

GUIDANCE NOTE 18 Takeovers Documents

Overview

Wrap information

The 'marketing' section at the front end of a bidder's statement is often referred to as the 'Wrap Information'. Although now commonly bound into the same booklet, the Wrap Information is, in some documents, still claimed to be separate from the bidder's statement. There has been an argument that section 633 of the Corporations Act does not require a bidder to provide a copy of the Wrap Information to the target and ASIC when it gives them the initial copy of the bidder's statement.

The Panel considers that it would generally constitute unacceptable circumstances for Wrap Information which is intended to persuade target shareholders to accept a takeover bid, and which is intended to be dispatched with the bidder's statement, not to be lodged with the bidder's statement and given to the target company at the same time as the bidder's statement. The Panel considers that target shareholders would reasonably expect to receive their directors' considered views and advice about the bidder's "selling campaign" in the Wrap Information. Giving it to target directors, ASIC and the market only at the time of dispatch of the bidder's statement is unlikely to promote informed acceptance decisions or an efficient competitive and informed market.

One role of Wrap Information which merely "accompanied" bidder's statements in the past has been to allow the bidder to update its message to shareholders to take into account events and developments in the two weeks between lodging and dispatch. The Guidance Note recognises and addresses that fact.

Broker price recommendations

A person sending materials to target security holders may wish to cite broker or analyst valuations or price recommendations in relation to the target's securities. Usually this is done to assert that the offer consideration represents a premium to those valuations or price recommendations.

If the document sent to target shareholders names an individual broker or analyst the consent of that analyst or broker is required. However, if the document contains an average of valuations, the act of aggregating the different values may remove the need for the sender to gain the brokers or analysts' consents.

The Panel considers that broker valuations can be potentially useful for target shareholders. However, there is a risk, particularly where an average of recommendations is used, of target shareholders being misled and unacceptable circumstances arising, unless the recommendation or average is accompanied by sufficient information for security holders to assess the proper weight they should give to the valuation or average. Information regarding potential conflicts of the persons providing the valuations is particularly relevant.

Wrap Information

1. The material to which this Guidance Note refers has commonly been referred to as 'Wrap Information' because previously it was often printed in a separate document which was wrapped around the bidder's statement prior to the bidder's statement being placed in envelopes to be posted to target shareholders. Thus, it was intended to fall within the provision of section 633(6) which requires a bidder to give the target directors a copy of any information it sends with the bidder's statement to target shareholders, when the bidder's statement is posted. Nowadays it is commonly bound into the printed bidder's statement booklet.
2. As stated above, the Wrap Information is the 'marketing' section at the front end of a bidder's statement. Frequently the Wrap Information:
 - (a) contains the bidder's reasons for the target shareholders to accept the bid;
 - (b) is printed in a colourful format, often using graphics;
 - (c) is primary information intended to affect the decision of retail shareholders;
 - (d) repackages information which is already in the bidder's statement;
 - (e) is material about which target shareholders would reasonably expect to receive their directors' considered views;
 - (f) by being presented as Wrap Information rather than in the bidder's statement avoids scrutiny, challenge or rebuttal by the target directors, market commentators and ASIC until after it has been sent to shareholders; and
 - (g) is the part of the document most likely to be read.
3. There has been varying practice by bidders in the past. Some lodged all of the Wrap Information with the bidder's statement, some formally included it in the bidder's statement and some dispatched it with the bidder's statement under section 633(6) without previously giving it to ASIC, ASX or the target.
4. The Panel considers that the Wrap Information is almost invariably "selling" material, intended to be influential on target shareholders' decisions whether or not to accept the bid and is therefore information which should be lodged, and given to target directors, with the bidder's statement, in the form in which it will be provided to shareholders (subject to paragraphs 6 to 9 below)¹. Failure to do so:
 - (a) would go against the purpose of the takeovers provisions set out in section 602(b)(ii) that target directors have a reasonable time to consider a proposal under which a person proposes to acquire a substantial interest in the company;

¹ As long as the copy includes all graphics, in their final size, colour and location, a final, bound printer's version would not necessarily be required, desk-top publishing version would suffice.

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- (b) may inhibit ASIC's proper conduct of its role;
- (c) is likely to constitute a contravention of section 636(1)(m); and
- (d) is likely to constitute misuse of the provisions of section 633(6).

Chairman's letter

5. The Panel does not consider that a Chairman's letter is so intrinsically different in nature to other parts of Wrap Information that it should receive different treatment. A Chairman's letter should be lodged with ASIC and given to the target company with the bidder's statement and the other Wrap Information.

