Australian Government
Takeovers Panel

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Dear all

Exposure Draft – Treasury Laws Amendment Bill 2024: Acquisitions

The Takeovers Panel is a peer review body established as 'a specialist body largely comprised of takeover experts'[1] that is the main forum for resolving disputes in takeovers. It consists as at 1 August 2024 of 52 specialists in mergers and acquisitions – investment bankers, lawyers, company directors and other professionals. The primary legislation empowering and regulating the operations of the Panel are Part 6.10 of the *Corporations Act 2001* (Cth) (**CA**) and Part 10 of the *Australian Securities and Investments Commission Act 2001* (Cth). The Panel's main function is to consider whether unacceptable circumstances exist in corporate control transactions. In exercising that power, the Panel must have regard to the purposes of Chapter 6 set out in section 602 of the CA, among other things.

In the context of the above, I convened a subcommittee of Panel members to consider the draft Treasury Laws Amendment Bill 2024: Acquisitions (the **draft Bill**) in relation to the Australian Government's proposed merger reform. The subcommittee welcomes the opportunity to provide this submission. The subcommittee members are Alex Cartel (Chair), Sylvia Falzon, Jon Gidney, Marina Kelman, Rebecca Maslen-Stannage, Rory Moriarty, Diana Nicholson and Nicola Wakefield Evans. The subcommittee was assisted by the Panel executive and Bruce Dyer[2].

The subcommittee strongly supports the government's aim of "a faster, stronger and simpler system which better targets anti-competitive transactions to improve consumer and business outcomes".[3] We endorse reforms which promote those

[1] Paragraph [7.16] of the Explanatory Memorandum for the Corporate Law Economic Reform Program Bill 1998 (Cth)
[2] Bruce is a Senior Fellow at Melbourne Law School and a former Panel Counsel, Professor of Practice at Monash Law School, and Partner of Ashurst
[3] https://treasury.gov.au/consultation/c2024-554547

objectives and seek to conform Australia's merger approval process with best international practice.

Acquisitions of control of listed entities

Our comments below on the draft Bill address only the small subset of mergers and acquisitions that involve acquisition of securities in Australian listed entities. These are, understandably, not the primary focus of the draft Bill. Nevertheless, they require special consideration to achieve the government's objectives due to the unique regulatory challenges they raise, and their significance for Australia's financial markets and economy.

In countries with longstanding liquid listed markets (such as the UK, US and Australia), it has long been recognised that the "threat" of takeover, when appropriately regulated, is an important market-based mechanism to incentivise better performance by listed companies' boards and management and hold them accountable. This, and other "benefits" of takeovers, have been recognised in law reform reports and legislation. For example, in 1969, the "Eggleston Committee" said:

> *[I]t cannot be said that takeover bids are disadvantageous. In many cases they enable an investor to obtain a greater price for his shares, and to reinvest the proceeds to obtain a higher income, than if the company remained under its original management. Moreover, the possibility that such a bid will be made must operate as a spur to management to improve its performance and to disclose to shareholders the true worth of their holdings.*[4]

The guiding principles recommended by the Eggleston Committee (commonly called the "Eggleston Principles") are still set out in the purposes of the current takeovers legislation in s602 of Chapter 6 of the CA (**Chapter 6**). Chapter 6 was rewritten in 2000, based on recommendations of the Simplifications Task Force[5] which were developed further by the Corporate Law Economic Reform Program (**CLERP**). The Explanatory Memorandum for the CLERP Bill stated:

> *The Takeover reforms contained in the Bill are designed to improve the efficiency of the market for corporate control while encouraging better management and enhancing investor protection. Takeovers, or the prospect of takeovers, provide benefits for shareholders, the corporate sector and the economy since they provide incentives for improved corporate efficiency and enhanced management discipline, leading ultimately to greater wealth creation. The reforms are aimed at ensuring that these incentives operate effectively.*[6]

