Australian Government

Takeovers Panel

Consultation Paper

Rewrite of:

GN 6 Minimum bid price

GN 13 Broker handling fees

GN 15 Trust scheme mergers

23 December 2010

Introduction

1. The Panel invites comments on the 3 draft Guidance Notes attached. The time for comments is open until **4 February 2011.**

2. Comments or queries can be directed to:

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3. Note that 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 The Panel will consider all comments and reserves the right to make changes to the draft Guidance Notes in response to comments or otherwise.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. The draft Guidance Notes are a rewrite of existing Notes. They employ principles of simplified drafting. While shorter, the Panel does not intend to give less guidance, but clearer, more concise guidance.

Issues

6. It has been some years since there was a general review of these areas and practices may have changed. The Panel invites comments on aspects of the Notes that may need updating to accommodate current market practice.

7. Comments are also sought on the following issues:

GN 6 Minimum bid price

8. The origin of GN 6 pre-dates ASIC RG 163. An option is to withdraw GN 6.

   a) Do you think the Panel should retain GN 6?

9. If GN 6 is retained, it might usefully address whether foreign cash is treated as non-cash consideration for takeover purposes. This has an impact on the minimum bid price rule (s621(3)) and acquisitions outside the bid (eg, on-

market acquisitions) (s651A). This issue arose, for example, in the CEMEX takeover of Rinker, which was made in US dollars.[1]

a) Do you think the Panel should state that foreign cash is treated as non-cash consideration for takeover purposes?

b) Please state the reasons for your answer.

10. GN 6 does not apply to schemes of arrangement. Damian & Rich[2] say that schemes are different to takeovers and the minimum bid price rule has no application.

a) Do you think there is a policy basis for applying GN 6 to schemes?

b) If so, should the policy be modified at all for schemes? One area would be to take into account practical differences (for example, by fixing the date as the date of entry in the merger implementation agreement for the 4 month count). Are there others?

GN 13 Broker handling fees

11. Paragraphs 8.1 and 8.2 of the rewrite refer to upper and lower limits for broker handling fees. These have been drawn from the existing GN 13.

a) Is the upper limit of 0.75% and $750, and the minimum of $50, still appropriate?

b) If not, what should the new limits be, or should there be no stated limits?

12. Paragraph 10(a) of the rewrite, based on existing para 23, says that the Panel does not seek to limit when a bidder may first offer a broker handling fee. However, a fee introduced in the last few days of a bid, when the bid might be extended, could create unacceptable circumstances.[3]

a) Should the Panel address this specifically?

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[1] In *Rinker Group Limited 01* [2006] ATP 35, the Panel did not need to decide (and did not make a finding) whether CEMEX's offer in US dollars offered a "cash sum" for the purposes of Chapter 6 on the basis that CEMEX gave an undertaking to the Panel that it would not purchase or arrange to purchase Rinker securities for Australian dollars outside the bid during the bid period

[2] Schemes, Takeovers and Himalayan Peaks, 2nd edition, para 6.5.5. See also *Ranger Minerals Ltd* (2002) 42 ACSR 582, *Anzon Australia Ltd* [2008] FCA 309

[3] This was an issue in *Aurion Gold Limited* [2002] ATP 13

13. Paragraph 10, like paragraph 25 of the existing Note, says that once a fee is withdrawn, the fee should not be reinstated even on different terms. While linked to paragraph 11.1, the policy for the statement is unclear.

    a) Is there a good policy basis to continue to adopt this position?

GN 15 Trust schemes

14. Footnote 15 reflects the practice that disclosure and approval is required for a responsible entity of the target (or a related body) giving up management rights over the target only if it is a related party transaction.

    a) Do you agree?

    b) Should approval be required in all circumstances?

15. Paragraph 21 reflects the practice of getting an expert's report not only on the 'fair and reasonable' test but also on 'best interests' test.

    a) Do you agree?

16. Paragraph 26 includes a new reference to s253E of the Corporations Act. This is to the effect that the responsible entity and its associates cannot vote (other than on a resolution for the removal of the RE) if they have an interest other than as a member.

    a) Is this a useful reference?

