and the securities are not quoted within that time?
a. all statements contain the information that target shareholders and their professional advisers would reasonably require and reasonably expect to find in the statement for the purpose of making an informed assessment of whether or not to accept the offer	B. Should there be a requirement to update what are now Part A, B, C and D statements as in the supplementary prospectus regime?
b. a bidder's statement (replacing what are now Part A and C statements) identify the bidder	C. Should a bidder be allowed to post offers less than 14 days after serving what is now the Part A statement, if the directors of the target company agree?

Proposal	Issues for consideration
c. a bidder's statement in relation to an offer of securities as consideration for a takeover offer contain the same matters that are required by section 1022 for a prospectus offering those securities (or if applicable in relation to quoted securities, the matters required by section 1022AA), and d. a target's statement (replacing what are now Part B and D statements) disclose the interests target directors have in the bid, any recommendations they make about accepting the bid and if no recommendation is made, a statement to that effect. 14. The 2 documents required for an off market bid (Part A statement and an offer document) will be merged into 1 document – a bidder's statement. 15. The information persons are required to disclose under the new general disclosure test will be extended to include information they could obtain by making reasonable enquiries. 16. Consents by experts for the inclusion of a statement by them in takeover documents will be required in all cases. <u>Takeover liability</u> 17. The following persons will be liable for damages resulting from a takeover document in which there is a false or misleading statement or from which there is an omission: a. a bidder and a director of a corporate bidder – for the whole of the document b. a person named with their consent as having made a statement in the document, or as having made a statement on which a statement in the document is based – for the statement in the document c. a person named in the document with their consent as having performed any professional or advisory function in relation to the document – for false or misleading statements for the correctness of which they are responsible in that capacity and omissions from statements for the completeness of which they are responsible in that capacity	D. Should what are now unconditional cash Part A statements continue to be required to be registered?

d. a person who is shown to be involved in the contravention (under section 79).

18. The following defences will be available to an action for damages:

a. after taking reasonable precautions and exercising due diligence, the person believed that a statement was true and not misleading or that there was no material omission from the document

b. the person placed reasonable reliance on a statement or report supplied by another person which was included in the document with their consent

c. the person withdrew their consent to being name in the document.

19. In an action for damages or an injunction, it will no longer be necessary to establish that the false or misleading statement or the omission was material. The requirement will be retained for criminal proceedings.

20. Actions for damages or an injunction in relation to disclosure in takeover documents, including notices of variation, will only be available under section 704, and not under the general prohibition on misleading and deceptive conduct in relation to dealings in securities in section 995.

21. Civil liability for misleading and deceptive statements made in relation to a takeover, but not in a bidder's or target's statement, will be regulated by section 995. Section 705 will be repealed.

ASC powers

22. The following ASC decisions will not be reviewable by the AAT:

a. whether to exercise its exemption and modification powers under section 728 or 730 in relation to takeovers or proposed takeovers

b. whether to register a bidder's statement (section 644)

c. whether to refer a matter to the Corporations and Securities Panel (section 733).

Proposal	Issues for consideration
Review by the Court under the *Administrative Decisions (Judicial Review) Act 1977* will continue to be available.	
23. The ASC's power under paragraph 633(c) to exempt an acquisition of shares from section 615 will be abolished. (Its powers under section 728 and 730 will be retained.)	
<u>The Panel</u>	
24. The definition of unacceptable circumstances in subsection 732(1) will be expanded to cover shifts in control of a company, whether or not an acquisition of a substantial interest in the company has occurred.	A. Should the jurisdiction of the Panel over matters involving the conduct of target companies and their directors under paragraph 732(2)(b) be extended? If so, how? B. Should a person with an interest in a takeover matter have a direct right of access to the Panel?
<u>Substantial shareholder notices</u>	
25. Following from the proposal to eliminate the concept of entitlement, substantial shareholders will only be required by Part 6.7 to disclose in relation to voting shares in a company: a. their relevant interests, and b. the identify of their associates.	Should Part 6.7 require a person to disclose other information (eg interests held by directors)?
<u>Tracing beneficial ownership of shares</u>	
26. The right to issue a beneficial shareholder notice under Part 6.8 will be extended to all companies with more than 50 members so that the scope of Part 6.8 is aligned with that of the section 615 prohibition.	
<u>Collective investment schemes</u>	
27. Resolutions to remove a responsible entity and to appoint a new one will have to be passed by an absolute majority (by value) of the disinterested members of the scheme. Both the responsible entity to be removed and the proposed new responsible entity will be regarded as having an interest in the outcome of the resolutions and they (together with their associates) will be precluded from voting.	A. Should there be a lower threshold for removing the responsible entity? If so, what should it be? B. As an alternative to proposal 27, should the Chapter 6 rules for companies apply to the acquisition of interests in a listed collective investment scheme? If so, given the rationale for the 20% threshold, should an ordinary resolution of the scheme members be sufficient to replace the responsible entity, as is the case for

Proposal	Issues for consideration
	appointment and removal of company directors? C. If either of the 2 alternatives were adopted, in order to prevent avoidance of these requirements, should a change in control of the responsible entity require approval of an absolute majority (by value) of the members of the scheme excluding the votes attached to interests held by: i. the shareholders of the responsible entity and their associates, and ii. the proposed controller of the responsible entity and their associates?
<u>Anomalies Report</u> 28. The recommendations of the CASAC Legal Committee in its Anomalies Report will be dealt with as indicate dint eh table on page 22. All recommendations for changes to the takeovers provisions will be implemented except for recommendations 21 and 43. Also, recommendations 10, 38 and 39 have been overtaken by other Task Force proposals.	

COMPULSORY ACQUISITIONS

CASAC LEGAL COMMITTEE KEY RECOMMENDATIONS

Task Force Proposal

The Task Force proposes to introduce a new general power to compulsorily acquire securities and to amend the existing compulsory acquisition provisions in Chapter 6 along the lines recommended by the CASAC Legal Committee in its Compulsory Acquisitions Report (January 1996). For that purpose the Task Force invites comments on the relevant recommendations.