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[4] Paragraphs 1.4 and 1.5 – General Considerations, *2nd Interim Report - Disclosure of Substantial Shareholdings and Takeovers* (February 1969 – Eggleston report)

[5] Corporations Law Simplification Program, Takeovers Proposal for Simplification (January 1996)

[6] Corporate Law Economic Reform Program Bill, Explanatory Memorandum, p1

The CLERP Proposals for Reform: Paper No. 4 stated:

> *Takeovers are an integral part of the operation of equity markets and in turn the Australian economy. The benefits of takeovers, or the prospect of takeovers, to shareholders, the corporate sector and the economy include improved corporate efficiency and enhanced management discipline, leading ultimately to greater wealth creation.*[7]

Chapter 6 regulates the *manner* in which control of listed companies is acquired – not *whether* it should be, as in the case of the draft Bill and the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**). In each case, however, the *method* of regulation is similar – crossing a threshold (set below the level at which control is likely to exist) is prohibited unless the acquisition is consistent with relevant policy.

Control of listed entities raises different challenges to closely-held companies due to the number and "spread" of shareholders required for listing, the market facilitating trading, and the law guaranteeing shareholders' right to remove directors with a simple majority of the votes cast. Some shareholders (especially small retail shareholders) will not vote their shares, with the result that the percentage of shares required to replace directors of listed companies (and potentially control the Board) is always less than 50% of issued shares, varies constantly, and is difficult to predict.

Unlike FATA and the draft Bill, Chapter 6's focus is almost exclusively on listed entities. It regulates acquisition of control using a threshold below the level likely to confer meaningful control – voting power above 20% (rather than the 30% threshold used by the UK and many other countries, which is still considered to be below the level likely to confer control). The Chapter 6 threshold uses the broad concept of "relevant interest" to define control over voting or disposal of securities and then extends that to include relevant interests of "associates" (also broadly defined). Crossing the threshold is then permitted by exceptions consistent with the purposes of Chapter 6 (such as takeover bids) and/or required by other legislative policy, including that necessary for effective listed markets.

Chapter 6 and its predecessors have been improved and refined, with the benefit of several law reform reports, over the last 40+ years. Our comments below draw on that to suggest ways in which the draft Bill's regulation of the acquisition of control over listed companies may be strengthened – and anti-competitive acquisitions better targeted – without impairing the effective operation of listed markets essential to our economy.

Effectiveness of the draft Bill's regulation of acquisition of control over listed companies

In this section we suggest some possible technical amendments that may improve the effectiveness of the draft Bill's regulation of the acquisition of control over listed

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[7] Corporate Law Economic Reform Program, Proposals for Reform: Paper No. 4 (1997), p7

companies. We note, however, that in the limited time available we may not have fully understood the draft Bill and its interaction with the *Competition and Consumer Act 2010* and will only be able to identify a few examples (see the attached Table) of the technical issues likely to arise. We note also that the Government has advised that it will consult separately on the notification thresholds that will decide which mergers need to be notified to the ACCC. Submissions made in this letter may be impacted by those notification thresholds.

Control threshold

As noted above, control of listed entities raises different issues. It is harder to meaningfully define and varies with share register changes and the willingness of shareholders to vote their shares. Control is not "all or nothing" but rather increases by degrees. Proposed s51ABC(1) appears to require identification of the point at which control is acquired. We do not consider that practical for listed companies. It is not likely to give sufficient guidance as to when acquisitions should be notified and will be difficult for the Commission to enforce. A lack of certainty as to whether a notification is required does not support the stated objectives of the draft Bill and may impede market activity and is not in the best interest of an efficient market. However, there is a logical, efficient and practical alternative which draws on and aligns with existing provisions of CA Chapter 6. We have suggested this as one possible alternative in Issue 1 of the Table.

Control presumptions

Proposed s51ABC(2) provides rebuttable presumptions as to when a person does and does not have control which reference the voting power test in Chapter 6. Although that test is more effective in setting a threshold below control, the cross-reference is slightly inconsistent with CA s606 and, more importantly, does not pick up ASIC's many significant modifications of the test that have been developed and refined over time to address market developments.

