Submission

from

ASIC

ASIC
Australian Securities & Investments Commission

28 February 2014

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By email: takeovers@takeovers.gov.au

Dear Mr Bulman

Takeovers Panel Consultation Paper – GN on Dividends

ASIC is grateful for the opportunity to provide comments in response to the Takeovers Panel's proposed new guidance note on dividends. This letter sets out ASIC's comments on the draft guidance note and the Panel's proposal to adopt the guidance note as policy.

1. Franking credits in the "headline" offer Price

1.1 ASIC supports the Panel's efforts to clarify the standards of disclosure expected when discussing franking credits in takeovers. ASIC agrees with the Panel's guidance that:

(a) the "headline" offer price should not include reference to any value that may be attributed to franking credits; and

(b) reference to the value of franking credits should be made in a separate, suitably qualified statement.

1.2 In ASIC's view this approach is appropriate having regard to the nature of franking credits as essentially a tax offset that is not necessarily realisable by all target security holders. It reduces the potential for target security holders to be mislead or confused about the cash component of the consideration on offer. Having a recognised standard for disclosing the value of franking credits also assists target holders to compare competing offers where a franked dividend may be paid.

1.3 ASIC suggests that it may be appropriate that the guidance note clarify that:

(a) reference to the "headline" offer price includes discussion of the cash component of the bid consideration generally; and

(b) the disclosure requirements apply equally to statements made by the target.

1.4 Some users may interpret the "headline" offer price to mean only price references in the title of an ASX announcement or the title of a heading within a bidder's or target's statement. It is consistent with the objective of ensuring that target security holders do not misconstrue the cash components of the bid consideration on offer with the value of the tax advantage that may be available to some shareholders, that all references to franking credits throughout the bidder's and target's public disclosures are made separately from discussion of the bid consideration.

1.5 For similar reasons, and consistent with the principles of clear and concise disclosure, ASIC suggests that the Panel clarify, in the context of paragraph 6 of the draft guidance note, that the value of the franking credit should not be aggregated with the cash value (or in a bid with a scrip component—the implied value) of the bid consideration in bidder or target disclosures. This is consistent with the deliberate separation of the discussion of the value of franking credits and reinforces the differences between the bid consideration and franking credits.

2. Deduction for franking credits

2.1 The Panel's draft guidance notes that a bidder is entitled to deduct the value of any dividends paid to target shareholders from its offer consideration. The deduction is by way of an adjustment to account for the value of the dividend. The draft guidance further recognises that some bids may seek to include the value of franking credits within the scope of 'rights' reserved to the bidder, that complications may arise in doing so, and any deductions made in relation to the franking credits attached to such dividends must be reasonable, clearly disclosed, and established by either a formula or as a fixed amount.

2.2 The approach to deducting franking credits suggested in the draft guidance note is aimed at addressing the following issues set out at paragraph 11:

> *a) as all the offers under an off-market bid must be the same, a bidder cannot make individual adjustments for the value of franking credits depending on the tax circumstances of each offeree, even if that was practicable; and*
>
> *b) it is likely to give rise to unacceptable circumstances for a bidder to seek to deduct an amount that is not clearly defined (for example, 'as reasonably assessed' by it), because such an assessment creates uncertainty and detracts from an informed market. Therefore, the example in paragraph 9, although perhaps effective as a contractual term, would be likely to give rise to unacceptable circumstances.*

2.3 Franking credits are a creature of tax legislation and operate as a post-tax benefit in the form of an offset and/or refund that is received by eligible shareholders after the relevant tax year. While ASIC recognises that any deductions incorporated into the offer price that may be made by a bidder under the terms of its bid should be for a value that is clearly defined, ASIC invites the Panel to reconsider more broadly whether it is desirable to permit bidders to incorporate any downward adjustment to the offer consideration on account of the 'right' to a franking credit at all.

Preferable approach to dealing with the value of franking credits

2.4 In ASIC's observation, in the past bidders have not generally sought to rely on a general or specific reservation of the rights attached to bid class securities in their offers to incorporate an estimate of the value of franking credits in the offsetting adjustment to the bid consideration they make when a franked dividend is paid. Rather, it is most common for bidders to hold out the value of the franking credits as a valuable benefit of the bid to eligible target security holders and price other elements of their bid accordingly. In ASIC's view, this approach is preferable as it most accurately deals with the equality issues that inevitably arise due to the variable value of franking credits to target security holders depending upon their eligibility and individual tax circumstances.

2.5 The Panel's draft guidance notes that bidders cannot practically make offer price adjustments for franking credits based on the individual circumstances of every security holder. ASIC agrees that bidders cannot and should not determine the value of franking credits to individual target security holders. However in ASIC's view it is preferable that bidders should not, as an alternative, be permitted to apply an arbitrary discount to the bid consideration available to all target holders to address the bidder's inability to determine the value of franking credits to individual security holders.

2.6 In support of this view ASIC also notes that allowing such an adjustment more generally:

(a) may itself result in the uneven treatment of shareholders with respect to the offer consideration; and

(b) may increase the complexity of the assessment of bid value for target holders.

2.7 The deduction from the offer price of a set value attributed to franking credits may result in the disadvantage and unequal treatment of some shareholders as bidders effectively incorporate into the offer price a post-tax value that was never realisable by those shareholders who are unable to utilise franking credits. These shareholders will (if franking credit deduction adjustments are permitted) be worse off overall in the event of a franked dividend being declared than they would be if no franked dividend were declared. Other shareholders will be in the same position, but only on an after-tax value basis—the portion of their bid consideration representing the franking credit deduction not being realised in economic terms until their tax return is processed.

2.8 The franking credit adjustment mechanism also adds complexity to the offer. In addition to the need to incorporate a mathematical formula, there is additional complexity involved in assessing, for example, the effective loss of overall value by a target holder who is not eligible to utilise imputation credits if a franked dividend is declared. Issues associated with the complexity of a similar assessment, and its effect on the market, were recently considered by the Panel in *Warrnambool Cheese and Butter Factory Company Holdings Limited* [2013] ATP 16 (see paragraphs 48-54).

2.9 Having regard to the framework and principles underlying the takeover provisions which require identical offers and equality of treatment, ASIC considers that the Panel would be justified in adopting the alternative view that downward adjustments for the value of franking credits should not generally be made—as it appears has been market practice to date.

2.10 For the above reasons, and in the absence of evidence that the current preferable approach of bidders is unnecessarily restrictive, ASIC is of the view that the more desirable position would be to limit deductions from the offer price in relation to dividends to the amounts actually paid to, and received by, security holders.

Consultation

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

Yours sincerely

Kim Demarte
Senior Specialist
Australian Securities and Investments Commission

Submission

from

Herbert Smith Freehills

1 Summary

This submission is being made by Herbert Smith Freehills in response to the invitation by Takeovers Panel (the **Panel**), in its consultation paper dated 10 January 2014, for comments on the Panel's proposed new Guidance Note on Dividends.

