



## CONSULTATION PAPER

### Guidance Note 1 – Unacceptable Circumstances

#### Why is the Panel consulting?

The Panel proposes to revise Guidance Note 1 to provide market participants more certainty by establishing a time frame before which departure from a no increase statement may give rise to unacceptable circumstances.

The example set forth in revised footnote 39 is intended to provide a general principle in relation to the application of last and final statements made by bidders following a takeover bid.

#### What is the Panel proposing?

Attached is a revised draft Guidance Note 1. The draft revisions are in example 4 of paragraph 32(a) and footnote 39. Footnote 39 provides that unacceptable circumstances are likely to arise if, after making a no increase statement, the bidder (or an associate) makes another bid (or proposes a scheme) within 4 months after the bid closes and offers increased consideration (unless that is contemplated by a clear qualification to the no increase statement). The footnote has also been updated to refer to relevant recent Panel matters.

#### Questions

Comments are sought on the proposed guidance, in particular:

1. Do you agree that there is uncertainty in the market regarding how long a last and final statement will be treated as having ongoing effect following the close of a bid? If so, does the proposed guidance provide greater certainty to the market?
2. What are the possible unintended consequences (if any) of the proposed guidance?
3. Do you agree with the suggested 4 month wait period? Is some other time period more appropriate?
4. Should there be an exception for a “material change” or “exceptional circumstance” occurring during the wait period? If so, how should these terms be defined?
5. Should the proposed guidance be extended to a last and final public statement made or authorised by a bidder in connection with a preliminary approach seeking an agreed control transaction? If so, when would the wait period commence?
6. Please identify any amendments you think should be made to the draft revisions.

#### Submissions

Comments are due by **Friday, 20 April 2018**.

Please send any submissions (which will be made public) or queries to [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au).



**Australian Government**

**Takeovers Panel**

## Guidance Note 1 – Unacceptable Circumstances

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### **Background**

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1. This guidance note has been prepared to assist market participants understand the Panel’s approach to making a declaration of unacceptable circumstances.<sup>1</sup>
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. If the Panel makes a declaration of unacceptable circumstances it has the power to make orders.<sup>2</sup>
4. The Panel aims to correct unacceptable circumstances as quickly and as cost-effectively as possible. It seeks to ensure that control transactions

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<sup>1</sup> Section 657A of the *Corporations Act 2001* (Cth). References are to the *Corporations Act* unless otherwise indicated

<sup>2</sup> Section 657D. See GN 4 (Remedies General) for a discussion on the use and effect of orders and other remedies available to the Panel

are decided by informed security holders who have confidence in the integrity of Australia's market for corporate control.

### History

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5. Section 60 of the Companies (Acquisitions of Shares) Act 1980<sup>3</sup> allowed the National Companies and Securities Commission to declare conduct, or an acquisition of shares, unacceptable. The section was seen to confer an anti-avoidance power:

*The Commission's exercise of discretionary powers will thus provide a mechanism whereby reasonable commercial transactions will be unencumbered but any belief that what is not illegal (or cannot be demonstrated to the Courts to be illegal) is acceptable will be precluded. The existence of such discretionary powers, and the principles upon which they are to be applied, may be seen as imposing an obligation of propriety on those who use the facilities of the market place and their advisers. The obligation is a responsibility that no person should fear or seek to avoid.*<sup>4</sup>

6. With the introduction of the Corporations Law the power to declare conduct or an acquisition unacceptable<sup>5</sup> was given to the Corporations and Securities Panel under s733 in the following terms:

*Where, on an application under subsection (1), the Panel is satisfied:*

- (a) *that unacceptable circumstances have occurred:*
- (i) *in relation to an acquisition of shares in the company;*  
*or*
  - (ii) *as a result of conduct engaged in by a person in relation to shares in, or the affairs of, the company; and*
- (b) *having regard to the matters referred to in section 731 and any other matters the Panel considers relevant, that it is in the public interest to do so;*

*the Panel may by writing declare the acquisition to have been an unacceptable acquisition, or the conduct to have been unacceptable conduct, as the case may be.*<sup>6</sup>

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<sup>3</sup> And State Codes

