



Australian Government

Takeovers Panel

Consultation Paper

Accessible documents

Amendments to GN 18 Takeover Documents

10 January 2014

Introduction

1. The Panel invites comments on the draft revised Guidance Note attached. The time for comments is open until **28 February 2014**.
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 are public.
4. The Panel will consider all comments and reserves the right to make changes to the draft Guidance Note in response to comments or otherwise.

Background

5. Paragraph 10 of the current Guidance Note 18 states the Panel's general approach to information in takeover documents, "*that the information should be accessible to the document's target audience; that is, it should be written with that audience in mind*".
6. The Panel considers that summaries are a useful way to present information for target security holders and has developed some draft best practice guidance, as proposed amendments to Guidance Note 18, on what could be included in a summary to assist preparers of takeover documents.
7. Other minor changes are also proposed as marked up.

Issues

8. Do you consider Panel guidance on the content of summaries in takeover documents useful?
9. Paragraph 20 of the draft Guidance Note provides a proposed structure for a summary for bidder's and target's statements. Do you agree with the items in the summary? Please specify whether you consider that we have included irrelevant matters, or failed to specify relevant matters, for retail security holders.

10. Should the Guidance Note specify a page limit for a summary, either as a single figure or a range?¹

Attachment

- 1 Draft revised GN 18 Takeover documents

¹ See for example the requirement for simpler PDS documents in *Corporations Amendment Regulations 2010 (No. 5)*

Attachment 1

Guidance Note 18 – Takeover documents

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Introduction

1. This guidance note has been prepared to assist market participants:
 - (a) -understand the Panel’s approach to information in takeover documents, including a bidder’s statement or target’s statement and
 - 1.(b) create more accessible takeover documents.

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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 that is deficient or not readily accessible to the target audience 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.¹

Document requirements

4. Section 636 applies to a bidder's statement. It requires a bidder's statement to include specific information. It also requires any other information material to the making of a decision by offeree shareholders whether to accept the bid, being information known 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).²

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

² Sections 633 and 635

Accessibility

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.³ Long documents and complex drafting reduce accessibility, particularly for retail shareholders. The Panel encourages brevity and plain English.⁴
11. While recognising that there are often complexities, information in takeover documents should be presented as clearly, concisely and effectively as possible.⁵ This does not necessarily involve reducing the amount of information available to shareholders. Accessibility is enhanced by providing key information to the audiences in an effective manner.

A summary section for takeover documents

12. It is common for a takeover document to include a summary of the offer and the key information at the front of the bidder's statement or target's statement. The Panel encourages summaries that are accessible to retail shareholders in particular.
13. Set out below is the Panel's best practice guidance on the contents of a summary section to assist preparers of takeover documents. Adoption of the summary section is likely to remove, or reduce, the need for other summary features such as a 'Q&A' section.

Length

14. The length of the summary will depend on the control transaction, but should be short enough to be comprehended quickly.

³ Tully Sugar Ltd [2009] ATP 26 at [21]; Northern Energy Corporation Limited [2011] ATP 2 at [112]. The audience comprises retail shareholders, institutional shareholders and the market (eg, advisers) and the document should address all their needs

⁴ Procedural Rule 2.1.1 requires documents for the Panel to be succinct, clear and avoid repetition

⁵ 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:

- (a) *highlights key information (e.g. through an investment overview as explained in Section C);*
- (b) *uses plain language (see Table 3);*
- (c) *is as short as possible (see RG 228.30-228.45);*
- (d) *explains complex information, including any technical terms (see Table 3); and*
- (e) *is logically organised and easy to navigate (see Table 4).*

Appearance

15. The accessibility of the information is affected by the typeface used, consistency of the font and point size, and the arrangement of material on the page (including layout elements, such as the margins and white space between paragraphs).
16. The size of the font in a summary section should be no less than 10 point.
17. Headings aid interpretation and navigation. Sub-headings may also be appropriate.

Structure of a summary

18. To improve accessibility, the summary section preferably should consist of the headings and related contents below. They may be placed in any appropriate order, and consideration should be given to placing more important information nearer the front.
19. It may also improve accessibility to provide cross-references to detailed information in the remainder of the document.⁶
20. The summary would normally follow the Chairman's letter.