New power

The new power for compulsory acquisitions would permit a person referred to as the 'controlling entity' who has a beneficial interest in at least 90% of any class of securities in any company to which takeover rules apply to compulsorily acquire the remaining securities in that class, subject to the controlling entity obtaining court approval if a minimum number of holders of those securities object. As a consequence, the existing power in section 414 will be repealed. The controlling entity will not be required to have made a successful Chapter 6 bid before using the power. The main procedures envisaged for the exercise of the power are:

- a controlling entity will be able to initiate an acquisition by circulating identical unconditional cash offers to all remaining holders of a class of securities to acquire the securities
- once the procedure is initiated it cannot be withdrawn except as expressly permitted and no other means of acquisition can be used
- the controlling entity will need to commission at least 1 independent expert's report on whether the offer for the relevant class is for fair value (with the Law to require that the value of the company be assessed as a whole and the value of each class of security be determined taking into account its relative financial risks and distribution rights and that there be no premium or discount for the securities to be acquired)
- if fewer than 10% (by value) of the remaining holders dissent, the acquisition must proceed and all holders will be notified and paid the consideration within 14 days after the close of the offer
- the controlling entity must either withdraw the offer or commence court proceedings for its approval, if 10% (by value) or more of the remaining holders dissent
- the court will have power only to approve or not approve a compulsory acquisition fro all holders
- the controlling entity will pay its costs of court proceedings and will generally pay the costs of dissenting holders
- a person who successfully acquires all the securities of a particular class will also have to offer to buy out the holders of all securities convertible into that class.

Existing mechanisms in Chapter 6

The CASAC Legal Committee has recommended other reforms to Chapter 6, including to:

- make it clear that the decision in *Gambotto v WCP Ltd* (1994-95) 182 CLR 432 does not apply to compulsory acquisitions under Chapter 6

- allow takeover offers to be made for any class of securities (not only shares as at present)
- extend section 701 to all securities of the bid class
- reform the compulsory acquisition threshold in section 701 by maintaining 90% entitlement test, but replacing the 75% in number tests with a 75% outstanding entitlement test
- permit the court, as well as the ASC, to relax the compulsory acquisition threshold in section 701 where appropriate
- confine section 703 buy-outs to securities of the bid class or securities which are convertible into that class
- apply the compulsory acquisitions under section 701 the same fair value test as recommended for the new power.

DEVELOPMENT OF THE PROPOSAL

The Task Force is aware that different views are held by participants in the market as to the appropriateness of the takeover rules in Chapter 6, as well as the Eggleston principles set out in section 731, which underline the rules. However, a broad review of these rules (introduced in 1980 as the Companies (Acquisition of Shares) Code), is beyond the Task Force's mandate. Rather, the Task Force is proposing changes to make the existing rules operate more effectively and efficiently.

Prohibited acquisitions

The proposal is to restructure the central prohibition in section 615 so that it achieves substantially the same results, but in a clearer and more direct way.

Current law

Section 615 prohibits a person from acquiring shares, if it would lead to an increase in any person's entitlement to shares. The provision relies on a combination of a number of artificial and complex concepts:

- Acquisition, which includes an acquisition of securities that results in an acquisition of a relevant interest in shares.
- Entitlement, which relies on the concepts of relevant interest and associate. A person's entitlement consists of shares in which they have a relevant interest and shares in which their associates have a relevant interest.
- Relevant interest, which includes the power to control votes attached to a share and the power over disposal of a share.
- Associate, which includes persons acting in concert and others who are likely to do so.

The Anomalies Report

In its Anomalies Report, the CASAC legal Committee recommended technical amendments to remove numerous anomalies relating to the concepts of relevant interest, entitlement and associate. It also suggested that the Task Force review those concepts as part of the Simplification Program. In carrying out that review, the Task Force sought the views of various experts on takeovers. While several suggested that the current complexities give rise to opportunities for avoidance, many thought that the provisions worked reasonably well in practice. The Task Force has therefore focused on making the provisions simpler and easier to use, while keeping in mind avoidance issues.

Proposed prohibition

Given that the prohibition in section 615 ultimately relies heavily on the concept of relevant interest, the Task Force proposes to use this concept directly and to by-pass the concepts of entitlement and associate. Framing the prohibition in terms of acquisitions of relevant interests which result in increasing someone's relevant interest in the 20% to 90% range provides a simpler and more certain rule.

It has the added advantage of closing some of the possibilities for avoiding section 615. the section currently applies only where an acquisition of shares coincides with an increase in entitlement. At least in theory, the section can be avoided by separating the acquisition and the increase in entitlement. For example, a person could create an association (thus becoming entitled to the shares of the associate) and then acquire those shares without breaching the prohibition.

Votes instead of shares

Practical difficulties arise because section 615 focuses on the number of voting shares, ignoring the difference in the voting power attached to the individual shares. For example, where a person holds 20% of shares which carry full voting rights and the other 80% of the voting shares carry only fractional voting rights (because they are partly paid), the person can control a percentage of votes substantially above the 20% level (in theory up to 100%). These difficulties can be overcome by shifting the focus of the prohibition to the overall voting power attached to a particular parcel of shares.

The shift in focus will be underpinned by implementing recommendation 8 in the Anomalies Report that section 51 has amended to provide that a person should be taken to acquire a share whenever the person acquires power to vote in respect of the share, even if the person already has a relevant interest in the share. The Task Force agrees with the substance of this proposal. It will be extended to apply to an acquisition of increased voting power in respect of a share. This would mean, for example, that an acquisition takes place where a person who holds partly paid shares with proportionate voting rights pays up all or part of the amounts outstanding on those shares.

One of the obstacles to the use of super voting shares by listed companies identified during the inquiry into super voting shares was that Chapter 6 would not adequately regulate acquisitions of these shares (*Super voting Shares: Report by Expert Panel of Inquiry into Desirability of Super Voting Shares for Listed companies,* March 1994). The proposal will remove this obstacle, but this should not be seen as a comment on the merits of shares in listed companies carrying multiple votes.