In summary:

- As a general comment, we consider that the Panel should clarify that is it <u>not</u> now requiring that bidders must proceed on the basis that franking credits always have some implicit value such that it is mandatory for bidders to put a value on franking credits and every bid is required to contain an adjustment clause applicable to the value of the franking credits.
- In terms of practical issues, we would suggest that the Panel confirms whether or not, in its view, paragraph 619(2)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**), already permits a bidder to differentiate offer terms on the basis of the value of franking credits. We consider that it does. If the Panel does not hold that view, then the Panel should request ASIC to issue a Class Order clarifying the position.

We have set out further detail below.

Please note that the views expressed in this submission do not necessarily represent the views of all Herbert Smith partners or of our clients.

2 No obligation to assign a value to franking credit

We consider that the Panel should clarify in the Guidance Note that it is <u>not</u> creating a new policy requirement that:

(a) bidders must proceed on the basis that franking credits always have some implicit value (regardless of how a bidder wishes to treat such franking credits);

(b) it is mandatory for bidders to put a value on franking credits in the bidder's statement; and

(c) every bid is required to contain an adjustment clause applicable to the value of the franking credits.

Instead, the Panel should clarify that it is entirely a matter for the bidder to decide whether or not it wishes to:

- adjust for the value of franking credits; and
- assign any value to franking credits.

If it does wish to do the above, the bidder should make clear in its bidder's statement how any deduction for franking credits will be established.

If the Panel is seeking to create new policy along the lines above, we would suggest it would be appropriate to have further consultation on this issue.

3 Value of franking credits

We assume that the Panel is not saying that it has already established 50 cents in the dollar as the default valuation. However, it would be useful to clarify the point that the Panel is not necessarily wedded to any particular number.

4 Application of the 'same offers' rule

We note that, in considering whether all offers made under an off-market takeover bid are the same, paragraph 619(2)(b) of the Corporations Act permits a bidder to disregard any *"differences in the offers attributable to the fact that the offers relate to securities having different accrued dividend or distribution entitlements"*.

We would suggest that the Panel confirms whether or not, in its view, paragraph 619(2)(b) of the *Corporations Act* already permits a bidder to differentiate offer terms on the basis of the value of franking credits.

We consider that paragraph 619(2)(b) already does have that effect. However, if the Panel does not share that view, the Panel should ask ASIC to issue a Class Order to make it clear that bidders can rely on paragraph 619(2)(b) for these purposes.

28 February 2014

Submission

from

Law Council of Australia

Law Council
OF AUSTRALIA
Business Law Section

Mr Allan Bulman
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28 February 2014

Dear Mr Bulman

Response to Consultation Paper on Dividends

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 a proposed new Guidance Note on Dividends (**GN**).

Whilst the Committee supports the Panel's proposal to introduce the GN to clarify issues in relation to the treatment of franking credits in bids and considers that there is utility in the Panel adopting the GN as policy as it helps to consolidate guidance emerging from recent Panel decisions, it has a number of concerns and suggestions in relation to some of the guidance being proposed in the GN. These concerns and suggestions are outlined below.

Franking credits in the 'headline' offer price

1. The proposed form of statement in paragraph 7 of the GN doesn't attribute any particular value to the franking credits attaching to the dividend. In contrast, the PEP/Spotless example referred to in footnote 5 of the GN did do this. Very similar formulations have been used in several transactions since the *Alesco*[1] decisions (for example, see the announcements made in the ADM/Graincorp transaction). Given this, if the proposed form of statement in paragraph 7 of the GN is to be retained (see our comments in the following paragraph), the Committee is of the view that the GN should note that the PEP/Spotless formulation is at least equally acceptable as the formulation proposed by the Panel.

2. The GN states that the PEP/Spotless formulation *'did not capture tax consequences for more than one group of shareholders'*. However, the Committee queries whether the formulation proposed by the Panel in paragraph 7 of the GN is itself accurate for all shareholders (e.g. non-resident shareholders). Given this, the Committee considers that it may be better for the Panel to pare back its guidance

[1] *Alesco Corporation Limited 01 and 02* [2012] ATP 14 and *Alesco Corporation Limited 03* [2012] ATP 18

and simply express the general principle without attempting to prescribe model disclosures.

Reservation of the right to deduct the value of franking credits

3. The Committee queries the statement in paragraph 12 of the GN that, not only does the amount of the deduction which would be made need to be clear, the basis for the deduction needs to also be '*reasonable*'.

4. The example given by the Panel suggests that to deduct 50% of the face value is reasonable. However, this raises the question as to whether the Panel will ever accept any higher percentage as being reasonable. For example, if a bidder states that it will deduct 100% of the face value of the franking credit, then the market is clear what the outcome is, but is that a reasonable thing to do?

5. The GN seems to suggest the Panel could intervene to force a bidder to deduct less than the amount stipulated in its offer if the Panel deems the amount not to be reasonable (although the basis for such intervention is far from clear). The Committee is of the view that the amount of the deduction ought to be a matter for bidders so long as the amount of the deduction is made clear and is the same for all offerees.

6. Accordingly, the Committee suggests that paragraph 12 of the GN should simply state that the bidder must specify the percentage of the face value of the franking credit that will be deducted from each offer and such percentage must be not more than 100% of the face value. This would be sufficient to address both of the concerns identified in paragraph 11 of the GN.

Truth in takeovers

7. The Committee considers that the section on 'truth in takeovers' in the GN could be better explained. As a starting point, before commenting on the application of the 'truth in takeovers' policy to statements about franking credits, the Panel's decision in *Rinker*[2] should be discussed, noting that bidders making a 'last and final' statement should clearly address what will happen if the target pays a dividend.

8. The GN could then go on to examine the implications of the Panel's decision in *Alesco*[3] and *Warrnambool*[4] noting that those decisions also stand for the principle that a 'last and final' statement about the amount of the dividend and associated franking credits that holders will be allowed to keep will bind the bidder. This then appropriately leads to the proposed guidance on franking credits.

Other general comments

9. The Committee considers that there may be some benefit in the GN commencing with a discussion on the presentation of dividends generally. In particular, it should

[2] *Rinker Group Limited 02* [2007] ATP 17 and *Rinker Group Limited 02R* [2007] ATP 19. See also the Federal Court's decision in *CEMEX Australia Pty Limited v Takeovers Panel* [2008] FCA 1572 and the Full Federal Court's decision in *CEMEX Australia Pty Limited v Takeovers Panel* [2009] FCAFC 78

[3] *Alesco Corporation Limited 01 and 02* [2012] ATP 14 and *Alesco Corporation Limited 03* [2012] ATP 18

[4] *Warrnambool Cheese and Butter Factory Company Holdings Limited* [2013] ATP 16

also contemplate the Panel's decision in *Hastings*[5] about the impact of dividends on headline consideration.