Updating Information

6. One reason given for not providing the Wrap Information with the bidder's statement has been that it needed to be updated to take account of market events, and the market's response to the announcement of the bid and the bidder's statement in the two weeks between lodgement of the bidder's statement and when the bidder's statement could be dispatched to shareholders.
7. The Panel recognises that there will often be market and other developments in that period. However, the bidder withholding the Wrap Information from the target, the market and ASIC until it posts the bidder's statement is not an appropriate solution. Further, in the Panel's experience, the vast majority of Wrap Information can be settled by the time of giving the bidder's statement to the target.
8. The Panel considers that appropriate solutions could include:
 - (a) setting spaces in the Wrap Information designated for updating of limited, specific, and identified, issues or information (for example, recent trading information on the target's securities)²;
 - (b) giving the target and ASIC a corrected bidder's statement under the provisions of ASIC Class Order 00/344; or
 - (c) lodging a supplementary bidder's statement under section 643.
9. If the Wrap Information clearly identifies the type and nature of information which is likely to be updated prior to the dispatch, and that specified information is reasonable in nature and extent, target directors will be prepared for it and the basis for them seeking any additional time to consider it prior to dispatch of the bidder's statement will be materially reduced.
10. It would be good practice for the bidder to provide copies of the updated Wrap Information to the target at the time it signs off on final proofs to the printer.
11. The Panel considers that it would be unacceptable for a bidder to attempt to avoid the requirements of the Corporations Act and this Guidance Note by simply moving the Wrap Information into a supplementary bidder's statement and dispatching it with the original bidder's statement without having given it

² This should be comparable with the updating allowed by ASIC under Class Order 01/1543.

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to the target with the original bidder's statement. The proper role and purpose of a supplementary bidder's statement is to disclose newly occurred or discovered information, not information or content which the bidder preferred to withhold from the target board and ASIC in the original bidder's statement.

Part of, or accompanying, the bidder's statement

12. The Panel notes that the policy set out above is not based on any view as to the implications for liability if the Wrap Information is not formally part of the bidder's statement but rather merely accompanies the bidder's statement. Documents which merely accompany the bidder's statement will lose the potential liability defences set out in section 670D.

Section 636(1)(m)

13. Section 636(1)(m) requires a bidder's statement to set out
"any other information that is material to the making of the decision by a holder of bid class securities whether to accept an offer under the bid" and "is known to the bidder".
14. The Panel considers that the statements, graphs etc. contained in Wrap Information is frequently information which section 636(1)(m) would require to be in the bidder's statement (if not specifically required under another provision), because, almost self-evidently, it is information which the bidder is using to persuade the target shareholders to accept the bid and is therefore information which is "material to the making of the decision by a holder of bid class securities whether to accept an offer under the bid".
15. The Panel is unlikely to be persuaded by arguments that some content in the Wrap Information is not "information" because it is merely a statement of the opinion of the bidder and, therefore, not subject to section 636(1)(m).

Section 633(6)

16. The Panel does not wish to prevent bidders from dispatching information with the bidder's statement under section 633(6). However, the Panel considers that documents which would properly fall under this provision are those which would not reasonably be considered to be influential in, or material to, the target shareholders' decision of whether or not to accept the bid. An example might be administrative information concerning the bid process or providing a changed Help Line telephone number.

Presentation counts

17. In the Panel's experience, information and material which is included in Wrap Information but has also been included in the bidder's statement, is frequently presented in a different, more persuasive manner in the Wrap Information than in the bidder's statement. Frequently, the information is more accessibly aggregated, represented in graphs and other visual representations and designed to be more persuasive. The Panel considers that such presentation differences are likely to be persuasive for shareholders, especially retail shareholders. The Panel does not consider that the fact that the information or content in Wrap Information has been included in the bidder's statement given

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to the target is any basis for not giving the Wrap Information to the target with the original bidder's statement in the form in which the Wrap Information will be printed when dispatched to shareholders.

Broker Valuations*Introduction*

18. Frequently, a person sending documents to target shareholders in relation to control transactions will consider citing or quoting the valuations or price recommendations of securities published by stockbrokers, in support of their arguments. Those valuations or price recommendations may have been published publicly (such as on a web site) or privately (such as in a subscription only newsletter).
19. Although they are commonly referred to in the market place as "broker valuations", the amount of analysis and research which goes into the development of the figures which are published can vary widely. The Panel considers that "price recommendations" is a more accurate description of them. However, as market usage is generally to call them "broker valuations", the Panel has used this terminology in the Guidance Note for consistency with market practice, and not as any recommendation as to the weight investors should place on them, or assessment of their reliability.