<sup>4</sup> NCSC Policy Statement 105, Issue 3 (1 October 1986), para 7

<sup>5</sup> The expression 'unacceptable circumstances' was defined in s732, essentially in terms of the Eggleston principles. A declaration could be made after having regard to, among other things, the matters in section 731

<sup>6</sup> Section 733(3) of the Corporations Law

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7. Whereas previously orders had been made by the courts, they were now made by the CSP.<sup>7</sup> Only the Australian Securities Commission could bring matters before the CSP.
8. From 13 March 2000, section 733 became section 657A in the following terms:

*The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:*

- (a) *are unacceptable having regard to the effect of the circumstances on:*
  - (i) *the control, or potential control, of the company or another company; or*
  - (ii) *the acquisition, or proposed acquisition, by person of a substantial interest in the company or another company; or*
- (b) *are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.*

*The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.<sup>8</sup>*

9. In addition, the persons who could bring matters before the Panel was broadened so that a bidder, target, ASIC or any other person whose interests were affected could apply for a declaration<sup>9</sup> and the Panel became the primary forum for resolving takeover disputes during the bid period.<sup>10</sup>
10. In 2001, the CSP became the Takeovers Panel.
11. In 2007, s657A (see Appendix A for detailed terms) was broadened further by:
  - (a) extending subsection (2)(a) to clearly cover past and potential future effect, likely effect, control or potential control and

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<sup>7</sup> Section 734 of the Corporations Law

<sup>8</sup> *Corporate Law Economic Reform Program Act 1999* (Cth) introduced s657A to the Corporations Law. See s657A(2)

<sup>9</sup> Section 657C(2)

<sup>10</sup> Section 659AA

- (b) the introduction of an additional test: that the circumstances are otherwise unacceptable having regard to the purposes of chapter 6 set out in s602.<sup>11</sup>

### Power to declare unacceptable circumstances

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- 12. Section 657A (**Appendix A**) empowers the Panel to make a declaration of unacceptable circumstances. The section requires the Panel to consider:
  - (a) the effect of the circumstances and
  - (b) whether the effect appears to the Panel to be unacceptable:
    - (i) having regard to control or potential control of a company<sup>12</sup>
    - (ii) having regard to the acquisition or proposed acquisition of a substantial interest in a company
    - (iii) having regard to the section 602 principles or
    - (iv) because of a contravention of Chapters 6-6C.
- 13. In *Glencore (No 1)*, the Federal Court said of s657A before its amendment in 2007:<sup>13</sup>

*It is therefore necessary, before the Panel considers whether it **appears** that particular circumstances are unacceptable, having regard to the effect of the circumstances, to make a determination as to the effect of those circumstances. It is only unacceptability of the effect that must appear to the Panel and the Panel must make a finding as to that effect before it considers whether that effect is unacceptable. In a sense, it is a precondition of the making of a declaration that the Panel make a finding as to the effect, on control, or acquisition as, referred to in s657A(2), that the relevant circumstances had.... (original emphasis)*

- 14. Before making a declaration the Panel is also required to consider:
  - (a) the purposes of Chapter 6 set out in s602<sup>14</sup>
  - (b) the other provisions of Chapter 6<sup>15</sup>

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<sup>11</sup> Sections 657A(2)(a) and (b), introduced by s4 of the *Corporations Amendment (Takeovers) Act 2007* (Cth), effective 13 May 2007

<sup>12</sup> Extends to listed bodies (s603) and managed investment schemes (s604)

<sup>13</sup> *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290, per Emmett J at [39]

<sup>14</sup> In considering s602(c), the Panel must take into account the actions of directors: s657A(3)

<sup>15</sup> An example of a declaration based on circumstances “at odds with basic principles and policies underlying takeovers regulation in Australia and Chapter 6” is *Consolidated Minerals Ltd 03R* [2007]

- (c) any rules, or matters specified in the regulations<sup>16</sup>
  - (d) whether making a declaration is not against the public interest<sup>17</sup> (generally meaning issues beyond the commercial interests and convenience of the parties to such things as the signal the decision may send the market and the wider investing community) and
  - (e) any policy considerations it considers relevant.<sup>18</sup>
15. The Panel may also consider any other matters it considers relevant.<sup>19</sup>
16. Before making a declaration the Panel must give parties, persons to whom the declaration relates and ASIC an opportunity to make submissions.