However, the most significant challenge with the s51ABC(2) presumptions is that they are rebuttable and give insufficient certainty for market transactions where the notification threshold is unclear and the transaction will be void if the presumption is rebutted. In addition, rebuttal is based on a different definition of control, drawing on CA s50AA but with significant differences. Its meaning is likely to be unclear for some time until it receives judicial consideration. In most respects, it catches far less than voting power, which will likely make enforcement difficult. However, it also lacks exceptions designed to accommodate listed market practices and accordingly risks disrupting markets.

As a result, we are concerned that the draft Bill's amendments may result in unintended consequences, through either or a combination of: vast numbers of notifications of transactions that raise no competition concerns; or failure to notify because the threshold is too complex, uncertain and difficult to enforce. The new

system will not be simpler[8] for acquisitions of shares in listed companies, given they will still need to comply also with the different threshold and prohibition in Chapter 6.

We suggest an alternative that we believe would be both simpler and more effective under Issue 1 in the Table.

Minimising adverse impact on listed markets and the purposes of Chapter 6

Voiding

The effects of market transactions cannot be effectively "undone" even if declared void. As a result of how trading and settlement works on-market for efficiency and integrity reasons, it will not be possible to determine whose shares were acquired. The acquirer can be forced to sell shares acquired. However, where control is relevant, the size or significance of the stake, if it was required to be sold on-market, may affect the share price of the company or other listed entities in a manner that is unfairly prejudicial or disrupts the market.

For acquisitions of securities on a securities exchange such as ASX, the effect of proposed s45AZA in voiding an acquisition put into effect while stayed is contrary to the important principle of certainty of settlement and clearing for securities markets transactions. The RBA's *Financial Stability Standards for Securities Settlement Facilities* includes *Standard 7: Settlement Finality* which provides that: "A securities settlement facility should provide clear and certain final settlement, at a minimum by the end of the value date. Where necessary or preferable, a securities settlement facility should provide final settlement intraday or in real time."

Given the difficulty of reversing a market transaction that "is, and is taken always to have been, void"[9], we recommend that the draft Bill be carefully reviewed to ensure that, in the case of listed securities at least, transactions are not voided unless that is essential for the legislation to achieve its aims and transactions can practically be undone. It appears to us that, currently, a number of requirements in the draft Bill could make transactions void for non-compliance that might be better dealt with in other ways.

We strongly recommend that the power conferred on the Federal Court in s77E be extended to include, at least, power to make such orders as the Court considers appropriate as an alternative to voiding.

Notification and timing of register disclosure

We submit that the purposes of the draft Bill can be fulfilled without requiring notification of acquisitions of securities ***in listed entities*** that give voting power[10] of

[8] Paragraph [1.29] of the draft Explanatory Materials.
[9] Proposed s45AZA(2)
[10] within the meaning of the CA as relevantly modified by ASIC

20% or less before they are put into effect. It is unusual for a 20% stake to give more than limited or defeasible influence over a listed company. Taking such a stake tends to be taken as a signal that the acquirer is contemplating making a takeover bid, which often unites the Board and other shareholders in opposition seeking a competing proposal. Even if the acquirer of such a stake is permitted to "nominate" a director, the influence or benefit that gives the holder of the stake is likely to be less in the case of a listed (public) company than for closely-held entities, for reasons including:

1. Directors' duties owed to the company will require that the director (among other things) acts in the best interests of the company and does not improperly use their position or information obtained to the advantage of the holder of the stake or detriment of the company.[11] Importantly, as a practical matter, a director of a listed company faces a much higher risk of personal liability or enforcement action by ASIC for contravention.
2. The director will generally be prevented from participating in or voting on matters in which they have a material personal interest.[12] Also, where control is in issue, the Panel's Guidance Note 19: Insider Participation in Control Transactions will usually require the matters to be dealt with by an Independent Board Committee that excludes the director.
3. The director will owe the usual duties of confidentiality to the company and may not disclose confidential information without consent.
4. If the holder of the stake receives non-public information from the director, insider trading laws may prevent acquisitions to increase that stake until the information is made public.
5. If the holder of the stake has ambitions to increase its control, a nominee director may create other complications under the CA[13] or ASX Listing Rules[14].

