



Takeovers Panel

Guidance Note 5: Specific Remedies – Information Deficiencies

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Introduction

1. This guidance note has been prepared to assist market participants understand the Panel's approach to remedies for information deficiencies. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
2. The Panel's primary focus is on the quality and accessibility of information for target shareholders and the market. Complete, accurate and relevant information is fundamental to Australian takeover regulation. This is reflected throughout Chapter 6 and in the Panel's approach.¹
3. In this guidance note the Panel discusses possible responses to information deficiencies, namely:
 - (a) restraining dispatch of documents until corrected and
 - (b) subsequent corrective disclosure.
4. This guidance note should be read with GN 4 *Remedies – General*.

¹ See also ASIC RG 25 “Takeovers: false and misleading statements”

Restraining dispatch

5. If disclosure is defective, or there are structural or procedural defects in relation to a bid, a party may seek to restrain dispatch of a document to shareholders.
6. The Panel generally considers that restraining dispatch of a document is not desirable,² but recognises that most bids are open for more than the statutory minimum of one month so a short delay may not cause material harm.
7. The Panel will balance the competing objectives of:
 - (a) ensuring a complete and not misleading document and
 - (b) allowing dispatch, assessing the risk that satisfactory subsequent correction can remove the effects of the incomplete or misleading disclosure in the original document.³
8. The Panel generally will not restrain a party from printing its document and is unlikely to find the relatively small cost of re-printing compelling in the overall takeover.⁴ This is all the more so if proceedings were threatened or commenced before printing. However, the Panel may have more regard to printing costs if the complaint was delayed until after printing.
9. Parties should first seek to negotiate amendments themselves and resolve as many issues as possible before the document is released. The Panel regards this as very important. They may keep the Panel executive informed if they wish, but usually this is not necessary. If negotiations break down, an application to restrain dispatch should be made early enough to give the Panel enough time to consider what course to take before release of the document. Allow five days for this. Short notice of a complaint or of proceedings being initiated may prejudice the ability of the Panel to consider the issues and may prejudice a party. Generally, if the notice has been short the applicant must demonstrate a higher level of alleged harm for the Panel to interfere with dispatch.

Policy considerations

10. The Panel's approach to restraining dispatch of takeover documents is guided by the following considerations:
 - (a) a purpose of the Panel is expressly to reduce tactical litigation, which frequent or routine delaying of documents encourages

² For example, *Patrick Corporation Limited 02* [2006] ATP 10

³ *Alinta Limited 02* [2006] ATP 14 at [85]

⁴ For example, *Sydney Gas Ltd 01* [2006] ATP 9 at [29]

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- (b) documents should be complete and not misleading when released. The Panel prefers that information is provided in fewer, comprehensive and comprehensible documents, rather than in correcting, supplementary documents.⁵ Generally speaking, the information test is - what would offerees and their advisers reasonably expect to be told to make informed investment decisions?
- (c) whether the information deficiency can be adequately remedied by supplementary disclosure and other relief (eg, extension of the closing date of the bid)
- (d) whether there are incorrect statements or omissions in the document.⁶ It may be easier to remedy an omission subsequently
- (e) the costs involved
- (f) the likely length of the delay. The shorter the delay the less harm is likely to be suffered
- (g) the incentive for parties to co-operate before documents are dispatched and
- (h) whether parties have demonstrated good faith and made a genuine attempt to resolve the issues.

Process considerations

11. A party that thinks it may apply at short notice for interim relief to restrain dispatch should advise the Panel executive as far in advance as possible. Discussions on the practical and logistical aspects of the application will be treated as confidential.⁷ Progress updates would then be useful.⁸ Note that views expressed by the executive do not bind the Panel.

⁵ In *Sydney Gas OI* [2006] ATP 9 at [35] the Panel said:

"The Panel does not intend to lay down a rule to the effect that there should only ever be one document when the need for change is known at the time of the issue of the bidder's statement. But when the need is known, and the corrections are voluminous or significant, the bidder must have sound reasons for not consolidating the information into one comprehensive and comprehensible document and must present the supplementary document in a clear and not misleading manner...."

⁶ An omission can be misleading: *Magna Pacific (Holdings) Ltd* [2007] ATP 02. A factually true statement can be misleading: *ASIC v National Exchange Pty Ltd* [2004] FCAFC 90

⁷ Section 127 of the ASIC Act

⁸ This may be done by copying correspondence between the parties to the Panel executive. The correspondence may be forwarded to the sitting Panel if the application proceeds

Content of application

12. Applications for restraint of dispatch of documents should clearly set out:
 - (a) the deficiencies, identifying each as omission or misstatement, and explaining why it is a deficiency
 - (b) the harm likely to be done by dispatching the document and why supplementary disclosure would be inadequate
 - (c) the harm likely to be done if dispatch is restrained and
 - (d) the negotiations (or attempts) to resolve the issues, and how much longer the applicant considers is needed for negotiation.