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 do so.

Yours sincerely,

John Keeves
Chairman, Business Law Section

[5] *Hastings Diversified Utilities Fund* [2012] ATP 1

Submission

from

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7 March 2014

MACQUARIE

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Dear Allan,

Dividends and Frustrating Action

Macquarie Capital welcomes the opportunity to comment on the draft Guidance Notes on these topics released in January.

Dividends

(a) Franking credits in the "headline" offer price

We agree the value of franking credits should not be included in a bidder's headline offer price. Consistently with the decision in *Alesco Corporation Limited 01 and 02,* the cash components of an offer that includes a dividend component should be clearly distinguished from the value of any associated franking credits.

However, franking credits undoubtedly have significant value for many shareholders. Indeed, many shareholders in a target are often able to capture their full face value. Accordingly, when an offer includes a franked dividend, the value of the associated franking credits will normally be material information that a bidder should disclose to target shareholders. As a result, we believe it is important the Panel's proposed guidance should not deter bidders from making such disclosures so long as they are truthful and not misleading.

In this regard, we are concerned the current draft of the proposed Guidance Note may be interpreted as suggesting a bidder should not explicitly refer to the value of franking credits for any target shareholders. While the draft notes the *Alesco* Panel approved the form of statement used in the PEP/Spotless transaction (which does refer to this value), it could be taken as suggesting the form of statement set out in paragraph 7 of the draft Guidance Note (which does not) is now considered preferable. In our view, this conclusion would not be warranted. Like the *Alesco* Panel, we consider the PEP/Spotless formulation (variants of which have been used several times since the *Alesco* decision, notably in the ADM/GrainCorp transaction) is both truthful and informative. Accordingly, we think it would be desirable if the proposed Guidance Note made it clear it is still considered to be consistent with the policy of s602(a).

While the draft Guidance Note observes that the PEP/Spotless formulation "did not capture tax consequences for more than one group of shareholders", it is worth noting the proposed formulation in paragraph 7 may itself not be completely accurate for all shareholders. In particular, it does not appear to be correct for non-resident shareholders. Given this, we query whether it is in fact helpful for the Panel to volunteer model disclosures in its Guidance Notes when these have not previously been considered in Panel decisions. Indeed, we believe it would be better if the first sentence of paragraph 7 were deleted for this reason.

(b) Deduction for franking credits

We agree the requirement all offers under an off-market bid must be the same means a bidder cannot make individual adjustments for the value of franking credits depending on the individual tax circumstances of each offeree. We also agree that uncertainty about the amount a bidder is to deduct could potentially give rise to unacceptable circumstances. However, we submit that:

- In some circumstances, it will still be appropriate for a bidder to retain a right to reasonably assess the value of Rights to be deducted from its offer price (e.g. if the target were to distribute *in specie* unquoted securities whose value cannot be determined in advance by a fixed formula).
- It would not necessarily give rise to unacceptable circumstances if a bidder:
    - reserved the right to deduct the full value of franking credits attaching to any dividend or distribution, but
    - retained a discretion to deduct a lesser amount (so long as its decision to do so was required to be announced in a timely manner).

A bidder may wish to retain the right to deduct the full face value of franking credits if the target unilaterally decides to pay a dividend in order to prevent what might otherwise represent a leakage of value. However, in the context of a specific dividend proposal, it may be willing to deduct a lesser proportion of that value (or none at all). So long as the amount of the deduction is announced in a timely fashion, this should not give rise to unacceptable uncertainty. In our view, there is no policy rationale for suggesting the amount of the deduction must necessarily be established by a formula or fixed amount in the bidder's statement when the range of circumstances that may occur during the life of the offer cannot accurately be foreseen.

We also believe the second sentence of paragraph 12 of the draft Guidance Note should be omitted. If a bidder's statement makes it clear the bidder can deduct 100% of the face value of any franking credits, all parties can make their decisions on that basis. It should not then be open for anyone to argue the bidder should deduct some lesser amount on the basis it would not be "reasonable" for the bidder to deduct more than, say, 50%. This would effectively amount to a forced variation to the bidder's offer price and it is far from clear how, or on what basis, the Panel could decide to impose this. In relation to this issue, the Guidance Note should confine itself to ensuring the amount of the deduction is clearly defined and the same for all shareholders.

Consistently with these views, we submit a bidder making a "last and final" statement should be able to address what will happen if the target pays a franked dividend by making it clear it still retains a discretion to determine the amount to be deducted from the offer price (if any) on account of franking credits. In our view, if a "last and final" statement is subject to a clear and proximate qualification of this sort, the subsequent exercise of the retained discretion should not offend the truth in takeovers policy.[1]

[1] See the discussion in *Rinker Group Limited* 02R [2007] ATP 19, at [59] – [74] (where, as a matter of fact, the Panel concluded there was no clear and proximate retention of the "dividend discretion" contended for by CEMEX).

Submission

from

Minter Ellison

MinterEllison LAWYERS

Draft Guidance Note on Dividends – Minter Ellison comments

Introduction

1. We thank the Panel for the opportunity to provide comments on the draft Guidance Note on Dividends. We consider that this Guidance Note is a timely and welcome initiative.

2. The draft Guidance Note focuses only on the treatment of franking credits in takeovers. Although franking credits are an important issue, there are a number of broader and intersecting dividend related issues on which we consider bidders, targets and other market participants would benefit from Panel guidance. Some of those other issues are briefly mentioned in the draft Guidance Note but are not developed (e.g. footnote 8).

3. We submit that the draft Guidance Note should address the broader spectrum of issues surrounding how dividends (including any associated franking credits) impact the takeover process, with appropriate recognition of:

   (a) the different treatment of dividends in a friendly bid compared to a hostile bid; and

   (b) the different issues raised by ordinary dividends compared to special dividends.

4. As the Panel will appreciate, any public company takeover, whether friendly or hostile, typically last several months. If the target has a history of paying dividends in the ordinary course, the period during which a takeover unfolds will often coincide with when the target pays an ordinary interim or final dividend, noting that the ordinary dividend may be fully or partly franked.

5. In addition, as the Panel will also appreciate, fully franked special dividends are becoming an increasingly prevalent feature in friendly takeovers of ASX listed companies, whether structured as a conventional takeover bid or as a scheme of arrangement.

6. Fully franked special dividends are often declared and paid in friendly takeovers where the target company has a large franking account balance representing an accumulation of franking credits. A target company in this position will usually seek to negotiate with the acquirer the payment of a fully franked special dividend that exhausts this franking credit balance. This will deliver a tax benefit to many of the target's Australian resident shareholders, both in terms of the tax saving that the franking credit delivers on the dividend component and also a reduction in the capital gains tax (CGT) component on the disposal of their shares.

