



Australian Government

Takeovers Panel

Consultation Paper

**Rewrite of GN 1 on Unacceptable Circumstances
Draft GN on Recommendations and Undervalue Statements**

20 April 2010

Introduction

1. The Panel invites comments on the 2 draft Guidance Notes attached. The time for comments is open until **21 May 2010**.
2. Comments or queries can be directed to:

<p>Allan Bulman Director, Takeovers Panel Email: takeovers@takeovers.gov.au</p>

3. It is Panel policy that submissions may be made public unless the respondent requests confidentiality.
4. The Panel will consider all comments and reserves the right to make changes to the draft Guidance Notes in response to comments or otherwise.

Background

5. Draft Guidance Note 1 Unacceptable Circumstances is a rewrite of the existing Note, employing principles of simplified drafting. However, the opportunity has been taken to incorporate more history to show the derivation of the current terms of s657A and also to make it clear that the power to declare circumstances unacceptable is broad.
6. Example 8 of paragraph 31(b) of GN 1 provides guidance in relation to a change of control which either disenfranchises shareholders or does not meet the policy of Chapter 6 (reverse takeovers). This guidance follows from recent Panel decisions in *Gloucester Coal 01 and 01R*.¹
7. The draft Guidance Note on Recommendations and Undervalue Statements follows from recent Panel decisions, including *Origin Energy Ltd 02*² and *Tully Sugar Limited 01 and 01R*.³ It provides guidance for target directors (among other matters) on:
 - (a) making recommendations, either before the target's statement is issued or in the target's statement and
 - (b) the disclosure required to support an undervalue statement.

Issues

8. While comments are sought generally, particular attention is directed to the following issues:

¹ [2009] ATP 6, [2009] ATP 9

² [2008] ATP 23

³ [2009] ATP 26 and [2010] ATP 1

GN 1 Unacceptable Circumstances

9. Are there any other examples of unacceptable circumstances which should be included in the draft GN?
10. Should we provide guidance as to what may constitute a change of control for the purposes of the example 8 of paragraph 31(b) (reverse takeovers) and whether triggering that definition should result in the requirement for a shareholder vote? If so, please also include details of what guidance you think we should give.
11. Are there any other issues relating to reverse takeovers that you think we should give guidance on? If so, please also include details of what guidance you think we should give.

Draft Guidance Note on Recommendations and Undervalue Statements

12. Do you think that there is a need for guidance on recommendations and undervalue statements?
13. Are there any other issues relating to recommendations and undervalue statements that you think we should give guidance on? If so, please also include details of what guidance you think we should give.
14. Should we provide further guidance as to the standard of disclosure for target directors in giving reasons for a recommendation in the target's statement? If so, what do you consider the standard to be?

Attachments

- 1 Revised draft GN 1 Unacceptable Circumstances
- 2 Draft GN Recommendations and Undervalue Statements

*Attachment 1***Guidance Note 1 – Unacceptable Circumstances**

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Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to making a declaration of unacceptable circumstances.⁴
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. If the Panel makes a declaration of unacceptable circumstances it has the power to make orders.⁵
4. The Panel aims to correct unacceptable circumstances as quickly and as cost-effectively as possible. It seeks to ensure that control transactions are decided by informed security holders who have confidence in the integrity of Australia's market for corporate control.

History

5. Section 60 of the Companies (Acquisitions of Shares) Act 1980⁶ allowed the National Companies and Securities Commission to declare conduct, or an acquisition of shares, unacceptable. The section was seen to confer an anti-avoidance power:

The Commission's exercise of discretionary powers will thus provide a mechanism whereby reasonable commercial transactions will be unencumbered but any belief

⁴ Section 657A of the *Corporations Act 2001* (Cth). References are to the *Corporations Act* unless otherwise indicated

⁵ Section 657D. See GN 4 for a discussion on the use and effect of orders and other remedies available to the Panel

⁶ And State Codes

*that what is not illegal (or cannot be demonstrated to the Courts to be illegal) is acceptable will be precluded. The existence of such discretionary powers, and the principles upon which they are to be applied, may be seen as imposing an obligation of propriety on those who use the facilities of the market place and their advisers. The obligation is a responsibility that no person should fear or seek to avoid.*⁷

