Takeovers Panel

Trust Schemes Guidance Note

Public Consultation Response Statement dated 7 April 2004

On 29 September 2003, the Takeovers Panel released for public comment a draft Guidance Note on Trust Schemes. Comments were due by 7 November 2003.

We received comments on the draft Guidance Note from Minter Ellison, ASIC and Freehills. Each was broadly supportive of the principle of applying similar regulation to similar transactions.

Minter Ellison

Minter Ellison's only specific comment was that the strict exclusion of the bidder (where it is a unitholder) from voting at the meeting of other unitholders should be moderated. We disagree. The separation of classes according to how different holders are affected by a proposal is a consistent feature of schemes of arrangement and other reconstructions approved at meetings of affected holders, and goes hand in hand with the majorities which have been accepted over time as appropriate for those meetings, as opposed to the majorities which entitle a bidder to acquire compulsorily outstanding securities after a successful bid.

ASIC

ASIC suggested a number of drafting and policy clarifications, which have generally been adopted. One which has not was a suggestion that the Guidance Note should develop the policy considerations which would be relevant to a decision whether to intervene in a resolution on a Trust Scheme which was heavily dependent on the votes of fund managers related to one of the parties to the scheme. We thought this would be unduly speculative exploration of the issues which might be weighed in relation to future matters.

Freehills

Freehills raised a number of caveats about borrowing provisions from Chapter 6, because of the differences between the bid process and the scheme process. In response to their general issues, we amended the draft to make it clearer why a Trust Scheme needs to be defined more prescriptively than a company scheme of arrangement and to stress that criteria imported from Chapter 6 should be applied with a view to achieving comparable outcomes and not mechanically.

They suggested that, the Panel having adopted a general disclosure test for a Scheme Notice, it was unnecessary to require in addition that specific items be covered in disclosure and a mandatory requirement for an expert report on every Trust Scheme. We have not accepted their suggestion to omit the requirements for the specific items and the expert's report. Instead, we have rationalised the disclosure regime, explaining the items which we have retained by reference to the statutory requirements for comparable transactions and the particular characteristics of a Trust Scheme.

Freehills also suggested that it was excessive to require the Scheme Notice to disclose all departures from compliance with Chapter 6 and all collateral benefits and transactions, and that those requirements should be restated in more general and less stringent terms. We have not fully adopted their recommendations. Instead, we have amended the requirement to disclose side deals to refer only to those which are directly related to the Trust Scheme and those which affect the interests of the Responsible Entity. On compliance with Chapter 6, we have clarified that what is required is disclosure of where the Trust Scheme does not comply with the policies and protections of Chapter 6, rather than mechanical adhesion to the letter of that Chapter, and have pointed out similar requirements in decisions of Courts on schemes of arrangement and reductions of capital.

Freehills also pointed out that the proposed requirement for an expert report to value consideration given by the acquirer for units in the target trust in the 4 months before the scheme meeting did not correspond with the provision in Chapter 6 on which it was based and was excessive. We accepted this criticism, and made that issue one of the matters to be dealt with, as relevant, in the mandatory expert's report, as one of the issues going to whether unitholders should support the proposed Trust Scheme.