

Attachment 3 to CP 365: Draft instrument



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Relevant Interests, Voting Power and Exceptions to the General Prohibition) Instrument 2023/XXX

I, [], delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date

[DRAFT ONLY – NOT FOR SIGNATURE]

[signature]

[insert name]

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Relevant Interests, Voting Power and Exceptions to the General Prohibition) Instrument 2023/XXX*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsections 655A(1), 669(1) and 673(1) of the Act.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

Part 2—Declaration

5 Modification of section 9 definitions

Chapters 6, 6A and 6C of the Act apply to all persons as if section 9 were modified or varied as follows:

(a) insert:

“acceptance facility means a facility established by a bidder under a takeover bid:

- (a) through which specified holders (*facility participant*) of bid class securities or persons (*facility participant*) on whose behalf or account bid class securities are held, may provide to an acceptance facility operator:
 - (i) completed acceptances (*facility acceptances*); or
 - (ii) instructions to another person who holds bid class securities on behalf or account of the person to accept an offer under the bid (*facility acceptances*);

in relation to bid class securities; and

- (b) under which the acceptance facility operator is authorised to maintain custody of the facility acceptances until such time as:
 - (i) the facility participant withdraws the facility acceptance; or
 - (ii) specified conditions (*triggering conditions*) for the delivery by the acceptance facility operator of the facility acceptances are met;

where under the terms of the facility:

- (c) the facility:
 - (i) in the case of a bid that is unconditional—must be made available to all holders of bid class securities or persons on whose behalf or account bid class securities are held;
 - (ii) otherwise—must be made available to all or specified holders of bid class securities or persons on whose behalf or account bid class securities are held; and
- (d) the triggering conditions for the facility depend solely on either or both of the following occurring (or being the subject of a written confirmation from the bidder):

- (i) the bidder declaring the bid free of all conditions or stating that it will declare the bid free of all conditions no later than the time that all facility acceptances are processed;
 - (ii) the securities in which the bidder and its associates have a relevant interest together with the securities that are the subject of the facility exceeding a specified percentage of securities in the bid class; and
- (e) all facility participants participate in the facility on the same terms; and
- (f) if bid class securities are quoted on a prescribed financial market—the acceptance facility operator must provide information about facility acceptances to the bidder sufficiently regularly to enable the bidder to determine and disclose to the operator of the market every movement of at least 1% in the aggregate level of the bidder’s voting power and the votes attached to securities the subject of facility acceptances by 9.30am on the next trading day after the movement; and
- (g) if bid class securities are not quoted on a prescribed financial market—the facility operator must provide information about facility acceptances to the bidder sufficiently regularly to enable to the bidder to determine and disclose to the target any movement in the aggregate level of the bidder’s voting power and the votes attached to securities the subject of facility acceptances above or below a percentage listed in subsection 654C(1) within 2 business days after the movement.

acceptance facility operator, in relation to an acceptance facility, means a person who:

- (a) holds an Australian financial services licence that covers the provision of financial services of the kind necessary to operate an acceptance facility; and
 - (b) is not the bidder or an associate of the bidder for the bid to which the acceptance facility relates.”;
- (b) omit the definition of ***convertible securities***, substitute:

“***convertible securities***: securities are convertible into another class of securities if the holder may, by the exercise of rights attached to those securities:

- (a) have the other class of securities issued to them; or
 - (b) have the securities transform into securities of that other class.

An option may be a convertible security even if it is non-renounceable.”;

- (c) in the definition of **substantial holding**, omit subparagraph (a)(ii), substitute:

“(ii) would have a relevant interest but for subsection 609(6) (market traded options), subsection 609(7) (conditional agreements), subsection 609(11) (company that issues restricted securities) or subsections 609(13A) or (13B) (securities subject to escrow agreement);”.

6 Modification of application of the associate reference—references to voting power and takeovers

Chapters 6, 6A and 6C of the Act apply to all persons as if section 12 were modified or varied as follows:

- (a) at the beginning of each of paragraphs (2)(b) and (c), insert “subject to subsection (2A),”;
- (b) after subsection (2) insert:

“(2A) For the purposes of paragraphs (2)(b) and (c), the second person is not an associate of the primary person in relation to a designated body merely because:

 - (a) they have entered or propose to enter into a relevant agreement; and
 - (b) one of them has or will have a right under that relevant agreement (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition) to dispose of securities in the designated body or control the exercise of a power to dispose of the securities.”.