6. With the introduction of the Corporations Law the power to declare conduct or an acquisition unacceptable was given to the Corporations and Securities Panel in the following terms:

Where, on an application under subsection (1), the Panel is satisfied:

(a) that unacceptable circumstances have occurred:

(i) in relation to an acquisition of shares in the company; or

(ii) as a result of conduct engaged in by a person in relation to shares in, or the affairs of, the company; and

(b) having regard to the matters referred to in section 731 and any other matters the Panel considers relevant, that it is in the public interest to do so;

*the Panel may by writing declare the acquisition to have been an unacceptable acquisition, or the conduct to have been unacceptable conduct, as the case may be.*⁸

7. A declaration could be made after having regard to, among other things, the matters in section 731 (ie the desirability of ensuring that an acquisition of shares took place in an efficient, competitive and informed market and the need to meet the 'Eggleston principles'⁹).

8. Whereas previously orders had been made by the courts, they were now made by the CSP.¹⁰ Only the Australian Securities Commission could bring matters before the CSP.

9. From 13 March 2000, section 733 became section 657A in the following terms:

The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

(a) are unacceptable having regard to the effect of the circumstances on:

(i) the control, or potential control, of the company or another company; or

(ii) the acquisition, or proposed acquisition, by person of a substantial interest in the company or another company; or

(b) are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

⁷ NCSC Policy Statement 105, Issue 3 (1 October 1986), para 7

⁸ Section 733(3) of the Corporations Law

⁹ See discussion at paragraph 26 and following

¹⁰ Section 734 of the Corporations Law

*The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.*¹¹

10. In addition, the persons who could bring matters before the Panel was broadened so that a bidder, target, ASIC or any other person whose interests were affected could apply for a declaration¹² and the Panel became the primary forum for resolving takeover disputes during the bid period.¹³
11. In 2001, the CSP became the Takeovers Panel.
12. In 2007, s657A (see Appendix A for detailed terms) was broadened further by:
 - (a) extending subsection (2)(a) to clearly cover past and potential future effect, likely effect, control or potential control and
 - (b) the introduction of an additional test: that the circumstances are otherwise unacceptable having regard to the purposes of chapter 6 set out in s602.¹⁴

Power to declare unacceptable circumstances

13. Section 657A (**Appendix A**) empowers the Panel to make a declaration of unacceptable circumstances. The section requires the Panel to consider:
 - (a) the effect of the circumstances and
 - (b) whether the effect appears to the Panel to be unacceptable:
 - (i) having regard to control or potential control of a company¹⁵
 - (ii) having regard to the acquisition or proposed acquisition of a substantial interest in a company
 - (iii) having regard to the section 602 principles or
 - (iv) because of a contravention of Chapters 6-6C.
14. In *Glencore (No 1)*, the Federal Court said of s657A before its amendment in 2007:¹⁶

*It is therefore necessary, before the Panel considers whether it **appears** that particular circumstances are unacceptable, having regard to the effect of the circumstances, to make a determination as to the effect of those circumstances. It is only unacceptability of the effect that must appear to the Panel and the Panel must make a finding as to that effect before it considers whether that effect is unacceptable.*

¹¹ *Corporate Law Economic Reform Program Act 1999* introduced s657A to the Corporations Law. See s657A(2)

¹² Section 657C(2)

¹³ Section 659AA

¹⁴ Sections 657A(2)(a) and (b), introduced by s4 of the *Corporations Amendment (Takeovers) Act 2007*, effective 13 May 2007

¹⁵ Extends to listed bodies (s603) and managed investment schemes (s604)

¹⁶ *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290, per Emmett J at [39]

In a sense, it is a precondition of the making of a declaration that the Panel make a finding as to the effect, on control, or acquisition as, referred to in s657A(2), that the relevant circumstances had.... (original emphasis)

15. Before making a declaration the Panel is also required to consider:
 - (a) the purposes of Chapter 6 set out in s602¹⁷
 - (b) the other provisions of Chapter 6¹⁸
 - (c) any rules, or matters specified in the regulations¹⁹
 - (d) whether making a declaration is not against the public interest²⁰ (generally meaning issues beyond the commercial interests and convenience of the parties to such things as the signal the decision may send the market and the wider investing community) and
 - (e) any policy considerations it considers relevant.²¹
16. The Panel may also consider any other matters it considers relevant.²²
17. Before making a declaration the Panel must give parties, persons to whom the declaration relates and ASIC an opportunity to make submissions.

