

Exceptions to a takeover

› Exceptions to the prohibition in s 606(1): s 611

- › Listed as Items, **s 611** contains about 20 exceptions to the s 606 prohibition that provide a range of avenues for effecting acquisitions that would otherwise invoke the prohibition.

- Takeover bids

- › Acceptance of takeover offer: **Item 1**
- › On-market purchase during bid period: **Item 2**
- › On-market purchase of convertible securities in bid period: **Item 3**
- › Acceptance of scrip offered as takeover consideration: **Item 4**

- Nature of acquirer: Item 6

- › Receiver
- › Receiver and Manager

- Approval by resolution of target: Item 7

- › provided that no votes are cast in favour of the resolution by:
 - the person proposing to make the acquisition and their associates; or
 - the persons (if any) from whom the acquisition is to be made and their associates; and
 - the members of the company were given all information known to the person proposing to make the acquisition or their associates, or known to the company, that was material to the decision on how to vote on the resolution, including:
 - › the identity of the person proposing to make the acquisition and their associates; and
 - › the maximum extent of the increase in that person's voting power in the company that would result from the acquisition; and
 - the voting power that person would have as a result of the acquisition; and
 - the maximum extent of the increase in the voting power of each of that person's associates that would result from the acquisition; and
 - the voting power that each of that person's associates would have as a result of the acquisition.

- Target newly formed: Item 8

- › An acquisition that results from an issue of securities of the company in which the acquisition is made if the company has:
 - not started to carry on any business, and
 - not borrowed any money

- **Manner of acquisition**
 - **3% creep in 6 months: Item 9**
 - An acquisition by a person if:
 - throughout the 6 months before the acquisition that person, or any other person, has had voting power in the company of at least 19%; and
 - as a result of the acquisition, none of the persons referred to above would have voting power in the company more than 3 percentage points higher than they had 6 months before the acquisition.
- **Manner of acquisition (cont)**
 - **Rights issues: Item 10**
 - An acquisition that results from an issue of securities that satisfies all of the following conditions:
 - a company offers to issue securities in a particular class;
 - offers are made to every person who holds securities in that class to issue them with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the issue;
 - all of those persons have a reasonable opportunity to accept the offers made to them;
 - agreements to issue are not entered into until a specified time for acceptances of offers has closed;
 - the terms of all the offers are the same.
- **Manner of acquisition (cont)**
 - **Dividend reinvestment etc.: Item 11**
 - An acquisition that results from an issue of:
 - shares in a company to existing holders of shares in the company under a dividend reinvestment plan or bonus share plan; or
 - interests in a managed investment scheme to existing holders of interests in the scheme under a distribution reinvestment plan or switching facility; if the plan or facility is available to all members.
- **Manner of acquisition (cont)**
 - **Initial public offering (IPO) fundraising: Item 12**
 - An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if:
 - the issue is to a promoter; and
 - the disclosure document is the first issued by the company; and

- the disclosure document disclosed the effect that the acquisition would have on the promoter's voting power in the company.
- **Manner of acquisition (cont)**
 - ***Underwriting of fundraising: Item 13***
 - An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if:
 - the issue is to a person as underwriter to the issue or sub-underwriter; and
 - the disclosure document disclosed the effect that the acquisition would have on the person's voting power in the company.
 - **Manner of acquisition (cont)**
 - ***Wills etc.: Item 15***
 - An acquisition through:
 - a will, or
 - operation of law (joint tenancy – survivorship)
 - **Manner of acquisition (cont)**
 - ***Forfeiture of shares: Item 16***
 - An acquisition that results from an auction of forfeited shares conducted on-market.
 - **Compromise, arrangement, liquidation or buy-back**
 - ***Part 5.1 compromise or arrangement: Item 17***
 - An acquisition that results from a compromise or arrangement approved by the Court under Part 5.1 (e.g. scheme of arrangement).
 - ***Section 507 arrangement: Item 18***
 - An acquisition that results from an arrangement entered into by a liquidator under s 507 (i.e. acceptance of shares in the purchaser as consideration for the sale of company property)
 - ***Buy-back: Item 19***
 - An acquisition that results from a buy-back authorised by s 257A.

Specific examples of exceptions:

- › **On-market purchase of convertible securities during the bid period: s611, Item 3**
 - › If a person acquires convertible securities through an on-market transaction during a full takeover bid for the target (i.e. the bid may be subject to a prescribed occurrence condition but otherwise must be unconditional), then an acquisition resulting from the exercise of rights attached to that security is exempt from s 606: *Green v Crusader Oil NL* (1985) 10 ACLR 120.
 - › “convertible securities” (s 9) are securities that are convertible into another class of securities if the holder may have the other class of securities issued to them by the exercise of rights attached to those securities.
- › **Acceptance of Scrip offered as Takeover Consideration: s 611 Item 4**
 - › Where target shareholders acquire voting shares in the bidder as consideration for accepting a takeover offer (i.e. share (non-cash) consideration), the acquisition of those voting shares in the bidder by the target shareholders is exempt from the s 606 prohibition.
 - › If a large enough number of shares is issued by the bidder so as to constitute a majority of the expanded capital, then a reverse takeover will result (which may be intended or unintended): *Rossfield Group Operations Pty Ltd v Austral Group Ltd* [1981] Qd R 279.
 - › A **reverse takeover** is where the bidder makes an offer to acquire shares in a target company that is larger than the bidder for a share consideration which will result in the target shareholders becoming the majority shareholders in the bidder.
 - › This will have the same economic result as if the larger target company had acquired the smaller bidder company.
 - › To control this, ASIC has granted a modification that only shareholders registered at the date of the bidder’s statement can rely on the rule.
 - › Accordingly, this modification prevents a person acquiring shares in the target in order to receive a controlling stake as consideration under the bid thereby protecting the bidder from an involuntary reverse takeover.
 - › Alternatively, a bidder can protect against the risk of an unintended reverse takeover by making the bid conditional on no other person acquiring more than a specified percentage of the target (e.g. 20% or 50%).