If notification is required and made public before acquiring a stake of up to 20% it will effectively be impossible to acquire a stake on-market. A pre-bid stake is generally highly desirable before making a takeover that the bidder considers may lack the support of the target's board. Such "hostile" takeovers have become increasingly less common over the last 15 years. If the draft Bill precludes acquisition of pre-bid stakes on-market, "hostile" takeovers will inevitably become even more rare. That will impair the benefits of takeovers in incentivising improved corporate efficiency and enhanced management discipline that informed the CLERP reforms. It is necessary and important to prevent takeovers that substantially lessen competition. But that should be achieved in a manner that minimises its impact on productivity and efficiency gains resulting from the disciplinary threat of takeovers.

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[11] See eg CA ss180-185
[12] CA s195
[13] Eg Chapter 2E Related Party Transactions, Chapter 6
[14] Eg LR 10.1

We note the desire for a transparent process that is referred to in paragraphs 1.2, 1.24, 1.29, 7.57 and 7.63 of the draft Explanatory Materials. If this requires a notified acquisition to be made public ***before*** it can be put into effect, we expect that it will make on-market takeover bids, and unconditional off-market takeover bids, unviable. Unconditional bids enable a bidder to put to shareholders promptly and directly an offer to sell their shares for cash, and quickly receive their consideration. As such, they provide the strongest and most effective version of the disciplinary benefits of takeovers. Such bids are relatively uncommon. However, if the draft Bill removes the "threat" of unconditional bids, we consider that will significantly undermine the benefits mentioned above and the objectives of the CLERP reforms.

We consider that appropriate transparency could still be achieved through minor changes to the draft Bill to allow takeovers that demonstrably have no competition concerns to be considered and approved by the Commission on a confidential basis. Such confidential consultations occur successfully in other jurisdictions, including:

1. The EUMR contains an exemption from the obligation to obtain pre-approval. (Article 7 EUMR). It allows you to buy shares on a stock market (bid or on the stock exchange) without pre-approval as long as you file as soon as possible and do not exercise voting rights pending approval. Most bidders include a precondition where relevant takeover rules allow them to do so.
2. In the US, notification filings are not made public unless there is an administrative or judicial action.[15]

Proposed s51ABZX(2)(c),(4),(5) may permit regulations allowing notification of unconditional takeovers to remain confidential and not be disclosed on the register until an acquisition determination is made. As currently drafted, however, it appears that if the acquisition determination ***refuses*** approval, that determination must still be made public on the register. In our view that would, as a practical matter, preclude its use by bidders wishing to make unconditional bids. We strongly recommend that the draft Bill be amended to provide for an acquisition determination regarding an unconditional bid or stake of 20% or less to remain confidential if approval is refused (unless there is a substantial public benefit application, or the decision is reviewed).[16] Arguably, that is appropriate for rejected proposals to acquire securities of listed entities since:

1. Where approval is refused there should not be any need for transparency permitting other interested parties to object to approval.

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[15] Only if a party requests early termination, and early termination is granted, is a notice published on the FTC website – however, early terminations have been suspended since February 2021.

[16] If prior notification of acquisitions of securities in listed entities that give voting power of 20% or less is required, we would also recommend in relation to proposed acquisitions of up to 20% stakes that the regulations provide for notification to remain confidential and for the draft Bill to be amended to provide for an acquisition determination to remain confidential if approval is refused (unless there is a substantial public benefit application, or the decision is reviewed).