What are unacceptable circumstances?

18. There is no definition of unacceptable circumstances.²³ Based on the wording of section 657A, the Panel's ability to make a declaration of unacceptable circumstances is broad.²⁴ It extends beyond takeover bids to other control transactions.

¹⁷ In considering s602(c), the Panel must take into account the actions of directors: s657A(3)

¹⁸ An example of a declaration based on circumstances "at odds with basic principles and policies underlying takeovers regulation in Australia and Chapter 6" is *Consolidated Minerals Ltd 03R* [2007] ATP 28 (see para [23]). Generally, these provisions give effect to the purposes set out in section 602

¹⁹ There are currently no rules made under section 658C or regulations for the purposes of paragraph 195(3)(c)

²⁰ Section 657A(2) – which also requires the Panel to consider whether not making a declaration is not against the public interest

²¹ Sections 657A(2) and (3)(a)

²² Section 657A(3)(b). See also *Glencore International AG v Takeovers Panel* [2006] FCA 274 at [35]

²³ Section 732 of the Corporations Law was, in effect, a definition

²⁴ For example, *Austar United Communications Limited* [2003] ATP 16, *Grand Hotel Group* [2003] ATP 34, *National Can Industries Limited* [2003] ATP 35, *Village Roadshow Limited* [2004] ATP 4. In *Pinnacle VRB Ltd (No 10)* [2001] ATP 21 and 21a (upheld on review: *Pinnacle VRB Ltd (No 11)* [2001] ATP 23) the Panel reversed an acceptance made in error. See also *Golden West Resources Ltd 03 and 04* [2008] ATP 1 at [40]. In *Midwest Corporation Ltd 02* [2008] ATP 15, the Panel declared an acquisition unacceptable in the contest for control of Midwest (a takeover by SinoSteel) because of failure to comply with the *Foreign Acquisitions and Takeovers Act 1975* (Cth)

Examples:

1. *rights issues*
 2. *buy-backs*
 3. *resolutions to approve acquisitions of shares*
 4. *reductions of capital*
 5. *substantial holding notices*
 6. *compulsory acquisition*
 7. *schemes of arrangement*²⁵
 8. *reverse takeovers.*
19. Parliament has twice suggested that a broad interpretation is intended.
20. In 1998, when s657A was proposed, Parliament said:
*The Panel's jurisdiction to make a declaration of unacceptable circumstances will not depend upon the existence of a general offer to shareholders under a takeover bid. Instead, its discretion will extend to circumstances involving an acquisition of a substantial interest in, or control of, a company (proposed paragraph 657A(2)(a)). In making a declaration of unacceptable circumstances, the Panel must have regard to the spirit of the takeover rules in section 602 in deciding whether the circumstances are unreasonable and whether it is in the public interest to make the declaration (proposed subsection 657A(2)).*²⁶
21. A broad interpretation allows the Panel to fulfil the role envisaged by s659AA as the main forum for resolving disputes about a takeover bid.²⁷
22. In 2007, Parliament said of the new s657A(2)(b):
A new paragraph 657A(2)(b) is inserted in the Act to give the Panel jurisdiction to declare circumstances unacceptable having regard to the purposes of Chapter 6 of the Act set out in section 602. This is a significant change, designed to ensure the Panel can address circumstances which impair those purposes, without having to also establish either a contravention of the Act or an effect on control or potential control of a company or on the acquisition or proposed acquisition of a substantial interest in

