Australian Government

Takeovers Panel

GN 23 SHAREHOLDER INTENTION STATEMENTS

PUBLIC CONSULTATION RESPONSE STATEMENT

11 DECEMBER 2015

Introduction

On 7 July 2015, the Takeovers Panel released a Consultation Paper seeking public comments on a new Guidance Note on *Shareholder Intention Statements*.

Comments on the Consultation Paper were due by 1 September 2015 and the Panel received 8 submissions in response. The Panel thanks the respondents. Attached to this response statement are the submissions (Annexure A).

Consistent with the Panel's published policy on responding to submissions, this statement sets out the Panel's response to the public consultation.

Material comments received and Panel's conclusions

The Panel sought comments on the following issues in particular:

Issue: Whether the statement "*The Panel does not encourage or discourage shareholder intention statements*" is helpful (see paragraph 4 of the Consultation Paper GN).

Comment

A number of submissions thought that the statement should be more discouraging of shareholder intention statements, particularly (said one) if the shares encompassed in solicited statements, when aggregated with the bidder's holding, would exceed 20% of the shares in the company.

A number of others thought that the statement should make it clear that shareholder intention statements are not unacceptable as such, but may be unacceptable if issues arise with them.

Response

The Panel has modified paragraph 4 of the GN to reflect that shareholder intention statements may give rise to concerns.

Issue: Whether a time frame should be specified, and if so what time frame (see paragraph 10(a) of the Consultation Paper GN). If a time frame should be specified, is it applicable to a statement made after the offer period has started? Why?

Comment

The submissions were split between those that thought it would be useful to specify a time, in which case 21 days was the appropriate time, and those that thought there was no need to be prescriptive.

Response

The Panel has amended paragraph 10(c) of the GN so that a time limit is expected if the shareholder intention statement is qualified by reference to a superior proposal. In that case, the time would generally be expected to be 21 days from opening of the offers, but it may be shorter if, for example, the statement is made after offers have opened or following a variation (from the date of the variation). See new footnote 12.

Issue: 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 Consultation Paper GN). Is guidance needed as to the meaning of 'material'?

Comment

A number of submissions considered that there was no need to define materiality, another considered it should be set at the 5% level, yet another at the 1% level, and others considered that, if disclosure was desirable, then materiality must be explained.

Response

The Panel agrees with the submission of ASIC that the better approach to take is that if the bidder or target considers it necessary or desirable to make a shareholder intention statement, then the holding should be considered material. Accordingly it has amended paragraphs 8(c) and 11(b) of the GN by deleting reference to materiality.

Because of this approach there is no need to give guidance as to the meaning of 'material'.

Issue: 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 Consultation Paper GN).

Comment

All but one submission said that identity should be disclosed. One of those supporting disclosure suggested that the identity should only be disclosed if the holding exceeded 1%.

Response

Paragraphs 11(b) and 11(d) of the GN have been amended by deleting reference to materiality, thus indicating that disclosure of the identity of the maker of the shareholder intention statement is required in all cases.

Issue: 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) and (d) of the Consultation Paper GN).

Comment

All but one submission said that consent should be required; although 3 of those said that it should not be required if the shareholder intention statement was reporting on statements already public. The other submission suggested that consent should be a matter for the bidder or target to decide.

Response

Paragraph 11(c) of the GN has been amended to make it clear that, if consent is not provided with a shareholder intention statement that is made outside of a bidder's statement or target's statement, then the Panel will look more closely at the statement.

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

Comment

All submissions said that no additional guidance was needed.

Response

No amendment is necessary.

Issue: Is guidance needed on whether shareholder intention statements give rise to relevant interests or associations?

Comment

About half of the submissions thought that it would be beneficial to add some guidance, with one suggesting an ASIC Class Order. Another suggested that guidance was required if qualified intention statements were permissible above the 20% threshold. It suggested that examples be provided.

The others thought that guidance was either not needed or difficult to give.

Response

The Panel has decided not to add guidance on this subject beyond what was already in paragraph 9 of the Consultation Paper version of the GN, but to focus on why the Panel might become interested in examining a shareholder intention statement, namely because it is concerned with whether the statement has an effect that precludes, or might preclude, the opportunity for a competing proposal. It has added this to paragraph 9.

Other amendments

Paragraph 1 has been amended to make it clear that the Panel deals with control transactions, not only takeover bids.

Paragraph 10(e) has been amended to make it clear that a shareholder who makes a shareholder intention statement may have good reason not to accept a superior proposal, which would be a factor in the Panel's consideration of the relevant circumstances.

ANNEXURE A

Submissions

Submission from Allens

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31 August 2015

Allan Bulman
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By Email

Dear Allan

Submission on Draft Guidance Note on Shareholder Intention Statements

We refer to the Takeovers Panel's Consultation Paper dated 7 July 2015 inviting comments on a draft Guidance Note on target shareholder intention statements (the ***draft Guidance***). Thank you for the opportunity to make this submission.

1 Encouragement

We don't think that the statement "The Panel does not encourage or discourage shareholder intention statements" gives much in the way of guidance. We suggest that paragraph 4 in the draft Guidance should be replaced with the following:

> Shareholder intention statements are not unacceptable as such. Market integrity issues may arise if the intention statement is ambiguous or misleading, or if the maker of the statement subsequently does not act in accordance with it. Also, control issues may arise if the bidder obtains a shareholder intention statement in conjunction with the announcement of its bid; the shares the subject of the intention statement, when aggregated with the bidder's interest in the target, amount to 20% or more of the target shares; and where the terms of the intention statement, if complied with, would require the shareholder to accept the bid prior to allowing a reasonable period for a superior proposal to emerge.
>
> However, absent these types of issues, the Panel will typically not regard shareholder intention statements as unacceptable. The Panel recognises that, provided these issues are addressed, shareholder intention statements have a policy benefit in that they may provide some level of certainty for a bidder in making a bid, which a bidder may otherwise not make and the benefits of which target shareholders may otherwise not have the opportunity to receive.

2 Timing

We think more specific guidance should be given on timing. We would replace the last sentence of paragraph 10(c) of the draft Guidance with the following:

> The amount of time required will depend on the circumstances, but generally the Panel will regard 21 days after the opening of the offer as being a reasonable period to allow a superior proposal to emerge.

Paragraph 10(a) of the draft Guidance should make it clear that if the statement is qualified by reference to a time, that time must be such as to allow a reasonable period for a superior proposal to emerge, as discussed in paragraph 10(c).

The consultation paper also asks whether this time frame is applicable to a statement made after the offer period has started. We think it is far less likely that such statements will be sought or given after the offer period has started, as they are usually sought and obtained in conjunction with the bidder announcing the bid so as to give the bidder some assurance that, in the absence of a superior proposal, the shareholder will accept the bid. However, if the bidder does obtain an intention statement after the offer period has started (for example, in connection with a price increase or dropping a bid condition) then we think the time frame (21 days after the opening of the offer) should still apply. This is consistent with the policy position that the bidder should not use shareholder intention statements to kill off an actual or potential auction for control.

3 Disclosure

The shareholder intention statement should disclose the identity of each shareholder and the level of each shareholding the subject of the statement, regardless of the size of the shareholding. It is important for the market to understand the representation that is being made to the market and its effect on the market. A statement can aggregate holders and holdings, but should be accompanied with a breakdown of the identity of each holder and their percentage holding (provided that a breakdown between related bodies corporate shouldn't be necessary).

4 Consents

We agree that consent should be required from each shareholder the subject of a statement. The benefit of obtaining consent is that it tests the veracity of the intention statement, and can help turn the shareholder's mind to the consequences of making the statement (including, for example, the application of ASIC's 'truth in takeovers' policy).

This position is in line with the statutory requirement for consent if a statement by a person is used in a bidder's statement or a target's statement (sections 636(3) and 638(5) of the *Corporations Act 2001*) and the Panel's position that the same standard should be applied to public announcements in the context of a takeover (Guidance Note 18 on *Takeover Documents* at [41]). It would seem incompatible with these principles if the consent of the shareholder making an intention statement is not required.

5 Impact on smaller companies

We think the policy issues for smaller companies are the same as for larger companies. We don't think any separate or additional guidance is required for smaller companies.

6 Guidance on relevant interests and associations

As previously discussed, this is a real issue for a bidder in obtaining a shareholder intention statement in conjunction with its bid where the shares the subject of the statement, when aggregated with the bidder's interest, amount to 20% or more of the target.

While there may be no policy objection to it doing so, because the intention statement is expressed to be subject to no superior proposal arising within 21 days after the opening of the offer (in circumstances where that is enough time for a superior proposal to emerge if one is going to do so), an understanding between the bidder and the shareholder (including potentially where the target procures the statement on the bidder's behalf) that the shareholder will make the statement in conjunction with the announcement of the bid is likely to give rise to an association between the bidder and the shareholder (and, although less likely, may even give the bidder a relevant interest in

those shares), with the result that the bidder will, quite possibly, breach section 606. That needs to be fixed, but it is not clear how the Panel can amend the law. Even if the Panel comes out in the draft Guidance and says that in its view a bidder procuring or obtaining a shareholder intention statement does not give rise to unacceptable circumstances (notwithstanding any potential association or relevant interest acquired), this still leaves the bidder exposed to an action by ASIC.

To help deal with this, we believe that ASIC should by class order modify Chapter 6 to permit an appropriately qualified shareholder intention statement, and we annex draft wording for an amendment of ASIC's existing Class Order 13/520. If it is the case that there is no policy objection, and in fact a policy benefit, we think that ASIC should modify Chapter 6 appropriately. If the Panel agrees that there is no policy objection, and in fact a policy benefit, then we would request that the Panel lend its support to that change.

7 Other comments

7.1 Definition of 'shareholder intention statement'

In its current form, the definition of 'shareholder intention statement' in paragraph 5 of the draft Guidance refers to 'any statement regarding the intention of a shareholder…' We suggest limiting the definition so that it only captures *public* statements.

7.2 Superior proposal

We think that the statement in the first sentence of paragraph 10(e) of the draft Guidance goes too far. If a shareholder makes a statement that it intends to accept a bid in the absence of a superior proposal, we think it is implicit in that statement that if a competing proposal later emerges which is demonstrably superior to the original bid that the shareholder *will* accept that superior bid. For example, if a higher cash offer is made with no or limited conditionality, we think that the market would be very surprised if the shareholder then turned around and said that it was not accepting that higher bid.

Please let us know if you have any questions in relation to the above comments.

Yours sincerely

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Annex

Annexure

Proposed Amendment to Item 5 of ASIC Class Order 13/520

Item 5 of ASIC Class Order 13/520 currently modifies section 12 to insert a new subsection (2A). The proposal would be to add paragraphs (b)(ii) and (b)(iii) below to section 12(2A), through amendment of the Class Order.

"(2A) For the purposes of paragraphs (2)(b) and (c), the second person is not an associate of the primary person in relation to a designated body merely because:

(a) they have entered or propose to enter into a relevant agreement; and

(b) one of them has or will have a right under that relevant agreement (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition) to:

(i) dispose of securities in the designated body or control the exercise of a power to dispose of the securities; or

(ii) require the other person to publicly announce, or consent to the public announcement of, that other person's intention to accept a takeover offer for securities held by them, or by a person under their control, in the designated body, absent a superior proposal for those securities being made public within [21] days after the later of the commencement of the offer period in respect of that takeover offer and the date of the public announcement of that intention; or

(iii) require the other person to publicly announce, or consent to the public announcement of, that other person's intention to vote on an acquisition scheme in respect of securities held by them, or by a person under their control, absent a superior proposal for those securities being made public during the period ending [14] days prior to the scheduled date for the meeting to vote on the acquisition scheme.