### **What are unacceptable circumstances?**

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17. There is no definition of unacceptable circumstances.<sup>20</sup> Based on the wording of section 657A, the Panel's ability to make a declaration of unacceptable circumstances is broad.<sup>21</sup>
18. The power extends beyond takeover bids to other control transactions.
- Examples:*
1. *rights issues and equity placements*
  2. *buy-backs and other reductions of capital*
  3. *resolutions to approve acquisitions of shares*
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ATP 28 (see para [23]). Generally, these provisions give effect to the purposes set out in section 602

<sup>16</sup> There are currently no rules made under section 658C or regulations for the purposes of paragraph 195(3)(c)

<sup>17</sup> Section 657A(2) – which also requires the Panel to consider whether not making a declaration is not against the public interest

<sup>18</sup> Sections 657A(2) and (3)(a)

<sup>19</sup> Section 657A(3)(b). See also *Glencore International AG v Takeovers Panel* [2006] FCA 274 at [35]

<sup>20</sup> Section 732 of the Corporations Law was, in effect, a definition

<sup>21</sup> For example, *Austar United Communications Limited* [2003] ATP 16, *Grand Hotel Group* [2003] ATP 34, *National Can Industries Limited* [2003] ATP 35, *Village Roadshow Limited* [2004] ATP 4. In *Pinnacle VRB Ltd (No 10)* [2001] ATP 21 and 21a (upheld on review: *Pinnacle VRB Ltd (No 11)* [2001] ATP 23) the Panel reversed an acceptance made in error. See also *Golden West Resources Ltd 03 and 04* [2008] ATP 1 at [40]. In *Midwest Corporation Ltd 02* [2008] ATP 15, the Panel declared an acquisition unacceptable in the contest for control of Midwest (a takeover by SinoSteel) because of failure to comply with the *Foreign Acquisitions and Takeovers Act 1975* (Cth)

4. *compulsory acquisition*
  5. *schemes of arrangement*<sup>22</sup>
  6. *reverse takeovers.*
19. Parliament has twice suggested that a broad interpretation is intended.
20. In 1998, when s657A was proposed, Parliament said:

*The Panel's jurisdiction to make a declaration of unacceptable circumstances will not depend upon the existence of a general offer to shareholders under a takeover bid. Instead, its discretion will extend to circumstances involving an acquisition of a substantial interest in, or control of, a company (proposed paragraph 657A(2)(a)). In making a declaration of unacceptable circumstances, the Panel must have regard to the spirit of the takeover rules in section 602 in deciding whether the circumstances are unreasonable and whether it is in the public interest to make the declaration (proposed subsection 657A(2)).*<sup>23</sup>

21. A broad interpretation allows the Panel to fulfil the role envisaged by s659AA as the main forum for resolving disputes about a takeover bid.<sup>24</sup>

22. In 2007, Parliament said of the new s657A(2)(b):

*A new paragraph 657A(2)(b) is inserted in the Act to give the Panel jurisdiction to declare circumstances unacceptable having regard to the purposes of Chapter 6 of the Act set out in section 602. This is a significant change, designed to ensure the Panel can address circumstances which impair those purposes, without having to also establish either a contravention of the Act or an effect on control or potential control of a company or on the acquisition or proposed acquisition of a substantial interest in a company. The intention is to give the Panel a wider power to give effect to the spirit of the Act. The purpose of the words in brackets in the new paragraph is to ensure that the Panel can make a declaration of unacceptable circumstances in relation to the affairs of one company, being the company referred to in subsection 657A(1), where the effect of the unacceptable circumstances*

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<sup>22</sup> The Panel normally leaves schemes to the regulation of the court seized of it. But see *Citect Corporation Ltd* [2006] ATP 6 at [33]

<sup>23</sup> *Corporate Law Economic Reform Program Bill 1998*, Explanatory Memorandum, para 7.9. The section took effect on 13 March 2000

<sup>24</sup> *Corporate Law Economic Reform Program Bill 1998*, First Reading by Mr Hockey, Hansard 3/12/1998, page 996: "To address concerns with the current dispute resolution mechanisms for takeovers, the existing Companies and Securities Panel will be reconstituted to become the primary forum for resolving takeover matters. The panel will retain its existing jurisdiction to enforce compliance with the spirit of the law...."

