



Australian Government
Takeovers Panel

Consultation Paper
GN on Shareholder Intention Statements

7 July 2015

Introduction

1. The Panel invites comments on the draft Guidance Note attached. The time for comments is open until 1 September 2015.
2. Comments or queries can be directed to:

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3. It is Panel policy that submissions are published on its website.
4. The Panel will consider all comments and reserves the right to make changes to the draft Guidance Note in response to comments or otherwise.

Background

5. [ASIC RG 25 - Takeovers: false and misleading statements](#), known as the “truth in takeovers” policy, discusses last and final statements as part of a general policy discussion on the need to ensure that public statements can be relied upon and not be misleading. It notes as an example of a last and final statement, a statement by a substantial holder that the holder will (or will not) accept a bid.¹ If the shareholder departs from the statement, ASIC may take enforcement action against the shareholder. Thus, RG 25 states in effect that substantial shareholders may be held to statements about whether they will (or will not) accept a bid.
6. It appears to be market practice for shareholder intention statements to be made, often by the target or bidder through an ASX announcement or in a target’s statement or bidder’s statement. In 2014, 45% of takeovers and 86% of schemes were announced together with a statement of shareholders’ intentions in response to the proposal.
7. In 2004, the Panel had considered the effect of third party statements in [Breakfree 03 & 04](#)² and in [Breakfree 04R](#).³ In the 04 application, a bidder sought to rely on third party ‘rejection’ statements gathered in a survey to withdraw. The Panel found that this was unacceptable, stating that it

¹ ASIC RG 25 at [25.29]

² [2003] ATP 38 & 39

³ [2003] ATP 42

was not reasonable to rely on those statements.⁴ That aspect of the decision was affirmed in the 04R proceeding.⁵

8. In 2008, in *Just Group*,⁶ the Panel stated that the market has to know whether a statement can be "relied on" (in the sense of the maker's conduct being consistent with the statement). Also in 2008, in *MYOB*,⁷ the Panel drew an inference of an understanding between a bidder and shareholders who had made unqualified intention statements and accepted at the beginning of the offer period.
9. Two recent Panel cases have highlighted issues in connection with the making of shareholder intention statements.
 - a) In *Ambassador 01*,⁸ Drillsearch announced that two substantial holders and three directors of Ambassador (collectively holding 25%) had made statements that they intended to accept Drillsearch's offer within 14 days from the opening of the offer, in the absence of a superior offer. The involvement of Drillsearch in obtaining the intention statements made it an associate of the directors and one of the substantial shareholders. The Panel also found that there were ambiguities regarding the statements.
 - b) In *Bullabulling*,⁹ the bidder's statement said that certain Bullabulling shareholders intended to accept the offer and the target's statement said that certain Bullabulling shareholders intended to reject the offer. Both were found by the Panel to be misleading. In particular, the 'rejection' statements (contained in the target's statement) were aggregated, unverified and made without the required consents.

Disclosure requirements in the UK

10. The UK Takeovers Code allows for mandatory bids (ie when a bidder can acquire greater than 30% of the shares of a Code company and make a follow on bid).¹⁰ An 'irrevocable commitment', or a 'letter of intent', from the target's shareholders to accept a bid or vote in favour of a scheme will not normally be counted as an interest for the purpose of the 30% mandatory bid threshold. Exceptions may include where the

⁴ [2003] ATP 39 at [108]-[141]

⁵ [2003] ATP 42 at [67]

⁶ [2008] ATP 22

⁷ [2008] ATP 27

⁸ [2014] ATP 14

⁹ [2014] ATP 8

¹⁰ See UK Takeovers Code, Rule 9

shareholders concerned acquire additional shares or gives the bidder voting rights.¹¹ Additional requirements apply in relation to irrevocable commitments and letters of intent from target directors.¹²

11. Any 'irrevocable commitment' or a 'letter of intent' must be publicly disclosed, including details about the shareholder's identity, shareholding size and circumstances in which the commitment will cease to be binding.¹³ If the shareholder in question is unable (or no longer intends) to comply, the shareholder must promptly announce an update of its position.¹⁴