Submission

from

ASIC

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17 September 2015

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***By email**: takeovers@takeovers.gov.au*

Dear Mr Bulman

Takeovers Panel Consultation Paper – GN on Shareholder Intention Statements

ASIC appreciates the opportunity to provide comments in response to the Takeovers Panel's proposed new guidance note on shareholder intention statements. This letter sets out ASIC's comments on the draft guidance note and the Panel's proposal to adopt the guidance note as policy.

1. Introduction

1.1. ASIC welcomes the opportunity to re-examine the approach that should be taken in relation to shareholder intention statements. ASIC is of the view that in re-examining this issue renewed consideration should be given to both:

(a) the application of the legislative provisions to the process by which shareholder intention statements are commonly solicited, made and disclosed; and

(b) the broader purpose, utility and desirability of facilitating such statements having regard to the underlying principles and overall framework of Chapter 6 of the *Corporations Act 2001* (**the Act**).

1.2. Having regard to the circumstances in which shareholder intention statements are often made in the context of control transactions, in ASIC's view:

(a) the arrangements underpinning many shareholder intention statements will in fact often constitute a relevant agreement resulting in a bidder, target or their associate acquiring a relevant interest, and/or voting power in the securities of the relevant shareholder given the broad scope of the relevant legal concepts in Chapter 6; and

(b) shareholder intention statements, and the current approach to practices surrounding their solicitation, raise a number of broader policy concerns—including that:

(i) binding shareholder intention statements that are made in the usual form in relation to acceptance or rejection of a takeover bid are difficult to materially distinguish—commercially and practically—from a standard formal pre-bid

acceptance or non-acceptance agreement, but have not necessarily been treated consistently to date;

(ii) inconsistent treatment has meant that they potentially provide a bidder with a mechanism to circumvent the limits on pre-bid acquisitions and 'lock-in' a pre-bid stake beyond 20%, thereby reducing the risk of a potential auction for control developing and undermining the current framework of Chapter 6 and the principles on which it is based; and

(iii) typically shareholders are invited to make an intention statement prior to receiving a copy of the regulated disclosure documents designed to ensure that they are fully informed and without the benefit of the usual period to consider that documentation.

1.3. Accordingly, ASIC considers that shareholder intention statements should in fact be discouraged and that any further guidance should focus on the circumstances in which the arrangements underpinning shareholder intention statements will give rise to relevant interests or associations under the Act. In this regard ASIC would be happy to work with the Panel in formulating a position for the benefit of practitioners and the market.

1.4. ASIC acknowledges that intention statements have been in use for some time and that the broader question of whether, as a general proposition, they may reflect a relevant agreement has not been the subject of specific guidance. However ASIC's suggested refocus on the legal framework governing intention statements, in response to the opportunity afforded by the Panel's consultation on the issue, is in part due to concerns regarding emerging market practice in the area.

2. Background – current practices and commercial drivers

2.1. In recent times ASIC has observed with some concern that the approach of proposed bidders, targets, deal proponents and/or their associates or agents **(Soliciting Entities)** to shareholder intention statements appears to have become increasingly formulaic. In particular, ASIC notes that the increasingly standardised form of intention statements tends to suggest:

(a) that Soliciting Entities may not always fully appreciate, or even consider at all, the application of the relevant provisions to the specific circumstances of their solicitations and the risk and consequences of acquiring a relevant interest or forming an association when intention statements are solicited by a bidder or target. There is a risk that solicited intention statements may simply be seen as 'the pre-bid acceptance agreement you have when you're not allowed to have one';

(b) that many intention statements are likely to be the result of negotiation or suggestions by Soliciting Entities that particular terms are 'market practice', potentially increasing the risks of undesirable Soliciting Entity conduct in connection with solicitations (as discussed below); and

(c) that there may be a misconception that no relevant agreement can or will be formed if a shareholder's statement simply provides for an appropriate period of time before acceptance and includes the usual qualification that the shareholder's intention is subject to no superior offer emerging.[1]

2.2. Further, in ASIC's view, the recent examples in *Ambassador Oil and Gas Limited 01* [2014] ATP 14 and *Bullabulling Gold Limited* [2014] ATP 8 of practices surrounding

[1] Note that formal pre-bid acceptance agreements, which are generally treated as giving rise to a relevant interest, typically contain these same terms.

acceptance statements further demonstrates the benefits of taking a refreshed look at the desirability of shareholder intention statements more broadly.

2.3. While shareholder intention statements are sometimes published independently by the shareholder, the vast majority are found in the public announcements or formal takeover or meeting documentation relating to a control transaction as a result of an invitation or facilitation by a Soliciting Entity.

2.4. It is commonly suggested that the purpose of soliciting statements of this kind is to provide target shareholders with an indication of the level of support for a bid. However, even where this is so, a key consideration for a Soliciting Entity seeking to include such a statement in a public release, is the application of ASIC Regulatory Guide 25 *Takeovers: false and misleading statements* (**Truth in Takeovers Policy**).

2.5. It is now well known and accepted that a consequence for certain shareholders making a public statement in the context of a control transaction is that the shareholder will be held to that statement under the Truth in Takeovers Policy. The Panel has consistently endorsed the Truth in Takeovers Policy and the underlying principle that market participants who make a last and final statement should be held to it.[2] For this reason, in most cases the making of a typical shareholder intention statement, for example, to accept a bid subject to no superior offer emerging, is for all intents and purposes, a pre-commitment to accept the bid on the specified terms.

2.6. In ASIC's view, the reality that the shareholder will be held to any statement solicited should be recognised as a key consideration of Soliciting Entities and the primary consequence of the vast majority of shareholder intention statements. The making of an intention statement in the form commonly sought provides comfort to Soliciting Entities that the intention will be carried through and, if not, compliance with the statement may be enforced. Shareholder intention statements included in public announcements by a bidder or target are rarely made in the form of a purely non-committal 'present intention' (*ie* containing an unconditional qualification that the shareholder is free to change their mind for any reason).[3]

2.7. The significance of the potentially binding nature of intention statements as a consideration for Soliciting Entities is reinforced by the requirement to obtain consent in order to incorporate intention statements in relevant publications and to ensure that, in effect, the application of the Truth in Takeovers Policy to the statement is clear to both the maker and reader. The requirement for the shareholder's consent itself, discussed further below, reflects an underlying policy that statements made in the context of a control transaction must be clear, accurate and reliable. Where consent is not obtained, the statement cannot be made. Even where consent is obtained, if a statement is presented in a way that suggests the maker will be held to it under the Truth in Takeovers Policy, but they will not be, then the statement is misleading and should not have been made.[4]

2.8. It is also important to recognise that in making a binding intention statement in the usual form, a shareholder forgoes a level of optionality by effectively committing to accept a

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[2] *Ambassador Oil and Gas Limited 01* [2014] ATP 14; *Warrnambool Cheese and Butter Factory Company Holdings Limited* [2013] ATP 16, *Alesco Corporation Limited* 03 [2012] ATP 18, *Ludowici Limited* [2012] ATP 3 at [38], *Ludowici Limited 01R* [2012] ATP, *Rinker Group Limited 02R* [2007] ATP 19, *Rinker Group Limited 02* [2007] ATP 17, *Summit Resources Limited* [2007] ATP 9, *Australian Leisure & Hospitality Group Limited 03* [2004] ATP 25, *Novus Petroleum Limited 02* [2004] ATP 9, *BreakFree Limited 04R* [2003] ATP 42, *BreakFree Limited 03 & 04* [2003] ATP 38 & 39 and *Anaconda Nickel Limited 18* [2003] ATP 18.

[3] See RG 25.38.

[4] *Bullabulling Gold Limited* [2014] ATP 8 at [33]; *BreakFree Limited 03 & 04* [2003] ATP 38 & 39 at [134] and [138]-[141].

bid. This is clearest in the case of conditional bids. While shareholders may have a variety of motives in doing so, in most cases it is presumed to involve a trade-off to some extent of the shareholder's individual interest in retaining optionality for a broader cause or purpose (such as indicating support for the transaction in order to increase the chance the bidder will proceed or that relevant conditions will be satisfied, or to 'flush out' any rival offers). This is consistent with a common assumption adopted by a variety of sitting Panels (and on which a number of key Panel decisions are based) that commercially rational behaviour and common market practice dictate that shareholders generally hold off accepting a conditional offer until late in the bid period in order to preserve their ability to deal in their shares in the event of changing market conditions or a rival offer.[5]

Shareholder intention statements distinguished from shareholder canvassing

2.9. In considering the legal issues that may arise in the context of communications with shareholders prior to, or during, a control transaction, it is useful to note the distinction between the practice of soliciting shareholder intention statements and what might otherwise be considered 'shareholder canvassing'. Shareholder canvassing generally involves a bidder or target contacting a shareholder to determine its likely reaction to a control transaction.[6] This conduct is generally carried out by a bidder or target for internal research purposes to, for example, obtain in advance a greater understanding of the likelihood that a takeover bid will be successful.

2.10. Shareholder canvassing should not generally require the shareholder to:

(a) in any way commit to either accept, reject or vote in a particular way (or to understand that in responding they are committing to a course that means they will be held to their statement under the Truth in Takeovers Policy); or

(b) consent to their intention statement being included in a regulated document or otherwise being publicly announced by the bidder or target.

2.11. During canvassing, shareholders will generally be engaging privately with a bidder or target on the understanding that their views are not binding and they are free to change their mind at any time. Shareholder canvassing does not involve any expectation that the shareholder will come to a consensus on, or commit to, a course of action and, provided that no consensus or arrangement between the parties in fact results, should therefore be unlikely to give rise to a relevant agreement.

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[5] See for example *MYOB Limited* [2008] ATP 27 at [21]; *Ambassador Oil and Gas Limited 01* [2014] ATP 14 at [48]-[52]; and *Novus Petroleum Limited 01* [2004] ATP 2 at [42] (where the Panel, referring to the requirements of s630 and 650F noted that shareholders '*typically wait certain in the knowledge that seven days before the end of the offer, they will know what the relevant position will be*').

[6] See *MYOB Limited* [2008] ATP 27 at [31].

3. Response to Consultation Paper questions

3.1. ASIC responds to the Panel's issues for comment at paragraph 14 of the Consultation Paper as follows:

> ***Encouragement?***
>
> ***a) Whether the statement "The panel does not encourage or discourage shareholder intention statements" is helpful (see paragraph 4 of the GN).***

3.2. After considering:

(a) the balance of the perceived benefits and utility of shareholder intention statements with their risks, as well as the broader statutory framework for takeovers (see 3.3-3.15); and

(b) the legal issues associated with shareholder intention statements (see 3.34-3.42),

ASIC is of the view that the Panel should in fact discourage shareholder intention statements.

Avoiding the pre-bid stake limits

3.3. In ASIC's view, any examination of the policy context of intention statements should start with the framework limits on pre-bid stakes—particularly given the functional similarity of many intention statements to formal pre-bid acceptance agreements (see 3.42).

3.4. The regulatory setting of the law is that a bidder, whether alone or with others, cannot acquire securities nor engineer an agreement, arrangement or understanding, that results in its pre-bid voting power increasing to (or from) a point above 20%. A bidder that has built a full pre-bid stake is also restricted from entering into relevant agreements during the bid—even if the agreement is to be given effect through acceptance of the bid.