Attachments

1 Revised draft GN 6 Minimum bid price

2 Revised draft GN 13 Broker handling fees

3 Revised draft GN 15 Trust scheme mergers

Attachment 1

Australian Government
Takeovers Panel

Guidance Note 6 – Minimum bid price

Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to the minimum bid price requirement in s621(3).[1]

2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.

3. Section 621(3) says:

> *The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.*

4. The section is *"fundamental to the policy and operation of Chapter 6"*.[2]

[1] References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

[2] *Email Limited (No 3)* [2000] ATP 5 at [39]

5. ASIC Regulatory Guide 163[3] also addresses s621(3), and Class Order 00/2338 applies to quoted securities as bid consideration.[4] Compliance with RG 163 will generally meet the Panel's policy.

Application

6. Section 621(3) applies to both cash and non-cash consideration.

7. Section 621(4) requires non-cash consideration to be valued at the time the offer is made. This means the day the bidder starts to post its offers.[5]

8. Section 621(3) applies to the consideration paid for securities within a class.[6]

Unacceptable circumstances

9. In considering whether unacceptable circumstances exist, the Panel looks at whether the policy of s621(3) and s602 has been met. The Panel does not take a technical approach.[7] It considers the following factors:

   a) whether the bid consideration (cash equivalent[8]) is equal in value to the highest consideration given by the bidder or an associate over the four months before the bid and

   b) cash equivalence for quoted scrip is usually measured by reference to the weighted average market price[9] over 2 full trading days.[10] No single sale

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[3] RG 163: "*Takeovers: Minimum Bid Price Principle - s621*" (issued 19/12/00)

[4] Similar relief may be available on case by case basis for unquoted securities: RG 163.21

[5] For an application of this, see *Rinker Group Ltd* [2006] ATP 35 at [32]

[6] *Skywest Ltd* [2004] ATP 10 at [63]: "*… The policy underpinning subsection 602(c) requires equality of opportunity between holders of bid class securities; it does not extend to requiring equality of opportunity between different classes of securities, such that holders of Skywest shares should be able to receive equal consideration to that received by Convertible Note holders….*"

[7] In *GoldLink IncomePlus Ltd 02* [2008] ATP 19 the Panel declined to make a declaration where the pre-bid agreement was amended so that no higher consideration could be paid to the pre-bid acceptor than under the bid. See also *Normandy Mining Ltd 06* [2001] ATP 32, *GasNet Australia Ltd* [2006] ATP 22

[8] In *Email Limited (No 3)* [2000] ATP 5, the valuation of preference shares as part consideration under a bid was taken as the midpoint of the range

[9] See also RG 163.22

or quote should be used. If there has been any risk of market manipulation, another basis may be appropriate.[11]

10. The Panel recognises the days needed for printing and dispatch, and generally allows up to 5 business days for printing and preparation prior to posting the documents.[12] Thus, the Panel generally will not consider it unacceptable for a bidder to use the weighted average market prices over 2 full trading days ending up to 5 business days before posting the document.[13]

Remedies

11. The Panel has a wide power to make orders (including remedial orders) if the minimum bid price principle is contravened.[14]

Publication History

First Issue	28 March 2000
Reformatted	17 September 2003
Second Issue	12 July 2004 (addition of important note)
Third Issue	xx 2011

[10] See also RG 163.31

[11] This may warrant ASIC relief

[12] If the bidder is offering quoted scrip, the bidder's statement must include 'the market price per security': s636(1)(h)(ii). ASIC also allows 5 days: RG 163.10 and Class Order CO 00/2338, which has modified s621 so a bidder can value target securities over 2 full trading days ending up to 5 business days before the date of the bid

[13] *Taipan Resources NL (No 10)* [2001] ATP 5 at [104]

[14] In *Taipan Resources NL (No 9)* [2001] ATP 4 the Panel ordered shares acquired in contravention of s606 to be divested, one basis being that the acquisition would have required an increased bid price under s621(3). See [2001] ATP 4 at [49]

Attachment 2

Australian Government
Takeovers Panel

Guidance Note 13 – Broker handling fees

Introduction

1. This guidance note has been prepared to assist market participants understand the Panel's approach to broker handling fees.[1]

2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.

