

Public Consultation Response Statement dated 14 May 2004

1. INTRODUCTION

- 1.1. On 27 February 2004, the Takeovers Panel released for public comment a draft Guidance Note on Correction of Takeovers Documents (GN). Comments were due by 8 April 2004.
- 1.2. This paper sets out the Panel's response to the public consultation process.
- 1.3. The Panel received submissions from Australian Stock Exchange Limited, Securities Institute, Law Council of Australia, Deacons and McCullough Robertson Lawyers in response to the draft Guidance Note. The Panel wishes to express its gratitude to each of these organisations for their valuable feedback.
- 1.4. Section 2 below sets specific comments on particular issues in the GN.
- 1.5. All four respondents broadly supported the GN.
- 1.6. References to sections in this statement are references to the *Corporations Act* (Cth) 2001.

2. SPECIFIC COMMENTS

The comments in this section set out material comments received on specific paragraphs or issues in the GN. The Panel's response is set out alongside the comment.

No.	Para.	Comment	Panel response
Issue: Cancellation of market transactions			
1.	18 Order 7	<p>The fifth bullet point in paragraph 18 states that it may be desirable for the Panel to order that on-market transactions be reversed.</p> <p>One respondent stated that it considered that only exceptional circumstances would justify the Panel making an order to reverse on-market transactions between market participants who are not associated with the parties before the Panel proceedings. Two respondents considered that generally, such an event would be likely to unfairly prejudice persons and particularly innocent third parties who would not have an opportunity to present their own position to the Panel.</p> <p>It was suggested that order 7 be redrafted to refer to specific transactions.</p> <p>It was further suggested that the Panel not consider such an order until it has first consulted with ASX and assessed the effect of unwinding share dealings before it makes such an order.</p>	<p>The Panel is required to give persons to whom a proposed order relates an opportunity to make submissions to the Panel before making the order (subsection 657D(1)). In the case of a general order cancelling contracts made on the stock market, the Panel would be likely to follow the practice adopted by the Review Panel in <i>BreakFree 04R</i> [2003] ATP 42 and make a public release of the proposed order and invite submissions on it. It should be noted that subsection 657D(1) does not require the Panel to form the view that no person would be prejudiced by an order but rather it prevents the Panel from making the order if it has reached the view, after giving the relevant persons and opportunity to make submissions, that the prejudice that a person may suffer would be "unfair".</p> <p>However, if the Panel has formed the view that the market in the relevant shares has been trading in a fundamentally misinformed state, any prejudice that might be suffered by particular persons is likely to be outweighed by the damage suffered by the market as a whole and by the counterparties to the relevant transactions. In such a case, the requirement that the Panel's orders "protect the rights or interests of" persons affected by the circumstances (subsection 657D(2)(a)) may require that the entire market in the relevant securities</p>

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			<p>be taken back to the position it was in prior to it being affected by misinformation. In these unusual cases, any prejudice suffered by individual parties is unlikely to be regarded by the Panel as being "unfair". The position would be like those which faced the Courts in <i>NCSC v Monarch Petroleum NL</i> (1984) 2 ACLC 256 and <i>ASC v Mount Burgess Gold Mining Co NL</i> (1994) 13 ACLC 271 and the Panel would deal with it in much the same way, subject to complying with its requirements to afford persons who might be affected by the order an opportunity to make submissions (which might include ASX in particular cases).</p> <p>Where particular transactions with particular classes of transaction has been identified by the Panel as being the only ones affected by the particular misinformation, any order would be limited to those transactions. An example of this, in the context of a different set of circumstances giving rise to unacceptability, is <i>Pinnacle VRB Ltd No 11</i> [2001] ATP 23.</p> <p>The Guidance Note has been amended to reflect this discussion.</p>
Issue: Comparable orders for non-bidders 90			
2.	19	<p>Paragraph 19 states that although the draft orders focus on a defective bidder's statement, comparable orders maybe attracted by a contravention of the information principle by others.</p> <p>One respondent indicated that it may be difficult for the Panel to find equally effective</p>	<p>A footnote indicating some possibilities relating to non-bidders and how advantages acquired by them might be dealt with by the Panel has been included, making it clear that these are only examples and in no way fetter the Panel's capacity to deal with any commercial advantage that any person may obtain as a consequence of an infraction of the information principle.</p>

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		<p>measures to reverse the commercial advantage obtained by non-bidders, ie. it is difficult to think of equivalents, in the case of breach by a target, to orders requiring a bidder to extend the offer period or to give withdrawal rights.</p> <p>It was suggested that if the Panel provided examples of orders it may consider in the case of a serious breach by a target, that should help to prevent any perception that the Panel might be "tougher" on bidders than it is on targets.</p>	
Issue: Suspension of deadlines			
3.	20	<p>Paragraph 20 states that even if contracts require certain things to be done by specific dates this would not, in suitable cases, prevent the Panel from making the kinds of orders set out in the GN. For example, the Panel may require the parties to contracts to suspend relevant deadlines to allow for the re-establishment of an informed, competitive and efficient market.</p> <p>One respondent suggests that further examples of the things that may be done by specific dates in contracts should be included in paragraph 20.</p>	<p>The Panel does not consider that examples in this case would assist - the point is that the Panel will not allow these sorts of considerations to deflect it from making proper orders to rectify the effects of infractions of the information principle.</p>