3.5. The general prohibition in s606 is a cornerstone of the takeovers legislation and, as in other contexts, there are sound policy reasons for ensuring a bidder's dealings prior to, or during, a bid do not give rise to a contravention of the limit on pre-bid arrangements it imposes. In particular, the announcement of a proposed control transaction can trigger the interest of other potential offerors and a competitive contest for control. The limits on pre-bid acquisitions and relevant agreements assist in ensuring that a first-moving bidder cannot enter into arrangements that deter a rival proposal from being successful or present target shareholders with a bid that is coercive or a *fait accompli*. The restriction on relevant agreements being reached during a bid where a bidder's voting power is above the 20% threshold (including agreements to accept a bid if it is increased) prevents similar anti-competitive behaviour—such as a bidder prematurely shutting down, or preventing the emergence of, an auction for control.

3.6. Accordingly, the pre-bid limits are a key part of the overall takeovers framework in Australia and reinforce the fundamental objectives of the takeover provisions in Chapter 6 by ensuring that acquisitions of control occur in an efficient and competitive market, and that target holders have an equal opportunity to enjoy the benefits of proposals elicited by a competitive market for control.[7] ASIC notes that similar policy

[7] S602(a) and (c).

concerns also underlie the Panel's Guidance Note 7 *Lock-up devices* (**GN 7**). In fact, it is arguable that relevant agreements that are reached in contravention of s606 can be used to encourage or facilitate a control transaction and potentially hinder another actual or potential control transaction and may themselves constitute a 'lock-up device' as defined in GN 7.

3.7. As noted above, the making of an intention statement is a means of providing comfort to Soliciting Entities that the intention will be carried through and, if not, compliance with the statement can be enforced. ASIC is concerned that shareholder intention statements effectively provide a bidder with a mechanism to circumvent the limits on pre-bid acquisitions and 'lock-in' a pre-bid stake beyond 20%, thereby reducing the risk of a potential auction for control developing and allowing the bidder to orchestrate a successful bid. In *MYOB Limited*, where a pre-bid stake of 34% was obtained, the Panel noted:

> The understanding in this case had the effect of locking up the MYOB shares of the investors for a significant period of time, contrary to what is permitted by Chapter 6. This had, has or is likely to have an anti-competitive effect on the market for MYOB shares by deterring potential rival bidders and impeding an auction for control of MYOB and inhibits an efficient, competitive and informed market in MYOB shares.[8]

3.8. A similar situation occurred in *Ambassador Oil and Gas Limited 01*, where the Panel found that the bidder had obtained a voting power of at least 19.55% in Ambassador as a result of an agreement arrangement or understanding, or acting in concert, with shareholders who had provided the bidder with acceptance statements, prior to acquiring a 19.9% stake through formal pre-bid acquisition agreements. The Panel inferred from the circumstances that the bidder in this matter was looking for a 'done deal'.[9] The Panel also noted that:

> Even if the Intention Statements helped encourage a rival bid by signalling to the market that Ambassador was 'in play', the early acceptances were uncommercial in our view. Early acceptance removed the optionality available to each of these shareholders in a substantially scrip deal (where there was no consequence of holding the consideration securities earlier, such as a dividend record date) and in the knowledge that there were potentially other bidders.[10]

Broader policy issues and options

3.9. In addition to the potential for pre-bid acquisition limits to be circumvented, ASIC also notes a number other policy issues that it considers ought to be considered in determining the overall desirability of facilitating or encouraging intention statements.

3.10. In particular ASIC has a concern that the increased scope for the use of informal arrangements to achieve outcomes akin to formal pre-bid acceptance arrangements increases the potential for a Soliciting Entity to offer or provide benefits to, or apply pressure to, shareholders in connection with soliciting the making of the statement.

3.11. Further, the greater capacity that is permitted to solicit intention statements in the usual form, the greater capacity for shareholders to be invited to make, what is in effect, a binding decision in relation to a control transaction in a way which undermines the

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[8] [2008] ATP 27 at [39].
[9] [2014] ATP 14 at [59].
[10] [2014] ATP 14 at [48].

processes and principles in Chapter 6. For example, typically shareholders are invited to make such a commitment prior to receiving a copy of the regulated disclosure documents designed to ensure that they are fully informed and without the benefit of the usual period allowed for consideration of that documentation. The potential to 'frontload' or 'offline' target decision-making may tend to defeat many of the fundamental shareholder protections of Chapter 6.

3.12. The risks associated with poor practices in connection with soliciting acceptance statements were exemplified in the recent matter of *Bullabulling Gold Limited*.[11] In that matter a target included an aggregated intention statement in its target's statement in circumstances where:

(a) the statement was compiled using varied verbal and written statements from 101 shareholders;

(b) the verbal statements were solicited by the target entity and provided by thirteen shareholders, including two substantial shareholders (but confirmed they would not be specifically named in the statement); and

(c) the written statements were not solicited by the target directly. Rather the statements were received from, or on behalf of, 88 shareholders in response to a target shareholder who used the HotCopper internet forum to ask shareholders to email a target director with their intentions in relation to the bid. Further:

(i) the statements were not uniform (some were qualified);

(ii) some shareholdings were expressed as approximate holdings;

(iii) some authors of the emails were not the registered shareholders; and

(iv) none of the shareholders expressly consented to the rejection statement.

3.13. ASIC also queries whether the apparent objectives of soliciting or facilitating intention statements can be achieved in ways that do not necessarily give rise to the risks and concerns discussed above. To the extent shareholder intention statements are designed to signal support, or to enable Soliciting Entities to provide an indication of the level of support, for a proposed transaction, it is always open to a shareholder to give such an indication in a way that is not binding under the Truth in Takeovers Policy (by, for example, expressly reserving their right to change their mind).

3.14. A similar method of signalling support is facilitated by shareholder acceptance facilities. ASIC has provided class relief for relevant interests arising under certain acceptance facilities under Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition*. Under an acceptance facility a holder of securities or a person otherwise entitled to accept an offer under a bid is able to provide to a facility operator a completed acceptance form or instructions to another person who holds the securities on their behalf to accept the bid. The facility operator holds the acceptances or instructions until certain conditions relating to the conditionality or level of acceptances the bidder receives are met, at which point the acceptances and instructions are forwarded to their final recipients. The bidder reports regularly to the market about the number of securities in respect of which acceptances and instructions are being held.

3.15. ASIC has provided relief under [CO 13/520] because acceptance facilities established on appropriate terms and operated in an appropriate manner[12] may improve the efficiency and competitiveness of the bid process by removing structural impediments to the

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[11] [2014] ATP 8.

[12] See clause 6(c) of Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition.*

success of bids. ASIC's relief provides certainty to bidders utilising acceptance facilities having regard to the broad application of the relevant interest provisions in Chapter 6.

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 acceptance. In MYOB15 and Ambassador 01 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?

3.16. ASIC notes that in *MYOB*, in relation to intention statements from target shareholders who indicated they would accept once the offer opened, the Panel at [21] stated:

> ...the fact that the acceptances were to occur at the beginning of the bid would be very unusual in the absence of an agreement, arrangement or understanding. It is at odds with commercially rational behaviour and common market practice not to hold off accepting an offer until late in a bid period...

3.17. The Panel in *Ambassador 01* stated at [76]:

> ...With the statutory minimum bid period being one month, we do not see any urgency that would necessitate accepting an offer, or a superior offer, until such time. In fact, by waiting up to 21 days from the opening of an offer, shareholders may be able to make their decision on what constitutes a superior offer with the benefit of the bidder's notice of the status of defeating conditions...

3.18. ASIC does not consider that any guidance on shareholder intention statements should state that any particular minimum timeframe is appropriate.

3.19. Where timeframes have generally been relevant, it has often been in the context of the Panel drawing an inference from that timeframe that an acceptance was uncommercial and therefore indicative of a relevant agreement or association with a shareholder. This does not however mean that:

(a) the reverse is true – *ie* that no relevant agreement or association can arise provided a certain timeframe is allowed; or

(b) that a particular timeframe indicating commercially rational behaviour in one context will necessarily represent commercially rational behaviour in another.

3.20. As mentioned above, the Panel has frequently observed that a rational shareholder is one that waits the longest possible time to accept a bid, in order to assess whether a superior offer is made and (if the bid is conditional) to assess the status of any defeating conditions.[13] In each context this will be determined by the statutory timeframe contained in Chapter 6 and the circumstances of the bid. In a conditional bid, for example, it may be as late as 7 days before the offer close.

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[13] Under s630(1) offers under an off-market bid may be made subject to a defeating condition only if the offers specify a date (not more than 14 days and not less than 7 days before the end of the offer period) for giving a notice on the status of the condition.

3.21. Where an intention statement incorporates a minimum time period, the commercial reasonableness, and apparent underlying purpose of the time period should be considered in light of all the particular circumstances surrounding the making of the statements—including the terms of the relevant bid.[14]

3.22. ASIC is also concerned that the inclusion of a set timeframe may exacerbate some of the concerns raised above regarding the often formulaic approach taken by Soliciting Entities to legal issues associated with soliciting intention statements.

3.23. Moreover, to the extent relevant as a matter of policy, we note that it is also difficult to specify a timeframe that may be considered appropriate for a rival bid to emerge.[15]

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).

3.24. ASIC queries the meaning of 'material' in the draft guidance note. Leaving aside questions as to whether the concept of materiality goes to issues such as the nature or position of the holder or strategic value of the holding, in ASIC's view the better approach is to take the view that, if the bidder or target has decided it is sufficiently necessary or desirable to disclose or refer to the shareholder intention statement, then it should be considered material.

3.25. Accordingly ASIC considers that the preferable and simpler approach is to avoid seeking to apply different requirements to statements on the basis of their perceived materiality.

3.26. In ASIC's view if a shareholder intention statement is disclosed by a bidder (or target), then the bidder (or target) should also disclose:

(a) the size of the relevant holding to which the acceptance (or rejection) statement relates in percentage terms;[16] and

(b) the consent of each holder to disclose the intention statement (see below 3.30-3.31).

3.27. ASIC considers that it will always be necessary to obtain and disclose the consent of all shareholders whose holdings are aggregated.[17] It follows that the identity of each shareholder should be disclosed, and as discussed above, the size of their holding (irrespective of the individual materiality of that holding).

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[14] For example, a different inference may be drawn from a statement that a shareholder will accept a conditional bid within the first 21 days where the offer period is several months as compared to where it only one month.

[15] Note for example the three rival bids for Warrnambool Cheese and Butter Factory Company Holdings Limited in 2013 where the first rival bidder announced its bid over 3.5 weeks, and the second rival bidder over 5 weeks after the date the first bidder announced their bid.

[16] See RG 25.74

[17] *See Bullabulling Gold Limited* [2014] ATP 8 at [34]-[38].

3.28. ASIC Regulatory Guide 55 *Statements in disclosure documents and PDSs: Statements in disclosure documents and PDSs: Consent to Quote* (**RG 55**) discusses the corresponding requirements in Ch 6D and Pt 7.9 of the Act for a person's consent to be obtained for statements in disclosure documents and PDS made by, or said to be based on a statement by, the person. The discussion in RG 55 is directly relevant for the purposes of the consent requirements in subsections 636(3) and s638(5): see RG 9.379.

3.29. As noted in *Bullabulling Gold Limited*[18] an aggregated intention statement will be a statement attributed to the shareholders who made it and represents an 'indication' or statement they made. The disclosure of intention statements relating to aggregated holdings is akin to an 'unnamed attribution' at RG 55.20-22. This is because a bidder or target cannot escape the fact that the relevant shareholders clearly provide the basic authority for matters relating to whether or not they will accept a bid.