<u>Headings</u>	<u>Bidder's Statement</u>	<u>Target's Statement</u>
<u>Offer consideration</u>	<u>Details of the consideration offered</u>	<i><u>Describe if the target considers this helpful</u></i>
<u>Reasons to accept/reject offer</u>	<u>(i) Reasons to accept the offer</u> <u>(ii) Expert's conclusion (if one is appointed by bidder)</u>	<u>(i) Reasons to accept/reject the offer</u> <u>(ii) Expert's conclusion (if one is appointed by target)</u>
<u>Recommendation⁷</u>	<u>N/A</u>	<u>Recommendations of the target's directors (or reasons no recommendation given)</u>
<u>Key dates</u>	<u>(i) Date offer opens</u>	<i><u>Describe if the target considers this helpful</u></i>

⁶ Particular information may be important enough to be included under 'Other key issues' in the summary rather than simply cross-referred

⁷ See paragraph 39 and following

<u>Headings</u>	<u>Bidder's Statement</u>	<u>Target's Statement</u>
	<p><u>(ii) Date offer closes</u></p> <p><u>(iii) Date bidder must advise status of conditions</u></p> <p><u>(iv) Date of payment</u></p> <p><u>(v) A qualification that dates (ii), (iii) and (iv) are correct at the time but the offer may be extended or withdrawn (if applicable)</u></p>	
<u>Conditions and terms of offer</u>	<p><u>(i) A summary of the key conditions of the offer</u></p> <p><u>(ii) A description of what happens if the conditions are not fulfilled</u></p> <p><u>(iii) Cross-reference to the full list</u></p> <p><u>(iv) Explain security holders' ability or inability to withdraw acceptances</u></p>	<i><u>Describe if the target considers this helpful (and must do so if the target thinks conditions not mentioned by the bidder in its summary section are unusual or bid-specific or a condition has been or will be triggered)</u></i>
<u>Bidder information</u>	<u>Description of the identity of the bidder and its intentions⁸</u>	<i><u>Describe if the target considers this helpful</u></i>
<u>Summary of expert's report (if any)⁹</u>	<p><u>(If the bidder has appointed an expert)</u></p> <p><u>(i) Expert's conclusion</u></p>	<i><u>(If relevant) the target's response, if any, to the bidder's expert's report</u></i>

⁸ See paragraph 36 and following

⁹ See paragraph 44 and following

<u>Headings</u>	<u>Bidder's Statement</u>	<u>Target's Statement</u>
	<u>(ii) Main reasons for the expert's conclusion</u> <u>(iii) Cross-reference to the full report</u>	<u>(If the target has appointed an expert)</u> <u>(i) Expert's conclusion</u> <u>(ii) Main reasons for the expert's conclusion</u> <u>(iii) Cross-reference to the full report</u>
<u>Key risks</u>	<u>A description of the key risks from the bidder's viewpoint if shareholders accept or reject the offer</u>	<u>A description of the key risks from the target's viewpoint if shareholders accept or reject the offer</u>
<u>Action to take</u>	<u>How to accept the offer</u>	<u>How to accept or reject the offer, consistent with any directors' recommendations</u>
<u>Other key issues</u> <u>(Use of sub-headings here may be helpful)</u>	<u>Description of any unusual features of, or key issues raised by, the offer from the bidder's viewpoint.</u> <u>Examples - tax issues</u>	<u>Description of any unusual features of, or key issues raised by, the offer, from the target's viewpoint.</u> <u>Example - tax issues</u>

11.

Marketing information

12.21. _____ Marketing information¹⁰ in any takeover document, particularly in the summary section, is the type of information ~~part~~ most likely to be read by retail investors. It is intended to be influential. It may include:

- (a) a letter to offeree shareholders

¹⁰ 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. 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: Southcorp Limited [2005] ATP 4

- (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

13.22. 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 them¹¹ and
- (b) presented in final form as for the offeree shareholders (eg, graphics in their final size, colour and location).

14.23. 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 statement¹² or revised bidder's statement¹³ 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 bid¹⁴

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

Example: a Help Line telephone number

¹¹ 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)

¹² Section 643

¹³ ASIC Class order 00/344

¹⁴ 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

~~15.24.~~ _____ 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 statement¹⁵

Wrap information

~~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.¹⁶~~

Broker valuation¹⁷

~~17.25.~~ _____ A bidder (target)¹⁸ 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.

~~18.26.~~ _____ 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.¹⁹ 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.

¹⁵ 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

~~¹⁶ *Southcorp Limited* [2005] ATP 4~~

¹⁷ "Price recommendations" may be a more accurate description

¹⁸ Also other entities in respect of other control transaction disclosure documents

¹⁹ Brokers are required to have adequate arrangements for the management of conflicts of interest: s912A(1)(aa)

19.27. _____ Moreover the broker's consent²⁰ 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.

20.28. _____ 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

21.29. _____ 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.²¹ 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.

22.30. _____ 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

²⁰ Section 636(3)

²¹ The Panel considered that it was not required in the circumstances in *Southcorp Limited* [2005] ATP 4 at [10]

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 value²² and
- (h) any other material information²³

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.

23-31. 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.

24-32. 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

25-33. A bidder (target) may want to show that the bid price is at a premium (discount) to the share price or share value.²⁴

²² *Origin Energy Limited 02* [2008] ATP 23 at [20]

²³ See also paragraph on conflicts

²⁴ See also section on broker valuations

~~26.34.~~ 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.