7 Situations not giving rise to relevant interests

Chapters 6, 6A and 6C of the Act apply to all persons as if the following provisions were modified or varied as follows:

- (a) omit subsection 609(1) (excluding the note), substitute:

“A person does not have a relevant interest in securities merely because of a security interest taken or acquired by the person if:

 - (a) the security interest is taken or acquired:
 - (i) in the ordinary course of the person’s business of the provision of financial accommodation by any means; or

- (ii) for the benefit of one or more other persons in relation to financial accommodation provided by the other persons in the ordinary course of the other persons' business of the provision of financial accommodation by any means; and

on ordinary commercial terms; and

- (b) the person whose property is subject to the security interest is not an associate of any other person mentioned in this subsection.

For the purposes of this subsection a security interest includes a negative pledge.”;

- (b) omit subsection 609(3), substitute:

“A financial services licensee does not have a relevant interest in securities merely because they receive specific instructions from a person directing the financial services licensee to on behalf of the person:

- (a) dispose of the securities; or
- (b) enter into a sold position in relation to a security by dealing in:
 - (i) a warrant; or
 - (ii) a financial product that, but for the product not being transferable, would be a warrant;

in the ordinary course of the licensee's financial services business.

For the purposes of paragraph (b), ***sold position*** means a position under which a person has an obligation to make delivery of the security.

Note: Subregulation 1.0.02(1) of the regulations defines ***warrant***.”;

- (c) after subsection 609(8) insert:

“(8A)A bidder does not have a relevant interest in bid class securities merely because facility acceptances are given to an acceptance facility operator under an acceptance facility in relation to a takeover bid if:

- (a) the acceptance facility is the only acceptance facility established by the bidder in relation to bid class securities;
- (b) if the bid class securities are quoted on a prescribed financial market—for every movement of at least 1% in

the aggregate level of the bidder's voting power and the votes attached to bid class securities the subject of facility acceptances, the bidder provides to the relevant market operator, by 9.30am on the next trading day after the movement, a notice (whether accompanying a notice required to be given under section 671B or otherwise), that:

- (i) sets out the aggregate number and percentage of bid class securities:
 - (A) in which the bidder and its associates have a relevant interest; and
 - (B) which are subject of facility acceptances;
 - (ii) discloses the breakdown between the two categories in sub-subparagraphs (A) and (B); and
 - (iii) contains a statement setting out the preconditions to the facility operator releasing the facility acceptances and warning that the facility acceptances may be withdrawn by participants in the facility at any time until the preconditions are met; and
- (c) if the bid class securities are not listed on a prescribed financial market—the bidder lodges with ASIC a notice of the kind referred to in paragraph (b) within 2 business days of the aggregate level of the bidder's voting power and the votes attached to bid class securities the subject of acceptances under the acceptance facility rising or falling above or below a percentage listed in subsection 654C(1).

This subsection stops applying to the relevant interest when the offer under the bid is accepted in respect of the securities the subject of the facility acceptance.”;

- (d) after subsection 609(10) insert:

“Securities escrowed under listing rules

- (11) A listed company does not have a relevant interest in restricted securities merely because under the listing rules of the prescribed financial market the company applies restrictions on the disposal of the securities by the holder.
- (12) The operator of a prescribed financial market does not have a relevant interest in restricted securities merely because under

the listing rules of the market the operator has the power to control the exercise of a power to dispose of the securities.

(13) For the purposes of subsections (11) and (12):

restricted securities has the same meaning as in the listing rules of the prescribed financial market.”;

(e) after subsection 609(10), insert:

“Securities subject to escrow agreement

(13A) A body corporate does not have a relevant interest in its own securities (the *escrow securities*) merely because, under an agreement (the *escrow agreement*) entered into by the body corporate with the holder of the securities, the body applies restrictions on the disposal of the escrow securities by the holder.

(13B) A person does not have a relevant interest in the securities (the *escrow securities*) of a body corporate merely because, under an agreement (the *escrow agreement*) entered into by the person in the ordinary course of the person’s business as an underwriter, lead manager or joint lead manager with the holder of the securities, the person applies restrictions on the disposal of the escrow securities by the holder.

