



DRAFT GUIDANCE NOTE: CORRECTION OF TAKEOVER DOCUMENTS

Introduction

1. The Panel seeks to ensure that its approach to disclosure issues¹ means that the quality of disclosure in takeover documents is at least as high as was required by the Courts before March 2000, and does not diverge significantly from that of disclosure documents under Chapter 6D of the Corporations Act 2001 (the **Act**).²
2. This Guidance Note informs market participants and their advisers concerning the remedies that the Panel may use to correct deficiencies in takeover documents which it regards as causing "unacceptable circumstances".
3. As a concrete example, this Guidance Note uses a defective bidder's statement. However, the principles discussed concerning that example apply equally to target's statements, other documents issued under the Act for the purposes of a bid, releases to Australian Stock Exchange Limited (**ASX**), media releases and letters to shareholders relating to a bid and to the documents required for other control transactions (for example, notices and explanatory statements for the purposes of meetings to approve an acquisition under section 611 item 7).
4. The Panel encourages parties to try to resolve disagreements concerning the completeness and accuracy of information provided to target shareholders and the market promptly and, where possible, without recourse to the Panel's procedures. This Guidance Note also indicates the approach of the Panel where one party has adopted commercially effective and appropriate measures to deal with alleged deficiencies in its documents and the criticising party nonetheless considers that there remain deficiencies constituting "unacceptable circumstances".

Background Principles

5. The completeness and accuracy of relevant information is a fundamental principle in Australian takeover regulation. It is reflected throughout Chapter 6. It finds expression, for example, in the principles:

¹ For example, see GN 5 "Restraining dispatch of takeover documents" and the Panel's decisions in *Infratil 02*[2000] ATP 2, *Brickworks 02* [2000] ATP 8, *Vincorp* [2001] ATP 6, *Alpha HealthCare* [2001] ATP13, *BigShop 03* [2001] ATP 22, *EPHS* [2002] ATP 12, *Normandy 01*[2001] ATP 27, *Goodman Fielder 01* [2003] ATP 1 and *Goodman Fielder 02* [2003] ATP 5.

² In this Guidance Note, statutory references are to the Act, unless otherwise obvious.

- of an "efficient, competitive and *informed* market" (s602(a)); and
 - that the target's shareholders and the directors "are given enough *information* to enable them to assess the merits of the proposal" (s602(b)(iii)).
6. The "information principle" also appears in the requirements for bidder's statements and target's statements (sections 636 and 638) and for their supplementation (sections 643 to 647).
 7. The fundamental position occupied by the "information principle" in takeover regulation is also recognised in the ASIC policy requiring "Truth in Takeovers",³ which the Panel has broadly adopted in several decisions.⁴
 8. Further, the Panel recognises that the investment decision involved in a takeover is of similar magnitude to investors to the initial decision to invest in securities. Thus, at a conceptual level, the quality of disclosure under Chapter 6 should be broadly comparable with that under Chapter 6D or Part 7.9 (even if the actual disclosures differ themselves because of the different contexts in which they are made).

Less is more

9. The Panel has said that it prefers that information be provided in fewer, more comprehensive (and comprehensible) documents delivered to target shareholders, rather than either to multiply the numbers of documents provided or to rely too heavily on the ability of the market and the press to distribute corrective information.⁵ The Panel also considers that it is preferable for a document or statement to be amended before it is distributed rather than to have a complex collage of similar, but differing, messages before shareholders.⁶ This concern is less where the information adds to, rather than corrects an inaccuracy in, the original document.
10. It is also the Panel's view that, consistent with shareholders having sufficient information, they also need sufficient time to consider a proposal (s602(b)(ii)). How much time is sufficient depends in part on the complexity of the information which shareholders are expected to read, evaluate and act on. There is thus a correlation between the efficiency of the communication of information (viewed from the perspective of the recipient) and the period needed to fulfil shareholders' need for sufficient time.

³ ASIC PS 25 "Takeovers: false and misleading statements".

⁴ For example, *Taipan 6*[2000] ATP 15, *PICA* [2003] ATP 36, *BreakFree 04(R)*[2003] ATP 42

⁵ see, for example, the Panel decisions in *Brickworks 02*, *BigShop 03*, *Pinnacle 9* [2001] ATP 25, *Vincorp* [2001] ATP 6 and *Alpha Healthcare*.

⁶ ASIC CO 00/344, ASIC PS 159 at [159.29] – [159.38], ASIC PS 25 at [25.63] and *Infratil 02* and *BreakFree 02* [2003] ATP 30.