~~27.35.~~ 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, unacceptable circumstances may arise if:

- (a) the prices at the most recent practicable date are not included.²⁵ 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 traded²⁶
- (b) there is not a clear explanation of the reason for selecting the particular date for the comparison²⁷
- (c) the comparison is not like-for-like and the method used to calculate it, if not the most reasonable, is not adequately explained²⁸
- (d) statements as to value are included without a reasonable basis for them being disclosed.²⁹

Intentions

~~28.36.~~ 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.

²⁵ *General Property Trust* [2004] ATP 30; *Programmed Maintenance Services Limited* [2008] ATP 7 at [24]; [Minemakers Limited \[2012\] ATP 8 at \[56\]](#)

²⁶ *Queensland Ores Limited* [2009] ATP 8

²⁷ *Magna Pacific (Holdings) Limited* [2007] ATP 2 at [46]; [Minemakers Limited \[2012\] ATP 8 at \[56\]](#)

²⁸ *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [35]; [Minemakers Limited \[2012\] ATP 8 at \[56\]](#)

²⁹ *Tully Sugar Ltd* [2009] ATP 26 at [18]; [Minemakers Limited \[2012\] ATP 8 at \[56\]](#)

~~29.37.~~ _____ 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).³⁰ 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.³¹

~~30.38.~~ _____ The section is not subject to a materiality threshold or a confidentiality carve-out.³²

Recommendations

~~31.39.~~ _____ The Panel encourages target directors to make a recommendation.³³ They do not necessarily need to value the target's shares to do so.³⁴

~~32.40.~~ _____ 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.³⁵

Information outside takeovers documents

~~33.41.~~ _____ Unacceptable circumstances can apply in any control transaction.³⁶

~~34.42.~~ _____ 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

³⁰ *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

³¹ *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

³² *National Foods Limited 01* [2005] ATP 8 at [40]

³³ See s638(3); GN 22 (Recommendations and Undervalue Statements)

³⁴ 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

³⁵ *Tully Sugar Limited 01R* [2010] ATP 1 at [16]

³⁶ Section 657A. See GN 1 (Unacceptable circumstances)

statement.³⁷ Accurate, reliable information and properly reasoned views will best assist offeree shareholders and promote an efficient, competitive and informed market.³⁸

35.43. 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.³⁹

Expert's report⁴⁰

36.44. Expert's reports are required in some situations⁴¹ and desirable in others.⁴² The Panel encourages the use of expert's reports in appropriate situations, even when not required.⁴³

37.45. An expert's report should be as clear, concise and effective as possible.⁴⁴ It should be written with the intended audience in mind (in most cases, the offeree shareholders).⁴⁵ Thus it should set out the expert's conclusions, assumptions and reasons so they are accessible to the target audience.⁴⁶

³⁷ 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]; *Alesco Corporation Limited 01 and 02* [2012] ATP 14 at [31]-[32]

³⁸ *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]

³⁹ *Foster's Group Limited* [2011] ATP 15 at [34]

⁴⁰ See also ASIC RG 111 (Content of expert reports) and RG 112 (Independence of experts)

⁴¹ For example s 636(2), s 640

⁴² For example, *Sirtex Medical Ltd* [2003] ATP 22 at [66]

⁴³ Note that consent is required: s636(3); s638(5)

⁴⁴ See also ASIC RG 111 (Content of expert reports) at [111.84]

⁴⁵ *Northern Energy Corporation Limited* [2011] ATP 2 at [111]-[112]

⁴⁶ *Bowen Energy Limited 02R* [2009] ATP 19 at [71]; *Northern Energy Corporation Limited* [2011] ATP 2 at [98]

38.46. _____ While it is a matter for the expert what information to rely on and disclose,⁴⁷ the basis of the valuation should be set out sufficiently to allow an assessment of its reliability⁴⁸ and material implications of the transaction terms should be clearly explained.⁴⁹

39.47. _____ Care is needed when using an expert's report not prepared for the specific purpose.⁵⁰

40.48. _____ An expert's report that is required to comply, or says it complies, with an industry standard (eg, JORC) must do so.⁵¹

Publication History

First Issue 15 December 2006

Second Issue 20 April 2012

Third Issue [] 2014

Related material

GN 5: Specific remedies: information deficiency

GN 22: Recommendations and Undervalue Statements

⁴⁷ *Queensland Gas Company Limited* [2006] ATP 36 at [39]; see also *Minemakers Limited 02* [2012] ATP 13 at [20] and *Minemakers Limited 02R* [2012] ATP 16 at [10]-[11]

⁴⁸ *Goodman Fielder 02* [2003] ATP 5 at [70]; *Bowen Energy Limited 02R* [2009] ATP 19 at [80]

⁴⁹ *Becker Group Limited 01* [2007] ATP 13 at [91]-[94]

⁵⁰ *Great Mines Limited* [2004] ATP 1

⁵¹ *Namakwa Diamond Company NL 02* [2001] ATP 9; *Bowen Energy Limited 02R* [2009] ATP 19; *Northern Energy Corporation Limited* [2011] ATP 2