Issues

12. The draft Guidance Note on Shareholder Intention Statements seeks to address ambiguities that can cause shareholder intention statements to mislead or confuse. In particular, the draft Guidance Note:
 - a) states that the Panel does not encourage or discourage the making of such statements
 - b) identifies that it may be misleading or confusing to make unclear statements, include ambiguous qualifications or withhold details of the holdings involved and
 - c) addresses the time frame for holding to a statement, aggregation of holdings in one statement, and how to deal with a superior proposal qualification.
13. Comments are sought on whether the Guidance Note is useful and what, if any, changes should be made to provide better guidance to the market.
14. In particular, comments are sought on the following issues:
 - Encouragement?*
 - a) Whether the statement "*The Panel does not encourage or discourage shareholder intention statements*" is helpful (see paragraph 4 of the GN).
 - Timing?*
 - b) Whether a time frame should be specified, and if so what time frame (see paragraph 10(a) of the GN). For example, the Panel might specify a time of 14 days or 21 days after an offer period starts before

¹¹ See Takeovers Code, note 9 to the definition of acting in concert and [Practice Statement No 22](#)

¹² See UK Takeovers Code, Rule 21.2 and [Practice Statement No 27](#)

¹³ UK Takeovers Code, Rule 2.11

¹⁴ UK Takeovers Code, Rule 2.11

acceptance. In *MYOB*¹⁵ and *Ambassador 01*¹⁶ the Panel suggested that it was appropriate to wait at least 21 days after an offer opened before acting on a stated intention to accept. If a time frame should be specified, is it applicable to a statement made after the offer period has started? Why?

Disclosure?

- c) Whether, in disclosing details of the holding, it is necessary for the shareholder's holding to be material before it is disclosed (see paragraphs 8(c) and 11(b) of the GN). Is guidance needed as to the meaning of 'material'?
- d) Whether, in disclosing aggregate holdings, it is necessary to disclose the identity and holdings of all the shareholders whose holdings are aggregated (see paragraph 11(d) of the GN).

Consents?

- e) Whether consent to the making of a statement is always required, and if not, in what circumstances it should not be required (see paragraphs 11(c) & (d) of the GN).

Impact on smaller companies

- f) Is the guidance clear and helpful for smaller companies? If not, please suggest what further guidance is necessary for smaller companies.

Guidance on relevant interests and associations?

- g) Is guidance needed on whether shareholder intention statements give rise to relevant interests or associations?

Attachments

- 1 Draft Guidance Note - Shareholder Intention Statements

¹⁵ [2008] ATP 27 at [52]

¹⁶ [2014] ATP 14 at [76]

Attachment 1

Draft Guidance Note – Shareholder Intention Statements

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Introduction

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to statements of intention made by shareholders in the context of a takeover bid or scheme of arrangement. For convenience, most references are to a takeover bid, but this note applies with necessary adaptation to a scheme or item 7 vote.¹⁷
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. The policy bases for this note are that shareholder intention statements should not inhibit:
 - the acquisition of control over voting shares taking place in an efficient, competitive and informed market¹⁸ and
 - shareholders and directors being given enough information to enable them to assess the merits of a proposal.¹⁹
4. The Panel does not encourage or discourage shareholder intention statements.

¹⁷ Section 611. References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

¹⁸ Section 602(a)

¹⁹ Section 602(b)(iii)

Shareholder intention statements

5. In this note, a shareholder intention statement is any statement regarding the intention of a shareholder, which has been made or authorised by the shareholder, in the context of a bid, scheme or a shareholder vote for the purposes of item 7 of section 611.
- Examples:*
1. X, a holder of #%, intends to accept the offer by Y in the absence of a superior proposal.
 2. X, a holder of #%, intends to vote in favour of the scheme proposal with Y in the absence of a superior proposal.
6. Such statements include ‘acceptance’ statements or ‘rejection’ statements,²⁰ but are not limited to these.²¹
7. Guidance Note 7 addresses shareholder intention statements in the context of entry into a lock-up device with that shareholder.²² ASIC’s regulatory guide on false and misleading statements also addresses statements by substantial holders.²³
8. If a shareholder makes a shareholder intention statement, there is a risk that the statement will be misleading, or at least confusing:
- (a) if expressed in terms that are unclear in meaning (eg an intention expressed as a ‘present’ intention)
 - (b) if a qualification is made and that qualification is ambiguous²⁴ and
 - (c) if published without detailed information regarding the holding where material.

²⁰ A statement that a shareholder intends not to accept (reject) a bid. See *Bullabulling Gold Limited* [2014] ATP 8

²¹ For example in *Summit Resources Limited* [2007] ATP 9, a bidder made a statement regarding voting in favour on a resolution approving a transaction between the target and a third party

²² Guidance Note 7 *Lock-up devices* at [33]-[34]. See also *Alpha Healthcare Limited* [2001] ATP 13

²³ ASIC RG 25: *Takeovers False and Misleading Statements* at [RG25.29]-[RG25.34]. See also *BreakFree Limited 03 and 04* [2003] ATP 38 and 39 at [111]

²⁴ For example in *Ambassador Oil and Gas Ltd 01* [2014] ATP 14 a stated intention to accept ‘within 14 days’ gave rise to unacceptable circumstances when the shareholder did not wait for the 14 days to elapse.