Subsequent corrective disclosure

13. Corrective disclosure is one of the main tools the Panel has to remedy unacceptable circumstances. To avoid creating a misleading impression that may be hard to dislodge, if possible corrective disclosure should be received by shareholders no later than the deficient information.⁹
14. However that is not always possible. When considering whether subsequent corrective disclosure is the appropriate remedy, the Panel looks to ensure that timely, comprehensible information is provided to shareholders to correct any information deficiency.
15. Subsequent corrective disclosure alone may not adequately get a bid back on track if an information deficiency was deliberate, for example to gain a tactical advantage.
16. In making orders the Panel seeks (among other things) to:
 - (a) identify and correct deficiencies. It is normally insufficient to present only the corrected information. Unless deficiencies are identified, the correction may not be sufficiently specific to be effective and
 - (b) as far as possible, get the bid back on track and remove any advantage. For example, acquisitions while shareholders and the market were inadequately informed may need to be reversed.¹⁰ There is no principle that prevents orders taking away the benefit of commercial momentum obtained from unacceptable circumstances.¹¹

⁹ For example, *Volante Group Limited* [2006] ATP 2

¹⁰ As in *Sydney Gas Ltd 01* [2006] ATP 9

¹¹ For example, *Pinnacle 11* [2001] ATP 23, *Ranger Minerals* [2002] ATP 11

What standard?

17. A shareholder's decision in a takeover is similar to the shareholder's initial investment decision, so the quality of disclosure under Chapter 6 should be broadly comparable (subject to context) to that under Chapter 6D or Part 7.9.¹² The Panel seeks to ensure that disclosure standards similar to those for a disclosure document or PDS under the Corporations Act are applied to:
- bidder's statements
 - target's statements
 - market announcements relating to a bid (eg, to ASX)
 - media releases relating to a bid
 - letters to shareholders relating to a bid
 - other documents issued under the Corporations Act relating to a bid and
 - other documents issued under the Corporations Act for other control transactions (eg, explanatory statement for meeting to approve an acquisition under section 611 item 7).
18. Shareholders also need sufficient time to consider a proposal.¹³ How much time depends in part on the amount and complexity of the information concerned. The Panel will also consider whether the bid period should be extended to allow the target (in its target's statement), directors of the target¹⁴ or shareholders sufficient time.

Format of corrective statements

19. The format will largely depend on the nature of the information and the circumstances. The format may be:
- (a) replacement pages incorporating the corrective information. This may be in mark-up or clean copy or
 - (b) a separate document with the corrective information.
20. An explanation of what was deficient and why is usually also required.

¹² In some circumstances it is identical: s636(1)(g)

¹³ Section 602(b)(ii). And see *Patrick Corporation Ltd 02* [2006] ATP 10 at [27]

¹⁴ Section 602(b) applies to directors as well as shareholders, recognised in *Southcorp Limited* [2005] ATP 4

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21. Once the Panel has commenced proceedings, in most cases there will be the following additional requirements:
 - (a) the form and content of the corrective disclosure must be approved by the Panel
 - (b) a statement must be included that the corrective disclosure was required by the Panel and
 - (c) the Panel will give directions on delivery of the corrective disclosure (eg, by posting to all shareholders).
22. An example order is in Attachment A.

Negotiations

23. The Panel prefers that information deficiencies are identified promptly to the party responsible, rather than through the press or in an application to the Panel. Before an application is made, there is no need to copy the Panel executive with correspondence between the parties.
24. The likelihood of a successful application is not enhanced by making numerous claims, compared to settling issues and only raising the remaining important issues. Nor is it enhanced by numerous claims in the hope that some will be accepted by the Panel.¹⁵
25. To give parties as much time as possible, if an application is made and negotiations are continuing, the Panel may decide to conduct proceedings but delay issuing a brief until it is clear that negotiation will not resolve the matter.¹⁶
26. The timing of the initial complaint, response and Panel application are relevant to whether the Panel will conduct proceedings, make interim orders, make costs orders etc. A party will not prejudice its position in Panel proceedings by seeking to resolve information deficiencies (or other disputes) by negotiation.
27. The Panel expects parties to accept reasonable criticism of their documents and to offer appropriate remedial action promptly. Frequently, such remedial action will be less onerous than an order.

Example: Agreed corrections may be included in a replacement bidder's statement if the bidder's statement has not yet been dispatched to shareholders.

¹⁵ It will normally be sufficient, if making the case succinctly and on point, to detail the application in approximately 10 pages

¹⁶ In *Infratil Australia Ltd 02* [2000] ATP 1, the Panel commenced proceedings then accepted undertakings as to dispatch of an amending document. In *Alpha Healthcare Limited* [2001] ATP 13, the parties co-operated to extend the time for dispatch. ASIC RG 159 refers to a class order (00/344) to allow a replacement bidder's statement: [159.48]-[159.59]

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This is so even where the target has other unresolved issues. The Panel considers that section 647 should be treated as complied with by dispatch of the replacement bidder's statement¹⁷ and it is often appropriate for the target to consent under ASIC Class Order 00/344 (or equivalent) without alteration to the bid timetable. If the changes are extensive, the bidder may agree to allow the target additional time as well.