Issues with broker valuations

20. As stated above, the Panel considers that the premium represented by the offer price to broker valuations (whether of particular named brokers or an average of valuations) is potentially useful information for target shareholders. However, there is a significant risk that they will be rendered misleading unless accompanied by adequate information to enable target shareholders to assess the proper weight they should give to them³.
21. This Guidance Note should not be taken as an endorsement or encouragement by the Panel of the use of broker valuations in control transaction documents, either consented valuations or average, unconsented valuations.
22. At the same time, the Panel is very reluctant to provide guidance which would reduce the range of material which bidders can provide to target shareholders. In saying this, the Panel recognises that some target shareholders will have access to the valuations anyway, and the Panel would not want to restrict the access of other shareholders to those opinions⁴.

³ **Note** For convenience, this Guidance Note is generally drafted to refer only to the use of broker valuations in bidder's statements. However, its guidance applies equally to their use in a range of control transaction disclosure documents and communications sent to shareholders or otherwise published where they may come within the Panel's jurisdiction. For example, Section 638(5) operates similarly for a target's statement. Similarly, the Guidance Note only refers to companies and shares, although it should be taken to apply also to listed managed investment schemes.

⁴ Frequently, institutional and other large shareholders will have access to a range of broker valuations and retail shareholders will not.

Conflicted research

23. For large, liquid companies, there will frequently be a wide range of brokers and other analysts who follow the company, most of whom provide research and valuations which are independent of either a bidder or the target. There will frequently be significant amounts of publicly available information about the company and the industry sector. In such cases, broker valuations are likely to be a useful, although not in any way definitive, opinion about the value of a company and its securities.
24. However, there are a very large number of companies on which few, one, or no brokers provide research reports and valuations. Frequently, such companies will, sensibly, seek to build a strong relationship with the broker who does provide research on the company. At times that relationship may become so close that significant concerns are raised as to whether research provided by the broker remains fully independent.
25. Properly dealing with conflicted research such as this is one of the most difficult issues which will face a bidder that considers using broker valuations. The problem is frequently seriously magnified in small capitalisation companies and may make the use of broker valuations infeasible.
26. In such cases, proof that the relationship has, or has not, become so strong as to impair the broker's independence, or perception of independence, will be almost impossible to demonstrate. On the other hand, the allegation is likely to be very easy to make. In all cases, clear disclosure of any potential conflicts is essential⁵ (in a similar manner to the disclosure which brokers make to ensure that they conduct their financial services businesses efficiently, honestly and fairly).
27. The Panel notes that with stricter compliance regimes and potentially more securities litigation, the number of brokers providing such research and valuation material is likely to fall with time, making the selection of a broad range of independent broker valuations even more difficult, and increasing the risks that the use of broker valuations in takeovers documents will become more problematic.

Section 636(3)

28. Under section 636(3) a bidder may not include in the bidder's statement a statement made by another person without the other person's consent to the use of the reference in the form and context in which it is to be used. In consenting, the other person attracts liability for the statement made in the bidder's statement.
29. The Panel considers that section 636(3) serves a positive purpose in ensuring that proper responsibility is taken for any statements made in a bidder's

⁵ A broker, as an AFS licensee, is required to have adequate arrangements for the management of conflicts of interest (section 912A(1)(aa)).

statement and that a person has a right to ensure that statements attributed to them in a bidder's statement are used properly and in proper context.

Consent

30. A broker may not wish to consent to a person using or quoting their valuation for a particular security for a range of reasons and they should not be required to be quoted against their will.
31. Where a broker does consent to their valuation being used, and themselves named, the Panel considers that they should carefully assess what information should accompany the valuation to ensure that it is not misleading or confusing. A broker may wish to consider consenting only if the valuation is accompanied by appropriate supplementary information in order to provide adequate context for the use of the valuation in the bidder's statement.
32. Consistent with the purpose of section 636(3), the Panel considers that it would normally constitute unacceptable circumstances for a bidder, in a bidder's statement, to use or cite an individual broker's valuation without the broker being adequately identified and that broker having given its consent for the use in the context.