2. Disclosure of an unconditional bid that is not proceeding because approval has been refused may only confuse or distort the market. To the extent the decision may give guidance relevant to others as to the Commission's approach, that guidance could be made public in a de-identified form.
3. The disclosure obligations of listed entities make it less likely anti-competitive acquisitions can occur without being noticed.
4. Some transparency for the Commission and the market is provided through the continuous disclosure obligations of listed entities and the requirement in CA Chapter 6C to give notice of a substantial holding of 5% or more and movements of at least 1%.[17]

Review

Given the importance and significance of the changes proposed, we would strongly recommend that the review of the operation of the provisions in proposed s51ABZZC be held earlier than 1 December 2028, that is, the review should commence no later than 1 December 2027 and complete no later than 1 December 2028. We suggest that the review be conducted by a government appointed committee of competition experts and mergers and acquisitions experts.

The subcommittee would be pleased to discuss any aspect of its submission.

Yours sincerely

Alex Cartel
President
Takeovers Panel

[17] CA s671B

Table of examples: Exposure Draft – Treasury Laws Amendment Bill 2024: Acquisitions

Issue	Example	Application of draft Bill provisions	*Recommended change* / Explanation
1. Control threshold – s51ABC will not catch all acquisitions of control (and a more effective 20% threshold is available)	A person acquires 19.99%, then subsequently 0.01%[1] (without notifying), then 6+ months later increases within Chapter 6's creep exception[2]) to a holding of 32%	Under s51ABC(1) the acquisition provisions do not apply if a person controlled the target immediately before an acquisition or does not control it after. The definition of "control" is a little like CA s50AA but significantly only requires capacity to directly or indirectly determine the policy of the company in relation to ***one or more matters***. Although much broader, that may not make much difference for a listed company unless the holding gives capacity to pass an ordinary resolution.[3] The first acquisition (19.99%) has the benefit of the s51ABC(2)(a) presumption, which is likely to be difficult to rebut. The second (0.01%) increasing to 20% would be presumed to give control (s51ABC(2)(b)). However, it may not be difficult to establish either that the acquirer did not gain control (rebutting s51ABC(2)(b)), or alternatively, that 19.99% already gave control (satisfying s51ABC(1)(a)). The person may have acquired control by the time they reach 32%. However, if each acquisition is small it may be difficult to prove that a particular acquisition did not fall within s51ABC(1). The Commission would need to prove that the person did not have control before a particular acquisition	***For listed entities, elements of the 20% threshold in Chapter 6 (which will already apply) should be used in place of s51ABC to require merger notification/approval before control is acquired.*** ***<u>Alternatively</u>, if s51ABC is retained for all companies:*** • ***the definition of "control" should be conformed with CA s50AA*** • ***subsection 51ABC(2) should be deleted and*** • ***the Commission should be given power to modify/exempt s51ABC (at least) in similar terms to ASIC's power in s655A, subject to appeal on the merits to the Tribunal.*** Control of listed companies, however defined, is generally not an "all or nothing" or stable concept. Consequently, takeovers regulation in most jurisdictions with significant listed equity markets uses a threshold of broadly defined interest in shares (set below the level likely to confer control) and then regulates increases above that threshold. A simpler and more effective approach than s51ABC (or s50AA) may be to use elements of the requirements that already apply through Chapter 6:

[1] This would be permitted by Chapter 6 as s606(1) and (2) only prohibits acquisitions that result in someone's voting power increasing to ***more than*** 20% or between that and 90%.

[2] CA s611 item 9 "3% creep in 6 months"

[3] Capacity to defeat a special resolution may prevent implementation of a desired policy but seems unlikely to "determine" it