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*relates to or is primarily manifest on another company or the securities of either company.*<sup>25</sup>

23. In *Alinta*, which concerned in part whether s606 had been contravened, it was said in the High Court:<sup>26</sup>

*... The declaration is a statement of the Panel's conclusion that, having regard to the circumstances created by the contravention and to the public interest, it considers something needs to be done about those circumstances. They are "unacceptable" in the sense that they cannot remain as they are and that they require consideration to be given to the orders that may be made under s 657D....*

24. The existence of unacceptable circumstances does not depend on conduct or intention. Typically the Panel considers the effect of the circumstances on persons and the market in the light of the principles in s602.
25. Unacceptable circumstances may arise whether or not there is also a breach.<sup>27</sup>

*Examples involving possible unacceptable circumstances:*

1. *contravention of section 606*<sup>28</sup>
2. *contravention of a provision mentioned in section 612*
3. *contravention of ss636(1) or 638(1) - disclosure*
4. *contravention of a timing provision (even minor) if persons may have changed their position in reliance on compliance with the provision*<sup>29</sup>
5. *contravention of ss636(3) or 638(5) – consent.*<sup>30</sup>

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<sup>25</sup> *Corporations Amendment (Takeovers) Bill 2007*, Explanatory Memorandum, para 3.8

<sup>26</sup> *Attorney-General of the Commonwealth v Alinta Limited & Ors* [2008] FCA 2, per Crennan and Kiefel JJ at [169]

<sup>27</sup> *InvestorInfo Ltd* [2004] ATP 6 (s611 item 10 - rights issue underwriting), *Email Limited (No 1)* [2000] ATP 3 (disclosure breach remedied by supplementary statement). Unacceptable circumstances may exist because of a contravention of Chapter 6: *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2

<sup>28</sup> For example, *Taipan Resources NL (No 9)* [2001] ATP 4, 38 ACSR 111; *Anaconda Nickel Ltd (No 18)* [2003] ATP 18; *Anaconda Nickel Ltd (No 19)* [2003] ATP 20; *Trysoft Corporation Ltd* [2003] ATP 26. An honest and accidental contravention of s606 may not be unacceptable if it has not had any relevant adverse effect: *ISIS Communications Ltd* [2002] ATP 10

<sup>29</sup> Sections 630(3), 650C(2) and 650F(1)

<sup>30</sup> *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5

## Section 602

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26. In 1969 the Eggleston Committee<sup>31</sup> said:

*We agree with the general principle that if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure:*

- (i) that his identity is known to the shareholders and directors;*
- (ii) that the shareholders and directors have a reasonable time in which to consider the proposal;*
- (iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interests in a corporation, that the kind of information which would ordinarily be provided in a prospectus is furnished to the offeree shareholders;*
- (iv) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.*

27. These 'Eggleston principles' were incorporated into the law.<sup>32</sup>

28. In the Corporations Law they applied in the following way when the ASC was exercising its modification power (section 731<sup>33</sup>):

*In exercising any of its powers ... the Commission shall take account of the desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure:*

- (a) that the shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company;*

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<sup>31</sup> Company Law Advisory Committee to the Standing Committee of Attorneys-General, chaired by RM Eggleston, and directed "To enquire into and report on the extent of the protection afforded to the investing public by the existing provisions of the Uniform Companies Acts and to recommend what additional provisions (if any) are reasonably necessary to increase that protection." See 2<sup>nd</sup> Interim Report, para 16

<sup>32</sup> Section 60 of the Companies (Acquisition of Shares) Act, then s732 of the Corporations Law, which was extended to buy-backs and capital reductions in the mid 1990s, now in s602 of the Corporations Act