²⁵ The Panel normally leaves schemes to the regulation of the court seized of it. But see *Citect Corporation Ltd* [2006] ATP 6 at [33]

²⁶ *Corporate Law Economic Reform Program Bill, 1998 Explanatory Memorandum*, para 7.9. The section took effect on 13 March 2000

²⁷ *Corporate Law Economic Reform Program Bill 1998, First Reading by Mr Hockey, Hansard 3/12/1998*, page 996: "To address concerns with the current dispute resolution mechanisms for takeovers, the existing Companies and Securities Panel will be reconstituted to become the primary forum for resolving takeover matters. The panel will retain its existing jurisdiction to enforce compliance with the spirit of the law...."

a company. The intention is to give the Panel a wider power to give effect to the spirit of the Act. The purpose of the words in brackets in the new paragraph is to ensure that the Panel can make a declaration of unacceptable circumstances in relation to the affairs of one company, being the company referred to in subsection 657A(1), where the effect of the unacceptable circumstances relates to or is primarily manifest on another company or the securities of either company.²⁸

23. In *Alinta*, which concerned in part whether s606 had been contravened, it was said in the High Court:²⁹

... The declaration is a statement of the Panel's conclusion that, having regard to the circumstances created by the contravention and to the public interest, it considers something needs to be done about those circumstances. They are "unacceptable" in the sense that they cannot remain as they are and that they require consideration to be given to the orders that may be made under s 657D....

24. The existence of unacceptable circumstances does not depend on conduct or intention. Typically the Panel considers the effect of the circumstances on persons and the market in the light of the principles in s602.

25. Unacceptable circumstances may arise whether or not there is also a breach.³⁰

Examples involving possible unacceptable circumstances:

1. *contravention of section 606³¹*
2. *contravention of a provision mentioned in section 612*
3. *contravention of ss636(1) or 638(1) - disclosure*
4. *contravention of a timing provision (even minor) if persons may have changed their position in reliance on compliance with the provision³²*
5. *contravention of ss636(3) or 638(5) – consent³³*

Section 602

26. In 1969 the Eggleston Committee³⁴ said:

²⁸ *Corporations Amendment (Takeovers) Bill 2007*, Explanatory Memorandum, para 3.8

²⁹ *Attorney-General of the Commonwealth v Alinta Limited & Ors* [2008] FCA 2, per Crennan and Kiefel JJ at [169]

³⁰ *InvestorInfo Ltd* [2004] ATP 6 (s611 item 10 - rights issue underwriting), *Email Limited (No 1)* [2000] ATP 3 (disclosure breach remedied by supplementary statement). Unacceptable circumstances may exist because of a contravention of Chapter 6: *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2

³¹ For example, *Taipan Resources NL (No 9)* [2001] ATP 4, 38 ACSR 111; *Anaconda Nickel Ltd (No 18)* [2003] ATP 18; *Anaconda Nickel Ltd (No 19)* [2003] ATP 20; *Trysoft Corporation Ltd* [2003] ATP 26. An honest and accidental contravention of s606 may not be unacceptable if it has not had any relevant adverse effect: *ISIS Communications Ltd* [2002] ATP 10

³² Sections 630(3), 650C(2) and 650F(1)

³³ *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5

We agree with the general principle that if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure:

- (i) that his identity is known to the shareholders and directors;*
- (ii) that the shareholders and directors have a reasonable time in which to consider the proposal;*
- (iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interests in a corporation, that the kind of information which would ordinarily be provided in a prospectus is furnished to the offeree shareholders;*
- (iv) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.*

27. These 'Eggleston principles' were incorporated into the law.³⁵ In the Corporations Law they applied in the following way (section 731):

In exercising any of its powers under section 728 or 730, the Commission shall take account of the desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure:

- (a) that the shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company;*
- (b) that the shareholders and directors of a company have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;*
- (c) that the shareholders and directors of a company are supplied with sufficient information to enable them to assess the merits of any proposal under which a person would acquire a substantial interest in the company; and*
- (d) that, as far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company;*