Issue	Example	Application of draft Bill provisions	*Recommended change* / Explanation
		(to rebut s51ABC(2)(b) causing (1)(a) to apply) but did have control afterward (so that s51ABC(1)(b) does not apply). The first step would become more difficult as the person increases over time. Even if the person is shown to have control it may be difficult to prove that it resulted from an acquisition rather than eg non-participation in a buy-back, other shareholders' disinclination to vote, or other shareholders selling.	• A broad & effective 20% threshold[4] – this could apply unchanged • Exceptions for permitted transactions[5] – many of which would be withheld until merger notification is given and approval obtained. We suggest: • **Exceptions withheld until notification (and then conditional on approval):** – Takeover bids[6] – Acquisitions approved by shareholders[7] – Creeping acquisitions[8] – IPOs[9] – Acquisitions through another listed entity[10] – Acquisition by scheme of arrangement[11] • **Exceptions applied/permitted:** – receiver /receiver & manager[12] (cf s51ABF(a)) – newly formed company[13] (cf s51ABE) – pro-rata rights issues[14]

[4] CA ss606-610
[5] CA s611
[6] CA s611 Items 1-4
[7] CA s611 Item 7
[8] CA s611 Item 9
[9] CA s611 Item 12
[10] CA s611 Item 14
[11] CA s611 Item 17
[12] CA s611 Item 6
[13] CA s611 Item 8
[14] CA s611 Items 10 and 10A including underwriting by professional underwriters or sub-underwriters (cf s51ABC(6)(7)), (but not shareholders, but it would be advisable for the Commission to have a modification/exemption power to permit this where appropriate eg for failing companies)

Issue	Example	Application of draft Bill provisions	*Recommended change* / Explanation
			– dividend reinvestment[15] – underwriting[16] – wills / operation of law[17] (cf s51ABF(b)) – forfeiture of shares.[18] This may promote better compliance given Chapter 6 already applies and its provisions are reasonably well understood by market participants/advisors. We consider s51ABC "control"[19] will catch less of the means of exercising control surreptitiously than Chapter 6 (although s51ABC may still catch and disrupt unobjectionable market practices that are exempted by Chapter 6). The concepts of "relevant interest" and "association" used by Chapter 6 extend well beyond indirect acquisition of legal or equitable interests.[20] This broad concept has been used and improved over more than 50 years to regulate takeovers of listed companies effectively[21] and is regularly fine-

[15] CA s611 Item 11

[16] CA s611 Item 13 by professional underwriters or sub-underwriters – see footnote 14

[17] CA s611 Item 15

[18] CA s611 Item 16

[19] Which appears to be similar in some respects to CA s50AA. If this approach is retained we consider that it would be better to use the same language as s50AA so as to have the benefit of judicial interpretation of that provision.

[20] See eg s608(3)(a)

[21] The concept of "relevant interest" began to be used to extend common law legal or beneficial interests in the early 1970s: G Durbridge and A Rich, "The Origin of the Australian Takeovers Code: Would the Real Sir Richard Eggleston Please Stand Up" in T Damian and C James (eds) *Towns Under Siege – Developments in Australian takeovers and schemes* (Ross Parsons Centre, 2016) pp3-72, especially pp37, 46. At 62, the authors conclude that, in 1980, Sir Richard Eggleston would "have had to concede that some of the innovations of 1979 had become necessary to address things … overlooked a decade before: ***particularly relevant interests, and relating acquisitions to relevant interests in shares, instead of ownership of them***." (emphasis added)

Issue	Example	Application of draft Bill provisions	*Recommended change* / Explanation
			tuned to address new developments and changes in market practice.[22] Query whether such cross-reference to Chapter 6 could enhance the constitutionality of the reforms (and later amendments) given the States' referral of powers regarding certain matters relating to corporations and financial products and services under s51(xxxvii) of the Constitution.[23] If the alternative suggestion above is adopted (of conforming s51ABC with CA s50AA), we consider it necessary and important that the Commission be given power to modify/exempt in order to avoid unnecessary market disruption.

[22] Since 2000 that has been achieved by ASIC regularly modifying the law for all persons by legislative instruments made under s655A to allow it to operate as intended in the light of changes in market practice. ASIC also frequently gives exemptions or modifications applying only to a specific transaction to ensure the law operates as intended in that matter. This works very well (in marked contrast to similar powers in Chapter 7 of the CA) because the primary legislation (Chapter 6) is clear and has the benefit of improvement over many decades.