<sup>33</sup> Previously s59 of the Companies (Acquisition of Shares) Act

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- (b) *that the shareholders and directors of a company have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;*
  - (c) *that the shareholders and directors of a company are supplied with sufficient information to enable them to assess the merits of any proposal under which a person would acquire a substantial interest in the company; and*
  - (d) *that, as far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company;....*
29. Section 732 set out when unacceptable circumstances was taken to have occurred, by reference to the 'Eggleston principles'.<sup>34</sup> The CSP was directed to have regard to the matters in s731 when considering whether to make a declaration.<sup>35</sup>
30. In 2000, the 'efficient competitive and informed market' principle (see now s602(a)) was established as one of the principles in s602 alongside the 'Eggleston principles' (see now ss602(b) and (c)).
31. Also in 2000 an additional principle was added to s602 - the 'compulsory acquisition' principle (see s602(d)).<sup>36</sup>
32. Section 602 sets out the purposes of chapter 6. There is overlap between some of the principles. They are to ensure that:
- (a) the acquisition of control over voting shares takes place in an efficient, competitive and informed market.

*Examples involving possible unacceptable circumstances:*

1. *information deficiency*<sup>37</sup>
2. *a false market in securities the subject of a bid*
3. *the lockout of rival bids*<sup>38</sup>

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<sup>34</sup> Section 732 did not include reference to an 'efficient, competitive and informed' market

<sup>35</sup> Section 733(3)(b) of the Corporations Law. The CSP also had to have regard to any other matters it considered relevant and the public interest

<sup>36</sup> *Corporate Law Economic Reform Program Act 1999* (Cth), effective 13 March 2000

<sup>37</sup> Also a failure to correct inaccurate media reports may affect the existence of an efficient, competitive and informed market

<sup>38</sup> GN 7 (Lock-up devices). *Consolidated Minerals 03* [2007] ATP 25 (review decided on a different basis), *Normandy Mining Ltd (No 3)* [2001] ATP 30, *Ballarat Goldfields NL* [2002] ATP 7, *Ausdoc Group Ltd* [2002] ATP 9, *National Can Industries Ltd 01R* [2003] ATP 40

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4. *departure from (or acting inconsistently with) a 'truth in takeovers' statement<sup>39</sup>*
  5. *failure to have (and maintain) a reasonable basis to believe you will be able to pay the cash component offered in a bid<sup>40</sup>*
  6. *failure to issue consideration securities<sup>41</sup>*
  7. *the refusal to reverse transactions entered in error and promptly notified<sup>42</sup>*
  8. *excessive broker handling fees<sup>43</sup>*
  9. *uncertainty concerning the effect of conditions of a bid<sup>44</sup>*
  10. *uncertainty about whether a bid will be made and its terms<sup>45</sup>*
  11. *an agreement taking a person's interest over 20% that restrains disposal of shares in reliance on section 609(7) and the restraint is not lifted should the 'acquirer' announce a takeover or scheme before shareholder approval or an ASIC exemption has been obtained*
  12. *excessive break fees.*
- (b) the holders of shares and the directors:
- (i) know the identity of a person who proposes to acquire a substantial interest
  - (ii) have a reasonable time to consider the proposal and

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<sup>39</sup> See ASIC Regulatory Guide 25, *Taipan Resources NL 06* [2000] ATP 15, *Summit Resources Limited* [2007] ATP 9, *Rinker Group Limited 02* [2007] ATP 17, *Rinker Group Limited 02R* [2007] ATP 19, *Ludowici Limited* [2012] ATP 3 and *Ludowici Limited 01R* [2012] ATP 4. For example, unacceptable circumstances are likely to arise if, after making a no increase statement, the bidder (or an associate) makes another bid (or proposes a scheme) within 4 months after the bid closes and offers increased consideration (unless that is contemplated by a clear qualification to the no increase statement) *Novus Petroleum Ltd (No 2)* [2004] ATP 9, *BreakFree Ltd 04R* [2003] ATP 42, *Prudential Investment Company of Australia Ltd* [2003] ATP 36. There are limits: *BreakFree Ltd 04R* (statement was an unauthorised assessment by one person of the proposed behaviour of others)