3. Fees not tied to acceptance of a bid (eg, a telemarketing agent) are not the subject of this note.

4. In this note the following definition applies.

[1] A similar approach may be taken in respect of other fees offered in other types of control transactions

Broker handling fees	Fees offered by bidders to brokers who solicit acceptances of a bid from their clients. The broker either stamps the acceptance form or initiates the message in CHESS

Excessive fees

5. If broker handling fees are excessive, they may create incentives for a broker to:

   - pressure shareholders to accept a bid or
   - advise shareholders to accept a bid prematurely.

6. Broker handling fees may facilitate the acquisition of shares in an efficient, competitive and informed market[2] by encouraging the provisions of information to shareholders. It detracts from an efficient, competitive and informed market if shareholders accept for reasons other than price or their best interests.

7. Excessive broker handling fees may:

   - offend sections 602(a), (b) or (c)[3]
   - offend sections 623 or 621(3)[4] or
   - give rise to conflicts for the brokers.[5]

8. In considering whether excessive fees give rise to unacceptable circumstances, the Panel considers the following factors:

   a) whether the fees exceed reasonable compensation for the time and expense incurred in talking to clients about the bid and processing acceptances. In the absence of other factors, the Panel considers a fee up to 0.75% of the consideration payable to an accepting shareholder, capped at $750 for a single acceptance, is generally not unacceptable

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[2] Section 602(a). Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

[3] Acquisition of shares in an efficient, competitive and informed market: s602(a). Reasonable time or enough information to assess the bid: ss602(b)(ii) and (iii). Equal opportunity to participate in any benefits: s602(c)

[4] Collateral benefits not allowed: s623. Minimum bid price requirement: s621(3). See also GN 6; *Taipan Resources NL (No. 10)* [2001] ATP 5 at [89]-[90]

[5] The Corporations Act regulates a broker's dealings with clients: for example, s945A

b) whether there is a minimum amount for a single acceptance. In the absence of other factors, the Panel considers that a minimum fee up to $50 for a single acceptance is generally not unacceptable. A minimum fee may encourage brokers to contact clients with small holdings. Appropriate protections should exist against arrangements such as share splitting which seek to take advantage of any minimum or maximum (see paragraph 13)

c) whether the fees are consistent with other types of fees and commissions normally charged by brokers for advisory and transaction-related services. A fee consistent with other types of fees is not likely to create an undue incentive for the broker

d) whether different rates of broker handling fees are offered depending on the number of shares in an acceptance (eg, a bidder might offer a higher rate for acceptances of small parcels to encourage targeting of retail shareholders). If a sliding scale is used, the upper and lower ends should come within the guidelines above. Otherwise, sliding scales may create an incentive for brokers to apply more pressure on retail clients, who usually need more protection than institutional clients and

e) whether the fees are changed during the bid. In the absence of other factors, the Panel considers that an increase is generally not unacceptable if the fees remain within the guidelines above. If the fees are decreased, this may lead to the same type of pressure as a fee that is available for only a limited time.

Availability of fees

9. If broker handling fees are available for only a limited time, they may create incentives for a broker to advise shareholders to accept prematurely. It detracts from the policy of allowing shareholders a reasonable time to consider the merits of the bid if, by accepting early, they may lose the opportunity of considering another bid.[6]

10. In considering the time that broker handling fees are available, the Panel will normally take the following factors into account:

a) once the fee is offered, it should generally be available for the balance of the bid period (including extensions unless this has been expressly

[6] *Normandy Mining Limited (No 5)* [2001] ATP 29 at [22]

excluded). The Panel does not seek to limit when the bidder may first offer a broker handling fee

b) in special circumstances, the broker handling fee may cease before the end of the offer period

Example: if the bid period has been long and ample notice has been given of the bidder's intention to withdraw the fee.

c) once withdrawn, the fee should not be reinstated, even on different terms.

