



**Australian Government**

**Takeovers Panel**

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# **REWRITE OF GN 18**

## **PUBLIC CONSULTATION RESPONSE STATEMENT**

### **20 APRIL 2012**

## **Introduction**

On 7 December 2011, the Takeovers Panel released a Consultation Paper seeking public comment on the rewrite of its guidance note 18 (bidder's statements).

Comments on the Consultation Paper were due by 3 February 2012 and the Panel received one submission from ASIC in response (Annexure A). The Panel thanks ASIC for its considered comments.

Consistent with the Panel's published policy on responding to submissions, this paper sets out the Panel's response to the public consultation process and its conclusions on the comments received. Attached to this paper is a copy of the final guidance note, in mark up to show the changes from the draft circulated with the Consultation Paper.

## **Material comments received and Panel's conclusions**

### *Comment on premia*

ASIC suggested that the guidance note should include a comment on the utility of disclosing the bid price as it was immediately before the announcement of the offer.

### *Response*

The guidance note has included this (paragraph 27).

### *Comment on recommendations*

ASIC suggested that the guidance note should make it clear that the need for a valuation should be decided on case by case.

### *Response*

Paragraph 31 has been amended to capture this.

*Comment on expert's reports*

ASIC suggested that the guidance note should cross-reference ASIC RG 111 and 112 and sections 636(3) and 638(5) of the *Corporations Act 2001* (Cth).

*Response*

Footnotes 35 and 38 added.



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**Annexure A**

**ASIC Submission**



**ASIC**

Australian Securities & Investments Commission

Level 5, 100 Market Street, Sydney  
GPO Box 9827 Sydney NSW 2001  
DX 653 Sydney

Telephone: (02) 9911 2000  
Facsimile: (02) 9911 2414

3 February 2012

Mr Allan Bulman  
Director, Takeovers Panel

***By email: [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au)***

Dear Mr Bulman,

**RE: ASIC's response to Panel Consultation Paper - Rewrite of GN 18 Takeover Documents**

We would like to thank the Takeovers Panel for giving ASIC the opportunity to provide comments on the Consultation Paper regarding the rewrite of Guidance Note 18 *Takeover Documents*. This letter sets out ASIC's response to some of the issues raised in the Consultation Paper and the attached draft Guidance Note (GN).

**ASIC Comments**

*Accessibility*

ASIC supports the Panel's inclusion of a section on 'Accessibility' and welcomes the reference to ASIC Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors (RG 228)*. In addition to the guidance about 'clear, concise and effective' disclosure, ASIC considers that RG 228 could be a useful reference point if the Panel were to give further guidance about documents issued in scrip-based control transactions.

*Premia*

In the context of presenting a bid price as being at a premium to the pre-bid price, paragraph 27 of the draft GN sets out the cases that in the Panel's view may give rise to unacceptable circumstances. In ASIC's experience, bid prices have often compared to the target's share price as at the date immediately before the announcement of an offer (which may be more than a few days or weeks before the date of the bidder's statement). The utility of this type of comparison could also be addressed in the GN.

## *Recommendations*

Paragraph 31 provides that the Panel encourages target directors to make a recommendation but directors do not need to value the target's shares to do so.

ASIC considers it is undesirable for there to be general guidance that, irrespective of the nature of the bidder and the target's businesses and level of information available to target shareholders, target directors need not value the target's shares when making a recommendation. Rather, a valuation will be important and of benefit to shareholders in many cases. For example, paragraph 12 of Guidance Note 22 *Recommendations and Undervalue Statements* states that (emphasis added):

*“However, not all ‘reject’ recommendations will include an undervalue statement since it may be possible in **unusual** situations to recommend that a bid be rejected for other, qualitative reasons. Directors should bear in mind that the market is likely to assume in this situation that there has been no quantification of a premium or discount to the bid.”*

ASIC also notes that paragraph 18 of Guidance Note 22 states that “[r]egardless of whether a recommendation is made, directors must provide shareholders with some guidance as to the value of the target.”<sup>1</sup>

In some cases it may not be possible to provide shareholders with useful guidance about the value of the target without engaging an expert to undertake a valuation (e.g. where the target has no earnings history or short term revenue prospects and where the equity or enterprise values in the financial accounts may not have a close correlation with the target's share price). For companies in the mining/exploration or biotechnology sectors with these features, it is common for a technical specialist to be engaged in light of the difficulties in valuing them based only on the available financial information. Given the challenges for shareholders in assessing the value of such companies, it will often be appropriate for their directors of these companies to provide shareholders with a valuation, rather than simply giving them financial information.

Accordingly, we recommend that paragraph 31 and GN 22 be amended to make it clear that whether target directors need to provide a valuation is to be determined on a case by case basis keeping the above factors in mind.

## *Expert's report*

ASIC supports the Panel's position on the desirability of expert's reports and the view that such reports should be as clear, concise and effective as possible.

