



## Takeovers Panel

## Guidance Note 16: Correction of Takeover Documents

### **GUIDANCE NOTE 16: CORRECTION OF TAKEOVER DOCUMENTS**

#### **Overview**

This Guidance Note provides takeovers market participants with guidance on circumstances that the Panel is likely to declare to be unacceptable in relation to deficiencies in takeovers documents and how the Panel may use corrective statements to remedy unacceptable circumstances.

The Panel's primary focus is on the quality and accessibility of information going to target shareholders and the market, and remedying in the most appropriate manner any unacceptable circumstances in relation to that information.

The Panel prefers that information be provided in fewer, more comprehensive (and comprehensible) documents. It also prefers a document to be amended before it is distributed rather than to have a complex collage of similar, but differing, messages before shareholders.

The Panel considers that it is desirable, where feasible, that parties agree the form and substance of additional information to be supplied. The Panel is prepared to accept undertakings, agree to withdrawal from proceedings and make orders to facilitate parties reaching and implementing lawful commercial resolutions of disputes, where the agreed manner of resolving the dispute also resolves any unacceptable circumstances to the Panel's satisfaction.

Where a person taking issue with a takeover document (the Critic) has a list of identified information deficiencies in that document, 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 is likely to take into account the timing of any communication of deficiencies (and responses) when assessing such issues as whether or not to commence proceedings, make interim orders, make costs orders etc. In general, a party which has materially delayed communicating with the other side, or delayed in making an application to the Panel, will have a higher burden of proof in convincing the Panel to take action.

Targets and other Critics should bear in mind who is in the best position to provide relevant information. If the best information is likely to be in the hands

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of the target, it is unreasonable for the target to require the bidder to attempt to provide that information from sub-standard sources.

In making orders the Panel will seek among other things to:

- a) deal with deficiencies - the Panel considers that it is inappropriate to present only a corrected version of information without pointing out deficiencies found by the Panel;
- b) get the bid back on track, which may mean taking all parties back to the point where the bid went off track; and
- c) remove any advantage obtained by any party.

### Introduction

16.1. The Takeovers Panel (**Panel**) seeks to ensure that its approach to disclosure issues<sup>1</sup> does not diverge significantly from that of disclosure documents or product disclosure documents under the Corporations Act 2001 (the **Corporations Act**)<sup>2</sup>.

16.2. 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".

16.3. As a concrete example, this Guidance Note uses a defective bidder's statement. However, the principles discussed concerning that example apply equally to other documents, for example:

- a) target's statements;
- b) other documents issued under the Corporations Act for the purposes of a bid;
- c) releases to Australian Stock Exchange Limited (**ASX**);
- d) media releases;
- e) letters to shareholders relating to a bid; and
- f) documents required for other control transactions, such as notices and explanatory statements for the purposes of meetings to approve an acquisition under section 611 item 7.

16.4. The Panel encourages parties to try to resolve disagreements concerning the

<sup>1</sup> For example, see Guidance Note 5 "Restraining dispatch of takeover documents"

<sup>2</sup> In this Guidance Note, statutory references are to the Corporations Act 2001 (Cth), unless it is otherwise indicated.

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completeness and accuracy of information provided to target shareholders and the market promptly and, where possible, without recourse to the Panel's procedures.<sup>3</sup>

### Background Principles

16.5. 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:

- a) of an "efficient, competitive and *informed* market" (paragraph 602(a)); and
- b) that the target's shareholders and the directors "are given enough *information* to enable them to assess the merits of the proposal" (paragraph 602(b)(iii)).

16.6. 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).

16.7. The fundamental position occupied by the "information principle" in takeover regulation is also recognised in the Australian Securities and Investments Commission (ASIC) policy requiring "Truth in Takeovers",<sup>4</sup> which the Panel has broadly adopted in *its* decisions.

16.8. 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). In some circumstances the specific disclosure required by Chapter 6 is identical to that required by Chapter 6D or Part 7.9.<sup>6</sup>

### Less is more

16.9. The Panel considers that it is preferable for information to be provided in fewer, more comprehensive (and comprehensible) documents delivered to target shareholders, rather than either to multiply the numbers of

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<sup>3</sup> If parties have not done so beforehand, they may be asked by the Panel to use their best endeavours to resolve any disclosure issues that they can between themselves. See, for example, Aztec Resources 02 [2006] ATP 30 and Patrick 03 [2006] ATP 12.