Discouraging contravention

11. Where there is an informational shortcoming in the market the Panel has a further concern -- the person who caused that state of affairs may have obtained a commercial advantage which would not have existed had that person complied with the requirements of the Act and the policy set out in section 602.
12. In this regard, the Panel considers that to deny a party an advantage gained by its own improper conduct may require more than merely that the deficient information be corrected. Thus, for example:
 - acquisitions that occurred while the market and shareholders were inadequately informed may need to be reversed; and
 - other advantages⁷ arising while the minds of shareholders and market participants were inadequately informed may need to be rectified by requiring that the person provide additional time to enable shareholders to consider the corrected information.
13. In other words, the Panel considers that "getting the bid back on track"⁸ may mean taking all parties back to the point where the bid went off the track.
14. The Panel also considers that it is usually inappropriate for parties to use corrective disclosures in effect to conceal that the Panel has found previous disclosures to be inadequate. For example it is usually inappropriate to present only a "corrected" version of the information without pointing out the deficiencies found by the Panel. Unless errors are identified and acknowledged, the attempt to correct may not be sufficiently specific to be effective.

The amicable solution

15. Panel decisions sometimes refer to the preparedness of the parties to resolve information deficiencies cooperatively.⁹ In those decisions, the Panel regarded it as consistent with the policy of the Act that the parties agree the form and substance of additional information to be supplied, preferably in the form of replacement or supplementary bidder's statements or target's statements. The Panel is prepared to accept undertakings, agree to withdrawal from proceedings and make orders (which may in effect be consent orders), including interim orders, to facilitate the lawful carrying

⁷ The Panel has held (*Pinnacle 11* [2001] ATP 23) that there is no principle that prevents the Panel from making orders that strips from a party the benefit of commercial momentum obtained from unacceptable circumstances. Further, much of the discussion in paragraphs 13-16 is drawn from the decision in *Ranger Minerals* [2002] ATP 11.

⁸ GN 4 – Remedies and Enforcement para 4.10.

⁹ See for example, *BigShop 03*, *Alpha Healthcare*, *SSH Medical* [2003] ATP 32, *BreakFree 03* [2003] ATP 38.

out of such commercial settlements and otherwise to facilitate the parties reaching and implementing such commercial arrangements, so long as to do so is consistent with speedy and fair resolution of the dispute.

16. Where the target is listed, section 647 requires only that a copy of a supplementary statement is given to the other party, ASIC and the relevant stock exchange. It does not require that a copy be sent to shareholders. In the Panel's view,¹⁰ where there are significant information defects the unacceptability caused by those defects may only be remedied where the correction is provided directly to the target shareholders (as the people most directly affected) by sending the supplementary statement to them. This will frequently be the case where the defect was in a document which was itself sent to shareholders, but may also arise in relation to any takeover-related document. The Panel does not assume that market mechanisms and the press can always be relied on to transmit all the relevant information to shareholders in a timely fashion.

The Possible Orders

17. The appendix to this Guidance Note is an example order (the **Order**) that assumes that the Panel has found unacceptable circumstances to exist in connection with a dispatched bidder's statement which has caused a contravention of the information principle.
18. There are several points to note. The Order:
 - presupposes that the information defect occurred in the context of a takeover bid – in other cases, the Order will need to be modified;
 - deals with a serious deficiency in a bidder's statement - again, if the actual deficiency is in another kind document (for example, an ASX release, media release or a letter to shareholders), the Order will need to be amended;
 - assumes that acceptances have been received but not processed, so that offering a withdrawal right to offerees is sufficient protection – in some severe cases, this may not be sufficient to remedy the mischief caused and the Panel may order the unwinding of takeover contracts;
 - assumes that on-market share transactions occurred while the market was affected by the deficient information and seeks to unwind those transactions and halt trading in the target's shares until the corrective information has been released and absorbed by market - the Order also assumes that no interim order has been granted by the Panel suspending settlement through the CHESS system of transactions

¹⁰ stated for example, in *Taipan 10* [2001] ATP 5 and *Ranger Minerals*. See also ASIC PS 25 at [25.66] and ASIC PS 159 at [159.63].

effected during the Panel's proceeding;

- in some cases, it may be desirable for the Panel to order that on-market transactions that occurred during a period of severe market misinformation may need to be reversed or that trading in the affected securities be halted or suspended while an information defect is remedied – in these cases, the Panel will seek to co-operate with the Australian Stock Exchange to ensure that the correct remedy is applied with the least disruption to “innocent” transactions;
- seeks to strip an advantage that the bidder obtained and to re-establish the status of the bid and the state of the market immediately prior to the contravention of the information principle, both by advertising and by the provision to shareholders of both direct corrective and supplemented information and additional time for consideration of the bidder's proposal;
- is probably at the steeper end of the scale of orders that the Panel is likely to make in these circumstances – the precise incidents of the order to be made in a particular case will depend on the facts of that case: for instance, the facts may not require advertising of the correction or, if they do, may not require that it be as extensive as set out in the Order, although it will be usual to require advertising in at least one national and the most appropriate metropolitan newspapers.

