



ASIC

Australian Securities & Investments Commission

14 October 2016

Mr Allan Bulman  
Director  
Takeovers Panel  
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Dear Mr Bulman

### **Takeovers Panel Consultation Paper – Guidance Note 4 *Remedies General***

ASIC appreciates the opportunity to provide comments in response to the Takeovers Panel's Consultation Paper regarding the proposed revision of Guidance Note 4 *Remedies General* (GN 4).

ASIC responds to the Panel's issues for comment at paragraphs 10 to 12 of the Consultation Paper as follows:

**1. Does the proposed amendment clarify that the Panel considers a balance of factors, including timing when exercising its discretion to accept an undertaking?**

- 1.1. ASIC agrees the amendment to paragraph 39 of GN 4 assists in clarifying that the Panel will take into account timing as a factor in determining whether to exercise its discretion to accept an undertaking in lieu of a declaration or orders, and ASIC supports the change on this basis.
- 1.2. However, ASIC recommends that the amendment be clarified to address the issue discussed in paragraph 11(b) of the consultation paper (see paragraphs 2.8 – 2.10 below). In addition, ASIC invites the Panel to consider elevating the discussion currently contained in footnote 8 of GN 4 so that it is included in the body of the guidance note as a proximate and equally prominent qualifier to the proposition (set out in paragraph 9 of GN 4) that the Panel may accept an undertaking even after it has indicated it is minded to make a declaration.

**2. The Panel's 'general policy' in favour of accepting an undertaking in lieu of a declaration and the effect of the proposed amendment**

*(a) Should the general policy be changed*

- 2.1. While ASIC acknowledges that an undertaking can be a convenient and flexible way to address matters that come before the Panel, we are concerned that, in expressing a general policy in favour of accepting an undertaking in lieu of a declaration, the Panel's guidance may act as a disincentive to parties to offer undertakings at the earliest possible time in a dispute (when the benefits of resolving the matter via undertaking are at their greatest).

- 2.2. To the extent that paragraph 40 of GN 40 expresses a general policy that undertakings are to be preferred to a declaration, we note that this may also complicate the message that the Panel determines whether to accept undertakings on the basis of a ‘balance of factors’.
- 2.3. ASIC has observed a number of instances where a party to proceedings has offered the sitting Panel an undertaking after being provided a final, or near-final, view on its position with respect to a matter that has been actively contested.<sup>1</sup> ASIC notes that the Panel has not always accepted these undertakings. For example in *Resource Generation Limited* [2015] ATP 12 the Panel referred to the policy in GN 4 at footnote 8 and noted that while the Panel generally encourages undertakings, the undertakings were offered at a point in proceedings where no advantage could be gained from a cost or time point of view.<sup>2</sup>
- 2.4. We acknowledge that in some instances there can be valid reasons for a party choosing to delay offering an undertaking, for example where the Panel is considering a novel issue. However, in other instances there may be much less uncertainty about the position and a party waiting to provide an undertaking until the Panel indicates it is minded to make a declaration can mean that a matter continues for longer than it otherwise would have, with the attendant resourcing and financial imposts on the parties. Having incurred the time and expense of proceeding to the final stages of a matter, the acceptance of an undertaking may then deprive parties to the proceedings from achieving an outcome that they may have otherwise sought— including:
- (a) a costs order where a party has unnecessarily delayed or obstructed proceedings; or
  - (b) the market signal regarding the unacceptable nature of particular conduct that is sent when the Panel makes a declaration: see paragraph 40 of GN 4.
- 2.5. ASIC, in its role as regulator of both M&A transactions and the broader market, has a particular interest in the market signal sent by Panel declarations. When the Panel makes a declaration of unacceptable circumstances this can have a positive deterrent effect on other market participants engaging in similar conduct. Accordingly, when making resourcing decisions regarding our bringing of, or participation in, applications to the Panel, an important consideration for a regulator such as ASIC is the opportunity to promote improvements in market practices and deter poor conduct through the broader message to the market that results from the Panel making a declaration.
- 2.6. In this regard ASIC also notes that while undertakings can be a flexible and convenient alternative to a declaration and orders in some circumstances, they can also be inflexible in others—particularly if the Panel anticipates it may need to amend the terms on which a dispute has been resolved to deal with changing circumstances.<sup>3</sup>
- 2.7. Accordingly, the Panel may wish to consider a more expressly neutral general policy position when it comes to accepting undertakings in lieu of a declaration and orders—consistent with the approach of looking at a balance of factors in exercising that discretion.
- (b) *Scope of the proposed amendment*
- 2.8. ASIC notes that the proposed amendment at paragraph 39 does discuss generally the timing of the offer of an undertaking being a factor and in this regard is on its face broad enough to encompass considerations regarding the relative benefits of accepting an undertaking as opposed to making a declaration at the ‘minded to declare’ stage of proceedings.

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<sup>1</sup> See *Sovereign Gold Company Limited* [2016] ATP 12; *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9; *Brisbane Markets* [2016] ATP 3; *Resource Generation Limited* [2015] ATP 12; *Bullabulling Gold Limited* [2014] ATP 8; *Tigers Realm Coal Limited* [2014] ATP 2.

<sup>2</sup> At [137].

<sup>3</sup> See *Sovereign Gold Company Limited* [2016] ATP 12 at [160].

- 2.9. However ASIC notes that the example given in proposed footnote 35 does not allude to considerations of this nature but rather discusses the impact of a relatively late offer in terms of the limited time available for the Panel's concerns to be addressed voluntarily before the deadline for making a declaration. In light of the relatively specific nature of the example, ASIC is concerned that the proposed wording may be narrowly interpreted or applied in practice on the grounds that if the Panel was minded to routinely take into account a broader consideration of the benefits of an undertaking compared to a declaration and orders then this would be spelled out more expressly in the guidance note in terms that clearly qualify the 'general policy' of favouring an undertaking.
- 2.10. ASIC would accordingly support the Panel adopting a clearer expression of the principle that the Panel may decline to accept an undertaking in lieu of a declaration on the basis that little or no benefit is gained from accepting the undertaking at the 'minded to declare' stage of proceedings.

### **3. Late undertakings denying outcomes**

- 3.1. For the various reasons noted above, ASIC considers that it would be beneficial to expressly state that the Panel may not accept an undertaking late in proceedings if:
- (a) the timing of the offer of the undertaking means that that little or no benefit is gained from accepting the undertaking when compared to making a declaration and/or orders; or
  - (b) it may deprive a party of an outcome having regard to the conduct of the party offering the undertaking.
- 3.2. While ASIC acknowledges that the existing guidance is arguably sufficiently flexible such that a sitting Panel could be considered to be acting consistently with it if it were to take these matters into account, in light of the Panel's existing general policy in favour of undertakings ASIC nonetheless believes it would be useful for the Panel to expressly provide that the Panel will consider these factors, particularly where the undertaking is offered at a late stage.

If you wish to discuss any aspects of this letter, please do not hesitate to contact me.

Yours sincerely



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