(13C) Subsections (13A) and (13B) apply in relation to an initial public offer of securities in the body corporate where both of the following are satisfied:

- (a) the escrow securities are in the same class of securities as the securities offered under the initial public offer;
- (b) the escrow agreement:
 - (i) does not restrict the exercise of voting rights attaching to the escrow securities;
 - (ii) in the case of a takeover bid (including a proportional takeover bid):
 - (A) allows each holder of escrow securities to accept into the takeover bid where the holders of at least half of the bid class securities that are not subject to escrow have accepted into the bid; and
 - (B) requires that the escrow securities be returned to escrow if the bid does not become unconditional;

- (iii) allows the escrow securities to be transferred or cancelled as part of a merger by way of a compromise or arrangement under Part 5.1;
- (iv) terminates no later than:
 - (A) for the purposes of subsection (13A)—the second anniversary of the date of entry into the escrow agreement;
 - (B) for the purposes of subsection (13B)—the first anniversary of the date of entry into the escrow agreement;
- (v) where the holder is permitted to create a security interest in some or all of the escrow securities in favour of a person whose relevant interests in the escrow securities does not arise because of subsection (1)—requires that the holder must not create a security interest in favour of the person unless the person has agreed in writing to take or acquire the security interest in the escrow securities subject to the terms of the escrow agreement; and
- (vi) where the holder is permitted to transfer their interests in the escrow securities to another person—requires that the holder must not transfer the escrow securities to another person if:
 - (A) the transfer would result in a change in the beneficial ownership of the escrow securities; or
 - (B) the transfer would result in an extension in the period of the escrow agreement; or
 - (C) the transferee does not agree to be subject to the same restrictions on disposal of the escrow securities under the escrow agreement.

(13D) For the purposes of subsections (13A) – (13C):

initial public offer, in relation to a body corporate, means an offer of securities in the body corporate that are in a class of securities that are to be quoted on a prescribed financial market.”;

- (f) after subsection 610(3) insert:

“(3A) Subsection (3) does not apply to an acquisition of an interest in securities by a subsidiary from its holding company, unless as a result of the acquisition the voting power of a person that is not a subsidiary of their ultimate holding company in the body corporate that issued the voting shares increases.”;

- (g) in items 2 and 3 of the table in section 611, omit each paragraph (d) and substitute:

“(d) the bid is:

- (i) unconditional; or
- (ii) subject to conditions of either or both of the following kind:
 - (A) conditions that relate only to the happening of an event or circumstance referred to in subsection 652C(1) or (2); or
 - (B) the condition required by subsection 625(3),
but not to any other conditions.”;

- (h) omit item 6 of the table in section 611 (excluding the heading), substitute:

“6 An acquisition that results from the exercise by a person of a power, or the appointment of a receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest if:

- (a) the ordinary business of:
 - (i) the person; or
 - (ii) a person or persons for the benefit of whom the person took or acquired the security interest;includes the provision of financial accommodation by any means; and
- (b) the person took or acquired the security interest:
 - (i) in the ordinary course of their business of the provision of financial accommodation by any means; or
 - (ii) for the benefit of one or more other persons in relation to financial accommodation provided by the other persons in the ordinary course of the other persons’ business of the provision of financial accommodation by any means; andon ordinary commercial terms.

For the purposes of this item a security interest includes a negative pledge.”;

- (i) omit item 14 of the table in section 611 (excluding the heading), substitute:

“14 An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of:

- (a) a prescribed financial market; or
- (b) a foreign body conducting a financial market that is a body approved in writing by ASIC for the purposes of this item,

where such inclusion is a primary listing.”;

- (j) omit section 615 (excluding the heading), substitute:

“The exception in item 10 of the table in section 611 applies even though the conditions set out in the item are not satisfied in respect of foreign holders of the company’s securities, or such of those foreign holders as are specified in the offers, if, under the terms of the offers:

- (a) the company must appoint a nominee for those foreign holders of the company’s securities who is approved by ASIC; and
- (b) the company must issue to the nominee:
 - (i) the securities that would otherwise be issued to the foreign holders who accept the offer; or
 - (ii) the right to acquire those securities; and
- (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.”;

- (k) omit subsection 671B(7), substitute:

“Relevant interests not excluded

- (7) For the purposes of this section a person has a relevant interest in securities if the person would have a relevant interest in the securities but for subsection 609(6) (market traded options), subsection 609(7) (conditional agreements), subsection 609(11) (company that issues restricted securities) or subsections 609(13A) or (13B) (securities subject to escrow agreement).”.