



**Australian Government**

**Takeovers Panel**

## **Consultation Paper**

**Rewrite of GN 18 Takeover Documents**

7 December 2011

## Introduction

1. The Panel invites comments on the draft Guidance Note attached. The time for comments is open until **3 February 2012**.
2. Comments or queries can be directed to:

<p>Allan Bulman Director, Takeovers Panel Email: <a href="mailto:takeovers@takeovers.gov.au">takeovers@takeovers.gov.au</a></p>
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3. Note that it is Panel policy that submissions are public.
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 The Panel will consider all comments and reserves the right to make changes to the draft Guidance Notes in response to comments or otherwise.

## Issues

5. The draft Guidance Note is a rewrite of the existing note, employing principles of simplified drafting. It recognises that “Wraps” are now less common and has been extended to include target’s statements, expert’s reports, premia, and intention statements.
6. The Guidance Note deals with issues that the Panel has addressed. It is not a comprehensive statement of policy in relation to takeover document disclosure. For example, it does not address forecasts or the use of concise expert’s reports. Should the note address takeover document disclosure more broadly? If so, what other areas should be addressed?
7. The note contains a new section on “Accessibility”, stating that the Panel’s general approach to information is that it should be accessible to the intended audience. It adopts the formulation of the standard used by ASIC, namely ‘clear, concise and effective’. Is this appropriate? If not, what standard should be adopted?
8. Paragraph 24 identifies the potential for continuous disclosure obligations to be a consideration. Is continuous disclosure a consideration in this decision?

## Attachment

- 1 Revised draft GN 18 Takeover documents

*Attachment 1***Guidance Note 18 – Takeover documents**

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**Introduction**

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to information in takeover documents, including a bidder’s statement or target’s statement.
2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
3. The policy bases for this note are that deficient information may:
  - inhibit the acquisition of control over voting shares taking place in an efficient, competitive and informed market or
  - deny holders of the relevant class of shares enough information to enable them to assess the merits of the proposal.<sup>1</sup>

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<sup>1</sup> Sections 602(a) and 602(b)(iii). References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

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## Document requirements

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4. Section 636 applies to a bidder's statement. It requires a bidder's statement to include specific information and any other information material to the making of a decision by offeree shareholders whether to accept the bid that is known by the bidder and (to the extent not already disclosed) does not relate to the value of any securities offered.
5. Section 638 applies to a target's statement. It requires a target's statement to include all the information that offeree shareholders and their professional advisers would reasonably require for making an informed assessment whether to accept the offer, but only to the extent that it is reasonable for them to expect to find such information in the statement and it is known to any director of the target.
6. Section 640 requires an expert's report to accompany a target's statement if the bidder's voting power is 30% or more, the bidder is a director of the target or a director of a corporate bidder is a director of the target.
7. Section 643 requires a supplementary bidder's statement if the bidder becomes aware of a material misleading or deceptive statement, omission or new circumstance.
8. Section 644 requires a supplementary target's statement in similar circumstances.
9. A bidder (target) must send the bidder's (target's) statement to offeree shareholders, ASIC, the market (if the target securities are quoted) and the target (bidder).<sup>2</sup>

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## Accessibility

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10. The Panel's general approach to information in takeover documents is that the information should be accessible to the document's target audience; that is, it should be written with that audience in mind.<sup>3</sup>
11. While recognising that there are often complexities, information in takeover documents should be presented as clearly, concisely and effectively as possible.<sup>4</sup>

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<sup>2</sup> Sections 633 and 635

<sup>3</sup> *Tully Sugar Ltd* [2009] ATP 26 at [21]; *Northern Energy Corporation Limited* [2011] ATP 2 at [112]

<sup>4</sup> In RG 228 (Prospectuses: Effective disclosure for retail investors) ASIC says at [228.24]:

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## Marketing information

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12. Marketing information<sup>5</sup> in any takeover document is the part most likely to be read by retail investors. It is intended to be influential. It may include:
- (a) a letter to offeree shareholders
  - (b) the reasons why offeree shareholders should accept (reject) the bid and
  - (c) 'repackaged' information (eg, from other parts of the bidder's statement or target's statement such as a 'Q & A' section or colour graphics). 'Repackaged' information should not be presented in a more persuasive manner than the material from which it is drawn, although fair graphical representation of tabular data is likely to be helpful and not unacceptable.
- Example: it may give rise to unacceptable circumstances if, by the scale adopted, a graphical presentation is unduly persuasive*
13. In the case of a bidder's statement, marketing information is sometimes prepared separately. If separate, it should nevertheless be:
- (a) lodged with ASIC and given to the target when the bidder's statement is first provided to them<sup>6</sup> and
  - (b) presented in final form as for the offeree shareholders (eg, graphics in their final size, colour and location).
14. Marketing information in a bidder's statement may need to be updated before dispatch of the bidder's statement. Unless the marketing information is genuinely new information, in which case a supplementary bidder's

