



Australian Government

Takeovers Panel

Guidance Note 6 – Minimum bid price

Background	1
Application.....	2
Unacceptable circumstances	2
Remedies.....	3
Publication History	3

Background

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to the minimum bid price requirement in s621(3).¹
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. Section 621(3) says:
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.
4. The section is “fundamental to the policy and operation of Chapter 6”.²
5. ASIC Regulatory Guide 163³ also addresses s621(3), and Class Order 00/2338 applies to quoted securities as bid consideration.⁴ Compliance with RG 163 will generally meet the Panel’s policy.

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

² *Email Limited (No 3)* [2000] ATP 5 at [39]

³ RG 163: “*Takeovers: Minimum Bid Price Principle - s621*” (issued 19/12/00)

Application

6. Section 621(3) applies to both cash and non-cash consideration.
7. Section 621(4) requires non-cash consideration to be valued at the time the offer is made. This means the day the bidder starts to post its offers.⁵
8. Section 621(3) applies to the consideration paid for securities within a class.⁶

Unacceptable circumstances

9. In considering whether unacceptable circumstances exist, the Panel looks at whether the policy of s621(3) and s602 has been met. The Panel does not take a technical approach.⁷ It considers the following factors:
 - (a) whether the bid consideration (cash equivalent⁸) is equal in value to the highest consideration given by the bidder or an associate over the four months before the bid and
 - (b) cash equivalence for quoted scrip is usually measured by reference to the weighted average market price⁹ over 2 full trading days.¹⁰ No single sale or quote should be used. If there has been any risk of market manipulation, another basis may be appropriate.¹¹
10. The Panel recognises the days needed for printing and dispatch, and generally allows up to 5 business days for printing and preparation

⁴ Similar relief may be available on case by case basis for unquoted securities: RG 163.21

⁵ For an application of this, see *Rinker Group Ltd* [2006] ATP 35 at [32]

⁶ *Skywest Ltd* [2004] ATP 10 at [63]: "... The policy underpinning subsection 602(c) requires equality of opportunity between holders of bid class securities; it does not extend to requiring equality of opportunity between different classes of securities, such that holders of Skywest shares should be able to receive equal consideration to that received by Convertible Note holders...."

⁷ In *GoldLink IncomePlus Ltd 02* [2008] ATP 19 the Panel declined to make a declaration where the pre-bid agreement was amended so that no higher consideration could be paid to the pre-bid acceptor than under the bid. See also *Normandy Mining Ltd 06* [2001] ATP 32, *GasNet Australia Ltd* [2006] ATP 22

⁸ In *Email Limited (No 3)* [2000] ATP 5, the valuation of preference shares as part consideration under a bid was taken as the midpoint of the range

⁹ See also RG 163.22

¹⁰ See also RG 163.31

¹¹ This may warrant ASIC relief

prior to posting the documents.¹² Thus, the Panel generally will not consider it unacceptable for a bidder to use the weighted average market prices over 2 full trading days ending up to 5 business days before posting the document.¹³

11. It may also give rise to unacceptable circumstances if the bid consideration is foreign money and the bidder treats the bid as a cash bid.¹⁴

*Example: Bidder offers US dollars, and then buys on-market on ASX in Australian dollars at a price which, according to exchange rates prevailing during the currency of the bid, is a higher price but does not increase its price under the bid.*¹⁵

Remedies

12. The Panel has a wide power to make orders (including remedial orders) if the minimum bid price principle is contravened.¹⁶

Publication History

First Issue	28 March 2000
Reformatted	17 September 2003
Second Issue	12 July 2004 (addition of important note)
Third Issue	6 May 2011

¹² If the bidder is offering quoted scrip, the bidder's statement must include 'the market price per security': s636(1)(h)(ii). ASIC also allows 5 days: RG 163.10 and Class Order CO 00/2338, which has modified s621 so a bidder can value target securities over 2 full trading days ending up to 5 business days before the date of the bid

¹³ *Taipan Resources NL (No 10)* [2001] ATP 5 at [104]

¹⁴ The Panel would be likely to treat foreign money as non-cash consideration, since foreign money must be exchanged before Australian shareholders are able to spend it and its value varies over time.

¹⁵ In *Rinker Group Limited 01* [2006] ATP 35, the Panel did not need to decide this issue as an undertaking not to buy shares on-market was given

¹⁶ In *Taipan Resources NL (No 9)* [2001] ATP 4 the Panel ordered shares which were acquired in contravention of s606 to be divested, one basis being that the acquisition would have required an increased bid price under s621(3). See [2001] ATP 4 at [49]