<sup>40</sup> GN 14 (Funding Arrangements). See also *Taipan Resources NL (No 3)* [2000] ATP 17, *Pinnacle VRB Ltd (No 6)* [2001] ATP 11, *Taipan Resources NL (No 10)* [2001] ATP 5, *Taipan Resources NL (No 11)* [2001] ATP 16, *Goodman Fielder Ltd* [2003] ATP 1

<sup>41</sup> *Colonial First State Property Trusts (No. 3)* [2002] ATP 17

<sup>42</sup> *Pinnacle VRB Ltd (No 11)* [2001] ATP 23

<sup>43</sup> GN 13 (Broker Handling Fees). Excessive fees may impair a broker's duty when advising clients, creating unacceptable circumstances

<sup>44</sup> *Brisbane Broncos Ltd (No 3)* [2002] ATP 2, *SA Liquor Distributors* [2002] ATP 22

<sup>45</sup> *Realestate.com.au Ltd* [2001] ATP 1, *Cobra Resources Ltd* [2003] ATP 23

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- (iii) are given enough information to enable them to assess the merits of the proposal

*Examples involving possible unacceptable circumstances:*

1. *failure to provide information under ASX Listing Rules or ss643, 644 or 630*
2. *failure to comply with substantial holding notices and tracing notices under Chapter 6C<sup>46</sup>*
3. *failure to disclose the intentions of the bidder concerning future relations between the target and the current shareholders of a co-operative<sup>47</sup>*
4. *using reports for a different purpose than intended<sup>48</sup>*
5. *failure to provide the qualifications of the person who prepared a report*
6. *failure to disclose the basis of comparison between a bid price and “comparable” transactions<sup>49</sup>*
7. *use of “inside” information (which may also breach the insider trading provisions)<sup>50</sup>*
8. *a change of control, or a material effect on control by an issue of shares as consideration for a bid, that either disenfranchises shareholders or does not meet the policy of chapter 6 (even if strictly it satisfies item 4 of section 611 - acquisitions that result from acceptance of a bid).<sup>51</sup>*

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<sup>46</sup> See *Austar United Communications Ltd* [2003] ATP 16, *National Can Industries Ltd 01* [2003] ATP 35, *Grand Hotel Group* [2003] ATP 34 and *Village Roadshow Ltd* [2004] ATP 4

<sup>47</sup> *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5. See also *SA Liquor Distributors Ltd* [2002] ATP 22, 47 ACSR 249

<sup>48</sup> *Great Mines Ltd* [2004] ATP 1, *Novus Petroleum Ltd* [2004] ATP 2

<sup>49</sup> *Goodman Fielder Ltd (No 2)* [2003] ATP 5

<sup>50</sup> National Companies and Securities Commission, Policy Statement 105 “Discretions vested in the Commission” at [15], [18]-[22]

<sup>51</sup> *Gloucester Coal 01* [2009] ATP 6; *Gloucester Coal 01R* [2009] ATP 9. A reverse takeover may also offend the principles in ss602(a) and (c). It may ‘lock up’ the bidder and adversely affect competition. The Panel takes into account whether the transaction is subject to the approval of bidder shareholders (relief from s629 can be sought from ASIC if necessary) and/or is subject to a condition that allows a superior proposal to be considered by those shareholders. A ‘superior proposal’ condition, however, if it depends on the opinion of, or an event controlled by, the bidder or an associate is void (s629) so should be drafted in objective terms

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- (c) as far as practicable, the holders of shares in the relevant class all have a reasonable and equal opportunity<sup>52</sup> to participate in any benefits<sup>53</sup> accruing to holders through any proposal under which a person would acquire a substantial interest. This does not require that all transactions provide a premium to the existing market or be equally attractive to all shareholders.<sup>54</sup>

*Examples involving possible unacceptable circumstances:*

1. *maximum acceptance conditions*
2. *uncommercial pricing of a rights issue*<sup>55</sup>
3. *deflating the price for shares that are the subject of the bid*<sup>56</sup>
4. *frustrating a bid*<sup>57</sup>
5. *brokers sharing broker handling fees with clients*<sup>58</sup>
6. *unreasonable effects of a share buy-back*<sup>59</sup>
7. *a target's associate acquiring the target's shares as a defence to a bid, then obtaining a benefit such as a material trading*