Definition of relevant interest

The following further refinements of the definition of relevant interest will be implemented:

- Power to substantially influence the exercise of voting power attached to voting shares as a result of an agreement, arrangement or understanding which is currently an element of the entitlement concept (paragraph 609(2)(a)(iii)) will be included in the concept of relevant interest.
- Every body corporate in a group will be regarded as having a relevant interest in shares controlled by any other body corporate in the group (paragraph 11(b) and section 32). This will continue to allow transfers of significant parcels of shares within company groups.
- The remainder of the entitlement concept dealing with shares held by associates of a person in circumstances where the person does not have any real control over the shares will not become a part of the new definition of relevant interest.
- In *North Sydney Brick & Tile Co Ltd v Darvall* (1986) 5 NSWLR 681, the Court held that pre-emptive rights in a company's articles gave each shareholder a relevant interest in all the company's shares. It is proposed that pre-emptive rights not give shareholders a relevant interest in each other's shares.
- A person controlling 20% of voting shares in a body corporate is deemed to control all shares controlled by the body and its associates (section 33). The rule is intended to apply only once (ie it is not intended to allow tracing through a chain of 20% holdings). Redrafting of the provision will clarify this aspect of its operation. In addition, a person will not be treated as having a relevant interest in shares because an associate of an interposed body corporate has a relevant interest in the shares (Anomalies Report, recommendation 2 & 3).
- Relevant interests will not be traced from relevant interests which are themselves disregarded under section 38 to 43 (Anomalies Report, recommendation 4).

- A person is currently taken to acquire a relevant interest in an issued share when they enter into an agreement if the other party to the agreement has a relevant interest in the shares and, on performance of the agreement, the person would have a relevant interest in the share (section 34). The aim of the provision is to establish certainty as to when a relevant interest arises. The provision's effect in relation to exchange traded options or futures contracts over shares can, however, lead to unfair results, because there are often no underlying shares held by the writer of the option or futures contract. Consequently, the Task Force proposes that in those situations a relevant interest should be attributed to the 'buyer' only when they become obliged to take delivery of the underlying share.
- A relevant interest arising from an agreement that is condition upon approval by target shareholders under section 623 or by the ASC under its exemption or modification powers will be disregarded until the approval has been give if the agreement:
  - Does not give the potential purchaser control over voting, and
  - Does not restrict disposal of the subject shares for more than 3 months (Anomalies Report, recommendation 14).

A relevant interest may also arise from a pre-bid understanding with a holder of a parcel of shares in the target that the holder would sell into a bid for a particular consideration. The Task Force invites comment on whether this interest should be disregarded. The provisions could be limited to agreements with significant shareholders which do not allow control over voting, which are limited in time, and which allow the holder to accept a better offer from other bidders. This might give greater certainty to bidders before they incur the expense of a formal bid.

The Task Force will also clarify that a director of a body corporate does not have a relevant interest in shares held by that body by reason only of their being a director (see subsection 30(5), section 31 and *Clements Marshall consolidated limited v ENT Limited* (1988) 13 ACLR 90; 6 ACLC 389, but also *Zytan Nominees Pty Ltd v Laverton Gold NL* [1988] 1 WAR 227.

Power of disposal

If the power over disposal of a share co-exists with the power over voting, it may be unnecessary for the power over disposal to remain a discrete element of the definition of relevant interest. The Task Force invites comment on this issue.

Associates

References to associates will no longer be relevant to section 615, but will continue to be relevant to other Chapter 6 provisions (sections 623, 630, 648, 662, 671, 686, 697, 698, 703 and 732). These provisions are directed at ensuring that things which cannot be done directly are not done indirectly through an associate; for example, that expert reports are prepared by independent persons, and that only disinterested shareholders vote where resolutions on regulated acquisitions are required. The concept of associate in these provisions is mainly directed at persons who will or may act together to achieve common goals.

The new definition of 'associate' for the purposes of Chapter 6 will comprise paragraphs 11(b), 12(1)(d), 12(1)(e) and 15(1)(a). The other elements of the definition will be removed:

- Elements relating to control over particular shares through agreements will be covered by the definition of 'relevant interest' and need not be part of the definition of 'associate' (paragraphs 12(1)(f) and (g)).

- The courts have not interpreted the references to 'proposes to become associated' (in paragraph 15(1)(c) and subsection 15(2)) and 'proposes to act in concert' (in paragraph 15(1)(a)) as extending to unilateral intentions to become associated. As a result, these elements add nothing to the concept of relevant interest arising from agreements, arrangements and understandings and the Task Force proposes that they be removed.
- Directors and secretaries of a body corporate will be associates of the body when they are acting in concert with the body and when they enter into relevant agreements with the body. Regarding them in all cases as associates, as at present under paragraphs 11(a) and (c), is undesirable, as there is no reason to assume that a director or secretary of a body corporate will necessarily act in concert with the body.

Exceptions to the prohibition

Acquisitions in closely held companies

The prohibition does not apply to acquisition of share sin a company (whether proprietary or public) that has no more than 15 members (subsection 619(1)).

The Task Force considers that the current 15 member threshold is too low. Australia is one of the few countries that apply their takeover provisions to proprietary companies. Regulating changes of control of closely held companies is difficult to justify having regard to the potential costs.

The proposal will exclude from takeover regulation many unlisted public companies and all proprietary companies, except those with employee shareholders resulting in the company having more than 50 shareholders. As a consequence of this change, it is proposed to remove the current right for members in a proprietary company with more than 15 members to exclude an acquisition of shares in the company from the takeover prohibition with the consent in writing of all members (paragraph 619(1)(b)).

Acquisitions under a prospectus or secondary sales notice

Subsection 622(1) excludes from the operation of section 615 an acquisition of shares by any person under a prospectus if the prospectus contains an offer to all members of the company. An acquisition of shares by any person under a secondary sale notice is also excluded if the notice contains an offer to all members of the company (section 622A). Neither exclusion requires the shares to be offered proportionally to existing members.