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*We consider that your prospectus will generally be 'clear, concise and effective' if it:*

*highlights key information (e.g. through an investment overview as explained in Section C);*

*uses plain language (see Table 3);*

*is as short as possible (see RG 228.30-228.45);*

*explains complex information, including any technical terms (see Table 3); and*

*is logically organised and easy to navigate (see Table 4).*

<sup>5</sup> This information was often separately printed and "wrapped" around the bidder's statement when sent to offeree shareholders (ie a "Wrap"). Wrap information is, generally, now incorporated in the bidder's statement

<sup>6</sup> Target directors must have a reasonable time to consider a proposal under which a person proposes to acquire a substantial interest in the company: s602(b)(ii)

statement<sup>7</sup> or revised bidder's statement<sup>8</sup> may be appropriate, such updated information should be restricted to:

- (a) limited, specific information (that has been clearly identified or space allowed for)

*Example: space could be reserved for recent trading information that takes into account the market's response to the proposed bid<sup>9</sup>*

- (b) information that is not reasonably considered to be influential.

*Example: a Help Line telephone number*

- 15. It may give rise to unacceptable circumstances if marketing information is not provided to ASIC and the target (bidder) when the bidder's statement (target's statement) is first provided to them.

*Example: marketing information put into a supplementary bidder's statement that is not given to the target but is dispatched with the bidder's statement<sup>10</sup>*

## **Wrap information**

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- 16. If information is to be provided in a 'Wrap' it should be dealt with in the same way as information in the bidder's statement.<sup>11</sup>

## **Broker valuation<sup>12</sup>**

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- 17. A bidder (target)<sup>13</sup> may want to include a broker valuation to indicate that the offer price is at a premium (discount) to the share price or share value.

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<sup>7</sup> Section 643

<sup>8</sup> ASIC Class order 00/344

<sup>9</sup> By analogy, ASIC Class Order 01/1543 allows the copy bidder's statement provided to ASIC, ASX and the target to exclude, among other things, the date of the proposed offer

<sup>10</sup> The purpose of a supplementary bidder's statement is the disclosure of new information, not the disclosure of information withheld from the target or ASIC until dispatch of the original bidder's statement

<sup>11</sup> *Southcorp Limited* [2005] ATP 4

<sup>12</sup> "Price recommendations" may be a more accurate description

<sup>13</sup> Also other entities in respect of other control transaction disclosure documents

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However, there is a risk of a broker valuation misleading or confusing offeree shareholders, giving rise to unacceptable circumstances, if enough information to enable them to assess the weight they should give the valuation is not included.

18. The Panel considers that, with any broker valuation in a takeover document, there should be clear disclosure of:
  - (a) the criteria used to select the valuation or valuations and
  - (b) any potential conflict the broker or brokers may have.<sup>14</sup> Larger companies tend to be covered by many brokers, but others may have only one broker covering them because of a relationship (eg, having floated the company). The relationship may affect the broker's independence, in which case it may not be feasible to use the valuation even with disclosure.
19. Moreover the broker's consent<sup>15</sup> should be given only if the valuation is used properly and in proper context. When seeking the broker's consent, the broker should be informed that it should carefully assess what information should accompany the valuation to ensure that it is not misleading or confusing to offeree shareholders.
20. It may give rise to unacceptable circumstances for a bidder (target) to, for example:
  - (a) use a broker's valuation but not identify the broker or get its consent or
  - (b) use a broker's valuation in a document other than a bidder's statement or target's statement so as to avoid the requirement for consent.

### **Aggregating valuations**

21. A bidder (target) may want to aggregate the valuations of a number of brokers into a single average value. The Panel makes no general comment on whether the consent of each is required.<sup>16</sup> However, it should be noted that a bidder (target) that aggregates valuations takes responsibility for the entirety of the information provided and not merely responsibility that the average was correctly calculated from its components.