Terms

11. To reduce concerns about collateral benefits or equal opportunity, the offer of a broker handling fee should expressly:

a) not apply to acceptances by the broker or its associates and

b) include a term that, by lodging an acceptance for which a fee is claimed, the broker represents that:

- neither it nor its associate is the accepting shareholder and
- the fee will not be passed on or shared directly or indirectly with the accepting shareholder.

12. To reduce concerns about share splitting, a bidder may expressly reserve the right to aggregate acceptances for the purpose of determining the broker handling fee payable to a broker if it reasonably believes a person has structured holdings to take advantage of the fee.

13. Broker handling fee offers should generally not be subject to a minimum aggregate level of acceptances before a broker is eligible to receive any handling fees. Such a requirement may result in brokers imposing unacceptable pressure on clients once the broker is close to attaining the minimum level.

Disclosure of the fees

14. Under the Corporations Act, brokers must disclose to their clients benefits they will receive in connection with advice they give.

15. The Panel expects that meaningful disclosure regarding the fees will be made at the time the broker recommends acceptance (or rejection) to the client. Blanket disclosure about the possibility of receiving benefits generally would not satisfy this.

16. As well, the fees and terms should be disclosed in the bidder's statement (or supplementary bidder's statement if applicable). It may be appropriate also to announce the fees and terms to the market.

Unacceptable circumstances

17. The Panel will consider a broker handling fee offer as a whole (ie, all aspects of it, not aspects in isolation) when determining whether it gives rise to unacceptable circumstances.

Remedies

18. The Panel has a wide power to make orders (including remedial orders), or accept undertakings,[7] if a broker handling fee gives rise to unacceptable circumstances. Remedies will be designed to:

    a) protect the rights or interests of any person or group affected by the circumstances, including target shareholders and actual or potential rival bidders and

    b) ensure that the takeover proceeds (as far as possible) as it would have if the circumstances had not occurred.

19. Remedies may include:

    a) giving shareholders who accepted after the broker handling fee offer was made the right to withdraw their acceptances

    b) cancelling contracts resulting from acceptances after the broker handling fee offer was made

    c) restraining payment by the bidder of the broker handling fee and

    d) varying the terms of the broker handling fee offer.

20. While some of the issues raised in this note may be resolved by splitting the fee with, or passing it on to, the client, this may offend sections 623 or 602(c).[8]

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[7] For example, *AurionGold Ltd* [2002] ATP 13. In *Ausdoc Group Limited* [2002] ATP 9 the Panel accepted undertakings that a break fee would not be claimed or paid

[8] Similarly, if the broker or its associate is the accepting shareholder

Publication History

First issue	3 June 2003
Second issue	xx 2011

Related material

GN 21 Collateral benefits

Attachment 3

Australian Government
Takeovers Panel

Guidance Note 15 –Trust scheme mergers

Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to mergers by listed trusts and managed investment schemes.

2. The examples are illustrative only and nothing in the note binds the Panel in a particular case.

3. Part 5.1[1] does not apply to a typical managed investment scheme.[2]

[1] Arrangements and Reconstructions. References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

[2] It is not a company, foreign company or non-company to which Part 5.1 applies. Holders are typically not members or creditors of the trustee

Trust schemes

4. The acquisition of interests in listed managed investment schemes is regulated by s606.[3] Accordingly, the acquisition of more than 20% is prohibited unless it falls within s611 or ASIC grants a modification or exemption.