28. Parties should bear in mind who is in the best position to provide relevant information. For instance, the Panel might form the view that the unacceptable circumstances require the target to make some disclosure as well as (or instead of) the bidder.
29. Parties should not abandon negotiations because an application to the Panel has been made, and resolution will often lead to the sitting Panel consenting to withdrawal of the proceedings.¹⁸ Moreover, the Panel will facilitate commercial settlements that address unacceptable circumstances to the Panel's satisfaction.

Confidentiality and media canvassing

30. The Panel has procedural rules:
 - (a) requiring parties to respect confidential information provided to them in proceedings¹⁹ and
 - (b) limiting media canvassing of the issues before the Panel.²⁰
31. The rules overlap but are conceptually distinct and seek to protect different interests.
32. The rules assist prompt and efficient resolution of disputes. In particular, the use of the media to publicise submissions or arguments before the Panel, or even to publicise the possibility of an application being made, is unlikely to assist in the speedy resolution of disputes and may itself constitute unacceptable circumstances. It also suggests that the proceedings are tactical rather than arising from a genuine concern with the accuracy of information.

¹⁷ If the target is listed, section 647 requires only that a copy of a supplementary statement be given to the other party, ASIC and the market, not that it be sent to shareholders. The Panel may require a supplementary bidder's statement to be sent to shareholders if the information deficiencies were significant

¹⁸ See Rule 14 of the Panel's *Rules for Proceedings*; *SSH Medical Limited [2003] ATP 32* at [52]

¹⁹ See Rule 8 of the *Rules for Proceedings*, especially rule 8.5. The Panel allows confidential information to be withheld from other parties only in exceptional circumstances and only with prior approval

²⁰ See Rule 12. It restricts, without considering issues of confidentiality, the publication or causing of media reports during Panel proceedings and provides guidance on appropriate media comment once proceedings have been completed

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33. Any announcement about an application (its making, substance and withdrawal) should be scrupulously balanced and neutral about the facts and the merits of each party's position. The Panel's general approach is that announcements concerning ongoing applications should only be made where required for an informed market.
34. The Panel does not discourage the publication of additional or supplementary information by a party.

Publication History

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Related material

GN 4: Remedies - General

Attachment A

Example of corrective disclosure order terms

(The particular orders will depend on the facts of the case)

A corrective disclosure order may include terms to the following effect:

1. **Corrective disclosure.** (Party) prepare, in a form and content approved by the Panel, a [supplementary bidder's/ target's statement] that prominently:

- (a) corrects the following information deficiency:

Note – the information is identified. The Panel may ask to see a printer's proof showing all art work and design features as well as the text.

- (b) identifies the statements found to be deficient and why
- (c) states that the corrective disclosure was required by the Panel and
- (d) discloses [the offer period has been extended until a set date]

Note – as required. If required, also includes the material required by section 650D

2. The corrective disclosure must be [(a) released on ASX, (b) sent to everyone to whom offers were made in the same manner as the offers were sent].

Note – as required.

3. **Extension.** (Party) extend the offer period to [date].

Note – as required.

4. **Advertising.** (Party) publish an advertisement in a form and content approved by the Panel, in the following newspapers:

Note – possibilities as relevant include: The Australian; Australian Financial Review; Sydney Morning Herald (Sydney); Daily Telegraph (Sydney); Age (Melbourne); Herald-Sun (Melbourne); Advertiser (Adelaide); West Australian (Perth); Courier Mail (Brisbane); Mercury (Hobart).

The Panel may ask to see a printer's proof of the advertisements showing all art work and design features as well as the text.

5. The advertisement must:
 - (a) be no smaller than [one half page]
 - (b) state clearly and prominently that it is published because the Takeovers Panel has found the information to be deficient
 - (c) state that everyone to whom offers were made under the bid will be sent a [supplementary bidder's/ target's statement]

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Note: alternatively - identify the statements found by the Panel to be deficient and why and set out clearly the correct information.

- (d) state that the offer period under the bid will be extended to [date]
6. **Dealings.** (Party) give each person who accepted the offer after [date] and before [date – eg, 3 business days after the publication of the advertisement], the right to withdraw their acceptance.

Note - sections 650E (2) to (6) may be ordered to apply as if references to the 'notice of variation' were to the supplementary statement.

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

Note - the Panel will seek to co-operate with the market operator and ASIC to ensure the least disruption to the market.

This order assumes that no interim order has been granted by the Panel suspending settlement through the CHESSE system of transactions effected during the Panel's proceedings.

It may be possible to limit the order to particular transactions or classes of transactions affected by the unacceptability²¹

8. **Suspension of trading.** Trading in securities of (target) on the market conducted by [ASX] be suspended until the end of the business day after the publication of the advertisement.

Note - this will only be necessary in extreme cases where it is likely that mischief will occur which cannot be dealt with another way.

²¹ This was possible, for example, in *Pinnacle VRB Limited No 11* [2001] ATP 23 where the particular unacceptable circumstances only affected certain acceptances of an off-market bid, in which case the order only cancelled the contracts affected by those circumstances.