

Submission
from
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Date 28 February 2014 Confidential Email
From Greg Bosmans / Gadi Bloch
To **Allan Bulman**, Director, Takeovers Panel
Email takeovers@takeovers.gov.au

Dear Allan

Submission on Consultation Paper – Guidance Note 18 – Takeover Documents

Thank you for the opportunity to comment on the Takeovers Panel's Consultation Paper regarding proposed amendments to Guidance Note 18 – Takeover Documents (**GN18**).

Our comments are as follows.

- 1 Allens endorses the proposition that takeover documents should be presented as clearly, concisely and effectively as possible. In our experience, takeover documents that are prepared with the assistance of experienced legal and financial advisers are already presented in such a manner.
- 2 For this purpose, the preparer of a takeover document will, in some cases, preface a takeover document with a summary section in a form similar to that suggested by the Panel. However, this is by no means the norm. In many instances, the preparer will consider that the accessibility of the document may be best served by adopting a different stylistic approach. For example, a preparer may include elements of the relevant information in different preliminary sections of the takeover document, rather than in one consolidated summary section.
- 3 Accordingly, while we consider that it may be helpful to takeover participants generally for the Panel to identify particular items of information which the preparer of a takeover document should consider including in a summary section, we do not consider that it would be helpful for the Panel to frame this in terms of 'best practice guidance'.
- 4 The draft amended GN18 seeks not to be unduly prescriptive as to the structure and content of a summary section and, in theory, continues to provide sufficient flexibility for a takeover document to be structured as the preparer considers most appropriate, taking into account the purpose of the document and the circumstances of the bid concerned, provided that structure is clear, concise and effective. However, preparers of takeover documents may potentially feel obliged to observe any 'best practice guidance' advanced by the Panel, if for no other reason than to mitigate the risk of an interested party seeking to impugn the document before the Panel merely on the basis of a departure from that guidance.
- 5 Regardless of the manner in which the Panel expresses any guidance as to the content of a summary section of a takeover document, we do not consider that it is necessary or appropriate for

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the Panel to specify a page limit for such a summary, whether as a single figure or a range. As recognised in the draft amended GN18, the length of any summary will depend on the nature of the bid concerned (with some of the more obvious variables including the nature of the consideration being offered, the conditions and terms of the offer and the existence or otherwise of any competing takeover proposals). We consider that a statement of general principle such as that contained in the draft amended GN18 (ie, that the summary be short enough to be comprehended quickly) is all that is required.

Please contact us if you have any queries in relation to this submission.

Regards

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Submission
from
Herbert Smith Freehills

Guidance Note 18: Takeover Documents

1 Summary

In response to the Panel's invitation for comments on the following issues in relation to Guidance Note 18 Takeover Documents:

- (1) *Do you consider Panel guidance on the content of summaries in takeover documents useful?*

It is useful for the Panel to suggest that every bidder's statement and target's statement should contain a short summary upfront. However, we suggest that the Panel's guidance on the content and form of summaries is too prescriptive and would be counterproductive.
- (2) *Paragraph 20 of the draft Guidance Note provides a proposed structure for a summary for bidder's and target's statements. Do you agree with the items in the summary? Please specify whether you consider that we have included irrelevant matters, or failed to specify relevant matters, for retail security holders.*

As above, we suggest that the Panel's proposed structure for summaries in takeovers documents is too prescriptive, and detailed guidance on the structure of summaries is counterproductive.
- (3) *Should the Guidance Note specify a page limit for a summary, either as a single figure or a range?*

We do not view a page limit as beneficial as each takeover bid (including as to complexity) is different.

Again, we have set out further detail below.

2 Guidance on structure and content of summaries

The inclusion, upfront in takeover documents, of a summary of the offer that is 'accessible to retail shareholders' is a positive addition to Guidance Note 18. Therefore, we have no issue with the inclusion of the Panel's references to accessibility in paragraphs 1(b), 3, 10, 11 and 12 of the Draft Guidance Note.

However, we suggest that each bidder and target should be able to decide on the content and form of a summary section in their takeover documents, depending on what is needed in the circumstances of each particular bid (taking into account, among other things, the complexity of the particular takeover bid). The move of disclosure law and practice from "checklist" approaches to encouraging the discloser to apply judgement and thought and to emphasis what is important from the perspective of investors has enhanced disclosure. It would be a retrograde step to go back to a "checklist" approach.



