



Australian Government

Takeovers Panel

Guidance Note 22 Recommendations and Undervalue Statements

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Background

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to recommendations in response to a bid, particularly those incorporating an undervalue statement.
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. Under s638(1) a target’s statement must contain all the information shareholders and their professional advisers would reasonably require in making an informed assessment of whether to accept a bid. However, under s638(1A) it need only include the information to the extent it is reasonable for those persons to expect to find it in the target’s statement and it is known to any of the directors.
4. Under s638(3)¹ a target’s statement must contain a statement by each director:
 - (a) recommending that offers under the bid be accepted or not accepted, and giving reasons for the recommendation or
 - (b) giving reasons why a recommendation is not made.

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

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5. An undervalue statement in a target's statement gives rise to specific disclosure concerns.
6. In this note the following definitions apply:

recommendation	a statement by a director about whether a shareholder should accept an offer or not
undervalue statement	a statement, or other representation, that says, or implies, that the value of an offer under a bid is less than the value of the securities in the target the subject of the offer

Recommendations

7. Making a recommendation, or stating why none is made, is required in a target's statement under the Act. The Act recognises the importance of the directors' recommendation² in a bid and the Panel recognises the importance that shareholders may place on a recommendation.³ Any recommendation must be soundly-based and reasonable.
8. However, before the issue of a target's statement directors may not want to make a recommendation. They may simply want to make a holding statement (eg, "wait for more information"). If they do make a recommendation, and it includes (expressly or by implication) an undervalue statement, then:
 - (a) they should make their reasons for the recommendation clear or
 - (b) if more work is needed to finalise the reasons, they should clearly state that the reasons for the recommendation will be disclosed later. This course can be adopted only if it is consistent with continuous disclosure obligations. The reasons must then be disclosed no later than the issue of the target's statement. Directors should bear in mind that the market will assume that the reasons are soundly-based and reasonable.
9. The form of expression of a recommendation is a decision for directors.⁴
10. When a director recommends that an offer be rejected, the recommendation may imply an undervalue statement.

² Or multiple recommendations: see s638(3)

³ The Panel encourages the making of a recommendation: *Tully Sugar Ltd 01R* [2010] ATP 1 at [16]

⁴ *Tully Sugar Limited* [2009] ATP 26 at [18]: "The obligation is placed on directors to determine what information is material to holders of bid class securities and to disclose what any of them knows on those matters..." (footnotes omitted). On review, see *Tully Sugar Ltd 01R* [2010] ATP 1

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Example: "The bid does not represent fair value"

11. An undervalue statement suggests that there has been an assessment of the value of the target by directors.⁵ If an undervalue statement is made in scrip bid, an assessment of the value of the bidder is also involved.
12. However, not all 'reject' recommendations will include an undervalue statement since it may be possible in unusual situations to recommend that a bid be rejected for other, qualitative reasons.⁶ Directors should bear in mind that the market is likely to assume in this situation that there has been no quantification of a premium or discount to the bid.

Unacceptable circumstances

13. It may give rise to unacceptable circumstances if:
 - (a) a director recommends that shareholders reject a bid relying on an undervalue statement, and the reasons for the recommendation (addressing also the undervalue statement) are not clearly disclosed or it is not clearly stated that the reasons will be disclosed later.⁷ This is because such a statement may be incomplete to the point of being misleading⁸ or shareholders may not have been given enough information to enable them to assess the merits of the proposal⁹
 - (b) the proposal to disclose the reasons for the recommendation (addressing any undervalue statement) later is not made in good faith (eg, the director does not honestly and reasonably believe that the target's value is higher than the bid)
 - (c) the director does not act promptly to ensure that the reasons are disclosed as soon as reasonably practicable (and no later than in the target's statement) or
 - (d) the reasons are not soundly-based or reasonable.
14. In considering whether non-disclosure of the reasons for an undervalue statement gives rise to unacceptable circumstances, the Panel is guided by the content and context¹⁰ of the statement, including the conclusions likely to be drawn by a reasonably well-informed, ordinary reader.

⁵ *Origin Energy Ltd 02* [2008] ATP 23 at [19]

⁶ A valuation usually includes aspects of judgment on the part of the valuer. It is for that reason at least partly a qualitative assessment anyway

⁷ For example, the reasons may be contained in the target's statement

⁸ *Goodman Fielder Ltd 02* [2003] ATP 5, *Programmed Maintenance Services Ltd 02* [2008] ATP 9

⁹ Section 602(c)(iii). See also s602(a) and s638(3)

¹⁰ This has two aspects: internal context and external context (eg, other recent assessments published)

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15. The Panel then considers whether there are clearly disclosed reasons, which are soundly-based and reasonable, for the statement by looking at whether the undervalue statement is supported by internal analysis or external advice, and whether the director has provided shareholders with sufficient information to allow them to make an informed assessment of the statement.
16. If the target is permitted not to disclose information (eg, under the listing rules) because, for example, it is negotiating a transaction, the directors should consider carefully whether, in making a recommendation, they should make an undervalue statement.
17. The Panel does not expect directors to put an upper limit on the value of the target, or necessarily state a value.¹¹
18. Regardless of whether a recommendation is made, directors must provide shareholders with some guidance as to the value of the target.¹²

Remedies

19. The Panel has wide powers to make orders,¹³ including remedial orders and further disclosure.

Publication History

First Issue: 21 September 2010

¹¹ In *Tully Sugar Ltd* [2009] ATP 26 at [26], the Panel said (footnotes omitted): “We consider that s638 requires that some guidance as to value be given. But this guidance need not take the form of:

(a) an explicit statement of what the directors consider Tully shares are worth. We do not consider that the principle in s602(a) would necessarily be served by the Tully directors naming the price at which they would be willing to recommend an offer or

(b) an independent expert's report valuing Tully shares (as was sought by Maryborough). Section 640 sets out when an expert's report must be included with a target's statement. The Panel has identified circumstances in which the requirement should be extended. Neither the preconditions to the operation of section 640 nor those circumstances are present here.”

¹² *Tully* fn 11

¹³ Section 657D