7. The CGT benefit arises because a portion of the total transaction value is split between the target (which pays the special dividend) and the bidder (which pays a reduced offer consideration). The reduction in the offer consideration paid by the bidder means there is a reduction in the amount of the sale proceeds received by target shareholders that is treated as capital proceeds on the disposal of their shares which is liable to capital gains tax.

Overview of our comments

8. Against this background, we consider that the Guidance Note should set out the key principles for bidders and targets to take into account for both ordinary and special dividends in a public company takeover, whether structured as a conventional takeover bid (for friendly or hostile proposals) or as a scheme of arrangement (for friendly proposals only).

9. The remainder of our comments address the following practical issues which we consider would be appropriate to address in the Guidance Note.

    (a) How are ordinary dividends dealt with in a friendly takeover (whether structured as a bid or a scheme)?

    (b) How are ordinary or special dividends dealt with in a hostile takeover?

    (c) How are special dividends dealt with in a friendly takeover?

    (d) Should ASIC's *truth in takeovers* policy apply to dividend related statements?

    (e) How should a target preserve its flexibility to revoke or modify a previously announced dividend?

    (f) Are special dividends viable in friendly takeovers given:

        (i) the potential for subsequent competing bids to emerge;

        (ii) the conditions that are typically attached to the declaration of a special dividend; and

        (iii) ASX's requirements surrounding the setting of a record date for a dividend, the practical need to set the record date for a special dividend while the offer is still conditional and the importance of maintaining an orderly secondary market for trading in the target's shares once the record date passes?

    (g) How do special dividends work in a scheme context compared to a bid context?

    The Panel's guidance need not be overly prescriptive but rather *principles* based. Therefore, although our comments on these issues are detailed in part, we do not intend or expect that the Panel's Guidance Note would go into the same level of detail. Our comments are simply intended to provide context and observations from our perspective. We are hopeful that the following comments assist the Panel in formulating its views on the appropriate scope of the Guidance Note and the nature of the guidance it wishes to provide.

Ordinary dividends - friendly takeover (by bid or scheme)

10. If the takeover is friendly, any recently declared ordinary dividend or any upcoming ordinary dividend is usually agreed with the acquirer as being a corporate action that the target is allowed to take.

11. The acquirer and the target may further agree that the payment of this ordinary dividend will not result in a corresponding deduction from the consideration offered under the bid or scheme. This is because the ordinary dividend is consistent with the target's past

practice in terms of timing and quantum, meaning that the dividend would have been paid in the absence of the takeover offer.

12. The terms of this permitted dividend are typically:

    (a) set out in an implementation agreement for a friendly takeover (whether by way of bid or scheme);

    (b) excluded from the bidder's condition that the target must not declare or pay any dividends or make any other distributions during the offer period; and

    (c) excluded from the definition of *Rights* that the bidder acquires when a target shareholder accepts a takeover offer.

13. An alternative approach in a friendly takeover is for the acquirer and the target to gross up the headline offer consideration to factor in the amount of a recently declared ordinary dividend or an upcoming ordinary dividend and to publicly announce that the ordinary dividend when paid will result in a corresponding *deduction* from the headline offer consideration but that this right of deduction does not extend also to any associated franking credit.[1]

Ordinary or special dividends – treatment in hostile bids

14. In a hostile bid, the bidder will usually include a condition that the target must not declare or pay any dividends or make any other distributions during the offer period. In addition to this condition, a hostile bidder will also usually include as a term of its offer that any dividends declared by the target will be deducted from the offer price, with scope for the bidder to also deduct the value of any franking credit benefit. The purpose of this term is to protect the bidder's position if the target declares or pays any dividends without the bidder's consent. The target could potentially do this once the bid has become unconditional, in which case the bidder at that point would no longer be able to rely on the *no dividends or other distributions type* condition.

15. If the target has no recent history of declaring dividends and proceeds to declare a dividend without the bidder's consent, this is likely to breach the *'no dividends or other distributions'* condition and constitute a *frustrating action*. A similar consequence is likely to arise even if the target has a history of declaring dividends but declares an abnormally large dividend inconsistent with past practice.

16. On the other hand, if the target declares a dividend that is consistent with past practice in terms of quantum and timing, it is unlikely that the bidder could rely on that breach as a *frustrating action* even though the declaration of this dividend would still technically breach the bid condition. In those circumstances, the bidder's sole recourse would be to exercise its right under the terms of its offer to reduce the offer consideration by the amount of the dividend (and potentially also a further amount reflecting the franking credit benefit).

[1] We prefer the simpler approach in paragraphs 11 and 12 under which an ordinary dividend will not, in a friendly context, result in a corresponding reduction in the offer price. This maintains conceptual separation between the ordinary dividend and the takeover process. This conceptual separation is preferable because an ordinary dividend whose amount and timing is consistent with past practice would be paid even if the takeover bid did not emerge in the first place and even if it does not succeed i.e. the ordinary dividend is separate and distinct from any change of control transaction. Also, the gross up and subsequent deduction approach may unnecessarily confuse retail shareholders.

17. In a hostile bid, it is open to the bidder to publicly state that it will allow target shareholders to retain any ordinary dividend declared by the target during the bid period (and to also retain the benefit of any franking credit), rather than the bidder exercising a right under its offer terms to deduct the dividend (and the benefit of any franking credit) from the amount of the offer consideration. Importantly however, if the bidder has already declared its offer *last and final* as to price, the bidder cannot subsequently state that it is allowing target shareholders to retain any ordinary dividend declared by the target during the bid period. This will be treated as delivering more value to target shareholders and therefore as an *improvement* in the offer consideration,[2] in circumstances where the bidder has already declared its offer price *last and final*. This will therefore breach ASIC's truth in takeovers policy: see ASIC RG 25 and *Rinker Group Limited 02 [2007] ATP 17*.

Further right of deduction for franking credit benefit

18. As noted at paragraph 14, a bidder in a hostile bid typically includes an offer term entitling it to reduce the offer consideration not only by the value of any dividend that is declared but also by the value of the associated franking credit.

19. The draft Guidance Note proposes that if the bidder wishes to include a right to also reduce the offer consideration by the amount of the associated franking credit, the bidder must clearly state in its bidder's statement how the deduction for franking credits will occur, either by a formula or as a fixed amount. The draft Guidance Note proceeds to state that the basis for adopting the formula or fixed amount calculation should be reasonable and explained in a way that shareholders can understand. If this policy is adopted, it will no longer be acceptable for a bidder to state – as many currently do – that it will be entitled to deduct an amount equal to the value of the franking credits *'as reasonably assessed by it'*. In this regard, the Takeovers Panel has suggested, as an example of an acceptable valuation formulation, the following wording: *'Bidder will value franking credits at 50% of their face value'*. We agree with the Panel's guidance on this point.

