



Public Consultation Response Statement dated 3 June 2003

1. Introduction

- 1.1. On 28 March 2003, the Broker Handling Fees (BHF) Sub-Committee of the Takeovers Panel released for public comment a draft Guidance Note on BHFs. Comments were due by 9 May 2003.
- 1.2. The purpose of this paper is to set out the Sub-Committee's response to the public consultation process.
- 1.3. The Panel received two substantive submissions in response to the draft Guidance Note¹. The Panel wishes to express its gratitude to these bodies for their valuable feedback.
- 1.4. The first respondent supported the draft Guidance Note's approach to BHFs.
- 1.5. The second respondent did not endorse the Panel's Guidance Note. It believed that the Panel should not examine BHFs, as they were sufficiently regulated by Chapter 7 (*Financial Service and Markets*) of the Corporations Act (**the Act**).

2. Material Comments Received from first Respondent and the Sub-Committee's Conclusions

- 2.1. **Paragraph 20² (Sliding Scales):** The first respondent submitted that it was opposed to BHFs being structured in ways that encouraged brokers to selectively target one group of shareholders; this increased the risk that retail investors would be pressured into accepting a bid.

The Sub-Committee agreed that bidders use sliding scales to target acceptances from particular groups of shareholders (large or small). The Panel did not believe that sliding scales were objectionable if they were within the Panel's quantitative

¹ The Panel also received several informal notes from various bodies expressing their support for the draft Guidance Note. These are not further mentioned in this note, as they did not suggest any changes to the draft policy.

² References to paragraphs are to those in the draft Guidance Note.

guidelines of 0.75% of the consideration payable to an accepting shareholder, subject to minimum amounts not exceeding \$50 and maximum amounts of \$750.

- 2.2 Paragraphs 23 and 24 (Duration of BHF):** The first respondent submitted that once a bidder offered to pay a BHF, the fee should always apply to all bid period extensions. Without this brokers may be induced to pressure their clients to accept the bid early.

The Sub-Committee agreed that generally BHFs should be available for all bid extensions for the reasons identified by the respondent. However, a fee payable for the initial bid period would not necessarily create unacceptable circumstances if the period was sufficiently long and if ample notice was given of the fee's limited duration. In this case it was less likely that the fee not being payable over bid extensions would have the effect of encouraging acceptances before shareholders had reasonable time and information to assess the bid. Several amendments were made to paragraph 24 to make the Panel's position clearer.

- 2.3 Paragraphs 33 and 34 (Disclosure by the broker):** The first respondent submitted that it would be preferable for brokers to disclose a BHF at the time that they recommended to their clients to accept the bid and certainly before the client accepted the offer.

The Sub-Committee agreed that prompt disclosure by brokers to their clients of BHFs promoted the principles of section 602(a). It made minor amendments to paragraph 34.

3. Material Comments Received from second Respondent and the Sub-Committee's Conclusions

- 3.1. The second respondent made several general comments indicating its opposition to the Panel's Guidance Note. These are set out, and responded to, together as they relate to the overall Guidance Note:
- (a) The draft Guidance Note raised inappropriately negative implications about broker conduct;
 - (b) BHFs should not be regulated under Chapter 6 principles of the Act as Chapter 7 stringently regulated all relevant aspects of broker conduct;
 - (c) It was not necessary to cap BHFs so long as the fees were disclosed; and
 - (d) BHFs were more appropriately regulated by the Australian Securities and Investments Commission (ASIC), not the Panel.

- 3.2. *The Sub-Committee believed that it is appropriate for the Panel to examine BHF's where these are structured in ways which potentially frustrate the principles of section 602 and 657A of the Act.*

While there may be some overlap between the principles of Chapters 6 and 7 in so far as they concern BHF's, the Panel's primary focus is on the conduct of bidders rather than that of brokers, the latter of which are regulated by other bodies such as ASIC.

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The Broker Handling Fees Sub-Committee**

The Panel's website on www.takeovers.gov.au/..... sets out in full the Guidance Note on Broker Handling Fees as amended by the Sub-Committee following the public consultation process.