[23] We note that approval of the Ministerial Council is not required for legislation relating to specified matters concerning provisions regulating managed investment schemes, takeovers, fundraising, and the securities and futures industries. Query whether any provisions supporting eg notification to the Commission of takeovers could be included in Chapter 6?

Issue	Example	Application of draft Bill provisions	*Recommended change* / Explanation
2. Threshold – 20% or more s51ABC(2) is not consistent with Chapter 6 and creates unnecessary complexity	A person acquires 20.01% in a warrant trustee company that holds 20% in a listed company	The person would be presumed under s51ABC(2)(b) to have control of the listed company since: • the person will have voting power above 20% in the warrant trustee (WT) giving the person voting power of 20% in the listed company.[24] • ASIC has modified the CA so that certain rights do not give WTs a relevant interest.[25] However s51ABC(2)'s reference to "within the meaning of the *Corporations Act 2001*" will not pick up ASIC's modifications. Another inconsistency is that the threshold in s51ABC(2)(b) is 20% or more whereas the threshold in s606 is only breached by voting power increasing to ***more than 20%*** (or between that and 90%).	***If both Issue 1 recommendations are rejected, and s51ABC(2) is retained:*** • ***the thresholds should be conformed with Chapter 6[26] to avoid unnecessary complexity and confusion and*** • ***the presumption in s51ABC(2)(a) should not be rebuttable*** ASIC has modified Chapter 6 as it applies to all persons in relation to (among other things): rights under call warrants, issuers of call warrants and put options, warrant trustees,[27] ASIC, the Chairperson of ASIC,[28] ETFs[29] and IDPS operators.[30] If such persons are required to notify acquisitions, or presumed to have control under s51ABC(2)(b), inconsistently with ASIC's modifications, that may lead to market disruption. Also, experience over the 40+ years indicates that it is likely ASIC will need to make further modifications to permit Chapter 6 to operate as intended despite changing market practice. If the draft Bill refers to elements of the threshold in Chapter 6 ***as modified from time to time*** by ASIC, relevant updates and refinements can be picked up automatically.

[24] Under s51ABC(2)(b) read with CA ss608(3)(a), 610

[25] See ASIC REGULATORY GUIDE 5: Relevant interests and substantial holding notices [RG 5.190] and Part E. ASIC has made a number of other modifications that are significant for the market – see eg ASIC RG 5 Part D to Part F.

[26] Chapter 6 had a similar inconsistency re less/more than 20% until it was corrected in 2000 by the CLERP Reforms implementing Recommendation 1 of the Legal Committee of the Companies and Securities Advisory Committee in its report on *Anomalies in the Takeovers Provisions of the Corporations Law* (March 1994). Unfortunately, FATA subsequently chose "less than" 20% and reintroduced the problem. It would be unfortunate if the draft Bill adopts the FATA threshold in the case of listed entities subject to Chapter 6 as the notification requirement is not confined to foreign acquisitions and is likely to have a far more significant impact on takeovers if (unlike FATA) approval cannot be obtained on a confidential basis.

Issue	Example	Application of draft Bill provisions	*Recommended change* / Explanation
3. Voiding – market transactions s45AZA	s45AZA makes an acquisition void if it is put into effect while stayed. Many requirements may result in an acquisition being stayed	Under s45AZA(2) an acquisition put into effect while stayed "is, and is taken always to have been, void". Many things may cause an acquisition to be stayed (s51ABI) including if it is: • required to be notified but is not a notified acquisition (**NA**) eg due to failure to notify jointly by ***all*** principal parties as required by s51ABR(1)(c) • an NA that has not been "finally considered" (see s51ABJ) • an NA that has no "effective notification date" (**END**) s4(1) eg because the Commission determines under s51ABS that it has no END as the Commission reasonably considers it is materially incomplete/misleading or contains information false in a material particular • an NA that is "stale" ie s51ABK 12 months after the most recent approval determination (conditional or not) under s51ABW(1)(a)(b) or s51ABZL(1)(a)(b)	***The draft Bill should ensure that, in the case of listed securities at least, transactions are not voided unless:*** • ***that is essential to achieve the Bill's aims and*** • ***the transaction can actually be undone in practical terms in the circumstances.*** The effects of a market transaction cannot be effectively "undone" even if declared void. Voiding transactions is contrary to the requirements of certainty of settlement and clearing for securities markets transactions: RBA *Financial Stability Standards for Securities Settlement Facilities* includes *Standard 7: Settlement Finality*. The power conferred on the Federal Court in s77E should be broadened to include power to make such orders as the Court considers appropriate as an alternative to voiding.