9. Market participants should note that a shareholder intention statement could potentially create a relevant interest in the shares the subject of the statement²⁵ or support an inference of association²⁶ which might contravene the Act and also result in unacceptable circumstances.

Unacceptable circumstances

10. In considering whether the terms of a shareholder intention statement gives rise to unacceptable circumstances, the Panel is guided by the following:

Time before acceptance

- (a) If the statement is qualified by reference to a time before which it will not be acted on, it is likely to give rise to unacceptable circumstances if the shareholder acts before that time has passed.

Aggregation with bidder's shareholding

- (b) If a statement is given without the qualification that it is subject to no superior offer emerging (or words to that effect), it is likely to give rise to unacceptable circumstances if given before the offer period is open and the shares the subject of the statement would, if aggregated with the bidder's shareholding and any other shares the subject of similar statements, increase the bidder's shareholding beyond the 20% threshold.²⁷

Superior proposal

- (c) If a statement is qualified by reference to a superior proposal, it is likely to be unacceptable if the shareholder accepts before allowing a reasonable time to pass for a superior proposal to emerge. The Panel considers that this is implied by the statement. The amount of time required will depend on the circumstances.
- (d) Whether a competing proposal is superior is primarily for the shareholder to determine, but it may give rise to unacceptable circumstances if a shareholder acts contrary to a demonstrably superior competing proposal without good reason.

²⁵ For example, *MYOB Limited* [2008] ATP 27

²⁶ For example, *Ambassador Oil and Gas Limited 01* [2014] ATP 14

²⁷ *MYOB Limited* [2008] ATP 27

- (e) If a superior proposal has been made, the shareholder is not obliged to accept it merely because it has made a statement regarding an earlier proposal. However, if the shareholder accepts the original bid, the Panel may be interested in whether that supports an inference that there was some form of agreement, arrangement or understanding between the shareholder and the original bidder.
11. In considering whether the manner in which a shareholder intention statement is disclosed gives rise to unacceptable circumstances, the Panel is guided by the following:

Details provided

- (a) The identity of the shareholder to whom the statement is attributed should be disclosed.
- (b) If the shareholder's holding is material, details of the holding, in number and percentage terms, should be disclosed.²⁸

Example: X Ltd, which holds at the date of this statement 100,000 shares (19.9%), intends to accept the offer.

- (c) Shareholder intention statements must only be published in a bidder's statement or target's statement if the shareholder has consented and the document so states.²⁹ The Panel expects that shareholder intention statements made outside a bidder's statement or target's statement will only be made with the consent of the shareholder.³⁰
- (d) If the statement aggregates holdings and the aggregate holding is material, the Panel expects that all the shareholders whose holdings are aggregated have consented,³¹ and will consider whether they and their individual holdings have been separately identified in the statement.

²⁸ Custodial institutions' holdings can change on the instruction of the beneficial owner, so a statement by a custodial institution might identify the holding at a particular date when the statement is made

²⁹ See sections 636(3) and 638(5). See also ASIC RG 55: *Statements in disclosure documents and PDSs: Consent to quote* at [55.68]–[55.70]. For the reason why consent is important, see *BreakFree Limited 03 and 04* [2003] ATP 38 and 39 at [129]–[131], affirmed in *BreakFree Limited 04(R)* [2003] ATP 42 at [67]

³⁰ Guidance Note 18 *Takeover Documents* at [41]

³¹ *Bullabulling Gold Limited* [2014] ATP 8 at [38]

Remedies

12. The Panel has wide powers to make orders.³² It may, for example:
- (a) require the maker of a shareholder intention statement to comply with the statement
 - (b) require the statement to be retracted³³
 - (c) release the maker of the statement from any obligation to comply³⁴ or
 - (d) unwind an action or transaction based on a statement.³⁵

Publication History

First Issue xx

Related material

GN 7 Lock-up devices

GN 18 Takeover documents

³² Section 657D

³³ *Bullabulling Gold Limited* [2014] ATP 8

³⁴ *MYOB Limited* [2008] ATP 27

³⁵ *Ambassador Oil and Gas Limited 01* [2014] ATP 14