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Issue: The persistent critic - relevance of parties' behaviour to orders			
4.	21 - 24	One respondent suggested that this section simply be headed "The critic". The basis for this suggestion is that it is important for the critic to resolve information difficulties directly with the other commercial party. It is vital that the challenging of the adequacy of takeovers documents is not persistently and intentionally used in a tactical manner to gain competitive advantage.	This suggestion has been accepted.
5.	21	Another respondent considered that the Panel should ensure that critics have a positive obligation to provide lists of information deficiencies and to use cooperative resolution measures as a prerequisite to initiating Panel proceedings. This could be achieved by requiring an applicant to confirm these matters in its application to the Panel.	The Panel considers that this is not an appropriate condition precedent for it to impose on the making of an application, particularly as the Act confers standing to do so on any person "whose interests are affected by the relevant circumstances". However, this may be a factor considered if the Panel decides to make orders. Further, in the context of the review of the Panel's Procedural Rules, consideration will be given to whether an application should be required to specify what acts have been taken by the parties to inform each other of the issues raised in the application and to seek to resolve any disagreement between the parties by negotiation.
6.	23	One respondent suggested that paragraph 23 should be reworded to clarify guidance regarding circumstances where other parties may have access to relevant information and how this information should be made available to shareholders and the market. This is	This paragraph has been amended to take account of this comment.

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		suggested to ensure that bidders and targets do not have available methods where by they may be able to transfer responsibility to other parties for adequacy of disclosure.	
7.	24	<p>It was questioned whether the Panel would be justified in making “less strict” orders simply because of the behaviour of the parties and suggested that the example given in paragraph 24 may not be appropriate.</p> <p>It was suggested that the Panel make orders it thinks appropriate to meet the objectives of section 657D(2)(a) and (b) and then where necessary address the behaviour of the parties separately through other orders (including costs orders).</p>	This paragraph has been amended to take account of this comment.
Issue: General disclosure – corrective advertising			
8.	Order 5	Draft order 5 requires an advertisement to be published. One respondent suggested that as currently drafted, order 5 has the effect of shifting the focus from the merit and value components of the offeror’s bid to the inference that the bid is therefore tainted. It was suggested that this order should focus on giving the market the required information in a dispassionate fashion and the text of a revised order was provided.	This order has not been amended. The Panel considers that for corrective advertising to be effective, the deficiencies found by the Panel need to be sufficiently identified. Refer to paragraph 14 of the GN.

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Issue: Suspension of trading			
9.	Order 8	It was suggested by one respondent that order 8 does not appear to be within the power of the Panel having regard to sub-section 657D(1). Having regard to subsection 657D(2), which specifies the type of orders which the Panel can make, the literal effect of the order as drafted, is interpreted as an order to ASX to suspend trading. The wording should be amended so that the thrust of the order is directed to the relevant party (target) to apply for suspension of trading in the (target's securities) ie. pursuant to ASX listing rule 17.2.	The order has not been amended - in extreme cases the Panel may make such an order, although as indicated in [18] it will seek to cooperate with relevant stock exchanges to ensure that the correct remedy is applied with the least disruption to "innocent" transactions.
Issue: Withdrawal right			
10.	Order 9	Draft order 9 requires persons who have accepted an offer under a bid to be provided with a right to withdraw their acceptance. It was suggested that the order be amended to make it clear that those persons are to be given written notice of their right.	The draft order has not been amended - the second sentence in order 9 means that the supplementary statement will contain notification of the withdrawal right.
Issue: Relationship to guidance note 5 (GN 5)			
11.		One respondent suggested that there is a reasonable amount of overlap with this guidance note and GN 5, because both guidance notes deal with the approach a "critic" should adopt in complaining about	Paragraph 21 of the Guidance Note has been amended to make reference to GN 5. GN 5 will be revised shortly and we will look at adding cross-referencing to GN 16.

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		<p>takeover documents.</p> <p>It was suggested that consideration be given to either combining the two guidance notes, including cross-references between the documents and providing more guidance in terms of balancing what appear to be competing tensions of the preferred approach of commercially resolving issues and that of initiating panel proceedings.</p> <p>Specifically, one respondent suggested that the views of the Panel in paragraph 21 of the draft GN are inconsistent with the Panel's policy in paragraph 5.3 of GN 5 which states:</p> <p><i>"It is important to note that the longer the parties take to negotiate between themselves, the less time there is for the Panel to consider the remaining issues before the bidder is entitled to post the statement. An application for interim relief at short notice prejudices the ability of the Panel to fully consider the issues before it must make a decision whether to restrain dispatch. Therefore it may prejudice the applicant."</i></p>	

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Issue: Private rulings			
12.		One respondent suggested that to facilitate the cooperative resolution of information difficulties by commercial parties, the Panel should provide commercial parties with the ability to apply to the Panel to have the Panel confirm that the resolution reached does not constitute unacceptable circumstances. It was suggested that a practice of the Panel issuing non-binding determinations in such circumstances would be a welcome start.	The provision of rulings by the Panel has been debated for some time. The current view of the Panel is that under existing legislation it should not provide a binding ruling on a proposed transaction. There is no current proposal to amend the Act to confer a power and institute a procedure for fixing rulings and the Panel is not inclined to manipulate existing procedures.

The Panel's website on www.takeovers.gov.au/content/guidance/corrective_statements.asp sets out in full the Guidance Note on Corrective Statements as amended by the Panel following the public consultation process.