<sup>4</sup> ASIC Policy Statement 25 "Takeovers: false and misleading statements".

<sup>6</sup> Paragraph 636(1)(g).

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documents provided or to rely too heavily on the ability of the market and the press to distribute corrective information.<sup>7</sup>

16.10. 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.<sup>8</sup>

16.11. The Panel also considers that, consistent with shareholders having sufficient information, they also need sufficient time to consider a proposal (section 602(b)(ii)).<sup>9</sup> How much time is sufficient depends in part on the volume and 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.<sup>10</sup>

16.12. The Panel notes that section 602(b) applies equally to directors of a target company having adequate time and information to consider a proposal in order to provide their considered views and advice to target shareholders. Therefore, this and other relevant Guidance Notes are intended to ensure that target directors receive adequate information and time to consider it so that they may properly discharge their role of advising their shareholders.<sup>11</sup>

<sup>7</sup> In Sydney Gas 01 [2006] ATP 9 the Panel stated that "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." For further examples, also see the Panel decisions in Brickworks 02 [2001] ATP 24, BigShop 03 [2001] ATP 22, Pinnacle 9 [2001] ATP 25, Vincorp [2001] ATP 6, Alpha Healthcare [2001] ATP 13 and Mildura Co-operative Fruit Company Ltd [2004] ATP 5 at [98].

<sup>8</sup> ASIC Class Order 00/344, ASIC Policy Statement 159 at [159.48] - [159.59], ASIC Policy Statement 25 at [25.63], Infratil 02 [2000] ATP 2 and BreakFree 02 [2003] ATP 30.

<sup>9</sup> The Panel also considers that shareholders need sufficient time to consider the target's response, in particular the target's statement and any supplementary target's statement. See, for example, Patrick 04 [2006] ATP 16.

<sup>10</sup> The Panel will also consider whether the amount, nature and complexity of the information which has to be disclosed is such that the bid period should be extended to allow the target sufficient time to prepare its target's statement.

<sup>11</sup> See, for example, Guidance Note 18 "Takeovers Documents" at [18.4], Southcorp [2005] ATP 4 and Tower Software [2006] ATP 20.

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### Discouraging contravention

16.13. Where there is an information shortfall in the market, the Panel has a further concern that 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 Corporations Act and the policy set out in section 602.

16.14. 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. For example:

- a) acquisitions that occurred while the shareholders and market were inadequately informed may need to be reversed<sup>12</sup> and
- b) other advantages<sup>13</sup> arising while shareholders and the market were inadequately informed may need to be rectified by requiring that shareholders have additional time to consider the corrected information.

16.15. In other words, the Panel considers that “getting the bid back on track”<sup>14</sup> may mean taking all parties back to the point where the bid went off the track.

### Corrective Disclosure

16.16. The Panel’s primary aim is that high quality original documents go to target shareholders and the market without unreasonable delay of takeover bids. The Panel will be guided by the extent and significance of the unacceptable circumstances in determining the appropriate balance between adequate disclosure and the timely conduct of a bid.

16.17. Corrective disclosure is one tool which the Panel has to remedy unacceptable circumstances where the original disclosure falls below the standards set in section 602(a) and 602(b)(iii). When considering whether corrective disclosure is the appropriate remedy, the Panel’s primary aim will be to ensure that information is provided to shareholders in the most easily comprehensible form and in a timely manner, so as to correct most effectively any misinformation.

16.18. The Panel would be concerned if it appeared that a person had included misleading information, or had excluded material information, in the belief

<sup>12</sup> See, for example, *Sydney Gas 01* [2006] ATP 9.

<sup>13</sup> The Panel concluded in Pinnacle 11 [2001] ATP 23 that there was no principle that prevented it making orders that took away the benefit of commercial momentum obtained from unacceptable circumstances. See also Ranger Minerals [2002] ATP 11.

<sup>14</sup> Guidance Note 4 “Remedies and Enforcement” at [4.11]-[4.12].

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that it would gain tactical advantage by putting misleading or deficient material before shareholders and providing corrective disclosure later if its behaviour was complained of to the Panel. In such circumstances, mere corrective disclosure would not adequately get the bid back on track or remove the tactical advantage obtained.