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).

3.30. ASIC is of the view that consent to the inclusion of an intention statement is always required and agrees with the Panel's statement at paragraphs 11(c) and (d) of the draft guidance note regarding consent. In this regard we refer to the requirements in s636(3) and 638(5),[19] RG 55 and the Takeovers Panel Guidance Note 18 *Takeover Documents* at [41].

3.31. The application of the consent requirements is also consistent with the policy underlying the consent provisions, which is designed to ensure that an appropriate liability regime underpins the bidder and target disclosure requirements in Chapter 6 in order to reinforce the reliability and effectiveness of the information provided to target holders: see RG 9.248 and RG 9.355.

3.32. A bidder (or target) who does not obtain the consent of a shareholder to the making of an intention statement, risks regulatory action by ASIC or an application by us or another party to the Takeovers Panel for a declaration of unacceptable circumstances.

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.

3.33. ASIC is of the view that the same policy should apply to all entities that are subject to Chapter 6 of the Act.

[18] [2014] ATP 8 at [36].
[19] See also *Bullabulling Gold Limited* [2014] ATP 8 at [34]-[38].

Guidance on relevant interests and associations?

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

3.34. Based on the analysis outlined below, ASIC is of the view that guidance *is* needed on whether shareholder intention statements give rise to relevant interests or associations. Having regard to the guidance ASIC has already provided in Regulatory Guide 5 *Relevant interests and substantial holding notices* (**RG 5**) on these topics, ASIC is prepared to work with the Panel to provide further guidance on this issue.

3.35. The breadth of the fundamental legal concepts in the Act of a 'relevant interest' and 'relevant agreement' means that bidders, targets and their associates must be cautious in the way they approach dealings with shareholders regarding their acceptance or support of a proposed or ongoing control transaction.

3.36. As noted at RG 5.24—RG 5.36, the nature of the power or control over voting or disposal that may give rise to a relevant interest under the basic rule is intentionally expressed in wide terms. Subsection 608(2) expressly extends to power or control that:

(a) is indirect, implied or informal;

(b) may be exercised alone or jointly with someone else;

(c) does not relate to a particular security;

(d) may be made subject to restraint or restriction; and/or

(e) may be exercised through, or counter to, a trust, agreement or practice (in combination or otherwise and whether enforceable or not).

3.37. The breadth of the extended definition of power or control has been acknowledged and applied in a number of cases: see for example *TVW Enterprises Ltd v Queensland Press Ltd* (1983) 7 ACLR 821 at 839 and *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [90]–[92]. ASIC refers in particular to the judgment of Justice Merkel in *Yandal Gold*, where his honour noted at [90]:

> The object of Ch 6 generally is to ensure that the acquisition of shares in companies complies with the Eggleston principles and takes place in an efficient, competitive and informed market... That objective has been secured, in part, by the use of artificial concepts and statutory fictions such as "a relevant agreement", "associations" and "relevant interests" which have been defined with such width that on some occasions the statutory scheme will inevitably apply to transactions that were not intended to be prohibited as they are not inconsistent with the Eggleston principles. However, the legislature has chosen to deal with such anomalies by conferring extensive power on ASIC...to modify the provisions of Ch 6. These provisions suggest that the legislature was cognisant of the possibility that the width of its definitions could lead to some anomalous outcomes, but intended that they be dealt with by ASIC granting relief from the operation of the provisions in an appropriate case to avoid anomalies arising.

3.38. The concept of a 'relevant agreement' as defined in s9 which may give rise to a relevant interest, is similarly widely cast to include:

> an agreement, arrangement or understanding:
>
> (a) whether formal or informal or partly formal and partly informal; and

(b) whether written or oral or partly written and partly oral; and

(c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.

3.39. The importance of recognising the breadth of the provisions was most notably demonstrated in the case of *Corebell Pty Ltd v New Zealand Insurance Co Ltd* (1988) 13 ACLR 349, where a relevant agreement constituted by a verbal conversation that a shareholder would accept a takeover offer if it were increased was found to contravene the provisions.

3.40. Having regard to the broad nature of the relevant legal concepts, ASIC considers that there is a significant risk that, in many cases, the process of securing and disclosing shareholder intention statements does result in the formation of a relevant agreement giving rise to a relevant interest in the shareholder's shares on the part of a Soliciting Entity. A number of common elements of intention statements support this conclusion:

(a) In determining whether a consensus or agreement as to a course of action is reached, discussions between a shareholder and Soliciting Entity in relation to the making of the statement must be considered in light of the substance, rather than the form, of what is being discussed. As noted above it is a well-known consequence of, and a key consideration in deciding to make, a shareholder intention statement that the shareholder will generally be held to the statement. Where a Soliciting Entity invites a shareholder to make an intention statement in the usual form, or facilitates the making of that statement, they do so in the knowledge that they are inviting or facilitating a course of action on the part of the shareholder that effectively pre-commits the shareholder to the stated course of action under the Truth in Takeovers Policy. As such, where a shareholder agrees to make the statement, there is typically, at the very least, the level of consensus or commitment between the parties as to the shareholder's future course of action necessary to form a relevant agreement. The substance of the relevant agreement is not altered by the parties characterising the arrangements as being the result of sequential unilateral action by the parties;[20]

(b) A consensus or commitment is further evidenced by the fact that there is often a level of negotiation associated with the making of a solicited intention statement. For example, the particular form of words to be used in making an intention statement is often agreed between the Soliciting Entity and shareholder for inclusion in a public statement. In ASIC's experience it is not uncommon for a Soliciting Entity, to request that a statement is made in particular 'terms' on the basis that it is consistent with 'market practice', or may reduce suspicions that a relevant agreement has been reached, or will enable the Soliciting Entity to standardise or aggregate a number of different intention statements from different shareholders;[21] and

(c) As discussed below, a Soliciting Entity referencing an intention statement will generally require the consent of the relevant shareholder. The process of obtaining this consent may involve the Soliciting Entity in an overall understanding or arrangement with the shareholder to give effect to, under the Truth in Takeovers

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[20] As is the cases where there are terms in a formal agreement between parties stating that the parties are not associates or have not acquired a relevant interest: *Edensor Nominees Pty Ltd v ASIC* (2002) ACSR 325 at [16] and [31].

[21] This is not to say that the same negotiation leading to consensus cannot also result from efforts initiated by a shareholder with whom the bidder subsequently engages.

Policy, the shareholder's commitment to deal with their shares or votes in a particular way.

3.41. The reality of the circumstances in which intention statements may be solicited was also recognised by the Panel in *MYOB Limited*:

> Manhattan's actions constituted more than the canvassing of shareholders. It had an understanding with each investor. In our view, the intention statements and the consents for them to be included in the bidder's statement appear to be a means to give effect to the understanding; that is, a way to put the investors under an obligation to the bidder. The understanding did not need to be legally enforceable. It was sufficient that the parties would act in accordance with it, although the intention statements do give a measure of control.[22]

3.42. The conclusion that many shareholder intention statements reflect a relevant agreement with a Soliciting Entity also brings consistency to the legal and commercial realities surrounding these statements. A binding shareholder intention statement in the usual form accepting or rejecting a bid is difficult to materially distinguish—commercially and practically—from a standard formal pre-bid acceptance or non-acceptance agreement. Given their similar practical effect, and the underlying purpose of the relevant provisions of preventing avoidance,[23] ASIC queries whether any significant policy objective is advanced in seeking to do so.

Kate O'Rourke
Senior Executive Leader
Corporations
Australian Securities & Investments Commission

[22] *MYOB Limited* [2008] ATP 27 at [32].
[23] See RG 5.27.

Submission

from

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1 September 2015

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By email
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Dear Allan

Consultation Paper on Shareholder Intention Statements

We refer to the Panel's Consultation Paper dated 7 July 2015 on this topic. On behalf of Baker & McKenzie, I am pleased to provide the following submissions and commentary on the questions raised.

1. Introduction to our comments

We believe that shareholder intention statements play a valuable role in the market for corporate control in Australia. These statements effectively put a shareholding "in play", and so allow an auction to develop which can benefit all target company shareholders.

However, intention statements can only play this role if they are reliable and well regulated. Setting clear expectations as to how they are used, and the implications for the shareholders who make them, is critical to the effective functioning of the market. The Panel's proposed guidance on this topic is therefore to be commended.

2. Encouragement?

Whether the statement "The Panel does not encourage or discourage shareholder intention statements" is helpful (see paragraph 4 of the GN).

For the reasons noted above, we believe that intention statements are helpful to the market, and can benefit all target company shareholders by facilitating an efficient auction for control. Accordingly, we suggest that the Panel could lean more towards encouraging the use of shareholder intention statements, or at least confirm that in principle they play a valuable role in a well functioning market.

3. Timing?

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 acceptance. In MYOB and Ambassador 01 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?

The key balance to be struck is allowing a shareholder intention statement to play a role in encouraging other bidders to emerge, while at the same time not unnecessarily slowing down the first bidder's offer.

We believe 21 days is an appropriate minimum time for this purpose in the case of shareholder intention statements announced with a bid. The reason for this view is that a bid must be open for a minimum of one month[1], and the bidder typically makes its decision whether to extend a conditional bid 7 days before the end of the initial bid period[2]. In other words, the bidder's earliest critical decision day will be 23 or 24 days after the bid is made (except for a bid made in February, where 21 days would be tight but still manageable).

A waiting period of 21 days before a shareholder can accept the bid therefore does not require a bidder to have an initial offer period which is longer than the minimum necessary, and does not hinder the bidder's ability to make the decision whether to extend or waive conditions.

Where a shareholder intention statement is announced after the bid is made, a shorter waiting period would be justified. The announcement of a bid will have already given other interested parties an opportunity to prepare a rival bid. In that case, perhaps a minimum 14 day, 7 day, or even no waiting period would be acceptable, provided the period does not end before 21 days after the bid was originally made. Some waiting period may still be desirable as a rival bidder may change its bid terms based on information about the shareholders who have put their shares in play, for example in setting the minimum acceptance condition. However, for practical purposes once the initial 21 day period has elapsed it is much less likely that an acceptance intention statement will be made to the market, as a shareholder would simply accept the bid if no superior proposal had been announced. Accepting a bid at that point in the timetable would not be unacceptable.

4. Disclosure?

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'?

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).

If a shareholder intention statements is considered important enough for a bidder (or a target) to announce to support its offer (or rejection of an offer), then it follows that it is already being treated as material to the other shareholders.

[1] Section 624
[2] Section 630(1)

Identifying the shareholders who have made these statements to the market is an important aspect of ensuring the reliability of such statements, which is a cornerstone of market efficiency. This is the case even for a small shareholder within an aggregate holding. In our experience, if a small shareholder does not wish to be identified then it often suggests they do not intend to be bound by their statement.

Finally, we note that if a number of shareholders had entered into a pre-bid agreement with the bidder such as a bid acceptance agreement or call option, then each of those shareholders would have to be named in the substantial holder notice as the current holders of the relevant shares. There does not appear to us to be a strong reason to depart from this principle for a shareholder intention statement to which "truth in takeovers" laws apply.

5. Consents?

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).

Yes, we believe consent should always be required. In our experience if a shareholder tells a bidder it supports the bid, but does not consent to be publicly named as intending to accept the bid, then often it means the statement is not to be taken at face value. Consenting to statements enhances their reliability.

If there were circumstances where a shareholder could be named without their consent as intending to accept (or reject) an offer, then the bidder (or target) would have to also disclose that the statement is made without the shareholder's consent. That would raise questions as the reliability of the statement, and would be confusing to the market.