In this context, ASIC considers that it would be helpful to refer to ASIC's Regulatory Guides 111 and 112 in relation to the preparation of expert's reports and the independence of experts, in addition to the comments on 'clear, concise and effective' reports. For example, Regulatory Guide 111 provides guidance on the practice of providing conclusions as to fairness and reasonableness of takeover bids and its comments are consistent with the suggestion in the draft GN that *'the basis of the*

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<sup>1</sup> *Tully Sugar Ltd* [2009] ATP 26 is noted in this context.

*valuation should be set out sufficiently to allow an assessment of its reliability'*  
(paragraph 38 of the draft GN).

ASIC also considers that it would be useful for completeness to state in this section that the consent of the expert will be required in order to include an expert's report in the takeover document, as required under s636(3) and s638(5) of the *Corporations Act 2001*.

**Contact**

If you wish to discuss these issues further, please contact Anthony Graham, Senior Manager – Corporations on (03) 9280 3506.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kate O'Rourke', with a stylized flourish at the end.

Kate O'Rourke  
Senior Executive Leader - Corporations  
Australian Securities and Investments Commission



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**Annexure B**

**Mark up of Consultation Draft vs New GN 18**



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## **Guidance Note 18 – Takeover documents**

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### **Introduction**

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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>

## 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~~. It also requires any other information material to the making of a decision by offeree shareholders whether to accept the bid ~~that is, being information~~ known ~~by~~to the bidder and, ~~(to the extent not already disclosed),~~ which 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>

## 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>

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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

<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]

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>

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

*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. 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.

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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

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.
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

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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]

*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.
- 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.

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

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

## 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. For example, often the share price immediately before the announcement of the bid and the bid price are compared. This can be useful for shareholders because the pre-announcement price is less likely to be influenced by the bid. However, ~~it may give rise to~~ unacceptable circumstances may arise 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>
  - (d) statements as to value are included without a reasonable basis for them being disclosed.<sup>24</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]

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

## 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 necessarily need to value the target's shares to do so.<sup>29</sup>
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>30</sup>

## Information outside takeovers documents

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33. Unacceptable circumstances can apply in any control transaction.<sup>31</sup>

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<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> Guidance as to the value of the target is usually required: See GN 22 at paragraph [18]. Moreover, it may be desirable or necessary to get expert advice in certain cases, such as if there is no earnings history

<sup>30</sup> *Tully Sugar Limited 01R* [2010] ATP 1 at [16]

<sup>31</sup> Section 657A. See GN 1 (Unacceptable circumstances)

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>32</sup> Accurate, reliable information and properly reasoned views will best assist offeree shareholders and promote an efficient, competitive and informed market.<sup>33</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>34</sup>

## Expert's report<sup>35</sup>

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36. Expert's reports are required in some situations<sup>36</sup> and desirable in others.<sup>37</sup> The Panel encourages the use of expert's reports in appropriate situations, even when not required.<sup>38</sup>
37. An expert's report should be as clear, concise and effective as possible.<sup>39</sup> It should be written with the intended audience in mind (in most cases, the offeree shareholders).<sup>40</sup> Thus it should set out the expert's conclusions, assumptions and reasons so they are accessible to the target audience.<sup>41</sup>
38. While it is a matter for the expert what information to rely on and disclose,<sup>42</sup> the basis of the valuation should be set out sufficiently to allow an assessment

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<sup>32</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>33</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>34</sup> *Foster's Group Limited* [2011] ATP 15 at [34]

<sup>35</sup> [See also ASIC RG 111 \(Content of expert reports\) and RG 112 \(Independence of experts\)](#)

<sup>36</sup> For example s 636(2), s 640. [See also ASIC RG 111 \(Content of expert reports\)](#)

<sup>37</sup> For example, *Sirtex Medical Ltd* [2003] ATP 22 at [66]

<sup>38</sup> [Note that consent is required: s636\(3\); s638\(5\)](#)

<sup>39</sup> See also ASIC RG 111 (Content of expert reports) at [111.84]

<sup>40</sup> *Northern Energy Corporation Limited* [2011] ATP 2 at [111]-[112]

<sup>41</sup> *Bowen Energy Limited 02R* [2009] ATP 19 at [71]; *Northern Energy Corporation Limited* [2011] ATP 2 at [98]

<sup>42</sup> *Queensland Gas Company Limited* [2006] ATP 36 at [39]



of its reliability<sup>43</sup> and material implications of the transaction terms should be clearly explained.<sup>44</sup>

39. Care is needed when using an expert's report not prepared for the specific purpose.<sup>45</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>46</sup>

## Publication History

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First Issue      15 December 2006

Second Issue    ~~20~~ [20 April](#) 2012

## Related material

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GN 5: Specific remedies: information deficiency

[GN 22: Recommendations and Undervalue Statements](#)

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<sup>43</sup> *Goodman Fielder 02* [2003] ATP 5 at [70]; *Bowen Energy Limited 02R* [2009] ATP 19 at [80]

<sup>44</sup> *Becker Group Limited 01* [2007] ATP 13 at [91]-[94]

<sup>45</sup> *Great Mines Limited* [2004] ATP 1

<sup>46</sup> *Namakwa Diamond Company NL 02* [2001] ATP 9; *Bowen Energy Limited 02R* [2009] ATP 19; *Northern Energy Corporation Limited* [2011] ATP 2