- 16.19. It is sometimes argued by the respondent in favour of corrective disclosure rather than reprinting the document that is complained of, that the cost of reprinting a new document is excessive. However, the Panel is unlikely to find this argument compelling.<sup>15</sup> Generally, unless the Critic has unreasonably delayed its complaint to the respondent or to the Panel, the risk of extra expense incurred by the printing of a document is a decision which the respondent is fully able to decide whether or not it wishes to take. In addition, in the Panel's experience, the cost of printing, although potentially significant, is usually small relative to the other costs of running a takeover bid or defence (let alone the overall bid price).
- 16.20. The Panel also considers that it is 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.

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Format and timing of Corrective Statements

- 16.21. Where it decides that corrective disclosure is an appropriate remedy, the Panel will consider a range of formats when deciding how new or corrective information should be presented to shareholders, depending on the nature and circumstances of the information and the transaction. The types of formats and strategies may include (without being exhaustive):
- a) a complete replacement document;
  - b) a complete replacement page or pages;
  - c) a document containing only the corrective relevant material;
  - d) "clean" replacement material or marked up with corrections to show what had been misleading or omitted;
  - e) a narrative explaining the deficiencies of the previous document and an explanation as to why the information was false, misleading, deficient etc;

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16.15 . Panel decisions sometimes refer to the preparedness of the parties to resolve information deficiencies cooperatively.

**Deleted:** <sup>16</sup> In those decisions, the Panel regarded it as consistent with the policy of the Corporations 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

<sup>15</sup> See, for example, *Sydney Gas 01*.

<sup>17</sup> See, for example, *Volante Group Limited [2006] ATP 2*.

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- f) directions as to how and when the corrective material must be delivered to shareholders; and
  - g) directions as to how material must be presented or packaged in relation to other material.
- 16.22. The Panel will generally require a corrective statement to make a standard set of statements that advise recipients that the statement:
- a) is a corrective statement;
  - b) corrects false, misleading, confusing or inadequate information in the earlier document;
  - c) identifies the issue or information which required correction;
  - d) was made at the request of the Takeovers Panel; and
  - e) was made to correct what would otherwise have been unacceptable circumstances.
23. In the Panel's view, it is highly desirable that any corrective statement be received by target shareholders before or at the same time as they receive the defective statement.<sup>17</sup> The Panel recognises that it may be more difficult for a statement designed to correct false or misleading information in a defective statement to achieve that outcome if it is received by target shareholders in a separate document after a misleading impression has already been created in the minds of target shareholders.

Restraining dispatch

- 16.23. The Panel is concerned that frequent or routine delaying of documents by it may encourage tactical applications to it. It is conscious that the Panel's role was materially reformed in 2000 expressly to address concerns about tactical litigation under the previous court based regime.
- 16.24. The Panel is frequently requested to make interim orders restraining the dispatch of a document. The Panel generally considers that restraining dispatch of a document is not a desirable outcome.<sup>18</sup>
- 16.25. However, the Panel is mindful that the vast majority of takeovers in Australia are open for acceptance for longer than the statutory minimum of one month. Therefore, delay of dispatch of a small number of days at the outset of a takeover bid is unlikely to cause material harm to a takeover or to inconvenience shareholders. Where it appears to the Panel that a small number of days delay, for example to conclude Panel proceedings, have the potential for a materially more accurate, or comprehensible, presentation of

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<sup>18</sup> See, for example, *Alinta 02* [2006] ATP 14.

information to shareholders, it will consider making interim orders restraining dispatch of a document or, in serious enough cases, orders requiring a completely new document to be despatched.<sup>19</sup> However, potential parties before the Panel should keep in mind the Panel's comment above about making tactical applications.

Restraining printing of a document

- 16.26. Frequently a Critic will ask the other party to delay printing of the final document until the issues in contention between them have been resolved, or until a Panel application has been dealt with. Similarly, the Panel is frequently requested to make interim orders restraining the printing of a document.
- 16.27. In general, the Panel believes that a respondent should be at liberty to form its own view as to the likely outcome of the Panel's proceedings in relation to its document and to print that document bearing the risk that it may need to be pulped if the Panel finds the disclosure contained in it to be inadequate. The Panel will not generally, therefore, be inclined to restrain the respondent from printing its document.
- 16.28. However, if the respondent elects to print a document the subject of current Panel proceedings or in the knowledge that such proceedings are likely to be commenced, the Panel will generally not take into account any inconvenience or cost to the respondent in deciding whether or not to require the document to be pulped and/or reprinted.<sup>20</sup>