6. Impact on smaller companies

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

We think the guidance is equally applicable to large and small companies. If anything, smaller companies are more likely to have larger shareholders (in percentage terms) and therefore this proposed guidance will likely be more relevant to them than to larger companies.

7. Guidance on relevant interests and associations?

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

This is, in our view, a key point to be dealt with in the Panel's guidance. Shareholder intention statements cannot properly play a role in facilitating an auction for control if they are treated as giving rise to a relevant interest or association, or if the position on such matters is uncertain from a legal or policy perspective.

The important feature, we suggest, is that the intention statement is qualified by applying only in the absence of a superior proposal. If that qualification is included,

and the shareholder acts consistently with the qualification, then from a policy perspective the shareholder should not be treated as an associate of the bidder by reason only of giving the intention statement. A loose analogy can be drawn with the exception to the association provisions for making a takeover offer to a shareholder[3], as that process similarly starts an auction while allowing a superior offer to emerge.

If the intention statement is not qualified in this way, or if a shareholder acts inconsistently with the qualification following a higher bid, then this certainly could suggest an association or a relevant agreement with the first bidder.

An interesting issue is where the shareholder intention statement is made without the bidder's (or target's) involvement. How would paragraph 10(b) of the draft Guidance Note apply if it is a unilateral statement by the shareholder? What would the remedy for "unacceptable circumstances" be? In essence, a unilateral unqualified intention statement is the same as acceptance of the bid, which is not unacceptable by itself. The circumstances described in paragraph 10(b) should be unacceptable only if the bidder (or target) is somehow part of the process.

* * * * *

We would be pleased to discuss these points further if that would be useful for you.

Yours sincerely

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[3] Section 16(1)(c)

Submission

from

John Fast

Tuesday, 14 July 2015 3:44 PM
Takeovers
Draft Guidance Note - Shareholder Intention Statements

Dear Allan,

I am writing in connection with the invitation for comments concerning the above Draft Guidance Note.

In response to the questions posed in the Consultation Paper that accompanied the Draft Guidance Note I would submit as follows:

Encouragement

Contrary to the proposed formulation, I am strongly of the view that the Panel should actively discourage shareholder intention statements and should consider them as unacceptable, except where they are strongly qualified by the party seeking to include them. My reasons are as follows:

1. A statement of intention is nothing more than that - an intention held at a point in time. It is almost never binding or contractually enforceable and always subject to change. And insofar as it represents a view held by a shareholder at a particular point in time, it should not be permitted to be used to influence or sway others into acting in a particular manner - and yet that is precisely the very reason why those statements may be sought to be included by a party.
2. The situation is different with respect to the intentions of directors of a company who may also hold shares and who may be making recommendations to their shareholders. In that instance, the intentions of directors are very relevant in terms of signalling to shareholders that the directors are personally aligned with and supportive (or not) of the recommendations made by them (or some of them) to their shareholders.
3. Rather than achieving an efficient, competitive and informed market these shareholder intention statements, if left unqualified, could have a diametrically opposite effect by creating the impression that other shareholders have committed to a particular course of action, when all that has in fact occurred is that some shareholders have signalled a (non-binding) intention to act in a particular manner. The mistaken belief as to how these shareholders may act can propel others to do likewise - potentially to their detriment - by causing shareholders to be dissuaded from acting on a proposal that with hindsight might have been to their advantage or alternatively, by depriving shareholders the opportunity to perhaps being able to achieve a superior financial outcome through events that may emerge subsequently.
4. My concerns would be largely allayed if shareholder intention statements were, in addition to the other matters addressed by the draft Guidance Note, required to be accompanied by a prominently displayed detailed explanation about the effect of a statement of intention - specifically that they are not binding and can change at any time until they are given legal effect

Timing

Overall, I feel that no time frame should be specified. The Guidance Note stands on its own and affords maximum flexibility to examine the conduct of parties against the background of all of the facts. In some cases the Panel may consider 21 days as appropriate while in other cases a different period may be more sensible in all the circumstances.

Disclosure

I am a little concerned about the discussion surrounding materiality. In particular:

1. Materiality will differ according to circumstances. In my view, there is a danger in stipulating specific thresholds of materiality by reference to fixed percentages.
2. Sometimes a small shareholding can be material, if it is the shareholding that effectively passes control or alternatively blocks it from occurring
3. Control in the case of very large corporations can be effected with significantly less than 50% shareholding
4. Certain shareholders may be more prominent and attract greater attention than others - and the actions of the former may influence the actions of other shareholders that follow them, irrespective of the actual level of shareholding that they may hold.
5. At the same time, erroneous impressions can be created by referencing the intentions of shareholders that may be small or insignificant in the overall context of a proposed transaction - and it is important that the market be kept fully informed.

For the foregoing reasons, I believe a better formulation may be to require parties that choose to release shareholder intention statements to include a detailed commentary outlining the relevance of the disclosure and stating why it should be viewed by the market and shareholders as material to the proposal under consideration. In adopting such a formulation, there is then an opportunity for the Panel and other stakeholders to consider if the disclosure is intended to create an uninformed market or to mislead stakeholders in some particular way.

On the question of aggregated holdings, I believe it is important for the market to be informed as to the identity of all of the parties whose interests have been aggregated - adopting a beneficial ownership test as per S671B3. The market should be informed if these aggregated holdings are all of related parties or represent the interests of a broader range of other shareholders.

Consents

Consents should always be required as the need for these will go a long way towards ensuring that the disclosures proposed to be made do not overstate the situation

Impact on smaller companies

I do not believe that further guidance is required at this stage

Guidance on relevant interests and associations

I believe the current law and guidance notes are sufficient

I hope this is of some assistance.

Best wishes
John

John C Fast
Joint Managing Director

Submission

from

Gilbert + Tobin

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By email

1 September 2015

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Dear Allan

Submission on Consultation Paper – Shareholder Intention Statements

We refer to the Panel's request for comments on the proposed guidance note on shareholder intention statements.

As an overarching comment, we very much welcome the proposed guidance note. There can be no doubt that ASIC RG 25 has been good policy and regulatory guidance. However, market practice has developed significantly since RG 25 was introduced. It is generally in need of a refresh. In particular, the use of shareholder intention statements has increased dramatically in recent years. Bidders generally expect some sort of indication of support from key shareholders in recommended transactions at the outset. Even more so when it comes to foreign bidders. In that respect, the Takeovers Panel's proposed guidance on shareholder intention statements will provide much needed guidance to the market, filling one of the voids in RG 25.

That said, we also think it critical that the guidance note also deal with relevant interests and associations. Following *Ambassador Oil and Gas 01*, there has been some general uncertainty as to the application of the relevant interest and association concepts to shareholder intention statements. We understand ASIC actively considers these matters in transactions. Therefore, to not deal with the Takeovers Panel's view on whether circumstances give rise to an association or relevant interest which is unacceptable would be to significantly reduce the value of the guidance.

We are grateful for your time in considering our comments below.

1. **Comments are sought on whether the Guidance Note (GN) is useful and what, if any, changes should be made to provide better guidance to the market.**

   We very much support the initiative of the Panel in drafting a proposed guidance note. We consider the proposed guidance to be very useful, subject to the comments and suggestions below.

2. **Comments are sought on whether the statement "The Panel does not encourage or discourage shareholder intention statements" is helpful (see paragraph 4 of the GN).**

   We do not think the statement serves any purpose and would not include it.

We think it would be more helpful to include a statement which acknowledges the place and legitimacy of shareholder intention statements in Australian takeovers. In our experience, statements of intention by shareholders in target companies, when made subject to the appropriate qualifications, play an important role in facilitating certain transactions and ensuring there is an informed market for the control of shares in listed companies.

3. **Comments are sought on 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 acceptance. In MYOB and Ambassador 01 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.**

Where an intention statement is qualified as being subject to a superior proposal (or words to that effect), it is appropriate for the shareholder to provide an opportunity for a superior proposal to emerge before accepting the offer.

We consider that the appropriate time period to allow a superior proposal an opportunity to emerge varies, depending on the circumstances of the bid.

For example, in a transaction where the target and/or major shareholder has conducted an auction process or otherwise sounded the market, a shorter time like 14 days might be appropriate. Similarly, if there has been or will be a significant period between announcement of an offer and the sending of bidder statements, a shorter period may also be acceptable.

Conversely a longer period like 21 days may be warranted in other cases. For example:

- in the case of an unsolicited takeover bid without warning, like in *MYOB*; or
- where the target (perhaps with major shareholders) has dealt with the bidder exclusively (or in effect exclusively) and has agreed to abridge the time between lodgement and dispatch of the bidder's statement.

In these types of cases it would seem consistent with the Eggleston principles that shareholders have a reasonable period of time to consider the merits of a bid, and also allow some time for an auction to develop, to prescribe a minimum period of 21 days.

While, in our view, the appropriate time period may vary in the circumstances, we do not think it would be helpful to just note that without providing a specified time period. Therefore, we consider it would be helpful for the Panel to provide guidance as to the period which could be considered appropriate in various circumstances.

We suggest a shareholder who makes an intention statement on or before the opening of an offer, where that intention statement is subject to a superior proposal (or words to that effect), that shareholder be guided towards waiting a minimum of 21 days from the opening of the offer before accepting into the bid, unless the reasons for a shorter period, like those set out above, apply.

4. **If a time frame should be specified, is it applicable to a statement made after the offer period has started? Why?**

No. In our view, generally speaking, time frames should not be applicable to statements made after an offer period has started. There is perhaps one exception to this which is discussed below.

Generally, it is difficult to envisage a circumstance where a shareholder would make a statement of support for a takeover bid *after* the offer period has commenced that would give rise to the same concerns about associations or prevention of an auction developing as statements made on announcement of the offer. This is because it seems to us less likely that there would be an arrangement or understanding between the bidder and shareholder if the bidder has already taken on the transaction risk by announcing an offer and commencing its transaction.

Once the offer period has opened, a shareholder is generally free to accept as soon or as late as they like. In our view the same applies to any intention statement made after the offer period has opened. For this reason, we do not think that guidance of general application as to a waiting period would be useful.

The one potential concern we have with statements after the offer period has commenced, which may be an exception to the above comments, is where a bidder for a target in a competitive bid situation says to a major shareholder we will only *increase* a bid if you commit to accept the offer on or following the announcement of the increase. This may have the impact of bringing an auction to an end prematurely. In this circumstance a short timeframe of say 7 days after the announcement of the increase may be beneficial.

5. **Comments are sought on 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'?**

Given the importance and value attributed to shareholder intention statements by bidders and targets it follows that where such statements are disclosed, the name of the shareholder and details of the holding should generally be disclosed. This would ensure that the difficulties in *Bullabulling* would not arise and would be consistent with the Masel and Eggleston principles.

That said, for small shareholdings, name and details of shareholders may not, of itself, assist a shareholder in their consideration of an offer. Therefore, the Panel may consider a relatively low materiality threshold for not having to disclose names and details of shareholders making intention statements. This could be a shareholding of 1% or less.

However, to ensure that statements made are not misleading, no matter the size of a shareholder's holding, the consent (or public verification) requirements discussed below should apply.

6. **Comments are sought on 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).**

In accordance with our suggestion above, where a number of individual shareholders' holdings are aggregated, the individual details of all shareholders holding 1% or more should be disclosed.