The CASAC Legal Committee concluded that these exemptions are inconsistent with the policy of Chapter 6 that target company shareholders have an equal opportunity to participate in benefits accruing from a person's acquisition of a substantial interest in the company. The Task Force agrees and proposes the repeal of subsection 621(1) and section 622A. however, it could be argued that these considerations do not apply to a company's initial fundraising, as there is in practice rarely a need to protect the persons who hold shares in a company before its first prospectus. The contrary view is that prospective shareholders should have the right to know about nay change in the control of the company resulting from the issue of shares under a prospectus. The Task Force invites comment on whether subsection 622(1) should be retained, but limited to a company's first prospectus.

Acquisitions under a prospectus will continue to be excluded where they result from subscription for shares by a promoter under a company's first prospectus (subsection 622(2)) or under an underwriting agreement disclosed in the prospectus (subsection 622(3)). However, given the potential for abuse of the exceptions in subsections 62292) and (3), the Task Force proposes that their operation be conditional on disclosure of the effect the acquisition would have on the control of the company.

Acquisition of shares in a company which has not commenced business (section 624) and acquisitions within the 3% range permitted every 6 months (section 618) will also continue to

be excluded. Operation of section 618 will be clarified in accordance with recommendation 9 in the Anomalies Report. In other cases, shareholder approval could be sought under section 623, which will be extended to cover acquisitions of a relevant interest by any means (Anomalies Report, recommendation 15). To improve disclosure of information to the target shareholders, the provision will be further amended so that the exception is available only where shareholders voting on a resolution to approve an acquisition have been given sufficient information to identify the person acquiring the shares and to decide whether to approve the acquisition (Anomalies Report, recommendation 16).

Pari-passu offers

The difficulties caused by foreign requirements are recognised in the exception for pari passu rights issue of shares (subsection 621(3)), which currently allows shares to e allotted to a trustee fro sale for the account of foreign shareholders. The CASAC Legal Committee recommended that this be brought into line with market practice and ASX requirements by allowing the trustee to sell the rights to take up shares, rather than to take up the shares and sell them. The Task Force agrees with this recommendation.

Takeovers bids

One of the principal exceptions to the takeover prohibition is acquisitions of shares under a takeover scheme (section 616). The rules for takeovers schemes (Parts 6.3 and 6.5 of the Law) are designed to ensure that acquisitions occur in accordance with the principles in section 731 that underpin Chapter 6.

Where a bidder intends to offer securities as consideration for a takeover offer, it may be unlawful or impracticable to make that offer to foreign shareholders. It may also not be commercially viable to include a cash alternative for all shareholders. Bidders frequently apply to the ASC for relief to allow special terms for foreign shareholders under a scrip bid. The proposal will permit variations in the terms of offers so that foreign shareholders are instead offered the proceeds of the sale of the securities offered as consideration to other shareholders.

The consideration for offers may be formally increased under section 655, or increased as result of outside acquisitions of shares under section 620, at any time during the offer period. The Law contains mechanisms to ensure that an increase in consideration, however late in the offer period, does not disadvantage offerees who have accepted the offer (sections 655 and 664 to 668).

However, a late variation in consideration may disadvantage offerees who were not prepared to accept on the previous terms, but who would accept the improved offer. Many offerees, particularly smaller shareholders, may not become aware of the varied consideration in time for them to consider or accept the revised offer. This is inconsistent with the principles that shareholders of the target have a reasonable time to consider a takeover bid and equal access to any benefits that may flow from the bid. The Task Force proposes that the consideration for takeover offers be permitted to be increased within the last week of the offer period only where the period is extended for at least 14 days.

The extension will also be required where the bidder's relevant interest in the target shares rises above 50% during the last week of the offer period. This is necessary because some target shareholders might have declined the offer on the basis they wished to stay in the company wit its existing management, but have accepted if they expected the bidder to succeed. The 14 days extension will give those shareholders a reasonable opportunity to accept the offer if they wish to do so.

The rule on equal access to benefits also applies to the 4 month period before a bid, by requiring cash consideration to be at a price not less than the highest price paid by the bidder

in that period (sections 641 and 676) and by prohibiting a person proposing to make a bid from offering or giving an additional benefit during that period to a person whose shares are proposed to be acquired or to their associates (subsections 69892) and (4)).

The Legal Committee recommended the repeal of subsections 698(2) and (4) on the grounds that these provisions:

- unduly fetter a bidder's ability to acquire shares in a target up to the 20% threshold and
- expose an associate of the proposing bidder to liability for breach, even if the associate is unaware of the bidder's intention to make a bid.

The Task Force considered that while the building of the first 20% parcel should not be unreasonably interfered with, bidders should be prohibited from offering to target shareholders (before or during a bid) any benefits likely to induce their acceptances under the bid. It is therefore proposed that a new provision be inserted to prohibit these benefits in place of the existing prohibitions in section 698(subsections (1) to (5)). The new provision will not expose associates to inappropriate risks of unintentional contraventions of the Law. The Task Force also seeks comment on whether bidders offering scrip under their bid, but who previously (within 4 months before the bid) had paid cash for the bid securities, should be required to include in their bid an equivalent cash alternative.

Section 697 prohibits a bidder (or an associate) giving to, or receiving from, a person who sold target shares in the previous 6 months (or an associate) a benefit determined by reference to the consideration offered under the takeover bid. The provision was originally inserted in response to a recommendation of the Companies and Securities Law Review Committee that a target shareholder should not be able to sell all of their holding and also be paid the difference between the price they received and a price subsequently offered under a partial bid. The Task Force sees no reason of policy to prohibit escalation clauses in relation to full takeover bids and proposes to limit the provision so that it allows persons who become bidders under a full bid to adjust the price previously paid for target shares up to the bid price.

Contents of takeover documents

Section 750 contains an extensive list of specific disclosure requirements for Part A and Part C statements. It also requires that those statements contain any other information known to the bidder which is material to the decision of an offeree whether to accept the offer and which has not previously been disclosed to offerees. Where the consideration for a takeover offer includes shares or debentures, the Part A statement must also contain the information that would be required in a prospectus offering those securities to target shareholders. However, if the offered securities are quoted and the requirements in subsection 1022AA(1) are satisfied, bidders can instead satisfy concessional disclosure obligation sin section 1022AA (regulations 6.12.01 and 6.12.02).