The amicable solution

- 16.29. Panel decisions sometimes refer to the preparedness of the parties to resolve alleged information deficiencies cooperatively.<sup>21</sup> In those decisions, the Panel regarded it as consistent with the policy of the Corporations 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 also considers that the additional information should be clearly identifiable in the replacement or supplementary statement to show what had been misleading or omitted.
- 16.30. The Panel is prepared to facilitate the lawful carrying out of such commercial settlements and otherwise to facilitate the parties reaching and implementing such commercial arrangements, ~~where they address any unacceptable circumstances to the Panel's satisfaction.~~ For example, it is

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<sup>19</sup> See, for example, the Panel's decision in *Sydney Gas 01* [2006] ATP 9.

<sup>20</sup> See, for example, *Sydney Gas 01*.

<sup>21</sup> See, for example, *Patrick 03*, *BigShop 03*, *Alpha Healthcare*, *SSH Medical* [2003] ATP 32, *BreakFree 03* [2003] ATP 38.

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prepared to accept undertakings, agree to withdrawal from proceedings and make orders (which may in effect be consent orders), including interim orders, where that is consistent with speedy and fair resolution of the dispute and any unacceptable circumstances are adequately redressed.

- 16.31. Where the target is listed, section 647 requires only that a copy of a supplementary statement be given to the other party, ASIC and the relevant stock exchange. It does not require that copies be sent to shareholders. In the Panel's view,<sup>22</sup> 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

- 16.32. 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.

- 16.33. There are several points to note. The example Order:

- a) deals with a serious deficiency in a bidder's statement - in other cases the Order will need to be amended;
- b) 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;
- c) 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 the market - the Order also assumes that no interim order has been granted by the Panel suspending settlement through the CHESS system of transactions effected during the Panel's proceeding;

<sup>22</sup> As stated for example, in *Taipan 10* [2001] ATP 5 and *Ranger Minerals*. See also ASIC Policy Statement 25 at [25.66] and ASIC PS 159 at [159.63].

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- seeks to remove 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, rather than a default or standard order. The precise order to be made in a particular case will depend on the facts of that case: for instance, the facts may not require reversal of on-market transactions, or 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. Similarly, undertakings offered by parties and accepted by the Panel may remove the need to make orders (for example, by the relevant parties seeking suspension of trading on its listing market).

16.34. The Panel emphasises that, although the Order focuses on a defective bidder's statement, comparable orders may be made to address contraventions of the information principle in other circumstances, since:

- a) all infractions of the information principle are potentially serious; and
- b) 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.

16.35. In addition to disclosure orders, the Panel may make any orders needed to protect the rights of innocent parties or the integrity of the market or to reverse any unfair advantage obtained - for example orders to unwind:

- (a) all acquisitions occurring during the period of misinformation; or
- (b) any acquisitions (on- or off-market) by a rival bidder; or
- (c) share buy-backs; or
- (d) issues (or exercises of options or other rights attached to shares) which may have been influenced by the deficient state of information.

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16.36. 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.

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16.37. The Panel notes that 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 be reversed or that trading in the affected securities be halted or suspended while an information defect is remedied. The Panel considers that this action will only be necessary in extreme cases where it is likely that mischief which cannot be dealt with in another way has or may occur because those transactions occurred in a market affected by serious informational deficiencies.

16.38. The Panel also notes that it will consider any prejudice that such an order may cause and whether it would be "unfair",<sup>26</sup> as required by subsection 657D(1). Where it is considering making such an order, the Panel will seek to co-operate with the relevant financial market operator and regulator to ensure that the correct remedy is applied with the least disruption to the market generally and to "innocent" transactions. In some cases, it may be possible to limit the order to particular transactions or classes of transactions affected by the unacceptability;<sup>27</sup>

#### **The Critic**

16.39. Sometimes 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.<sup>28</sup> It recognises, however, that there is a balance which needs to be struck in this, as negotiations may reduce the time

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<sup>26</sup> *NCSC v Monarch Petroleum NL* [1984] VR 733, 8 ACLR 785, 2 ACLC 256; *ASC v Mt Burgess Gold Mining Co NL* (1994) 62 FCR 389, 15 ACSR 714, 13 ACLC 271.