19. The Panel emphasises that, although the Order focuses on a defective bidder's statement:

- all infractions of the information principle are potentially serious;
- statements by other parties (including rival bidders, the target, its substantial holders, influential financial advisers and commentators) can give rise to serious effects on a control transaction; and
- comparable orders may be attracted by a contravention of the information principle by others to restore the transaction to the position applying before the contravention.

20. Even if contracts require certain things to be done by specific dates this would not, in suitable cases, prevent the Panel from making these kinds of orders. Of course, the Panel will consider whether innocent parties would be unfairly prejudiced by the making of an Order and, for example, may require the parties to contracts to suspend relevant deadlines to allow for the re-establishment of an informed competitive and efficient market in the relevant securities.

The persistent critic

21. Sometimes a person (the **Critic**) has an extensive list of identified

information deficiencies in a takeover document. In this case, the Panel prefers the Critic to give that list promptly and directly to the person responsible for the relevant document rather than communicate indirectly through the press or apply to the Panel immediately. The Panel prefers to see commercial parties try to resolve these information difficulties speedily, directly and cooperatively.

22. In the frequent situation of a target identifying information issues in a bidder's statement, the Panel expects the bidder to accept reasonable criticisms of its document and to offer appropriate remedial action promptly (frequently this remedial action will be significantly less onerous than under the Order and would involve, for example, the preparation and lodgment under section 647 of a supplementary bidder's statement). If the bidder's statement has not yet been dispatched to shareholders, the Panel considers that it is usually sufficient if section 647 is complied with and a replacement bidder's statement (corrected in accordance with the supplementary bidder's statement) is sent to shareholders. In this case, the Panel considers that it is often appropriate for the target to consent under ASIC CO 00/344 (or any equivalent successor) to the use of the replacement bidder's statement without alteration to the bid timetable.¹¹ This may be the case even where the target has unresolved issues with the bidder's statement, as supplemented.¹²
23. In relation to the potential criticisms that the target might make, the Panel observes that Chapter 6's regulatory scheme involves two principal information documents - the target's statement as well as the bidder's statement. The level of acceptances of takeovers is generally very low before the target's statement is issued as shareholders await clarity on the commercial outcome of the bid (especially in terms of possible higher bids being made) and the completion of the informational matrix before reacting to a bidder's proposal. Accordingly, targets or other Critics should bear in mind who is in the best position to provide relevant information. In particular, if the best information is likely to be in the hands of the target, it is unreasonable for the target to require the bidder to attempt to provide that information from sub-standard sources. In this situation, the Critic must either provide the information itself (e.g. in the target's statement) or provide the person responsible for the document with access to the relevant information or otherwise make the information generally available (for

¹¹ Where the extent of the changes made is so great that the target may require additional time to prepare its target's statement, the Panel would prefer that the parties agree to allow a consolidated bidder's statement to be dispatched (eg by the target consenting to the use of a replacement on condition that the bidder extend the bid period by the time required to consider and respond to the further material contained in the bidder's statement).

¹² But not where the remaining deficiencies cannot be rectified by disclosure by the target and may fundamentally affect the level of disclosure provided to shareholders of *BreakFree 02* .

example, by providing it to the ASX under Listing Rule 3.1). It is usually not reasonable for a Critic to seek to require a person responsible for a document to speculate on the basis of incomplete information – this would require the provision of material that could seriously undermine the efficiency of the market.¹³

24. It follows that the Panel accepts that an element in determining whether unacceptable circumstances exist or, more commonly, the seriousness of the unacceptability, or in formulating orders that will rectify the unacceptability will not only be the original informational deficiency but also the behaviour of all persons who have subsequently become involved in discussions concerning the rectification of the informational defect. The seriousness of the unacceptability concerned in a particular set of circumstances will have an effect on the Panel's orders. For example, if a bidder has responded positively and helpfully to target criticisms in relation to information within the bidder's knowledge and done what it can to re-establish a properly informed market while the target has not cooperated in the establishment of agreed documents and has pressed alleged deficiencies which it is better able to rectify, the Panel may make an order which is less strict than would otherwise be the case. The Panel might also form the view that any unacceptable circumstances existing in this situation may require conduct by the target as well as, or instead of, the bidder.

Confidentiality and media canvassing

25. The Panel has procedural rules requiring parties to respect the confidentiality of confidential information provided to them by the other parties.¹⁴ This is necessary for the prompt and efficient resolution of disputes. Parties asserting informational deficiencies should be aware that the Panel will only in the most exceptional circumstances allow a party to withhold information from all parties to Panel proceedings which may be relevant to determining whether unacceptable circumstances exist and, if so, the means by which they may best be rectified, on the ground that to do so may involve the disclosure of information confidential to that party.