The prescriptive requirements arguably result in some information being included in the Part A and Part C statements which may have limited relevance to target shareholders. As a result of these requirements, the statements may be less readable and may obscure significant information.

Takeover provisions and fundraising provisions are underpinned by a common policy of ensuring adequate disclosure of information. Although the takeover provisions seek to achieve some additional policy objectives (eg the principle of equality of opportunity), they do not justify different disclosure requirements. The Task Force therefore proposes that the rules for takeover statements be aligned with those proposed for the fundraising provisions. Given that both Part A and Part C statements will have the same contents requirements they will be replaced by a single bidder's statement.

The Law currently requires an offer under a takeover scheme to be contained in a separate document to the disclosure in the Part A statement. The Task Force proposes to combine the 2 documents. It considers that requiring the offer document and acceptance form to be in the same document as the disclosure statement reduces the likelihood that target shareholders will make a decision whether to accept the offer without having considered the information required for an informed decision.

Part B and D statements

Part B and D statements contain a similar mix of prescriptive and general information requirements. The proposal will retain the requirements to disclose the interest of the directors of the target and to disclosure directors recommendation about the bid. The Task Force considers this information to be relevant to the consideration by offeree of any recommendation by the board of the target that night not be required to be disclosed under a material information test. Otherwise, the prescriptive requirements will be removed. An independent expert's report required by section 648 will become part of a part B statement. As in the case of Part A and C statements, Part B and D statements will be replaced by a single target's statements.

Further content rules

Under the current law, the information required to be disclosed in a Part A or Part C statement is generally limited to that known by the bidder. The Task Force considers it more appropriate, consistent with the approach taken in relation to prospectuses, that the content rules be based on information known to the persons involved in the preparation of the document or information which they could obtain by making reasonable inquiries. These persons will also be liable for the content of the document.

An expert who prepares a report required under section 648 is potentially liable for its content under section 704. where a Part B or Part D statement contains an expert's report, the expert must consent to its inclusion and is liable for its content. The Law (section 644) does not currently require an expert to consent to the inclusion in a Part A or Part C statement of a statement by them or of a statement based on their statement, or accept liability for the statement. The inclusion of a statement made by a person who purports to have relevant expertise may give authority to the statement and influence the decision of target shareholders. It is important that close attention is focused on the content of these statements and this will be assisted by the Task Force proposal to require consent of an expert for the inclusion of their statement in all cases.

<u>Liability for takeover documents</u>

The combine operation of the various provisions which impose civil liability in relation to conduct associated with takeovers is unsatisfactory. Section 704 imposes statutory liability for misstatements made in Part A, B, C and D statements, expert's reports and compulsory acquisition notices. Section 705 imposes statutory liability for other misstatements in relation to takeovers. Liability arises where a statement is false in a material particular, is materially misleading or omits a material matter. These provisions are effectively rendered nugatory by the operation of:

- section 995 which prohibits misleading and deceptive conduct in dealings in securities
- section 52 of the Trade Practices Act which prohibits corporations from engaging in misleading and deceptive conduct in trade and commerce (and the corresponding prohibitions in the various State Fair Trading Acts).

While defences are available in relation to a civil action under section 704 and 705, none are available in relation to an action concerning the same conduct brought under section 995 or section 52.

The Task Force addressed the Trade Practices Act issue in its November 1995 proposal on fundraising and the application of section 52 of the Trade Practices Act to dealings in securities. In brief, it proposed that fundraising, takeovers and other dealings in securities be regulated under the Corporations Law to the exclusion of section 52 (this proposal is being considered as part of the consultation process conducted by the Task Force in the context of preparing a report to the Attorney-General and the Minister of Consumer Affairs on the application of section 52 to dealing sin securities). The Corporations Law liability regime for takeovers was left to be considered in the context of the takeovers proposal.

The Task Force now proposes that the unsatisfactory interaction of sections 704, 705 and 995 be addressed in a similar manner to that proposed in relation to the equivalent problem which arises under the fundraising provisions. This entails liability for misstatements in takeover documents (including variations), expert's reports and compulsory acquisition notices being dealt with under a specific regime to the exclusion of section 995. that regime will involve:

- the imposition of liability on directors, experts and persons shown to be involved in the making of the misstatement, and
- the provision of defences based on the exercise of due diligence, reasonable reliance on another person and the withdrawal of consent.

This approach will underpin the proposed general disclosure requirements, a s well as remove the current uncertainty with the absence of defences to actions under section 995. In addition, it will remove the anomalous difference in liability associated with offers of securities as consideration for takeovers and offers of securities under a prospectus.

Consistent with the approach proposed for fundraising, civil liability for other conduct in relation to takeovers, for example the publication of statements in the press, will be regulated under the general misleading and deceptive conduct prohibition in section 995. as a result, section 705 will be repealed. While a contravention of section 705 is an offence and a contravention of section 995 is not, it is thought that sections 999 to 1001 adequately provide for criminal liability in relation to relevant conduct.

ASC powers

Administrative review

The majority of takeover bids involve some modification of Chapter 6 by the ASC. A target company or a rival bidder often seeks to review a decision by the ASC to give such a modification. The substantive dispute is usually not between the applicant for review and the ASC, but between parties to the takeover. It is undesirable to allow merits review by the AAT to be used to frustrate hostile takeovers. Accordingly, the Task Force proposes the removal of the jurisdiction of the AAT to review decisions of the ASC under sections 728 and 730 made in relation to takeover bids and decisions made under sections 644 and 733. this would not affect judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

The Task Force proposal may be revisited, depending on the outcome of a broader examination of AAT review of ASC decisions by the Administrative Review Council, which advises the Government on administrative law matters. As part of the examination, the Council is developing principles for determining whether particular administrative discretions under the Corporations Law are appropriate for AAT merits review.