7. **Comments are sought on 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).**

Intention statements by significant shareholders are clearly material information for shareholders. If it is clear that a significant shareholder has made such a statement publicly, shareholders should not be denied the benefit of that information in a bidder or target statement just because the shareholder refuses to consent to its inclusion (as an aside, we do not think it practical or timely to seek an ASIC modification of the consent requirements in such circumstances).

Therefore the key matter here for us is the verification and accuracy of the intention statement.

Where a shareholder has made its statement in a reliable or verifiable public source, such as a market or press release by the shareholder, or a quote in a reputable media outlet such as a national circulation newspaper article which is attributed to the shareholder, then consent should not be required in these circumstances. That is, where a party is simply repeating public information, it should be sufficient to provide a source for that information which may include an existing public document.

In all other cases, consent should be obtained from the shareholder to the inclusion of the form and content of an intention statement.

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

We believe this guidance is adequate for smaller companies.

9. **Is guidance needed on whether shareholder intention statements give rise to relevant interests or associations?**

Yes. It is critical that clear guidance on this matter is provided in the guidance note.

In our view, subsequent to the decision in *Ambassador Oil and Gas 01*, some practitioners, and perhaps even some regulators, consider that an intention statement is evidence of an association or of the bidder having acquired a relevant interest in the shares. Indeed, on a technical analysis, the very consent to disclosure of an intention statement in a bidder's statement can be said to be evidence of an agreement or understanding which gives rise to an association with the bidder, or even worse, gives the bidder a relevant interest. Further, following this argument, negotiation of the form of the statement must ultimately lead to an "understanding" about the circumstances in which shares would be disposed.

In our view, the value of Takeovers Panel guidance would be greatly diminished if the relevant interest and association points are not dealt with. While the law may be clear on these matters, the application of the law to the facts and the circumstances which the Takeovers Panel may consider to be unacceptable are not.

In our view, where a statement of support for a transaction is made by a shareholder (including in circumstances where the shareholder and bidder's aggregate voting power exceeds 20%) that:

(a) is made with the shareholder's consent;

(b) is expressed to be subject to a superior proposal; and

(c) in the case of a takeover bid, allows sufficient time for a superior proposal to arise,

should not, without more, give rise to an association, and even if a technical association or relevant interest arises by virtue of the agreement of the statement, unacceptable circumstances should not be found to exist. It is difficult to understand how an efficient, competitive and informed market for the shares in the target company can be inhibited in these circumstances, even if a technical association arises. There is no 'lock up' of any target shares which infringes on the Eggleston Principles: if a superior proposal emerges, the bidder would have no capacity to limit the shareholder's ability to withhold its acceptance of the original proposal.

In our experience, market practice in Australia has also evolved such that, where possible, a statement of support by key shareholders (which complies with the above requirements) can be an important factor for a bidder in deciding whether to undertake the significant time and expense involved in proceeding with a control transaction proposal for a public company. Shareholder intention statements therefore play an important role in facilitating some control transactions and the efficiency of our markets.

In light of the benefits of takeovers and enhancement of efficiencies in our markets, we think it critical that regulators do not take an overly technical view as to whether the bidder has reached an 'agreement' or 'understanding' with a shareholder which may then lead to an association which is considered unacceptable. It seems to us that, any consideration of whether there is a technical 'understanding' between the bidder and shareholder on the discrete issue of whether the shareholder supports a takeover proposal is not helpful, provided the factors in (a) – (c) above are satisfied: clearly there can be no unacceptable circumstances as a result.

In this respect, the market needs clear guidance on these matters to avoid unnecessary concerns around associations and relevant interests in these circumstances.

We understand that others making submissions may suggest that ASIC issue class order relief amending section12 of the Corporations Act to put this matter beyond doubt. While we have not had input into the detail of such proposals, we are, in principle, supportive of such an initiative. However we acknowledge that this is a matter for ASIC, not the Takeover Panel.

In any event, in our view, clear guidance from the Takeovers Panel as outlined above is essential as to the circumstances where an association or relevant interest should not arise or, perhaps more relevantly, the circumstances which the Panel consider to be not unacceptable.

Yours faithfully,

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Submission

from

Herbert Smith Freehills

HERBERT SMITH FREEHILLS

Submission in response to the Takeovers Panel's consultation paper on shareholder intention statements

1 September 2015

1 Introduction

1.1 Nature of this submission

This submission is being made in response to an invitation for comments by the Takeovers Panel (the **Panel**) on its consultation paper dated 7 July 2015 relating to its proposed guidance note on shareholder intention statements (**Proposed Guidance Note**).

Our responses to the particular issues identified in the consultation paper are set out below in section 2.

Please note that the views expressed in this submission do not necessarily represent the views of all Herbert Smith Freehills partners or of our clients.

1.2 General observations

We consider that shareholder intention statements can be a useful source of additional information for shareholders and the market, thereby contributing to control transactions taking place in an efficient and informed market.

Most relevantly, these statements, if accurate and disclosed appropriately, can aid shareholders and the broader market in forming a view as to the probability of a transaction succeeding. This may be a factor that is relevant to shareholders' decision whether or not to accept an offer for their securities. It may also assist in the more efficient setting of the market price for those securities as the market can more accurately factor in the probability and likely timing of the transaction succeeding.

Having said this, and as is implicit in the draft guidance and the Panel's past decisions, shareholder intention statements can in some circumstances also undercut such policy objectives. For example, shareholder intention statements may also be solicited, received and/or disclosed by the proponent or target of a transaction in a tactical or otherwise inappropriate manner – for example, by omitting relevant facts or considerations, or casting the statements in manner intended to coerce shareholders rather than inform.

We generally support the approach adopted proposed by the Panel in its proposed guidance – particularly in terms of grappling with identified regulatory issues in this area, while not dis-incentivising market participants from making or publishing these potentially useful statements.

2 Specific submissions

2.1 Is the Panel's statement of impartiality towards shareholder intention statements helpful (paragraph 4)?

In our view, this statement does not add to the Panel's guidance. It seems to us implicit in the Panel's guidance (excluding this statement) that the Panel will not oppose statements that have been appropriately made and disclosed. Expressly adopting a position of ambivalence does not therefore, in our view, contribute to the effectiveness of the proposed guidance.

Our recommendation:

We recommend that the Panel remove its statement of impartiality and, instead, include a positive statement (similar to that included in its lock-up device guidance note), to the following effect:

"Intention statements are not unacceptable as such."[1]

2.2 Should a minimum time-frame for acting on a stated intention to accept be included (paragraph 10(a))?

We do not see any need for the Panel to introduce a fixed or prescribed timeframe for accepting a bid where a shareholder has previously disclosed an intention to accept. Doing so would potentially have the following detrimental effects:

- It would reduce the flexibility afforded shareholders who disclose their intentions at the outset of a bid compared to those shareholders who do not disclose an intention. This may create an incentive for shareholders to withhold their intentions, and thus potentially inhibit a fully informed market.
- Early acceptance of a bid (without prior disclosure of an intention to accept) denies the market (and the Panel) the opportunity to assess that shareholder's intentions in the period between when the intention is disclosed and when acceptance occurs. Regulating the timing of acceptance (or encouraging non-disclosure of intentions) may make it more difficult for the Panel to detect and manage conduct and/or relationships between shareholders and the proponent or target that may give rise to unacceptable circumstances.
- A mandatory rule may unnecessarily complicate those bids which occur in circumstances where there is no real prospect of an alternative proposal emerging (eg where the target has undertaken an exhaustive process to identify a preferred bidder).

We consider a specific rule on early acceptances is unnecessary, as any concerns that early acceptances have precluded a likely rival bid should be assessed on their merits. If the Panel considers the conduct of the relevant shareholders in a particular case is so uncommercial as to evidence an impermissible arrangement between the relevant shareholder(s) and the bidder it can make a declaration of unacceptable circumstances and appropriate orders.

In summary, our view is that timing of acceptance is one of a number of factors (as set out in paragraph 10 of the Proposed Guidance Note) that the Panel should consider in the context of determining whether the particular facts of individual cases manifest unacceptable circumstances, rather than a matter that should, in of itself, be regulated.

Our recommendation:

The Panel should not introduce a fixed or prescribed timeframe for accepting a bid where a shareholder has previously disclosed an intention to accept.

2.3 Disclosing the details of 'material' individual shareholdings (paragraph 8(c) and 11(b))?

The disclosures contemplated by paragraphs 8(c) and 11(b) (that is, disclosure of the number and percentage of shares held by a particular shareholder) should only be

[1] See Takeovers Panel Guidance Note 7: Lock-up devices, at [6] (noting that whether the effect of a particular lock-up device gives rise to unacceptable circumstances will depend on all the facts and circumstances – a similar approach should apply to intention statements).

mandated for holdings which are at least "substantial holdings" to ensure consistency with ASIC's 'Truth in Takeovers' policy.[2]

We also consider that a substantial holding test is a better test than the proposed 'material' holding test, as the former is a clearly understood concept and avoids the need for further explanation, speculation and uncertainty. If the 'material' holding test was included to capture holdings less than 5% that are critical to the outcome of a bid (eg to satisfy a minimum acceptance condition) this should be expressly stated. Outside this scenario, there should be no requirement to disclose the details of holdings less than 5%.

Our recommendation:

The undefined concept of "material holding" should be replaced with the Corporations Act concept of "substantial holding".

2.4 Disclosing details of aggregate shareholdings (paragraph 11(d))

We consider that an aggregated statement of shareholder intentions should properly be the responsibility of the target or bidder making the statement (and its directors) rather than the individual shareholders upon whose aggregated intentions the statement is based.

(This is not to say that ASIC's truth in takeovers policy ceases to be relevant. If a substantial holder has an inaccurate intention statement publicly attributed to them, that holder should continue to be required to correct the public record upon becoming aware of such a statement.)

Directors of the target or the bidder should only be prepared to publish an aggregated statement of intention in circumstances where they have taken appropriate measures to verify the intention statements from individual shareholders and thus have a reasonable basis for publishing the statement (see further comments below)[3]. In other words, those responsible for the publication of the statement must take responsibility for ensuring that the statement is not misleading or deceptive.[4]

In the context of broker valuations, ASIC Regulatory Guide 55[5] (and the Panel's previous application of the policy in that Regulatory Guide[6]) allows for directors to make statements not attributable to any particular individuals on the basis that the company making the statements and its directors take responsibility (and will be liable if the statement is misleading or deceptive). We submit that the policy basis for permitting such unattributed aggregated statements is equally applicable to aggregated intention statements.

For the reasons set out above, we do not consider that it is necessary to disclose the identity and holdings of all the shareholders whose intentions are aggregated to create an aggregate intention statement (or publish their consent to be named)[7], even if the statement relates to an aggregated notional holding in excess of 5%. We also consider disclosing the identity and holdings of individual shareholders has the potential to mislead as:

[2] ASIC Regulatory Guide 25:Takeovers: false and misleading statements, at [25.29] and [25.75].

[3] *Re Bullabulling Gold* Limited [2014] ATP 8 at [17].

[4] This is consistent with the approach adopted by ASIC in Regulatory Guide 55: Statements in disclosure documents and PDSs: Consent to quote, at [55.22].

[5] *Re Southcorp Limited* [2005] ATP 4 at [96]-[98].

[6] *Re Southcorp Limited* [2005] ATP 4.

[7] ASIC Regulatory Guide 55: Statements in disclosure documents and PDSs: Consent to quote, at [55.18(c)] and [55.20] - [55.22]. See also Takeovers Panel Guidance Note 18: Takeover Documents at [28].

- it may incorrectly suggest that the aggregate intention statement is attributed to those individual shareholders (rather than their individual confirmations as to their own holdings); and
- investors may incorrectly infer that the company making the aggregate intention statement is attempting to disclaim responsibility for it.