¹³ The requirement is for the provision of information not speculation – see for example, *Email 03* [2000] ATP 5, *Taipan 11* [2001] ATP 16 and *Vincorp*.

¹⁴ Confidentiality is the subject of Procedural Rule 8 and especially rule 8.5. This rule protects, without any time limit, the confidentiality of information disclosed to a person by the Panel or another party in or in connection with a Panel proceeding. Media canvassing is dealt with in Procedural Rule 12 and restricts, without considering issues of confidentiality, the publication or the causing of media reports during and after Panel proceedings. It imposes a more rigorous media silence rule during the course of proceedings and provides guidance as to appropriate media comment once proceedings have been completed. These two Procedural Rules may overlap to some extent, but are conceptually distinct and seek to protect different interests.

26. The Panel also regards the use of the media as a means of publicising submissions or arguments before the Panel as unlikely to assist in the speedy resolution of disputes and as potentially itself constituting unacceptable circumstances. Accordingly, the Panel may regard it as inappropriate for a Critic to provide significant detail on its criticisms to the press even before the Critic has commenced proceedings. If it does so, the Panel may consider that this suggests that the proceedings have been commenced for tactical reasons rather than from a genuine concern with the accuracy of information. This may disincline the Panel to order the most stringent available remedies to rectify an information deficiency.



DRAFT ORDER

The Panel orders that:

Supplementary statement

- 1) (Party) prepare a supplementary (bidder's) statement which contains a separate, prominent section that:
 - (a) states clearly that the section and the statement is prepared and circulated [and the offer period has been extended] as a result of findings of unacceptable circumstances made by the Takeovers Panel requiring the correction of statements made by (Party);
 - (b) identifies the statements found by the Panel to be deficient;
 - (c) states clearly and prominently the deficiencies found by the Panel in those statements; and
 - (d) sets out clearly the accurate information, based on the findings of the Panel, and which also contains a section setting out the material required by section 650D in order to comply with orders (2) and (9).
- 2) (Party) extend the offer period so that it ends not less than 14 days after (Party) complies with order (4).
- 3) (Party) give the Panel a printer's proof of the supplementary statement, showing all art work and design features as well as the relevant text, not less than two business days before it is sent to (target) under section 647 and may not send the supplementary statement in purported compliance with that section until the Panel has informed (Party) that the form of the statement is considered by the Panel to be appropriate and to comply with this order.
- 4) Not less than three days after it complies with section 647, (Party) send the statement to everyone to whom offers were made under the bid as if the statement were a notice to which section 650D applied.

Corrective advertising

- 5) (Party) publish an advertisement (the **Advertisement**) in the following newspapers on [a business day/[two] successive business days] in accordance with this order:
 - i) The Australian
 - ii) The Australian Financial Review
 - iii) The Sydney Morning Herald (Sydney)
 - iv) The Daily Telegraph (Sydney)
 - v) The Age (Melbourne)
 - vi) The Herald-Sun (Melbourne)
 - vii) The Advertiser (Adelaide)
 - viii) The West Australian (Perth)
 - ix) The Courier - Mail (Brisbane)

x) The Mercury (Hobart).

The Advertisement must:

- (a) not be smaller than one tabloid page;
- (b) state clearly and prominently that the Advertisement is published because the Takeovers Panel has found that unacceptable circumstances exist requiring (Party) to correct statements made it;
- (c) identify the statements found by the Panel to be deficient;
- (d) set out clearly and prominently the deficiencies found by the Panel;
- (e) set out clearly the accurate information, based on the Panel's findings; and
- (f) state that, in accordance with the Panel's requirements, everyone to whom offers were made under the bid will be sent a supplementary (bidder's) statement and that the offer period under the bid will be extended so that it ends not less than 14 days after the supplementary (bidder's) statement is sent to offerees.

- 6) (Party) give to the Panel a printer's proof of the proposed Advertisement, showing all art work and design features as well as the relevant text, not less than two business days before the last time at which changes to the Advertisement may be notified to the publisher. (Party) must not issue an advertisement in purported compliance with order (5) until the Panel has informed it that the form of the Advertisement is considered by the Panel to be appropriate and to comply with this order.

Unwinding share dealings

- 7) Each transaction in (target) securities which has been effected on or reported to the financial market conducted by Australian Stock Exchange Limited after [time] on [date] be cancelled.

Suspension of trading

- 8) Trading in securities of (target) on the financial market conducted by Australian Stock Exchange Limited be suspended until the end of the business day after the publication of the Advertisement.

Withdrawal right

- 9) (Party) give each person who accepted an offer made under the (party)'s bid and whose acceptance was received by (Party) after [date] and before the day three business days after the first publication of the Advertisement, the right to withdraw their acceptance. Sections 650D(1)(a)(ii) and 650E (2) to (6) (inclusive) apply to this right as if references to the notice of variation were to the supplementary statement prepared under order (1).