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<sup>52</sup> Reasonable opportunity means that holders have adequate time to consider a proposal and respond to it and are not exposed to pressure tactics. Equal opportunity means equal value, not identical dealing. Opportunity may be direct (eg, selling shares) or indirect (eg, voting on a transaction under s611 item 7: some aspects of this were considered in *PowerTel Ltd (No 1)* [2003] ATP 25)

<sup>53</sup> Benefits may be given directly or in collateral transactions. For example, *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd* [1993] 177 CLR 508 (price of another parcel of shares), *Alpha Healthcare* [2001] ATP 13, *PowerTel Ltd (No 3)* [2003] ATP 28 (acquiring another asset for an overvalue), *Re Pivot Nutrition Pty Ltd* [1997] ATP 1 (transfer of a key supply arrangement from Gibson's to another subsidiary of Pivot, which deflated Gibson's share price and Pivot was able to make a significantly lower offer), *Citect Corporation Limited* [2006] ATP 6 (unconditional share acquisition before bid conditions changed), *Becker Group Ltd* [2007] ATP 13 (asset sale to selling shareholders and voting to approve that sale)

<sup>54</sup> See *PowerTel Ltd (No 2)* [2003] ATP 27

<sup>55</sup> For example, pricing may be a concern in a rights issue: this and other related issues are considered in *InvestorInfo Ltd* [2004] ATP 6 at [38]. See also *Data & Commerce Ltd* [2004] ATP 7. See also GN 17 (Rights issues)

<sup>56</sup> Pivot's bid for Gibson: Fn 53

<sup>57</sup> See also *Pinnacle VRB Ltd (No 8)* [2001] ATP 17, *Bigshop.com.au Ltd (No 2)* [2001] ATP 24, *Normandy Mining Ltd (No 6)* [2001] ATP 32. See also GN 12 (Frustrating action)

<sup>58</sup> Possible collateral benefit. See GN 13 (Broker Handling Fees)

<sup>59</sup> *Village Roadshow Ltd (No 2)* [2004] ATP 12; Australian Securities and Investments Commission Policy Statement 110 (Share buy-backs) at [110.48 - 110.49]

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*arrangement with the target or an interest in the target's assets<sup>60</sup>*

8. *a rights issue not affording genuine accessibility to its benefits to all shareholders<sup>61</sup>*

9. *a collateral benefit.<sup>62</sup>*

(d) an appropriate procedure is followed as a preliminary to compulsory acquisition.

*Example involving possible unacceptable circumstances:*

1. *a bid which satisfies the preconditions to compulsory acquisition only because of acquisitions which did not reflect an arms-length approval of the bid terms.*

### Publication History

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First Issue	28 February 2000
Second Issue	14 May 2001
Reformatted	17 September 2003
Third Issue	28 September 2004
Fourth Issue	18 April 2008
Fifth Issue	21 September 2010

[Sixth Issue](#)

### Related material

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GN 15 Listed Trust and Managed Investment Scheme Mergers

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<sup>60</sup> National Companies and Securities Commission Policy Statement 105 (Discretions vested in the Commission) at [32]

<sup>61</sup> See *InvestorInfo Ltd* [2004] ATP 6, *Data & Commerce Ltd* [2004] ATP 7. See also GN 17 (Rights issues)

<sup>62</sup> *Becker Group Ltd* [2007] ATP 13

**Appendix A: Section 657A(1)-(3)**

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- “(1) *The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.*
- (2) *The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:*
- (a) *are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:*
    - (i) *the control, or potential control, of the company or another company; or*
    - (ii) *the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or*
  - (b) *are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602; or*
  - (c) *are unacceptable because they:*
    - (i) *constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or*
    - (ii) *gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.*

*The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.*

- (3) *In exercising its powers under this section, the Panel:*
- (a) *must have regard to:*
    - (i) *the purposes of this Chapter set out in section 602; and*
    - (ii) *the other provisions of this Chapter; and*
    - (iii) *the rules made under section 658C; and*
    - (iv) *the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the ASIC Act; and*
  - (b) *may have regard to any other matters it considers relevant.*

*In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).*