

GUIDANCE NOTE 6: MINIMUM PRICE REQUIREMENT [S621(3) & (4)]

Important Note

This Guidance Note was issued on an interim basis pending the receipt of submissions. After it was issued, ASIC issued Policy Statement 163 "Takeovers: Minimum Bid Price Principle - s621" (PS 163) and Class Order 00/2338. The Panel considers that the policy of ASIC set out in PS 163 as embodying and elaborating the guidance in this Guidance Note and advises bidders that, except in unusual circumstances, it will regard compliance by them with PS 163 as also complying with the Panel's policy. Given this, the Panel is not at the moment actively considering making a rule in this area as contemplated in paragraph [6.18], and accordingly, this Guidance Note has not been updated. It remains on issue so that bidders and ASIC may be aware of the Panel's approach to this issue. This is likely to be relevant if a person seeks review under section 656A of a decision of ASIC relating to this area or if the Panel needs to consider whether there are unacceptable circumstances and the situation is unusual.

Bidders should also consider the Panel's decisions in:

Email Limited (No 3) [2000] ATP 5, 18 ACLC 708

Taipan Resources NL (No 10) [2001] ATP 5

Normandy Mining Limited (No 6) [2001] ATP 32

Overview

Corporations Act s621(3) requires that the consideration offered under a takeover bid equal or exceed the maximum consideration that the bidder or an associate provided or agreed to provide under any purchase or agreement within the four months before the date of the bid. It applies to both cash and non-cash consideration and is a fundamental provision giving effect to the principle set out in paragraph 602(c) that shareholders all have a reasonable and equal opportunity to participate in bid benefits.

Subsection 621(4) requires the bid consideration to be valued as at the day the bidder starts to post its offers. This should generally be done by reference to the market price of the consideration offered if it is in the form of quoted securities. In exceptional cases a different basis of valuation may need to be taken into account. The Panel prefers the use of weighted average market prices over a short period: the 2 trading days before a relevant date is usually suitable.

Bid documents needed to be printed before they can be posted and, in order to do that, the valuation of the consideration offered has to be finalised. Accordingly, the Panel indicates that, because printing may take up to five business days, it will

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generally not regard it as unacceptable for a bidder to finalise its bid consideration using the weighted average market prices over 2 full trading days ending up to 5 business days before posting of the document. Bidders should not use market prices earlier than reasonably necessary for printing and related purposes or to exploit timing to reduce the consideration. Strict compliance with subsection 621(3) may not mean that circumstances will not be unacceptable -- for example, if the bidder's share price had been artificially supported.

Introduction

- 6.1 This policy is to guide bidders on the matters the Takeovers Panel will take into account in deciding whether to declare circumstances unacceptable or to make orders, where a bidder fails to comply with the letter or spirit of subsection 621(3) of the Corporations Act 2001 (the Act). It is principally about bidders who offer quoted scrip as consideration, where the bidder or an associate acquired bid class securities in the four months before the bid was made.
- 6.2 The policy deals with when relief is required from strict compliance with the subsection, whether there is any need for Panel rules to supplement it and whether it should be amended to reduce the market exposure of scrip bidders. It also sets out interim guidelines on valuing scrip for the purposes of subsection 621(3).

Uncertainty Issue

- 6.3 Practitioners have told the Panel that they expect difficulties in compliance, because a bidder offering scrip as consideration does not know how much scrip it must offer, until it posts its offers. If the market price falls after it lodges its offer and before it posts it, the bidder may need to increase its bid and amend its bidder's statement accordingly.
- 6.4 Without discounting these concerns, the Panel is of the view that many problems will be overcome in practice by a combination of the appropriate use of averaged market prices in valuing scrip, ASIC's recent policy initiative allowing bidders time to print documents, and ASIC's reserve power to give relief in anomalous cases (the Panel has no power to exempt from subsection 621(3) by making a rule under section 658C).
- 6.5 The Panel will keep the operation of the section under review, however, and if it does cause difficulties in practice, may recommend amendments to bring forward the date at which bid consideration is valued.

The Section

- 6.6 Subsection 621(3) provides that:

'The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.'