5. It is possible to merge managed investment schemes using a trust scheme, which is usually effected by amendment of the constitution following one or more votes of holders in the target. There are generally two types:

   a) a redemption scheme: this involves the merger of managed investment schemes by one (target) redeeming all the interests of holders except interests held by the other (acquirer).[4] Cash or interests in the acquirer may be paid to the former holders in the target as consideration for the redemption. Under a redemption scheme, the target can be delisted before any units in it are issued to the acquirer. This avoids breach of s606 and the need for ASIC modification of item 7[5] and

   b) transfer scheme: this involves the merger of managed investment schemes by the transfer to one (acquirer[6]) of all the interests in the other (target). Transfer schemes cannot be implemented without a vote under s611 item 7. Under item 7,[7] votes cannot be cast in favour by persons proposing to acquire or dispose of interests, so this requires an ASIC modification or exemption.[8]

Policy

6. Redemption schemes and transfer schemes follow similar procedures. They have a similar effect on holders (perhaps apart from tax consequences) through different mechanisms. The Panel considers that the principles in s602 and the

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[3] Because of the application of chapter 6 to managed investment schemes: see s604. They are also regulated by chapter 5C

[4] A variation would involve the target issuing units to the acquirer, which may be done after the target is delisted to avoid a breach of s606

[5] If the managed investment scheme is "non-liquid" (s601KA(4)) compulsory redemption would generally not meet Part 5C.6 and would require ASIC relief (s601QA)

[6] Responsible entity of the acquirer would hold the interests: s601FC(2)

[7] Item 7(a). See also *Village Roadshow Ltd v Boswell Film GmbH* [2004] VSCA 16

[8] ASIC RG 74.53

other policies and protections of Chapter 6 should apply to trust scheme mergers and looks at the effect of a scheme against them.

7. A trust scheme is similar to a member's schemes of arrangement under Part 5.1. It is as flexible as a members' scheme of arrangement and, like a scheme of arrangement, there are no detailed procedural requirements similar to Chapter 6. Unlike a members' scheme of arrangement, a trust scheme is not supervised in the same way by the court or ASIC.[9]

8. The Panel does not hold the view that a managed investment scheme can be taken over only under a bid. However, it does hold the view that trust schemes should be governed by similar policies and protections[10] as in Chapter 6. This is similar to the policy that courts apply when considering section 411(17) in connection with a members' scheme of arrangement.[11] Moreover, as there is no court or ASIC supervision, more direct and prescriptive protections for holders should be provided.

Unacceptable circumstances

Jurisdiction

9. The Panel considers that trust schemes involving listed managed investment schemes come within its powers under Part 6.10 because they affect control of the target[12] and involve acquisitions of substantial interests: s657A(2).

Section 602

10. To reduce the likelihood of a trust scheme giving rise to unacceptable circumstances the following should be considered.

Differential treatment

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[9] In some situations judicial advice is sought as part of a trust scheme

[10] This formulation reflects the relationship between the policies in s602 and the procedures and prohibitions in the remainder of Chapter 6 (except Part 6.10). See also *Catto v Ampol* (1989) 7 ACLC 717, per Kirby P at 720

[11] *Re Archaean Gold NL* (1997) 15 ACLC 382, *Catto v Ampol* (1989) 7 ACLC 717*, Nicron Resources Ltd v Catto* 10 ACLC 1186, *Re Ranger Minerals Ltd* [2002] 20 ACLC 1769

[12] Chapter 6 extends to listed managed investment schemes: s604

11. A trust scheme may provide that holders are to be treated differently.[13] If it does, the scheme would be likely to be contrary to s602(c) unless the different treatment was approved by properly informed and constituted meetings of holders (and this may require meetings of sub-groups of holders).

12. Differential treatment may also create a collateral benefit. To address this:

    a) the acquirer can undertake that neither it nor its associates will acquire interests outside the scheme or, if acquired, it will increase the scheme consideration to match[14] and

    b) the trust scheme should meet the following principles from Chapter 6:

    - all interests in the relevant class, or the same proportion of each holding, should be acquired and on the same terms (excepting those already held or to be acquired on approved or exempted different terms)[15]
    - the 4-month minimum bid price rule[16] and
    - no escalators, discriminatory conditions or unapproved collateral benefits.[17]

Disclosure

13. The notice of meeting should meet disclosure standards comparable (as applicable to the trust scheme[18]) to requirements under:

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[13] Relief by ASIC from s601FC(1)(d) may be neecessary

[14] This undertaking should apply at least from the date of the notice of meeting until the scheme is implemented or rejected. Note however, that adjustment of the scheme consideration may require the documentation to be amended, limiting how close to the scheme meeting this could occur

[15] ss618(1) and 619

[16] ss621(3), (4) and (5) as modified by ASIC CO 00/2338. The date the scheme notice is sent to holders is treated as "the date of the bid" under s621

[17] ss622, 623, 627, 628 and 651A. Benefits include those given to the responsible entity of the target or a related body in exchange for giving up management rights over the target would require disclosure, and perhaps approval (eg, if a related party transaction) but see s253E. The date the scheme notice is sent to holders is treated as the start of the "offer period" under s623. The "offer period" is treated as ending immediately after the meeting. As for s629, see paragraph 29(b)

a) the common law notice of meeting requirements[19]

b) s601GC[20]

c) ss602(a) and 602(b)(i) and (iii)

d) ss636 and 638[21]

e) s611 item 7[22]

f) s411(3) [23] and

g) if securities or managed investment products are offered, Part 6D.2 or Part 7.9.[24]

14. The standards involve overlap and, of course, information need not (and should not) be repeated to satisfy each.

15. The standards would normally require the scheme notice to include:

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[18] The standards are not a Procrustean bed (ie one size fits all)

[19] All information needed to fully and fairly to inform holders of the nature of the proposed resolutions and enable them to judge for themselves whether to attend the meeting and vote for or against the proposed resolutions: see *Bulfin's Limited v Bebarfald* (1938) 38 SR (NSW) 423 at 440; *Fraser v NRMA Holdings Limited* (1995) 55 FCR 452 at 466

[20] For example, if there is to be a special resolution to amend the constitution

[21] All the information known to bidder (target) which holders of bid class securities and their professional advisers would reasonably require to make an informed decision whether to accept the bid

[22] All the information (not already disclosed) known to the acquirer and the target that holders of units in the target trust and their professional advisers would reasonably require to make an informed assessment whether to vote in favour of the scheme

[23] The effect of the proposal, the interests of the directors and the effect of the proposal on those interests and any information which is material to a decision whether to agree to the proposal which is within the knowledge of the directors and has not already been disclosed to the members. It must also include the information in Schedule 8 to the Corporations Regulations

[24] See ss636(1)(g) and (ga), Class Order 01/1543, ASIC RG 60 at [60.7-60.8]

a) a statement of the effect of the scheme on the responsible entity of the target, its related bodies and their directors, if different to holders in general

b) the voting intentions of the responsible entity of the target, its related bodies and their directors

c) from each of the directors of the responsible entity for the target, either:

- a recommendation as to how holders should vote, giving the reasons or
- the reasons why a recommendation is not made

d) any voting exclusions

e) any collateral transactions or benefits proposed or already provided and

f) a statement of whether (and how) the scheme would not comply with Chapter 6 (were it a bid on similar terms).[25]

16. As well, there should be proper disclosure of:

a) securities being retained by the acquiring entity, its related bodies and their nominees

b) any differential treatment of holders in the scheme

c) how and why the classes have been constituted

d) the reasons for the voting exclusions (if any) and

e) the approvals required to implement the scheme.

17. Disclosures made on behalf of the acquirer should be clearly identified as such and state that the acquirer consents to those statements being included in the form and context in which they appear.

18. If missing, corrective or updating information is required, it should be given to ASX by supplementary notice with a copy to ASIC as if ss643 and 644 applied.[26]

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[25] *Ranger Minerals* at [45] (scheme of arrangement); *Nicron* at 235 (reduction of capital)

[26] *Cleary v Australian Co-operative Foods Ltd* (1999) 32 ACSR 701

Independent expert

19. The scheme notice should also contain a report by an independent expert.

20. Although an expert's report is only required in a bid (scheme) if the acquirer and the target have a shared director or the acquirer has over 30% voting power in the target (in a class), [27] the requirement in all cases for a trust scheme is supported by practice, the absence of judicial or ASIC scrutiny, and the fact that every trust scheme is recommended by the responsible entity of the target even though it has an interest because its management rights are affected.