³⁴ Company Law Advisory Committee to the Standing Committee of Attorneys-General, chaired by RM Eggleston, and directed "To enquire into and report on the extent of the protection afforded to the investing public by the existing provisions of the Uniform Companies Acts and to recommend what additional provisions (if any) are reasonably necessary to increase that protection." See 2nd Interim Report, para 16

³⁵ Section 60 of the CASA, then section 731 of the Corporations Law, which was extended to buy-backs and capital reductions in the mid 1990s

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28. The CSP was directed to have regard to the matters in s731 when considering whether to make a declaration.³⁶
29. In 2000, the 'efficient competitive and informed market' principle (see now s602(a)) was established as one of the principles in s602 alongside the 'Eggleston principles' (see now ss602(b) and (c)).
30. Also in 2000 an additional principle was added to s602 - the 'compulsory acquisition' principle (see s602(d)).³⁷
31. Section 602 sets out the purposes of chapter 6. There is overlap between some of the principles. They are to ensure that:
- (a) the acquisition of control over voting shares takes place in an efficient, competitive and informed market.
- Examples involving possible unacceptable circumstances:*
1. *information deficiency*
 2. *a false market in securities the subject of a bid*
 3. *the lockout of rival bids*³⁸
 4. *departure from a 'truth in takeovers' statement*³⁹
 5. *failure to have (and maintain) a reasonable basis to believe you will be able to pay the cash component offered in a bid*⁴⁰
 6. *failure to issue consideration securities*⁴¹
 7. *the refusal to reverse transactions entered in error and promptly notified*⁴²
 8. *excessive broker handling fees*⁴³

³⁶ Section 733(3)(b) of the Corporations Law. The CSP also had to have regard to any other matters it considered relevant and the public interest

³⁷ *Corporate Law Economic Reform Program Act 1999*, effective 13 March 2000

³⁸ GN 7. *Consolidated Minerals 03* [2007] ATP 25 (review decided on a different basis), *Normandy Mining Ltd (No 3)* [2001] ATP 30, 20 ACLC 471; *Ballarat Goldfields NL* [2002] ATP 7, *Ausdoc Group Ltd* [2002] ATP 9, *National Can Industries Ltd 01R* [2003] ATP 40

³⁹ *Novus Petroleum Ltd (No 2)* [2004] ATP 9; *BreakFree Ltd 04R* [2003] ATP 42, *Prudential Investment Company of Australia Ltd* [2003] ATP 36. There are limits: *BreakFree Ltd 04R* (statement was an unauthorised assessment by one person of the proposed behaviour of others)

⁴⁰ GN 14. See also *Taipan Resources NL (No 3)* [2000] ATP 17, *Pinnacle VRB Ltd (No 6)* [2001] ATP 11, *Taipan Resources NL (No 10)* [2001] ATP 5; *Taipan Resources NL (No 11)* [2001] ATP 16; *Goodman Fielder Ltd* [2003] ATP 1

⁴¹ *Colonial First State Property Trusts (No. 3)* [2002] ATP 17

⁴² *Pinnacle VRB Ltd (No 11)* [2001] ATP 23

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9. *uncertainty concerning the effect of conditions of a bid*⁴⁴
 10. *uncertainty about whether a bid will be made and its terms*⁴⁵
 11. *an agreement taking a person's interest over 20% that restrains disposal of shares in reliance on section 609(7) and the restraint is not lifted should the 'acquirer' announce a takeover or scheme before shareholder approval or an ASIC exemption has been obtained*
 12. *excessive break fees.*
- (b) the holders of shares and the directors:
- (i) know the identity of a person who proposes to acquire a substantial interest
 - (ii) have a reasonable time to consider the proposal and
 - (iii) are given enough information to enable them to assess the merits of the proposal

Examples involving possible unacceptable circumstances:

1. *failure to provide information under ASX Listing Rules or ss643, 644 or 630*
2. *failure to comply with substantial holding notices and tracing notices under Chapter 6C*⁴⁶
3. *failure to disclose the intentions of the bidder concerning future relations between the target and the current shareholders of a co-operative*⁴⁷
4. *using reports for a different purpose than intended*⁴⁸
5. *failure to provide the qualifications of the person who prepared a report*
6. *failure to disclose the basis of comparison between a bid price and "comparable" transactions*⁴⁹