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<sup>14</sup> Brokers are required to have adequate arrangements for the management of conflicts of interest: s912A(1)(aa)

<sup>15</sup> Section 636(3)

<sup>16</sup> The Panel considered that it was not required in the circumstances in *Southcorp Limited* [2005] ATP 4 at [10]

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22. To reduce the risk of an aggregated valuation being misleading or confusing, at least 4 broker valuations should be included in the aggregation and the following information should be disclosed:
- (a) the number of broker valuations aggregated
  - (b) the date range of the valuations
  - (c) the dispersion of the valuations and total range
  - (d) the selection criteria for the valuations and why those criteria were used  
*Example: "All publicly available valuations known to the bidder for the 3 months prior to the announcement of the bidder's intention to bid"*
  - (e) whether any valuations were excluded despite fitting the selection criteria, why they were excluded and their effect on the average if included. In general, all valuations that fall within the selection criteria should be used  
*Example: A bidder that aggregated the lowest 4 out of 10 available valuations of a target would be likely to mislead offeree shareholders, giving rise to unacceptable circumstances*
  - (f) whether any of the valuations used in the aggregation was made on a different basis to the others (eg, portfolio basis versus whole of company basis)
  - (g) whether the directors of the bidder (target) adopt the average value<sup>17</sup> and
  - (h) any other material information<sup>18</sup>  
*Example 1. Events since the date of the individual valuations which might reasonably affect them*  
*2. Whether some of the valuations came from before the announcement of (or speculation of) the bid and some after.*
23. If a valuation is excluded (eg, as an outlier or because of unusual, specific assumptions) this should be explained clearly and the same criteria applied to all valuations (eg, both high and low material outliers should be excluded). The use of an aggregated valuation may not be feasible if there is a risk of selectivity.

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<sup>17</sup> *Origin Energy Limited 02 [2008] ATP 23 at [20]*

<sup>18</sup> See also paragraph on conflicts



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24. A party (eg, a bidder) using an aggregated valuation should consider giving the other party (eg, the target) a list of the valuations that make up the aggregation. This will allow the other party to assess the reasonableness of the average and associated disclosure. Consideration should be given to whether:
- (a) the other party needs to agree not to disclose such information publicly without each broker's consent and
  - (b) any continuous disclosure obligations arise.

## Premia

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25. A bidder (target) may want to show that the bid price is at a premium (discount) to the share price or share value.<sup>19</sup>
26. In a cash bid, the share price of the target will change with the market's view of the bid (or potential bid), including the likelihood of the bid succeeding and the bid consideration being increased. In a scrip bid, these factors affect also the bidder's share price. It is therefore important, if comparing the bid consideration to the target's share price or value, to do so in a way that will not mislead or confuse offeree shareholders.
27. A statement as to premium (discount) in a takeover document is necessarily a snapshot. However, it may give rise to unacceptable circumstances if:
- (a) the prices at the most recent practicable date are not included.<sup>20</sup> This would be the date just before the date of the bidder's statement or target's statement; or, if the bidder's statement or target's statement is subsequently amended, just before printing. Particular care is needed if the target's shares are thinly traded<sup>21</sup>
  - (b) there is not a clear explanation of the reason for selecting the particular date for the comparison<sup>22</sup>
  - (c) the comparison is not like-for-like and the method used to calculate it, if not the most reasonable, is not adequately explained<sup>23</sup>

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<sup>19</sup> See also section on broker valuations

<sup>20</sup> *General Property Trust* [2004] ATP 30; *Programmed Maintenance Services Limited* [2008] ATP 7 at [24]

<sup>21</sup> *Queensland Ores Limited* [2009] ATP 8

<sup>22</sup> *Magna Pacific (Holdings) Limited* [2007] ATP 2 at [46]

<sup>23</sup> *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [35]

- (d) statements as to value are included without a reasonable basis for them being disclosed.<sup>24</sup>

## Intentions

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28. Section 636(1)(c) requires a bidder to include in the bidder's statement details of its intentions regarding continuation of the business, major changes to be made to the business, and future employment of present employees.
29. The section does not require intentions to be formed, only that they be disclosed if formed. However, non-disclosure may result in a departure from the principles in ss 602(a) and (b)(iii).<sup>25</sup> The types of disclosure that should be considered include:
- (a) integration plans or directions, even if imprecise
  - (b) management expertise and
  - (c) intended dividend policy.<sup>26</sup>
30. The section is not subject to a materiality threshold or a confidentiality carve-out.<sup>27</sup>

## Recommendations

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31. The Panel encourages target directors to make a recommendation.<sup>28</sup> They do not need to value the target's shares to do so.
32. The basis for a recommendation must be disclosed, must not be misleading and must give offeree shareholders enough information for them to make an informed assessment about whether to accept the offer.<sup>29</sup>