Acquisitions approved by the ASC

An acquisition of shares approved by the ASC is excluded from the takeover prohibition (paragraph 633(c)). As a matter of practice, the ASC does not rely on paragraph 633(c), but rather uses its general exemption and modification powers in section 728 and 730, partly because decisions on these matters are required to be published in the *Commonwealth of Australia Gazette.* The Task Force therefore proposes that paragraph 633(c) be repealed.

The Panel

The Corporations and Securities Panel was established to rule on whether acquisitions or conduct is unacceptable in response to references from the ASC. It was set up to separate the function of declaring conduct unacceptable from the function of investigating and prosecuting suspected misconduct. Both of these functions were previously discharged by the National Companies and Securities Commission. The making of a declaration of unacceptable acquisition or conduct by the Panel empower the Panel to make a wide range of orders to protect the rights of interests of those affected.

Because it is dependent on an acquisition of a substantial interest, section 732 does not give the Panel jurisdiction in cases where relatively small parcels of shares are used to influence the outcome of a battle for corporate control or where a person's exercise of corporate control does not coincide with acquisitions of shares.

The Task Force believes that the role of the Panel in deterring behaviour contrary to the policy aims of Chapter 6 could be improved. It proposes that section 732 be amended so that an unacceptable acquisition or conduct can occur even if there has been no acquisition of a substantial interest.

The Task Force invites comment on whether the provision which currently allows the Panel to declare unacceptable conduct of the target company or its directors (paragraph 732(2)(b)) should be extended, and if so, how. The provision has been inserted to deter target companies from engaging in undesirable defensive strategies, but the orders available to the Panel (section 734) are arguably not suited for that purpose.

At present, only the ASC can refer a matter to the Panel. This restriction is inherent in the purpose for which it was created. It has the advantage of preventing a party from using a reference to the Panel as a defensive or spoiling strategy. However, it has been suggested that interested parties should have a direct right of access to the Panel. This would lead to the Panel assuming a general role in reviewing conduct in relation to takeovers. The Task Force invites comment on whether an interested person should be able to refer a matter directly to the Panel.

Substantial shareholder notices

Part 6.7 currently requires a person who becomes entitled to more than 5% of the voting shares in a listed company to disclose:

- particulars of that entitlement
- changes of 1% or more in that entitlement arising from a change in the relevant interest of the person or an associate
- if they cease to be entitled to more than 5% of those shares.

It would be undesirable for Part 6.7 to continue using the concept of 'entitlement' after its removal from section 615. The Task Force therefore proposes that instead of substantial shareholders disclosing their entitlements, they be required to disclose only their relevant interest and the identify of their associates. The identity of associates will no longer be relevant for the purposes of section 615, but may be required by the market for other purposes (eg to facilitate follow-up searches under Part 6.8). the Task Force seeks comment son whether Part 6.7 should require the disclosure of some further information (eg if the substantial shareholder is a body corporate, the interests held by its directors).

The forms prescribed for Part 6.7 to provide the specified information about substantial shareholdings are universally criticised as complex and very difficult to comply with. The ASC and the Attorney-General's Department are currently reviewing these forms as a separate exercise with a view to making them easier to use.

Tracing beneficial ownership of shares

Part 6.8 contains provisions which enable a listed company, its members and the ASC to trace the beneficial ownership of the company's voting shares. The information obtained under Part 6.8 can be crucial for planning takeovers. As a result, the Task Force proposes that he operation of Part 6.8 be extended to all companies subject to takeover regulation.

Collective investments schemes

The Law Reform Commission and CASAC in their joint report entitled *Collective Investments: Other Peoples Money* (1993), recommended a review of the application of the takeover regime to collective investment schemes. The report noted that no submissions had been received favouring takeover provisions for collective investments.

The issue of whether takeover rules should be apply to collective investments was not considered in the context of preparing the exposure draft of the Collective Investment Bill released by the Attorney-General in December 1995, but was left for consideration by the Task Force as part of its work on takeovers.

The Task Force does not consider that a case has been made to apply the Chapter 6 rules for companies to collective investment schemes having regard to the purpose of takeover regulation and relevant differences between companies and these schemes.

In particular, the fundamental purpose of takeover regulation in Chapter 6 is to ensure that all members of companies to which it applies have a reasonable opportunity to share in any control premium. So far as collective investment schemes are concerned, control will be vested in the person having the management rights, namely the responsible entity.

In respect of the bulk of the collective investment industry, constituted by unlisted trusts of various kinds, no premium is likely to be paid for changes in control which is capable of being shared amongst members. In practice, the usual way of 'taking over' management rights in relation to what are now prescribed interest schemes is to acquire a controlling interest in the management company. In such cases the 'premium' received by the selling controller will not be shared with the members of the relevant scheme. Nor does there appear to be any basis for requiring any premium to be shared, as the management rights of a scheme would generally be regarded as a proprietary right of the manager particularly having regard to the manager's role in attracting funds to the scheme.

There does not appear to have been any attempts to acquire control of an unlisted scheme through the acquisition of interests in the scheme from existing investors. Moreover, there would generally be barriers to attempting to do so, including:

- new interest in the scheme continuously being issued
- no secondary market existing fro the interests but rather investors using buy-back/redemption facilities.

As a practical matter, the payment of a premium is only likely to occur where the interests are traded on a secondary market especially where the market price is below the net asset backing. Units in a listed trust usually trade at a discount. This is because the market is assessing the manager's ability to extract value from the underlying assets of the trust – it is not placing a value on those assets. The market recognises that control of the trust creates value for the shareholders in the management company and not for the holders of units in the trust.

It has been rare for a significant premium to be paid to investors in schemes with a view to acquiring control of management rights. The current Law (which will be preserved by the Collective Investment bill) makes this especially difficult by requiring the removal of a manager to be approved by an absolute majority (by value) of the investors. The Task Force considers that given the relative infrequency with which the application of takeover provisions would have any relevance for collective investment schemes, any benefit which may result would not be sufficient to justify the additional burdens.