20. An alternative view is that the Panel should prohibit or at least discourage bidders from incorporating a right to deduct for franking credits, as it is too complex for retail shareholders to understand and difficult to practically implement. We are not aware of any instance where a bidder has sought to rely on this type of right to make a deduction for franking credits. Even if a bidder seeks to do so, there are a number of questions as to how this would work in practice, even with the Panel's currently proposed guidance on this point. For example:

    (a) Will deduction by a fixed amount ever work given different shareholders will have different entitlements to utilise franking credits?

    (b) How does deduction by a fixed amount accord with the principle that all shareholders should be treated equally?

    (c) Is the Panel equipped to determine whether the basis for adopting a calculation methodology is reasonable? What guidelines will the Panel use to evaluate reasonableness?

    (d) Does providing guidance on this specific issue make it too difficult for bidders to deduct for franking credits and therefore discourage bidders from trying to do so?

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[2] See section 650B(1)(g)

Is this unduly restrictive and unfair to bidders? In our view, probably not given that we are not aware of any instance where a bidder has actually sought to rely on such a provision to make a deduction for franking credits.

How are special dividends dealt with in a friendly takeover (by bid or scheme)?

Permitted corporate action

21. As noted earlier, if the target has a large franking account balance and it is negotiating a friendly takeover, the target will often seek the bidder's consent to declare and pay a fully franked special dividend. The quantum and terms of the special dividend will be agreed with the acquirer as a corporate action that the target is permitted to take. The terms of this permitted corporate action are typically set out in the implementation agreement for a friendly takeover (whether by way of bid or scheme).

22. Special dividends are generally not seen in hostile bids because:

   (a) special dividends are usually only declared by a target in contemplation of a change in control of the target – in a hostile bid, the target will be seeking to deny control passing to the bidder, at least on the terms it is initially proposing;

   (b) special dividends require a level of cooperation from the bidder in terms of timing and mechanics – that cooperation is unlikely to be forthcoming from the bidder if the bid is not recommended; and

   (c) special dividends undertaken without the consent of the bidder are more likely to enliven a defeating bid condition and invite an allegation from the bidder that the target has engaged in frustrating action.

Special dividends (but not the franking credit benefit) are usually deducted from headline offer price

23. In a friendly takeover, the amount of any special dividend is usually *deducted* from the headline offer price.

24. For example, an acquirer may make a recommended takeover for all of the target's shares (by bid or scheme) offering $10.00 cash per share. As part of the negotiated arrangements with the target, the bidder permits the target to declare a fully franked special dividend of up to $2.00 per share. The value of the franking credits attached to a special dividend of $2.00 is $0.85 per share (calculated as 30/70 x $2.00).

25. If a fully franked special dividend of $2.00 is paid, the target's shareholders will receive $8.00 cash per share from the bidder and $2.00 cash from the bidder i.e. $10.00 in aggregate, which is the same amount that the target's shareholders would have received if no special dividend was paid. However, those target's shareholders that are able to utilise the $0.85 franking credit will also receive a further benefit, as the franking credit reduces the tax that many of the target's Australian resident shareholders would otherwise have to pay on receipt of the $2.00 special dividend.

26. This is why in a friendly takeover the bidder's right to deduct the special dividend from the offer consideration does not go one step further and say, as it typically does in a hostile bid, that the right of deduction also extends to the value of the associated franking credit. Therefore, in the above example, the $10.00 headline offer price would only be reduced by $2.00 not by $2.85, as that would completely nullify the benefit of the franking credit.

27. As noted earlier, the position is different in a hostile bid where a bidder would reserve a right to make a further deduction beyond $2.00 to reflect the franking credit benefit. We submit that the draft Guidance Note should draw out the subtle but important difference in treatment between how franking credits are dealt with in a hostile bid compared to a friendly bid.

Headline offer price must not incorporate value of franking credits

28. Paragraphs 5 to 7 inclusive of the draft Guidance Note reflect the principle articulated in *Alesco Corporation Limited 01 and 02* [2012] ATP 14 that the value of franking credits should not be incorporated into the headline offer price. We agree with this principle but submit that these paragraphs of the Guidance Note (including the example) could benefit from some amendment and elaboration. Our accompanying mark up contains our suggested re-draft.

Truth in takeovers – should this apply to dividend related statements?

29. The Takeovers Panel's decision in *Warrnambool Cheese and Butter Factory Company Holdings Limited* [2013] ATP 16 concluded that ASIC's truth in takeovers policy is capable of applying to announcements relating to dividends in takeovers. The consultation paper accompanying the draft Guidance Note also states that truth in takeovers policy can apply to statements about franking credits.

30. Although we consider that the end result in the *Warrnambool Cheese* proceedings was correct, we submit that using truth in takeovers as the gateway to deliver that outcome is strained. More generally, we submit that truth in takeovers policy does not readily apply to dividend related market statements for the following reasons taken as a whole.

(a) Applying the truth in takeovers policy to dividend related market statements made during a takeover diminishes the clarity of the principle in *Alesco 01 & 02* that the potential additional value of franking credits should not be conflated with the headline offer price. If *franking credits* are not part of the offer price (as per *Alesco*), it logically follows that the *franked dividend itself* is also not part of the offer price. By extension, any public statements made by the target relating to a franked dividend and/or the franking credits do not readily sit within the traditional sphere of the truth in takeovers policy.

(b) Applying the truth in takeovers policy to dividend related market statements is inconsistent with the dividend framework in the Corporations Act which incorporates flexibility to revoke announced dividends before they are formally declared (see further the discussion at paragraphs 31 to 36 below).

(c) Applying the truth in takeovers policy to dividend related market statements is inconsistent with the fact that the recipients of a dividend are not necessarily the same as the recipients of offer consideration (see further the discussion at paragraphs 37 to 39 below).

Dividend framework in the Corporations Act

31. The dividend framework in the Corporations Act and market practice distinguish between:

(a) the *determination* of a dividend (the determination of a dividend is typically communicated in an announcement by the company of its *intention* to declare a dividend);

(b) the *declaration* of a dividend (this being the point at which the law recognises that a company incurs a debt to shareholders in the amount of the declared dividend); and

(c) the *payment* of a dividend.

32. The dividend regime in the Corporations Act means that the actual receipt of a dividend is subject to inherent qualifications and uncertainties because of:

(a) the conditions in section 254T of the Act that must be satisfied before a dividend can lawfully be paid;

(b) the requirement that a dividend must be paid out profits or other distributable reserves so that a dividend is not paid out of capital;[3]

(c) the express acknowledgement in section 254V of the Act that a dividend that is to be paid by the determination of a payment date can be revoked at any time until the payment date;

(d) the decision of the High Court of Australia in *Bluebottle*[4] that a declaration of a dividend which is subject to the satisfaction of a condition precedent will only take effect and a legal debt only created on the satisfaction of that condition and not at the time the declaration is made; and

(e) the decision of the Full Federal Court of Australia in *Noza Holdings*[5] that a company incurs a debt only on declaration of a dividend by virtue of the operation of section 254V(2) of the Act.