<sup>27</sup> 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.

<sup>28</sup> See *Aztec 02* and *Patrick 03*.

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**Correction of Takeover Documents**

available for an application to be made and considered properly by the Panel before a critical date.<sup>29</sup>

16.40. 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 **lodgement** under section 647 of a supplementary bidder's statement).

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16.41. 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 Class Order 00/344 (or any equivalent successor) to the use of the replacement bidder's statement without alteration to the bid timetable.<sup>30</sup> This may be the case even where the target has unresolved issues with the bidder's statement, as supplemented.

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16.42. 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 and 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), the satisfaction or waiver of conditions (if any) 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.

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16.43. In particular, if the best information on a particular issue 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 or unreliable **secondary** sources. In this situation, the Critic must either provide the information itself (for example, in the target's statement) or provide the person responsible for the document with access to the relevant information

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<sup>29</sup> As discussed in Guidance Note 5 "Restraining dispatch of documents" [5.3].

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<sup>30</sup> 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).

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or otherwise make the information generally available (for example, by providing it to ASX under Listing Rule 3.1).

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- 16.44. Which of these will be most appropriate will depend on the particular circumstances of each case; for example, if the Critic is the target and it has prepared and distributed an information memorandum which has led to a further bid being announced, it may be appropriate for the Critic to provide that information memorandum to the first bidder so that the information is provided by that bidder in its bidder's statement. As a general rule, however, 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.<sup>31</sup>

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- 16.45. Also, 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 (without the target's help) to re-establish a properly informed market while the target has not cooperated in the establishment and dispatch of documents with agreed amendments, the Panel will fashion its order accordingly to require any unacceptability to be rectified by the persons in the best position to do so. For instance, the Panel might 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.

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- 16.46. Further, the Panel considers that parties will not prejudice their position in any related Panel proceeding by negotiating and resolving information deficiencies (or other disputes) with another party either before or during the course of a proceeding.

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### Timing of Applications

- 16.47. Critics (and respondents) should ensure that they do not delay unreasonably in their negotiations or in making an application. The time periods in takeovers are short. While the Panel endeavours to work quickly and informally, there are limits as to the time within which it can sensibly consider issues put before it and give parties sensible and reasonable time to make submissions on those issues.
- 16.48. In general, Critics, and their respondents, should take it that the shorter a period that is left between the time of an application and the time at which the Panel must make a decision to act, the higher the onus will be on an applicant to demonstrate the harm which may eventuate if the Panel does not take the action sought. Similarly, a higher onus will be on the applicant to convince the Panel that taking the action sought will not cause material

<sup>31</sup> 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*.

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- 16.49. However, the Panel is also aware that if it merely adopted the policy above, there could be an incentive for the other party to delay the negotiations in order to make the Critic appear to have delayed unreasonably in the Panel's eyes, or that bona fide negotiations took time but still failed to reach agreement. Therefore, the Panel will normally seek to assess the behaviour of both sides when faced with such issues.

**Confidentiality and media canvassing**

- 16.50. The Panel has procedural rules requiring parties to respect the confidentiality of confidential information provided to them by the other parties.<sup>32</sup> 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.

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- 16.51. 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.<sup>33</sup> 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 affect the weight the Panel considers appropriate to give to the submissions of the Critic.

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<sup>32</sup> Confidentiality is the subject of the Panel's 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.

<sup>33</sup> The Panel does not discourage the publication of additional or supplementary information by a party.

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Correction of Takeover Documents

**Publication History**

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## EXAMPLE ORDER

The Panel orders that:

### Supplementary statement

- 1) (Party) prepare a supplementary (bidder's) statement which contains a separate and 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 **[30]** 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 in the same manner as those offers were sent.

### 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:
  - (a) The Australian;
  - (b) The Australian Financial Review;
  - (c) The Sydney Morning Herald (Sydney);
  - (d) The Daily Telegraph (Sydney);
  - (e) The Age (Melbourne);
  - (f) The Herald-Sun (Melbourne);
  - (g) The Advertiser (Adelaide);
  - (h) The West Australian (Perth);
  - (i) The Courier Mail (Brisbane);

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- (j) The Mercury (Hobart); and
- (k) Other relevant regional newspaper (where relevant).

**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 by 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 [30] 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. Paragraph 650D(1)(a)(ii) and sub-sections 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).

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