Moreover, there would be practical difficulties in attempting to do so, particularly as the majority needed to remove a responsible entity is such that the 20% threshold (in section 615) is not a level at which an investor could be said to be approaching control.

Rather than applying the Chapter 6 rules to situations which they were not designed to deal with, the Task Force proposes a refinement of the rule governing changes of responsible entities.

Under the current law and the exposure draft of the Collective Investment Bill, the incumbent manager is disqualified from voting on the change of a responsible entity.

The proposal by the Task Force will refine the rule by excluding from voting also the proposed responsible entity and their associates. The refined rule will:

- enhance investor protection, and
- remove any incentive to acquire interests in a scheme with a view to removing the existing manager.

The Task Force seeks comment on whether there should be a threshold lower than an absolute majority by value for removing the responsible entity and if so what should it be.

The Task Force seeks also seeks comment on whether as an alternative to its proposal, Chapter 6 rules should apply to listed collective investment schemes and if so, whether the rules for replacing responsible entities should be brought in line with those for company directors. In addition, the Task Force seeks comment on whether transfers of management rights through transfers of a controlling interest in the responsible entity should also be subject to approval of members of the relevant collective investment scheme.

Compulsory acquisitions

The proposal invites comment on the recommendations of the CASAC Legal Committee report on Compulsory Acquisitions of January 1996.

The law permits, either expressly or by implication, compulsory acquisition in each of the following circumstances:

- amendment of articles (section 176)
- selective capital reduction (section 195)
- schemes of arrangement (section 411)
- amalgamations (section 413)
- share acquisitions (section 414)
- voluntary liquidations and selective distribution in specie (section 501)
- voluntary liquidation – amalgamation (section 507)
- the compulsory acquisition procedure following a successful takeover bid (section 701).

The only Chapter 6 mechanism for majority shareholders to compulsorily acquire shares held by minority shareholders is in section 701.

It allows bidders who have succeeded in acquiring 90% by value of the shares in the bid class to acquire the remaining 10%, provided at least 75%, by number, of the shares under a takeover offer have been subject to acceptances or at least 75%, by number, of the shares have changed hands during the period. The mechanism has been criticised because of the onerous and sometimes artificial nature of its conditions and because it does not enable compulsory acquisitions of convertible securities which are becoming increasingly common.

Section 703 mirrors section 701 in that it allows minority shareholders to require a successful bidder to buy them out at the bid price.

Benefits of compulsory acquisitions

The CASAC Legal Committee considers that compulsory acquisitions can be a necessary and desirable means of corporate rationalisation. They may produce considerable economic, administrative and taxation benefits including:

- facilitating financial restructuring
- permitting the transfer of tax losses between wholly owned grouped companies
- reducing administrative and reporting costs
- avoiding greenmailing
- protecting the confidentiality of commercial information and otherwise eliminating possible conflicts of interest in partially owned companies.

Compulsory acquisitions can produce conflict between these imperatives and the right of shareholders to deal with their property as they see fit.

The remaining recommendations

In addition to the recommendations set out at page 10, the Legal Committee has made a number of recommendations which are related to schemes of arrangement. The Task Force

will address those when it reviews Chapter 5. however, given that the new compulsory acquisition power would overlap with the existing narrower power in section 414, the Task Force will address the recommendation of the Legal Committee to repeal that section as part of the takeovers proposal.

Gambotto

The Legal Committee recommended that the implications of the decision in *Gambotto v WCP Ltd* 1994-95) 182 CLR 432 be restricted to compulsory acquisitions through amendments to a company's constitution. The decision dealt with an amendment proposed to a company's constitution. The decision dealt with an amendment proposed to a company's constitution to insert an article authorising compulsory acquisitions.

The court held that he power to amend articles of association of a company can be used only for a proper purpose. On the facts, it would appear that compulsory acquisition of a minority shareholding is not a proper purpose if the benefit pursued through the acquisition is that of the majority shareholder and not that of a company.

Overseas comparison

The Legal Committee took into account the law in the Untied Kingdom and several province in Canada which provide for the right of a majority shareholder to compulsorily acquire the shares of minority shareholders.

WHAT WILL HAPPEN TO THE RECOMMENDATION S IN THE ANOMALIES REPORT?

AR1-3	Section 33 will be amended (Proposal 5(d)) so that: • it applies where a person has power over more than 20% of votes (AR1) • relevant interests of a body's associates are not attributed to significant shareholders in the body (AR2) • it is clear that the section does not apply successively (AR3).
AR4	The definition of relevant interest will be amended so that relevant interests will not be traced from relevant interests which are disregarded (Proposal 5(d)).
AR5	The repeal of part of the concept of entitlement was recommended and the Task Force was invited to review the concept further. It is proposed that the concept of entitlement be abolished (Proposal 1).
AR6	The definition of 'nominee corporation' in section 9 will be changed to a definition of 'nominee body corporate' at the drafting stage (Proposal 5(d)).
AR7	The exceptions for money lending in section 38 and 630 will be extended (Proposal 5(d)): • to the provision of financial accommodation, and • to cover receivers.
AR8	It was recommended that a person who has the power over disposal of a share and comes to have power over voting be taken to acquire the share for the purposes of section 615. this will be implemented in away so that it also applies to a person who comes to have increased voting power over a share (Proposal 5(d)).
AR9	The exception for creeping acquisitions (section 618) will be based on percentage interests, rather than the number of shares acquired. The concept of relevant interest will be used instead of entitlements (Proposal 28).
AR10	It was recommended that the ability of members of a private company to resolve unanimously to opt out of Chapter 6 should be extended to members of public companies. This recommendation will not be taken up. As a practical matter, it is overtaken by Proposal 7(a).
AR11	A nominee for foreign participants in a pari passu rights issue will be permitted to sell the rights to shares, rather than the shares themselves, on account of the participants (Proposal 28).
AR12	This recommendation was directed to the ASC.
AR13	Subsection 622(1) and section 622A will be repealed (Proposal 7(c)).
AR14	A relevant interest arising from an agreement conditional on approval under section 623 or on ASC relief will not arise until fulfilment of the condition, provided the agreement confers no control over voting and does not restrict disposal fro more than 3 months (Proposal 28).