33. The above points demonstrate that the intended payment of a dividend is inherently uncertain. For example a company may announce its intention to declare a dividend and then subsequently encounter adverse trading conditions or experience a material adverse change with the result that it no longer has profits or non capital reserves (or the same level of profits or non capital reserves) to distribute the previously announced (determined) dividend.

34. As per section 254V, the decision to pay the dividend may be revoked until the *time for payment* arises. Some companies' constitutions have not been updated to align with the new dividend framework in the Act and therefore they still provide simply for the *declaration* of dividends. For those companies, a debt is incurred as soon as the dividend is *declared* (section 254V(2)). However, most ASX listed companies have now updated their constitutions and amended their dividend provisions to authorise the board to *determine and/or declare* that dividends are payable rather than simply authorising the

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[3] See *ATO Ruling TR2012/5, 'Income Tax: section 254T of the Corporations Act 2001 and the assessment and franking of dividends paid from 28 June 2010', together with a joint legal opinion (Joint Opinion) by A H Slater QC and J O Hmelnitsky of counsel dated 29 November 2011.*

[4] *Bluebottle UK Limited v The Deputy Commissioner of Taxation* [2007] HCA 54 at 40.

[5] *Federal Commissioner of Taxation v Noza Holdings Pty Ltd* [2012] FCAFC 43 at 69.

board to *declare* a dividend. This provides greater flexibility by allowing the board to first announce (determine) a dividend and then control the time that the announced dividend is subsequently *declared* (if it is in fact declared at all), noting again that it is only once the dividend is *declared* that the debt is crystallised and owed to shareholders.

35. Therefore, outside the specific context of a takeover, the settled and accepted position is that a listed company's board can revoke an intention to declare a dividend as long as the dividend has not yet been declared, as *declaration* is the point at which the debt crystallises.

36. Similarly, and again outside the specific context of a takeover, if a dividend has been declared subject to the fulfilment of a specific condition, the declaration of the dividend will only take effect on the satisfaction of that condition (*Bluebottle UK Limited v The Deputy Commissioner of Taxation* [2007] HCA 54 at [40]).

Recipients of dividend may not be the same as recipients of offer (or scheme) consideration

37. It is relevant to note that if any ordinary or special dividends are declared in a takeover, all persons who are registered as holders of shares in the target on the record date for that dividend will receive the dividend from the target *irrespective* of whether or not they subsequently accept the offer (if it is structured as a takeover bid) or vote in favour of the scheme (if it is structured as a scheme of arrangement).

38. Therefore, it is possible (and indeed often the case) that the body of shareholders who receive an ordinary or special dividend do not perfectly mirror the body of shareholders who receive the bid or scheme consideration. Similarly, it is possible that persons may purchase target shares *after* the record date for the dividend (and therefore not be eligible to receive that dividend) but still participate in the takeover or scheme. This illustrates the point that a dividend is not *technically* part of the offer consideration or the scheme consideration but rather is a separate and distinct corporate action undertaken by the target with the bidder's permission.

39. However, we acknowledge the Panel's broader perspective in *Warrnambool Cheese* that many shareholders (especially retail shareholders) regard any proposed dividend announced in a takeover or scheme context as being inextricably intertwined with, and therefore commercially part of, the offer/scheme consideration. This commercial interpretation is also supported whenever a target announces a proposed special dividend with the consent and cooperation of the bidder, as is usually the case.

Section 631 and 650B(1) principles may provide a better gateway

40. As noted earlier, we consider that the outcome in the *Warrnambool Cheese* proceeding was entirely correct. However, we consider that using *truth in takeovers* as the gateway to deliver that outcome is not necessarily correct. In the context of dividends in takeovers and schemes, if there are any subsequent developments that result in an announced dividend being revoked or modified and if the target has not publicly reserved a sufficiently broad discretion to revoke or modify the dividend arrangement, we submit that section 631 principles[6] and/or section 650B(1) principles[7] provide a more appropriate basis for restoring any withdrawn or diminished economic value.

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6 Section 631 regulates the period between public announcement of a proposed bid and the making of the bid itself. Section 631 essentially provides that the terms of the bid once made must be the same *or not substantially less favourable* than those in the public proposal.

41. Leaving aside whether *truth in takeovers*, section 631 principles and/or section 650B(1) principles are the appropriate mechanism for ensuring that target shareholders are not economically disadvantaged by the revocation or modification of any dividend announced during a takeover, perhaps the more practical questions for the Guidance Note to consider are:

(a) what type of circumstances might legitimately prompt a target to revoke or modify a previously announced dividend?

(b) how should a target communicate in advance the possible revocation or modification of a proposed dividend so that the market is sufficiently informed that the receipt of the dividend is not assured?

42. Our thoughts on these questions are set out below.

How should a target company's board preserve its flexibility to revoke or modify a previously announced dividend?

43. The Guidance Note could note that there are a number of legitimate reasons why a target, having initially announced a proposed special dividend in a friendly takeover (by bid or scheme), may subsequently wish to revoke or modify the dividend proposal. For example:

(a) the acquirer and the target may wish to restructure the terms of the recommended offer in a way that no longer incorporates a special dividend component but which instead improves the headline offer price (as occurred, at least in part, in Saputo's offer for Warrnambool Cheese);

(b) the target may receive a subsequent superior proposal that it wishes to publicly recommend but that later proposal does not involve any special dividend component at all or involves a lesser special dividend component;

(c) the expected tax treatment of the special dividend may change e.g. due to a change in tax law or tax policy that affects the expected benefit of the special dividend; or

(d) the target may encounter adverse trading conditions or experience a material adverse change with the result that it no longer has profits or non capital reserves (or the same level of profits or non capital reserves) to distribute the previously announced (i.e. determined) dividend.

44. The Takeovers Panel in *Warrnambool Cheese* concluded that the legal distinctions noted earlier between *determining* a dividend, *declaring* a dividend and *paying* a dividend are not of themselves sufficient to permit a target to revoke a special dividend that has been announced as part of a friendly takeover. We acknowledge that those distinctions are not appreciated by all market participants in a takeover.