We consider any potential for the blatant misuse of aggregate intention statements by substantial holders as an artifice to cloak their own intentions (ie where it is obvious that the aggregate figure consists entirely or almost entirely of 1 or 2 substantial holders), which would otherwise require disclosure under the Proposed Guidance Note and attract ASIC's 'Truth in Takeovers' Policy, is capable of being addressed through the Panel's usual processes.

Our recommendation:

The Panel should not mandate the disclosure of the identity and holdings of all the shareholders whose intentions are aggregated.

2.5 Should consent to the making of a statement always be required (paragraph 11(c) and 11(d))?

In our view, the question of whether to obtain a formal written "consent" from an individual shareholder for the use of their individual intentions in an aggregate intention statement, is a matter for the bidder or target (and its directors) to decide in light of its verification procedures and of its need to be able to explain an intentions statement to ASIC or the Panel.

The Proposed Guidance Note should clarify that the Panel will likely draw an inference adverse to the party publishing the statement if that party fails to obtain and keep appropriate and up to date consents from the relevant shareholders.

We also note that the notes accompanying Rule 19.3 of the United Kingdom's Panel on Takeovers and Mergers' *City Code on Takeovers and Mergers* (**City Code**) are broadly consistent with the position outlined above. In particular, the City Code requires the consent of the relevant shareholders to be obtained but does not require the identity and holdings of those shareholders to be published[8].

It is important that the Proposed Guidance Note does not confuse verification purposes with the very different purposes under which consents are sought and published under s636(3) or s638(5), which are currently referenced in paragraph 11(c) and 11(d)[9].

There should be no requirement to publish consents for the purpose of s636(3) or s638(5), as:

- the aggregate intention statement is properly attributable to the company making the statement (not the individual shareholders) so there is no liability gap; and
- individual shareholders are unable to consent to an aggregate intention statement as their knowledge will be limited to their own intention (ie they cannot be responsible for the intentions of the other shareholders).

If the Panel's intention is that the reference to consent in paragraph 11(d) should only be required for verification purposes, we suggest that the Proposed Guidance Note be amended to clarify this.

[8] United Kingdom Panel on Takeovers and Mergers, *City Code on Takeovers and Mergers* Note on Rule 19.3 (Statements of support)

[9] In particular the reference to *Re Bullabulling Gold Limited* [2014] ATP 8 at [38] in 11(d).

We also note that if consent were to be required for the purpose of s636(3) or s638(5) (contrary to our views set out above) then the Corporations Act would require the consents to be obtained and published in every case, not only in those instances where the Panel considers the aggregate holding is 'material'. Therefore, it is unclear what discretion the Panel has to require publication and consent where the aggregate is material (but not otherwise).

Our recommendation:

There should be no mandatory obligation to publish a formal written consent from a target shareholder for the use of their individual intentions in an aggregate intention statement.

2.6 Is the guidance clear and helpful for smaller companies?

We consider that the helpfulness of the Proposed Guidance Note can be maximised by making the guidance as simple and precise as possible and minimising the number of additional regulatory requirements imposed, so that smaller companies and shareholders retain maximum flexibility to respond to proposed offers in the manner they deem fit, within existing legal restrictions.

Our recommendation:

No further guidance is necessary for smaller companies.

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

The Proposed Guidance Note highlights (in paragraph 10) various specific situations where shareholder intention statements may lead to a declaration of unacceptable circumstances. This is helpful.

In our view, detailed guidance on whether shareholder intention statements give rise to relevant interests or associations would be difficult, as whether or not a particular shareholder intention statement will give rise to a relevant interest or association depends very much on the facts and circumstances of each case. The difficulty is one of evidence. Such questions are best left to each sitting Panel to determine: we note the development of the Panel's thinking on this (see Re MYOB Limited [2008] ATP 27 and Re Ambassador Oil and Gas Limited (No 1) [2014] ATP 14).

At most, the only guidance that the Panel should give is to expressly acknowledge that a mere shareholder intention statement will not, of itself, give rise to a relevant interest or an association.

If the Panel is minded to provide guidance on whether shareholder intention statements give rise to relevant interests or associations, given the importance of that issue, then we suggest that guidance should be the subject of a further consultation process before it is finalised.

We also note ASIC has provided existing guidance on drawing inferences from indicia of an association which may be relevant to this analysis.[10]

Our recommendation:

Specific guidance is not needed on the circumstances in which shareholder intention statements may give rise to relevant interests or associations.

[10] ASIC Regulatory Guide 5: Relevant interests and substantial holding notices, at [5.137] – [5.138].

Submission

from

Law Council of Australia

Law Council
OF AUSTRALIA
Business Law Section

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1 September 2015

Dear Mr Bulman,

Response to Consultation Paper – shareholder intention statements

This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to the Consultation Paper issued by the Takeovers Panel (the **Panel**) on 7 July 2015 in relation to the draft Guidance Note on Shareholder Intention Statements.

Encouragement

The Committee suggests that the statement "The Panel does not encourage or discourage shareholder intention statements" may not be adequate to signal that this is a high risk area in which care should be taken. We suggest a reformulation in the form below:

> "Shareholder intention statements are not unacceptable as such. However, the Panel notes that they are an area where concerns have arisen in the past – particularly as to how such statements have been gathered and used in a context where the statements, when aggregated with the bidder's interest in the target, relate to 20% or more of the shares in the target. Therefore they are an area of focus for the Panel, where unacceptable circumstances can arise."

Timing

The Committee considers that some guidance on timing would be useful. However, we submit that such guidance should not be prescriptive. We suggest wording along the following lines:

> "The Panel expects that a person would not act on a stated intention to accept an offer until a reasonable time had elapsed after the opening of the offer unless they have good commercial reasons for doing so. The Panel considers that the passing of 21 days after the opening of the offer

is generally likely to be the minimum time which is reasonable. However, in some circumstances a shorter time frame may be appropriate."

Disclosure

We do not believe guidance as to the meaning of 'material' is necessary as we consider that there is enough guidance available on the meaning of the term in other contexts, with the substantial holder provisions also providing some context.

The Committee considers that it should be necessary to disclose the identity and holdings of all shareholders whose holdings are aggregated in a shareholder intention statement.

Consents

The Committee considers that consents should generally be required before a company attributes a shareholder intention statement to one of its shareholders. The need for consent will signal to the shareholder the seriousness and consequences of making such a statement publicly.

The Committee considers that there should be an exception to the requirement to obtain consent where the company is merely reporting on a statement which has previously appeared in the public domain. In this circumstance, we consider that it is appropriate that the company refers to the statement so that all shareholders are equally informed including those who may not have seen the public statement.

Impact on smaller companies

The Committee does not consider that the issues facing smaller companies are materially different from those facing larger companies. Consequently, we do not consider that additional guidance is required for smaller companies.

Guidance on relevant interests and associations

While there is ASIC guidance in other contexts as to when a relevant interest or association arises, it emerged in discussions among members of the Committee that there were a range of disparate views regarding whether, and in what circumstances, shareholder intention statements convey a relevant interest or trigger association. This tends to suggest that there are quite diverse views among takeovers practitioners on this point, so further guidance on the circumstances in which shareholder intention statements give rise to relevant interests or association may be beneficial.

Other comments – unacceptable circumstances paragraph 10

Paragraph 10(b) of the daft Guidance Note – timing of statement

This refers to the statement being given "before the offer period is open". The Committee suggests that concerns generally arise in relation to statements made before announcement of the offer. Accordingly, we suggest replacing those words with: "before or in conjunction with the announcement of the offer"

Paragraph 10(e)

The first sentence of this paragraph requires some qualification. Perhaps it is already implicit in paragraph 10(d). However, for clarity we suggest that in the second sentence of paragraph 10(e), the words "or does not accept the superior proposal" be inserted after the words "However, if the shareholder accepts the original bid".

The Committee would be pleased to discuss this submission if that is helpful. In the first instance, please contact the Committee Chair, Bruce Cowley, on 07-3119 6213, if you would like to do so.

Yours sincerely,

Teresa Dyson, Deputy Chairman
Business Law Section

Submission

from

Norton Rose Fulbright

NORTON ROSE FULBRIGHT

31 August 2015

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Dear Allan

Response to Consultation Paper - shareholder intention statements

Thank you for the opportunity to comment on the Consultation Paper issued by the Takeovers Panel (**Panel**) regarding the draft Guidance Note on shareholder intention statements.

Our comments on the issues raised by the Panel in the Consultation Paper are as follows:

1 **Eggleston Principles and interaction with intention statements**

1.1 The solicitation by a bidder of acceptance statements from shareholders of a target is a relatively recent phenomenon which, in our view, has been largely unregulated by the Panel. This is likely due in part to the difficulty in proving the existence of an association in the construct of Panel proceedings, and in part to the jurisdictional restrictions placed on the Panel when making declarations.

1.2 The fundamental purposes of Chapter 6 of the *Corporations Act 2001* (Cth) (**Act**) are to ensure that control over listed companies takes place in an efficient, competitive and informed market, and that shareholders have a reasonable time to consider the proposal. These principles, along with the remaining Eggleston Principles in section 602 of the Act, continue to be the governing principles for control transactions in Australia.

1.3 In addition, the 20% threshold in section 606 of the Act remains the gate through which a bidder must not pass other than through one of the permitted gateways in section 611 of the Act.

1.4 We understand that that the Panel takes the position, when assessing whether unacceptable circumstances exist, that there can be a breach of the law provided that there is no negative effect on the maintenance of an efficient, competitive and informed market. With respect, we do not believe that intention statements should be treated in this manner.

1.5 The key provision to reflect the underlying principle that control over shares takes place in an efficient, competitive and informed market is the 20% threshold. It must therefore be the case that the legislature intended that a breach of the 20% threshold must be unacceptable. That is, the 20% threshold must be treated as sacrosanct and not capable of being gamed or bypassed without complying with section 611 of the Act.

1.6 In our view, the evolution of intention statements in their current form pushes the boundaries of permissible conduct under Chapter 6 of the Act too far. For this reason, we consider it necessary that the Panel firmly clarify its position on intention statements, and issue clear guidance in relation to when intention statements will be unacceptable.

1.7 Our view is that a bidder should not be permitted to solicit intention statements from target shareholders in respect of target shares where they would, when aggregated with either:

(1) the bidder's current or simultaneously acquired relevant interest in shares in the target; or

(2) intention statements from other shareholders in the target obtained by the bidder,

exceed the 20% threshold.

1.8 We believe that solicitation of an intention statement inevitably gives rise to an association, and likely a relevant interest, in respect of the relevant shares. Detailed reasons supporting this position are set out in Annexure A to this submission.

1.9 To the extent that the bidder enters into the relevant agreements described in paragraphs 2 and 3 of Annexure A in respect of more than 20% of the target's voting shares, a breach of the takeovers prohibition will occur.

1.10 In our experience, before intention statements became conventional, there was no substantial hindrance to offers being made and deals being announced in circumstances where the bidder could only acquire an interest in up to 20% of the target before making its offer. We do not believe that a return to the true policy underlying the Eggleston Principles would hinder the announcement and implementation of transactions in the present market environment.

1.11 Furthermore, the advent and acceptance of break fees and other lock-up devices means that under-bidders are adequately compensated in circumstances where an over-bidder is successful in acquiring control.

1.12 For these reasons, we submit that the Panel should make a clear policy statement that intention statements which take the bidder's interest over 20% will be unacceptable, whether or not such statements are qualified. There should, however, be no restriction on the ability of a bidder to solicit unqualified intention statements up to the 20% threshold.