[27] ASIC Corporations (Warrants: Relevant Interests and Associations) Instrument 2023/687
[28] ASIC Corporations (Relevant interests, ASIC and ASIC Chairperson) Instrument 2023/194
[29] ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/147
[30] ASIC Corporations (IDPS—Relevant Interests) Instrument 2015/1067

Issue	Example	Application of draft Bill provisions	*Recommended change* / Explanation
4. Voiding – clarifying that offers can be made under a bid conditional on merger approval	It is not sufficiently clear that making offers under a notified bid subject to a merger approval condition would not constitute putting into effect the acquisition. If it is "putting into effect", offers cannot be made before merger approval is obtained. This may mean offers cannot be made within 2 months of disclosure on the register (as required by CA s631(1)). It would also discourage many takeover bids because the bidder would need to "out" themselves due to public disclosure of their interest well ahead of launching the bid, giving interlopers an opportunity to disrupt any bid.	If a person notifies a proposed takeover that is conditional on Commission merger approval and the notification is made public on the register, the person will be required by CA s631(1) to make offers under the bid (which may then be accepted) within 2 months. If merger approval is not obtained before then, s45(7B) will not apply and it is unclear whether s45(7A) would cover the making and acceptance of conditional offers. We assume that sending the conditional offers would not be viewed as "putting into effect" an acquisition stayed under s51ABI(3). However, that should be made clear given the potentially serious consequences including contravention of s45AY and the acquisitions being void under s45AZA. In addition, particularly if there is no facility for making a confidential advance merger approval (see Issue 5), having the ability to make a bid subject to a merger approval condition is very important. The prospect of having to signal an intention to make a takeover bid well before launch would invite interloper activity with a long lead time and therefore strongly disincentivise takeover bids.	***The draft Bill should make it clear that, where a bid is conditional on merger approval, offers may be made and accepted without that constituting: "putting the acquisition into effect".*** Alternatively, the merger approval condition could be required to be a condition precedent (meaning offers could be made and accepted, but there would be no binding contract preventing withdrawal of acceptance until the condition is satisfied). This is the approach taken in the *Foreign Acquisitions and Takeovers Act 1975 (Cth)*.

Issue	Example	Application of draft Bill provisions	*Recommended change* / Explanation
5. Register – confidential notification and public disclosure s51ABZX	Notification is given of an on-market bid, unconditional off-market bid, or proposed acquisition of up to 20%	Subsections 51ABZX(2)(c),(4),(5) appear to permit regulations providing that notification of an unconditional takeover or notified acquisition of up to 20% should remain confidential and not be disclosed on the register until an acquisition determination is made. We assume it is intended that the Regulations will provide for this, consistently with international best practice. In view of the significance of this issue, however, it should be addressed in the draft Bill (with further detail to be prescribed by regulation if appropriate). Also, as currently drafted, it appears that an acquisition determination ***refusing*** approval must still be made public on the register. In our view that would, as a practical matter, stop bidders making unconditional bids.	***The draft Bill should provide a process for an acquisition determination regarding an unconditional bid or proposed acquisition of up to 20% to remain confidential:*** • ***until an acquisition determination is made, and*** • ***if approval is refused (unless there is a substantial public benefit application, or the decision is reviewed).***