45. Therefore, the Guidance Note could state that if a proposed special dividend is announced as part of any friendly takeover, the target should expressly reserve a discretion to revoke or modify that dividend proposal, including ensuring that the circumstances in which that discretion may be exercised are clearly and fully disclosed. That disclosure should be

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[7] Once a formal bid is made the effect of section 650B(1) is that the bid can be varied but only in a way that *improves* the offer consideration. Even though dividends (and any associated franking credits) are not strictly part of the offer consideration, section 631 and/or section 650B(1) principles would support a declaration of unacceptable circumstances in the circumstances described in paragraph 40.

made when a proposed dividend is first announced as part of a takeover and in all subsequent announcements.

46. Specifically, the Guidance Note could state that until the dividend is declared by the target, the target's board should in all public announcement relating to the proposed dividend:

(a) expressly note the conditions that must be met before the dividend is declared (see discussion below); and

(b) expressly reserve an overriding discretion on the part of the target's board not to proceed with declaring the previously announced dividend or to modify that dividend.

Are special dividends viable in friendly takeover bids?

47. Footnote 8 to the draft Guidance Note states that the dividend arrangements considered in the *Warrnamabool Cheese* proceedings were described by the Panel as *complex, uncertain and undesirable*, and that the Panel discourages similar arrangements in the future. The Panel in its reasons for decision in *Warrnambool Cheese* and again in footnote 8 to the draft Guidance Note observes that the special dividend arrangements in the Warrnambool takeover had *a 'conditional' (and effectively retrospective) record date without there being any certainty of the dividends being paid, affecting market integrity*. The Panel describes this conditionality *as complex and essentially unworkable*.

48. We acknowledge that having *two* special dividends at different ownership thresholds in the Warrnambool Cheese takeover, with a single and conditional record date for each special dividend, perhaps introduced too much complexity for the market to absorb. However, much of the complexity that the Panel criticises, in particular surrounding a conditional record date, applies even if there is just one special dividend.

49. Given the tax benefits that special dividends potentially offer a large cross section of Australian resident target shareholders and given the resultant commercial appetite for including special dividends in friendly takeovers, the Panel should consider providing general guidance as to whether special dividends are in fact viable in friendly takeover bids, in light of the following practical considerations.

(a) The prospect that a subsequent competing bid may emerge - if an auction for control develops, it may no longer be appropriate or practical to maintain a special dividend arrangement that was negotiated with the initial bidder.

(b) Special dividends will always have conditions attached to them – these conditions may raise timing and other complications, even if there are no subsequent competing bids.

(c) For practical reasons, the record date for a special dividend needs to be set while the offer is still conditional.

(d) There is also a need to maintain an orderly secondary market for trading in the target's shares, with certainty surrounding ex-dividend trading.

50. Each of these points is considered further below.

A subsequent competing bid may emerge

51. Whenever a friendly takeover offer with a special dividend component is negotiated and first announced, the bidder and the target each recognise that the potential exists for one or more competing bids to subsequently emerge. If that occurs, a target may wish to withdraw its recommendation of the initial offer and instead recommend a later offer which it considers is superior.

52. If one or more competing bids emerge, proceeding with the special dividend negotiated with the first bidder as part of its recommended offer can potentially be problematic. If there are multiple competing bids for a target on foot at the same time, the target cannot simultaneously offer each competing bidder the capacity to incorporate as part of its offer terms a discretion on the part of the target to pay a special dividend. By their nature, special dividend arrangements can only be entered into by a target with one preferred bidder at a given time. This is because the special dividend will be a corporate action that needs to be authorised by the preferred bidder, otherwise the dividend would likely breach a term and/or condition of that bidder's offer. The authorisation from the preferred bidder will be documented in an implementation agreement. An implementation agreement can only be entered into with a preferred bidder.

53. If a competing offer emerges that the target considers is superior or has the potential to develop into a superior offer, the target and the initial bidder may each conclude that it is in their respective best interests to revoke the proposed special dividend.

54. From the perspective of the target, its board should in these circumstances rely on its previously disclosed broad discretion to revoke the special dividend, as there has now been a change in circumstances in the form of a competing offer that is or may develop into a superior offer.

55. From the perspective of the first bidder, the target's revocation of the special dividend in response to the emergence of the competing offer may legally require the first bidder to increase its offer consideration by at least the value of the franking credit that could have been received by eligible shareholders under the special dividend that was part of the initial announcement. This is to avoid any suggestion that the first bidder has effectively reduced the value of its offer consideration as a consequence of the special dividend being revoked. In any event, the first bidder will most likely need to increase its offer consideration to remain price competitive given the emergence of the competing bid. The size of that price increase will most likely need to be more than the value of the franking credit that could have been received by eligible shareholders under the revoked special dividend.

Conditions for the declaration of any special dividend

56. During the negotiation of a friendly takeover that incorporates a special dividend, the bidder and the target will usually require that specific conditions be satisfied prior to the target declaring the special dividend. This is to ensure that the special dividend only proceeds if there is a reasonably high degree of certainty that control of the target will pass to the bidder. A target will generally not want to commit itself to paying a special dividend if the takeover does not result in a change in control, either because one or more of the bidder's offer conditions are not satisfied or waived or because the bidder does not achieve a controlling interest (more than 50%).

57. In the context of a friendly takeover bid, the bidder and the target typically agree that the conditions for the target to declare a special dividend are that:

(a) the bidder has achieved a specific relevant interest in the target's shares (e.g. more than 50% or more than 75%); and

(b) the bidder has declared (or announced an intention to declare) its offer unconditional.

Setting the record date for the special dividend

58. As a practical matter, the record date for any special dividend must be set *before* the bidder declares the takeover offer unconditional. This is to ensure that the special dividend (and the benefit of the franking credit) is received by the intended recipients, namely target shareholders (whether or not they accept the bidder's offer), not by the bidder. Set out below is an explanation of why setting the record date for a special dividend before the date that the takeover offer becomes unconditional achieves this objective.

59. A target shareholder will only be entitled to receive a special dividend if they are recorded as a shareholder on the record date for the special dividend.

60. When a target shareholder accepts a takeover offer while it is still conditional, this acceptance creates a conditional contract for the transfer of their shares. This means that a target shareholder who accepts a conditional offer will remain registered as a shareholder of the target until (a) the takeover offer is declared unconditional and (b) their acceptance form is processed by the target's share registry. The practical effect of this is that if the record date is set while the takeover offer is still conditional, a shareholder who accepts the offer will still be entitled to receive the special dividend because they will still be registered as the holder of the shares on the record date.

61. In contrast, a target shareholder who accepts a takeover offer once it has been declared unconditional will cease to be recorded as a shareholder of the target as soon as their acceptance form is processed by the target's share registry. Processing of acceptance forms once an offer is unconditional generally takes a matter of days after the acceptance form is received. Consequently, if the record date for any special dividend falls on a date *after* the takeover offer becomes unconditional, shareholders who accept the takeover offer will have their acceptance forms processed before the record date and, following processing, will receive the offer consideration and no longer be registered as the holder of target shares. Therefore, they will not be entitled to the special dividend. Instead, it will be the *bidder* that will be entitled to the special dividend (and the associated franking credits), as it is *the bidder* that will now be registered as the holder of this parcel of shares on the record date for the special dividend. In these circumstances, the headline offer price will not be reduced by the amount of the special dividend. Nevertheless, target shareholders – being the intended recipients of the special dividend and franking credit – will not receive the special dividend, meaning that the original purpose of having a special dividend will have failed.