⁴³ GN 13. Excessive fees may impair a broker's duty when advising clients, creating unacceptable circumstances

⁴⁴ *Brisbane Broncos Ltd (No 3)* [2002] ATP 2; *SA Liquor Distributors* [2002] ATP 22, 47 ACSR 249

⁴⁵ *Realestate.com.au Ltd* [2001] ATP 1, 37 ACSR 218, 19 ACLC 618; *Cobra Resources Ltd* [2003] ATP 23, 45 ACSR 487

⁴⁶ See *Austar United Communications Ltd* [2003] ATP 16, 45 ACSR 456; *National Can Industries Ltd 01* [2003] ATP 35, 48 ACSR 409, *Grand Hotel Group* [2003] ATP 34 and *Village Roadshow Ltd* [2004] ATP 4, 22 ACLC 578

⁴⁷ *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5, see also *SA Liquor Distributors Ltd* [2002] ATP 22, 47 ACSR 249

⁴⁸ *Great Mines Ltd* [2004] ATP 1, *Novus Petroleum Ltd* [2004] ATP 2

⁴⁹ *Goodman Fielder Ltd (No 2)* [2003] ATP 5

7. *use of "inside" information (which may also breach the insider trading provisions)*⁵⁰
 8. *a change of control which either disenfranchises shareholders or does not meet the policy of chapter 6 (even if strictly it satisfies item 4 of section 611 - acquisitions that result from acceptance of a bid).*⁵¹
- (c) as far as practicable, the holders of shares in the relevant class all have a reasonable and equal opportunity⁵² to participate in any benefits⁵³ accruing to holders through any proposal under which a person would acquire a substantial interest. This does not require that all transactions provide a premium to the existing market or be equally attractive to all shareholders.⁵⁴

Examples involving possible unacceptable circumstances:

1. *maximum acceptance conditions*
2. *uncommercial pricing of a rights issue*⁵⁵
3. *deflating the price for shares that are the subject of the bid*⁵⁶
4. *frustrating a bid*⁵⁷

⁵⁰ National Companies and Securities Commission, Policy Statement 105 "Discretions vested in the Commission" at [15], [18]-[22]

⁵¹ *Gloucester Coal 01* [2009] ATP 6; *Gloucester Coal 01R* [2009] ATP 9. A reverse takeover may also offend the principles in ss602(a) and (c). It may 'lock up' the bidder and adversely affect competition. The Panel takes into account whether the transaction is subject to the approval of bidder shareholders (relief from s629 can be sought from ASIC if necessary) and/or is subject to a condition that allows a superior proposal to be considered by those shareholders. A 'superior proposal' condition, however, if it depends on the opinion of, or an event controlled by, the bidder or an associate is void (section 629) so should be drafted in objective terms

⁵² Reasonable opportunity means that holders have adequate time to consider a proposal and respond to it and are not exposed to pressure tactics. Equal opportunity means equal value, not identical dealing. Opportunity may be direct (eg, selling shares) or indirect (eg, voting on a transaction under s611 item 7: some aspects of this were considered in *PowerTel Ltd (No 1)* [2003] ATP 25)

⁵³ Benefits may be given directly or in collateral transactions. For example, *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd* [1993] 177 CLR 508 (price of another parcel of shares), *Alpha Healthcare* [2001] ATP 13, *PowerTel Ltd (No 3)* [2003] ATP 28 (acquiring another asset for an overvalue); *Re Pivot Nutrition Pty Ltd* [1997] ATP 1 (transfer of a key supply arrangement from Gibson's to another subsidiary of Pivot, which deflated Gibson's share price and Pivot was able to make a significantly lower offer), *Citect Corporation Limited* [2006] ATP 6 (unconditional share acquisition before bid conditions changed), *Becker Group Ltd* [2007] ATP 13 (asset sale to selling shareholders and voting to approve that sale)