21. The report should state:

    a) whether, in the expert's opinion, the terms of the trust scheme are fair and reasonable for the holders of the target other than the acquirer and its associates[28]

    b) the expert's reasons for forming that opinion (taking into account acquisitions by the acquirer and its associates in the past 4 months) and

    c) the particulars required by s648A(3).

Voting

22. A trust scheme generally requires a special resolution under s601GC to amend the constitution. No holders are excluded from voting by s601GC.

23. If the trust scheme is a transfer scheme, an ordinary resolution under s611 item 7 is also required. Acquirers and their associates are excluded by item 7 from voting in favour of the resolution (they may vote against it).[29] ASIC RG 74 expounds the principle that the vote should be only by those holders who will not gain from the transaction (other than as ordinary members) and who are not acting in concert with those who will.[30] This would capture vendors.

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[27] s640; Schedule 8 clause 8303

[28] It is also not uncommon for the expert to opine on whether the transaction is in the best interests of holders

[29] On the meaning of the voting restriction, see *Village Roadshow* at [15]-[18]

[30] ASIC RG 74.51

24. If other statutory or ASX Listing Rule approvals are required, voting exclusions may apply.

25. In a members' scheme of arrangement, for example, only members whose interests are affected by the scheme in the same way vote together. The Panel would expect the holders voting on a trust scheme to be constituted into appropriate classes with appropriate voting exclusions.

26. The trust scheme should be subject to a condition that it will only be approved if the resolution is passed disregarding any votes cast in favour[31] by:

    a) the acquirer and its associates

    b) the responsible entity of the target and its associates (other than related fund managers)[32]

    c) any person excluded from voting under another statutory or listing rule approval requirement (these units should only be voted against the resolution if permitted by the statute or listing rules) and

    d) any person who should be treated differently under the trust scheme from the general body of holders (agreement to the trust scheme by such person needs to be obtained separately).

27. Interests voted but disregarded, and interests of related fund managers voted, should be separately recorded so their impact on the result can be assessed.

28. Votes may be cast in favour[33] in respect of interests held subject to fiduciary or statutory duties owed to 'independent' persons (eg, a responsible entity, a superannuation fund trustee or a life insurance company) even though the holder may be an associate of the acquirer. The Panel expects the holder to comply with s601FC(3) or s52(2) of the *Superannuation Industry (Supervision) Act 1993*.

Defeating conditions

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[31] Eg, ss256C(2)(a) and 257D(1)(a). See *Re Tiger Investment Company Ltd* (1999) 33 ACSR 438, *Village Roadshow*

[32] Section 253E provides that the responsible entity and its associates cannot vote (other than on a resolution for the removal of the RE) if they have an interest other than as a member

[33] unless a specific prohibition applies

29. Trust schemes should:

    a) if applicable, include a condition along the lines of s625(3) and

    b) not include a condition that would, in a bid, contravene ss627 or 629.

Enforceability

30. Any undertakings given in relation to a trust scheme to meet the policies and protections of Chapter 6 or Part 5.1 must be capable of direct enforcement by holders (eg, as in a deed poll in their favour) .[34]

Withdrawal and right not to proceed

31. Applying the policy of s631, the Panel expects that, if a person announces a trust scheme, the person will proceed and be able to meet their obligations under it.

32. However, it may not give rise to unacceptable circumstances to withdraw from a trust scheme after it is announced, if the withdrawal:

    a) is timely (and announced in a timely way) and

    b) is based on a prescribed occurrence[35] or a condition included when the trust scheme was first announced.

Remedies

33. The Panel has a wide power to make orders (including remedial orders) if a trust scheme gives rise to unacceptable circumstances, including cancelling agreements.

Publication History

First Issue 7 April 2004

Second issue xx 2011

[34] *Archaean Gold*

[35] ss652C(1) and (2)