2 Encouragement

2.1 We agree with the Panel's position in paragraph 10(b) of the draft Guidance Note, but we think that the Panel should go further to make a clear statement of discouragement of the solicitation of intention statements (either qualified or unqualified) where, before the offer is made, the aggregate interest of the bidder would exceed 20% when aggregated with the shares the subject of the intention statement.

3 Timing

3.1 If the approach as set out in paragraphs 1 and 2 above is adopted, then no guidance on timing would be required. If, however, the Panel does not agree with this position, and instead considers that qualified intention statements which would take a bidder's interest above 20% are not contrary to the Eggleston Principles or section 606, then we encourage the Panel to provide guidance on timing.

3.2 Chapter 6 of the Act sets the minimum period for an offer to be open as 1 month. The policy rationale for this is that the legislature considered that 1 month was the minimum amount of time that a shareholder would need to consider the merits of the offer and decide whether or not to accept it. Further, a target is not required to send its target's statement to its shareholders until 15 days after it receives notice that all of its shareholders have been sent the bidder's statement. We therefore submit that if qualified intention statements regarding shares over the 20% threshold are to be permitted, then the appropriate period that the maker of an intention statement should be required to wait before accepting the offer is at least 21 days after the date that the offer opens, as this provides

a reasonable time for a superior proposal to emerge, and for the target's statement to be released. Indeed, there is a good argument to suggest this should be 28 days, given the minimum 1 month offer period represents the true deadline by which a competing bidder could reasonably expect to table a competing bid and not be shut out.

3.3 In our view, there are two different types of qualified intention statements to which this 21 day "lockout" period should apply:

(1) where the qualified intention statement is qualified by timing, eg "*X will accept the offer within Y days of the offer opening, in the absence of a superior proposal*"; and

(2) where the qualified intention statement is silent as to timing and qualified only by there being no superior proposal.

3.4 That is, a qualified intention statement must not specify a date for acceptance which is less than 21 days after the offer opens, and a qualified intention statement must not be acted upon before the date that is 21 days after the date of the offer where it is silent as to timing.

3.5 Indeed, even if the Panel is minded to go down this path, we believe the statement in paragraph 3.3(1) is inherently more objectionable than the statement in paragraph 3.3(2). This is because the real reason why a bidder seeks to extract an intention statement with the time qualification in paragraph 3.3(1) is very likely to be in an effort to limit the likelihood of a competing bid.

3.6 After an offer opens, there is no need for a time to be specified in respect of an intention statement (qualified or otherwise), given that a target shareholder is likely to make such a statement freely and in its own interests. Market participants should, however, be advised that intention statements may be challenged and declared unacceptable where there is evidence of association which was present prior to an offer being made.

4 Disclosure

4.1 The identity and shareholding details of any shareholder whose holding is aggregated for the purposes of an intention statement should be included in any communication by a bidder or target to the market regarding intention statements. We consider it to be inconsistent with the Eggleston Principles for a materiality threshold to be applied to holdings for the purposes of disclosure in this context.

5 Consents

5.1 Consent should be required where a bidder or a target attributes an intention statement to a shareholder of the target. This is consistent with the attribution of statements in bidder's statements and target's statements. We do, however, support an exception where an intention statement has been released to the ASX by the maker of the statement.

6 Impact on smaller companies

6.1 We do not consider there to be any need to distinguish between smaller and larger companies for the purposes of the Guidance Note. Companies face similar issues in control transactions in relation to intention statements and associations, regardless of the size of the company.

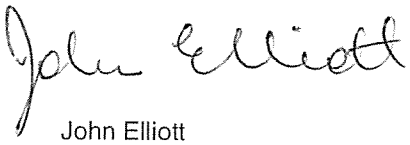
7 Guidance on relevant interests and associations

7.1 If the approach we set out in paragraphs 1 and 2 above is accepted and adopted, then no further guidance on association as it relates to intention statements is required, as there is already sufficient information in the existing guidance.

7.2 We are aware that there will be a range of views on the consultation Paper, and it is likely that not many respondents to the Consultation Paper will share our view. However, this fact alone provides a clear indication that specific guidance and clarity is required. If the Panel forms the view that qualified intention statements should be permissible above the 20% threshold, then we consider it is

necessary for the Panel to provide clear guidance, using examples, on when an intention statement will give rise to an association, and/or give rise to a relevant interest.

Yours faithfully



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Annexure A – Association and relevant interest

1. An association arises between the maker of the intention statement and the bidder because:

   (1) intention statements are not made independently by the maker;

   (2) to agree to make an intention statement indicates that the bidder and the relevant target shareholder are acting, or proposing to act, in concert in relation to the target's affairs[1]. That is, at the time of agreeing to make the intention statement, the target shareholder commits to act in support of the bid and the bidder then initiates its bid in reliance on this;

   (3) there is a mutual understanding as to how the parties will act and the element of dependency by each party on the actions of the other;

   (4) the understanding relates to the most fundamental corporate control action, a takeover bid; and

   (5) any argument to the effect that an offer from the bidder would not be forthcoming without such "deal certainty" further strengthens the argument that an association between the bidder and the target shareholder exists.

2. A relevant interest arises between the maker of the intention statement and the bidder because:

   (1) at the time of the target shareholder agreeing to give an intention statement, the bidder and the target shareholder form a relevant agreement in respect of the relevant shares;

   (2) that is, they reach an agreement, arrangement or understanding that the target shareholder will itself publish an intention statement or that it consents for the bidder to do so;

   (3) both parties fully understand that the consequence of the intention statement is that the target shareholder will become bound to accept the bidder's bid (albeit in the case of a qualified statement that obligation is conditional);

   (4) as a result, at the time the target shareholder agrees to give the intention statement, the bidder has acquired the power to control the exercise of disposal of the relevant shares (**Power Over Disposal**) and therefore a relevant interest[2];

   (5) the Power Over Disposal arises because the target shareholder is no longer free to dispose of the shares to any person other than the bidder or to retain the shares rather than accepting into a bid;

   (6) the analysis of the Power Over Disposal does not require a contractual agreement between the bidder and target shareholder – s608(2) of the Act makes clear that the Power Over Disposal includes a power or control that is indirect or that is, or can be, exercised as a result of, by means of a practice, and whether or not that power is enforceable, subject to restraint or restriction, is express or implied, or is formal or informal;

   (7) it does not matter that the Power Over Disposal does not lie in the bidder's hands because the intention statement is not binding in a way directly in favour of the bidder. This is because:

      (a) the bidder is a market participant that might seek to enforce an intention statement, perhaps by Panel application; and

[1] Section 12(2)(c) of the Act
[2] Section 608(1)(c) of the Act

(b) the arrangement viewed as a whole is explicitly calculated to constrain the target shareholder's disposal to the benefit of the bidder, a type of Power Over Disposal that s608(2) of the Act is clearly designed to catch; and

(8) qualifying the intention statement does not vitiate the Power Over Disposal, it is merely in the nature of a condition to the bidder's Power Over Disposal.

3. A relevant interest also arises between the maker of the intention statement and the bidder because:

(1) at the time of the target shareholder agreeing to give an intention statement, the bidder and the target shareholder form a relevant agreement in respect of the relevant shares;

(2) that is, they reach an agreement, arrangement or understanding that the target shareholder will itself publish an intention statement or that it consents for the bidder to do so;

(3) the relevant agreement, if performed, would result in the target shareholder accepting the bidder's bid, giving the bidder a relevant interest in the relevant shares because the bidder would acquire Power Over Disposal (at least from the time of acceptance) and ultimately become the holder of the relevant shares;

(4) at the time of the target agreeing to give an intention statement, the bidder will therefore be taken to already have a relevant interest in the relevant shares under s608(8) of the Act;

(5) in the context of s608(8)'s acceleration of relevant interests in anticipation of the performance of an agreement, the term 'agreement' is defined to mean 'relevant agreement', which in turn is defined to mean an agreement, arrangement or understanding, whether formal or informal, whether or not having legal or equitable force and whether or not based on legal or equitable rights;

(6) whatever the nature of the discussions between the bidder and target shareholder, if this results in publishing an intention statement, the parties can be assumed to understand the significant consequences of this and their interaction will clearly meet the broad definition of 'relevant agreement'; and

(7) qualifying the intention statement does not vitiate the relevant agreement which if performed would give rise to a relevant interest, it is merely in the nature of a condition to that relevant agreement.

ANNEXURE B

Mark-up of GN 23 *Shareholder Intention Statements* from the draft in the Consultation Paper

Australian Government
Takeovers Panel

Guidance Note 23 – Shareholder intention statements

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 control transaction such as 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.[1]
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 market[2] and
   - shareholders and directors being given enough information to enable them to assess the merits of a proposal.[3]

[1] Section 611, item 7 "Approval by resolution of target". References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

[2] Section 602(a)

[3] Section 602(b)(iii)

4. ~~The Panel does not encourage or discourage shareholder intention statements~~A shareholder intention statement can give rise to concerns, depending on how it has been obtained and how it is used, particularly where the interests the subject of the statement, when aggregated with the bidder's interest, exceed 20%.

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,[4] but are not limited to these.[5]

7. Guidance Note 7 addresses shareholder intention statements in the context of entry into a lock-up device with that shareholder.[6] ASIC's regulatory guide on false and misleading statements also addresses statements by substantial holders.[7]

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 ambiguous[8] and

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

[5] 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

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

[7] 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]

[8] 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.

(c) if published without detailed information regarding the holding(s) ~~where material~~.

9. In examining a shareholder intention statement, the Panel is concerned with whether the statement has an effect that precludes, or might preclude, the opportunity for a competing proposal. ~~Market participants should note that~~For example, a shareholder intention statement could potentially create a relevant interest in the shares the subject of the statement[9] or support an inference of association[10] which might contravene the Act and undermine ~~the policy of Chapter 6. If it did, it would likely give rise to ~~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.[11]

Superior proposal

(c) If a statement is qualified by reference to a superior proposal, it is likely to ~~be~~ give rise to unacceptable circumstances 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, but generally the Panel will

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

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

[11] *MYOB Limited* [2008] ATP 27

consider a reasonable time to be 21 days after the offer has opened.[12].

(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.

(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. There may be good reasons why the shareholder does not. 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, d~~Details of the holding, in number and percentage terms, should be disclosed.[13]

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.[14] The Panel expects that shareholder intention statements made outside a bidder's statement or target's statement will only be made with the

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[12] If a shareholder intention statement is made after offers have opened, a reasonable time might be less than 21 days because the shareholder could otherwise have accepted. If there is a variation of the bid after offers have opened, such as a price increase, and thereafter a shareholder intention statement is made, a reasonable time might be calculated from the date of the variation and be less than 21 days from that date

[13] 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

[14] 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]

consent of the shareholder.[15] If consent is not provided, the Panel will look more closely at the statement.

(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,[16] and ~~will consider whether they and~~ their individual holdings have been separately identified in the statement.

Remedies

12. The Panel has wide powers to make orders.[17] It may, for example:

(a) require the maker of a shareholder intention statement to comply with the statement

(b) require the statement to be retracted[18]

(c) release the maker of the statement from any obligation to comply[19] or

(d) unwind an action or transaction based on a statement.[20]

Publication History

First Issue xx

Related material

GN 7 Lock-up devices

GN 18 Takeover documents

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

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

[17] Section 657D

[18] *Bullabulling Gold Limited* [2014] ATP 8

[19] *MYOB Limited* [2008] ATP 27

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