⁵⁴ See *PowerTel Ltd (No 2)* [2003] ATP 27

⁵⁵ For example, pricing may be a concern in a rights issue: this and other related issues are considered in *InvestorInfo Ltd* [2004] ATP 6 at [38] and also see *Data & Commerce Ltd* [2004] ATP 7. See also GN 17 (Rights issues)

⁵⁶ Pivot's bid for Gibson: Fn 53

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5. *brokers sharing broker handling fees with clients*⁵⁸
 6. *unreasonable effects of a share buy-back*⁵⁹
 7. *a target's associate acquiring the target's shares as a defence to a bid, then obtaining a benefit such as a material trading arrangement with the target or an interest in the target's assets*⁶⁰
 8. *a rights issue not affording genuine accessibility to its benefits to all shareholders*⁶¹
- (d) an appropriate procedure is followed as a preliminary to compulsory acquisition.

Example involving possible unacceptable circumstances:

1. *a bid which satisfies the preconditions to compulsory acquisition only because of acquisitions which did not reflect an arms-length approval of the bid terms*

Publication History

First Issue	28 February 2000
Second Issue	14 May 2001
Reformatted	17 September 2003
Third Issue	28 September 2004
Fourth Issue	18 April 2008
Fifth Issue	xx/xx/ 2010

Related material

GN 15 Listed Trust and Managed Investment Scheme Mergers

⁵⁷ See also *Pinnacle VRB Ltd (No 8)* [2001] ATP 17, 39 ACSR 55, 19 ACLC 1252; *Bigshop.com.au Ltd (No 2)* [2001] ATP 24; *Normandy Mining Ltd (No 6)* [2001] ATP 32. See also GN 12 (Frustrating action)

⁵⁸ Possible collateral benefit: see GN 13 "Brokers Handling Fees"

⁵⁹ *Village Roadshow Ltd (No 2)* [2004] ATP 12; Australian Securities and Investments Commission Policy Statement 110 "Share buy-backs" at [110.48]-[110.49]

⁶⁰ National Companies and Securities Commission Policy Statement 105 "Discretions vested in the Commission" at [32]

⁶¹ See *InvestorInfo Ltd* [2004] ATP 6; *Data & Commerce Ltd* [2004] ATP 7. See also GN 17 (Rights issues)

APPENDIX A: SECTION 657A(1)-(3)

- “(1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.*
- (2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:*
- (a) are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:*
 - (i) the control, or potential control, of the company or another company; or*
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or*
 - (b) are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602; or*
 - (c) are unacceptable because they:*
 - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or*
 - (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.*

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

- (3) In exercising its powers under this section, the Panel:*
- (a) must have regard to:*
 - (i) the purposes of this Chapter set out in section 602; and*
 - (ii) the other provisions of this Chapter; and*
 - (iii) the rules made under section 658C; and*
 - (iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the ASIC Act; and*
 - (b) may have regard to any other matters it considers relevant.*

In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).

*Attachment 2***Guidance Note [] Recommendations and Undervalue Statements**

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Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to recommendations in response to a bid, particularly those incorporating an undervalue statement.
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. Under s638(1) a target's statement must contain all the information shareholders and their professional advisers would reasonably require in making an informed assessment of whether to accept a bid. However, under s638(1A) it need only include the information to the extent it is reasonable for those persons to expect to find it in the target's statement and it is known to any of the directors.
4. Under s638(3)⁶² a target's statement must contain a statement by each director:
 - (a) recommending that offers under the bid be accepted or not accepted, and giving reasons for the recommendation or
 - (b) giving reasons why a recommendation is not made.
5. An undervalue statement in a target's statement gives rise to specific disclosure concerns.
6. In this note the following definitions apply:

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

⁶² References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

Recommendations

7. Making a recommendation, or stating why none is made, is required in a target's statement under the Act. The Act recognises the importance of the directors' recommendation⁶³ in a bid and the Panel recognises the importance that shareholders may place on a recommendation.⁶⁴ Any recommendation must be soundly-based and reasonable.
8. However, before the issue of a target's statement directors may not want to make a recommendation. They may simply want to make a holding statement (eg, "wait for more information"). If they do make a recommendation, and it includes (expressly or by implication) an undervalue statement, then:
 - (a) they should include the basis for the recommendation or
 - (b) if more work is needed to finalise the analysis, they should clearly state that the basis for the recommendation will be disclosed later. In some circumstances it may be desirable to say more than simply this. The basis must then be disclosed no later than the issue of the target's statement.
9. The form of expression of a recommendation is a decision for directors.⁶⁵
10. When a director recommends that an offer be rejected, the recommendation may imply an undervalue statement.
Example: "The bid does not represent fair value"
11. An undervalue statement suggests that there has been an assessment of the value of the target by directors.⁶⁶ If an undervalue statement is made in scrip bid, an assessment of the value of the bidder is also involved.
12. However, not all 'reject' recommendations will include an undervalue statement since it may be possible to recommend that a bid be rejected for other, qualitative reasons.⁶⁷

Unacceptable circumstances

13. It may give rise to unacceptable circumstances if:
 - (a) a director recommends that shareholders reject a bid relying on an undervalue statement, and the basis for the statement is not disclosed or it is not clearly

⁶³ Or multiple recommendations: see s638(3)

⁶⁴ The Panel encourages the making of a recommendation: *Tully Sugar Ltd 01R* [2010] ATP 1 at [16]

⁶⁵ *Tully Sugar Limited* [2009] ATP 26 at [18]: "The obligation is placed on directors to determine what information is material to holders of bid class securities and to disclose what any of them knows on those matters..." (footnotes omitted). On review, see *Tully Sugar Ltd 01R* [2010] ATP 1

⁶⁶ *Origin Energy Ltd 02* [2008] ATP 23 at [19]

⁶⁷ A valuation usually includes aspects of judgment on the part of the valuer. It is for that reason at least partly a qualitative assessment anyway

stated that the basis will be disclosed later.⁶⁸ This is because such a statement may be incomplete to the point of being misleading⁶⁹ or shareholders may not have been given enough information to enable them to assess the merits of the proposal⁷⁰

- (b) the proposal to disclose the basis for an undervalue statement later is not made in good faith (eg, the director does not honestly and reasonably believe that the target's value is higher than the bid)
 - (c) the director does not act promptly to ensure that the basis is disclosed as soon as reasonably practicable (and no later than in the target's statement) or
 - (d) there is not a sufficient basis for the undervalue statement.
14. In considering whether non-disclosure of the basis for an undervalue statement gives rise to unacceptable circumstances, the Panel is guided by the content and context⁷¹ of the statement, including the conclusions likely to be drawn by a reasonably well-informed, ordinary reader.
15. The Panel then considers whether there is a sufficient basis for the statement by looking at whether the undervalue statement is supported by internal analysis or external advice, and whether the director has provided shareholders with sufficient information to allow them to make an informed assessment of the statement.
16. If the target is unwilling to disclose information because, for example, it is negotiating a transaction, the directors should consider carefully whether, in making a recommendation, they should make an undervalue statement.
17. The Panel does not expect directors to put an upper limit on the value of the target, or necessarily state a value.⁷²
18. Regardless of whether a recommendation is made, directors must provide shareholders with information that enables them to assess the value of the bid.⁷³

⁶⁸ For example, the basis may be contained in the target's statement

⁶⁹ *Goodman Fielder Ltd 02* [2003] ATP 5, *Programmed Maintenance Services Ltd 02* [2008] ATP 9

⁷⁰ Section 602(c)(iii). See also s602(a)

⁷¹ This has two aspects: internal context and external context (eg, other recent assessments published)

⁷² In *Tully Sugar Ltd* [2009] ATP 26 at [26], the Panel said (footnotes omitted): "We consider that s638 requires that some guidance as to value be given. But this guidance need not take the form of:

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

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

⁷³ *Tully* fn 72

Remedies

19. The Panel has wide powers to make orders,⁷⁴ including remedial orders and further disclosure.

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⁷⁴ Section 657D