



Australian Government
Takeovers Panel

Guidance Note 23 – Shareholder intention statements

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Introduction

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to statements of intention made by shareholders in the context of a control transaction such as a takeover bid. For convenience, most references are to a takeover bid, but this note applies with necessary adaptation to a scheme or item 7 vote.¹
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. The policy bases for this note are that shareholder intention statements should not inhibit:
 - the acquisition of control over voting shares taking place in an efficient, competitive and informed market² and
 - shareholders and directors being given enough information to enable them to assess the merits of a proposal.³
4. A shareholder intention statement can give rise to concerns, depending on how it has been obtained and how it is used, particularly where the

¹ Section 611, item 7 “Approval by resolution of target”. References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

² Section 602(a)

³ Section 602(b)(iii)

interests the subject of the statement, when aggregated with the bidder's interest, exceed 20%.

Shareholder intention statements

5. In this note, a shareholder intention statement is any statement regarding the intention of a shareholder, which has been made or authorised by the shareholder, in the context of a bid, scheme or a shareholder vote for the purposes of item 7 of section 611.
Examples:
 1. X, a holder of #%, intends to accept the offer by Y in the absence of a superior proposal.
 2. X, a holder of #%, intends to vote in favour of the scheme proposal with Y in the absence of a superior proposal.
6. Such statements include 'acceptance' statements or 'rejection' statements,⁴ but are not limited to these.⁵
7. Guidance Note 7 addresses shareholder intention statements in the context of entry into a lock-up device with that shareholder.⁶ ASIC's regulatory guide on false and misleading statements also addresses statements by substantial holders.⁷
8. If a shareholder makes a shareholder intention statement, there is a risk that the statement will be misleading, or at least confusing:
 - (a) if expressed in terms that are unclear in meaning (eg an intention expressed as a 'present' intention)
 - (b) if a qualification is made and that qualification is ambiguous⁸ and
 - (c) if published without detailed information regarding the holding(s).

⁴ A statement that a shareholder intends not to accept (reject) a bid. See *Bullabulling Gold Limited* [2014] ATP 8

⁵ For example in *Summit Resources Limited* [2007] ATP 9, a bidder made a statement regarding voting in favour on a resolution approving a transaction between the target and a third party

⁶ Guidance Note 7 *Lock-up devices* at [33]-[34]. See also *Alpha Healthcare Limited* [2001] ATP 13

⁷ ASIC RG 25: *Takeovers False and Misleading Statements* at [RG25.29]-[RG25.34]. See also *BreakFree Limited 03 and 04* [2003] ATP 38 and 39 at [111]

⁸ For example in *Ambassador Oil and Gas Ltd 01* [2014] ATP 14, a stated intention to accept 'within 14 days' gave rise to unacceptable circumstances when the shareholder did not wait for the 14 days to elapse

9. In examining a shareholder intention statement, the Panel is concerned with whether the statement has an effect that precludes, or might preclude, the opportunity for a competing proposal. For example, a shareholder intention statement could potentially create a relevant interest in the shares the subject of the statement⁹ or support an inference of association¹⁰ which might contravene the Act and undermine the policy of Chapter 6. If it did, it would likely give rise to unacceptable circumstances.

Unacceptable circumstances

10. In considering whether the terms of a shareholder intention statement give rise to unacceptable circumstances, the Panel is guided by the following.

Time before acceptance

- (a) If the statement is qualified by reference to a time before which it will not be acted on, it is likely to give rise to unacceptable circumstances if the shareholder acts before that time has passed.

Aggregation with bidder's shareholding

- (b) If a statement is given without the qualification that it is subject to no superior offer emerging (or words to that effect), it is likely to give rise to unacceptable circumstances if given before the offer period is open and the shares the subject of the statement would, if aggregated with the bidder's shareholding and any other shares the subject of similar statements, increase the bidder's shareholding beyond the 20% threshold.¹¹

Superior proposal

- (c) If a statement is qualified by reference to a superior proposal, it is likely to give rise to unacceptable circumstances if the shareholder accepts before allowing a reasonable time to pass for a superior proposal to emerge. The Panel considers that this is implied by the statement. The amount of time required will depend on the circumstances, but generally the Panel will

⁹ For example, *MYOB Limited* [2008] ATP 27

¹⁰ For example, *Ambassador Oil and Gas Limited 01* [2014] ATP 14

¹¹ *MYOB Limited* [2008] ATP 27

consider a reasonable time to be 21 days after the offer has opened.¹²

- (d) Whether a competing proposal is superior is primarily for the shareholder to determine, but it may give rise to unacceptable circumstances if a shareholder acts contrary to a demonstrably superior competing proposal without good reason.
- (e) If a superior proposal has been made, the shareholder is not obliged to accept it merely because it has made a statement regarding an earlier proposal. There may be good reasons why the shareholder does not. However, if the shareholder accepts the original bid, the Panel may be interested in whether that supports an inference that there was some form of agreement, arrangement or understanding between the shareholder and the original bidder.

11. In considering whether the manner in which a shareholder intention statement is disclosed gives rise to unacceptable circumstances, the Panel is guided by the following.

Details provided

- (a) The identity of the shareholder to whom the statement is attributed should be disclosed.
- (b) Details of the holding, in number and percentage terms, should be disclosed.¹³

Example: X Ltd, which holds at the date of this statement 100,000 shares (19.9%), intends to accept the offer.

- (c) Shareholder intention statements must only be published in a bidder's statement or target's statement if the shareholder has consented and the document so states.¹⁴ The Panel expects that shareholder intention statements made outside a bidder's statement or target's statement will only be made with the

¹² If a shareholder intention statement is made after offers have opened, a reasonable time might be less than 21 days because the shareholder could otherwise have accepted. If there is a variation of the bid after offers have opened, such as a price increase, and thereafter a shareholder intention statement is made, a reasonable time might be calculated from the date of the variation and be less than 21 days from that date

¹³ Custodial institutions' holdings can change on the instruction of the beneficial owner, so a statement by a custodial institution might identify the holding at a particular date when the statement is made

¹⁴ See sections 636(3) and 638(5). See also ASIC RG 55: *Statements in disclosure documents and PDSs: Consent to quote* at [55.68]–[55.70]. For the reason why consent is important, see *BreakFree Limited 03 and 04* [2003] ATP 38 and 39 at [129]–[131], affirmed in *BreakFree Limited 04(R)* [2003] ATP 42 at [67]

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consent of the shareholder.¹⁵ If consent is not provided, the Panel will look more closely at the statement.

- (d) If the statement aggregates holdings, the Panel expects that all the shareholders whose holdings are aggregated have consented,¹⁶ and their individual holdings have been separately identified in the statement.

Remedies

- 12. The Panel has wide powers to make orders.¹⁷ It may, for example:
 - (a) require the maker of a shareholder intention statement to comply with the statement
 - (b) require the statement to be retracted¹⁸
 - (c) release the maker of the statement from any obligation to comply¹⁹ or
 - (d) unwind an action or transaction based on a statement.²⁰

Publication History

First Issue 11 December 2015

Related material

GN 7 Lock-up devices

GN 18 Takeover documents

¹⁵ Guidance Note 18 *Takeover Documents* at [41]

¹⁶ *Bullabulling Gold Limited* [2014] ATP 8 at [38]

¹⁷ Section 657D

¹⁸ *Bullabulling Gold Limited* [2014] ATP 8

¹⁹ *MYOB Limited* [2008] ATP 27

²⁰ *Ambassador Oil and Gas Limited 01* [2014] ATP 14