For example, the summary categories which may be helpful for a complex bid offering a combination of foreign scrip and foreign currency cash would likely be quite different from what is helpful in the context of a simple domestic cash bid.

We find the Panel's draft guidance on the content and form of a summary section in takeover documents is quite prescriptive. We propose that paragraphs 13-20 are unnecessary to include in Guidance Note 18, and that these matters are best left to the judgement of the parties, which are subject to obligations not to be misleading or deceptive.

In particular, we are of the view that prescribing a page limit for a summary, or a particular font size for takeover documents is unnecessary. We are not aware of significant issues having arisen in practice, where common sense and self-interest in getting the disclosing party's message across clearly have tended to drive legible disclosure. We suggest that these types of presentation issues continue to be left to parties and their advisers.

Submission
from
Law Council of Australia

Mr Allan Bulman
Director, Takeovers Panel
Level 10
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28 February 2014

Dear Mr Bulman

Response to Consultation Paper on Accessible Documents

This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to the Consultation Paper issued by the Takeovers Panel (the **Panel**) in early January this year on revisions to Guidance Note 18 on Takeover Documents.

The Committee makes the following submissions:

1. Whilst the Committee agrees with the Panel that there is merit in promoting the use of summaries to make takeover documents more accessible, it considers that the proposed revisions to Guidance Note 12 are too prescriptive (e.g. specifying the use of size 10 font and best practice guidance on the contents of a summary section).
2. Whether a summary will enhance accessibility will depend on the complexity and scale of the control transaction. For example, in circumstances involving a relatively small scale simple cash bid, requiring a summary may impede, rather than enhance accessibility. It may result in unnecessary repetition resulting in the document being longer than otherwise needs to be the case.
3. Given the above comments, the Committee considers that it is not beneficial to the market for the Panel to include such prescriptive guidance in Guidance Note 18 on the length, appearance and structure/content of summaries. As flagged above, what is appropriate will vary depending on the control transaction.
4. The Committee is of the view that the market would be better served by the Panel paring back its guidance so as not to be too prescriptive. For instance, rather than prescribing what the summary section should contain, it may be better for the Panel to more generally note that the summary should include the matters which are most likely to be of importance to target shareholders and their decision whether to accept or reject a bid. It may also be beneficial to refer to ASIC

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Regulatory Guide 228 and note that it contains illustrations of matters that should be considered in preparing the summary section.

5. The Committee further considers that there is no need to specify a page limit for the summary section. The statement in paragraph 14 of the proposed revised Guidance Note noting that the length will depend on the control transaction should suffice as adequate guidance.
6. If, contrary to our submission, the Panel decides to retain the proposed section on 'Structure of a summary', the Committee considers that it would be beneficial to include a statement in the Guidance Note that in bids offering foreign scrip as consideration, accessibility may be enhanced by including in the summary section a description of the key issues in relation to the foreign scrip being offered. Currently, information on foreign scrip being offered as part of the offer consideration is not particularly accessible. It is generally placed towards the back of takeover documents and can be lengthy, complex and difficult for retail shareholders to understand.

The Committee would be pleased to discuss any aspect of this submission. Please contact the chair of the Committee, Bruce Cowley on (07) 3119 6213, if you would like to do so.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal stroke extending to the right.

John Keeves
Chairman, Business Law Section

Submission
from
Macquarie Capital (Australia) Limited

Accessible documents

Whilst the proposed “best practice guidance on the contents of a summary section” in takeover documents is not inherently objectionable, it does seem overly prescriptive in so far as it suggests a summary section “should consist of the [specified] headings and related contents and that a specific font size need be used (as sensible as that might be). In our view, it would be far preferable if the Panel simply expressed the view that every bidder’s statement and target’s statement should contain a short summary upfront that provides key information for retail shareholders in an accessible form. As the draft Guidance Note acknowledges, this is already common practice. And we doubt Panel guidance will ever succeed in reducing the front section of takeover documents to a standardized *pro forma*.

This submission has been prepared by Macquarie Capital (Australia) Limited and does not necessarily reflect the view of other members of the Macquarie Group.

If you have any questions in relation to this submission, please do not hesitate to contact Michael Hoyle on (03) 9635 9148.

Yours faithfully

Macquarie Capital (Australia) Limited



Michael Hoyle
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Kristen Jung
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