62. To summarise, the record date for any special dividend must be set *before* the bidder declares the takeover offer unconditional so that the benefit of the special dividend is received by target shareholders (irrespective of whether or not they accept the offer) rather than by the bidder.

63. In setting the record date for the special dividend, the target must also factor in the requirement in Appendix 3A of the ASX Listing Rule for there to be at least 7 business days between the announcement of a record date and the actual record date. To accommodate the above timing considerations, it is usual for the bid implementation deed

to provide that the bidder must give sufficient notice to the target once it has achieved the agreed relevant interest threshold so that the target can set and announce the record date for the special dividend before the bidder declares its offer unconditional.

The need to maintain an orderly secondary market

64. Outside the specific context of a takeover, it is usually the case that once the record date for a dividend passes, the share price of the company declaring the dividend will fall by the amount of that dividend because buyers acquiring the target shares on market after the record date will know with certainty that they will be acquiring them ex-dividend; i.e. without an entitlement to the special dividend. Similarly, sellers will know with certainty that they retain the dividend.

65. However, in a takeover context, if the declaration of a special dividend is uncertain (for example, because the fulfilment of a necessary condition such as a 50% relevant interest threshold being achieved is itself uncertain), this uncertainty will be reflected in the market price for the target's shares after the record date. It is for this reason that ASX does not like having a record date for a *conditional* corporate action; here, a proposed dividend that has been determined (announced) but whose declaration is conditional on the bidder achieving a specific relevant interest (e.g. greater than 50%) *and* declaring its offer unconditional. This means that people buying and selling shares before and after the record date will not know for sure whether they will receive the dividend. This creates potential market disruption and uncertainty in the secondary market for the target's shares.

66. The potential for this market disruption and uncertainty is exacerbated if (as occurred in *Warrnambool Cheese*) the record date for a special dividend is set and announced by a target too early; i.e. before it is sufficiently certain whether the conditions relating to the declaration of the special dividend will be met, in particular whether the bidder will achieve the required relevant interest threshold.

67. One way to address these uncertainties is for the bidder to establish an institutional acceptance facility. This allows institutional shareholders to indicate their acceptance of the offer while it is still conditional but at the same time retain the right to not formally accept the offer and to otherwise deal with their shares. A retail acceptance facility could also be established (as Alesco did in its takeover bid by Dulux).

68. As an alternative to setting the record date for a special dividend *before* the bidder declares the offer unconditional, the target and the bidder may agree that the bidder will not process any acceptance forms until *after* the record date has passed. This will ensure that target shareholders who accept the takeover offer prior to the special dividend record date will still be registered as the holder of their shares and therefore they will still be entitled to receive the special dividend. This approach was adopted in Zijin Mining's recommended takeover bid for Norton Gold Fields Limited in 2012. However, this may not be attractive to a bidder in a competitive bid scenario because it requires delaying the processing of offer acceptances and therefore delaying the dispatch of payment to shareholders who have accepted. This delay means that shareholders who accept early will have to wait until the special dividend record date is set before their acceptance forms are processed and the offer consideration is received by them. A bidder may regard this as disadvantageous to its broader objective of encouraging acceptances into its bid.

Conclusion as to viability of special dividends in friendly takeover bids

69. We consider that it remains viable for special dividends to be incorporated into friendly takeovers bids provided:

    (a) a target company publicly reserves a sufficiently broad discretion to revoke or modify the special dividend in response to subsequent developments of the kind noted in paragraph 43;

    (b) no subsequent competing bids emerge; and

    (c) the bidder establishes an institutional acceptance facility and/or retail acceptance facility to:

        (i) give the bidder the confidence to publicly state that it will shortly declare its offer unconditional; and

        (ii) give the ASX, the target and those trading in the secondary market for the target's shares confidence that the bidder's offer will soon become unconditional on the date announced by the bidder.

Special dividends in schemes of arrangement

General

70. Recent market examples of schemes that have incorporated a special dividend component include Healthscope (2010), Cellestis (2011) and Spotless (2012).

71. The timing and mechanics for a special dividend in a scheme are simpler than those in a takeover bid. This is because a scheme delivers an *all or nothing outcome* on a specific date. If the scheme is approved by the requisite majority of shareholders at the scheme meeting and by the court at the second hearing (approximately one week later), 100% control will pass to the acquirer on the implementation date. If the scheme is not approved either by shareholders or the court, the status quo is preserved and control does not pass. This makes the timing and mechanics for a special dividend in a scheme considerably easier than in a takeover bid where the bidder's relevant interest increases by an unknown percentage depending on the level of acceptances received during the offer period, noting that the offer period may need to be extended several times and the precise point that the offer will be declared unconditional is not known at the time the intention to declare the special dividend is first announced.

72. In contrast, with a scheme, when the proposed special dividend is announced as part of the initial announcement of the overall transaction, the dates for the shareholder meeting to vote on the scheme, for the court to approve the scheme and for the implementation of the scheme are all known in advance (or these dates will be set and announced reasonably soon after the initial announcement).

Special dividend deducted from headline scheme consideration

73. As is the case with a takeover bid, in a scheme of arrangement any special dividend declared and paid by the target is deducted from the headline scheme consideration payable by the acquirer. (However, this right of deduction does not extend to deducting the value of the franking credit as that would nullify one of the tax benefits of having a special dividend in the first place).

74. The record date for the special dividend will be different to the record date for the scheme, meaning that to receive both the special dividend and the scheme consideration, shareholders need to hold their shares on both record dates.

Conditions for the declaration of special dividend in a scheme

75. In a scheme of arrangement, both the acquirer and the target will want to ensure that the special dividend is only declared and paid once it is reasonably certain that the scheme will proceed (i.e. once the scheme of arrangement has been agreed to by the requisite majorities at the scheme meeting and approved by the court).

76. Typically the target declares the special dividend only after the scheme is approved by shareholders at the scheme meeting. At that point, the target's board also publicly announces that the special dividend is conditional on the scheme becoming legally effective. A scheme becomes legally effective if it is approved by the court and when the target lodges an office copy of the court's order approving the scheme with ASIC: see section 411(10) of the Act.

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Please feel free to contact us if you have any queries arising from our comments or suggested amendments. We look forward to the issue of the final Guidance Note.

Yours faithfully

Alberto Colla Partner   **Tim Watkin** Partner

Minter Ellison

28 February 2014