- 6.7 Subsection 621(3) is one of the provisions which effect the equality principle set out in paragraph 602(c) of the Act, that:

'as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any

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benefits accruing to the holders under any proposal under which a person would acquire a substantial interest in the company, body or scheme’.

- 6.8 Subsection 621(3) replaces former section 641, which required the price under a cash bid to be not less than the highest price paid by the bidder (or an associate) for bid class shares in the four months before offers were made. It also replaces former subsections 698(2) and (4), which prohibited a bidder (or associate) to give a benefit to a holder of bid class securities during the four months before the bid, unless the bidder was going to offer the same benefit under the bid.
- 6.9 While it works in a different way and extends to non-cash consideration, subsection 621(3) has the same policy objective as the repealed sections: namely, that the bid consideration, when offers are made, be equal in value to the highest consideration given by the bidder (or an associate) over the four months before the bid. This is one of the fundamental requirements of Chapter 6: cf paragraph 612(c).

Mark to Market Rule

- 6.10 Under subsection 621(4), the bid consideration must be valued as at the day the bidder starts to post its offers. Consideration given for bid class securities in the previous four months must be valued as at the day it was given or agreed to be given. The cash equivalent per security of the bid consideration must be not less than the cash equivalent of the highest consideration given in the previous four months. If the bidder is offering quoted scrip, the bidder’s statement must include ‘the market price per security’ of that scrip (paragraph 636(1)(h)(ii)).
- 6.11 In general, quoted scrip should be valued for the purposes of subsection 621(3) by reference to market prices. There must be a reasonable basis to establish that the section has been complied with. In exceptional cases, circumstances will indicate that bases of valuation other than current market prices should be taken into account.
- 6.12 In the Panel’s view, no one sale or quote should be used to determine the value of the bidder’s scrip. In general, it is preferable to take a weighted average of market prices over a short period: the two full trading days immediately before the relevant date would usually be suitable.

The Printing Time Problem

- 6.13 Substantial compliance with subsection 621(3) requires a bidder offering scrip to value the scrip as near as possible to the date that offers are posted. Strict compliance requires it to be valued on the day that offers are posted. This is impractical, as a bidder must finalise the terms of its offers some days

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before it posts them, to leave time to finalise, print and post the offer document and bidder's statement.

- 6.14 The Panel notes ASIC's information release of 7 March 2000, indicating that ASIC will generally allow a bidder to determine its bid consideration two days before posting. The Panel agrees that bidders must be able to finalise their prices some time before posting. In the experience of Panel members, however, printing documents for a scrip bid (which must contain prospectus-type information) in some particular cases may take up to five business days rather than two.
- 6.15 ASIC has power to exempt from subsection 621(3), particularly if it causes difficulties in unusual or anomalous circumstances: for instance, if the market price of a bidder's scrip was manipulated. ASIC has announced that it will consider applications for relief from subsection 621(3), and that it will seek comments on whether clarification or alteration is needed, and whether any such relief should be given by class order. Bidders who meet or anticipate difficulties in complying should contact ASIC.

Policy on Compliance with Subs 621(3)

- 6.16 Accordingly, the Panel would not declare circumstances unacceptable, simply because a bidder, in complying with the section, used a weighted average of market prices over two full trading days, ending up to five business days before posting. A bidder should not use market prices earlier than reasonably necessary for printing and related purposes, or exploit this timing to reduce the consideration.
- 6.17 The Panel may declare the circumstances of a bid unacceptable, even if the bid complies with subsection 621(3), if the bid does not comply with the policy of the section. An example might be if there was evidence that the price of the bidder's scrip had been artificially supported so that the market price was high enough to satisfy the section at the date offers were posted, but fell afterwards. The Panel might declare the circumstances of the bid unacceptable, and order the bidder to increase the amount of scrip it was offering.

Is a Panel Rule Needed?

- 6.18 The Panel is considering whether a rule under section 658C of the Act is needed to clarify the operation of subsections 621(3) and (4), particularly as regards:
- (a) the use and adjustment of market prices in valuing scrip;
 - (b) prices on overseas markets and foreign exchange fluctuations;
 - (c) alternative methods of valuation of quoted scrip;

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- (d) valuing consideration other than quoted scrip;
- (e) whether both of alternative considerations must comply with subsection 621(3).

Publication History

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