Aggregation

33. It has been suggested that if the identity of the broker who gave the valuation is removed and a material number of valuations from different brokers are aggregated into a single average value, the consent of any individual broker or all of the brokers becomes unnecessary.
34. If the individual information of one broker cannot be identified and the individual weight of their valuation has been very materially reduced the purpose behind section 636(3) is lost.
35. Whether or not section 636(3) applies in such a case, the Panel considers that, subject to the comments below on the risks of such information being rendered misleading, it would not normally constitute unacceptable circumstances if a bidder aggregates valuations from a material number (at least four) of brokers in relation to a security and cites the average value in a bidder's statement. It should be noted, however, that a bidder who does so would be taking sole responsibility for the information i.e. that the average broker valuation value is not false or misleading (and not merely responsibility that the average was correctly calculated from its components).
36. However, citing an aggregated figure on its own has the potential to be confusing or misleading. It is the bidder's responsibility to ensure that the value, in the context in which it is published, is not misleading.
37. The Panel considers that any average value should be accompanied by at least the following information to allow shareholders to consider the weight they should put on the average (see also the Panel's comments at paragraph 26 on disclosure of conflict issues):
 - (a) the number of brokers whose valuations were aggregated;

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- (b) the date range over which the valuations were given;
 - (c) a measure of the dispersion of the valuations aggregated (such measures as the total range, standard deviation etc may be suitable);
 - (d) the criteria used to select the valuations which make up the average (for example: “all publicly available valuations known to the bidder from the three months prior to the announcement of the bidder’s intention to bid”) and the reasons for selecting the criteria;
 - (e) the exclusion of any valuations which would otherwise fall within the criteria and clear explanation of why those recommendations were excluded and the effect on the cited average value of those valuations;
 - (f) whether any of the valuations are made on different portfolio or trading versus whole of company bases to the others;
 - (g) whether the directors (of the entity citing the average value) adopt the average value cited; and
 - (h) any material information or events which have occurred since the date of the individual valuations which might reasonably affect them⁶.
38. A bidder putting forward an average value of valuations for the target should ensure that it does not select individual valuations to achieve a desired average value. In general, a bidder should use *all* valuations which fall within the criteria referred to in paragraph (d) above and are not objectively inappropriate for some other reason (discussed below). For example: A bidder who used the lowest four out of ten broker valuations of the target to arrive at an “average broker valuation” would mislead target security holders.
39. There may be cases where, for various reasons, a bidder considers that one or more valuations should not be included (such as one valuation being considered a very material outlier or the valuation being based on a very specific assumption that materially affected the amount). Bidders who wish to cite average valuations but wish to omit one or more should take care to avoid criticisms of such omissions being selective with an intent to skew the average value. Wherever a bidder deliberately excludes a valuation, or selects a particular range, the reasons should be very carefully explained in the bidder’s statement. These reasons should demonstrate that the bidder has *consistently applied objective criteria* in determining which valuations are to be excluded – for example, if a material outlier is excluded, *all* material outliers should be excluded, not merely those at one end of the range. In some situations, such exclusion or range selection may preclude the bidder from providing an average value which is not misleading.

⁶ It would be confusing, if not misleading, if some of the aggregated broker valuations came from a period before, and some after, the announcement of (or speculation of) a takeover bid. Persons publishing aggregated broker valuations should be careful to ensure that this either does not happen or is carefully explained so that readers may assess what weight they should put on the aggregated valuation.

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40. A bidder should consider providing to the target company, with the bidder's statement, a list of the valuations, including amount, broker, date published by the broker, and the place or document in which the valuation was published.⁷ This will allow the target to assess the reasonableness of the average and the associated disclosure and will obviate the target having to make an application to the Panel in order to find out the details in order to make that assessment.

Use of valuations outside takeovers documents

41. The Panel recognises that there are many other situations where a document provided to shareholders, or published where they may be expected to see it, will not fall within any requirement for consent to the use of third parties' statements. If the document contained an attributed broker valuation, the same material included in a bidder's statement would require consent. It is difficult to see why such documents should be able to be given or published without consent, while a bidder's statement with the same information or statements would require consent.
42. The Panel accepts that there does appear to be a different legislative treatment of very similar information being made available to very similar target audiences.
43. However, the principles set out in section 602 apply broadly and to all aspects of control transactions. Therefore, the Panel may find that unacceptable circumstances exist even where valuations are used outside bidders' and targets' statements. The Panel may make a declaration of unacceptable circumstances and orders as appropriate, if the use of broker recommendations appears to avoid or undermine the purposes of the takeovers chapters, or may prevent the acquisition of control of listed securities taking place in an efficient competitive and informed market.

Publication History

First Issue 15 December 2006

⁷ The target would need to agree that such information is provided on the basis that it will not be disclosed to target securityholders without the consent of all of the relevant brokers.