AR15	The exception for acquisitions approved by a resolution of target shareholders (section 623) will be widened so that shareholders can approve any type of acquisition of shares (Proposal 28).
AR16	The procedure for seeking shareholder approval for section 623 will be amended (Proposal 28) to require: • the resolution to identify the acquire and the maximum number of shares to be acquired • shareholders to be given all other information required for them to make an informed decision whether to approve the acquisition.
AR17	Section 625 will be amended at the drafting stage to apply to all acquisitions occurring as a result of a compromise or arrangement (Proposal 28).
AR18	The exception for acquisitions of voting shares through the exercise of renounceable options or rights under convertible notes (section 627) will be extended to any convertible securities. The exception will only apply to an acquisition in the ordinary course of trading on the ASX (Proposal 28).
AR19-20	The exception for acquisitions of shares in downstream companies as a result of acquisitions in upstream companies (section 629) will be widened (Proposal 28) to cover: • all lawful acquisitions (such as a 3% creep rule under section 618), not just those related to takeover schemes and takeover announcements, and • foreign upstream companies listed on a foreign exchange that have been prescribed by regulations or approved by the ASC.
AR21	It was recommended that the power of the ASC to declare a body as a Chapter 6 body and Chapter 6 company (section 53A) be widened to cover a company incorporated overseas but having a sufficient nexus with Australia. However, the Task Force proposes that this recommendation not be implemented because it could lead to enforcement difficulties (Proposal 28).
AR22-24	The date on which offers must be sent out under sections 635 and 636 will be clarified so that the bidder may specify a date not earlier than the date of service of the Part A statement and not later than the date of the offer. Section 699 will also be amended to require that the written statement to be provided be accurate at the specified date (Proposal 28).
AR25	Offers will be permitted to vary because of different amounts unpaid on target shares (Proposal 28).
AR26	Shares will not be considered to be separate classes only because different amounts remain unpaid (Proposal 28).
AR27	Bidders under a takeover scheme will no longer be required to send themselves an offer under subsection 636(2) (Proposal 28).

AR28	Section 638, which deals with the contents of takeover offers, will be amended so that a takeover offer can provide that: • the payment for shares from accepting offerees will be deferred if documents needed for transfer of the shares are not provided; and • the bidder may elect to treat the contract as ineffective if the documents are not provided within 1 month after the offers close (Proposal 28).
AR29	Part A statements will be able to be registered and served on the same day. Target companies will now have 15 instead of 14 days in which to give a Part B statement to the bidder (Proposal 28).
AR30	The date for determining whether an independent expert's report is required to accompany a Part B statement will be the date of service of the Part A statement on the target company (Proposal 28).
AR31	The rules for variation of the offer price (section 655) will allow offers to be varied so that the offeree may retain or be paid all or part of a dividend in relation to the shares being acquired (Proposal 28).
AR32-33	Conditions within the sole control of, or occurring as a direct result of actions by, associates acting together and the bidder acting together with an associate or associates will be prohibited. For this purpose, a target company or its subsidiaries will no longer associates of the bidder merely because they are related bodies corporate of that bidder (Proposal 28).
AR34-35	A bidder under a takeover scheme will have up to 3 business days after the end of the offer period to declare the offer free of a prescribed occurrence defeating condition (Proposal 9).
AR36	This recommendation was directed to the ASX.
AR37	Offers constituted by a takeover announcement will be required to be open for 20 trading days. Commencing 10 trading days after the announcement and can be extended for further periods of 20 trading days (Proposal 28).
AR38	It was recommended that benefits conferred other than in connection with an acquisition of a person's shares under a takeover bid not be prohibited. This recommendation has been superseded by Proposal 11.
AR39	It was recommended that subsections 698(2) and (4) which prohibit the giving of benefits discriminating between the members of a company in the 4 months leading up to the making of a takeover bid be repealed. These provisions will be replaced with a new provision prohibiting 'collateral' benefits (Proposal 11).
AR40	It was recommended that section 698 should be amended to permit simultaneous offers for voting shares and for other securities. The decision in *Gantry Acquisition Corporation v Parker & Parsley Australia* (1994) 51 FCR 554 confirmed that simultaneous offers are permitted and the redrafted provisions will further clarify this.

AR41	The exemption to the prohibition on giving collateral benefits in section 698 will be extended to apply to the acquisition not only of shares, but also other securities of the company acquired in the ordinary course of stock market trading (Proposal 11).
AR42	The requirement for a target to give a bidder a written statement of its shareholders (section 699) will require the information to be in a form stipulated by the bidder and permitted by the technology of the target company (Proposal 28).
AR43	It was recommended that a scrip Part A statement be capable of being used as a secondary prospectus (now a section 1043B notice). This recommendation will not be taken up (Proposal 28). The situations where unquoted securities are offered as consideration under a takeover offer for which a section 1043B notice may be required to resell them would be very rare. A bidder's statement would normally contain a substantial amount of information which would be irrelevant tot potential buyers of the securities. Furthermore, there are potential difficulties in applying the civil liability provisions applicable to secondary notices to which section 1043C applies. Consequently, any relief from section 1043B would be best dealt with on a case by case basis by the ASC.
AR44	The power of the ASC to exempt from or modify the provisions of Chapter 6 will be extended to cover a class of cases. Possible applicants for exemption will includes companies acting on behalf of a class of shareholders and any other agent of the shareholders(Proposal 28).
AR45	The ASC will be able to omit, vary or modify provisions of Chapter 1. The power to modify and exempt under section 728 and 730 will be extended to any provisions which are relevant to Chapter 6 (Proposal 28).
AR46	All takeover documents will be able to be sent by courier (Proposal 28).
AR47	Form 602A (required to be sent by a bidder to dissenting offerees indicating the bidder's desire to compulsorily acquire their shares) will be altered in the Regulations (Proposal 28).