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<sup>24</sup> *Tully Sugar Ltd* [2009] ATP 26 at [18]

<sup>25</sup> *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [87], although the Panel noted the relevant intentions and special nature of the company as a cooperative

<sup>26</sup> *Australian Leisure & Hospitality Group Limited 01* [2004] ATP 19, which concerned disclosure should the bidder obtain a relevant interest in more than 50% but less than 90% of the shares, the bid being subject to a 50.1% minimum acceptance condition

<sup>27</sup> *National Foods Limited 01* [2005] ATP 8 at [40]

<sup>28</sup> See s638(3); GN 22 (Recommendations and Undervalue Statements)

<sup>29</sup> *Tully Sugar Limited 01R* [2010] ATP 1 at [16]

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## Information outside takeovers documents

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33. Unacceptable circumstances can apply in any control transaction.<sup>30</sup>
34. The Panel takes the view that the same standard of care and the same standard of disclosure should be applied to any takeover document sent to offeree shareholders as is applied to the formal bidder's statement or target's statement.<sup>31</sup> Accurate, reliable information and properly reasoned views will best assist offeree shareholders and promote an efficient, competitive and informed market.<sup>32</sup>
35. From the time it is apparent to a bidder that it is likely to make a takeover (or becomes apparent to a target that a takeover is imminent), a heightened state of alert regarding all the bidder's (target's) public announcements that might influence offeree shareholders should exist.<sup>33</sup>

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## Expert's report

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36. Expert's reports are required in some situations<sup>34</sup> and desirable in others.<sup>35</sup> The Panel encourages the use of expert's reports in appropriate situations, even when not required.
37. An expert's report should be as clear, concise and effective as possible.<sup>36</sup> It should be written with the intended audience in mind (in most cases, the

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<sup>30</sup> Section 657A. See GN 1 (Unacceptable circumstances)

<sup>31</sup> GN 5 at [17]; *Universal Resources Limited* [2005] ATP 6 at [16]; *Consolidated Minerals Limited 01* [2007] ATP 20 at [75]; *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [20]; *Foster's Group Limited* [2011] ATP 15 at [24]-[25]

<sup>32</sup> *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [18]. An example involving a listing statement under s625 is *Premium Income Fund* [2011] ATP 10 at [44]

<sup>33</sup> *Foster's Group Limited* [2011] ATP 15 at [34]

<sup>34</sup> For example s 636(2), s 640. See also ASIC RG 111 (Content of expert reports)

<sup>35</sup> For example, *Sirtex Medical Ltd* [2003] ATP 22 at [66]

<sup>36</sup> See also ASIC RG 111 (Content of expert reports) at [111.84]

offeree shareholders).<sup>37</sup> Thus it should set out the expert's conclusions, assumptions and reasons so they are accessible to the target audience.<sup>38</sup>

38. While it is a matter for the expert what information to rely on and disclose,<sup>39</sup> the basis of the valuation should be set out sufficiently to allow an assessment of its reliability<sup>40</sup> and material implications of the transaction terms should be clearly explained.<sup>41</sup>
39. Care is needed when using an expert's report not prepared for the specific purpose.<sup>42</sup>
40. An expert's report that is required to comply, or says it complies, with an industry standard (eg, JORC) must do so.<sup>43</sup>

## Publication History

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First Issue        15 December 2006

Second Issue     xx 2012

## Related material

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GN 5: Specific remedies: information deficiency

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<sup>37</sup> *Northern Energy Corporation Limited* [2011] ATP 2 at [111]-[112]

<sup>38</sup> *Bowen Energy Limited 02R* [2009] ATP 19 at [71]; *Northern Energy Corporation Limited* [2011] ATP 2 at [98]

<sup>39</sup> *Queensland Gas Company Limited* [2006] ATP 36 at [39]

<sup>40</sup> *Goodman Fielder 02* [2003] ATP 5 at [70]; *Bowen Energy Limited 02R* [2009] ATP 19 at [80]

<sup>41</sup> *Becker Group Limited 01* [2007] ATP 13 at [91]-[94]

<sup>42</sup> *Great Mines Limited* [2004] ATP 1

<sup>43</sup> *Namakwa Diamond Company NL 02* [2001] ATP 9; *Bowen Energy Limited 02R* [2009] ATP 19; *Northern Energy Corporation Limited* [2011] ATP 2